

Your guide to the Water Works lawsuit

EDITOR'S NOTE: Tempers are boiling. Rhetoric is flying. Lines have been drawn. And yes, even boycotts have been suggested. The Des Moines Water Works' decision to sue three northwest Iowa counties was the spark that finally ignited the volatile tension rippling on the surface of the water quality debate for years. Among the political posturing, outrage and debate, is a lawsuit that has the potential to affect the lives of countless Iowans and businesses. I asked Senior Staff Writer Perry Beeman to wade through the controversy in an effort to place the Des Moines Water Works lawsuit in the context of the broad fight over Iowa's water quality, by creating a sort of primer or FAQ on the utility's unusual decision to sue. Perry has been covering water quality in Iowa for more than three decades, regularly visiting farms, lakes, and rivers to report for the Des Moines Register on the relationship between one of Iowa's premier industries and the environment. Perry studied nitrate pollution as a fellow at the Marine Biological Laboratory in Woods Hole, Mass. and as part of the environmental studies program at Iowa State University. He has written frequently about efforts to reduce runoff pollution in Iowa and its impact on the seasonal dead zone in the Gulf of Mexico. The Water Works case involves some of the biggest political players in Greater Des Moines, and beyond. It brings to the forefront one of Iowa's touchiest balancing acts between industry and those affected by pollution from production. What follows is your guide to a lawsuit that's going to be as legally intriguing as it is important politically, economically, and environmentally. - *Chris Conetzkey, editor of the Business Record*

Awash in hyperbole

Waterworks lawsuit brings political tempers to boil

Des Moines Water Works' federal lawsuit against three northwest Iowa counties accuses them of threatening the health of 500,000 Central Iowans by discharging large amounts of nitrate from drainage ditches into the Raccoon River without a federal permit, in violation of the Clean Water Act.

As they say at the grain elevator: Those are fighting words.

The nitrate in question comes largely from nitrogen used to fertilize crops. The resulting nitrate pollution has been associated with deadly diseases at high concentrations, though Des Moines Water Works and other water utilities are required to keep nitrate at safe levels at the tap. The Raccoon is a key drinking water source.

The cost of keeping drinking water clean is a big part of the legal fight.

Nothing in recent Iowa history, except maybe the fight over large-scale hog confinements, has brought so much angst among farm groups, environmental organizations, and your average Iowa resident sick of swimming in E. coli, looking at lakes that are green, and paying higher water rates to cover the cost of pollution control equipment.

Grain farmers wonder what happened to the day they were revered for being the most productive in the nation -- and that was the end of the conversation. They firmly believe the drainage districts don't need federal permits. The farmers wonder why Des Moines Water Works won't give the relatively new Iowa Nutrient Reduction Strategy a chance to work, with its menu of options farmers can use to voluntarily address the problem.

Des Moines Water Works counters that decades of voluntary projects, like those listed in the strategy, have failed to bring significant improvement.

The utility spent most of last year building that case with water samples from the drainage districts that showed readings far beyond the federal limit for drinking water.

Water Works considers it unfair that customers are subjected to health risks and a tab of up to \$7,000 a day at times to remove nitrate deposited upstream. Water Works argues that downstream property owners should not be damaged by uncontrolled pollution.

Things are getting worse, not better, Water Works contends, but that stance is directly countered by the likes of the Iowa Soybean Association, armed with a certified laboratory and Water Works' former chemist, Chris Jones, who has analyzed thousands of samples. Some data suggest that there have been modest drops in nitrate concentrations in places.

This is not your average Iowa environmental debate. At stake are the pocketbooks of Greater Des Moines residents, farmers and taxpayers. The lawsuit could change how the nation enforces the Clean Water Act, or it could get thrown out of court. It is a big test of wills between the charismatic man of many college degrees, William Stowe, the Des Moines Water Works general manager and CEO, and a coalition of agricultural groups that are among the strongest political forces in the state. The fight seems to have added energy to the debate over water quality in Iowa, which has been simmering for decades. Potentially, it could provide political fuel to the efforts -- fruitless to this point -- to get the sales tax increase needed to fill the voter-approved Natural Resources and Outdoor Recreation Trust Fund. That account would funnel money to the voluntary farm conservation projects, among other things.

What is the lawsuit about?

Des Moines Water Works has filed a lawsuit against three counties that operate drainage districts -- Sac, Calhoun and Buena Vista -- in a rare attempt to argue that pollution that originated on scattered farms is subject to permit requirements set out in the U.S. Clean Water Act. The Act has always exempted runoff from farms, and so-called return water from irrigation from regulation.

