IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF IOWA
WESTERN DIVISION

BOARD OF WATER WORKS TRUSTEES OF THE CITY OF DES MOINES, IOWA, Plaintiff, vs. SAC COUNTY BOARD OF SUPERVISORS AS TRUSTEES OF DRAINAGE DISTRICTS 32, 42, 65, 79, 81, 83, 86, and CALHOUN COUNTY BOARD OF SUPERVISORS and SAC COUNTY BOARD OF SUPERVISORS AS JOINT TRUSTEES OF DRAINAGE DISTRICTS 2 AND 51 and BUENA VISTA COUNTY BOARD OF SUPERVISORS and SAC COUNTY BOARD OF SUPERVISORS AS JOINT TRUSTEES OF DRAINAGE DISTRICTS 19 and 26 and DRAINAGE DISTRICTS 64 and 105. Defendants.	Case No. 5:15-cv-04020 **DEFENDANTS' REPLY TO PLAINTIFF'S RESISTANCE TO SUMMARY JUDGMENT**

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Preliminary Statement

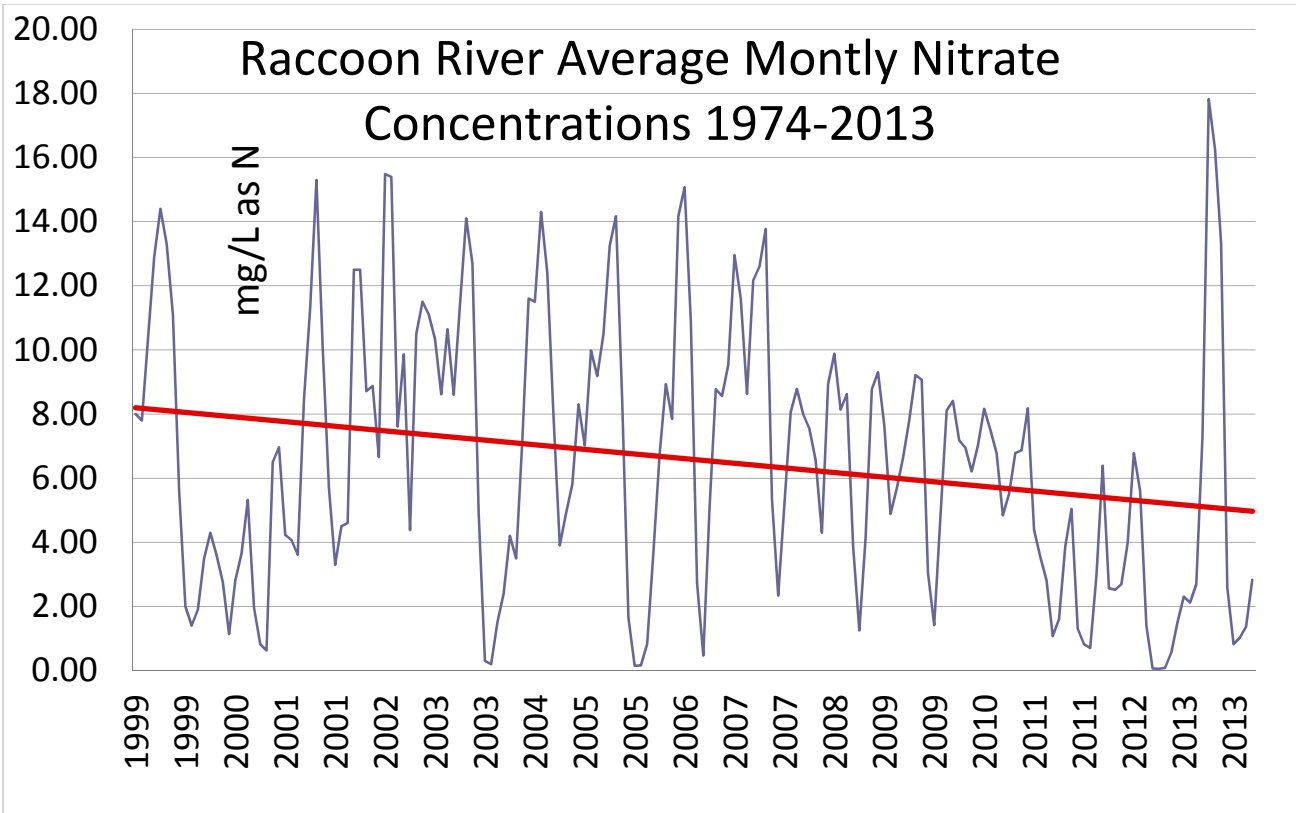
On April 1, 2016, Defendant Drainage Districts (the "Districts") sought summary judgment on all Des Moines Water Works' ("DMWW") claims not referred to Iowa's Supreme Court. On May 5, 2016, DMWW resisted. Because the issues presented are inherently legal issues properly decided on summary judgment and DMWW's positions are contrary to the law, the Districts ask that their motion be granted.

