

# WATERWAYS

A Quarterly Publication of the Iowa Drainage District Association

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## Des Moines Water Works sues three Iowa Counties—wants drainage regulated

**O**n March 16, Des Moines Water Works (DMWW) officially filed suit against three Iowa Counties – Buena Vista, Calhoun and Sac. The suit is against the Boards of Supervisors in those counties in their capacity as trustees of several drainage districts in those counties.

The fifty-two page suit contends that the named drainage districts have violated the federal clean water act through their alleged discharge of nitrate pollution into the Des Moines River and for “the failure to obtain a National Pollution Discharge Elimination System (NPDES) permit or other state permit in violation of the clean water act.” The suit aims to have drainage districts regulated as “point sources” under the Clean Water Act.

The suit claims that the discharge of nitrate by the drainage districts is a “permanent invasion of the Des Moines Water Works’ use of property.” The suit attempts to differentiate between the types water carried in drain tile and whether it is mainly storm water or groundwater.

Among the other counts in the suit, the contention is made that drainage districts are a public nuisance (this count also contends that dd’s are anti-social), statutory nuisance, private nuisance, are guilty of trespass, are negligent, are unlawfully taking the property of DMWW without just compensation and that “the Iowa Code and decisions of the Iowa Supreme Court have developed a constitutionally defective immunity for drainage districts that violates Des Moines Water Works’ due process and equal protection rights.”

Among the many remedies sought by the suit are that districts be enjoined “from any and all ongoing and future violations of the Clean Water Act by ordering compliance with the CWA and NPDES permit program”, that Civil penalties be assessed and litigation costs and reasonable attorneys fees be awarded to the DMWW.

The three counties have retained legal representation in the lawsuit. IDDA will also seek to intervene in the case pending the receipt of the funding necessary to do so.

## Study shows drainage does not cause flooding

Agricultural tile drainage is an integral part of Iowa’s landscape, with nearly 30% of Iowa’s cropland being drained. The drainage allows for efficient crop production in Iowa’s nutrient rich soils by removing excess water from frequently inundated fields through subsurface pipe networks. For all their productive benefits, these tile systems were suspected by some of making flooding worse in Iowa.

Recent published research shows that is NOT the case. Dr. Ricardo Mantilla, an assistant professor in civil and environmental engineering and an assistant faculty research engineer at the University of Iowa’s IIHR – Hydroscience and Engineering center says that for very large storm events, field tile has little impact. Tile drainage can, however, reduce the peak flows at the outlet for certain storm events, he says. Mantilla presented his research results at the Iowa-Minnesota-South Dakota Drainage Research forum held at Iowa State University last November.

In his research, it was found that adding drained fields to the densest portion of the Clear Creek Watershed in Iowa and Johnson Counties can decrease the peak flow at the

outlet. According to the results, tile drainage is capable of reducing peak flows and possibly minimizing flooding in Iowa at the field and catchment scales for certain events. The addition of drainage can decrease flows in less than permeable soils, but increase flows in more permeable soils because of the alteration to dominant pre-drainage flow mechanisms.

The field scale DRAINMOD model was used in the research in conjunction with a simplified routing equation to analyze the impact of tile drains in the Clear Creek Watershed. Current research has concluded that the impacts of tile drainage on the hydrologic response entail a complex interaction of processes that is dependent upon landscape, climatic and anthropogenic controls, and that the effects of tile drainage vary with watershed scale. The field results indicate that the soil permeability and rainfall event size are essential in determining the impact of tile drainage. *Editor’s note – IDDA is going to extend an offer to Dr. Mantilla to speak at the IDDA annual meeting in December. Summary published in Farm Bureau Spokesman.*



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

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## Ag groups say DMWW should explore options to disposing of nitrates in river

The Des Moines Water Works (DMWW) should consider alternatives to its current practice of discharging nitrates and other substances it removes from its water sources back into the Raccoon River, the Iowa Farm Bureau and other farm and agribusiness organizations said last week in written comments to the Iowa Department of Natural Resources (DNR).

The groups, in response to the DMWW’s application for a National Pollutant Discharge Elimination System (NPDES) permit under the Clean Water Act, noted that it was “hypocritical” for the DMWW to rely only on discharging while dismissing other alternatives.

At the same time, they said, the DMWW claims that farmers are willfully discharging nutrients into the Raccoon River. The central Iowa water supplier is threatening a lawsuit over water quality and has publicly demanded that farmers and others spend billions of dollars to reduce nutrients and address the water supplier’s infrastructure challenges.