Really the only way the Clean Water Act has directly regulated agriculture is through permits required of large livestock confinements deemed a "point source" of pollution just as sewage treatment plants and factories are.

The utility says this water is not surface water, but ground water, which isn't exempted from the Clean Water Act.

This is a huge legal question in a state with 3,000 drainage districts.

Des Moines Water Works contends that the drainage ditches that handle water collected by engineered underground pipes known in the industry as "tiles" should legally be considered point sources needing a federal permit.

Why is nitrate pollution bad?

Nitrate in drinking water can suffocate babies in extreme cases by robbing the blood's ability to carry oxygen. The pollutant has been associated with a variety of cancers, and miscarriages. Water utilities are required to meet federal limits for nitrate in tap water so customers are safe. That treatment can be expensive, which is a central point in the lawsuit.

How is this environmental fight different?

The hog battle has been mostly about those who live near a confinement.

The nitrate fight potentially affects everyone with a tap in Iowa's capital city and the surrounding area.

And it has drawn interest across the country as politically powerful farm groups jockey for position with media savvy environmental organizations and a water utility whose CEO is so charismatic, he has been featured on T-shirts. One of the Raygun store's latest is blue and reads "I'm With Stowe," and includes a symbol in place of the "O" that declares "America Needs Clean Water." Yet, Stowe also is controversial, and in some quarters, even polarizing.

After two years of warning that something has to be done about the nitrate issue, Stowe has dug in for a long legal fight.

“The lawsuit can’t be wished away and there is little the Legislature or governor can do to influence what the Des Moines Water Works decides – other than getting serious about water quality,” wrote Neil Hamilton, a Drake University law professor who is an authority on environmental issues. Waterworks “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.”

Is there support for the lawsuit?

The legal action drew quick praise from environmental groups that have been fighting to force the U.S. Environmental Protection Agency to set limits for nitrogen and phosphorus in waterways. It also brought quick opposition from agricultural groups that have stressed the state, and Des Moines Water Works, will be far better off working to promote voluntary work to reduce the runoff, rather than setting up a long, expensive and potentially quixotic legal fight. Greater Des Moines businesses, among the biggest water users, have been buzzing over what this debate means to water bills, and the environment.

For the record, a Des Moines Register Iowa Poll in February found that 63 percent of Iowans support the Water Works lawsuit, filed in the U.S. District Court for the Northern District in Sioux City. An unscientific online poll by the Business Record in March found 70 percent in favor, 29 percent opposed and 1 percent undecided.

The Business Record poll gave the 115 respondents a chance to vent, and many did. Most lived within 20 miles of downtown Des Moines.

“Most of us in Iowa are not farmers, nor do we rely on the ag industry to support our families,” wrote Paul Weeks, vice president of CBRE/Hubbell Commercial. “I have only heard the ag interests speak against the lawsuit. This is a matter of public health!”

Others had a different view.

“Sorry, there are no real winners in court,” wrote Park Woodle, who indicated he owns a business and a farm. “Should Des Moines Water Works be held accountable for putting nitrate back into others water supply?”

Woodle referred to a sore subject for farm interests and Water Works both. After nitrate is removed from the river water to make tap supplies safe, it is dumped back into the river and heads downstream toward Ottumwa. Stowe said the utility is required to do that under its agreement with EPA, and hasn’t been able to find a cheap enough alternative.

“The lawsuit is counterproductive,” said an unidentified respondent who lives more than 50 miles from downtown Des Moines. “There are far better solutions that don’t go to the courts.

Unfortunately, what we have now is grandstanding by Bill Stowe to boost his ego.”

Why has agriculture been largely exempt from the Clean Water Act?

Agricultural surface water runoff has been exempt because it comes from many sources. Typically, the Clean Water Act is designed to require permits that limit pollution from single sources that can be regulated. These facilities regularly emit pollution that can be directly measured. In the case of runoff, the nitrogen can come from farms, yards, golf courses, and other sources, and it would be difficult to trace back to specific sources.

Why is Des Moines Water Works suing now?

Stowe asked the Water Works board to act after years of troublesome nitrate readings hit new records during winter, when the \$7,000-per-day nitrate-removal system at the central water treatment plant usually doesn’t have to run.

“Our view is that the drainage districts are point source polluters and we believe we have the empirical evidence to show that,” Stowe said.

A year of sampling at the three drainage districts found average nitrate levels of 20 to 30 milligrams per liter; the drinking water limit is 10.

There is a central contention, Stowe noted: “Our argument is that drainage districts are not agricultural stormwater discharges (which are exempt from the Clean Water Act); they are groundwater discharge.”

Kirk Leeds, CEO of the Iowa Soybean Association, isn’t buying it.

