

WATERWAYS

A Quarterly Publication of the Iowa Drainage District Association

Volume 1, 2012

EPC blinks on New Farmers Drainage District/Brush and Weed Case

For the first time in the long and torturous history of the New Farmers Drainage District Case, there is hope. On Tuesday, February 21, the state Environmental Protection Commission (EPC) was unable to muster enough votes to approve the decision of the Administrative Law Judge (ALJ).

The case revolves around weed spraying that took place in a drainage ditch in Monona County. The ditch was part of the New Farmers Drainage District which was controlled by elected trustees. The Iowa Department of Natural Resources (IDNR) contended that the weed spraying created conditions which led to the fish kill. This contention was despite expert testimony that was introduced into the record stating that the chemical used could not have led to the fish kill. Additionally, no testing of any type was ever done on the fish so there is no proof as to the cause of death for the fish.

The case is almost five years old. The case first went to an administrative law judge which sided with the state. It then went before the state Natural Resource Commission and Environmental Protection Commission – both of which also sided with the state. After that, the case went to District Court in Monona County. The district court there ended up sending the case back to the state for further review in light of new evidence. The court found that the IDNR had improperly withheld information from Iowa State University Weed Scientist Bob Hartzler that was not supportive of the state's case.

The review process started all over. The case went back to the same administrative law judge who heard the case the first time. Despite being directed by the court to review the new evidence, the administrative law judge found in favor of the state once again.

So, her decision must then be ratified (again) by the Natural Resource Commission and Environmental Protection Commission. The Natural Resource Commission met on Thursday, February 9 and affirmed the ALJ decision.

That left the EPC as the final stopping point before the case went back to court. After almost one hour of closed session, a motion was made in the EPC meeting for the Commission to support the decision of the ALJ. It needed five votes to pass and only received four. The practical effect of the vote is unclear but what it does mean is that for the first time in almost five years, the state is not speaking with a unified voice on this issue.

Craig Levien, the attorney who represents both the Drainage District and Brush and Weed Control Specialist said, "We are grateful that the Environmental Protection Commission yesterday refused to approve the proposed Administrative Law Judge's proposed decision finding against Brush and Weed Specialist and New Farmers Drainage District. Along with the vote by one of the Commissioners on the Natural Resource Commissioners we believe the Commissioners are finally seeing the evidence (including the opinions of a well respected Iowa State Professor Bob Hartzler) does not support the position taken by the DNR. In addition there is an understanding that fish kills in drainage ditches are caused by many factors and that naturally occurring seasonal conditions can impact the fish that migrate into the drainage ditch system. No dead fish were found outside the ditches in any stream, river, or lake. We are urging the DNR to dismiss further legal proceedings in light of the EPC's decision." The state has indicated that they do not plan to dismiss any actions at this time.

Waterways is a quarterly publication of the Iowa Drainage District Association. Comments can be directed to the association at:

Iowa Drainage District Association

www.iowadrainage.org

3775 EP True Parkway, #124

West Des Moines, Ia. 50265

515/221-1961 (phone)

515/598-7897 (fax)

515/707-7451 (cell)

jtorbertidda@mchsi.com

“Working for the mutual protection and benefit of Iowa Drainage Districts”

President	Harlan Hansen Humboldt County Supervisor
Vice-President	Myron Amdahl Wright County Supervisor
Board Members	Paul Beneke Pocahontas County Supervisor Ken Chalstrom Clay County Supervisor Phil Condon Webster County Supervisor Don McGregor Kossuth County Supervisor Ron Smith Emmet County Supervisor
Staff	John T. Torbert, CAE, Executive Director

CREP Field Specialists – Dennis Barrick, Jay Lynch, Lannie Miller, Bob Powers, Eddie Peterson, Ike Petersen and Mark Sandvik.
Engineering support–Don Peterson.(CREP field specialists and engineering support personnel work for IDDA under a contract administered by IDALS).

