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Dead Zones & Drinking Water, Part 4: the Des Moines Water Works Lawsuit

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In addition to the Gulf of Mexico hypoxia that has led to the Illinois Nutrient Loss Reduction Strategy, many in the agricultural community are watching closely the lawsuit filed by the Des Moines Water Works (DMWW) in Iowa. DMWW has sued because of nitrates in the Des Moines drinking water supply. The lawsuit poses complicated questions about farming and water quality regulation. Part 4 in this series undertakes an initial review of that lawsuit and preliminary analysis of the legal issues.

DMWW has sued the boards of supervisors for Sac, Calhoun and Buena Vista counties as trustees of specific drainage districts. The lawsuit is a citizen enforcement action under the Federal Clean Water Act (CWA) and alleges that the drainage districts violated the CWA by discharging nitrate pollution into the Raccoon River without a permit. In addition to the CWA claims, DMWW has also put forth nuisance, trespass, negligence claims, as well as one for an unconstitutional taking of DMWW's rights. The CWA claim is the focus here.

The CWA was passed in 1972 to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters" and it operates mostly by requiring permits (National Pollutant Discharge Elimination System (NPDES) permits) for any discharge of a pollutant from a point source into navigable waters of the U.S. (33 U.S.C. §1251(a)). The term "point source" is defined as:

> any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged. This term **does not include agricultural stormwater discharges** or return flows from irrigated agriculture (33 U.S.C. §1362(14) (emphasis added)).

Pursuant to the statute, agricultural stormwater discharges are not within the definition of point source and are considered exempt from direct CWA regulation and the NPDES permit system. DMWW's lawsuit is notable because it challenges whether this exemption applies beyond the farm field for nitrate-transporting water discharged at the drainage district level. DMWW argues that under natural conditions very little

nitrate would be discharged and that the subsurface drainage infrastructure creates an artificial mechanism for removing water and nitrates.

DMWW's claims are in line with a question similar to the one asked by the late Justice Antonin Scalia: "are stormwater discharges 'natural runoff' when they are channeled through manmade pipes and ditches, and carry with them manmade pollutants?" (*Decker v. Northwest Environmental Defense Center*, 133 S. Ct. 1326, 1342 (Scalia, concurring in part and dissenting in part)). The Supreme Court did not directly answer Justice Scalia's question, reversing the Ninth Circuit on other grounds and sending the case back to the appellate court (*Decker*, 133 S. Ct., at 1338). The version of that question raised by DMWW is whether it continues to be an agricultural stormwater discharge when it reaches the end of the district lines at the Raccoon River.

According to Environmental Protection Agency (EPA) regulations, "storm water means storm water runoff, snow melt runoff, and surface runoff and drainage." (40 C.F.R. 122.26(b)(13)). EPA regulations further state that "[a]ny introduction of pollutants from nonpoint-source agriculture and silvicultural activities, including storm water runoff from orchards, cultivated crops, pastures, range lands and forest lands" does not require an NPDES permit (40 C.F.R. 122.3(e)). The Eleventh Circuit has added that stormwater pumped into a lake "rather than flowing natural into the lake does not remove it from the exemption" (*Fisherman Against the Destruction of the Environment, Inc., v. Closter Farms, Inc*., 300 F.3d 1294, 1297 (11th Cir. 2002)). The property owner in that case was not required to have a permit because the agricultural stormwater exemption applied to the water management system which pumped the water into the lake (*Closter Farms*, at 1297).

This is not the issue raised by the DMWW lawsuit, however, because it is not suing the property owners. DMWW is suing the drainage districts for nitrates in the water collected, transported and discharged into the river. The importance in this distinction may be found in the Supreme Court's statement "that a point source need not be the original source of the pollutant; it need only convey the pollutant to navigable waters." (*S. Florida Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95, 105 (2004)). The Eleventh Circuit decision that was reviewed by the Supreme Court also concluded that the receiving body of water was the relevant body of water for determining the point source question (*Miccosukee Tribe of Indians v. S. Florida Water Mgmt. Dist*., 280 F.3d 1364, 1368 (11th Cir. 2002)). These decisions raise questions about the agricultural exemption. The water and nitrates originated in farm fields and due to precipitation, but does that matter at the point where the tile discharges into the Raccoon River?

Additionally, courts have looked to "the primary cause of the discharge" and whether that primary cause was a natural one such as precipitation (see, *Waterkeeper Alliance, Inc. v. U.S. EPA*, 399 F.3d 486, 508-09 (2d Cir., 2005), see also, *Concerned Area Residents for the Environment v. Southview Farm*, 34 F.3d 114, 120-21 (2d Cir., 1994)). Where human actions are the primary cause of the discharge, the agricultural stormwater discharge exemption may not apply. This distinction between natural conditions and those that are manmade has also been applied in the context of water diverted from reservoirs (see, *Catskill Mountains Chapter of Trout Unlimited, Inc., v. the City of New York*, 273 F.3d 481, 484 (2d Cir. 2001). In that case, the court looked specifically at whether "water is artificially diverted from its natural course and travels several miles" to be discharged into "a body of water utterly unrelated in any relevant sense" (*Id*., at 492).

All of which returns to the *Decker* case discussed above. On remand from the Supreme Court, the Ninth Circuit reiterated its conclusion that "when stormwater runoff is collected in a system of ditches, culverts, and channels and is then discharged into a stream or river, there is a 'discernable, confined and discrete conveyance' of pollutants and there is therefore a discharge from a point source' within the meaning of the Clean Water Act's definition of a point source." (*Northwestern Environmental Defense Center v. Decker*, 728 F.3d 1085, 1085-86 (9th Cir., 2013), referring to *Northwest Environmental Defense Center v. Brown*, 640 F.3d 1063 (9th Cir. 2011), reversed on other grounds by *Decker*, 133 S.Ct., at 1338). The decision again points to the importance of the impact of manmade infrastructure and systems in determining whether the exemption applies.

The outcome of the DMWW lawsuit is far from certain. Agriculture activities combined with natural events such as precipitation are exempt from the CWA's direct regulatory reach. EPA regulations specifically include drainage in that exemption. The nitrates that DMWW is suing over originated in farm fields and in part from natural events. The DMWW lawsuit, however, raises the question as to how far down the tile system the exemption applies. Specifically, it challenges whether the exemption still applies when the water reaches the rivers after it has been collected and carried through manmade drainage infrastructure.