“It’s clear that farm tile is not part of the Clean Water Act,” Leeds said. “There is a lot of information that says farm drainage tile is not a point source. You would have to find an activist judge who would reinterpret the Clean Water Act to say it is.”

What if Des Moines Water Works wins?

If the utility persuades the U.S. District Court, the U.S. Environmental Protection Agency could make radical changes, requiring permits of Iowa’s 3,000 drainage districts that could lead to regulations on individual farms. However, EPA could also install a general permit category for farms that would change little or nothing.

Waterworks installed one of the world’s largest nitrate-removal plants in 1991, a system that now costs as much as \$7,000 a day to run. The utility said the system faces an upgrade to keep up with record nitrate levels in the Raccoon River.

Nearly a year of tests showed levels of nitrate in the drainage ditches several times the health limit. Water Works wants to see action to cut the pollution, and is seeking damages due to expected expenses in the \$100 million range to replace the aging nitrate-removal system, which was installed under pressure from the U.S. Environmental Protection Agency in 1991.

What if the defendants win?

Presumably, farm operations other than large livestock confinements wouldn’t need federal permits, and voluntary conservation efforts would continue. If the drainage districts win, the public discussion could turn in part to encouraging more state and federal spending on the voluntary conservation programs that help pay for buffer strips and the like. Des Moines Water Works would most likely continue to assess the need for a new nitrate removal plant that could cost as much as \$100 million.

What was the counties’ response to the lawsuit?

Basically to lawyer up and to let organizations such as the Iowa Soybean Association do the public speaking on the issue. The Belin McCormick lawyers hired to defend the counties aren’t talking. But agricultural interests contend that the drainage districts are exempt from the Clean Water Act. They pointedly told Stowe he is in for a 10 year court fight that will sour what many had seen as improving relations among urban and rural interests attempting to improve water quality in cooperative ventures.

And they strongly believe that the Iowa Nutrient Reduction Strategy hasn’t been given enough time to ease pollution through farmers’ voluntary conservation efforts.

Are voluntary methods the answer?

Some, including Stowe and Hamilton, say the strategy as written will not significantly change a trend that has left Iowa with major nitrate issues decades after farmers picked up the pace on conservation projects.

“The (Nutrient Reduction Strategy) is not really a plan because it has no funding commitments or timelines for action,” Hamilton wrote on his blog. “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.”

But agricultural groups note that nitrate concentrations have leveled off even as corn acres increased, and they suggest voluntary efforts are far more productive than long, expensive legal fights. They contend the Clean Water Act simply doesn’t apply to this farm-related pollution.

Why pick on three rural counties?

Water Works chose to sue Sac, Calhoun and Buena Vista counties because they are heavily dominated by farm fields and the drainage ditches could be accessed by publicly property, Stowe said. When a member of the Central Iowa Regional Drinking Water Commission asked why Water Works chose the three rural counties instead of say, Dallas County closer to Des Moines, Stowe responded: “We really aren’t interested in suing our customers. We chose Sac County largely because there is a (U.S. Geological Survey) station at Sac City; we have great access to right of way off Highway 20, and these particular tiling systems are used entirely by agricultural systems.” Added Stowe: “The three counties are not the end game. The drainage districts are the end game. The ultimate issue is whether we believe the voluntary techniques will protect the source waters. We disagree with that. The victories our country had in air quality, phosphates in detergent, etc., happened due to regulation,” not voluntary actions, Stowe said. “Here ends the sermon.”

Is there precedent for a case like this?

One case that made a somewhat similar claim was dismissed in federal district court in California when the Pacific Coast Federation of Fishermen’s Associations and others failed, in the judge’s view, to provide proper evidence of damages.

The plaintiffs had sued the U.S. Bureau of Reclamation and others under the same citizens’ lawsuit section of the Clean Water Act that the Des Moines Water Works is using.

In the California case, the plaintiffs alleged that the Grasslands Bypass Project illegally discharged pollution into two waterways. They, like Des Moines Water Works, claimed the pollution was coming from what amounted to a point source.

The court ruled the plaintiffs had failed to properly make their case. Des Moines Water Works spent almost a year measuring nitrate from the drainage districts in an attempt to show direct damage to the water supply feeding taps in Greater Des Moines.

What does that precedent mean for this case?

Vermont Law School professor Patrick Parenteau told the online publication Greenwire that the Des Moines Water Works has a stronger case.

“Their theory of why this meets the definition of a point source discharge and is not subject to the agricultural runoff exemption -- which was the reason that the California case got dismissed -- was intriguing,” he said.

