

***IN RE ANNANDALE AND THE DISCONNECTIONS  
BETWEEN MINNESOTA AND FEDERAL AGENCY  
DEFERENCE DOCTRINE***

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I. INTRODUCTION

*In re Annandale*<sup>1</sup> presented the Minnesota Supreme Court with a particularly complex administrative law issue: Should a state high court defer to a state administrative agency’s interpretation of an

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1. *In re Cities of Annandale & Maple Lake NPDES/SDS Permit Issuance for the Discharge of Treated Wastewater*, 731 N.W.2d 502 (Minn. 2007).

ambiguous federal regulation that the state agency administers?<sup>2</sup> Or should it decide that such interpretive questions are too far removed from the rationales behind agency deference and are therefore more appropriately resolved directly by the courts?<sup>3</sup> In concluding that deference was appropriate, the Minnesota Supreme Court followed a century-old pattern of bolstering its own agency deference analysis with citations to purportedly analogous federal case law.<sup>4</sup>

This consistent reliance on federal cases has been helpful to practitioners because it opened up a vast reserve of persuasive authority on these often difficult issues. Close examination of the *Annandale* court's analysis, however, raises questions about the continued viability of that practice. In particular, *Annandale*'s analysis differs from federal agency deference doctrine in at least three significant ways. First, *Annandale* authorizes strong deference to an agency's interpretation of an ambiguous regulation that the agency administers but did not author, a result at odds with federal case law. Second, unlike federal case law, the court's discussion of agency deference in *Annandale* does not clearly distinguish between agency deference problems involving ambiguous statutes and those involving ambiguous regulations. Third, and closely related to the second point, the court identifies separation of powers as the common theoretical justification for deference to agency interpretation of both statutes and regulations—an approach that, again, contrasts with the federal approach.

This article explores each of these differences between *Annandale*'s view of deference and comparable federal authority. Part II begins the discussion with an explanation of the somewhat complicated legal and factual background that gave rise to

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2. *Id.* at 505.

3. *Id.*

4. *Id.* at 512 (citing *Udall v. Tallman*, 380 U.S. 1, 16 (1965)). *See also* *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984); *St. Otto's Home v. Minn. Dep't of Human Servs.*, 437 N.W.2d 35, 40 (Minn. 1989) (citing *Udall*, 380 U.S. at 16); *Resident v. Noot*, 305 N.W.2d 311, 312 (Minn. 1981) (citing *Red Lion Broad. Co. v. F.C.C.*, 395 U.S. 367 (1969)); *Knopp v. Gutterman*, 258 Minn. 33, 39–41, 102 N.W.2d 689, 695–96 (Minn. 1960) (citing *Durkee-Atwood Co. v. Willcuts*, 83 F.2d 995 (8th Cir. 1936)); *In re Abbot's Estate*, 213 Minn. 289, 295, 6 N.W.2d 466, 469 (Minn. 1942) (citing *Red Wing Malting Co. v. Willcuts*, 15 F.2d 626 (8th Cir. 1926)); *Bemis Bros. Bag Co. v. Wallace*, 197 Minn. 216, 227, 266 N.W. 690, 696 (Minn. 1936) (citing *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 418 (1821)); *State v. N. Pac. Ry. Co.*, 95 Minn. 43, 45, 103 N.W. 731, 732 (Minn. 1905) (citing *Cohens*, 19 U.S. (6 Wheat.) 264).

*Annandale's* unusually thorny agency deference issues.<sup>5</sup> This section includes an extended discussion of the *Annandale* administrative record and the reasoning of the Minnesota Court of Appeals and Minnesota Supreme Court.<sup>6</sup> Part III then critically analyzes the *Annandale* court's claims to have acted consistently with federal agency deference case law in each of the three areas discussed above.<sup>7</sup> Part IV concludes with some post-*Annandale* developments and practical observations for Minnesota administrative law practitioners.<sup>8</sup>

## II. THE LEGAL AND FACTUAL BACKGROUND

### A. *Legal Background*

Like many landmark administrative law cases, *Annandale* is also an environmental law case.<sup>9</sup> This particular dispute involved the confluence of two aspects of the Clean Water Act (CWA).<sup>10</sup> The first is the National Pollution Discharge Elimination System (NPDES), which requires permits for specific "point-source" discharges of water pollution affecting "waters of the United States"—meaning navigable waters, interstate water bodies, and intrastate water bodies used for purposes of interstate commerce such as recreation and fishing.<sup>11</sup> Although the permit obligation is federal, the Environmental Protection Agency (EPA) may delegate its permitting authority to qualifying states.<sup>12</sup> In addition to discharge or "effluent" conditions, NPDES permits typically contain requirements governing monitoring, reporting, and other matters.<sup>13</sup>

The other relevant legal regime is the CWA's state water quality standards requirement. In contrast to the NPDES regime's

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5. See *infra* Part II.

6. See *infra* Part II.

7. See *infra* Part III.

8. See *infra* Part IV. A caveat at the outset: the *Annandale* case involves many issues of both environmental and administrative law. This article does not aim to address all of them. Instead, it is narrowly focused, as identified above.

9. See, e.g., *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984); *Reserve Mining Co. v. Herbst*, 256 N.W.2d 808 (Minn. 1977).

10. 33 U.S.C. §§ 1251–1387 (2000).

11. Clean Water Act § 402, 33 U.S.C. § 1342 (2000).

12. *Id.* § 402(b), 33 U.S.C. § 1342(b).

13. CHRISTOPHER L. BELL ET AL., ENVIRONMENTAL LAW HANDBOOK 312 (19th ed. 2007).

focus on regulating specifically identified pollution sources, the state water quality standards regime focuses on establishing the appropriate uses and condition of waters subject to the CWA.<sup>14</sup> To use an example, a state may determine that in streams whose designated uses include trout propagation, arsenic levels may not exceed 0.2 milligrams per liter.<sup>15</sup> If a stream does not meet this standard, it is designated as “impaired,” and the state is further obligated to scientifically determine how much arsenic the stream could absorb (plus a safety margin) and still comply with water quality standards. The process of calculating this “Total Maximum Daily Load” (TMDL) of arsenic includes cataloging all of the arsenic sources affecting the stream.<sup>16</sup>

A federal regulation promulgated by the EPA, 40 C.F.R. § 122.4(i), connects the NPDES and water quality standards.<sup>17</sup> Because this regulation is central to the interpretive issue in *Annandale*, it is worth quoting at length:

No permit may be issued . . . [t]o a new source or a new discharger, if the discharge from its construction or operation will *cause or contribute* to the violation of water quality standards. The owner or operator of a new source or new discharger proposing to discharge into a water segment which does not meet applicable water quality standards or is not expected to meet those standards even after the application of the effluent limitations required by [law], and for which the State or interstate agency has performed a [TMDL] allocation for the pollutant to be discharged, must demonstrate, before the close of the public comment period, that:

- (1) There are sufficient remaining pollutant load allocations to allow for the discharge; and
- (2) The existing dischargers into that segment are subject to compliance schedules designed to bring the segment into compliance with applicable water quality standards.<sup>18</sup>

The meaning of the phrase “cause or contribute” would become the major focus of the state permitting action and the subsequent litigation.

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14. Clean Water Act § 303(c), 33 U.S.C. 1313(c) (2000).

15. BELL ET AL., *supra* note 13, at 320.

16. Clean Water Act § 303(d), 33 U.S.C. § 1313(d) (2000).

17. 40 C.F.R. § 122.4(i) (1996).

18. *Id.* (emphasis added).

