

NO. A06-1371

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State of Minnesota  
**In Supreme Court**

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In the Matter of the Alexandria Lake Area Sanitary District  
NPDES/SDS Permit No. MN0040738, Reissuance for the  
Expanded Discharge of Treated Wastewater, Douglas County,  
Alexandria, Minnesota

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**BRIEF OF AMICUS CURIAE  
L'HOMME DIEU LAKE ASSOCIATION**

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JAMES P. PETERS (#177623)  
KARNA M. PETERS (#245975)  
Peters & Peters, PLC  
507 N. Nokomis St. #100  
Alexandria, MN 56308  
(320) 763-8458  
*Attorneys for Amicus Curiae,  
L'Homme Dieu Lake Association*

STEVEN W. NYHUS (#0296193)  
Flaherty & Hood  
525 Park Street, Suite 470  
St. Paul, MN 55103  
(651) 225-8840  
*Attorneys for Appellant Alexandria  
Lake Area Sanitary District*

KEVIN REUTHER (#0266255)  
Minnesota Center for Environmental  
Advocacy  
26 East Exchange Street Suite 206  
St. Paul, MN 55101-1667  
(651) 223-5969  
*Attorneys for Respondent,  
Minnesota Center for Environmental  
Advocacy*

ALAN C. WILLIAMS (#0117328)  
Assistant Attorney General  
Office of the State Attorney General  
445 Minnesota Street, Suite 900  
St. Paul, MN 55101-2127  
(651) 296-7200  
*Attorneys for Appellant,  
Minnesota Pollution Control Agency*

SUSAN L. NAUGHTON (#259743)  
League of Minnesota Cities  
145 University Avenue West  
St Paul, MN 55103-2044  
(651) 281-1232  
*Attorney for Amicus Curiae,  
League of Minnesota Cities*

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## STATEMENT OF ISSUES

### I. STANDARD OF REVIEW ON THIS APPEAL.

Minn.Stat. Sec. 14.69.

In re Cities of Annandale and Maple Lake NPDES/SDS Permit Issuance for the Discharge of Treated Wastewater, 731 N.W.2d 502, 515 (Minn. 2007).  
Resident v. Noot, 305 N.W.2d 311, 312 (Minn. 1981).

### II. BECAUSE MPCA FAILED AS A MATTER OF LAW TO SET A NPDES PERMIT LIMIT ON ALASD THAT WILL COMPLY WITH THE CWA AND STATE LAW, THE SUPREME COURT SHOULD AFFIRM THE DECISION OF THE COURT OF APPEALS.

The Court of Appeals reversed and remanded the MPCA's decision to issue the NPDES permit to the ALASD.

40 CFR Sec. 122.44(d)(1).

Minn.R. 7001.0140, subp. 1.

In re Cities of Annandale and Maple Lake NPDES/SDS Permit Issuance for the Discharge of Treated Wastewater, 731 N.W.2d 502, 515 (Minn. 2007).  
Gavle v. Little Six, Inc., 555 N.W.2d 284, 296 (Minn. 1996).

## STATEMENT OF THE CASE

This case presents the question of whether, under Minnesota law, Appellant MPCA's June 23, 2006 decision to issue a NPDES permit to Appellant ALASD for an expanded discharge of treated sewage into Lake Winona, Douglas County, Minnesota, was contrary to the purpose, intent and plain language of the federal regulation adopted under the Clean Water Act. 40 C.F.R. 122.44(d)(1).

Amicus Curiae L'Homme Dieu Lake Association ("Association") respectfully submits this amicus curiae brief to the Minnesota Supreme Court.<sup>1</sup> The Association is a non-profit Minnesota corporation, whose members are property owners located on Lake L'Homme Dieu, Douglas County, Minnesota. Lake L'Homme Dieu is a downstream water resource relative to the NPDES permit that is at issue in this appeal. The Association also filed a detailed brief with the Minnesota Court of Appeals.

