STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF LIVINGSTON

LAKELAND PROPERTY OWNERS ASSOCIATION, a Michigan unincorporated voluntary association, and TOWNSHIP OF HAMBURG, a Michigan body corporate, jointly and severally,

Plaintiffs,

AND

Civil Action No. 1453

PORTAGE AND BASE LAKE ASSOCIATION, INC., a Michigan non-profit corporation,

Intervening Plaintiffs,

-V-

TOWNSHIP OF NORTHFIELD, a Michigan body corporate,

Intervening Defendant,

AND

TOWNSHIP OF GREEN OAK, a Michigan body corporate,

Defendant.

FILED
FEB 29 1972
COUNTY CLERK
Howell, Mich.

OPINION OF THE COURT

This cause of action was initially instituted between Lakeland Property Owners Association, a Michigan unincorporated voluntary association, and Township of Hamburg, a Michigan body corporate, jointly and severally as plaintiffs against the Township of Northfield by the filing of the Complaint with this Court on August 27, 1970. In said Complaint plaintiffs complain of activities of defendant, Township of Northfield, in the operation of a certain waste water treatment plant located in Green Oak Township. Northfield Township is located in Washtenaw County, Hamburg and Green Oak Townships are both located in Livingston County.

The allegations, in short, in plaintiffs Complaint are to

the effect that they are suffering damages both directly and by way of pollution of the water course that they are located on due to the operations of defendants waste water treatment plant. And further, plaintiffs complain of and seek a Restraining Order against the expansion of such operations.

Interim Relief was sought by plaintiffs herein in the form of a Preliminary Injunction to restrain defendant, Northfield Township, from beginning construction on a physical expansion of such plant and from restraining defendant from increasing its daily discharge over and above the level for which this plant was constructed. Such Restraining Order was ultimately issued by this Court.

Defendant Northfield Township filed its Answer to plaintiffs Complaint in this matter and setout therein certain affirmative defenses. Defendant Northfield Township also filed a Motion for Change of Venue alleging that Venue was improperly laid. After arguments on such Motion said Motion was denied.

The above referred to Interim Preliminary Injunction was issued by this Court on October 7, 1970.

After Lakeland Property Owners Association and Hamburg Township filed their reply to the defendants Answer this Court received an application of Portage and Base Lake Association, both being Michigan non-profit corporations, for intervention as party plaintiffs and such application was filed on November 25, 1970. On November 30, 1970 this Court received a Motion to Intervene, as a party defendant, from the Township of Green Oak. On December 4, 1970 this Court signed an order allowing the intervention, as parties plaintiff, of Portage and Base Lake Association incorporated. On December 9, 1970 this Court entered its order granting intervention, as a party defendant, of the Township of Green Oak based upon a stipulation of the parties dated December 1, 1970 and filed with this Court on December 10, 1970.

Defendant Green Oak Township, on December 28, 1970, filed its Answer to the original Complaint and the Complaint of the Intervening Plaintiffs.

Green Oak Township filed a Motion for Reference to the Michigan Water Resources Commission (herein after referred to as WRC) and for Modification of the Preliminary Injunction on December 28, 1970 together with a Brief in Support of said Motion for Reference. Such Motion was ultimately denied by this Court.

This matter was ultimately tried by the Court after first having filed with it Northfield Township's Answer to the Complaint of the intervening plaintiffs, a Supplemental Answer of defendant Northfield Township, Reply to Affirmative Defenses of defendant Township of Northfield, Interrogatories to plaintiffs by defendants, a Pretrial Conference, Plaintiffs objections to Interrogatories of the third-party defendant, Answers to certain Interrogatories by plaintiffs, a Second Pretrial Conference, Supplemental Answers to Interrogatories of intervening defendants, plaintiffs Request for Admissions from Defendants and Objections to Request for Admissions from Defendant. And finally, this Court received for filing, defendant Township's Second Supplement to Answer, followed by Answer to Amendment to Complaint.

Plaintiffs allege, in their Complaint, that defendant Townships herein collect sewage from around their own lake and township and dump the effluent from such collections several miles away into the heart of Hamburg Township, where it pollutes the lakes and water courses upon which plaintiffs herein reside. Plaintiffs seek a mandatory injunction closing down or rerouting defendants out fall, or, in the alternative, Injunctive Relief against defendants expanding said operation together with an Order compelling defendants to better treat the effluent discharge from their plant. It should be noted that defendant Northfield

Township owns and operates the said Sewage Disposal Plant which is located in defendant Green Oak Township and such plant serves homes and business operations located around Whitmore Lake. Whitmore Lake is physically situated in both Livingston and Washtenaw County. The out fall from the sewage disposal plant in question is located in Hamburg Township and is reached by a pipe from said plant which is approximately 7,200 feet in length. The out fall pipe discharges into a small water course which flows into the Huron River just up stream from Strawberry Lake and other lakes located in Plaintiff Hamburg Township upon which other plaintiffs reside.

