



Dead Zones & Drinking Water: an Update on the DMWW Lawsuit

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June 9, 2016

farmdoc daily (6):109

Recommended citation format: Coppess, J. "[Dead Zones & Drinking Water: an Update on the DMWW Lawsuit](#)." *farmdoc daily* (6):109, Department of Agricultural and Consumer Economics, University of Illinois at Urbana-Champaign, June 9, 2016.

Permalink: <http://farmdocdaily.illinois.edu/2016/06/dead-zones-drinking-water-an-update.html>

The potential trial on the Des Moines Water Works (DMWW) lawsuit against three drainage districts in Iowa over nitrates in the drinking water has been [delayed](#) until June 2017. The lawsuit is currently in the motion stage. The Drainage Districts are seeking summary judgment against DMWW's claims under the Clean Water Act. This article continues the series on water quality issues for farming with a review of the arguments for and against summary judgment.

Background

As discussed in the [March 24th farmdoc daily article](#), DMWW has sued the boards of supervisors for Sac, Calhoun and Buena Vista counties as trustees over drainage districts (the "Drainage Districts"). The basis for the lawsuit is nitrate pollution in the Raccoon River which supplies drinking water to Des Moines. DMWW has made numerous claims, including under the Clean Water Act and common law torts such as nuisance and trespass. The key focus of this article continues to be the Clean Water Act claims.

In general, a motion for summary judgment is made by the defendants. The motion asks for a decision by the judge as a matter of law. It requires demonstrating that there are no real or genuine disputes of material facts in the case. The Drainage Districts must demonstrate to the judge that the facts are undisputed and in their favor as a matter of law. By contrast, DMWW merely needs to demonstrate that there are material facts that are in dispute. Those material facts would then impact how the law is applied. If the Drainage Districts win on the motion, the case is concluded at the district court level and is then subject to appeal. If DMWW wins on the motion, the case proceeds further towards trial. The burden rests with the Drainage Districts.

Discussion

Focusing exclusively on the Clean Water Act issues, this discussion reviews the arguments made by the Drainage Districts and DMWW for and against (respectively) summary judgment. This is not an attempt to make conclusions about the merits of either side's arguments, nor is it an attempt to discern how the judge might rule on the motion. The motion for summary judgment is part of the early stage of litigation, made before the parties have undertaken discovery. The pleadings, briefs and other legal materials can be found on the Iowa State University Center for Agricultural Law and Taxation [website](#).

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(1) Drainage Districts Arguments for Summary Judgment

The core of the Drainage Districts' argument is that under the Clean Water Act discharges from their drainage system are excluded from the permitting system (National Pollutant Discharge Elimination System (NPDES)). As discussed previously, NPDES permits are required for point sources of pollution. The Clean Water Act defines point sources. The definition excludes both return flows from irrigated agriculture and agricultural storm water discharges. Being excluded from the definition of point source, these discharges are not regulated directly under the Clean Water Act's NPDES permitting system. The Drainage Districts argue that "[b]ecause drainage districts' tile drains and ditches move excess water from the surface and the root zone following precipitation, those flows are exempt from NPDES permitting as 'agricultural stormwater discharges'" ([Drainage District](#), page 40; see also, [Drainage District reply](#) to DMWW brief).

Neither Congress nor the EPA have defined the phrase "agricultural stormwater discharge." The Drainage Districts argue that the term applies to all precipitation-related discharges. More specifically, they argue that the phrase includes water that runs off of the surface of the land as well as that which goes through the soil and flows through subsurface drainage tiles. The point being that Congress intended to keep farm-related discharges out of the permitting system so long as they were not due to negligence or improper actions; farmers should not be held responsible for discharges that were the result of weather. Thus, any discharges related to precipitation fall within the scope of the statutory exclusion, including those from the subsurface tile and ditch system designed to remove excess water from farm fields. This is because all water moving through that system is related to precipitation and excluded.

