

NO. A05-1686

State of Minnesota
In Supreme Court

Hans Hagen Homes, Inc.,

Respondent,

v.

City of Minnetrista,

Appellant.

**BRIEF OF AMICUS CURIAE
 MINNESOTA CENTER FOR ENVIRONMENTAL ADVOCACY**

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STATEMENT OF THE ISSUES

Amicus curiae Minnesota Center for Environmental Advocacy (“MCEA”)¹

submits the following legal issue to this Court for its consideration:

Can governmental actions that are the subject of mandatory environmental review pursuant to the Minnesota Environmental Policy Act, Minn. Stat. § 116D.01 *et seq.*, “automatically” take place by operation of the “60-Day Rule” contained in Minn. Stat. § 15.99 before the environmental review process is completed?

This issue was not addressed by the District Court or the Court of Appeals below.

Most Apposite Cases and Statutes:

- *No Power Line, Inc. v. Minnesota Environmental Quality Council*, 262 N.W.2d 312 (Minn. 1977)
- *Minnesota Center for Environmental Advocacy v. Minnesota Pollution Control Agency*, 644 N.W.2d 457 (Minn. 2003)
- *Carl Bolander & Sons Co. v. City of Minneapolis*, 502 N.W.2d 203 (Minn. 1993)
- *Allen v. City of Mendota Heights*, 694 N.W.2d 799 (Minn. Ct. App. 2005)
- Minn. Stat. § 116D.04, subds. 2a, 2b
- Minn. Stat. § 15.99, subd. 3(d)

¹ As required by Rule 129.03 of the Rules of Civil Appellate Procedure MCEA hereby certifies that (1) this *amicus* brief was not authored in whole or in part by counsel for any party or other *amici* to this action, and (2) no person or entity other than counsel for MCEA has made a monetary contribution to the preparation and submission of this brief.

STATEMENT OF THE CASE

MCEA accepts the Statement of the Case as set forth in the Brief and Appendix of Appellant City of Minnetrista heretofore filed with this Court. MCEA was granted leave to participate in this appeal as *amicus* by this Court's Order of August 9, 2006.

STATEMENT OF THE FACTS

MCEA accepts the Statement of the Facts as set forth in the Brief and Appendix of Appellant City of Minnetrista.

SUMMARY OF ARGUMENT

The Court of Appeals' decision below, and the arguments addressed to this Court by appellant City of Minnetrista ("Minnetrista"), "focus narrowly on the structure and text of the second and third subdivisions of Minn. Stat. § 15.99." *Hans Hagen Homes, Inc. v. City of Minnetrista*, 713 N.W.2d 916, 919 (Minn. Ct. App. 2006). *Amicus* MCEA asks this Court to take a broader view of the issues presented herein, one that centers upon the interplay between Minn. Stat. § 15.99's "60-Day Rule" and the environmental review process mandated by the Minnesota Environmental Policy Act, Minn. Stat. § 116D.01, *et seq.* ("MEPA"). MCEA submits that, when MEPA and Minn. Stat. § 15.99 are correctly construed together, the inescapable conclusion is this: petitions for governmental approval falling within the 60-Day Rule *cannot*, as a matter of law, be "automatically" approved where the activity for which approval is sought is the subject of

mandatory environmental review under MEPA until 60 days after the environmental review process is complete. MCEA respectfully asks this Court to explicitly so hold.

The Court of Appeals' strict interpretation of Minn. Stat. § 15.99, subd. 2(a) permits governmental inadvertence to result in the automatic approval, *without any environmental review whatsoever*, of proposed land-use projects that carry the potential for significant environmental effects. That result is contrary to the plain language and stated purpose of MEPA – to assure that governmental decisions are premised upon a fully-informed appreciation of their environmental ramifications. The Court of Appeals' decision also invests local governmental units, through the default of automatic approval, with legal authority that is expressly denied to them under MEPA. Interested citizens would be divested of public participation rights guaranteed to them by MEPA, and unscrupulous developers would be handed a roadmap for environmental mischief. The citizens, environment and public policy of this State would all suffer as a result.