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B. *The Annandale/Maple Lake Wastewater Treatment Plant Proposal and Administrative Record*

In 2003, the cities of Annandale and Maple Lake in Wright County, Minnesota, proposed to build a new, shared wastewater treatment plant to replace their existing facilities.<sup>19</sup> The cities' existing facilities were more than forty years old, and the anticipated rapid population growth in Wright County, on the edge of the Minneapolis/St. Paul metropolitan area, was expected to quickly outstrip the capacity of the old plants.<sup>20</sup>

The cities' proposed facility would discharge pollutants including phosphorus into waters that eventually feed Lake Pepin, 125 miles away on the Mississippi River.<sup>21</sup> In 2002, the Minnesota Pollution Control Agency (MPCA) had determined that Lake Pepin was "impaired" under the state's CWA water quality standards, although it had not yet calculated TMDLs for the lake.<sup>22</sup> In particular, Lake Pepin suffered from too much phosphorus, which feeds algae blooms that can deplete oxygen levels and affect water clarity.<sup>23</sup> Now the cities were requesting an NPDES permit for a new facility that would discharge 2200 additional pounds of phosphorus into the Lake Pepin watershed.<sup>24</sup>

The MPCA recognized that the federal regulation barring any permits to new dischargers that "cause or contribute" to water quality violations was going to be a concern for the Annandale/Maple Lake proposal. A March 31, 2004 draft memo in the administrative record, entitled "NPDES Permits and Impaired Waters," pointedly frames the legal issue—how to deal with the word "contribute" in the federal regulation:

Issue: 40 C.F.R. [§] 122.4(i) states that "No permit may be issued to a new source or new discharger, if the discharge from its construction or operation will cause or *contribute* to the violation of water quality standards."<sup>25</sup>

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19. *In re* Cities of Annandale & Maple Lake NPDES/SDS Permit Issuance for the Discharge of Treated Wastewater, 731 N.W.2d 502, 505 (Minn. 2007).

20. *Id.* at 506.

21. *Id.*

22. *Id.* at 506, 510–11.

23. *Id.* at 510 n.6.

24. *Id.* at 507.

25. Annandale Administrative Record at 385, *In re* Cities of Annandale & Maple Lake NPDES/SDS Permit Issuance for the Discharge of Treated Wastewater, No. A04-2033 (Minn. May 17, 2007) (on file with author) [hereinafter Administrative Record].

The memo goes on to observe, “[n]ew dischargers of phosphorus above Lake Pepin will contribute phosphorus to the cumulative load of phosphorus causing the water quality standard violation in Lake Pepin,” and asks, “[h]ow can we continue to issue NPDES permits to new discharges of phosphorus above Lake Pepin and comply with federal law?”<sup>26</sup>

From the outset—at least according to the picture painted by the administrative record—the answer to that question would involve implementing some kind of phosphorus trading system that would use reduced discharges in some places to offset increased discharges in others. One of the first mentions of this approach in the record is in a February 2004 draft by an internal MPCA group called the “Lake Pepin Trading Group” that was tasked with “develop[ing] a policy and framework that ensures issuance of NPDES wastewater permits that are compliant with . . . 40 C.F.R. § 122.4(i).”<sup>27</sup> The draft described several different phosphorus trading schemes, and recommended one called the “Aggregate Phosphorus Bank” to track “cumulative credits (phosphorus reductions)” and “cumulative debits from new or expanded facilities resulting in phosphorus load increases.”<sup>28</sup> The draft suggested that this phosphorus bank solution would be “a temporary system, a bridge” until TMDLs were calculated, and it recommended that this apply only to Lake Pepin.<sup>29</sup>

Curiously, this draft recommendation includes the word processing traces of a reviewer’s comments and suggested revisions. Some are intriguing. For example, the reviewer suggests that the phrase “*prohibition* found in 40 CFR § 122.4(i) which prohibits a new discharge that will cause or contribute to the violation of water quality standards[,]” be revised to read: “*requirement* found in 40 CFR § 122.4(i) which prohibits a new discharge that will cause or contribute to the violation of water quality standards . . . .”<sup>30</sup>

Another suggested revision would have changed the phrase “*increases* in phosphorus loadings located upstream of Lake Pepin” to “*changes* in phosphorus loadings located upstream of Lake Pepin.”<sup>31</sup> The reviewer also recommended deleting the original

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26. *Id.* at 385.

27. *Id.* at 326.

28. *Id.* at 327.

29. *Id.*

30. *Id.* at 326 (emphasis added).

31. *Id.* (emphasis added).

author's evocative (albeit parenthetical) nickname for the Aggregate Phosphorus Bank: ("spreadsheet in the sky").<sup>32</sup> Also, where the draft criticized another form of trading known as "permit specific point/point trading" as being too "reactive, repetitive, time consuming," the commenter wrote, "[t]his may slant negatively the need to do point[/]point trading in other instances, we may need to tone this [down] a little."<sup>33</sup>

In any case, the draft confidently predicted that the "size of the credit account on January 1, 2005, should be sufficient to draw upon until the completion of the TMDL."<sup>34</sup> The draft doesn't explain the basis for this confidence in the size of the "credit account" eleven months down the road (which may be what led our reviewer to note, "[n]ot sure I get this part").<sup>35</sup> Nevertheless, the administrative record depicts MPCA officials focused in the spring and early summer on resolving the 40 C.F.R. § 122.4(i) issue through a phosphorus trading policy that viewed the entire Lake Pepin watershed as the source of pollution creditors and debtors.

Still, some officials discussed the point/point trading approach criticized by the Lake Pepin Trading Group, in which "one discharger offsets the load of another,"<sup>36</sup> and it was in these discussions that questions were explicitly raised about whether the agency had the legal authority to implement phosphorus trading. A March 2004 memo discussing the point/point trading model suggested that "MPCA staff and the Attorney General staff should investigate if there exists current authority for these mechanisms to be in place or if a state rule needs to be promulgated to begin this process."<sup>37</sup> The record also reflects some anxiety about the non-legal considerations confronting the agency as it wrestled over the permit application and the issue of the federal regulation. An e-mail dated April 29, 2004, entitled "Held up permits," frets that, if the Annandale/Maple Lake NPDES permit application and others affected by the impaired waters question were not quickly resolved, "things will go political pretty soon."<sup>38</sup>

Late in the summer of 2004, MPCA staff were forced to focus on a different problem. On August 18, 2004, the Minnesota Center

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32. *Id.* at 327.

33. *Id.*

34. *Id.* at 328.

35. *Id.*

36. *Id.* at 420-24.

37. *Id.*

38. *Id.* at 496.

for Environmental Advocacy (MCEA) submitted a comment letter on the proposed Annandale/Maple Lake permit.<sup>39</sup> The letter noted that Lake Pepin was not the only impaired water potentially affected by the project: the proposed project would discharge first into the North Fork of the Crow River, which the MCEA pointed out had been listed as “impaired by low dissolved oxygen 16 miles downstream from the proposed facility,” a condition that MCEA argued was attributable in part to high phosphorus levels.<sup>40</sup> In a stroke, the idea of drawing upon the broad reservoir of potential phosphorus “credits” apparently contained in the “spreadsheet in the sky” to offset the “debits” arising from the proposed Annandale/Maple Lake facility seemed to evaporate. While the MPCA was focused on Lake Pepin, 125 miles away, MCEA was pointing to impairment much closer to the proposed Annandale/Maple Lake project, where there were fewer potential phosphorus creditors and debtors among whom a trading arrangement might be worked out.

