

Sixteen Things to Know About the DMWW Proposed Drainage District Lawsuit

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First lets talk about the key legal issues in the dispute. As a starting point the potential lawsuit by the Des Moines Water Works against drainage districts in Sac, Calhoun and Buena Vista Counties raises important legal issues concerning the interpretation and application of the Clean Water Act (CWA) and of the authority and legal status of Iowa's drainage districts. Many are issues of first impression – meaning the federal courts have not considered them previously. While some may believe the idea of a lawsuit is unhelpful – the claims are not frivolous or without merit, instead they raise important questions for the courts and society to address.

1. It is a citizen suit under the Clean Water Act claiming the drainage districts are point sources which need NPDES permits from the EPA– The Clean Water Act (CWA) is the major federal law designed to protect water and prevent pollution. It authorizes EPA – and the states which administer the law, in Iowa the DNR, to issue NPDES permits (National Pollution Discharge Elimination System) to point sources – such as pipes and ditches – to allow them within in limits and after treatment to discharge pollution into the waters of the U.S.

The CWA – and most other environmental laws – include provisions allowing interested citizens to bring lawsuits to enforce the law after notifying the authorities of their intention. Citizen suits expand the resources available to protect the environment and the notice requirements give the government the first opportunity to act. This potential suit involves a series of complex and important legal questions the federal court will be asked to resolve.

2. Key legal issue # 1 – the drainage ditches are artificial conveyances of polluted ground - The key legal claim is the drainage districts built, manage, and maintain the system of drainage ditches which artificially collect, convey and discharge polluted groundwater into Iowa's rivers and streams imposing costs on the DMWW and others who use the water. This makes the districts point sources under the CWA which need permits to discharge – no different than the discharge coming out of the pipe at a municipal sewage treatment plant or a private factory.

Presently EPA and the state do not treat drainage districts as point sources, but instead consider them to be an exempt nonpoint source - carrying water running off farm fields after storms. Under the CWA nonpoint sources are exempt from any permit requirements – which is why the CWA is largely a non-issue for most of agriculture – the exception being some concentrated animal feeding operations (CAFOs) are considered point sources and may be required to obtain a permit.

3. Key legal issue #2 - nitrates enter drainage ditches from groundwater – The second key legal claim is the nitrate contaminated water flowing in the drainage ditches is primarily ground water coming from tile outlets collected in the ditches

and it is not surface water run-off. This issue is critical to the DMWW lawsuit because the CWA definition of exempt nonpoint sources includes “agricultural stormwater discharges.” This means the outcome of the case may hinge on whether what comes out of a tile line is considered groundwater or stormwater surface discharge.

When Congress wrote the CWA it did not define “agricultural stormwater runoff” and the federal courts have never had to answer what this means. Some observers believe tile lines have always been exempt from the CWA but no federal case law or legislation supports this. The courts have looked at “irrigation return flows” but that exemption is not applicable here. The importance of the groundwater-surface runoff distinction means the evidence of water contamination and the timing of the measurements will be critical evidentiary issues.

4. Key legal issue #3 - the lawsuit is against drainage districts not farmers – The lawsuit is not directed at individual farmers and landowners and not at tile outlets – but instead is directed at the drainage districts which under Iowa law are undeniably responsible for creating, operating, and maintaining the drainage ditches and system. Iowa has an extensive body of statutory law – over 70 pages and a constitutional amendment- on drainage districts, but a common understanding of their legal status and authority is not widely shared by lawyers, public officials, or farmers. Most Iowans including many in this room have no experience with drainage districts because they only operate in some parts of the state. The lawsuit raises important questions about the legal and jurisdictional relation between drainage districts and county governments, in part, because some districts are managed by county supervisors who also serve as trustees for the districts. That is the case for the three counties involved here - but one important legal issue will be whether the lawsuit is against the counties or against the districts?
5. Key legal point #4 - nothing will happen quickly – The citizen suit provision requires 60 days notice but it is uncertain when or even if the DMWW will actually file a lawsuit. It could happen next week or next year – or be postponed indefinitely if the board feels meaningful action is taking place. For example if the Legislature votes to raise the sales tax 3/8 cents to fund IWILL -the Natural Resources and Outdoor Trust Fund to provide steady and significant funding to share the cost of water quality actions needed by farmers and landowners – the suit may not proceed.

Even if a suit is filed it will trigger legal maneuvering: parties seeking to intervene on either side; lengthy discovery – gathering information and evidence; procedural disputes over whether the court has jurisdiction or the parties have standing to sue. Once it goes to trial and the court decides if the ditches are point sources – any ruling will likely be appealed.

The fact litigation takes time doesn't mean it isn't valid – and is certainly no reason for the state or farmers to stop taking action to protect Iowa's waters.

6. The DMWW choice of drainage districts was very strategic – One of the key strengths of the DMWW litigation may be in the choice of the districts it has notified of the potential suit. The choices were not random but instead the districts were selected because they are predominantly agricultural and because the DMWW was able to obtain and verify credible and accurate readings of significant nitrate water pollution taken from publicly accessible sites, in part relying on U.S. Geological Survey testing.