Statement of Facts

This case involves statutory and regulatory interpretation and basic legal principles, therefore, few facts need be addressed. DMWW, however, emphasizes critical points when it states:

> The most significant source of nitrate pollution in the Raccoon River is agricultural drainage. For decades, researchers and government officials, including the State of Iowa, have known that the practice of intensive drainage of agricultural land in regions like northwestern and north central Iowa provides a short-circuit for nitrate and other contaminants to reach streams and rivers. Although the nitrate problem has been identified and studied for many decades, it has not been corrected, and its impact on DMWW continues to worsen.

Pl.'s Br. in Resistance to Defs.' Mot. for Partial Summ. J. 7. DMWW's internal charts certainly show the opposite of worsening conditions:



DMWW0002902[1]

DMWW's CEO, Bill Stowe, acknowledged the downward trend may well result from farmers' efforts:

Q. In fact, in more recent years the trendline downward becomes more dramatic; correct?

A. That's true.

Q. Do you have any reason to dispute that that's, in fact, accurate?

A. I do not.

Q. Do you have any reason to dispute that that is, in fact, a result of efforts of agricultural producers?

A. It would be certainly one of the factors, as would precipitation that we talked about before.

[1] Although miscaptioned to represent nitrate trends from 1974 to 2013, it actually is from 1999 to 2013.

Stowe Dep. at pp. 197-98 (App. pp. 9-10). Whether the trend is up or down, however, is ***not*** DMWW's claim relevant to summary judgment. What *is* critical, as DMWW emphasizes, is our leaders have known about agricultural contributions to water quality issues for decades and expressly chose *not* to require NPDES permits for agricultural drainage. Instead, Congress and EPA consciously chose to leave such management and land stewardship in the hands of those closer to the land—the states—to be addressed through state programs. Far ranging policy debates are best resolved by Congress and agencies with expertise in the field. Judicial intervention would merely interfere with the legislative process and usurp other bodies' proper roles.[2]

Argument

Three failings in DMWW's claims require summary judgment. First, a claim against a governmental entity without power to resolve the issue fails the jurisdictional requirement of redressability. Second, once an agency makes its position clear, a party may not sit on its hands and allow the limitations period to expire before contesting that position. Third, everyone, including Congress, the Environmental Protection Agency ("EPA"), the Iowa Department of Natural Resources ("DNR"), and every single state in the Union with drainage tile makes clear NPDES permits are ***not*** required for drainage tile. DMWW knows everyone disagrees but argues it knows better than everyone else and is a majority of one:

> Q. Des Moines Water Works is a majority of one in this instance?
>
> A. That we are. And our rate payers are a majority of one.

[2] DMWW complains its position will face resistance in Iowa. Br. at 26. Not only does this emphasize that DMWW asks this court to overturn the political process, it ignores that the U.S. EPA also rejected DMWW's position. Stowe Dep. at pp. 275, 358 (App. pp. 18, 27).

Stowe Dep. at p. 281 (App. p. 19). Far from asking this Court to interpret the law, DMWW asks this Court to rewrite it without the benefit of the ample fact finding and resources available to Congress and EPA thereby risking extreme detriment to our State.