MCEA’s letter appears to have jarred some MPCA officials. One wrote in an e-mail that two colleagues were prepared to testify that the proposed Annandale/Maple Lake project should have to “trade its phosphorus load down to zero” unless a net decrease in phosphorus loading of the Crow River could somehow be demonstrated.<sup>41</sup> The official argued that MPCA would have “to show MCEA a ‘bubble concept’ for the North Fork of the Crow watershed,” meaning some kind of demonstration that *net* discharges of phosphorus from Annandale/Maple Lake and other dischargers into the North Fork of the Crow would be reduced, even if Annandale/Maple Lake itself represented an increase.<sup>42</sup> The official concluded, “[i]f we cannot show an overall decrease in phosphorus loading for the watershed, I think we have a problem.”<sup>43</sup>

MPCA found its solution to that problem in a permit that it had approved three years earlier to upgrade the wastewater treatment facility in the Meeker County community of Litchfield,

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39. *Id.* at 1071–74.

40. *Id.* at 1071.

41. *Id.* at 957.

42. *Id.*

43. *Id.*

about twenty-five miles to the east of Annandale.<sup>44</sup> Like the proposed Annandale/Maple Lake facility, Litchfield's discharges flowed to the North Fork of the Crow River, in Litchfield's case via a tributary known as Jewitts Creek.<sup>45</sup>

For nearly a decade, the Litchfield facility had been operating under variances from three state water quality standards (none directly regulating phosphorus) granted by MPCA officials.<sup>46</sup> The city had requested these variances in 1991, based on claims that the cost of full compliance would "cause an unnecessary burden on the residents and businesses in Litchfield."<sup>47</sup> The city had also asserted that the variances would "not harm the downstream reaches of [Jewitts C]reek, or the North Fork of the Crow River."<sup>48</sup> Ten years later, Litchfield went back before the MPCA to propose an expansion of its facility, and in July 2001 the agency approved the expansion, which included improvements that were expected to yield an approximately 40,000 to 50,000 pound annual *reduction* in phosphorus discharges into Jewitts Creek.<sup>49</sup>

MPCA officials, confronted by MCEA's arguments on the Annandale/Maple Lake project in September 2004, realized that they could use Litchfield's massive phosphorus reductions, which the record suggests had started taking effect in April 2004,<sup>50</sup> could serve as phosphorus credits not only for Lake Pepin, but also for the North Fork of the Crow River. Of course, all of this assumed that using one facility's improvements to offset another facility's increased discharges was consistent with the federal regulation's prohibition on new sources that "cause or contribute" to water quality violations. Still, MPCA officials were pleased with this solution to MCEA's challenge.<sup>51</sup>

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44. Minnesota Pollution Control Agency (MPCA), National Pollutant Discharge Elimination Sys. (NPDES) and State Disposal Sys. (SDS) Permit MN 0023973 (issued July 20, 2001, expiring June 30, 2006) (copy on file with author).

45. Letter from Mayor Ron Ebnet, Litchfield, Minnesota, to Gregory S. Gross, Division of Water Quality, MPCA (Aug. 12, 1991) (copy on file with author) [hereinafter Ebnet Letter 1]. "Jewitts" is also spelled Jewitt, Jewett, or Jewetts. *Id.*

46. Letter from Gbolahan Gbadamosi, MPCA, to Kelly Garvey and Joellen Rumley, MPCA (Apr. 10, 2001) (copy on file with author).

47. Letter from Mayor Ron Ebnet, Litchfield, Minnesota, to Gregory S. Gross, Division of Water Quality, MPCA (Sept. 23, 1991) (copy on file with author).

48. Ebnet Letter 1, *supra* note 45.

49. Administrative Record, *supra* note 25, at 958–59.

50. *Id.*

51. "Excellent," wrote one official. *Id.* at 991.

So it was that on September 8, 2004, the word “Litchfield” made its first appearance in the Annandale/Maple Lake administrative record,<sup>52</sup> and twenty days later the MPCA Citizens Board approved the cities’ permit.<sup>53</sup> MPCA had not yet performed TMDL calculations to determine how much phosphorus was too much phosphorus in the North Fork of the Crow River or Lake Pepin,<sup>54</sup> nor was anyone claiming that Litchfield’s reductions would be enough to clear up either of those waters. Nevertheless, it determined that, because increases at Annandale/Maple Lake would be offset by the reductions that it had previously approved for Litchfield, the proposed plant would “not contribute to water quality standards violations in Lake Pepin.”<sup>55</sup> Point/point offset trading had prevailed, and the permit issued.

*C. Challenging the Permit: The Meaning of “Cause or Contribute”*

MCEA challenged the permit in the Court of Appeals, arguing that the Federal regulation plainly prohibited MPCA from issuing the permit because the new facility’s 2200 pounds of phosphorus would “contribute” to the impairment of the Lake Pepin watershed, regardless of what was happening at Litchfield or elsewhere.<sup>56</sup> On the other side, MPCA argued that although the new facility’s phosphorus might affect Lake Pepin’s watershed, overall there would be a significant net reduction once Litchfield was brought into the equation, such that the federal regulation’s “cause or contribute” prohibition was not triggered.<sup>57</sup> The agency further argued that to read the regulation as simply barring all new phosphorus inputs without consideration of the larger picture would prevent cities from replacing older, dirtier facilities with newer, cleaner ones, thus frustrating the intent of the CWA.<sup>58</sup>

Resolution of the parties’ arguments required the court to determine, as a threshold matter, what deference, if any, should be given to MPCA’s offset interpretation. On this point, the panel was

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52. *Id.* at 958.

53. *Id.* at 994.

54. *In re* Cities of Annandale & Maple Lake NPDES/SDS Permit Issuance for the Discharge of Treated Wastewater, 731 N.W.2d 502, 510–11 (Minn. 2007).

55. Administrative Record, *supra* note 25, at 1038.

56. *In re* Cities of Annandale & Maple Lake NPDES/SDS Permit Issuance for the Discharge of Treated Wastewater, 702 N.W.2d 768, 770 (Minn. Ct. App. 2005).

57. *Id.* at 774.

58. *Id.* at 775 (citing *Arkansas v. Oklahoma*, 503 U.S. 91 (1992)).

divided between two seemingly conflicting lines of Minnesota Supreme Court authority.

The majority invoked a line of authority that includes a case called *Eller Media*, in which the Minnesota Supreme Court stated that it retained “the authority to review de novo errors of law which arise when an agency decision is based upon the meaning of words in a statute.”<sup>59</sup> This line of authority seemed to suggest that, under Minnesota law, there was no such thing as deference on questions of legal interpretation. The majority also approvingly cited a commentator’s observation that “when separate agencies promulgate and enforce regulations, deference to the enforcing agency improperly allows inconsistent interpretation of regulations,”<sup>60</sup> the implication being that MPCA did not deserve deference for its interpretation of a regulation it did not promulgate.<sup>61</sup>

Having approved this line of authority, the majority made its consideration essentially unnecessary by finding that “a plain reading” (that is, a reading not requiring *any* interpretation) of the federal regulation’s “cause or contribute” language supported MCEA’s arguments:

A plain reading of the phrase “cause or contribute” . . . indicates that, so long as some level of discharge may be causally attributed to the impairment of Section 303(d) waters, a permit shall not be issued. Here, the record demonstrates that, notwithstanding the reduction in phosphorus resulting from other sources, the waters at issue remain impaired. And the amount of phosphorus discharged into the North Fork from the proposed wastewater-treatment plant, which is more than double the current [amount discharged by Annandale and Maple Lake into the same watershed], will contribute to impaired nutrient levels in Lake Pepin. We, therefore, conclude that the PCA erred as a matter of law when it issued a permit for the Cities’ proposed plant.<sup>62</sup>

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59. *In re Denial of Eller Media Co.’s Applications for Outdoor Adver. Device Permits*, 664 N.W.2d 1, 7 (Minn. 2003). This part of *Eller Media* was cited with approval in the court of appeals’ decision. *In re Annandale*, 702 N.W.2d at 772.