The Minnesota Court of Appeals on August 28, 2007 held that the NPDES permit improperly allowed the ALASD to increase nutrient discharges into already impaired Lake Winona. The increased discharge from ALASD, which is the primary source (89%) of the criteria pollutants into Lake Winona, violated the mandate of the Clean Water Act ("CWA") to achieve water quality standards. Congress intended the CWA to prevent further degradation of water quality through increased discharges from the primary documented source of existing contamination. The NPDES permit also violated the

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<sup>1</sup> The Association's undersigned counsel hereby certifies pursuant to Rule 129.03 of the Minnesota Rules of Civil Appellate Procedure that no counsel for any party authored this brief either in whole or in part and that no one, other than Amicus Curiae Association, made a monetary contribution to the preparation or submission of this brief.

CWA requirement for a prior total maximum discharge limit (“TMDL”) study for impaired waters to assure protection of water quality. The decision of the Court of Appeals is well reasoned, direct, and clear in the interpretation and application of the relevant federal regulation, 40 C.F.R. 122.44(d)(1).

The Association maintains that the Court of Appeals correctly applied 40 C.F.R. 122.44(d)(1). Lake Winona and the Alexandria Chain of Lakes are a vital piece of West Central Minnesota that warrants the protection of the CWA, for many reasons. ALASD has several options available for the treatment facility other than an increased discharge at the same site that is a flagrant violation of the CWA. It would be different if the ALASD or MPCA had a plan in place to achieve water quality standards, but unfortunately neither ALASD nor MPCA admittedly have any plan at this time. It appears that ALASD’s primary idea for the CWA violation herein was to petition MPCA in August 2007 for a use attainability study seeking to downgrade Lake Winona from being considered a “lake” suitable for swimming, fishing and aquatic vegetation to an industrial pond in order to eliminate the CWA mandate to achieve water quality standards. By that petition, ALASD indicated how ALASD views Lake Winona, the head of the Alexandria Area chain of lakes.

On this appeal, MPCA and ALASD put forth necessarily elaborate arguments to contort the plain language of the federal regulation and to back up MPCA’s unreasonable interpretation of that regulation. The intent of the CWA is to achieve water quality standards. MPCA’s interpretation of the CWA here that proposes to allow the primary documented source of existing contamination to an impaired water to increase the criteria

discharge is unreasonable, is contrary to Congress' mandate and is entitled to no deference from the Court of Appeals or from this Supreme Court.

For the reasons set forth herein and in the Brief of MCEA, Amicus Curie Association supports the position of MCEA that the Supreme Court should affirm the decision of the Court of Appeals reversing and remanding MPCA's decision.

### **STATEMENT OF THE FACTS**

The factual background on this appeal is set forth in the administrative record that was before MPCA in the permitting process, including an EAW. The Association relies upon and incorporates herein by reference the Statement of Facts of MCEA. The Association also provides this Statement of Facts for purposes of this appeal.

MPCA admits that the ALASD facility causes or contributes to a violation of the MPCA's narrative water quality standard. Resp. Appendix, p. 3. This is not a case where the source or extent of the contribution is unclear or trifling. ALASD's facility directly discharges 89% of the external load of phosphorus into Lake Winona, which is listed on the 2004 list of impaired waters - "303(d)" list - for excess nutrients. PCA App. 20. Lake Winona does not meet water quality standards. Id. ALASD is the documented source of 89% of the existing contamination. Id.

MPCA further admits that the NPDES permit here will allow phosphorus levels to increase in Lake Winona and Lake Agnes in the interim period following construction of the expansion. PCA App. 21-22. This appears to be the polar opposite of achieving water quality standards. MPCA's internal analysis concluded in part that: "We believe that the phosphorous concentrations of Lakes Winona and Agnes will increase . . .".

LHDApp.82. MPCA's findings essentially concede the same for the period thereafter and argue that no "significant" additional deterioration will take place based upon MPCA measurement standards (secchi levels). *Id.* Nowhere do MPCA's Findings document any progress towards achieving water quality standards.

MPCA concluded in permit review that the proposed NPDES permit allows an increase in total phosphorus in downstream Lake Agnes by over 300 kg per year and Lake Henry by about 200 kg per year. LHDApp. 60. By 2025, ALASD proposes to more than double the volume of discharges into Lake Winona from 3.75 mgd to 6.7 mgd. The Court of Appeals noted the increase in phosphorus. ALASD is increasing the geographic service area like a spider web reaching out further and further into the rural areas of Douglas County for their sewage business, is discharging directly into Lake Winona, and is not pursuing other alternatives.

