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October 21, 2005

Clerk of Appellate Courts  
Supreme Court  
305 Minnesota Judicial Center  
25 Rev. Dr. Martin Luther King, Jr., Boulevard  
St. Paul, MN 55155

**Via Messenger**

Re: In the Matter of the Cities of Annandale and Maple Lake NPDES/SDS Permit Issuance for the Discharge of Treated Wastewater, and Request for Contested Case Hearing  
Appellate Court File No. A04-2033

Dear Clerk of Appellate Courts:

Enclosed for filing in the above-referenced matter, please find:

1. The original and three copies of National Association of Clean Water Agencies' Request for Leave to Participate as *Amicus Curiae* pursuant to Minnesota Rules of Appellate Procedure 129.01 and 117, subd. 5; and
2. Proof of Service of notice to the parties.

By copy of this letter, the same is being served via U.S. Mail upon the parties pursuant to Minn. R. App. P. 129.01.

Sincerely,

Molly Mc Kee, for  
Larkin Hoffman Daly & Lindgren Ltd.

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Enclosures

cc: Minnesota Center for Environmental Advocacy  
Minnesota Pollution Control Agency  
City of Annandale  
City of Maple Lake  
Janette Brimmer, Esq.

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Charles N. Nauen, Esq.  
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bcc: Fredric P. Andes, Esq.  
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**STATE OF MINNESOTA**

**SUPREME COURT**

Appellate Court No. A04-2033

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In the Matter of the Cities of Annandale  
and Maple Lake NPDES/SDS Permit  
Issuance for the Discharge of Treated  
Wastewater, and Request for Contested  
Case Hearing

**REQUEST FOR LEAVE TO  
PARTICIPATE AS *AMICUS  
CURIAE***

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**NATIONAL ASSOCIATION OF CLEAN WATER AGENCIES'  
REQUEST FOR LEAVE TO PARTICIPATE AS *AMICUS CURIAE***

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TO: The Supreme Court of the State of Minnesota:

The National Association of Clean Water Agencies (“NACWA”), pursuant to Minnesota Rules of Appellate Procedure 129.01 and 117, subd. 5, requests leave to participate and file a brief as an *amicus curiae* in the above-captioned case in the event that the Court accepts review of the Court of Appeals opinion pursuant to either the State of Minnesota or the cities of Annandale and Maple Lake Petitions for Review. In support of its request, NACWA states as follows.

NACWA has represented the interests of the nation’s publicly-owned wastewater treatment agencies (“POTWs”) since 1970. NACWA is comprised of over 300 public agency members, who serve the majority of the U.S. sewered population and collectively treat and reclaim over 18 billion gallons of wastewater each day. NACWA’s members

operate municipal wastewater treatment plants under federal and state laws and regulations in cities and towns across the United States. NACWA's Minnesota member agencies include the City of Rochester - Minnesota Reclamation Plant, the Metropolitan Council of Environmental Services in St. Paul, and the Western Lake Superior Sanitary District in Duluth. As an organization, NACWA strives to maintain a leadership role in the development and implementation of scientifically-based, technically-sound, and cost-effective environmental and clean water programs to protect public and ecosystem health.

On September 30, 2004, the Minnesota Pollution Control Agency (the "PCA") issued a National Pollutant Discharge Elimination System ("NPDES") permit to Annandale and Maple Lake for a new wastewater-treatment plant. The proposed Annandale and Maple Lake wastewater-treatment plant would discharge to Mud Lake, which flows to the North Fork of the Crow River (the "North Fork"). The Crow River subsequently flows into the Mississippi River, which contributes to the Lake Pepin watershed. One section of the North Fork, 17.9 miles downstream from the discharge point of the proposed wastewater-treatment facility, is listed as impaired for dissolved oxygen under the Clean Water Act ("CWA"). The PCA determined that its issuance of this permit was proper and did not violate 40 C.F.R. § 122.4(i) because, although the discharges allowed under the permit requested by Annandale and Maple Lake standing alone would contribute to the impairment of water with an impaired status under the CWA, Annandale's and Maple Lake's new discharges would be effectively offset by a decrease in discharges from the City of Litchfield into the North Fork, due to Litchfield's

new and improved wastewater treatment facility. As a result, the net discharges into the North Fork would not be increased, and the issuance of a permit would not violate 40 C.F.R. § 122.4(i).

In addition, the PCA found that the issuance of a permit was appropriate even though no total maximum daily load (“TMDL”) had been set for North Fork or Lake Pepin. Under section 303(d) of the CWA, because North Fork is impaired for insufficient dissolved oxygen and Lake Pepin is impaired for excessive nutrient levels, the PCA is required to establish TMDLs for these waterbodies. The PCA estimates that these TMDLs will not be set before 2012 for North Fork and 2009 for Lake Pepin. As a result, the PCA’s issuance of a permit, in effect, would allow Annandale and Maple Lake to discharge until the TMDLs were in place.

On August 9, 2005, the Court of Appeals ruled that under 40 C.F.R. § 122.4(i), an NPDES permit may not be issued for a new source discharger when its discharge will cause or contribute to the impairment of waters with impaired status under the CWA, regardless of whether the discharge is effectively offset by a reduction in another existing source discharging to the same water body. Accordingly, the Court of Appeals held that the PCA improperly issued an NPDES permit to the cities of Annandale and Maple Lake under 40 C.F.R. § 122.4(i).