### Viable alternatives

“We encourage the applicant to work with scientists to choose a viable alternative for either reducing or avoiding the discharge,” the agricultural groups said. “Whether any of these alternatives are practicable, economically efficient and affordable should be examined over the course of the next five years in order to bring the discharge within the permit limits.”

The board of trustees of the DMWW, which draws much of its water from the Raccoon and Des Moines rivers, is expected to vote this week to pursue a lawsuit against 10 drainage districts in Buena Vista, Calhoun and Sac counties in northwest Iowa over water quality issues. The water supplier’s CEO, Bill Stowe, has stated that the voluntary Iowa Nutrient Reduction Strategy is a failure and that farmers should be regulated and be required to obtain Clean Water Act permits.

The Iowa Nutrient Reduction Strategy, launched in 2013 by the Iowa Department of Agriculture and Land Stewardship and the DNR with technical support from Iowa State University, encourages farmers to adopt one

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# Collaboration is the path forward for water quality

**By Bill Northey – Iowa Secretary of Agriculture**

Iowa water quality is certainly a hot topic. Iowa farmers have been focused on the issue, but the potential Des Moines Water Works lawsuit has brought new attention to the topic.

The challenge has always been how do we make the most progress on this important issue in the timeliest manner. It is vitally important that we improve water quality while maintaining the strong agricultural production that is so important to Iowa's economy.

I truly believe working with farmers, harnessing the innovation of our agriculture community and finding new ways to help us do an even better job on the farm is how we will see results. This is how we have made progress to increase yields and reduce soil erosion, and that is how we will see progress on water quality.

Des Moines Water Works is taking the wrong approach and has the potential to take us back to the days of finger-pointing and inaction. A lawsuit is years, if not a decade or more, away from reaching a final decision. Lawsuits and regulations don't actually make water quality improvements — practices on the ground do that.

Cedar Rapids is a great example of a community that is taking the approach of working with farmers to address water quality issues. They recently received \$2 million in funding through the USDA Regional Conservation Partnership Program to work with 16 organizations and agencies to address water quality and water supply issues for the city. Investing limited funds to work with farmers is much more productive than starting on a long and expensive court battle.

The Iowa Nutrient Reduction Strategy was unveiled in 2012 to better focus our water quality efforts. The Iowa Department of Agriculture and Land Stewardship, the Iowa Department of Natural Resources and a group of scientists led by Iowa State University, working with a number of other partners, created a framework outlining what it would take to reach the aggressive goals we all share for water quality.

The strategy showed that we need additional practices implemented on farms focused specifically on improving water quality, as well as infrastructure improvements at sewage treatment plants and industrial sites.

Farmers and cities across the state are committed to meeting the challenge of improving water quality head on. No one is claiming we are done, but it is important to recognize the significant steps that have been taken. In the past two years, more farmers have tried new practices. They invest their own money, along with assistance from local, state and federal partners, to explore what they can do on their farm to better protect water quality.

It is important to recognize that Iowans have safe water to drink thanks to the hard work of the water supply utilities across the state. Fortunately, we have infrastructure in place to ensure a safe and reliable supply of drinking water in Des Moines and communities across the state.

There is a misconception that our water quality is terrible and getting worse. That is not true. The Iowa Soybean Association analyzed nearly 5,600 water samples taken from 41 sampling locations in the Raccoon River watershed from 1999 to 2014 and found that nitrate concentrations are decreasing significantly, down by nearly 25 percent on average. Analysis by the Iowa Geological Survey shows 80 percent of rivers show no significant change in nitrate levels.

My message to Iowans since this potential lawsuit was first announced was that we can't let this distract us from the important work we have to do to improve water quality. Iowa's agriculture community is committed to working together and making significant investments to continue to make progress. I hope Des Moines Water Works will join us in our efforts. Collaboration has been and will continue to be the most effective path forward for improving water quality in Iowa.



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# Do the Des Moines Water Works claims hold water?

The following article was written by Kristine A. Tidgren who is the staff attorney for the Center for Agricultural Law and Taxation at Iowa State University. The article was written in January, shortly after the Des Moines Water Works filed their notice of intent to sue.