In addition to the total volume of increased total phosphorus discharges, the Association is concerned that the increased flow proposed by ALASD would "flush" the mass of phosphorus that is presently held and accumulated in Lakes Winona, Agnes, and Henry down through the chain of lakes and into Lake L'Homme Dieu.

The Alexandria "chain of lakes" in Douglas County, Minnesota, borders on the City of Alexandria and includes Lakes Winona, Henry, Agnes, L'Homme Dieu and on downstream. PCA App. 14. Downstream lakes include Carlos and Darling. Lake Winona is the head of the chain of lakes. *Id.* The chain of lakes in Douglas County represents one of the most significant natural resource assets to Douglas County for residential, tourism, and recreation, among other uses. The chain of lakes is a major

economic base for Douglas County. The properties around the chain of lakes provide Douglas County with a substantial percentage of property tax base to support County programs and services. The health of the chain of lakes is vital to Douglas County.

The chain of lakes is significant statewide and across the United States. Lake Carlos State Park is a Minnesota State Park on the chain and operated by the Minnesota Department of Natural Resources. Lake Carlos State Park contains a tamarack bog, marshes, woodland ponds and lakes. The Park offers swimming, fishing, boating, camping, hiking and horseback riding on about 1,236 acres and hosts about 169,169 annual visits. The Arrowwood Resort and Conference Center is located on the chain, is one of the most significant resorts in Minnesota, and offers lodging, swimming, fishing, and boating. Visitors come from all across the United States. Other resorts are on the chain of lakes. The Luther Crest Bible Camp is located on the chain and offers numerous camps throughout the summer and has facilities for year round use. Mount Carmel Ministries is on the chain and features the Mount Carmel family and other camps that have a full schedule of events all summer long and other events throughout the year. Mount Carmel offers lodge rooms, cabins, cottages, campsites and a conference center. On the chain of lakes are DNR boat launches, public landings, and public beaches. People from all over the State and Country enjoy these assets.

On August 14, 2007, the ALASD submitted to MPCA a Petition for a Use Attainability Assessment of Lake Winona. LHDApp. 1. The Petition is filed herewith at LHDApp. Pp. 3-9. ALASD asked the MPCA in the petition to conclude that Lake Winona was not suitable for swimming, fishing or aquatic plant life. LHDApp. 5.

ALASD asked MPCA to remove the "Class 2 designation" from Lake Winona for purposes of the CWA. LHDApp.6. ALASD asked MPCA to consider Lake Winona as a lesser body of water, such as an industrial pond, for the CWA. Id. The ALASD petition sought to eliminate the mandate of the CWA to achieve water quality standards for lakes.

Fortunately, MPCA denied the ALASD petition as contrary to the evidence in the record. LHDApp. Pp. 10-12. People in the region couldn't believe that the ALASD was throwing weight around like this. Local media covered the event and noted that "Lake Winona is a lake". LHDApp. 15-17. Declassification of Lake Winona as a lake to an industrial pond would obviously have reduced property values.

The NPDES permit threatens property values of private property on the chain of lakes, which values are among the highest in Douglas County and West Central Minnesota. At least one study in Minnesota has documented the positive relationship between water quality and property values. The Mississippi Headwaters Board and Bemidji State University submitted to the Minnesota legislature a report in 2003 entitled: "Lakeshore Property Values and Water Quality: Evidence from Property Sales in the Mississippi Headwaters Region." LHDApp, pp. 18-76. This study "defines the dollar value of water quality to the northern Minnesota economy". LHDApp. 19. The study "attaches tremendous economic value to investing in a clean environment." Id. The study concluded that: "Water quality was shown to be a significant explanatory variable of lakeshore property prices in all lake groups . . .". LHDApp. 51. The results of the study show that "millions of dollars in lakeshore property values on Minnesota's lakes could be lost or gained upon a one-meter change in water clarity. Property owners, as

will local and state property tax recipients, either gain or lose dollars as water clarity improves or degrades.” LHDApp. 59.

## ARGUMENT

### **I. STANDARD OF REVIEW ON THIS APPEAL.**

The Supreme Court determines whether the agency decision is: (a) in violation of constitutional provisions; or (b) in excess of the statutory authority or jurisdiction of the agency; or (c) made upon unlawful procedure; or (d) affected by other error of law; or (e) unsupported by substantial evidence in view of the entire record as submitted; or (f) arbitrary or capricious. Minn.Stat. Sec. 14.69; In re Cities of Annandale and Maple Lake NPDES/SDS Permit Issuance for the Discharge of Treated Wastewater, 731 N.W.2d 502, 515 (Minn. 2007); Resident v. Noot, 305 N.W.2d 311, 312 (Minn. 1981).