Defendants current discharge per day is approximately one quarter million gallons. Plaintiffs allege that the contents of such discharge are polluting the lakes and other water courses upon which they reside. It is further alleged, without dispute from defendants herein, that plaintiffs are located approximately four miles distant from Whitmore Lake which is serviced by defendants plant.

The waste water disposal plant now in dispute was originally constructed by the State of Michigan in 1963 and 1964 to serve and service the W.J. Maxey Boys Training School, located in Green Oak Township.

In 1966 the State sold the above mentioned sewage plant to Northfield Township, for consideration, together with all of its right, title and interest in the above mentioned plant and pipeline. It is further alleged, without dispute, that Northfield Township intends to expand the operations of such plant and increase the discharge of said plant's effluent to 750,000 gallons per day and further intends on using the existing form of disposal of the product of said plant.

Plaintiffs have raised the following legal issues during the litigation of this matter;

A. Northfield Township is constitutionally prohibited in the operating or maintaining of said plant and its outfall outside of its corporate limits;

B. Northfield Township failed to obtain the consent of Hamburg Township to the location of such outfall and is required to do so;

C. Plaintiffs have a constitutional right to clean water;

D. The presence of said sewer pipeline and outfall is a trespass upon Hamburg Township;

E. Defendants discharges of effluent into the waters located in Hamburg Township constitute a public and private enjoinable nuisance;

F. The discharges of defendants effluents into plaintiffs waters are discharges by a non-riparian and non-littoral party and is an unreasonable use of those waters which is violative of plaintiffs riparian rights;

G. Northfield Township is bound by all the obligations of the State of Michigan via promises made by the state to Hamburg Township;

H. Plaintiffs property is being taken without compensation and without due process of law under both the United States and Michigan Constitutions;

I. Plaintiffs are entitled to declaratory and equitable relief under the Environmental Protection Act of 1970, PA 127.

J. Defendants have no meritorious affirmative defenses to plaintiffs complaints.

To the above defendants herein respond as follows:

1. That the defendant townships have statutory authority for ownership and operation outside of township limits;

2. Hamburg's consent to the operation of the said pipeline is not required;

3. That the wording of Hamburg Township Nuisance Ordinance No. 10 does not setforth provisions that prescribe a nuisance;

4. That a certain Water Resources Commission Order authorizes defendants activities. In addition to the above defendants allege that there is no feasible and prudent alternative to defendants continuing to maintain and operate their treatment facility or the expansion of same, and further, that plaintiffs are estopped from making some or all of its complaints at this time. Defendants further allege that plaintiffs herein are not entitled to equitable relief inasmuch as they come to Court with unclean hands in that defendants allege much of the pollution plaintiffs complain of is caused by activities of plaintiffs themselves or the citizenry living within the confines of plaintiff Township of Hamburg.

Testimony was taken in this matter in open Court on July 20, 21, 22, and 23, 1971 and this Court was afforded the benefit of the testimony of several witnesses and the offering and receiving of numerous exhibits both in support of plaintiffs case and defendants case and rebuttal thereto. This Court feels it necessary at this time to review, herein, material portions of such testimony.

A past and present Hamburg Township officer testified that many complaints were received by them from Hamburg residents regarding the condition of the water in the various lakes, odors emitting from such waters, fish kills and other complaints and such complaints reached their peak some four to five years ago and have continued up to the present at that level.

Francis Shehan, a Hamburg Township Official, testified that during his tenure in office, which covers the past twelve years, he, officially, resisted defendants out fall pipe being located

in Hamburg Township but further testified that his resistance came somewhat late inasmuch as the State of Michigan had already made that decision. During meetings with officials from the Boys Training School and the State of Michigan this witness learned of the intended expansion of defendants waste water treatment facility but had not been contacted in his official capacity regarding such proposed expansion until a few months prior to trial.

