Administrative Law CLE
2010 Case Law Review

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I. Introduction and Trends

A. Trends and observations

1. *Chevron* at the state level. The continued impact and importance of the *Annandale* decision.
2. Struggles to deal with continued complexity of federalism: Federal law enforced by state and local jurisdictions.
3. Federal law clarifies state law.
4. Deference to agency discretion.
5. State agencies generally only get one bite at the apple (to enforce or approve).
6. Commissioners may get two bites at the apple (to save the courts time).

II. Minnesota Supreme Court

A. ***In the Matter of the Denial of the Certification of the Variance Granted to David Haslund by the City of St. Mary's Point*, 781 N.W. 2d. 349 (Minn. 2010).**

1. Facts: Under the 1968 United States National Wild and Scenic Rivers Act Congress designated the Lower St. Croix River as a protected river. Minnesota enacted the Lower St. Croix Act in order to administer policy related to that federal law, empowering the DNR to adopt rules to protect the river. The DNR rules are enforceable through local zoning codes based upon a master plan designed by the DNR. Local zoning ordinances are subject to review by the DNR and must be brought into compliance with its rules and the state law. The DNR rules generally prohibited new development along the river, but Minn. R. 6105.0380, subp. 2 created an exception (variance) for lots deeded prior to May 1, 1974 and which are less than one acre. Yet this exception does not apply if the land is adjacent to another parcel owned by the owner. In that case, no variance is permitted and instead the adjacent parcels must be combined and if one acres or more, then they are buildable. Haslund had an undeveloped and unplatted .54 acres of land "Lot A") which was in family possession since 1943. He also owned an adjacent parcel which he acquired in 2000. In 2000, St. Mary's Point, in consultation with DNR, granted Haslund a variance for Lot A, but neither new Haslund also owned the adjacent land. He began construction on Lot A and in 2004 sold the adjacent land. In 2006 he sought to renew his variance and upon becoming aware of the ownership of the adjacent land at the time of the original variance, the DNR denied the renewal. Haslund appealed the DNR

decision to an ALJ who affirmed the denial. The Court of Appeals affirmed.

2. Issue: May the DNR deny the renewal of a variance to develop land under the Lower St. Croix Act when a local government, whose zoning laws had been approved by the DNR as complying with state law, had previously permitted the variance? **No.**
3. Reasoning: The St. Mary's Point zoning ordinance in question here applied only to platted lots and therefore the variance issue should not apply. However, the DNR contends that the State Law and rules necessitate a variance. This assertion by the DNR creates a conflict determining whether the state rule may be deemed to be superior and enforceable against an individual proposed land use. The Court ruled no. The State Act does not permit the DNR to enforce the state rule in place of the BSM ordinance to achieve a desired result. Rather, the Act requires that the DNR review local ordinances during the approval process; if a local ordinance is in conflict the local government must bring it into compliance. The Act does not permit the DNR to directly enforce its master plan objectives on its own. If the DNR has approved a local ordinance as in compliance with state law and rules and if the local government has approved of the variance then the DNR lacks authority to enforce a state rule over the plain language of local law.
4. Why significant? Complex facts, simply point: The DNR only gets one bite at the apple via approval of local rules and not to enforce its own rules if it does not like a local result. DNR lacks the authority to directly enforce state rules that must be done at the local level.

B. *See also:* ***In the Matter of the Denial of Certification of the Variance Granted to Robert W. Hubbard by the City of Lakeland*, 778 N.W. 2d. 313 (Minn. 2010)**, for a similar result under the same law.

C. ***In re Review of 2005 Annual Automatic Adjustment of Charges for All Elec. and Gas Utilities*, 768 N.W.2d 112 (Minn.,2009).**

1. Facts: Under Minnesota's regulatory scheme, utility companies are not allowed a profit from supplying natural gas to their customers. Minn.Stat. § 216B.01 (2008). A utility company is required pass the costs of supplying natural gas along to customers without any mark-up. On April 5, 2006, CenterPoint requested that the Minnesota Public Utilities Commission grant a variance that would allow CenterPoint to recoup previously unrecovered natural gas costs. In November 2006, the Commission considered and denied CenterPoint's request to recover $20.9 million in unrecovered costs for the 2000-4 time period. It found that the denial of the recovery would not impose an excessive burden on the company and that the exemption was not in the public interest. CenterPoint challenged the denial. The Court of Appeals reversed, claiming that the denial was at variance with similar other similar variances and the MPCA has failed to explain this. MPCA appealed.
2. Issue: Did the MPCA err in not granting a cost recovery to a party under Minn.Stat. § 216B.01 (2008) when it found that the denial would not impose an excessive burden on it and when it also found that approval of the

exemption would not be in the public interest? **No, Court of Appeals reversed.**