Executive Director Notes

March “madness” has officially started so I guess spring will finally arrive.

Thanks to all of you who attended the IDDA annual meeting. The reviews received on the meeting were very positive. They also yielded some suggestions on programming changes for this year’s meeting to make it even better. By the way, this year’s meeting is set for December 7.

We have passed the forecast midpoint of the legislative session. Appropriations are not done until the very last but at this point, it looks like we might be successful in restoring some funding to the Ag drainage well program that was eliminated last year. Both the house and senate have money in their appropriations bills for the program. This is one of IDDA’s top priorities. IDDA will issue a full legislative report at the end of the session.

The board of directors met in January and elected Harlan Hansen, Humboldt County supervisor as President and Myron Amdahl, Wright County supervisor as Vice-President. They also designated TP Anderson Company to fill the treasurer role for the association.

We still await the Iowa Supreme Court decision on the Calhoun County railroad case. IDDA will release information on the decision once it becomes available.

Times are good in production agriculture right now. There seems to be a great deal of interest by landowners in improving their drainage systems. Landowners recognize the value that drainage adds to their cropland.

As always, I continue with my member visits and plan to get around to all member counties by this summer.

– John T. Torbert

Watershed Planning Grants Announced

The DNR is opening another round of Watershed Planning Grants, which help local Iowa groups find solutions for improving Iowa’s state’s lakes, streams and rivers. Groups can get started by calling for a consultation to discuss their ideas and have their questions about the grant application process and watershed improvement answered. Applications are due April 2. Planning grants offer \$10,000 to \$50,000 to develop Watershed Management Plans that address problems and create solutions for waters on the state’s impaired waters list. Local or regional groups, organizations or agencies (public or private) are eligible to apply. More information is available on the DNR website at: <http://watershed.iowadnr.gov/WatershedPlanning/WatershedPlanningGrants.aspx>.

Linn County Farm Bureau works to defend farm drainage

Linn County Farm Bureau members went on the offensive recently to counteract erroneous charges in county documents, websites and other places citing farm drainage as a contributor to flooding, surface water pollution and other environmental issues.

In a meeting with Linn County's supervisors and other county officials, Farm Bureau invited experts to explain the value of field drainage to the environment, farmers and the community. Contrary to the statements in the Linn County documents, the experts pointed out that research shows that tile drainage in farm fields can actually help reduce surface runoff. It also helps to stem soil erosion and nutrient loss that occurs in surface runoff from fields, they said.

Creating Water Storage

"We create water storage capacity through drainage that helps reduce surface runoff," said Matt Helmers, and Iowa State University (ISU) agricultural engineer who has done extensive research on tile drainage. Drainage, he said, give the soil the capacity to absorb more water for subsequent rainfall events. However, after record rains like those in 2008 when the soil is completely saturated, more water is going to run off whether there is tile or not, he said.

Helmers made a presentation to the Linn County supervisors on the value of field drainage and answered their questions. He was supported by Greg Brenneman of ISU extension and Dean Lemke of the Iowa Department of Agriculture and Land Stewardship (IDALS).

Leaders of the county Farm Bureau felt it was important to bring in experts to help county leaders get accurate information from recognized experts on the value of farm drainage, said Brian Lensch, the Linn County president. "There seems to be an agenda out there against field tile and we felt we needed to get out the real information," he said.

It's especially important to get the correct information to county officials and others because Linn County and Cedar Rapids are still recovering from the devastating flood of 2008, said Curt Zingula the Linn County Farm Bureau voting delegate. "We really seem to have people out there who were planting seeds of discontent. They were blaming tile drainage for flooding and using it as a scapegoat. We need to counteract that," Zingula said.

Statements criticizing farm drainage showed up in Linn County's rural land use plan late last year, Zingula explained.

Under the heading Hazard Mitigation, the county rural land use plan states: "Increased impervious surfaces and agricultural tiling have changed surface and ground flows of water, resulting in faster drainage, quicker flooding

and decreased flow in dry times."