To avoid these consequences, MCEA asks this Court to declare that land-use proposals that carry the potential for significant environmental effects – thus triggering mandatory environmental review under MEPA – cannot, as a matter of law, be “automatically” approved via operation of the 60-Day Rule contained in Minn. Stat. § 15.99 until 60 days after the environmental review process is complete. Such a holding requires this Court to reverse the decision of the Court of Appeals below. The points and authorities supporting MCEA's request are set forth in the following paragraphs.

ARGUMENT

I. WHERE A PETITION FOR GOVERNMENTAL APPROVAL IS SUBJECT TO MANDATORY ENVIRONMENTAL REVIEW UNDER MEPA, AS A MATTER OF LAW THE PETITION CANNOT BE “AUTOMATICALLY” APPROVED PURSUANT TO MINN. STAT. § 15.99 UNTIL 60 DAYS AFTER THE ENVIRONMENTAL REVIEW PROCESS IS AT AN END.

A. Proposed Land-Use Projects That Invoke MEPA’S Mandatory Environmental Review Provisions Cannot, As A Matter Of Law, Receive Governmental Approval Until The Environmental Review Process Is Complete.

Protection of the environment, one of the paramount public policies of this State, lies at the heart of MEPA. In it, the Legislature announced its intent:

(a) to declare a state policy that will encourage productive and enjoyable harmony between human beings and their environment; (b) to promote efforts that will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of human beings; and (c) to enrich the understanding of the ecological systems and natural resources important to the state and to the nation.

Minn. Stat. § 116D.01. The Legislature went on to recognize “the critical importance of restoring and maintaining environmental quality to the overall welfare and development of human beings” Minn. Stat. § 116D.02, subd. 1. Accordingly, the Legislature declared it to be “the continuing policy of the state government, in cooperation with federal and local governments, and other concerned public and private organizations, to use all practicable means and measures . . . to create and maintain conditions under which human beings and nature can exist in productive harmony” *Id.*

Based upon these findings, the Legislature crafted MEPA. Its purpose is straightforward – to assure that, before governmental units take actions having the potential for significant environmental effects, a process is followed by which those entities are fully

informed of the likely environmental consequences of their decisions. *See, e.g., Minn. Ctr. for Env'tl. Adv. v. Minn. Pollution Control Agency*, 644 N.W.2d 457, 462 (Minn. 2003) (purpose of environmental impact statement is “to provide information to evaluate proposed actions that have the potential for significant environmental effects, to consider alternatives to the proposed actions, and to explore methods for reducing adverse environmental effects”). The environmental review process is not intended to force the deliberating agency to reach any particular outcome on an application before it; rather, the process ensures the parties, and the public, that all significant environmental impacts of the proposed action have been taken into account by the agency *before* it makes its final decision. *No Power Line, Inc. v. Minn. Env'tl. Quality Council*, 262 N.W.2d 312, 323 (Minn. 1977) (MEPA intended “to ensure that administrative decision-making affecting the environment was made with environmental factors in mind”).

At the heart of MEPA are two key requirements. First, MEPA provides that environmental impact statements must be prepared in advance of certain governmental decisions, so that the potential environmental effects of governmental actions can be thoroughly analyzed and understood before a final decision is reached:

Where there is potential for significant environmental effects resulting from any major governmental action, the action *shall* be preceded by a detailed environmental impact statement prepared by the responsible governmental unit. . . . To ensure its use in the decision-making process, the environmental impact statement shall be prepared as early as practical in the formulation of an action.

Minn. Stat. § 116D.04, subd. 2a (emphasis added); *see also No Power Line, Inc.*, 262 N.W.2d at 327 (purpose of MEPA is “to force agencies to make their own impartial

evaluation of environmental considerations *before reaching their decisions*") (emphasis added). "Governmental action," in turn, is broadly defined as "activities, including projects wholly or partially conducted, permitted, assisted, financed, regulated, or approved by units of government including the federal government." Minn. Stat. § 116D.04, subd. 1a(d).