Courts provide appropriate deference to reasonable agency decisions. Reserve Mining Co. v. Herbst, 256 N.W.2d 808, 824 (Minn.1977).

The Courts do not give deference to an agency on interpretation of regulations where the language is clear and capable of understanding. In re Cities of Annandale and Maple Lake NPDES/SDS Permit Issuance for the Discharge of Treated Wastewater, 731 N.W.2d 502, 515 (Minn. 2007); In re St. Otto's Home v. Minnesota Dep't of Human Servs., 437 N.W.2d 35, 40 (Minn.1989) (citations omitted).

Our Minnesota Supreme Court has noted that, where federal law is unambiguous, it is the role of Congress, the federal agency, or the U.S. Supreme Court to change federal law, not the role of the Minnesota Supreme Court. Gavle v. Little Six, Inc., 555 N.W.2d 284, 296 (Minn. 1996).

**II. BECAUSE MPCA FAILED AS A MATTER OF LAW TO SET A NPDES PERMIT LIMIT ON ALASD THAT WILL COMPLY WITH THE CWA AND STATE LAW, THE SUPREME COURT SHOULD AFFIRM THE DECISION OF THE COURT OF APPEALS.**

MPCA made an error of law in issuing the NPDES permit to ALASD by failing to comply with 40 C.F.R. Sec. 122.44(d)(1). Minnesota requires MPCA to comply with the Clean Water Act (“CWA”) in issuing NPDES permits. Minn.R. 7001.0140, subp. 1. The Court of Appeals clearly identified in the well written opinion that the MPCA interim and final effluent limits on the NPDES permit violate the CWA. The decision of the Court of Appeals, if affirmed, will help to implement the purposes of the CWA as they apply to Lake Winona, Lake L’Homme Dieu and the chain of lakes.

The CWA requires states to establish minimum effluent limitations for point sources of pollution, including publicly owned wastewater treatment facilities. 33 U.S.C. § 1311(b)(1)(A), (B), CWA § 301(b)(1)(A), (B). The CWA requires states to identify bodies of waters for which the federally mandated effluent limitations are “not stringent enough to implement any water quality standard applicable to such waters.” States are required to rank these waters “taking into account the severity of the pollution and the uses to be made of such water.” 33 U.S.C. § 1313(d)(1)(A), CWA § 303(d)(1)(A). The state must then establish a total maximum daily load (“TMDL”) for each pollutant that impairs a listed body of water. 33 U.S.C. § 1313(d)(1)(C), CWA § 303(d)(1)(C). Where a facility causes or contributes to violations of water quality standards, the CWA requires a water quality based effluent limit (“WQBEL”). 40 CFR Sec. 122.44(d). The Rule also states that “removal of nutrients from all wastes shall be provided to the fullest extent

practicable wherever sources of nutrients are considered to be actually or potentially detrimental to preservation or enhancement of the designated water uses.” Minn. R. 7050.0211, subp.1a.

The Minnesota Supreme Court should enforce the plain language of the federal regulations where unambiguous. Minnesota Courts review de novo and apply the plain language of unambiguous regulations. In re Cities of Annandale and Maple Lake NPDES/SDS Permit Issuance for the Discharge of Treated Wastewater, 731 N.W.2d 502, 515 (Minn. 2007); Resident v. Noot, 305 N.W.2d 311, 312 (Minn. 1981).

Here, the Court of Appeals correctly held that MPCA erred as a matter of law in failing to adequately achieve water quality standards and by failing to require a WQBEL. The language of 40 CFR Sec. 122.44(d) is plain and unambiguous on its face and in the context of the CWA. The Court of Appeals noted with good reason that these regulations, though complex, are plain and readily understood upon analysis in the context of the purposes and intent of the CWA. The CWA is intended to require projects to achieve water quality standards, not to allow for additional degradation by existing facilities that are the documented source of the majority of criteria pollutants to an impaired body of water. MPCA failed by allowing the ALASD to cause an increase in total phosphorus – the criteria pollutant - in all of the lakes for which MPCA modeled concentrations. There is no evidence anywhere in the record that this NPDES permit will improve water quality in impaired Lake Winona. This is directly opposite to the mandate of the CWA of achieving water quality standards. Here, MPCA is allowing further degradation and not requiring improvement to the existing impairment.