Us against them climate

Cindy Golding, a Linn County Farm Bureau member, said statements against agricultural drainage in the land use plan, in the newspaper and other places tended to pit farmers against city dwellers over the issue of flood control. She noted that there was extensive press coverage of a recent book that cited farm drainage as one of the big factors in the 2008 flooding in eastern Iowa.

"It's setting up as an 'us versus them' climate that is really taking on a life of its own and is not going to help anybody," Golding said.

Zingula said attacks on agricultural drainage in Linn County and parts of the state threaten "one of the best conservation tools that farmers have." Tile drainage is essential for many conservation practices, such as no-till farming and terracing, to work for farmers, he said.

Source – Iowa Farm Bureau Spokesman

Unattributed Wisdom

"Repetition does not transform
a lie into the truth."



KUEHL & PAYER, LTD
Consulting Engineers
Land Surveyors
Management Consultants
www.kpltd.com

Experienced professionals committed to quality engineering services for Iowa's drainage districts.

Repair & Improvement Studies
Annexation & Reclassification
Common Outlet Assessments
Drainage Well Closure Projects
Government Regulation Compliance & Permits
Wetland-Related Appeal Assistance
Wetland Restoration Impact Studies
Levy Calculation Assistance

... building trust and lasting relationships with the people among whom we work and live.

Storm Lake
(712) 732-7745

Algona
(515) 295-2980

Sac City
(712) 662-7859

EPA Seeks to Extend Jurisdiction of Clean Water Act

Each year, the Center for Agricultural Law and Taxation (CALT) at Iowa State University publishes a listing of top 10 agricultural law developments. In 2011, one of those developments could have a large impact on drainage in Iowa. Here is the CALT summary and what it might mean.

On April 27, 2011, the United States EPA issued proposed “Draft Guidance on Identifying Waters Protected by the Clean Water Act” concerning its jurisdiction under the Clean Water Act’s dredge and fill provision. The issue is important for farmers and ranchers due to the presence of seasonally ponded areas, drainage ditches, intermittently dry streams, prairie potholes and other wet areas located on farm and ranch land that may be adjacent to other waters over which the federal government may claim jurisdiction. In that event, agricultural activities can be curtailed substantially.

Under the draft guidance, the EPA is claiming expansive jurisdiction over certain waters well beyond what the existing regulations allow. Upon finalization, the Draft Guidance will replace present guidance that was first issued in 2003 and updated in 2008 after significant U.S. Supreme Court opinions did little to clear up existing questions about federal jurisdiction over isolated wetlands. Under the draft guidance, the EPA claims that interstate waters (including interstate wetlands that cross state lines) are always jurisdictional – they don’t require a significant nexus analysis (unless apparently the wetlands are merely “adjacent”). So, the EPA’s position is that such interstate ponds, isolated wet areas, streams etc., are fully subject to federal jurisdiction in every situation. More troubling, however, is that the Draft Guidance redefines the EPA’s regulatory definition of “other waters” and “physically proximate” waters. Under the draft guidance, the regulatory (and judicial) definition of “adjacency” would no longer apply just to wetlands but would also apply to lakes and ponds that aren’t typically viewed as “wetlands” and isolated interstate waters. These types of waters would only be subject to the “significant nexus”

analysis. They would not, according to the EPA, require an interstate commerce connection. That is clearly beyond the scope of existing regulations. In addition, waters that have historically had a seasonal flow are jurisdictional, with EPA field staff having the ability to determine what seasonal flow means in each situation. That could turn out to be very important to farmers and ranchers, particularly in the more arid western half of the United States.

The Draft Guidance also expands the federal government’s jurisdictional reach in another matter. The EPA says that the regulatory process is to identify all “similarly situated” waters in the watershed as the beginning point of the “significant nexus” analysis. So, where a significant nexus has been identified for a particular wetland, the EPA will assume that all other comparable wetlands in the same watershed are subject to jurisdiction.