Mr. Francis B. McLaughlin, Director of Laboratories, Analytic and Biological Laboratories, Inc., testified as to his professional personal contact with the areas in question. Mr. McLaughlin holds a Bachelor of Science Degree in Microbiology from the Detroit Institute of Technology and has twenty years of experience in such work in addition to having run the above mentioned laboratory since 1956. Mr. McLaughlin's credentials include extensive biochemical work for private and public concerns mostly in the area of evaluation of test results to the problem at hand. Mr. McLaughlin was quite familiar with the defendants plant, its outfall, and the total area downstream therefrom. Mr. McLaughlin was the author of a certain study of the Northfield Township effluent, Huron River and Strawberry Lake phosphate levels made in 1970. Mr. McLaughlin was also the author of a study of the effluents from the Northfield Township Waste Water Treatment Plant and their effect on the Huron River Ecology made in 1970. The above two mentioned studies were received as exhibits No. 14 and No. 12 respectively.

It was the testimony of Mr. McLaughlin, via the witness stand and the above mentioned studies, that defendants discharge onto and into the receiving waters contains an excess biochemical oxygen demand (hereinafter referred to BOD). Such excess BOD load was determined to be, in the opinion of Mr. McLaughlin, 40 parts per million. Further testimony from said witness indicated that

the BOD load on the Huron River Chain at Kensington Lake and Park is 2 to 4 parts per million. Exhibit No. 14 above reflects that the BOD load at the time such report and study was made were at 24 parts per million with high concentrations of phosphates. In the opinion of said expert witness a clean lake, or water course, is defined as one with a BOD load below 5 parts per million. In addition to the above said expert testified that the discharge from defendants outfall pipe had a lower level of dissolved oxygen (hereinafter referred to as DO) than the receiving waters. Nitrate loads were determined to be, by said witness's studies and testimony, to be 33 parts per million at the outfall and .8 parts per million upstream of said outfall. Further testimony from said witness indicated that anything over .1 parts per million nitrate cannot be tolerated for any stream or river in the state.

It was the expert opinion of said witness that defendants herein contribute considerable pollution to the water chain under consideration. And further, that Strawberry Lake cannot stand today's input by defendants let alone the possibility of tripling said input.

Mr. McLaughlin testified in detail regarding his objections to the Department of Natural Resources amended final order of determination recommendations with regard to defendants waste water plant operation. Mr. McLaughlin agreed with only one provision of said technical recommendations the same being 1.c.

Said DNR recommendations may be found in detail at defendants exhibit No.3. Two strenuous objections were made by Mr. McLaughlin to recommendations contained in the WRC Order of Determination. The recommendations heretofore referred to strongly objected to by Mr. McLaughlin are found at 1.d and 1.e. 1.d reads as follows:

> "Contain not more than One Thousand (1,000) total coliform per One Hundred (100) milliliters."

The witness testified that this item should be a recommendation of no active coliforms. His strenuous objections in his

opinion and testimony was to the effect that the recommended level is not adequate to protect the environment in that the receiving waters have a count upstream from the outfall pipe unknown but opines it is far below One Thousand (1,000) coliform per Hundred (100) milliliters.

With regard to item 1.e, which reads as follows:

> "Contain not more than Twenty percent (20%) of the phosphorus contained in the influent to the waste water treatment facility."

Said witness testified that this means 80% removal of phosphate but all other factors are unknown. The witness did concede that 80% removal is about as good as present technology allows. It was the further testimony of Mr. McLaughlin that the defendant is currently not removing phosphates, and last year, as per the witness's calculations, defendants discharged 14,000 pounds of phosphates into the water course in question. It was the concluding expert testimony of Mr. McLaughlin that if the WRC determinations were complied with nutrients would be increased in an unknown degree primarily because of the levels set in 1.d therein.

At this point plaintiffs rested their case and relied on their Briefs and other legal arguments contained therein. Thereupon defendants moved to dismiss based on the argument that the WRC Order was conclusive and not appealed from. Such Motion was denied by this Court on the basis that plaintiffs herein had made a Prima Facie case and that the burden of over coming such Prima Facie case had shifted to defendants.

Mr. John Beebe, Superintendent of defendants plant, testified that he is a licensed plant operator by the Department of Health, State of Michigan and that such plant is a secondary treatment plant of the trickling filter type. Monthly reports are made on all extractions and performances of the plant and such reports are filed with the State Department of Health which supervises the operations, reviews such reports and makes recommendations.

It was the further testimony of Mr. Beebe that the plant in question operates within the expectations of the Department of Health at a present volume of Two Hundred Twenty Thousand (220,000) gallons per day which has increased steadily since 1964. The current treatment efficiency of the plant in question has remained constant since its inception. Said plant services 1,400 (units) users. It was the further testimony of said witness that at present efficiency levels this plant could handle 240 additional units or users and still be within its planned capacity of Two Hundred Fifty Thousand (250,000) gallons per day.

It was the concluding testimony of this witness that there have been normal mechanical problems, within levels of expectation, and that said plant employs daily membrane filtering for coliform counts and in addition chlorination is used.