Neither MPCA nor ALASD have any plan in place for achieving water quality standards. They admit that a TMDL study will not be complete until at least 2009. They have no WQBEL for Lake Winona, only a limit proposed upon the facility's proposed technology. Area residents have no information on how the NPDES permit of ALASD will help to achieve water quality standards. There is none.

It appears that the only plan of the ALASD relative to the CWA violation here was to petition MPCA to downgrade Lake Winona from a lake to the same status as an industrial settling pond in order to avoid CWA requirements. The Petition of the ALASD shows how little regard the ALASD has for Lake Winona and the chain of lakes. Lake Winona is the head of the chain of lakes. Agnes, Henry, L'Homme Dieu, Carlos and Darling are all downstream. ALASD actually petitioned MPCA to downgrade the classification of Lake Winona based upon the purported status of not having use for swimming, fishing and aquatic plants. ALASD stated in the petition: "Swimming uses do not exist and the evidence indicates that they have never existed . . .". LHDApp. 5. ALASD stated the same for fishing and suggested that the only fish left in the lake were "under stress" and near dead. Id. These arguments were factually without any reasonable basis. Residents informed the MPCA of swimming and boating on Lake Winona. LHDApp. 11. The Minnesota DNR authored a lake report indicating "normal to large numbers of Black Crappie, Bluegill, Largemouth Bass, Northern Pike, and Yellow Perch". LHDApp. 11. The audacity of the ALASD to petition to downgrade a lake to an industrial pond is astonishing in the circumstances. It also reflects badly on the veracity of ALASD's proposed NPDES permit application. Based on the lack of any reasonable

basis for the petition, how can anyone trust ALASD's statements on, for example, project alternatives? It appears that ALASD is only interested in geographic expansion of service area, with increased revenues, and not at all interested in people using Lake Winona for swimming, boating or fishing. ALASD wants Lake Winona to serve as its industrial pond. If ALASD was as good at environmental management as it is at financing expansion, ALASD would have ensured the completion of the required environmental studies at the time of the NPDES application.

MPCA failed to adequately consider the increased volume and flow of discharges and the possibility that the increased flow will flush out the resident phosphorus downstream. The addition of phosphorus to a lake is a contaminant and degrades water quality. In re City of Owatonna's NPDES/SDS Proposed Permit, 672 N.W. 2d 921 (Minn.App. 2004). MPCA has not adequately analyzed salt degradation of Lake Winona.

Our State must protect this chain of lakes with enforcement of the CWA. If the chain of lakes is not protected, then there will be no enforcement of clean water standards anywhere in Minnesota. The ALASD project threatens important and valuable assets within Douglas County and threatens real dollar losses to this region of the state, which depends upon these assets as a core component of the economy. Tourism at the Lake Carlos State Park, Arrowwood Resort, other area resorts, and at the many public boat launches and beaches is at risk. The activities at the Luther Crest Bible Camp and the Mount Carmel Family Camp are at risk. The property values on the chain of lakes are at risk, for the reasons documented in the 2003 study to the Minnesota legislature by the Mississippi Headwaters Board and Bemidji State University. The Court of Appeals

decision correctly notes that the ALASD facility contributes 89% of the phosphorus to Lake Winona, that Lake Winona is on the 303(d) list of impaired waters, and that the proposed NPDES permit does nothing to achieve water quality standards. This violates the CWA as a matter of law.

Requiring ALASD and MPCA to comply with the CWA will force ALASD to look to other technologies or locations to discharge effluent if ALASD continues to expand the service area or, alternatively, will help avoid the need to ultimately clean up Lake Winona and the chain of lakes from its phosphorus contamination. Minnesota law provides for: "removal of nutrients from all wastes shall be provided to the fullest extent practicable wherever sources of nutrients are considered to be actually or potentially detrimental to preservation or enhancement of the designated water uses." Minn. R. 7050.0211, subp.1a. MPCA arbitrarily accepted the .30 mg/l level without any reasoned analysis of the practicability of other options. Chapter 9 of the Feasibility Study discusses alternative treatment systems, although according to the Study's author, the chapter only "presents a  *cursory review* of alternative treatment systems which may be considered in lieu of expanding the existing [Facility]." Forced compliance with environmental regulations is often the impetus for innovation. Clean ups are far more expensive, as documented for example by the EPA's requirement that General Electric Company clean up of pcbs on the Hudson River in New York State.