60. *In re Annandale*, 702 N.W.2d at 772 (citing 1 RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 6.11 (4th ed. 2002)).

61. The court did not explain how de novo interpretation of a federal regulation by a state court would avoid inconsistent interpretations by other state and federal courts. *See In re Annandale*, 702 N.W.2d at 768–76.

62. *Id.* at 775.

The dissent based its analysis on an entirely different line of Minnesota agency deference cases, which extended deference to agency interpretations of statutes that the agencies were charged by law with administering.<sup>63</sup> Based on this line of authority, the dissent argued that the phrase “cause or contribute” was not clear on its face, “as evidenced by the meritorious opposing constructions advanced by both parties,”<sup>64</sup> and was “reasonably susceptible to different interpretations.”<sup>65</sup> As such, the dissent argued, the court should have deferred to a reasonable and expert interpretation.<sup>66</sup> Moreover, the dissent pointed out that the MPCA was required by federal and state statute to enforce the CWA “and its attendant regulations,” and that the MPCA therefore deserved deference even if it did not author the regulation.<sup>67</sup>

*D. Annandale in the Minnesota Supreme Court*

In its review, the Minnesota Supreme Court faced an especially difficult agency deference issue compounded by the existence of a seeming conflict in state case law. In resolving these questions, the Minnesota Supreme Court used federal cases to bolster its own analysis in several ways.

The Minnesota Supreme Court began its analysis by explaining that the court of appeals erred when it concluded that a state agency’s interpretation of a federal regulation was not entitled to deference, noting that its holding in *St. Otto’s Home v. Minnesota Department of Human Services*,<sup>68</sup> cited by the dissent below,<sup>69</sup> provided guidance on this question.<sup>70</sup> *St. Otto’s Home* discussed the deference owed to the state Department of Human Services’ interpretation of a regulation that it had promulgated, and concluded that courts should give considerable deference to a state agency’s construction of its “own regulation.”<sup>71</sup>

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63. *Id.* at 777 (Schumacher, J., dissenting) (citing *Krumm v. R. A. Nadeau Co.*, 276 N.W.2d 641, 644 (Minn. 1979); *In re Max Schwartzman & Sons, Inc.*, 670 N.W.2d 746, 754 (Minn. Ct. App. 2003)).

64. *Id.*

65. *Id.*

66. *Id.* at 776–77.

67. *Id.* at 777.

68. 437 N.W.2d 35 (Minn. 1989).

69. *In re Annandale*, 702 N.W.2d at 777 (Schumacher, J., dissenting).

70. *In re Cities of Annandale & Maple Lake NPDES/SDS Permit Issuance for the Discharge of Treated Wastewater*, 731 N.W.2d 502, 512 (Minn. 2007).

71. *St. Otto’s Home*, 437 N.W.2d at 40.

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At first blush, the key phrase “own regulation” would appear to distinguish *Annandale*, as the regulation in question was promulgated by the EPA, not the MPCA. To meet this point, the court deployed federal case authority:

[U]nlike the case before us, in *St. Otto’s Home* we were not required to decide whether an agency’s “own regulation” is limited to regulations promulgated by that agency or also includes regulations coming from another source that the agency is legally required to enforce and administer. Yet, a United States Supreme Court case cited in *St. Otto’s Home* provides us with a reference point on this issue.<sup>72</sup>

That federal case was *Udall v. Tallman*,<sup>73</sup> a 1965 decision in which the United States Supreme Court noted that a federal agency’s interpretation of a federal statute was entitled to deference “when the administrative practice at stake ‘involves a contemporaneous construction of a statute by [those] charged with the responsibility of setting its machinery in motion; of making the parts work efficiently and smoothly while they are yet untried and new.’”<sup>74</sup> The *Annandale* court stated that it agreed with this reasoning and concluded that “an agency’s ‘own regulation’ may include a regulation that the agency is legally required to enforce and administer, even if the regulation was not promulgated by the agency.”<sup>75</sup>

Based on the court’s brief quotation, one might conclude that *Udall* was about agency interpretation of an ambiguous statute. In fact, the case concerned the Secretary of the Interior’s interpretation of presidential and administrative orders dealing with federal land management and leasing.<sup>76</sup> It is all the more remarkable, then, that the *Annandale* court did *not* quote the next few lines from *Udall*: “[w]hen the construction of an administrative regulation rather than a statute is at issue, deference is even more clearly in order.”<sup>77</sup> This portion of *Udall* would seem to be directly

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72. *In re Annandale*, 731 N.W.2d at 512.

73. 380 U.S. 1 (1965).

74. *Id.* at 16 (quoting *Power Reactor Dev. Co. v. Int’l Union of Elec., Radio & Mach. Workers*, 367 U.S. 396, 408 (1961)).

75. *In re Annandale*, 731 N.W.2d at 512.

76. *Udall*, 380 U.S. at 2.

77. *Id.* at 16.

on point for the *Annandale* case. So why didn't the court go this extra distance to support its reasoning?<sup>78</sup>

At this point in the opinion, the court sought to explain how the underlying justification for its broad interpretation of "own regulation" was consistent with the underlying justifications for deference.<sup>79</sup> The court pointed to another of its own cases, *In re Excess Surplus Status of Blue Cross and Blue Shield of Minnesota*,<sup>80</sup> in which the court stated that deference was "rooted in the separation of powers doctrine" and therefore "extended to an agency decision-maker in the interpretation of statutes that the agency is charged with administering and enforcing."<sup>81</sup> The court explained that the separation of powers justification advanced in *Blue Cross* was not only consistent with *Udall*, but went "beyond" that case by holding that "when judicial deference—which is rooted in the separation of powers doctrine—is appropriate, it goes beyond deference to agency-created regulations and also includes statutes administered by the agency that the agency is charged with enforcing and administering."<sup>82</sup> It is not clear what the court meant by this, since *Udall* dealt with agency interpretation of presidential and administrative orders,<sup>83</sup> while *Blue Cross* dealt with agency interpretation of statutes.<sup>84</sup> What is clear, however, is that the *Annandale* court believed that both state and federal precedent supported its decision to interpret the "own regulation" rule of *St. Otto's Home* as embracing regulations applied by an agency, even if not authored by that agency.<sup>85</sup>

The court's other explicit references to federal case law dealt with an aspect of agency deference doctrine that is actually preliminary to the issues discussed above: Minnesota courts, like federal courts, state that they will not defer to an agency's interpretation of its own regulation when the regulation is

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78. A possible answer is suggested below. See *infra* Part IV.

79. *In re Annandale*, 731 N.W.2d at 512.

80. 624 N.W.2d 264 (Minn. 2001).

81. *Id.* at 278.

82. *In re Annandale*, 731 N.W.2d at 512.

83. *Udall*, 380 U.S. at 17 (identifying executive orders issued by the President and public land orders issued by the Secretary of the Interior).

84. *Blue Cross*, 624 N.W.2d at 273.