Generally speaking, for projects that are the subject of mandatory environmental review, the first step in the process is the preparation of an environmental assessment worksheet ("EAW"). An EAW is "a brief document which is designed to set out the basic facts necessary to determine whether an environmental impact statement is required for a proposed action." Minn. Stat. § 116D.04, subd. 1a(c). For certain proposed actions, preparation of an EAW is mandatory. Minn. R. 4410.1000, subp. 2 and 4410.4300 (2005). The content, format, manner of preparation, and public participation requirements associated with an EAW are defined by rule. Minn. R. 4410.1200-.1600 (2005). Once an EAW is complete and interested citizens have had an opportunity to comment thereon, the responsible governmental unit must decide, based upon the information developed in the EAW, whether the proposed action has the potential for significant environmental effects; standards and criteria to aid the governmental unit in that determination can be found at Minn. R. 4410.1700, subps. 6, 7 (2005). If so, preparation of an environmental impact statement ("EIS") is required. Minn. Stat. § 116D.04, subd. 2a; Minn. R. 4410.1700, subps. 1, 3 (2005). For certain actions, although an EAW must be prepared in the first instance, the subsequent preparation of an EIS is automatic. *See* Minn. R. 4410.2000, subp.2 and 4410.4400 (2005).

The purpose of the EIS, in turn, is as follows:

The environmental impact statement shall be an analytical rather than an encyclopedic document which describes the proposed action in detail, analyzes its significant environmental impacts, discusses appropriate alternatives to the proposed action and their impacts, and explores methods by which adverse environmental impacts of an action could be mitigated. The environmental impact statement shall also analyze those economic, employment and sociological effects that cannot be avoided should be action be implemented.

Minn. Stat. § 116D.04, subd. 2a; *see also* Minn. R. 4410.2000, subp. 1 (2005). The content, drafting, finalization, determination of adequacy and public participation opportunities attendant to the preparation of an EIS are all established by rule. Minn. R. 4410.2200-.2800 (2005).

The second key element of MEPA is its express prohibition upon final governmental approval of proposed land-use projects until the environmental review process is complete:

If an environmental assessment worksheet or an environmental impact statement is required for a governmental action under subdivision 2a, *a project may not be started and final governmental decision may not be made to grant a permit, approve a project, or begin a project, until:*

- (1) a petition for an environmental assessment worksheet is dismissed;
- (2) a negative declaration has been issued on the need for an environmental impact statement;
- (3) the environmental impact statement has been determined adequate; or,
- (4) a variance has been granted from making an environmental impact statement by the environmental quality board.

Minn. Stat. § 116D.04, subd. 2b (emphasis added); *see also* Minn. R. 4410.3100, subp. 1 (2005). Where preparation of an EAW is mandatory, completion of the environmental

review process occurs (1) when a negative declaration on the need for an EIS is issued, or, if an EIS is required, (2) when the EIS is determined to adequate. *Id.* Until one of those two events occurs, the governmental unit lacks the legal authority to give final approval to the proposed project. *See, e.g., Carl Bolander & Sons Co. v. City of Minneapolis*, 502 N.W.2d 203, 207 (Minn. 1993).

B. MEPA's Requirements And The 60-Day Rule Of Minn. Stat. § 15.99, Taken Together, Compel The Conclusion That, For Governmental Actions For Which Environmental Review Is Mandatory, The 60-Day Approval Period Does Not Commence Until The Environmental Review Process Is Complete; Until Then, As A Matter Of Law, Projects Requiring Environmental Review Cannot Be "Automatically" Approved.

Rarely can the environmental review process, start to finish, be completed within sixty days. *See generally* Minn. R. 4410.1400-.1600 (2005) (EAW requirements) and Minn. Stat. § 116D.04, subd. 2a(h) and Minn. R. 4410.2800, subp. 4 (2005) (EIS requirements); *see also Allen v. City of Mendota Heights*, 694 N.W.2d 799, 802-03 (Minn. Ct. App. 2005) (describing process for preparation and consideration of EAW). Hence, MEPA's command for thoughtful, thorough consideration of the environmental impacts of governmental actions can collide with Minn. Stat. § 15.99, subd. 2(a), which deems a written request for governmental approval of certain land uses to be automatically approved unless denied within 60 (or 120)² days of its making. When these two statutory schemes are construed together, MCEA submits, the only permissible conclusion is that MEPA's environmental review process trumps the 60-Day Rule.

² By statute, the agency can unilaterally extend the period for another sixty days, Minn. Stat. § 15.99, subd. 3(f), but no further.