While the Draft Guidance does not eliminate the exemption for “normal farming activities,” that may not be meaningful. Existing regulations limit the exemption to pre-established farming activities that do not bring a new area into farming or require modifications to the hydrological regime. In addition, the courts have narrowly construed the exemption to those situations where the agricultural activity is extremely minimal and no additional areas of “navigable waters” are brought into use. Also, exempt activities are subject to a “recapture” provision that requires a permit if a discharge changes the use of the waters, impairs the water’s flow or circulation, brings an area of navigable waters into a use to which it was not previously subject, or reduces the reach of the waters. On that point, a significant federal court opinion in 1994 held that the exemption only applied to activities occurring on the remainder of the land. The part of the farm in question adjoined cropland that the landowner owned and operated and was part of the same drainage system. The court held as irrelevant for CWA purposes a prior SCS classification of

Continued ►



IOWA CONCRETE PRODUCTS CO.
4401 Westown Parkway, Suite 121
West Des Moines, Iowa 50266-6721
(515) 223-8761 (800) 858-PIPE
FAX: (515) 223-8737

- Reinforced Concrete Pipe
- Concrete Drain Tile
- Precast Manholes & Intakes
- Special Utility Structures

**Manual and Automatic
Water Level Control Structures**
FOR DRAINAGE WATER MANAGEMENT



Call Today!
1-800-232-4742

Agri Drain
CORPORATION
PO Box 458 • 1462 340th Street • Adair, IA 50002
Ph: 800-232-4742 • Fax: 800-282-3353 • www.agridrain.com
Call for a FREE catalog!

IDDA Annual Meeting held December 2

Almost 100 people gathered in Fort Dodge on Friday, December 2, 2011 for the IDDA annual meeting. Speakers included Dean Lemke, IDALS; Dr. Matt Helmers with ISU; Kevin Griggs with Griggs Environmental Strategies and Jamie Ridgely with Agren Inc. in Carroll, Iowa. The featured luncheon speaker was Chuck Gipp, deputy director of the IDNR.

At the business meeting held earlier in the day, delegates re-elected two people to the IDDA board of directors – Harlan Hansen, Humboldt County supervisor and Myron Amdahl, Wright County supervisor. Both were elected to three year terms.

Delegates also approved legislative priorities for this legislative session. The following priorities were approved:

1) Crep/Wetlands Funding–The IDDA supports an increased state appropriation from the “Environment First” fund for the Crep/Wetlands program. Every dollar appropriated by the state is able to leverage four federal dollars. The current state appropriation level is \$1 million – a reduction from the previous year’s funding. With increasing land prices across the state, CREP appropriated dollars do not go as far. The program currently has a waiting list of interested landowners. An increased state appropriation would allow increased construction of nitrate removal wetlands providing increased protection for Iowa’s water. IDDA supports restoring the funding to at least \$1.5 million annually – the funding level before the program was cut.

2) Regulation of Wetlands–The IDDA opposes any legislative proposal to empower the state of Iowa to regulate the dredging or filling of isolated wetlands. The dredging or filling of the majority of these isolated wetlands is already subject to review and regulation under provisions of the farm bill or local subdivision approval and building permit authorities. The state of Iowa cannot afford and ought not to divert precious resources toward creation of a needless regulatory bureaucracy.

3) Ag Drainage Well Closure–There are currently about 140 Ag drainage wells in active use – acting as direct chemical pipelines into drinking water supplies. Previously, state funds were provided to help close these drainage wells. However, the 2011 legislature eliminated those funds. The ag drainage wells remaining are going to be difficult and costly to close. IDDA supports the reinstatement of funding for the Ag drainage well program to at least \$1.25 million.

4) Expansion of Definition of Trustee Eligibility–In some rural drainage districts that still elect trustees, the Code definitions of who is eligible to be a trustee have become problematic. More and more landowners own land in a form other than with their names. For example, they may have trusts that own the land, a partnership or a family farm corporation. The definition of who is eligible to be elected trustee should be expanded to include other types of individuals with ownership interests or legally recognized representatives of business entities. Examples of this could include stockholders, officers, directors, trustees, partners, members, managers or possibly even farm managers.

