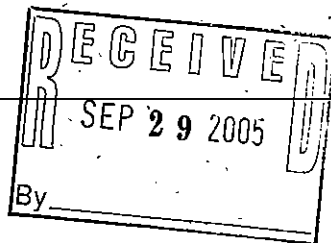




# Minnesota Center for Environmental Advocacy

The legal and scientific voice protecting and defending Minnesota's Environment



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September 28, 2005

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**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  
Court of Appeals No. A04-2033**

Dear Messrs. Nauen and Hood and Ms. Naughton:

Please find enclosed and served upon you in the above-referenced matter Minnesota Center for Environmental Advocacy Response in Opposition to Petitions to Participate Amicus Curiae of the Metropolitan Council, the League of Minnesota Cities and the Minnesota Environmental Science and Economic Review Board (2 copies).

Please do not hesitate to contact me should you have any questions.

Sincerely,

Janette K. Brimmer  
Legal Director

Enclosure

**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,

**Response of Minnesota Center for  
Environmental Advocacy in  
Opposition to Amicus Curiae  
Petitions of Metropolitan Council,  
League of Minnesota Cities, and  
Minnesota Environmental Science  
and Economic Review Board**

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TO: The Minnesota Supreme Court

**INTRODUCTION**

Minnesota Center for Environmental Advocacy (“MCEA”) files this Response in Opposition to the Petitions to Participate Amicus Curiae (“Petitions”) of the Metropolitan Council (“Met Council”), the League of Minnesota Cities (“LMC”) and the Minnesota Environmental Science and Economic Review Board (“MESERB”) (collectively, the “Municipal Petitioners”). MCEA opposes participation of Municipal Petitioners because their interests and knowledge are adequately represented by the parties in the case, making their participation duplicative and potentially burdensome to the Court and the parties. MCEA further opposes participation of Municipal Petitioners as portions of the petitions are nothing more than attempts to litigate facts not in evidence.

MCEA takes this unusual step because the flurry of amici petitions, before the court has even taken the case, threaten to obscure the actual legal issues involved and are clearly meant less to present unique or overlooked legal issues and more to sway the court to accept review and to overturn the Court of Appeals. In this regard, MCEA argues that the amici are neither necessary nor appropriate under the applicable law.

**A. Standard For Participation By Amici Curiae.**

This Court has stated that an amicus curiae is one who provides information on a legal matter to a court upon which the court is doubtful. *State v. Finley*, 242 Minn. 288, 294-5, 64 N.W.2d 769, 773 (1954). The purpose of an amicus brief in a civil action is to inform the court as to facts in the case or a situation which may have escaped consideration by the parties to the action. *Id.* Similarly, an amicus brief may be useful in reminding a reviewing court of legal matters that may have escaped the notice of the parties or the court and regarding which legal matters the court appears to be in danger of making a wrong interpretation. *Id.* Finally, an amicus is not to give adversarial argument or argue why a particular party should prevail. *State v. Rosenfeld*, 540 N.W.2d 915, 924 (Minn. Ct. App. 1995) [*citing SCSC Corp. v. Allied Mut. Ins. Co.*, 515 N.W.2d 598 n. 1 (Minn. Ct. App. 1994) (*citations omitted*)]. These purposes are not met in the case of the Municipal Petitioners and some of the petitions take an outright adversarial position. The stated interests of the Municipal Petitioners are exactly those set forth and argued by the existing parties in the case, demonstrating that the Municipal Petitioners will simply duplicate arguments, rather than fill in any gaps.

**B. The Met Council Does Not Meet The *Finley* Requirements.**

The Met Council's petition simply restates in conclusory fashion the *Finley* requirements with no explanation or discussion of how the Met Council's municipal waste treatment concerns are not addressed by the already zealous representation of the parties Maple Lake and Annandale. The minimal discussion is that the Twin Cities metropolitan area will grow and need permits for waste treatment. That is exactly the circumstances already at issue and amply addressed by the parties in this case---Maple

Lake and Annandale have grown and intend to grow and the conditions for permitting their expanded waste treatment needs are discussed. MCEA argues that new waste treatment discharges must comply with the Clean Water Act and regulations thereunder that provide for certain conditions to be met when a new discharge will contribute to existing polluted conditions. 40 C.F.R. § 122.4(i). The parties have exhaustively researched and briefed the minimal case law on the issue. *See* briefs from appeal below. Facts about other municipalities' growth are speculative and certainly outside the record of this administrative review case. At best, such facts would merely duplicate the scenario already before the court with the growth of Annandale and Maple Lake and their attendant proposal for a new, larger, waste treatment plant. Met Council demonstrates no "missed" law or unique issue that it would bring to the court to assist the court in any way. In fact, Met Council cites no law relevant to, or even mentioning 40 C.F.R. § 122.4(i) at all. Met Council has failed to demonstrate the need for, or appropriateness of, its participation as amicus.