First and foremost, Minn. Stat. § 15.99, subd. 3(d), provides as follows:

The time limit in subdivision 2 is extended if a state statute, federal law, or court order requires a process to occur before the agency acts on the request, and the time periods prescribed in the state statute, federal law or court order make it impossible to act on the request within 60 days. In cases described in this paragraph, the deadline is extended to 60 days after completion of the last process required in the applicable statute, law, or order. . . . (Emphasis added.)

There can be no possible doubt but that MEPA is “a state statute [that] requires a process to occur before the agency acts on the request” For projects for which an EAW is required, as shown above MEPA mandates that an environmental review process must occur, and be complete, before the agency may lawfully approve the applicant’s request. *See Allen*, 694 N.W.2d at 803 (“[w]e think it is clear that MEPA requires a process to occur before the city acts on written requests for action on a proposed development”).

The second element of Minn. Stat. § 15.99, subd. 3(d), that “the time periods prescribed in the state statute . . . make it impossible to act on the request with 60 days,” is also met in situations where environmental review of a proposed governmental action is mandatory under MEPA. Even if the agency issues a negative determination on the need for an EIS after the EAW is complete, that process will require more than 60 days. *See Allen*, 694 N.W.2d at 802-03 (discussing time needed for completion of EAW and determination that EIS is not required). If an EIS is necessary, of course, more time will be required before the EIS can be found to be adequate. *Id.* at 803.

Accordingly, it is clear that, for projects involving mandatory environmental review, both prongs of Minn. Stat. § 15.99, subd. 3(d) are satisfied: MEPA review is a

required process, lasting more than 60 days, which by law must be completed before the agency may approve the underlying request. Hence, as a matter of law, where MEPA specifies that an EAW must be prepared for a proposed project, the 60-day deadline for agency approval established by Minn. Stat. § 15.99, subd. 2(a) does not commence until after the environmental review process is complete, either through a negative declaration on the need for an EIS or through a determination that the EIS is adequate.³

Other canons of statutory construction support this conclusion. In Minn. Stat. § 116D.03, subd. 1, the Legislature directed that the policies set forth in MEPA should, “to the fullest extent practicable,” guide the interpretation and administration of all “policies, rules and public laws of the state” – including the 60-Day Rule. In addition, the Legislature has declared that, in ascertaining legislative intent, the courts are to be guided by the presumption that “the legislature intends to favor the public interest as against any private interest.” Minn. Stat. § 645.17(5). That presumption, too, favors the public interest of environmental protection over a developer’s private pecuniary interests.

Finally, if the rigid interpretation of Minn. Stat. § 15.99’s 60-Day Rule is allowed to trump the environmental review process mandated by MEPA, the express language of

³ See *Allen*, 694 N.W.2d at 803-04. Notably, the Court of Appeals there held that a petition filed by interested citizens pursuant to Minn. Stat. § 116D.04, subd. 2a(c) for preparation of an EAW, which the city had the discretion to grant or deny, extended the statutory approval period to 60 days after completion of the last environmental review step associated with the citizens’ petition. Unlike the facts at issue in *Allen*, in all likelihood, as discussed in greater detail *infra* this matter involves a governmental action for which preparation of an EAW is mandatory – all the more reason why Minn. Stat. § 15.99, subd. 3(d) should prevent the result reached by the Court of Appeals.

MEPA, and the public policies declared by the Legislature to support the statute, would be thoroughly eviscerated. A hypothetical situation illustrates this point.

Assume that a developer submits a written petition seeking governmental approval for development of 200 residential units in a city within the Twin Cities metropolitan area that has adopted a comprehensive land-use plan; however, the proposed development is not consistent with that plan. The development carries the “potential for significant environmental effects” within the meaning of Minn. Stat. § 116D.04, subd. 2a, and pursuant to Minn. R. 4410.4300, subps. 1, 19(C), an EAW must be prepared before the applicant’s petition may be approved. Before addressing the proposed development’s environmental impact, the city decides to deny the petition upon unrelated grounds. However, due to a clerical error, the city fails to mail notice of its denial to the developer within the 60-day time limit.⁴