Stowe simply says the court can’t use the exemption for surface runoff from farms because the water at issue here is groundwater, and is conveyed by a specially engineered system that is far from a trickle running across the ground.? Which led Neil Hamilton, a Drake University law professor who is an authority on environmental issues, to blog: “This makes the districts point sources under the Clean Water Act, 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.”

How long will the lawsuit take?

That’s up to debate. But the Belin McCormick lawyers expect to take a couple of months to form a response to the lawsuit on behalf of the counties. Various observers have estimated the case could take a decade, especially given the likely good that the District Court decision will be appealed, no matter who wins. Should Des Moines Water Works ultimately prevail, it could take years for the U.S. Environmental Protection Agency to decide what to do about possible permit requirements.

Who is arguing the case?

The lawyers: Dickinson vs. Belin

FOR THE PLAINTIFFS:

Dickinson Mackaman Tyler & Hagen P.C.

Richard Malm

Malm, who has practiced since 1974, represents clients in financing, contracts, civil litigation and other matters. A graduate of Drake University Law School, he represents small and large businesses, some of them international. He has had experience in most areas of business practice, including litigation in state and federal courts.

John Lande

Lande is an associate attorney at the Dickinson law firm. He represents both businesses and individuals in all phases of commercial litigation. His practice covers a range of commercial litigation matters including creditors' rights in bankruptcy, collections, business torts, and agency regulatory actions. He also works on bank regulatory issues. He advises banks with questions or issues related to cybersecurity, criminal investigations, fraud, confidentiality, insider transactions, mobile banking, collections, and wire transfers. Lande has a law degree from the University of Iowa.

Colleen MacRae

MacRae's general practice includes business and banking law, real estate, administrative law, and government affairs. She provides advice to business and banking clients regarding corporate transactions including organization, development, reorganization, and general contract drafting and negotiations. A graduate of Drake University Law School, she also assists in the acquisition, sale and financing of commercial and residential properties and assists with environmental issues such as compliance with the purchase and sale of contaminated properties and with federal and state environmental regulations and permit requirements. In her practice of governmental affairs, MacRae advises and assists in the development of client goals and strategies regarding regulatory and legislative agendas.

FOR THE DEFENSE:

Belin McCormick P.C.

Charles Becker

Becker, a shareholder in the Belin McCormick law firm, focuses on cases involving environmental issues, land use, and trials. He has represented major corporations, developers, environmental groups, and individuals. Part of that work has involved representing corporations on their water quality permit work. He also regularly negotiates on behalf of corporations with governmental agencies, including the Environmental Protection Agency, the Department of Justice, and the Iowa Department of Natural Resources. A former editor of the Iowa Law Review, Becker earned a law degree at the University of Iowa.

Michael Reck

Reck, also a shareholder at Belin McCormick, has handled matters ranging from complex commercial litigation to employment disputes. Among his cases were asbestos property damage class actions, a proposed public nuisance class action, antitrust class actions, a shareholder fraud class action, Fair Labor Standards collective actions, and derivative suits challenging corporate mergers. Reck has a law degree from Harvard University.

Case brings political maneuvering

Gov. Terry Branstad quickly moved to portray the fight as one pitting urban interests against those of rural communities.

“Des Moines has declared war on rural Iowa,” Branstad said.

It’s an attention-grabbing quote, but some have contended that statements of that type portray an animosity that isn’t there. And Des Moines City Councilwoman Christine Hensley has said she’s frustrated because people erroneously think the city of Des Moines, not Des Moines Water Works, has sued the counties. The city of Des Moines has nothing to do with the lawsuit other than the mayor’s appointment of the Water Works board members. The Greater Des Moines Partnership has nothing to do with the lawsuit. The Greater Des Moines Convention and Visitors Bureau has nothing to do with the lawsuit. The people of Des Moines didn’t vote to sue. The business owners in Des Moines haven’t taken a position. Neither have state lawmakers, at least as a group.

Census data clearly show that Iowans are moving to town, and only a small fraction are engaged in farming. But many Iowans have ties to farms, through family or business relationships. So the relationships among rural and urban interests are hard to reduce to simple statements.

Agriculture Secretary Bill Northey, one of Branstad’s Republican colleagues, quickly called meetings in the rural counties that were sued. He opposes the lawsuit but chooses to focus on what farmers have done to address the issues in cooperation with urban interests.

“Iowa farmers have invested millions of dollars of their own money to help improve water quality,” Northey said in announcing his visits to the counties named in the lawsuit. “We need to build on this momentum and work together. Sensationalized rhetoric and threats of litigation are not the answer to help us achieve our joint goals of improved water quality in Iowa.”