## Overview

On January 8, 2015, the Des Moines Board of Water Works Trustees (DMWW) voted unanimously to send a notice of intent to file a Clean Water Act citizen lawsuit against the county supervisors of Sac, Buena Vista, and Calhoun Counties in Iowa. The notice alleges that the supervisors, in their role as trustees for 10 Iowa drainage districts, are violating the Clean Water Act (CWA) by discharging pollutants into the Raccoon River through various point sources without proper permits. The notice alleges that if the drainage districts do not cease discharging pollutants without permits or act within 60 days to correct the violations, DMWW will file their federal lawsuit. The notice also threatens state law claims of nuisance, trespass, and negligence.

DMWW contends that it is without other recourse

to avert high nitrate levels in its water, which flows from the Raccoon and Des Moines Rivers and supplies approximately 500,000 consumers. DMWW alleges spending thousands of dollars for a denitrification process required during certain days to ensure safe drinking water. DMWW states that it must pay more than \$7,000 for each day the process is operated. Nonetheless, DMWW asserts that the lawsuit is not about the money, but about meeting a “public safety need.”

## Is There a Point Source?

The threatened action is truly unprecedented. Drainage districts are unique creatures of Iowa law, which grants county supervisors the authority to create drainage districts for the purpose of straightening, widening, deepening, or changing any natural watercourse whenever the same will be of “public utility or conducive to the public health, convenience or welfare.” The law specifically states that “the drainage of surface waters from agricultural lands and all other lands or the protection of such lands from overflow shall be presumed to be a public benefit and conducive to the public health, convenience and welfare.” In other words, drainage districts exist to retain the productivity of farmland by ensuring that surface waters (which generally comprise rainwater) are not allowed to flood the land and take it out of production.

This premise, however, must be challenged by DMWW for its suit to survive initial scrutiny. Under the CWA, a point source does not include agricultural stormwater discharges and return flows from irrigated agriculture. Congress specifically excluded agricultural stormwater discharges from CWA permitting requirements. Instead, this type of discharge is considered nonpoint source discharge, which is “widely understood to be the type of pollution that arises from many dispersed activities over large areas, and is not traceable to any single discrete source.” Because it arises in such a diffuse way, nonpoint source discharge is very difficult to regulate through individual permits. Thus, to pursue its CWA litigation, DMWW must prevail in its novel argument that the drainage districts manage point source discharges, rather than nonpoint source discharges. To make this argument, DMWW contends that the discharge at issue is not agricultural stormwater runoff, but artificially drained groundwater. Thus, DMWW’s notice contends that the discharge is a point source subject to CWA permitting requirements.

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## Relevant Federal Case

The only federal case to address a similar claim suggests that DMWW’s claims will likely falter. In 2013, the Federal

District Court for the Eastern District of California ruled that farm drain tiles were not point sources of pollution. The plaintiff, a fishermen's association, sought to require the administrators of a grasslands bypass project to obtain a permit to discharge pollutants into a river. The plaintiffs argued that although much of the land at issue was irrigated cropland, the "return flows from irrigated agriculture" exception did not apply to prevent the land's drainage tiles from being point sources. Specifically, the plaintiff argued that the exception did not apply because the water tables were high without the irrigation and the tiles were not draining irrigation outflows, but "polluted groundwater." The court dismissed the action, finding that Congress intended to "exempt drainage from farms practicing crop-production agriculture facilitated by irrigation, rather than focusing on what the components of a particular flow are on any given day."

The same could be argued for the agricultural stormwater runoff exception: Congress intended to exempt drainage from farms practicing crop-production agriculture from the permitting requirements of the CWA. There is an inseparable interconnection between stormwater runoff and the groundwater into which it seeps. It is difficult to see how a court could possibly separate the two in analyzing whether the agricultural exemption applied to a particular system of farm drainage tile.

If a complaint is filed, an Iowa federal court will most likely have the opportunity to decide this question. Even if the suit is ultimately dismissed at an early stage, it is probable that DMWW and the counties at issue will invest thousands to convince the court of the legitimacy of their differing positions.