⁴ These hypothetical facts were not chosen arbitrarily. The Record indicates that Respondent Hans Hagen Homes (“Hagen”) petitioned Minnetrista to rezone some 200 acres of property from agricultural to multi-family residential for the purpose of constructing 303 dwelling units (Appellant’s Appendix (“App.”) at 11, 19), a project that was not consistent with Minnetrista’s approved comprehensive land use plan. (App. at 24, 55; Appellant’s Brief at 5-6 (“the City Council moved to deny the Application because the proposal was not consistent with the Comprehensive Plan . . .”).) Thus, it would appear that Hagen’s proposed project meets the threshold criteria of Minn. R. 4410.4300, subp. 19(C) and would require, at a minimum, a mandatory EAW before the project could be approved. Such a conclusion is certainly true for the relief originally sought by Hagen from the district court – automatic approval of *both* its rezoning request and its Conceptual Site Plan for the proposed development (*see* Appellant’s Brief at 15 n.10) – but case law supports the conclusion that Hagen’s rezoning request, made for the purpose of allowing the 303-unit development to proceed, is itself a “major governmental action” within the meaning of Minn. Stat. § 116D.04, subd. 2a. *Citizens Concerned for Harlem Valley Env. v. Town Bd. of Amenia*, 254 A.D.2d 394, 694 N.Y.S.2d 108, 109 (App. Div. 1999) (rezoning “was an integral part of a mining proposal that would have obvious potential environmental impacts” and therefore triggered environmental review);

Upon these hypothetical facts, if Minn. Stat. § 15.99, subd. 2(a) were permitted to trump the requirements of MEPA, the developer's petition would be automatically approved by operation of law *without any environmental review whatsoever*. The developer would be free to implement its project – with *no* informed consideration of the environmental effects of the project, *no* evaluation of environmental alternatives, *no* assessment of how adverse environmental impacts could be mitigated, *no* analysis of the unavoidable economic, employment and sociological effects, and *no* opportunity for public participation. That is demonstrably *not* what the Legislature intended when it enacted MEPA.

Furthermore, as noted *supra*, MEPA expressly denies to governmental agencies the legal authority to grant requests for governmental action for which environmental review is mandatory until the environmental review process is complete. Hence, under the hypothetical facts set forth above, the city was legally incapable of granting the developer's petition until, at the earliest, the city issued a negative determination on the need for an EIS. Minn. Stat. § 116D.04, subd. 2b; Minn. R. 4410.3100, subp. 1. If the 60-Day Rule were to trump MEPA's requirements, however, the automatic application of the 60-Day Rule would provide the developer with a result that the city was legally powerless to provide in the normal course of events. In the words of the Court of Appeals, such an interpretation is "absurd and unreasonable." *Breza v. City of*

City of Carmel-by-the-Sea v. Bd. of Supervisors of the County of Monterey, 183 Cal. App. 3d 229, 242-44, 227 Cal. Rptr. 899, 907-08 (1986) (rezoning decision, "a necessary first step in the approval of a specific development project," was a "project" under California counterpart to MEPA).

Minnetrista, 706 N.W.2d 512, 517 (Minn. Ct. App. 2005), *rev. granted* (Minn., February 14, 2006) (where a city's statutory authority to approve wetland exemption requests was limited to 400 square feet, a petition seeking to exempt 5,737 square feet of wetlands was beyond the city's legal authority to grant and could not be automatically approved by operation of Minn. Stat. § 15.99); *see also Carl Bolander & Sons Co.*, 502 N.W.2d at 206 (where environmental review is required, pursuant to Minn. Stat. § 116D.04, subd. 2b "a project may not be granted" until the process is complete). As the Court of Appeals stated in *Breza*:

To conclude as Breza urges that the legislature intended Minn. Stat. § 15.99 to supersede every statute that grants specific, limited authority to an agency would give agencies the ability to indirectly approve applications that they do not have direct authority to approve by simply failing to make a decision within 60 days.

706 N.W.2d at 517.

Such a result would also undermine the public participation requirements built into MEPA, which offers several opportunities for notice and comment to citizens interested in the potential environmental effects of projects for which environmental review is required. Once an EAW is prepared, notice of its completion must be published in the *EQB Monitor*, a biweekly publication of the EQB. Minn. R. 4410.5200, subp. 1(C) (2005). Thereafter, interested citizens have 30 days to submit written comments to the responsible governmental unit as to whether or not a full EIS should be required, Minn. Stat. § 116D.04, subd. 2a(b) and Minn. R. 4410.1600 (2005), and the responsible governmental unit may thereafter hold a public meeting to gather additional public comment on the EAW and the need for an EIS. Minn. R. 4410.1600 (2005).