Mr. John Holland, the holder of a University of Michigan degree in engineering testified that he has much experience in waste water treatment plants in both their construction and evaluation of operations. This witness's company designed defendants plant and recommended the location of said plant at Hamburg Township as a regional facility. It was this witness's further testimony that a plant, such as defendants, is designed to do a reasonable job based on the financial ability of the community, and further, that this plant does not remove phosphates and was not originally designed to remove phosphates as the WRC did not require such removal at the time of the construction of this plant. It was the further opinion and testimony of this witness that compliance with the amended final order of determination (defendants exhibit No. 3) would cost approximately One Million Five-Hundred Thousand Dollars ($1,500,000.00) and that the same is a strong order to the extent that compliance would require state and federal aid which defendants herein have applied for but such aid has been withdrawn by the Water Resources

Commission (WRC) who administer such funds.

Mr. Holland further testified that all users of defendants waste water treatment plant are located in the horseshoe drainage area and that such users are almost completely domestic. Such witness further testified that if the size of this plant is increased that defendants would continue to discharge into Horseshoe Creek. Alternatives to such discharging were studied and a determination was made that the present method is the most reasonable and feasible, in his opinion. It was such witness's further testimony that the above mentioned 7,000 foot outfall pipe originally cost approximately One-hundred Thousand Dollars ($100,000.00).

On cross examination Mr. Holland did admit that phosphates do pollute but did not admit that defendants plant herein does in fact pollute the waters in question with the further statement that in his opinion local units and population are doing the polluting. His further testimony was that while building this plant his engineering firm did not take into consideration the level of population along the water course to be used as a disposal nor were water samples taken from any of these lakes or water courses before the plant was built. Said witness did concede that this plant must remove 80% phosphates even if not extended as per the terms of defendants exhibit No. 3 set out above.

Mr. Paul Blakeslee, a Regional Professional Engineer with a specialty in sanitary engineering and a holder of a BS and MS Degree testified regarding municipal waste water systems and the fact that the WRC reviews plans and designs with the Michigan Department of Public Health issuing construction permits. Further, the Michigan Department of Public Health, as per the testimony of Mr. Blakeslee,trains plant operation personnel, receives reports regarding operating data such as flow, volume, weather information, influent and effluent qualities, and attempts to control facility

operations at the highest degree such facility is capable of operating at overall. It was further testified to that the Michigan Department of Public Health inspects such plants every six months and scans their reports. Mr. Blakeslee testified that defendants plant is operated extremely good and is at an efficiency level in the 85% range and is operating within its designed limits and further that such plant was not designed to consider phosphates but more importantly that defendants plant is not capable of meeting the standards set out in the final amended order of the Water Resources Commission and further that in order to comply with such final order the plant in question would necessitate the addition of an additional treatment stage.

Further testimony was to the effect that the load of the defendants plant has increased since its construction and that such plant is still within the expectations of performance when constructed.

Paragraph two of plaintiffs exhibit No. 2, the same being a letter from Donald M. Pierce, Chief Waste Water Section Division of Engineering, Michigan Department of Health, dated January 9, 1964 to Mr. W.J. Maxey, Jr., Assistant Superintendant, Boys Training School, Whitmore Lake, Michigan reads as follows:

> "It is imperative that you and others to whom copies of this letter are directed recognize that the point of discharge of the treated effluent would have to be altered if nuisance conditions, public health hazards, damage to fish life or other unlawfull conditions should be created. Surveillance will be maintained of the stream below the point of effluent discharge and we will advise you and others if conditions exist or land uses change requiring an alteration in the point of discharge."

Paragraph three of plaintiffs exhibit No. 9, the same being a letter dated February 27, 1964 from the above referred to Donald M. Pierce to Mr. Francis Shehan, 7209 Stone Street, Hamburg Michigan reads as follows:

> "We wish to assure you and the others to whom copies of this letter are being sent that irrespective of

> who owns or operates the present treatment plant its expansion will not be permitted until a thorough and complete evaluation and study is made and the matter is discussed with your Township Board and the County of Livingston with specific consideration being given to the point of discharge of the treated effluent from the expanded plant."

Paragraph 2.c of plaintiffs exhibit No. 10, the same being a letter from Mr. Donald M. Pierce dated April 6, 1964 to Mr. Donald A. Moon, 326 W. Main, Brighton, Michigan reads as follows:

> "We will require that the point of discharge be relocated if it creates a nuisance, becomes a health haxard or damages fish life in Hamburg Creek, Huron River or any of the chain of lakes located in Hamburg Township."