I. This Court Lacks Subject Matter Jurisdiction.

"The burden falls on Plaintiffs to allege facts to demonstrate that they have standing." *Kessler v. Grand Cent. Dist. Mgmt. Ass'n, Inc.*, 960 F. Supp. 760, 766 (S.D.N.Y. 1997) (citing *Warth v. Seldin*, 422 U.S. 490, 501 (1975)), *aff'd*, 158 F.3d 92 (2d Cir. 1998). "It is not sufficient for Plaintiffs to allege 'a generalized grievance against allegedly illegal government conduct.'" *Id.* (quoting *United States v. Hays*, 515 U.S. 737, 743 (1995)).

Far from satisfying its burden, DMWW admits it seeks relief well beyond drainage districts' power. To avoid this fundamental failing, DMWW mischaracterizes the issue as "personhood" under the Clean Water Act. The Districts certainly noted that, because a district is a mere land area farmers join together to drain and not a person, *Clary v. Woodbury County*, 113 N.W. 330, 332 (Iowa 1907), whether a district could be "person" within the Act's meaning presents an interesting question. As previously stated, however, this proposition is unnecessary to resolve this case. Notwithstanding whether DMWW sued a "person" under the Clean Water Act, it must sue a proper person capable of redressing the issue. Redressability is distinct from whether a defendant is a "person". The mere claim federal law is violated does not create jurisdiction over a party lacking the power of redress. *See Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547-48 (2016) (noting Congress cannot create jurisdiction); *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 100 ("In no event ... may Congress abrogate the Art. III minima"). A federal right, after all, was contested in *Okpalobi v. Foster*, 244 F.3d 405, 410 (5th Cir. 2001), yet that did not somehow make the Attorney General a proper defendant. Contrary to

DMWW's oft-repeated refrain, the issue is *not* whether *anyone* can be sued.[3] The issue *is* whether the party sued, when it lacks the power of redress, is the *proper* party for such a suit.

Article III standing requirements serve to prevent the judicial process from being used to usurp the powers of the political branches—precisely the concern here. *Spokeo*, 136 S. Ct. at 1547. "'[N]o principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies.'" *Spokeo*, 136 S. Ct. at 1547 (quoting *Raines v. Byrd*, 521 U.S. 811, 818 (1997)). Redressability is no rarefied, arcane doctrine. It is universally accepted and constitutionally compelled. *Okpalobi*, 244 F.3d at 427 (ruling injunction against state official is "utterly meaningless" where official against whom the injunction is granted lacks power to redress the asserted injuries); *see Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) ("It must be 'likely' as opposed to merely 'speculative; that the injury will be 'redressed by a favorable decision'"); *Turner v. McGee*, 681 F.3d 1215, 1218 (10th Cir. 2012) ("As is often the case, redressibility turns on the scope of authority of the defendants. We ask: Could these defendants, enjoined as [plaintiff] has requested, remedy [plaintiff's injury]?"); *Bronson v. Swensen*, 500 F.3d 1099, 1111 (10th Cir. 2007) ("The redressability prong is not met when a plaintiff seeks relief against a defendant with no power to enforce a challenged statute."); *McDaniel v. Bd. of Educ. of City of Chicago*, 956 F.Supp. 2d 887, 893 (N.D.Ill. 2013) ("[I]f a defendant does not have the authority to carry out the injunction, a plaintiff's claims for injunctive relief must be dismissed ...."); *Clark v. Fomby*, Civil Action No. 9:11CV42, 2012, WL 3064228, at *8 (E.D.

[3] Although the remainder of this brief makes clear such claims would fail for many other reasons, redressability would not, for example, prevent claims against DNR, the State of Iowa, or property owners who actually control their land's drainage. The Districts should not be understood, however, to be suggesting DMWW sue someone else on claims they regard as frivolous.