## Can DMWW Sue the County Supervisors?

That is, if the suit gets that far. Another issue raised by this case is the propriety of filing suit against the county supervisors acting on behalf of the drainage districts. The Iowa Supreme Court has held that drainage districts are not subject to a money judgment in tort under any state of facts. The reason for this is the "special and limited powers and duties conferred by the Iowa Constitution" and the fact that the "statutes do not include tort liability for money damages." "A drainage district is merely an area of land, not an entity subject to a judgment for tort damages." The Iowa court has also ruled that neither the county nor the board of supervisors can be vicariously liable for a money judgment against a drainage district. This law clearly undermines at least some of the claims alleged by DMWW. Although the notice threatens that DMWW will seek "damages," the extent of these claims will not be known until a complaint is actually filed. Iowa courts have allowed claims against drainage districts to compel the proper maintenance of a drainage district's drainage system. These cases, however, have noted the limited nature of a drainage district's existence. These suits have been allowed against districts only where the claims implicate a specific statutorily granted power or duty granted to the district.

It is impossible to see what relief the county supervisors

could provide to DMWW. The county has no authority over the use of the land at issue. The drainage districts exist solely to assess landowners so that a unified drainage system can be established. DMWW alleges that the nitrates flowing through these tiles stem from the farming practices of the landowners or tenants. There is no link between these individual farming practices and the drainage districts. Establishing the legitimacy of a CWA suit against the county supervisors (on behalf of their drainage districts) will no doubt be another early issue litigated by the parties if DMWW proceeds with its action.

## Where Would the Blame End?

If the litigation were to cross the above hurdles, where would the blame end? Would these defendants be forced to implead all other landowners within the watersheds feeding the DMWW water supply? Would DMWW be sued by downstream plaintiffs claiming DMWW must do more to avoid sending the nitrates it removes from its drinking water back down the river? It is difficult to see how a court could sort out the contributing cause issues implicated by DMWW's proposed lawsuit. It is also difficult to see how this lawsuit would be an appropriate forum to remedy Iowa's clean water issues.

## Related Developments

Shortly after the DMWW notice was issued, United States Secretary of Agriculture Tom Vilsack announced that the State of Iowa would receive \$3.5 million as part of the Regional Conservation Partnership Program designed to, among other things, "cut down on fertilizer runoff" in an attempt to "improve water quality throughout the country."

Since 2013, Iowa leaders and landowners have sought to improve the quality of Iowa water through the Iowa Nutrient Reduction Strategy, a voluntary program established to assess and reduce the delivery of nutrients into Iowa waterways (and ultimately the Gulf of Mexico). The program specifically includes "nonpoint sources, including farm fields."

We will be watching to see what transpires during the next 60 days, and will bring you updates if DMWW ultimately files its complaint.

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of a number of strategies, such as cover crops, wetlands and bioreactors, which have shown, over the long term, to reduce the loss of nitrogen and phosphorus from farm fields.

As they implement the strategy, farmers have increased the investment of their own resources, and at least \$7.5 million was spent on state and federal land treatment programs in fiscal 2014 in the nine counties that comprise the majority of the Raccoon River watershed, the comments said.

Along with the Iowa Farm Bureau Federation, the comments were signed by the Agribusiness Association of Iowa, the Iowa Cattlemen’s Association, the Iowa Corn Growers Association and the Iowa State Dairy Association.

**Plant use declining**

The agricultural groups also noted that the number of times that the DMWW has needed to operate its nitrate removal system has declined over time. They also questioned the infrequency of discharge water testing by the DMWW.

Nutrient levels in the Raccoon River have actually trended down since the 1990s, and the DMWW has been able to reduce the number of the days that it runs its nitrate removal system, according to the ag group’s comments to the DNR. Indeed, the DMWW did not need to run it at all for five years between 2007 and 2012, they noted.

While farmers have adopted new practices and increased investments to reduce nutrient loss, unpredictable weather patterns and soils that are naturally rich in nutrients remain the dominant factor influencing nutrient levels in the Raccoon River, the ag groups said.

The groups also asked that the DNR increase water sampling in the Raccoon River to once per week and require that the samples be publicly reported. *Source – Iowa Farm Bureau Spokesman*

## IDDA board appoints new members, elects officers

The IDDA board had its organizational meeting for the year on January 28. The first item of business was replacing three board members who retired – Ken Chalstrom, Clay County; Ron Smith, Emmet County and Paul Beneke, Pocahontas County. The IDDA bylaws provide that board vacancies are filled by appointment of the board of directors. To fill the vacancies, the board appointed Scott Jacobs, Calhoun County supervisor, Ed Noonan, Palo Alto County supervisor and Bev Juhl, Emmet County supervisor.

Also on tap for that day was the election of officers for 2015. Harlan Hansen, Humboldt County supervisor was re-elected as President and Keith Dencklau, Webster County supervisor was elected as Vice-President.




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