

**IN THE UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF OHIO  
WESTERN DIVISION**

<b>CITY OF CINCINNATI,</b>	:	
	:	
<b>Plaintiff</b>	:	
	:	<b>CASE NO. C-1-03-731</b>
<b>v.</b>	:	
	:	<b>(Judge Weber)</b>
<b>UNITED STATES OF AMERICA</b>	:	
	:	
<b>and</b>	:	
	:	
<b>SECRETARY OF THE DEPARTMENT</b>	:	
<b>OF HEALTH AND HUMAN SERVICES</b>	:	
	:	
<b>Defendants.</b>	:	
	:	

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**JOINT MOTION BY THE NATIONAL LEAGUE OF CITIES,  
NATIONAL ASSOCIATION OF FLOOD AND STORMWATER MANAGEMENT AGENCIES,  
ASSOCIATION OF METROPOLITAN SEWERAGE AGENCIES  
AND THE AMERICAN PUBLIC WORKS ASSOCIATION  
FOR LEAVE TO PARTICIPATE AS *AMICI CURIAE***

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The National League of Cities (NLC), the National Association of Flood and Stormwater Management Agencies (NAFSMA), the Association of Metropolitan Sewage Agencies (AMSA), and the American Public Works Association (APWA) (collectively the “*amici*”) respectfully move this Court for leave to participate as *amici curiae* in support of the City of Cincinnati, the Plaintiff in this matter. In support thereof, the *amici* state as follows:

1. The members of the *amici* represent city governments and a large number of city and county public works organizations responsible for the operation, oversight and management of municipal separate storm sewer systems; as well as agencies, companies and professionals

involved in ensuring that such systems are designed, funded, operated and maintained in compliance with applicable laws and regulations.

2. NLC is the country's largest and oldest organization serving municipal governments, comprised of more than 1,600 direct member cities and 49 state municipal leagues which collectively represent more than 18,000 municipalities and more than 135,000 local elected officials throughout the United States.

3. NAFSMA is a national non-profit association of municipalities, special purpose public districts, and state agencies. Its members represent a broad nationwide spectrum of flood control, water conservation, stormwater management, wastewater, and other water-related districts, bureaus, departments, and other instruments of state and local government. NAFSMA's 130 member agencies (including 11 in the State of Ohio) serve a combined population of approximately fifty (50) million people.

4. AMSA represents the interests of nearly 300 of the nation's wastewater treatment agencies, including 15 public agency members in Ohio. AMSA members serve the majority of the sewered population in the United States, and collectively treat and reclaim more than 18 billion gallons of wastewater each day. Numerous AMSA members are regulated by the Clean Water Act's permit program for municipal separate storm sewer systems.

5. APWA is an organization of 27,000 public works professionals, including city and county Public Works Directors responsible for stormwater management, water and wastewater services, waste collection, and other municipal services. APWA members and their agencies are responsible for planning, budgeting, design and management of municipal stormwater programs.

6. The *amici* have an interest in this litigation because their members are directly involved in the administration of stormwater utilities and the implementation of stormwater management programs mandated by Section 402(p) of the Clean Water Act, by the U.S.

Environmental Protection Agency's ("U.S. EPA") implementing regulations at 40 CFR § 122.26 (the "Phase I" permit program, applicable to larger cities) and 122.30 through 37 (the "Phase II" permit program, applicable to smaller cities and to those otherwise exempted from Phase I), and by the corresponding state regulations in states such as Ohio that have been delegated authority by U.S. EPA to administer the National Pollutant Discharge Elimination System ("NPDES") permit program in their respective jurisdictions.

7. A fundamental requirement of the Phase I and Phase II permit programs is the development, implementation and enforcement of Storm Water Management Programs ("SWMPs"), which require the local, county or regional stormwater authority to reduce the discharge of pollutants from municipal separate storm sewer systems to the "maximum extent practicable." The Phase I program requires the use of "management practices, control techniques and system, design and engineering methods and such other provisions which are appropriate." 40 CFR § 122.26(d)(2)(iv). Under the Phase II program, a SWMP must, at a minimum, include the six control measures set forth in 40 CFR § 122.34(b).