3. Reasoning: Under the MAPA, appellate courts in review of agency decisions "may affirm the decision of the agency or remand the case for further proceedings; or [we] may reverse or modify the decision if the substantial rights of the petitioners may have been prejudiced because the administrative finding, inferences, conclusion, or decisions are: (a) in violation of constitutional provisions; or (b) in excess of the statutory authority or jurisdiction of the agency; or © 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."
4. Minnesota Courts must offer presumption of correctness attaches to an agency decision, and deference is shown to an agency's conclusions in the area of its expertise. The Court said that it will grant this deference to an agency's expertise or special knowledge when: (a) the agency is interpreting a regulation that is unclear and susceptible to more than one reasonable interpretation or the agency's interpretation is reasonable or (b) when application of the regulation is "primarily factual and necessarily requires application of the agency's technical knowledge and expertise to the facts presented." Here, the determination of the variance required such a use of technical and expert information and therefore the courts should defer to the agency.
5. Why significant? This is a *Chevron*-like deference that flows directly from *In re Cities of Annandale & Maple Lake NPDES/SDS Permit Issuance for the Discharge of Treated Wastewater*, 731 N.W.2d 502, 515 (Minn.2007), which the Court cites in this opinion. This case represents a continued application of federal court *Chevron* deference into state law (being pushed by P. Anderson).

D. *See also below*: ***In the Matter of a Request for issuance of the SDS general permit MNG300000 for Ballast Water Discharges from Vessels Transiting Minnesota State Waters of Lake Superior*, 769 N.W.2d 312 (Minn.App.,2009)**

III. Minnesota Court of Appeals

A. ***In the Matter of a Request for issuance of the SDS general permit MNG300000 for Ballast Water Discharges from Vessels Transiting Minnesota State Waters of Lake Superior*, 769 N.W.2d 312 (Minn.App.,2009)**

1. Court of appeals follows the same deference in *In re Review of 2005 Annual Automatic Adjustment of Charges for All Elec. and Gas Utilities*, 768 N.W.2d 112 (Minn.,2009) and under *Annandale* when it comes to agency construction of an ambiguous rule.
    a. (1) "when a decision turns on the meaning of ... an agency's own regulation, it is a question of law that [appellate courts] review de novo"; (2) "when the language of the regulation is clear and capable of understanding, [an appellate court] give[s] no deference to the

agency's interpretation and may substitute [its] ... judgment for that of the agency"; and (3) "when the relevant language of the regulation is unclear or susceptible to different reasonable interpretations, ... [an appellate court] will give deference to the agency's interpretation and will generally uphold that interpretation if it is reasonable."

2. Why significant? Know your *Chevron*!

B. ***In the Matter of the Temporary Immediate Suspension of the Family Child Care License of Christine Strecker*, 777 N.W. 2d 41(Minn. App. 2010).**

1. Facts. A licensed provider had her license temporarily suspended after a child under her supervision was injured. Under Minn. Stat. §245A.07, subd. 2a(a) 2008, the temporary suspension can be continued only if the Commissioner of Human Services determines there is reasonable cause that the licensee poses an imminent risk of harm to the health or safety of those served. At an expedited hearing before an ALJ the latter ruled to lift the temporary suspension, concluding that DHS had not carried its reasonable cause burden. DHS Commissioner issued a final order disagreeing with the ALJ on the matter of reasonable belief burden. Therefore the temporary suspension was continued.
2. Issue: Did the DHS Commissioner err in concluding that under Minn. Stat. §245A.07, subd. 2a(a) 2008, DHS had met its reasonable cause burden in demonstrating that a day care provider provided an imminent risk of harm to the health or safety of those served by her? **No.**
3. Minn. Stat. §245A.07, subd. 2a(a) 2008, does not define "reasonable cause to believe that a licensee poses an imminent risk of harm." But according to the Minnesota Supreme Court in *Wall v Fairview Hospital & Healthcare Services*, 584 N.W. 2d. 395 (Minn. 1998) it has interpreted similar language to be analogous to the standard of probable cause in criminal law. This would require Minn. Stat. §245A.07, subd. 2a(a) 2008, to be interpreted as a showing of circumstances "sufficient to warrant a cautious person to reasonably believe that relator posed an imminent risk of harm to the health or safety of her daycare children." Here, the DHS Commissioner applied an "inherently incredible" standard for assessing evidence, and such a standard was not found in the statute.
4. Why significant? The case clarifies an important evidentiary burden.