The Supreme Court should affirm the decision of the Court of Appeals where the interpretation of the CWA put forth by MPCA is unreasonable. The mandate of the CWA is to achieve water quality standards. The interpretation of the CWA by the MPCA here

is the polar opposite - to allow further degradation of water quality standards by the documented source of the contamination - the ALASD. This is particularly troublesome where the ALASD is the on-site source of 89% of the existing contamination for the listed criteria. This interpretation of MPCA that allows for no improvement in water quality is patently unreasonable and is not entitled to any deference.

The fact that ALASD is the prime documented source of existing contamination to an impaired water distinguishes this situation from the case presented to this Supreme Court in the matter of In re Cities of Annandale and Maple Lake NPDES/SDS Permit Issuance for the Discharge of Treated Wastewater, 731 N.W.2d 502, 515 (Minn. 2007). Both MPCA and ALASD extensively rely in their Briefs upon the Annandale/Maple Lake case and use that decision to argue that the instant action threatens development statewide. The cases have important differences. Lake Winona is a small body of water with only two documented sources of criteria pollutants. ALASD is the principal source sitting right there at Lake Winona. Phosphorus is the criteria pollutant. The CWA surely protects an impaired body of water from further contamination from the only documented and dominant source of that contamination.

In contrast, Lake Pepin had numerous sources of contamination, none of which were documented as the source of anything approaching 89%. Neither Annandale nor Maple Lake was documented as contributing the major amounts, if any, to the existing contamination in Lake Pepin. Neither Annandale nor Maple Lake is situated within miles and miles of Lake Pepin.

By their arguments here, MPCA and ALASD are essentially asking the Supreme Court to rewrite the CWA and the applicable federal regulation. Our Minnesota Supreme Court has received similar requests in the past and duly noted that it is the role of Congress, the federal agency, or the U.S. Supreme Court to change federal law, not the role of the Minnesota Supreme Court. Gavle v. Little Six, Inc., 555 N.W.2d 284, 296 (Minn. 1996).

It is the role of the Courts to ensure that agencies and persons follow state and federal law, even where the agency does not want to follow that law. The Court of Appeals correctly interpreted and applied the CWA in the decision below. The decision is articulate, logical and sound. Practitioners of environmental law in Minnesota have noted that the Court of Appeals got it right. The Supreme Court should uphold the decision of the Court of Appeals as consistent with state and federal law.

### **CONCLUSION**

ALASD wants to expand at the present location to increase service area, which is apparently the least cost alternative towards getting bigger. The current expansion plans raise the question of when or where will it end? ALASD is spreading large pipes further in Douglas County and towards neighboring Otter Tail, Pope, and Todd Counties. ALASD seems intent on gathering, treating, and discharging all the effluent of Douglas County and surrounds into Lake Winona and classifying Lake Winona as an industrial pond for that purpose. ALASD seems intent upon precluding use of Lake Winona for swimming, boating, fishing or plant life.

MPCA should have enforced the plain language and intent of the federal regulation and required proof of improvement of the ALASD discharge. MPCA should have undertaken a hard look at alternative locations and alternative treatment options. At some point, it makes no sense to pipe all of this sewage from Douglas County and surrounds into Lake Winona. The CWA prohibits this NPDES permit. ALASD's proposed increased discharge into Lake Winona violates the CWA. MPCA's interpretation of the federal regulation is convoluted and unreasonable.

Because the NPDES/SDS permit issued by the MPCA does not meet state or federal requirements, the Association respectfully requests that this Supreme Court affirm the decision of the Court of Appeals reversing the NPDES permit and remanding this matter back to MPCA.

PETERS & PETERS, PLC

DATED: January 31, 2008

By:   
James P. Peters #177623  
Karna M. Peters #245975  
Attorney for Amicus Curiae Ass'n  
460 Franklin St. N., # 100  
P.O. Box 313  
Glenwood, MN 56334  
(320) 634-3778