85. *In re Annandale*, 731 N.W.2d at 512–13 ("Based on the foregoing case law, we conclude that when addressing whether to defer to an agency's interpretation of a federal regulation, an initial factor courts must consider is whether the agency is charged with enforcing and administering the regulation such that the regulation can be characterized as the agency's own regulation.").

unambiguous. This was essentially the approach of the *Annandale* court of appeals majority.<sup>86</sup> On this point, the court cited *Resident v. Noot*,<sup>87</sup> a 1981 Minnesota Supreme Court case in which the court stated that it would not defer to an agency's interpretation of its own regulation "when the language employed or the standards delineated are clear and capable of understanding."<sup>88</sup> The *Annandale* court stated that the approach in *Noot* "comport[ed] with the approach articulated by the [United States] Supreme Court,"<sup>89</sup> and went on to cite *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*,<sup>90</sup> perhaps the most well-known agency deference case in American jurisprudence, and *United States v. LaBonte*,<sup>91</sup> a more recent and less well-known case, both for the proposition that no deference would be paid to federal agency interpretations of unambiguous federal statutes.<sup>92</sup>

The *Annandale* court used this rule in an interesting way to reconcile the two seemingly contradictory lines of Minnesota case law that divided the court of appeals. As discussed above, one line of authority held that courts were to apply a de novo standard of review to questions of law, which the *Annandale* court of appeals majority interpreted to mean that legal questions were reserved to the court and no deference was owed; the other line of authority advocated by the dissent assumed that courts should defer to agencies on some questions of law.<sup>93</sup>

In its brief to the Minnesota Supreme Court, MCEA pressed the majority's line of authority, including *Eller Media*.<sup>94</sup> In response to this argument, the court carefully characterized *Eller Media* as a case in which it had "apparently found no indication that the

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86. *In re Cities of Annandale & Maple Lake NPDES/SDS Permit Issuance for the Discharge of Treated Wastewater*, 702 N.W.2d 768, 774–75 (Minn. Ct. App. 2005), *rev'd*, 731 N.W.2d 502 (Minn. 2007).

87. 305 N.W.2d 311 (Minn. 1981).

88. *Id.* at 312.

89. *In re Annandale*, 731 N.W.2d at 513.

90. 467 U.S. 837 (1984).

91. 520 U.S. 751 (1997).

92. *In re Annandale*, 731 N.W.2d at 513–14.

93. *See generally In re Cities of Annandale & Maple Lake NPDES/SDS Permit Issuance for the Discharge of Treated Wastewater*, 702 N.W.2d 768 (Minn. Ct. App. 2005), *rev'd*, 731 N.W.2d 502 (Minn. 2007).

94. Brief for Respondent Minn. Center for Environmental Advocacy at 34–37, *In re Cities of Annandale & Maple Lake NPDES/SDS Permit Issuance for the Discharge of Treated Wastewater*, 731 N.W.2d 502 (Minn. 2007) (No. A04-2033), 2005 WL 5488629 (citing *In re Denial of Eller Media Co.'s Applications for Outdoor Adver. Device Permits*, 664 N.W.2d 1 (Minn. 2003)).

[statute] was ambiguous or that [the agency's] training and expertise were required for its application."<sup>95</sup> This, of course, is a clear reference back to the court's discussion of *Noot*, *Chevron*, and *LaBonte*. Under this approach, the court reasoned, it was never called upon in *Eller Media* to defer to the agency's interpretation, because the statute at issue there was unambiguous.<sup>96</sup> Therefore, "*Eller Media* did not overrule or modify the analytical framework we previously established for determining when we defer to an agency's interpretation of its own regulation."<sup>97</sup> The apparent conflict in Minnesota agency deference law was thus resolved.

Having laid this groundwork with the aid of federal case law, the court restated the factors that it concluded would sustain deference to an agency's interpretation of a regulation under Minnesota law and applied those factors to approve MPCA's interpretation of 40 C.F.R. § 122.4(i). First, the court concluded that the EPA's regulation was the MPCA's "own regulation," by virtue of the fact that MPCA was charged by state law with implementing the state's NPDES program.<sup>98</sup> Next, the court determined, after a long discussion of the CWA and related cases, that the regulation, especially the phrase "cause or contribute," was ambiguous and susceptible to more than one reasonable interpretation.<sup>99</sup> Finally, the court concluded that the MPCA's approach to the regulation, which allowed for new sources of pollution so long as they could be offset by other recently approved reductions in pollution, was reasonable because it was "consistent with the purposes and principles" of the CWA.<sup>100</sup>

One other type of federal authority played an interesting role in the court's analysis. In 2002, the EPA and the state of Arizona approved an NPDES permit for the Carlota Copper company to open a new open-pit copper mine adjacent to Pinto Creek, a water of the United States already impaired by mining pollution.<sup>101</sup> The permit was approved by the EPA and Arizona on the condition that Carlota Copper reduce pollution flowing into Pinto Creek from

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95. *In re Annandale*, 731 N.W.2d at 515.

96. *Id.* at 515–16.

97. *Id.* at 516.

98. *Id.*

99. *Id.* at 516–22.

100. *Id.* at 524.

101. *Friends of Pinto Creek v. U.S. E.P.A.*, 504 F.3d 1007, 1009–10 (9th Cir. 2007).

one of its abandoned mines.<sup>102</sup> Environmental groups challenged the permit's offset feature, but in 2004 it was upheld by the Environmental Appeals Board, an arm of the EPA.<sup>103</sup> The Minnesota Supreme Court pointed to this administrative adjudication as evidence that the interpretation of the federal regulation was "not a clear-cut issue where [it could] just give effect to an unambiguously expressed intent and therefore substitute [its] judgment for that of the MPCA."<sup>104</sup> Instead, the court reasoned, the regulation was clearly susceptible to multiple reasonable interpretations, one of which was the MPCA's offset interpretation.<sup>105</sup> Based on this reasoning, the court reversed the court of appeals and upheld the permit.

### III. CRITIQUING ANNANDALE

Having outlined the reasoning of the Minnesota Supreme Court in this difficult case, this section ungallantly critiques it. In particular, it seeks to show that contrary to the court's claims to have acted consistently with federal agency deference doctrine, *Annandale* actually pushes Minnesota and federal doctrine further apart.

The discussion begins by distilling *Annandale's* specific claims to have comported with federal doctrine, followed by a short overview of that federal body of law. This sets up the main critique, which is that *Annandale* departs from federal doctrine in at least three significant ways: (1) it authorizes strong deference for agency interpretations of ambiguous regulations authored by other agencies; (2) it draws no distinction between statutes and regulations for purposes of deference analysis; and (3) it deploys separation of powers as the justification for deference to administrative interpretation of regulations.

#### A. *Four Claims of Consistency with Federal Doctrine*

The discussion above illustrates several ways in which the court explicitly and implicitly claimed to have acted in accordance with federal agency deference doctrine:

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102. *Id.* at 1010.

103. *In re Carlota Copper Co.*, 11 E.A.D. 692 (2004).

104. *In re Annandale*, 731 N.W.2d at 522.

105. *Id.* More will be said about this conclusion and its relation to *Carlota Copper* later in this article. See *infra* Part IV.

- In its discussion of *St. Otto's Home* and *Udall*, the court claimed that its decision to interpret the phrase "own regulation" expansively was consistent with United States Supreme Court precedent.
- In its discussion of *Blue Cross* and *Udall*, the court strongly suggested that separation of powers is the common justification for state and federal deference doctrines applying to statutes and regulations.
- In its discussion of *Noot*, *Chevron*, and *LaBonte*, the court asserted that Minnesota and federal case law are in agreement that no deference is to be afforded to unambiguous legal authorities.

If one considers for a moment the nature of the cases used by the court to support these assertions, there is another, implicit claim: most of the federal and state cases cited in the court's analysis involved agency interpretation of *statutes*, rather than *regulations*. The interesting exception on the federal side is *Udall*, which involved an agency head's interpretation of presidential orders as well as his own agency order. But even there, the court was content to quote only that portion of *Udall* explaining the circa-1946 federal deference rules applicable to statutes, and refrained from quoting the more obviously analogous portion of *Udall* addressing deference to agency interpretations of ambiguous regulations. The *Annandale* court's willingness to rely on statute cases to resolve a regulation case thus seems to imply a fourth claim:

- Throughout its discussion, the court implicitly claimed that neither state nor federal case law draws any relevant distinction between statutes and regulations for purposes of deference analysis.