NACWA has a substantial public interest in the outcome of this case, because NACWA members include municipalities in the State whose wastewater treatment practices will be directly affected by this Court’s decision. In addition, because this case

involves the interpretation of 40 C.F.R. § 122.4(i), a federal regulation, the Court of Appeals decision will have a precedent-setting effect nationwide. In fact, the Court of Appeals' ruling is the first decision of any court interpreting 40 C.F.R. § 122.4(i) in a manner that so dramatically restricts an agency's discretion in making permitting decisions pursuant to the CWA. The Court of Appeals' ruling thus can be cited as precedent by a state or federal court in any jurisdiction. In addition, the Court of Appeals decision disregarded the United States Supreme Court precedent of *Arkansas v. Oklahoma*, 503 U.S. 91 (1992), which held that no provision under the CWA mandates a complete ban on discharges into a waterway that is in violation of state water quality standards and, instead, "the Clean Water Act vests in the EPA and the States broad authority to develop long-range, areawide programs to alleviate and eliminate existing pollution." *Arkansas*, 503 U.S. at 108. Again, the Court of Appeals interpretation of this Supreme Court law elevates the significance of its decision to a national level. Because the Court of Appeals ruling involves the interpretation of federal law, a decision by this Court will have an impact on NACWA members nationwide.

In addition, the decision by the Court of Appeals, in effect, imposes a moratorium on permitting in section 303(d) listed waters where, as is the case here, TMDLs are many years from completion. Under the Court of Appeals decision, Annandale and Maple Lake will not be able to discharge from a new wastewater treatment facility into North Fork regardless of the net beneficial effects such a new facility may have on impaired waters. Accordingly, the effect of the Court of Appeals decision is that no new or

increased dischargers to North Fork will be allowed until 2012, when the TMDLs for both North Fork and Lake Pepin are established. If allowed to participate as an *amicus curiae*, NACWA will provide a perspective for why permitting discharges into pre-TMDL, 303(d) impaired waters is necessary. NACWA has worked closely with EPA on developing rules and guidelines for the establishment of TMDLs for years. NACWA has also been involved in litigation around the country involving the propriety of TMDLs, giving NACWA an experienced standpoint on TMDL and pre-TMDL permitting issues. Moreover, NACWA has been involved in various nutrient-related issues, including issues involving dissolved oxygen and phosphorus, on a national level for years.

NACWA urges this Court to grant the Petitions for Review of the Court of Appeals decision. The Court of Appeals' decision will substantially impair the ability of NACWA members in Minnesota, and potentially nationwide, to obtain permits for new or increased discharges in order to provide safe wastewater treatment for growing populations and to protect water quality and public health. The PCA, as well as other permitting authorities, need the discretion to consider various factors when making permitting decisions under the CWA, including public health and environmental benefits. For example, in the ordinary permitting process, the PCA has the discretion to consider numerous factors, such as the "effluent reduction benefits" to be achieved from the issuance of a permit. 40 C.F.R. § 125.3(d)(1) & (2). If the Court of Appeals decision is applied as it stands, however, the PCA will not be able to use a factor-based approach that allows consideration of important issues such as public health and environmental



benefits. Indeed, under the Court of Appeals ruling, the PCA will not be able to issue permits for the replacement of failing facilities with new or updated facilities because the PCA would have to disregard the offset from a failing facility's discharges, the increased efficiency of a new facility's water treatment processes, and the overall net benefit to the environment. NACWA's requested *amicus curiae* brief will assist the Court by providing information and arguments regarding the economic and environmental impacts of the Court of Appeal's interpretation of 40 C.F.R. § 122.4(i), the effect that the Court's decision will have on wastewater treatment entities in the public sector, and the effect the Court's decision will have nationally on all of NACWA members. This broad effect of the Court of Appeals decision is not an issue that was considered by the parties during this litigation, and NACWA will provide information to assist the Court with this issue.

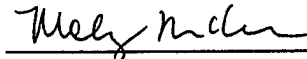
For these reasons, if allowed to participate, NACWA will argue for reversal of the Court of Appeals decision. Specifically, the Court of Appeals erred in ruling that 40 C.F.R. § 122.4(i) does not allow consideration of offsets from decreased existing dischargers into a water body when issuing an NPDES permit to a new source discharger and determining whether such new source discharger will cause or contribute to the impairment of waters with an impaired status under the Clean Water Act.

WHEREFORE, NACWA requests that the Court enter an Order allowing NACWA to participate and file a brief as an *amicus curiae* in the event that the Court

accepts a Petition for Review, and for all other relief the Court deems fair and just.

Respectfully submitted this 21st day of October, 2005.

Dated:



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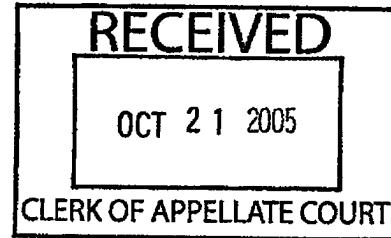
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**On behalf of The National Association  
of Clean Water Agencies**



STATE OF MINNESOTA  
 SUPREME COURT  
 Appellate Court No. A04-2033



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