William Stowe, the general manager and CEO of Des Moines Water Works, had telegraphed the impending lawsuit for two years, repeatedly mentioning the inevitability of legal action unless there was evidence of progress and promise in the battle to reduce nitrate problems.

Still, many close to agriculture acted surprised when the lawsuit was filed, and the news release machines went into overdrive.

Politicians quickly pandered to the folks back home.

Sen. Randy Feenstra, R-Hull, contended that rural Iowans are doing everything possible to reduce nitrates in water running off farm fields, a statement so broad the farm groups haven’t even matched it. Feenstra claimed that the three counties named in the lawsuit weren’t given a chance to resolve the issues without litigation. They were, but failed to come to any kind of agreement during the two-month negotiation period before the lawsuit was filed, or the century and a half since the counties formed.

During the two months before the lawsuit, both sides seemed to be most concerned with choosing their roster of lawyers. Farm groups repeated their support for voluntary initiatives. Water Works’s stump speech included calls for new regulations.

Feenstra’s comments were firmly in the rural vs. urban vein.

“I just think it is a bit of a mentality of ‘we don’t care about rural Iowa,’” Feenstra said. “We are going to do our own thing. Rural Iowa, you are costing us money,’ not looking at themselves. Being a rural Iowa legislator, I see this snob urban-versus-rural mentality on a regular basis. Urban cities no longer have any regard for the state’s agricultural community,” Feenstra wrote.

He then dropped the political bomb. “I firmly believe that the power of our agricultural community needs to stand up against Des Moines. I would advocate that rural Iowa boycotts Des Moines. This could be done by shopping in other communities, vacationing in other areas of the state, and holding our many organizational meetings in Ames or Cedar Rapids. Iowa has plenty of great locations; we don’t need Des Moines and this arrogant mentality against rural Iowa.”

Rep. Gary Worthan also expressed frustration with Water Works, suggesting the utility had insulted “every family farmer in northwest Iowa” and trying to make a pun from Stowe’s name.

“This lawsuit is wrong,” said Worthan, a farmer from Storm Lake. “The approach is wrong. It’s

time for the Des Moines Public Water Works to reel in their legal beagles and put ‘em back on the leash, to stow the vitriolic rhetoric.”

Worthan pointed out that no farmer wants to spend money on fertilizer that washes downstream. What he didn’t mention was that nitrate is highly soluble, making it difficult to keep on the farm. As much as 60 percent washes away, federal scientists report.

The Iowa Soybean Association was quick to offer data that supposedly showed a modest drop in nitrate in the Raccoon River system in recent years. But a careful reading of Jones’ full statement shows staff chemist Chris Jones, the former Water Works chemist, considers it difficult to make sweeping claims about trends based on the data.

“We need to develop studies that look more closely at the combined effects of increasing nitrogen use efficiency for different forms and timing of nitrogen and manure applications, introduction of cover crops, and better management of water flows above and below the soil’s surface in Iowa’s highly variable weather,” Jones wrote in a report.

Bill Stowe: Egomaniac?

Is this really about Bill Stowe’s ego?

Some observers outside the Des Moines Water Works have suggested Stowe is on an ego trip with the lawsuit, which quickly brought national attention. Stowe is fairly sure of himself, but he says this is about protecting the pocketbooks of his ratepayers, and their health. It is going to cost hundreds of thousands just to get an answer from the court. (Water works has asked the court to award damages.)

Stowe is an interesting guy. He began his collegiate studies with a degree in political economy at Grinnell College, a national liberal arts college an hour east of Des Moines. Grinnellians, as the grads like to call themselves, are known for their fierce independence, critical thinking, entrepreneurship, ingenuity and creativity. They have opinions, and aren’t afraid to share them. Stowe then added a master’s degree in engineering from the University of Wisconsin, a master’s degree in industrial relations from the University of Illinois; and a law degree from Loyola University New Orleans.

It became clear when Stowe was working as Des Moines public works director that he, like his predecessor, John Bellizzi, enjoyed the limelight.

Stowe’s following has long been a bit of Des Moines’ lore. More than a few comments have been made about his long, gray hair. Some have suggested he looks like actor Russell Crowe, and Stowe’s frequent TV appearances when he was the city’s public works director gave him added visibility.

It’s the type of thing that can feed an ego. Stowe eventually became Des Moines’ latest “flood stud,” a term once applied to former Water Works chief L.D. McMullen, the man Stowe replaced at the utility.

But Stowe also is self-deprecating. While he was attending a Grinnell College function at the Science Center of Iowa, a woman approached and said, “You are a bigger man than you appear to be on TV.” Stowe laughed and replied, “When people tell me that I assume they mean that I am even fatter than they expected.”