Where the governmental unit makes the positive determination, based upon the EAW, that an EIS should be prepared, the responsible governmental unit must publish notice of its availability in the *EQB Monitor*, make the draft EIS document available for public review and comment, conduct an informational meeting in the county where the project is proposed, and allow for additional public comment after the informational meeting takes place. Minn. R. 4410.2600, subs. 2, 5, 6, 7 and 9 (2005). Upon preparation of the final EIS, again notice of the final EIS must be published in the *EQB Monitor* and interested citizens may thereafter submit written comments on the adequacy of the final EIS. Minn. R. 4410.2700-.2800 (2005). Public notice and opportunity to comment is also required where an EIS is supplemented. Minn. R. 4410.3000, subp. 5(B) (2005).

If the 60-Day Rule trumps MEPA, these opportunities for public notice and comment, like MEPA's guarantee of environmental review and its prohibition upon final agency decision-making until the review process is complete, would essentially be expunged from the statute. Upon the facts presented in the hypothetical, no EAW would ever be prepared; no notice of EAW availability would be published in the *EQB Monitor*; interested citizens relying upon the *EQB Monitor* to inform them of projects having the potential of significant environmental effects would remain unaware of the existence of the project at issue; and, even if interested citizens did learn about the project and its possible environmental impacts, it would be too late for informed comment as the project would have already been automatically approved.

In light of all of the foregoing, MCEA submits that the correct harmonization of the 60-Day Rule incorporated in Minn. Stat. § 15.99, subd. 2(a) and the environmental review process provided by MEPA is this: when an applicant requests governmental action that must be preceded by mandatory environmental review under MEPA, the 60-day time limit for “automatic” approval does not commence until the environmental review process is complete, *i.e.*, either the governmental unit issues a negative declaration on the need for an EIS, or the EIS is determined to be adequate. This conclusion is mandated by the express language of and public policy underlying MEPA, by standard canons of statutory construction and interpretation, and by the plain language of Minn. Stat. § 15.99, subd. 3(d). In the interests of eliminating any uncertainty that may continue to exist among developers, municipalities, and interested citizens caught in the interplay between these seemingly-conflicting statutory schemes, MCEA asks the Court to expressly adopt this conclusion as the law of this State.

II. THE COURT OF APPEALS’ DECISION, IF ALLOWED TO STAND, WILL RESULT IN SUBSTANTIAL HARM TO THE CITIZENS, THE ENVIRONMENT, AND THE PUBLIC INTEREST OF THIS STATE.

Should this Court accept MCEA’s construction of the interplay between MEPA and the 60-Day Rule, it necessarily follows that the Court of Appeals’ decision below must be reversed by this Court. Given the likelihood (if not the certainty) that the governmental action sought by Hagen from Minnetrista was the subject of a mandatory EAW, as noted *supra*, by law Minnetrista could not approve Hagen’s petition without requiring preparation of an EAW and allowing an opportunity for public comment

thereon. The Court of Appeals' holding, allowing Hagen's project to proceed without any environmental review at all, therefore must be reversed.

On a broader level, however, the Court of Appeals' decision below, if allowed to stand, would cause great harm to the citizens, the environment, and the public interest of this State. MCEA wishes to illustrate a few of those harms.

First, MCEA submits that the Court of Appeals' decision will provide parties seeking to evade the time and expense of complying with MEPA with a roadmap for environmental mischief. If an unscrupulous developer may be looking for avenues to achieve quick project approval without full environmental review, the Court of Appeals' decision throws that door wide open. Judge Randall voiced these very concerns in his special concurrence below:

For instance, had Hans Hagen sought to construct a tire-burning industrial unit, a coal-fired power plant, a monstrous metal-shredder plant, a car battery/freon disposal plant, etc., today's decision would grant and allow a potential injurious business to operate in residential Minnetrista. Anyone seeking a variance for something they have no chance to get, but are willing to pay the application fee and "take a shot" could file for a variance just to see what happens. With an administrative slip of the pen, as we have here, and with no showing of actual prejudice (with candor, respondent agrees that the short time-lapse caused none) it looks like the law mandates granting that variance.