It was the testimony of Mr. Blakeslee, a Regional Project Engineer of the Michigan Department of Public Health, after reviewing the above passages cited herein from plaintiffs exhibits that plant expansion of defendants plant was never discussed with Hamburg Township.

Mr. John M. Bohunsky, a Water Resources Commission Regional Engineer and holder of a BS and MS Degree with 11 years experience with said commission testified that in 1968 the WRC moved against 11 communities to remove phosphates and that two such communities did not comply, defendant Northfield Township herein being one of those two communities. Mr. Bohunsky testified that the water course in question is highly polluted, with nutrients, both above and below the outfall pipe and testified further that he judged the quality of the receiving waters by a visual observation made some months prior to his testimony. This witness's testimony was further that he did not know if stopping all phosphates from defendants plant would make any appreciable difference with regard to Strawberry Lake. Such witness further testified that he is in total agreement with all the standards set out in defendants exhibit No. 3 above and further opines that the receiving waters would be enhanced if the final order is complied

with. Mr. Bohunsky further testified that defendants herein have two options, 1. Remove phosphates, 2. expand plant and remove phosphates. To this witness defendant has, apparently, elected to follow No. 2 and this witness does not know whether or not Hamburg Township was ever consulted with regard to these two options being offered defendant (see excerpts from plaintiffs exhibits 2,9 and 10 set out above).

It was the further testimony of this witness that if the defendants herein comply with the amended final order of determination and damage is still being done to the receiving waters because of nutrients the levels in the order could be ordered "adjusted" or the complaint ignored even though the "standards" are being abused. See exhibit No. 15 "Water Quality Standards For Michigan Waters".

Francis B. Frost, holder of a BS in Civil Engineering, Sanitary Engineer with the Water Resources Commission for 35 years, Chief Engineer and Chief of Water Research Division and Enforcement of Water Resources Laws was the next witness of defendants herein who testified that the latest WRC order makes the effluent self sustaining if such order is complied with and further that fish could exist in such effluent and further testified that said order is extremely restrictive and has some items, such as 1.c, that he feels engineers might well not be able to consistently comply with. It was the further testimony of this witness that the water course in question is so over loaded with nutrients now that the complete removal of defendants plant or the increase of its output to 750,000 gallons per day would make no difference.

It was the further testimony of this witness that there was no feasible alternate outfall site. Mr. Frost further testified that the current order of the WRC calls for a stable effluent which means that the influent does not decompose after leaving

the outfall and further that an increase to 250,000 gallons per day from 225,000 gallons per day of such stable effluent would be a non measurable impact on the receiving waters. It was Mr. Frost's further testimony that he does not recommend stable effluents being discharged into any empounded lake.

Joseph W. Price, Sanitary Public Health Engineer, Washtenaw County, BS, MS, 20 years experience, testified that there are about 2,000 dwellings in the area in question employing the use of spetic tanks and that such septic tank purpose is a settlement process and not a treatment process with the idea that such waste is to be absorbed in a tile field. Mr. Price further testified that many of the cottages in the area in question are from one to three feet above ground water and that many are seasonably within the ground water.

Mr. Price accepts the latest WRC standards as proper for expansion of defendants plant to meet population growth.

Dr. Jack A. Borchardt, Professor of Sanitary and Water Resources Engineering University of Michigan testified that in 1956 he studied the Huron River for the City of Ypsilanti by the taking of 30,000 samples at 16 points over 30 miles of the river to study algae. Such studies were not compared to, in the testimony of Mr. Borchardt, present levels in the waters in question. Later grab sampling to show nutrients above and below defendants plant on the Huron River were done within the last year at Horseshoe Creek and up to Ore Lake through Strawberry Lake. High concentrations were detected at Ore Lake and such concentrations rose and fell to Horseshoe Creek. This witness further testified that the entire watershed in question has a super abundance of phosphates and that there is no reason to believe nor feels defendants contribution of phosphates has a marked effect on the algae already present with the recommendation that these lakes must be sewered inasmuch as septic tank use is a serious

source of contamination in the area in question.

Professor Borchardt was of the opinion that the latest Water Resource Commission recommendations were the most strict of any one would find in the country and would be productive of a high quality discharge and that such discharge would support fish. Professor Borchardt further testified that the expansion of defendants plant as planned would have little if any impact with regard to flow alone and that the important consideration is the poundage of nutrients and further that the quality of the recommended effluent is far superior to the present effluent from such plant and finally that if such plant were closed down completely it would make no difference in nutrients already in existance in the area.