These four claims are tested against the federal framework outlined below.

#### B. *The Federal Framework*

Federal case law governing agency deference has evolved over

the years into a somewhat elaborate framework that provides for different strengths of agency deference depending on what kind of legal authority is being interpreted (i.e., interpretation of a statute versus interpretation of a regulation) and the means of interpretation (i.e., interpretation by means of a notice-and-comment regulation versus an interpretation by means of an informal letter to a regulated party). Figure 1 provides a simplified illustration of the federal framework; the discussion that follows fills in some of the details relevant to the critique of *Annandale*.

**Figure 1. A Visual Guide to Federal Agency Deference Doctrine**

	<b>...by means of Notice-and-Comment Regulation</b>	<b>...by means of Formal Adjudication</b>	<b>...by other means authorized by Congress to fill interpretive gaps</b>	<b>...by other means <i>not</i> authorized by Congress to fill interpretive gaps</b>
<b>Interpreting Ambiguous Statutes Administered by Agency</b>	Strong Deference ( <i>Chevron</i> )	Strong Deference ( <i>Chevron, per Mead</i> )	Strong Deference ( <i>Chevron, per Mead</i> )	Weak Deference ( <i>Skidmore, per Mead</i> )
<b>Interpreting Ambiguous Regulations Authored by Agency</b>	Strong Deference ( <i>Seminole Rock/Auer</i> )	Strong Deference ( <i>Seminole Rock/Auer</i> )	Strong Deference ( <i>Seminole Rock/Auer</i> )	Strong Deference ( <i>Seminole Rock/Auer</i> )
<b>Interpreting other Ambiguous Authorities (regs authored by Agency A and applied by Agency B)</b>	Weak Deference ( <i>Skidmore</i> )	Weak Deference ( <i>Skidmore</i> )	Weak Deference ( <i>Skidmore</i> )	Weak Deference ( <i>Skidmore</i> )

The starting point for most discussions of federal agency deference (including this one) is the strong deference that federal courts tend to give to agency interpretations of ambiguous statutes, commonly known as “*Chevron* deference,” after the Supreme Court’s landmark 1984 decision.<sup>106</sup> The Supreme Court has identified some of *Chevron*’s limits in recent years, but this much endures: when Congress leaves interpretive gaps in federal statutes, and assigns a federal agency the job of implementing that statute, federal courts will defer to reasonable agency interpretations contained in duly promulgated legislative regulations or decisions in formal (that is, trial-like) administrative adjudications.<sup>107</sup>

Although *Chevron* deference is often thought to be justified by agency technical expertise,<sup>108</sup> a better argument can be made that the actual justification lies in notions of separation of powers and political accountability.<sup>109</sup> As the Court explains in a key passage, a statute might be written ambiguously because Congress wants the agency to use its technical expertise to fill in the gaps; or ambiguity might be the result of Congress’s inability to overcome some political impasse that is then punted to the agency; or ambiguity might simply be the result of a lack of foresight or even an outright mistake.<sup>110</sup> “For judicial purposes,” the Court observed, “it matters not which of these things occurred.”<sup>111</sup>

Instead, what matters is that Congress left an interpretive gap in a statute implemented by a federal agency. Under *Chevron*, the existence of such a gap carries a strong implication that it is to be filled by a reasonable agency interpretation, and to allow unelected judges to second-guess the policy decisions of agency officials appointed by an elected President and delegated this power by an elected Congress would undermine the prerogatives of the political

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106. *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

107. *Id.* at 843–44 (“If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation.”).

108. See, e.g., Nicholas J. Leddy, *Determining Due Deference: Examining When Courts Should Defer to Agency Use of Presidential Signing Statements*, 59 ADMIN. L. REV. 869, 881 (2007) (noting that “whether addressing a question of law or fact, an interpretive rule, or a legislative rule, the Supreme Court consistently cites agency expertise as a primary rationale for deferring to agency action”).

109. For an analysis of competing views about *Chevron*’s justifications, see Note, *The Two Faces of Chevron*, 120 HARV. L. REV. 1562 (2007).

110. *Chevron*, 467 U.S. at 865.

111. *Id.*

branches. As the Court put it, “[i]n such a case, federal judges—who have no constituency—have a duty to respect legitimate policy choices made by those who do.”<sup>112</sup>

More recent cases have emphasized this connection between congressional intent and *Chevron* deference. In *United States v. Mead Corp.*,<sup>113</sup> the Court was asked to decide whether interpretations of statutes contained in tariff ruling letters, issued by the thousands each year by U.S. customs officials, qualified for *Chevron* deference.<sup>114</sup> In declining to extend deference to these letters, the Court stated that *Chevron* deference was appropriate only for interpretations promulgated under a congressional grant of authority to make rules carrying the force of law.<sup>115</sup> The Court identified legislative rules and formal adjudications as examples that meet this test and allowed that there might be other forms of agency action reflecting “comparable congressional intent” to confer upon agencies this kind of lawmaking authority.<sup>116</sup> The Court also identified some forms of agency action that do not qualify, such as “policy statements, agency manuals, and enforcement guidelines,” which the Court said were “beyond the *Chevron* pale.”<sup>117</sup> *Mead* thus shows that for purposes of *Chevron* deference, the form of an agency interpretation is a critical consideration because form speaks to congressional intent and *Chevron* deference is about judicial respect for the intent of Congress—in a phrase, separation of powers.

An entirely separate line of authority addresses the interpretation of ambiguous regulations. This strong form of deference is known variously as *Seminole Rock* or *Auer* deference, and under this doctrine an agency’s interpretation of *its own* ambiguous rules will be upheld unless “plainly erroneous or inconsistent with the regulation.”<sup>118</sup> Although both *Chevron* and *Auer* lead to strong deference, there are two important differences between the doctrines for our purposes. First, whereas the

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112. *Id.* at 866.

113. 533 U.S. 218 (2001).

114. *Id.* at 221.

115. *Id.* at 226–27.

116. *Id.* at 227.

117. *Id.* at 234.

118. See *Auer v. Robbins*, 519 U.S. 452, 461 (1997); *Bowles v. Seminole Rock Co.*, 325 U.S. 410, 414 (1945). This rule from *Seminole Rock* is also quoted in *Udall v. Tallman*, 380 U.S. 1, 16–17 (1965), deepening the mystery over why the Minnesota Supreme Court made such truncated use of that case.

justification for *Chevron* deference is fairly conceptual, *Auer* deference has been traditionally understood to be based on the more pragmatic consideration that the author of an ambiguous regulation is best positioned to explain it.<sup>119</sup> Thus, separation of powers is not ordinarily understood to justify *Auer* deference, and for this reason is not strictly dependent on the form of the interpretation in the way that *Chevron*-after-*Mead* is.<sup>120</sup>

There is a third form of deference at the federal level, known as *Skidmore* deference,<sup>121</sup> which sometimes applies where the stronger forms do not. In *Mead*, for example, after the Court declined to apply strong *Chevron* deference, it remanded to the lower courts for consideration of whether *Skidmore* deference might apply.<sup>122</sup> This flavor of agency deference is both weaker and significantly looser in its application than *Chevron* deference:

We consider that the rulings, interpretations and opinions of the Administrator under this Act, while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.<sup>123</sup>

Expertise matters here, because expertise is a key factor in the persuasive power of an agency's interpretation.<sup>124</sup> Also, although

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119. Thus, in *Auer*, the Court noted that to require an agency to narrowly construe its own regulations "would make little sense," since the agency would be free to rewrite the regulations more broadly. *Auer*, 519 U.S. at 463.