Tex. July 26, 2012) ("[T]he practice managers and the patient liaison have no power or authority to fit or replace Clark's dentures, inasmuch as they are not patient care providers and have no authority over patient care providers."); *Scott v. DiGuglielmo*, 615 F.Supp. 2d 368, 373 (E.D.Pa. 2009) ("If the defendants have no power to redress the alleged injuries even if the court were to grant the requested relief, the plaintiff has no case or controversy against those particular defendants."); *Options For Cmty. Growth, Inc. v. Wisconsin Dep't of Health & Family Servs.*, No. 03-CV-1275, 2006 WL 2645185, at *4 (E.D. Wis. Sept. 14, 2006) ("The State Defendants have no power to restrict or prevent the City of Milwaukee from acting under the 2500-foot and closure hearing rules. 'For all practical purposes, [an] injunction granted by the district court [would be] utterly meaningless.'") (quoting *Okpalobi*, 244 F.3d at 426. Consistent with this doctrine being distinct and independent from "personhood" under the Clean Water Act, ***not one*** of the foregoing cases involved or depended on whether the defendant was a "person."

Drainage districts' powers include only those delegated by statute. *Reed v. Muscatine-Louisa Drainage Dist. No. 13*, 263 N.W.2d 548, 551 (Iowa 1978). The only changes they can pursue to drainage tile are to restore or increase water flow. Iowa Code §§ 468.126(1)(a), 468.126(4). Yet, DMWW claims they should do myriad things to reduce nitrate:

> Q. How do you believe drainage districts themselves can control the output from drainage tiles?
>
> A. By, again, effecting infield practices and effecting edge-of-field practices as well as assuming the responsibility within the conveyance of a treatment mechanism.
>
> Q. Is that all the things that we discussed before?
>
> A. Generally, yes.
>
> Q. Wetlands, for example, potentially?
>
> A. Wetlands, saturated buffers, crop rotation, certainly some of them.
>
> Q. Cover crops?
>
> A. Cover crops. Thank you.

Q. Fewer row crops?

A. Part of the crop rotation issue, yes.

Q. No-till and low-till farming?

A. An impact, yes.

Q. Bioreactors and biofilters; correct?

A. Yes, sir.

Stowe Dep. at pp. 304-05 (App. p. 23). None of these changes restores or increases drainage and none is within a drainage districts' control. Stowe Dep. at pp. 253, 255 (App. pp. 14-15):

Q. So in terms of the things you're talking about, they are not things to restore the flow or increase the flow of the tiles; correct? They're generally things to slow the flow; correct?

A. Yes.

Stowe Dep. at p. 255 (App. p. 15); *see* Droessler Dep. at p. 85 (Supp. App. p. 1449). Because DMWW seeks relief the Districts have no statutory authority to provide, redressability is lacking.[4]

Beyond the statutory restrictions, drainage districts, literally, can compel nothing DMWW seeks because farmers simply can override them:

Q. So let me make sure that I ask the question clearly. I'm asking you how the drainage district trustees would raise the money to implement any of the changes that you're proposing be made to drainage district tiles.

A. Presumably through levy of the benefited properties.

Q. And as far as you know, could the farmers defeat that if they wanted to?

A. Yes.

[4] Emphasizing the Districts' nominal role in this suit, DMWW confirms it has had many settlement discussions about this lawsuit, but **none with the Districts**:

Q. Now, you've identified several people with whom discussions have been had about resolving this matter; correct?
A. Yes.
Q. But none of those is affiliated in any way with drainage districts; correct?
A. That's correct.

Stowe Dep. at p. 332 (Supp. App. p. 1397).

Q. So the trustees could not compel that on anybody, could they?

A. That's my understanding.

Stowe Dep. at p. 307-308 (App. p. 24); *see* Iowa Code § 468.126(4)(e). Where others can defeat a proposal, jurisdiction is lacking to order the particular defendant to perform the act. *Scott v. Taylor*, 405 F.3d 1251, 1259 (11th Cir. 2005) (Jordan, J., concurring). Trustees who do not control the outcome cannot be sued seeking what they cannot compel. *United States v. Carroll*, 667 F.3d 742, 745 (6th Cir. 2012). It is DMWW's burden to prove redressability. DMWW's admission that the Districts cannot accomplish what it seeks prevents DMWW from meeting its burden.[5]

DMWW argues the U.S. Constitution's Supremacy Clause somehow allows suit against a party lacking power to redress an issue. DMWW misses the point. The fact DMWW sued the wrong party does not somehow cause the Supremacy clause to override the jurisdictional requirement for a case and controversy or excuse suing the wrong party. The U.S. Constitution *requires* redressability for a case or controversy to exist. *Lujan*, 504 U.S. at 560–61. Nor can a statute override constitutional requirements. Regardless of what a statute says, DMWW still