8. In order to implement the requirements of both Phase I and Phase II municipal stormwater permits, local stormwater authorities throughout Ohio and the rest of the United States have devised appropriate funding mechanisms, including the creation of stormwater utilities and the collection of user fees and service charges to pay for their SWMP activities. In locations where facilities owned by the United States government contribute runoff to the municipal separate storm sewer system, and thus are users of the local government's stormwater management services, local governments rely upon the express authority of Clean Water Act § 313, 33 U.S.C. § 1323, to collect from the federal government the share of the cost of those services incurred by federal facilities.

9. In the present case, one branch of the United States government has not only questioned the jurisdiction of the federal courts to entertain the City's claim for collection of its storm water fees, but has also announced its intention to litigate whether such fees constitute a legitimate "service charge" or an impermissible tax on the federal government; whether they are based on a "fair approximation" of the federal government's use of the City's system; and whether the fees are "reasonable" within the meaning of CWA § 313. This Court's ruling on each of these issues will have a direct and substantial impact on the *amici's* member agencies, including not only the City of Cincinnati, but other cities and stormwater management agencies throughout Ohio and the rest of the United States.

10. Unlike the appellate rules, the Federal Rule of Civil Procedure do not explicitly provide for the filing of briefs or other forms of limited participation in District Court proceedings by an *amicus curiae*. However, the courts in this Circuit have routinely allowed parties to participate as *amici curiae* in cases where formal intervention as a party litigant was either not requested by the party concerned or was otherwise not appropriate, timely, or lawful. *See, e.g., Thornton v. East Texas Motor Freight, Inc.*, 454 F.2d 197 (6<sup>th</sup> Cir. 1972) (EEOC denied intervention but allowed to participate in the case as an *amicus curiae*); *Brewer v. Republic Steel Corp.*, 61 F.R.D. 591 (N.D. Ohio, 1974) (Ohio Civil Rights Commission denied intervention, but allowed to file briefs on matters of law and evidentiary presentations), *affirmed* by 513 F.2d 1222, 1225 (6<sup>th</sup> Cir. 1975) (noting that the district court's invitation to participate as an *amicus curiae* would "afford the Commission ample opportunity to give the court the benefit of its expertise"); *Penick v. Columbus Education Association*, 574 F.2d 889 (6<sup>th</sup> Cir. 1978) (Columbus Education Association's motion to intervene was untimely, but association was allowed to participate as *amicus curiae*); *Bradley v. Milliken*, 828 F.2d 1186, 1194 (6<sup>th</sup> Cir. 1987) (motion to intervene was untimely but the proposed intervenor was invited to participate

as an *amicus* and the district court had the benefit of their concerns and views, as well as their expertise on the issues in the case); *Stupak-Thrall v. Glickman*, 226 F.3d 467, 475 (6<sup>th</sup> Cir. 2000) (motion to intervene was denied but appellants received permission to submit a brief as *amicus curiae*).

11. In the present case, numerous members of the *amici curiae*, both in Ohio and nationwide, either have established or are in the process of establishing stormwater user fees or service charges using an approach similar to that employed by the City of Cincinnati in this case, and the validity and implementation of those programs would be called into question if the Defendant prevailed in its opposition to the fees at issue in this proceeding. Although the *amici* might well qualify for intervention permissively or as of right under Fed. R. Civ. P. 24, the *amici* seek leave to participate on a less formal basis by the submission of briefs on such questions of law and evidentiary matters where their collective experience and national perspective on the implementation of U.S. EPA's stormwater permit program will benefit the Court in reaching its decision.

For each of the foregoing reasons, the *amici* request that their Motion for Leave to Participate as *Amici Curiae* be granted by this Court.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on June 30, 2004, a copy of the foregoing Joint Motion by The National League of Cities, National Association of Flood and Stormwater Management Agencies, Association of Metropolitan Sewerage Agencies and The American Public Works Association for Leave to Participate as *Amici Curiae* was served by regular first class mail, postage prepaid, on the following:

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