Hans Hagen Homes, Inc., 713 N.W.2d at 924 (Randall, J., concurring).

These concerns, MCEA submits, are unfortunately all too real. MCEA's First Annual Wetlands Protection Report (2006)⁵ ("2006 Wetlands Report") documents the case of a developer, intent upon creating a commercial park in Albertville, who for more

⁵ This report is publicly available at www.mncenter.org/mcea_wetlands_initiative/files/MCEA_Wetlands_Report_2006.pdf.

than a decade was engaged in legal wranglings with a variety of federal, state and local governmental entities over wetlands issues. Ultimately, in 2003 the developer took it upon himself to illegally fill wetlands on his property. After the developer ignored administrative orders requiring him to cease and desist and to develop a restoration plan, the city filed a formal complaint against the developer in district court. The developer then sought a wetlands exemption, and after several failed attempts at completeness dropped the completed application off at the city's consultant's office late on the afternoon of Friday, June 25, 2004; the consultant delivered the application to the city's offices the next Monday morning, June 28, and the city stamped the application as "received" on June 28.

On August 26, 2004, the city requested a 60-day extension of the decision period, pursuant to Minn. Stat. § 15.99; while that date fell 59 days after June 28, the date the petition was delivered by the city's consultant to the city, it came 62 days after the developer delivered the petition to the consultant, late on a Friday afternoon. In response, the developer claimed that, because the city allowed the 60-day period to elapse without rendering a decision on his petition, the application was automatically approved by operation of law. The city reluctantly concluded that it was automatically required to grant the permit, and did so. *See* 2006 Wetlands Report at 39-41, Case Study No. 6.

This example is precisely of the type Judge Randall warned against in his special concurrence below: a developer, faced with possible civil and criminal sanctions for violating wetlands protection laws, who was nonetheless relieved of the consequences of his actions when the city innocently miscalculated the 60-day deadline. The Court of

Appeals' decision, if allowed to stand, will undoubtedly foster more situations where parties hope to parlay governmental inadvertence into automatic approval of projects that may carry significant environmental impacts, thereby avoiding the requirement of environmental review. The environment, and citizens who enjoy it, should not be forced to bear the consequences of an innocent governmental error.

Second, the Court of Appeals' holding directly affects organizations like MCEA that seek to provide environmental input on governmental actions on a statewide basis. Because MCEA typically first learns of proposed projects carrying the potential for significant environmental effects via the publication of an EAW availability notice in the *EQB Monitor*, MCEA's ability to provide meaningful citizen input to the responsible governmental unit depends on compliance with MEPA's notice requirements. However, where projects that would otherwise trigger the mandatory preparation of an EAW escape environmental review as a consequence of the Court of Appeals' holding, MCEA would have no ability to provide informed input to agency decision-makers on the potential environmental consequences of their actions. Indeed, interested citizens would often never know that a project with the potential for significant environmental effects had even been proposed – more or less that it was automatically *approved* by operation of law.

If the Court of Appeals' decision below is allowed to stand, the only way interested citizens could protect against the possibility that a land-use petition otherwise requiring mandatory environmental review might be automatically approved through agency inadvertence would be to submit petitions requesting preparation of an EAW for

every land-use application filed with every governmental agency – even where, by law, the preparation of an EAW is mandatory. *See Allen*, 694 N.W.2d 799. Such a burden is, of course, utterly impractical and absurd; ordinary citizens have neither the ability nor the resources to submit petitions for EAW preparation in connection with every land-use application statewide, and the resulting hardships imposed upon governmental agencies by such a practice would be significant and, where an EAW is otherwise mandated by law, totally unnecessary. Moreover, it should *not* be the responsibility of ordinary citizens to insure against the prospect, however unlikely it might be, that agency inaction might inadvertently negate an environmental review process that the Legislature clearly intended to make mandatory in most cases.