Continued from page 4

the drainage activities as a “commenced conversion.” The court also noted that even if the activities were held to be exempt, they would be subject to the recapture provision. Thus, only routine activities with relatively minor impacts on waters are exempt and the exemption will be lost if the new activity is a new use and the activity reduces the reach or impairs the flow of water.

The EPA admits in the Draft Guidance that it expects “the extent of waters over which the agencies assert jurisdiction under the CWA will increase compared to the extent of waters over which jurisdiction has been asserted under existing guidance.” In addition, EPA notes that “each jurisdictional determination will be made on a case-by-case basis considering the facts and circumstances of the case and consistent with applicable statutes, regulations and case law.” Thus it is probably correct to anticipate that wetland litigation will increase. If the Draft Guidance is finalized, all farmers, ranchers, rural landowners, businesses, land developers and others owning land with geographical and topographical characteristic that either contain wet areas or could be impacted by a watershed will have to determine whether the new rules could potentially apply and take whatever action is appropriate. Thus, the fact that the Draft Guidance retains the existing exemption for “normal farming activities” is essentially irrelevant. It only applies to routine activities with relatively minor impacts on waters, and the exemption is lost if the activity is a new use or reduces the reach or impairs the flow of water.



DON REFFER

P.O. Box 641
1108 230th Street
Algona, IA 50511

**Professional
Application of
Right-of-way Industrial
and Aquatic Brush and
Weed Control Products**

Telephone
Office: (515) 295-4114
Toll-free: (888) 860-0040

Standing up for Iowa's tile drainage system

The following editorial appeared in the Iowa Farm Bureau "Spokesman" last year. It was written by Dirck Steimel

Along with many of Iowa's Farm Bureau county presidents, I recently got a firsthand look at one of the world's engineering wonders – the Panama Canal.

The canal, opened nearly a century ago, continues to serve its purpose, saving billions in transportation costs. It was amazing to see the towering cargo ships as they edged through the canal's narrow locks and then into the open waters of the Pacific.

Right here in Iowa is another century-old engineering wonder, the state's vast network of drainage tile.

Interestingly, the two great engineering projects were both completed in the early part of the 20th century. And, as Iowa Secretary of Agriculture Bill Northey noted recently, the total cost of digging the trenches, placing drainage tile under some 9 million acres and hooking it into outlets was roughly the same as constructing the Panama Canal.

Like the Panama Canal, our tile drainage system is still hard at work, draining excess water from Iowa's rich soils. As Iowa farmers know, without the drainage system it would be virtually impossible for the northern

part of the state to produce high yields of the crops the world desperately needs. The drainage system also makes a huge contribution to soil conservation by keeping soil and nutrients on fields.

Drainage under fire – But instead of being celebrated, Iowa's tile drainage system is often under fire. Environmental activists and other have attacked the tile drainage system, blaming it for recent flooding and other problems. They recommended that the tile system be dismantled, or be allowed to atrophy, turning the highly productive lands of northern Iowa into tall grass prairie.

With farmers being asked to produce more food while leaving a smaller environmental footprint, getting rid of Iowa's tile drainage system would be exactly the wrong approach.

Instead, it is clearly time to work to upgrade the state's drainage system, just as Panamanians are modernizing their canal. As part of that upgrade, it makes sense to expand the state's program of strategically-placed wetlands into a system to remove nutrients from the drainage water.

Such a program would lead to higher yields, reduced soil erosion and improved water quality. Or, as Northey put it, "it's a win-win-win."

PMB 124, 3775 E.P. TRUE PARKWAY
WEST DES MOINES, IA 50206



PRSR STD
US POSTAGE
PAID
PERMIT NO. 21
LAURENS, IA