A significant part of the Drainage Districts' argument is based on legislative history. First, they explain that the 1972 amendments excluded farm runoff but left confusion about water from irrigated farmlands. This resulted in concerns that farmers who irrigated were treated unfairly under the law. Discharges from non-irrigated farming systems were understood to be outside of the permitting system but discharges resulting from irrigation were included. This meant that irrigated farmers were regulated but others were not. To remedy this, Congress amended the Act again in 1977 to clarify that return flows from irrigated farming were not subject to regulation as a point source. Additionally, Congress further amended the Act in 1987 and added the explicit exclusions for agricultural stormwater discharges along with return flows from irrigated agriculture. The Drainage Districts contend that the 1987 amendments were intended to cut back regulatory efforts that Congress felt had gone too far. The exclusions were also the result of Congressional extension of regulation to industrial and municipal storm water discharges. To provide clarity, Congress went further and explicitly excluded agricultural storm water discharges. The Drainage Districts point out that EPA and state regulatory agencies have interpreted the Clean Water Act as excluding agricultural drainage for 40 years.

(2) DMWW Arguments against Summary Judgment

DMWW makes two fundamental arguments against the motion for summary judgment. First, DMWW argues that the statute and regulations distinguish between discharges that are runoff from the surface of farm fields and those that are the result of groundwater below the surface. Water that runs off of the fields is storm water and excluded but once it passes through the soil it becomes groundwater and no longer excluded. Second, DMWW argues that while discharges from farms are excluded, those by the Drainage Districts are not because the Drainage Districts are not farmers and water that is collected and transported by the Drainage Districts' infrastructure is a point source.

DMWW's argument is that the definition of point source would clearly apply to Drainage District tiles and ditches because they are discernible, confined and discrete conveyances and fit within the very words of the statute. The discharges can be excluded only if they qualify as agricultural storm water discharge, and an exclusion to a definition has to be interpreted narrowly. In that sense, storm water narrows the exclusion to only surface runoff. Specifically, "the word stormwater considerably narrows the scope of the exclusion . . . to flow directly from, and in immediate temporal proximity to a storm event . . . runoff that is not absorbed by the soil, but rather moves across the surface of the land" ([DMWW](#), pg. 40). To support its argument, DMWW points to EPA's definition of the term storm water. EPA regulations state that storm water "means storm water runoff, snow melt runoff, and surface runoff and drainage" ([40 C.F.R. §122.26\(b\)\(13\)](#)). DMWW argues that EPA did not include subsurface groundwater in this definition and that the word drainage applies only to surface runoff. To make its point, DMWW quotes EPA's 1990 submission to the Federal Register for storm water discharges where EPA explained that "infiltration is not storm water" and that the word drainage means only "the flow of runoff into a conveyance" ([DMWW](#), page 42). DMWW adds that water running off of the farm field surface is largely free of nitrate but that once it passes through the soil and into the drainage tile it is "heavily polluted by nitrate" ([DMWW](#), page 43).

DMWW's second argument is that the agricultural storm water discharge exclusion applies only to farming and that the Drainage Districts are not engaged in farming. It argues that the Drainage Districts support farming in a manner akin to a public utility. In this way, "discharges of nitrate by farms and farmers are excluded from regulation, but discharges by Drainage Districts are still required to obtain NPDES permits because they are exactly the kind of large scale infrastructure which is within the heart of the purpose of the NPDES system" (DMWW, page 48). This returns DMWW to the definition of point source which controls the meaning of what is a nonpoint source. In this way, DMWW compares it to urban storm water runoff which is a nonpoint source but is considered a point source under the Clean Water Act when it is collected, transported and discharged by storm sewers.

Conclusion

DMWW appears to be making a novel interpretation of the agricultural storm water discharges exclusion in the Clean Water Act. The Drainage Districts argue that the exclusion applies broadly to include discharges made through the drainage system because they are all related to weather and precipitation. As such, the court should rule in its favor as a matter of law. DMWW argues that the water coming out of the Drainage District infrastructure is not storm water but rather groundwater that picks up pollutants as it passes through the soil and that the Drainage Districts are not engaged in agricultural activities. DMWW contends that these are facts which are in dispute and material to any decision by a court, thus the case cannot be decided at this early stage on summary judgment.

References

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