120. See, e.g., *Gardebring v. Jenkins*, 485 U.S. 415, 429–30 ("We recognize that the Secretary had not taken a position on this question until this litigation. However, when it is the Secretary's regulation that we are construing, and when there is no claim in this Court that the regulation violates any constitutional or statutory mandate, we are properly hesitant to substitute an alternative reading for the Secretary's unless that alternative reading is compelled by the regulation's plain language or by other indications of the Secretary's intent at the time of the regulation's promulgation.").

121. *Skidmore v. Swift & Co.*, 323 U.S. 134, 139–40 (1944).

122. *United States v. Mead Corp.*, 533 U.S. 234, 238–39 (2001).

123. *Skidmore*, 323 U.S. at 140.

124. Although at least one current justice views *Skidmore* as an "anachronism," a majority would probably find that *Skidmore* deference persists. See Kristin E. Hickman & Matthew D. Krueger, *In Search of the Modern Skidmore Standard*, 107 COLUM. L. REV. 1235, 1244 (2007) ("Justice Scalia, concurring in *ARAMCO*, called

this form of deference is weaker in the sense that it does not bind the reviewing court as tightly as *Chevron* deference, it is also less encumbered than *Chevron* deference or *Auer* deference by questions of form and authorship. As the *Mead* Court's remand suggests, *Skidmore* deference may apply to the interpretation of statutes or regulations contained in a host of interpretive devices "beyond the *Chevron* pale," so long as the interpretation carries the requisite, if nebulous, "power to persuade."<sup>125</sup>

### C. Critiquing Three Out of Four Claims

Based on this discussion, it should be clear that of the four claims identified above, only one is noncontroversial: federal courts and Minnesota courts agree that if a statute or regulation is clear on its face, there is no issue of agency deference—the court applies the clear terms of the law.<sup>126</sup> The remaining three claims are questionable.

First, unlike *Annandale's* approach, a federal court would be unlikely to extend strong deference to an agency's interpretation of an ambiguous regulation authored by another agency. Recall that *Annandale* took a broad view of the "own regulation" language from *St. Otto's Home*, reasoning that "own regulation" might include regulations administered but not promulgated by the interpreting agency.<sup>127</sup> This stands in contrast with the underlying justification of *Auer* deference, the obvious federal analogue. As discussed above, *Auer* deference is premised on the notion that the promulgating agency knows best what its regulation means; the

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Skidmore deference 'an anachronism' in the post-*Chevron* era."). For a discussion of *Skidmore* in the post-*Mead* era, see Richard W. Murphy, *A "New" Counter-Marbury: Reconciling Skidmore Deference and Agency Interpretive Freedom*, 56 ADMIN. L. REV. 1 (2004).

125. *Mead*, 533 U.S. 218, 219–20.

126. *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984) ("If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress . . ."); *In re Cities of Annandale & Maple Lake NPDES/SDS Permit Issuance for the Discharge of Treated Wastewater*, 731 N.W.2d 502 (Minn. 2007). Of course, determining what is clear and what is ambiguous remains a challenge. The *Annandale* dissenters, for example, would have held that the plain language of the federal regulation unambiguously prohibited the agency from issuing Annandale/Maple Lake an NPDES permit because the proposed facility's extra 2200 pounds of phosphorus would clearly "contribute" to the violation of phosphorus water quality standards in Lake Pepin. *In re Annandale*, 731 N.W.2d at 526 (Page, J., dissenting).

127. *In re Annandale*, 731 N.W.2d at 512 (majority opinion).

corollary is that if the agency has not authored the regulation in question, that justification for strong deference disappears.

By way of example, consider *Martin v. OSHRC*,<sup>128</sup> in which the United States Supreme Court declined to defer to the Occupational Safety and Health Review Commission's (OSHRC) interpretation of regulations adopted by the Secretary of Labor, even though the Commission was charged by law with adjudicating disputes under those regulations.<sup>129</sup> The *Martin* Court reasoned, for interpretive purposes, that those regulations belonged to the Secretary, not the Commission: "[b]ecause the Secretary promulgates these standards, the Secretary is in a better position than is the Commission to reconstruct the purpose of the regulations in question."<sup>130</sup>

Here, then, is one potential explanation for the court's mysterious selective quotation from *Udall*.<sup>131</sup> Had the court gone beyond the material in *Udall* dealing with statutes, and had it discussed agency deference issues involving regulations, it would have also had to acknowledge the underlying authority cited by the *Udall* court—*Seminole Rock*, the precursor to *Auer*.<sup>132</sup> That line of authority, in turn, is constrained by cases like *Martin*, which seem to undercut *Annandale's* conclusion that an agency's "own regulation" may include another agency's regulation.<sup>133</sup>

This brings us to the second difference between *Annandale* agency deference and the federal system of agency deference: by relying extensively on federal authority dealing with the rules of agency deference for statutes, *Annandale* seems to imply that there is no analytical difference in federal agency deference law between statutes and regulations. However, in the federal system there are clearly two lines of authority—*Chevron/Mead* for statutes and *Auer*

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128. 499 U.S. 144 (1991).

129. *Id.* at 152 (holding that the court owed no deference to the agency responsible for adjudications under regulations promulgated by another agency). For a contemporaneous overview of the issues in *Martin*, see Russell L. Weaver, *Deference to Regulatory Interpretations: Inter-Agency Conflicts*, 43 ALA. L. REV. 35 (1991).

130. *Martin*, 499 U.S. at 152. Recently, the United States Supreme Court suggested that expertise also matters for purposes of *Seminole Rock* deference. See *Gonzales v. Oregon*, 546 U.S. 243, 256–57 (2006). However, there is no indication in *Gonzales* that the Court meant to extend *Seminole Rock* deference to rules adopted by other agencies. See *id.*

131. See *In re Annandale*, 731 N.W.2d at 512; *supra* Part II.D.

132. See *Udall v. Tallman*, 380 U.S. 1, 16–17 (1965).

133. See *Martin*, 499 U.S. at 152 (declining to defer where agency did not author regulations).

for regulations. Both lines of authority contain their own freestanding justifications—separation of powers for *Chevron/Mead* and the more pragmatic author-knows-best reasoning of *Seminole Rock/Auer*. Both also have their own internal rules and conditions. For example, *Chevron/Mead* is constrained by questions of interpretive form; *Auer* (so far as we know) is not. None of these nuances make their way into the *Annandale* schema.

The final difference, closely related to the prior point, is that a federal court would not be likely to invoke separation of powers in a case involving agency interpretation of a regulation rather than a statute. As noted above, *Chevron* deference rests largely on separation of powers, and after *Mead* there is a particular focus on respect for legislative judgments about the role of the executive in carrying out policy. This kind of legislative judgment is not really at issue in a case involving agency interpretation of a regulation, and even less so in a case like *Annandale* that involves a regulation promulgated by the federal government.

To be fair, the court did cite a Minnesota statute that authorizes the agency to implement the state side of the NPDES permitting program and an MPCA regulation, noting the concurrent application of state and federal water pollution regulations.<sup>134</sup> Based on these references, one might argue that deference here really was about separation of powers and respect for the Minnesota Legislature's judgments. Two points may be made in response. First, the court did not cite these authorities as part of its separation of powers discussion; it cited them to try to show that the federal regulation was the MPCA's "own regulation."<sup>135</sup> Second, it is hard to see how withholding deference to the MPCA's interpretation of the federal regulation at issue would have constituted an affront to legislative judgments. Unlike *Chevron* and other cases where a legislature's own statute was the subject of interpretation, in this case the Minnesota Legislature's only real involvement was to authorize the MPCA's participation in a federal regulatory scheme. The regulation itself was not authored by *any* arm of Minnesota government. Under these circumstances, deference rules designed to show due respect to the intent of the legislative branch seem less compelling than the judiciary's own constitutional role of ensuring that the law is

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134. *In re Annandale*, 731 N.W.2d at 515–16.