The wisdom of this approach is reflected in the fact that with all the criticism of the possible lawsuit no one has challenged the claims about the high nitrate levels. This approach was in part designed to avoid the “lack of credible data” defense which some in agriculture have used in the past as a way to delay action. It also nullifies the goose poop and golf course arguments some have used to deflect responsibility

7. Implications or Possible Effects of a Ruling for DMWW are unclear – Assuming the federal court rules the drainage districts are point sources and need NPDES permits from EPA – the implications of the ruling or “what happens next” are uncertain. First, EPA and Iowa don't consider districts a point source so there are no rules or standards for how to grant them permits to control discharges – like other point sources. EPA and Iowa would need to develop a permitting process. It could require districts to act to address water quality but EPA could also develop a “general permit” for drainage districts requiring little action on their part.
8. What could the drainage districts do to protect water quality? - A second aspect of the “what happens next” issue concerns exactly what legal authority do the drainage districts have to require farmers and landowners subject to their jurisdiction to take action? Clearly the districts have significant legal powers including the power of eminent domain, taxing authority through the levying of assessments on landowners, and the ability to enter onto property to construct and perform maintenance of ditches.

While districts may not have implemented rules to protect water quality – it is not unreasonable to believe they may have the legal power to do so – such as by requiring vegetative buffers on fields adjacent to ditches – or even requiring some form of treatment for water emptying into ditches from tile outlets. For example, could the districts require farmers to create wetlands or even purchase district owned land to be used as wetlands to treat water flowing through the systems? The truth is this is a largely unexplored area of Iowa law.

Now let me share some general observations about how we got into this situation.

9. The proposed lawsuit was predictable and is understandable – The DMWW warned people over 18 months ago it faced the need to consider filling suit unless aggressive and meaningful steps were taken to address the water quality problems in the Raccoon River. This action – which the DMWW board does not take lightly or without significant costs and risks - grows out of frustration with the state’s reliance on the entirely voluntary Nutrient Reduction Strategy (NRS) and the paltry funding the state has allocated to the water quality initiative.

Why did the DMWW decide to take this action now? It is uncertain why the DMWW decided to act but key factors or tipping points in the decision probably include the Governor’s May 2014 veto of the supplemental appropriation for the NRS which showed a lack of good faith and this winter’s spike in nitrate levels in the water which illustrated the growing and serious nature of the pollution problem. Claims about progress being made with the NRS and about the need for more time for it to work may be factors. The DMWW appears to be tired of waiting.

10. The real issue is accountability and responsibility – The DMWW board is obligated under the Safe Drinking Water Act to protect the 500,000 customers it serves. The board appears frustrated others in the watershed including drainage districts and farmers are not required – under current legal interpretations – to account for their impacts on water quality. They may feel the claims of “progress” with the NRS – aren’t supported by measureable improvements – and reflect a lack of urgency. In other words - talk is cheap and actions so far have been minimal – the lawsuit seeks to share the responsibility for clean water.
11. Dispute illustrates legal ironies and conflicts in Iowa’s water debate – First, we have a local unit of government with regulatory authority created to protect soil and water quality – the soil and water conservation districts, but they are not in the case, instead the drainage districts which were not created to protect water quality are.

Second, many believe surface runoff is the cause of water pollution, but the reality is surface runoff dilutes contamination and it is more likely the later ground water discharges from tile lines cause the increases in nitrate levels – that is why the suit focuses on groundwater.

Third, many agricultural groups claim nonfarm sources are contributors to water pollution in Iowa – the goose poop and golf course argument – which is why these drainage districts were singled out – they are predominantly agricultural areas.

Fourth the anti-regulatory dogma driving much of the Iowa debate about agriculture and water quality has delayed consideration and adoption of effective and low cost regulatory steps that could have addressed the problems before now and helped avoid the litigation.

12. Reactions to the proposed lawsuit are mixed but generally positive – News of the proposed suit was greeted with many predictable reactions – ranging from the Governor’s silly comment Des Moines had declared war on rural Iowa to the suggestion by some pork producers to boycott Des Moines. But the lawsuit has also generated a perhaps surprising level of supportive comments from across rural Iowa and from other communities – which illustrate a collective concern about the quality of Iowa’s water and the deterioration in our commitment to soil conservation and natural resource protection.

The recent Iowa poll shows a majority of Iowans, both urban and rural, support the idea of the suit. The poll is a significant indicator of the public attitudes about the need for action.

Surprisingly - this threatened litigation may turn out to be one of the most important things to happen in Iowa’s natural resource debate in decades – because it is making people think and may lead people – including local and state officials, farmers, and others - to take action.

13. Inadequacy of Nutrient Reduction Strategy are at the heart of the dispute – The proposed lawsuit has brought into focus some of the perceived inadequacies of the NRS, e.g. it is entirely voluntary; it has no standards, timelines or measurements; and the lack of funding for implementation. The NRS is not really a plan because it has no funding commitments or timelines for action. At best it is a promise we will try harder and at worst it is a continuation of Iowa’s legacy of delay and denial when it comes to dealing with natural resource issues.