**C. LMC Does Not Meet The *Finley* Requirements.**

Similarly, LMC's petition demonstrates it has nothing to add to the issues and law to be briefed in this case. LMC cites to no law that has been overlooked or misapplied by the court below. LMC's petition simply repeats the speculative alarmism exhibited in the Petitions for Review and briefs below of the Minnesota Pollution Control Agency ("MPCA") and the cities of Annandale/Maple Lake (the "Cities"). Each of those parties claims, with absolutely no basis of support in the record, that growth will completely halt and that the issuance of permits will be "effectively precluded." A review of the administrative record reveals that at no time did MPCA or any other interested party,

raise or put into evidence anything regarding impacts to growth or permits banned, categorical or otherwise. At most, during oral presentations to the MPCA Board, MPCA's attorney raised a legal argument regarding whether the state could categorically ban permits under the Clean Water Act, a question soundly answered in the negative by the Court of Appeals. LMC's petition is an echo chamber of those arguments with no citation to law or facts in the record. This claim is directly contrary to the statement of the Court of Appeals that its decision is *not* a categorical ban on permits and thereby on growth. Rather, all future permits or cases where 40 C.F.R. § 122.4(i) may apply must be evaluated on a case by case basis under the regulation. Future decisions will depend upon pollutants involved, amount of pollutants, nature of the new discharge and status of the waters, facts which are not in evidence here. Further, under the plain language of 40 C.F.R. § 122.4(i), MPCA can allow new discharges to contribute pollutants if MPCA completes a wasteload allocation that has room for the new discharge. MPCA and municipalities simply need to consider, case by case, new ways to allow growth to happen and comply with the Clean Water Act.

LMC seeks to introduce "facts" (actually *opinion*) by citing newspaper coverage entirely outside the record of the case, of statements of a party in interest for "evidence" of the need for its amicus participation on the unsubstantiated issue of stifled growth. This is clearly improper. Moreover, LMC cites to statements by MPCA about the Lake Pepin Total Maximum Daily Load study ("TMDL"), again with no explanation of how the MPCA is failing to express or defend itself adequately in the subject litigation. The Lake Pepin TMDL is at the heart of the parties' arguments throughout this case. LMC's citations to MPCA's website add nothing. LMC clearly seeks only to sway the court in

adversarial fashion, arguing not just for participation as a friend of the court, but for the court to accept the petition for review in order to overturn the Court of Appeals. LMC steps beyond the need and usefulness of an amicus curiae.

**D. MESERB Does Not Meet The *Finley* Requirements.**

Finally, MESERB, the “science” arm of the Coalition of Greater Minnesota Cities, also asserts interests already amply addressed by the Cities, the actual parties to the litigation. As with the other Municipal Petitioners, MESERB’s petition cites to no law that it claims was incorrectly applied nor any law that has been overlooked below. MESERB’s arguments go only to the “facts” of the matter, raising many of the same claims already made by the party Cities. MESERB claims that it is uniquely situated to provide scientific information to the court and presents statements regarding what *might* happen relative to treatment and its technological “impossibility” with no support—bare assertions with no cites to the record or even citations to scientific journals or something public and objective to which the court could actually refer.

This is an administrative record review case and MPCA has many scientists on staff with ample experience. The record is replete with their analysis regarding waste treatment technology and limits. It is entirely outside administrative law and the law with respect to amicus participation to allow MESERB to add “scientific facts” to the record before the Supreme Court. Again, the role of amicus is primarily to provide the court with law or facts in evidence that may have been overlooked or not adequately presented by the parties which will aid the court in its decision. The role of amicus is decidedly not to improperly introduce entirely new facts outside an administrative record through bare

assertions in briefs at the highest level of review. And, as with LMC, MESERB blatantly asserts its adversarial position and brings no added understanding of the law to this case.

### SUMMARY AND CONCLUSION

MCEA does not question that Municipal Petitioners are interested in the results of this case and may have concerns. That is surely true for almost every case that this Court may address. Many citizens or organizations throughout the state may be affected by its decisions and have a concern regarding the outcome. Nonetheless, this Court must ensure that amici are indeed helpful to the Court, that they truly bring legal matters to the Court that the parties cannot or have not addressed, and that they do not simply seek to “pile on” in adversarial fashion. The court has not in the past and should not now allow these amici petitioners to litigate their hypothetical cases through the back door. MCEA, acting in the public interest, should not be forced to repeatedly respond to multiple hypotheticals outside the boundaries of this case, particularly given the rules regarding page limits and the need for concision and efficiency before the court. The law with respect to amicus curiae is designed to ensure full, but also fair and efficient, discussion of important legal issues. Those legal issues will be amply addressed by the parties and the Municipal Petitioners amici petitions do not demonstrate otherwise.

MCEA respectfully requests that the Court deny the Petitions to Participate Amicus Curiae of the Metropolitan Council, the League of Minnesota Cities and the Minnesota Environmental Science and Economic Review Board.

**RESPECTFULLY SUBMITTED:**

Date: 9/28/05

By: 

Janette K. Brimmer, Atty. No. 174762

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