C. ***In the Matter of the Application of Northern States Power Company d/b/a Xcel Energy for Approval of a Mercury Emissions Reduction Plan for the Sherburne County Generating Facility's Unit 3*, 775 N.W.2d 65 (Minn.App.,2009).**

1. Facts: The Minnesota Mercury Emissions Reduction Act requires that a " public utility that owns a dry scrubbed unit at a qualifying facility shall develop and submit to the agency (MPCA and MPUC) and the commission a plan for mercury emissions reduction at each such unit." Ecel submitted a mercury emissions reduction plan for its Faculty Unit 3 and it is approved by MPCA and MPUC. Southern Minnesota Municipal Power Agency (SMMPA) challenges the approval of the plan. SMMPA jointly own but

Ecel singularly operates this facility. SMMPA asks alternatively either that the plan not be approved until cost issues are addressed or that if approved Ecel be solely assessed for the reduction costs. SMMPA also contended that the Act did not apply to them as a municipal utility and that MPUC had exceeded its authority in approving a faculty jointly owned by a public and municipal utility.

2. Issue: Did the MPUC exceed its authority in approving a mercury reduction plan for a facility jointly owned by a municipal and public utility but singularly operated by a municipal utility? **No.**
3. Reasoning: While the statute is clear that MPUC does not have jurisdiction over municipal utilities, and the Act is silent on issues regarding joint ownership with a municipal utility, Ecel still had an obligation to submit the reduction plan. Once approved by MPCA, MPUC has clear and limited authority to review and approve, subject to several criteria. MPUC did that in this case. The Court said that MPUC does not have the authority to approve parts of the plan as SMMPA asks, and it did not act in an arbitrary and capricious way when it did so.
4. Why significant? MPUC has authority to approve mercury reduction plans in jointly operated facilities, even if one of them is a municipal utility.

D. ***Coalition of Minnesota Cities v. MPCA*, 765 N.W. 2d 159 (Minn. App. 2009).**

1. Facts: MINN. MPCA R. 7053.0255, subp. 4. mandates that the discharge of phosphorus effluent directly to or which affects a lake or reservoir, shall be limited to one milligram per liter. The Coalition sought clarification and amendment of the rule to define "lake or reservoir" and "affect." Some of the Coalition's concerns were addressed among them, the rule stated that: "if the discharger can demonstrate that it meets the standards for one of three possible exemptions, it " *may* qualify for an alternative total phosphorus limit or no limit." In its SONAR MPCA indicated that it would probably offer few exemptions from this Rule in order to protect the lakes and tourism. An ALJ held hearings on the proposed rule and recommended adoption and the MPCA adopted. The Coalition brought a declaratory judgment suit seeking a preenforcement challenge to the new rule. It claimed that the use of "may" in the Rule regarding exemptions to the phosphorus limit gave the MPCA unbridled discretion.
2. Issue: Does the MPCA have unbridled discretion under a rule regulating phosphorus discharge, thereby violating Minn. Const. art. III, sec. 1, and the Minnesota Administrative Procedure Act, when the rule states that it "may" grant exemptions from the discharge limits? **No.**
3. Reasoning: The court first dismissed claims that the Coalition lacked standing to bring the action, finding that in fact it did suffer a potential real harm to itself or members. Therefore it had standing under MINN. STAT. §14.44. However, on the merits of the challenge, the Court ruled that the legislature has defined "may" as "permissive," and "shall" as "mandatory, Minn.Stat. § 645.44, subds. 15, 16 (2008), thereby providing some legislative

limits on discretion (???) Moreover the Court also stated that MPCA was limited in its discretion by the Federal Clean Water Act to define standards for clean water. Therefore,, the MPCA did not exceed its authority under either the state Constitution or the MAPA.

4. Why significant? The use of "may' is not so open-ended to create unbridled MPCA discretion, especially when constrained by federal standards determining clean water.

E. Also of note: ***Little v. Arrowhead Regional Correction*, 773 N.W.2d 344 (Minn.App.,2009).**

1. Once a party has filed a timely appeal with the courts, a commissioner could raise issues on a remand that were not limited to those the party sought reconsideration upon. The Court stated that three reasons supported this:
   a. "First, it may eliminate the need for appellate review. Second, parties may have more fully developed " 'critical aspects of the record' " in the event of appellate review Third, the original decision-maker may take the opportunity "to flesh out the reasoning behind [its] ruling. The original decision-maker also has the opportunity to correct any errors it may find."
2. Why significant? Let the Commissioner do it first to get it right so that it may save the courts time and energy.

IV. Readings on Federal Law

A. Jack M. Beermann, *Ending the Failed Chevron Experiment Now*, 35 ADMIN. & REG. L. NEWS, 3 (Winter, 2010).

B. Ann Graham, *Searching for Chevron* in Muddy *Watters*: The Roberts Court and Judicial Review of Agency Regulations, 60 ADMIN. L. REV.299 (2008).

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