The NRS fails to create a funding mechanism so the many farmers taking action to protect water quality can receive support for their efforts. Groups like the Iowa Soybean Association are providing critical leadership on innovative approaches to water quality.

Funding allocated to the NRS is minimal compared to the projected costs. Some point to how quickly the state’s cost share money is claimed - less than 5 days in 2014 - as a sign of success; but more realistically doesn’t this indicate the inadequacy of state funding?

Allocating a few thousand dollars to each county should be seen an embarrassment not a sign of commitment – or the basis to claim significant progress.

If we are serious about addressing water quality – and protecting soil – we should pass the IWILL legislation to increase the sales tax 3/8 cent so the

Natural Resources and Outdoors Trust Fund has the cost sharing funds needed to help farmers. We now have a bill S.F. 357 introduced March 2nd by Senators Johnson and Dearden.

14. We Need a Regulatory Reality Check – Much support for the NRS as the “solution” to Iowa’s water problems is really an effort to prevent any consideration or use of regulatory approaches. Consider how often you hear leaders talk about how “one-size fits all” regulations are not the answer and no regulation will improve water quality. The “anti-regulation” dogma - championed by the Farm Bureau and others - is uninformed and shows a basic misunderstanding for how law works and for how the state and nation have historically made progress addressing soil conservation.

First, regulations are key to the legal system, they are how law is delivered - such as signing up for ARC or PLC payments as many of you will do at FSA offices this month. Regulations establish objective processes and responsibilities or duties for all individuals in society. Second, regulations operate by being uniform - one size fits all – the same rules apply to all citizens – you don’t get to make your own rules. If you want to buy crop insurance you follow the RMA rules.

Consider two examples – speed limits and blood alcohol limits. You can’t drive 60 in a school zone and then tell the officer its OK because you are really careful – or blow a .16 and explain it is all good because you can handle your liquor! The rules are the same for all of us. You comply with rules mainly because you accept the responsibility to act to protect the public – not because you fear the fines. The point is regulations don’t prevent people who want to comply from doing so – but they do require actions by those who would otherwise refuse to act.

Third, regulations establish responsibilities for people or they face risks. Consider how the 1985 conservation title – with sodbuster, highly erodible land, conservation compliance, and swampbuster provisions– was the key for making real progress in reducing soil losses in Iowa and across the nation. These are regulations - they were voluntary only if you wanted to operate without farm programs – and still are today - if you don’t want crop insurance. But rules like conservation compliance let you choose how to comply, they don’t require only one practice.

15. Iowa’s water will not be clean until rules require individual responsibility – The range of entirely unregulated farming actions that can impact Iowa’s water quality – such as unrestricted tiling and farming next to stream banks - means there is a key role for regulatory approaches. Iowa law already establishes a duty on all landowners to protect the soil and meet soil loss limits set by county soil districts. We need a similar rule for water quality. But any rules adopted will not need to be onerous, overly restrictive or

costly. For example, here are two regulations that would be effective, relatively easy to adopt and have limited costs.

First, Iowa could require people farming next to rivers, streams and ditches to plant vegetative buffer strips of a minimum width. Second Iowa could require anyone applying fertilizer to develop a nutrient management plan to inform their decisions. How you comply with either requirement would be up to the farmer and landowner but everyone would need to comply. If you don't think these rules are possible think again – Minnesota requires stream-side buffers and Ohio has recently adopted the nutrient planning rules. Adopting both measures would help protect Iowa's water and share the responsibility, ideas most Iowans embrace.

In 1979 the Iowa Supreme Court faced a constitutional challenge to the law requiring landowners comply with soil loss limits. In *Woodbury County Soil Conservation District v. Ortner* the Court upheld the law, noting:

It should take no extended discussion to demonstrate agriculture is important to the welfare and prosperity of this state. It has been judicially recognized as our leading industry. The state has a vital interest in protecting its soil as the greatest of its natural resources, and it has the right to do so.

This means the state has the legal authority to impose a duty to protect water quality – if we choose to do so.

16. There are risks and uncertainties for farmers with the lawsuit – Clearly the lawsuit makes people nervous because it involves untested theories – and the outcome is hard to predict. DMWW officials are quick to point out they are not suing farmers or tile outlets – but this is a bit disingenuous because if the court agrees drainage districts are point sources they may have to take steps to obtain permits – which could result in farm level impacts. The DMWW suit may require actions by farmers living in drainage districts – we just don't yet know what they might be. This is one more reason for farmers and all of us to protect water quality.

Conclusion - What is next? – The lawsuit can't be wished away and there is little the legislature or Governor can do to influence what the DMWW decides – other than getting serious about water quality. DMWW faces significant economic costs – perhaps as much as \$100 million if forced to build a new nitrate removal plant. Doing so would make the water safe to drink but do nothing to help Iowa find long-term solutions to a serious matter. The real answer is for all of us to collaborate and support innovative efforts to protect our water – and soil – and support profitable, sustainable farming.

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