135. *Id.* at 516.

obeyed.<sup>136</sup>

Thus, despite the court's explicit and implicit claims, there does not appear to be a great deal of overlap between *Annandale* deference and the federal deference framework. The two models agree that if the statute or regulation is unambiguous, deference is not an issue. But beyond that there is considerable disconnect between the two approaches. The implications of this disconnect are addressed in the concluding section below.

#### IV. CONCLUSION: SOME POST-ANNANDALE DEVELOPMENTS AND THOUGHTS FOR PRACTITIONERS

Whether consistent with federal law or not, *Annandale* is likely to be the touchstone for agency deference issues in Minnesota courts for the foreseeable future. This concluding section briefly touches on questions of what might have been, and what might come next.

##### A. *What Might Have Been: Carlota Copper Revisited*

As noted above, the Minnesota Supreme Court's analysis rested in part on the EPA's own use of what amounted to an offset in the *Carlota Copper* matter.<sup>137</sup> That matter did not end when the appeals board affirmed the permit, however. About the time that the *Annandale*/Maple Lake NPDES permit was being challenged in Minnesota courts, *Carlota Copper*'s NPDES permit was being litigated in the Ninth Circuit. And less than four months after *Annandale* approved MPCA's offset scheme under 40 C.F.R. § 122.4(i), the Ninth Circuit ruled the *Carlota Copper* permit's offset to be illegal under that same regulation:

The plain language of the first sentence of the regulation is very clear that no permit may be issued to a new discharger if the discharge will contribute to the violation of water quality standards. . . . The EPA contends that the partial remediation of the discharge from the Gibson Mine will offset the pollution. However, there is nothing in the Clean Water Act or the regulation that provides an

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136. The *Annandale* dissent makes a similar point. *Id.* at 527 (Page, J., dissenting). In fact, it may be that the real constitutional value at stake in *Annandale* was not so much separation of powers as it was the proper distribution of power between state and federal governments—in a word, federalism.

137. See *Friends of Pinto Creek v. U.S. E.P.A.*, 504 F.3d 1007, 1009–10 (9th Cir. 2007); *supra* Part II.D.

exception for an offset when the waters remain impaired and the new source is discharging pollution into that impaired water.<sup>138</sup>

The tantalizing question, of course, is whether *Annandale* would have come out differently had *Carlota Copper* been decided first. Would the Minnesota Supreme Court have adopted this federal appeals court interpretation of the federal regulation at issue? Or would it still have gone ahead with the view that the regulation is ambiguous and the MPCA's offset solution was reasonable? For what it may be worth, MCEA asked the Minnesota Supreme Court to stay its deadline for requesting rehearing until after the Ninth Circuit had a chance to rule, even offering to forgo rehearing if the Ninth Circuit ended up agreeing with the offset approach.<sup>139</sup> The court denied that motion.<sup>140</sup>

*B. What Next? Some Thoughts for the Practitioner*

*Annandale* is a mixed bag of clarifications and new questions. On the clarity side, we now know that practitioners are unlikely to get far in arguing that the court should always apply a pure de novo standard under *Eller Media*. Instead, *Annandale* sets up a three-step deference analysis that requires the court to ask:

- (1) Is the regulation ambiguous? (If not, there is no question of deference as the court applies the plain meaning of the regulation.)
- (2) If so, is it the interpreting agency's own regulation? (If not, it is unclear what happens; the court will probably apply a de novo standard, although practitioners might attempt to make a *Skidmore*-esque argument here for partial deference.)
- (3) If the ambiguous regulation is the interpreting

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138. *Pinto Creek*, 504 F.3d at 1012.

139. Notice of Motion & Motion for Extension of Time to Request Rehearing and Memorandum, *In re Cities of Annandale & Maple Lake NPDES/SDS Permit Issuance for the Discharge of Treated Wastewater*, 731 N.W.2d 502 (Minn. 2007) (No. A04-2033).

140. Order on Request for Contested Case Hearing, *In re Cities of Annandale & Maple Lake NPDES/SDS Permit Issuance for the Discharge of Treated Wastewater*, 731 N.W.2d 502 (Minn. 2007) (No. A04-2033).

agency's own regulation, is the interpretation reasonable?

Second, practitioners with federal experience may find this analysis comfortably familiar, because it is basically *Chevron* without the messy questions of form raised by *Mead*.<sup>141</sup> Although the court hasn't yet directly addressed whether this framework will apply to deference issues involving statutes rather than regulations, the answer seems likely to be yes, given the court's willingness in *Annandale* to lump statutes and regulations together in its deference reasoning. If *Annandale* signals the beginning of a kind of "regime change" in Minnesota law that will see this *Chevron*-type analysis applied to the range of agency deference issues, as one commentator has suggested,<sup>142</sup> then practitioners should be able to take advantage of some of the insights of those who have lived with *Chevron* for years. For example, one study of *Chevron* cases showed that agencies prevailed nearly 90% of the time on the question of whether their interpretation was reasonable.<sup>143</sup> Armed with this knowledge, it may be wise for advocates to treat the threshold question of whether the regulation is ambiguous as virtually outcome determinative.<sup>144</sup>

On the other hand, some things are less clear after *Annandale*. In particular, those accustomed to using federal cases as persuasive authority may find it harder to predict what kinds of federal cases are going to be persuasive. For example, on the question of "own regulation," proponents of deference will probably want to avoid federal cases that lead to *Auer* and *Martin*, even though those cases are instinctively the most analogous as they deal with agency deference issues pertaining to regulations and not statutes.

There is something else that practitioners may want to pay close attention to in the coming years. In setting forth its restatement of agency deference law as it pertains to regulations,

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141. For one of many critiques of *Mead*, see Lisa Schultz Bressman, *How Mead Has Muddled Judicial Review of Agency Action*, 58 VAND. L. REV. 1443 (2005).

142. David Schultz, *Administrative Law: The Year in Review*, Continuing Legal Education Presentation for the Minnesota State Bar Association (June 20, 2007).

143. See generally Orin S. Kerr, *Shedding Light on Chevron: An Empirical Study of the Chevron Doctrine in the U.S. Courts of Appeals*, 15 YALE J. ON REG. 1 (1998) (examining *Chevron* cases in the federal circuit courts in 1995 and 1996).

144. For a general discussion of *Chevron*'s acceptance among state courts, see William R. Andersen, *Chevron in the States: An Assessment and a Proposal*, 58 ADMIN. L. REV. 1017 (2006).

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the *Annandale* court installed an escape valve:

When a court concludes that the language of the agency's regulation is unclear and susceptible to different reasonable interpretations and that the agency's interpretation of the regulation is reasonable, then the court will *generally* defer to the agency's interpretation.<sup>145</sup>

The court did not explain what circumstances might result in the court deviating from what turns out to be only a *general* rule. But it does seem clear that whatever bows to agency authority the opinion may make, the court retains ample power to deviate from deference should the need, in its sole discretion, arise.

The court, in short, is still in charge.

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145. *In re* Cities of Annandale & Maple Lake NPDES/SDS Permit Issuance for the Discharge of Treated Wastewater, 731 N.W.2d 502, 516 (Minn. 2007) (emphasis added).