In support of defendants above referred to testimony regarding the extensive use of septic tanks in the area in question and their contribution to the contamination complained of, defendants introduced into evidence exhibits No. 18 through and including No. 27 which were photographic slides of the area in question. Slide No. 22 purports to be a picture of a cottage at Ore Lake pumping water directly onto the surface of the ground. Slide No. 23 purports to be a picture of another cottage with a drainfield under construction at ground water level. Slide No. 25 depicts the East shore of Strawberry Lake showing a high concentration of cottages, the lake level line, and a retaining wall through which there appears to be a drain pipe running directly into the lake. Slides No. 26 and 27 appear to be cumulative of the cortent of No. 25.

Rebuttal testimony indicated that dye tests have been made at Strawberry Lake resulting in only two traces being apparent, one immediately and the other within a 24 hour surveillance. A 47 year resident on Bob White Beach testified, in rebuttal, that

in his opinion, based on his observations, the water course in question has never been as bad in the past as defendants would indicate but that such water course is currently in poor physical shape and has become so over the past several years. Further rebuttal testimony was received from a party who has lived for the past 27 years on Mill Creek which runs through her property. Such testimony indicated that before 1963 Mill Creek was used for general recreational purposes which included fishing and swimming approximately 1800 feet from the outfall pipe. Said witness further testified that said creek is now useless for swimming and fishing purposes and that she receives a highly offensive odor from said waters.

This Court finds, as a matter of law, that the State of Michigan via its paramount powers, had a right to establish the waste water disposal plant herein in question in Green Oak Township with the discharge pipe located in Hamburg Township and also had the right to, as it did, dispose of such plant as a State facility and sell the same to a lesser municipality but subject to promises and conditions made to or held out to other parties or municipilities affected by the operation of said waste water treatment plant or the location of said plant's discharge pipe.

This Court of equity holds that as a matter of law plaintiffs herein are entitled to rely on those portions of their exhibits No. 2, 9 and 10 herein set out at pages 12 and 13. Such promises, to be enforced, are hereby held to be subject to a showing that the determental conditions set out therein do in fact exist, which this Court so finds as a fact.

This Court finds, as a matter of fact, based on the testimony received from both plaintiff and defense witnesses under oath in open Court that the State of Michigan has not lived up to the promises contained in the exhibits above referred to.

This Court further finds, as a matter of fact, based on

the evidence and exhibits presented to it, that defendants herein have in the past and are currently discharging an effluent that pollutes the receiving waters.

This Court further finds that the quality and quantity of defendants effluent can be and will be ordered adjusted. And further, this Court finds, as a matter of fact, based upon the evidence and testimony presented to it, that not only is the existing quality of defendants effluent objectionable but that the proposed standards of quality and quantity set out in defendants exhibit No. 3 above are unreasonable and deficient when taking into account the designated use of the receiving waters.

Before adopting and specifying any particular standards in this case the Court will now address itself to the question of jurisdiction in this case of Lakeland, et al v. Township of Northfield, et al.

Defendants herein seriously contest the jurisdiction not only of this Court in this case but of the Circuit Court in general in any particular litigation wherein there has been activity of the Department of Natural Resources and/or the Water Resources Commission and such activity of such agency has been productive of an order wherein a standard has been fixed.

Public Act 127, 1970, also known as the "Thomas J. Anderson, Gordon Rockwell Environmental Protection Act of 1970", provides in section 2 thereof that any person, natural or otherwise, "may maintain an action in the Circuit Court having jurisdiction where the alleged violation occurred or is likely to occur for declaratory and equitable relief...for the protection of the air, water and other natural resources and the public trust therein from pollution, impairment or destruction."

MSA 14.528 (202) sec. 2.(2) reads as follows:

> (2) In granting relief provided by subsection (1)where there is involved a standard for pollution or for an anti-pollution device or procedure, fixed by rule or otherwise, by an

> instrumentality or agency of the state or a political subdivision thereof, the Court may: (a) determine the validity, applicability and reasonableness of the standard. (b) When a Court finds the standard to be deficient, direct the adoption of a standard approved and specified by the Court."

This Court finds that the above language is not mandatory. Also in this regard see section 4(2) of the Act which reads as follows:

> "If administrative, licensing or other proceedings are required or available to determine the legality of the defendants conduct, the Court may remit the parties to such proceedings..."

Section 6 of the Act recites:

> "This Act shall be supplementary to existing administrative and regulatory procedures provided by law."