Finally, once the automatic approval of a proposed development otherwise requiring environmental review occurs, there is little that affected citizens or representative organizations like MCEA can do about it. Persons aggrieved by a governmental unit's approval – automatic or otherwise – of a proposed land use have the right to judicial review of that approval. Minn. Stat. § 462.361, subd. 1; *Alliance for Metro. Stability v. Metro. Council*, 671 N.W.2d 905, 913-15 (Minn. Ct. App. 2003) (discussing standing of organizations to challenge agency decisions). However, where the agency's approval arises by operation of law, by definition that approval cannot possibly be challenged as arbitrary, unreasonable or contrary to law. *See Gun Lake Assn. v. County of Aitkin*, 612 N.W.2d 177, 182 (Minn. Ct. App. 2000) (“the result reached by the county board . . . is . . . compelled by statute due to the county's failure to deny the CUP application within the period set out by Minn. Stat. § 15.99, subd. 2. We cannot

hold that the county acted in an arbitrary, or otherwise improper, fashion when the result it reached was compelled by statute”). And if the entity seeking judicial review of an agency’s automatic approval of a land-use project seeks to prevent the project from going forward without compliance with MEPA, the proponent of judicial review must obtain a temporary restraining order or temporary injunction against the project, which in turn must be premised upon a security bond. Rule 65.03, Minnesota Rules of Civil Procedure. Where the developer claims that an unsuccessful judicial review will result in delay and substantial additional expense, citizens and organizations like MCEA will find it difficult, if not impossible, to post the required security⁶ – again assuring that meaningful environmental review will not occur.

In sum, the Court of Appeals’ decision, if allowed to stand, will work harm on many levels. It will allow projects for which mandatory environmental review is required to escape the requirements of MEPA, thereby preventing any informed consideration of the project’s environmental impacts in advance of its approval. It will provide persons seeking to avoid the environmental review process with a roadmap for doing so. It will deny to citizens seeking to avail themselves of MEPA’s public participation guarantees the ability to provide meaningful input before an agency’s final decision is made, and it will make it all but impossible for interested citizens to challenge the propriety of the agency’s decision after it is made. It is, in short, repugnant to environmental quality, to

⁶ Even the minimum amount of such a bond, \$2,000, is an insuperable hurdle for most private citizens and environmental organizations seeking to restrain a developer from taking action before the environmental review process is complete. See Rule 135 of the General Rules of Practice for the District Courts.

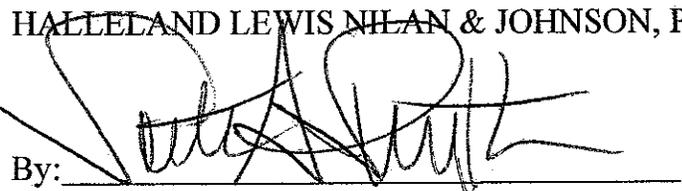
informed environmental decision-making, to citizen participation in the decision-making process, and to the public policy of this State. It cannot be allowed to stand.

CONCLUSION

For the foregoing reasons, MCEA respectfully urges this Court to hold that, in situations where governmental action must be preceded by mandatory environmental review under MEPA, the 60-day time limit of Minn. Stat. § 15.99 does not commence until the environmental review process is complete – a holding that requires this Court to reverse the decision of the Court of Appeals in this case.

Dated: August 25, 2006

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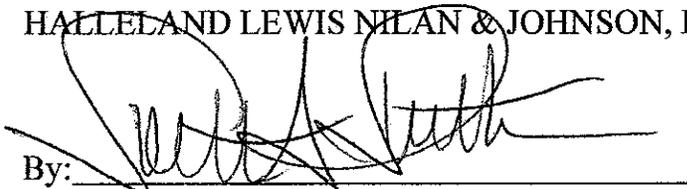
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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 132.01, subd. 3(c)(1) of the Minnesota Rules of Civil Appellate Procedure, counsel for *amicus curiae* Minnesota Center for Environmental Advocacy hereby certifies that this brief complies with the word count limitation set forth in the Rule. This brief was prepared utilizing Microsoft Word 2002 word processing software. All typed material, including all headings and footnotes, appear in at least 13-point Times New Roman font, which complies with the typeface requirements of the Rule. According to the automatic wordcount feature of the software, this brief, exclusive of pages containing the Table of Contents, Table of Authorities and this Certificate, contains 5,814 words.

Dated: August 25, 2006

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