This Court finds, as a matter of law, that it does have original jurisdiction in litigation such as is presently before the Court. This Court further finds, as a matter of law, that the litigation now before this Court is original litigation authorized by Public Act 127, 1970 and not judicial review of administrative proceedings or orders as set out in section 4 of said Act. One could legitimately confuse litigation now before this Court as one being in the nature of judicial review of an order of an administrative body in that defendants herein attempt to justify their present and future activities on a heretofore entered amended final order of determination from the Water Resources Commission. Plaintiffs herein are not appealing from such order but are merely, in the process of their original litigation, attacking the proposed future conduct of defendants herein based on such WRC Order of Determination.

Defendant, in its Brief, relies heavily on the opinion of Judge Warren, Ingham County Circuit Judge, in the matter of Roberts v. State of Michigan, et al, Ingham County Circuit Court, File No. 12428-C. This Court is of the opinion that it is not controlled by the opinion set out in Roberts by the learned Ingham County Circuit Court Judge and further finds that any

dispute between circuits must be resolved by a higher tribunal.

This Court does not believe Act 127, 1970, is unconstitutional by virtue of it having contained therein a prohibited delegation of powers. Said Act simply states that when a Court finds a standard to be unreasonable or deficient the Court may set an acceptable standard which the Court may enforce directly or order the agency involved to enforce such standard.

This Court is further of the opinion that it can direct the Water Resources Commission to adopt a different pollution standard without a judicial review of Commission proceedings wherein standards were adopted and by virtue of said Act 127 can direct the Commission to adopt different standards via judicial review of the Commission's proceedings. Such power of this Court is not inconsistent with the authority set out in said Act 127 in this regard see also Act 245, 1929 as amended by Public Acts 1970, No. 200, and Public Acts of 1969, No. 306.

In addition to the above, this Court is not unmindful of the law set out in White Lake Association v. Whitehall, 22 Mich App 262. This Court is of the opinion that White Lake, and the rules set out therein, is no longer controlling in that Act 127 of 1970, specifically section 2 thereof, denies the Water Resources Commission primary jurisdiction in matters such as are now before the Court. The primary jurisdiction doctrine was the controlling factor employed by the Court of Appeals in its disposition of White Lake but such doctrine was coupled with considerations of the lack of advance judicial proceedings when such doctrine was asserted and the fairness or unfairness of remitting plaintiff therein to another proceeding, and further, such doctrine was employed in the absence of the language now found in Act 127 of 1970. It should be understand herein that this Court does not disagree with the rationale for nor the necessity of the primary jurisdiction doctrine but merely points out that the same is not absolutely controlling herein.

This Court further finds, based on the evidence and testimony presented to it, that defendants present effluent discharge as a matter of fact and law is a pollutant and that the same does constitute a nuisance which is abatable via equitable and or declaratory relief. And further, this Court finds as a matter of fact and as a matter of law that such discharge by defendants of a polluted effluent is an unreasonable use of these waters and is Violative of plaintiffs riparian rights. This Court further finds that the offensive quality of defendant's effluent can be corrected by the adjustment of standards, heretofore set out, to improve the quality of such effluent to a state acceptable by this Court.

Section 3(1) of the Act setsforth the standards of evidentiary showings in such matters now before the Court. Without taking issue as to the legislature's power to set rules of evidence in court this court will accept, arguendo, the standards set out in said section 3(1) which reads as follows:

> "When the plaintiff in the action has made a prima facie showing that the conduct of the defendant has, or is likely to pollute, impair or destroy the air, water or other natural resources or the public trust therein, the defendant may rebut the prima facie showing by the submission of evidence to the contrary. The defendant may also show, by way of an affirmative defense, that there is no feasible and prudent alternative to defendant's conduct and that such conduct is consistent with the promotion of the public health, safety and welfare in light of the state's paramount concern for the protection of its natural resources from pollution, impairment or destruction."

This Court finds as a matter of fact and as a matter of law that the plaintiff herein has established a Prima Facie showing that the conduct of the defendants herein has polluted and is likely to continue to pollute the natural resources in question. It is the further finding of this Court as a matter of fact and as a matter of law that although the defendant has submitted its case and evidence that such Prima Facie case of

plaintiffs herein has not been overcome. It is the further finding of this Court that the affirmative defense raised by the defendants herein of there being no feasible and prudent alternative to their conduct has not been borne out by defendants proofs. Defendants merely recited, through their witnesses, that there was no reasonable and feasible alternatives to their actions and did not support such recitations with facts other than alluding to economic considerations. Defendants also admitted, by way of their proofs, that present and future population below the outfall pipe had not been taken into consideration at the original construction of their waste water treatment plant and apparently is being ignored currently upon their request to continue operation and expand the volume of their discharge.

Plaintiffs herein, in their Complaint, seek relief from this Court which this Court feels presently may be overly harsh in view of the fact that it is the opinion of this Court that the polluting effect of defendants effluent into plaintiffs receiving waters can be negated and that the receipt of a clean non polluting effluent into plaintiffs receiving waters from defendants waste water treatment plant will not injure plaintiffs herein.

If defendants herein elect not to abide by the hereinafter judicially redetermined effluent standards they are at complete liberty to forthwith cease discharging their effluent in such a manner and at such a place as the same finds its way into, either directly or indirectly, the receiving waters of plaintiffs herein. This may well be accomplished by defendants herein either relocating or constructing anew its outfall pipe to a point of discharge not offensive to plaintiffs herein or their receiving waters.

By authority of MSA 14.528 (202) sec. 2 (2) (a) (b) this Court finds the standards setforth in paragraph 1.a to f of an

nded final order of determinatio[illegible]o. 1316, dated October 15, 1969 of the State of Michigan Water Resources Commission to be deficient and directs said Water Resources Commission to adopt the following standards setforth herein as substitutes for and in lieu of the standards setforth in said Water Resources Commission's amended final order of determination No. 1316.

Said judicially directed redetermined standards, and additional standards, shall read as follows:

1. "Treat or control the sewage and wastes collected by its system of sewers and drains to the extent that when discharged from its waste water treatment plant to the Horseshoe Drain or any other water course they shall:

a. Contain not more than four (4.0) milligrams per liter of oxygen consuming substances as measured by the five-day biochemical oxygen demand (BOD) test.

b. Contain not more than ten (10.0) milligrams per liter of suspended solids.

c. Contain not more than five tenths (0.5) milligram per liter of ammonia nitrogen as NH_3-N.

d. Contain not more than one thousand (1,000) total coliform per one hundred (100) milliliters and the average of any series of ten consecutive samples shall not exceed 1,000 coliform per one hundred (100) milliliters. The average fecal coliform density for the same ten consecutive samples shall not exceed 100.

e. Contain not more than twenty percent (20%) of the phosphorus contained in the influent to the waste water treatment facility. Township of Northfield, Washtenaw County is ordered to begin complying with this standard forthwith.

f. Contain not less than ten (10.0) milligrams per liter of dissolved oxygen (DO).

g. Concentrations of substances of unnatural origin shall be less than those which are or may become injurious to the receiving waters designated use of recreational, total body contact.

h. The temperature of such effluent discharge shall not exceed ninety degrees fahrenheit.

It is the further order of this Court that said water Resources Commission shall adjust, where necessary, the time

schedule setforth in item 2 a through 2 d of said amended order No. 1316, dated October 15, 1969.

It is the further order of this Court that in the event that defendants herein elect not to cease discharging their effluent into plaintiffs receiving waters that the herein judicially redetermined water effluent standards shall be put into effect under a time table to be set by the Water Resources Commission with the exception of the phosphate removal requirement (see e above) which shall be complied with forthwith.

It is the further order of this Court that defendant Northfield Township shall forthwith meet with officials of Hamburg Township and officals of Livingston County, Michigan for a complete disclosure to said officials of their intentions which shall include but not be limited to plant expansion plans and a time table of increased discharge volume up to but not to exceed 750,000 gallons per day of effluent in conformity with the herein judicially redetermined effluent standards.

It is the further order of this Court that defendant herein is no longer restrained from physically increasing the size of its waste water disposal plant but that said defendant cannot and is hereby ordered not to increase the volume of its daily discharges beyond 250,000 gallons per day until further order of the Court and the Court being satisfied, at that time, that the above judicially set standards have been met and will be regularily met and will continue to be met as the discharge volume increases and further that the Court is satisfied that plaintiffs receiving waters will not be polluted by such increase in volume of effluent discharge.

It is the further order of this Court that this Court shall retain jurisdiction of this matter pending completion of the redesignated time schedules mentioned above by the Water Resources Commission.

It is the further order of this Court that pending further

action of the Water Resources Commission temporary restraining orders may issue, as needed, to maintain the present status quo.

It is the further order of this Court that defendants herein are restrained from issuing any new tap-in permits or increasing the number of units or users of their waste water treatment plant if such increase in units or users will provide a discharge in excess of 250,000 gallons per day, notwithstanding the language of the perceeding paragraph.

It is the further order of this Court that plaintiffs herein are directed to prepare an order in conformity with this opinion of the Court, circulate the same amongst all parties hereto for consent as to form and content and present the same for entry no later than 20 days from the date of receipt of this opinion. In the event that plaintiff cannot secure such signatures or that defendants refuse to affix their signatures the same may be brought on for entry, after notice, on a regular motion day.

PAUL R. MAHINSKE, Circuit Judge