[5] Also important, DMWW complains it needs to treat for nitrate but cannot show the Districts *even* *once* caused it to treat for nitrate. Stowe Tr. at 243:18-244:1, 245:3-7 (App. p. 13). The Districts are not even shown to contribute *detectable* amounts under accepted standards. (App. p. 93). DMWW responds that, if it combines these Districts with others it did ***not*** sue, maybe it would have standing. DMWW "fails to explain why a plaintiff's injury resulting from the conduct of one defendant should have any bearing on her Article III standing to sue other defendants, even if they engaged in similar conduct that injured other parties." *Mahon v. Ticor Title Ins. Co.*, 683 F.3d 59, 65 (2d Cir. 2012). DMWW does not gain standing by cumulating inputs from parties not sued. DMWW also, having not hired its own expert, takes a number from the *beginning* of the Districts' expert's analysis to say, if the analysis is not completed, it would make it appear higher contributions reached DMWW than analysis shows. It is not, however, appropriate to pull misleading data from the *starting* point of the analysis to argue it shows something it does not. Hentges Aff. at ¶ 9 (Supp. App. pp. 1399-1400). If DMWW wished to contest Mr. Hentges's analysis, it either should have hired its own expert or at least deposed Mr. Hentges.

needed to sue a party with the power of redress. DMWW also likens drainage districts to corporations to suggest they somehow are proper parties. The comparison is not apt. Drainage districts are expressly created *not* to have the powers at issue and *not* to be proper parties to litigation. *E.g.*, *Gard v. Little Sioux Intercounty Drainage Dist. of Monona & Harrison Counties*, 521 N.W.2d 696, 699 (Iowa 1994); *Coe v. Bd. of Superiors of Harrison Cnty.*, 295 N.W. 151, 154 (Iowa 1940). A corporation, by contrast, is expressly created to shield shareholders and directors from liability by *being* the proper party to sue. *Donovan v. Agnew*, 712 F.2d 1509, 1513 (1st Cir. 1983); *Pierce v. National Bank of Commerce in St. Louis*, 13 F.2d 40, 47 (8th Cir. 1926) ("A leading purpose of such statutes and of those who act under them is to interpose a non-conductor, through which, in matters of contract, it is impossible to see the men behind.") (citing *Donnell v. Herring-Hall-Marvin Safe Co.*, 208 U.S. 267, 273 (1908)). The redressability doctrine finds its application with regard to governmental entities, like drainage districts, precisely because laws creating them do not grant powers at issue: "[I]n a suit against state officials for injunctive relief, a plaintiff does not have Article III standing with respect to those officials who are powerless to remedy the alleged injury." *Scott*, 405 F.3d at 1259.[6]

DMWW also points to Section 404 permits for draining wetlands. In doing so, DMWW not only emphasizes that the government is fully capable of seeking permits *when they are required*, it again misunderstands the principle. Section 404 permits are not required for previously drained farmland. *Clean Water Act Regulatory Programs*, 58 Fed. Reg. 45,008, 45,031 (Aug. 25, 1993) ("[W]e are excluding [prior converted] cropland from the definition of

[6] Further, DMWW's position simply makes no sense as, unlike corporations, drainage districts do not control the assets. If a drainage district received a penalty under the Clean Water Act, it would have to levy to pay it, yet there is nothing that allows it to do so and farmers could defeat the levy. In such circumstances, the drainage district is not the proper party.

waters of the U.S.")) (Supp. App. 1375). They are only required when ***farmers*** wish to drain previously undrained wetlands.[7] In other words: (1) they involve expanding drainage—which expressly ***is*** within a drainage district's power; and (2) they are done *at the direction of farmers* who wish to expand drainage. Thus, drainage districts are doing as farmers direct within their delegated powers, not trying to compel farmers to do what they lack power to require.[8]

II. The Applicable Statute Of Limitations Bars DMWW's Claims.

The Districts also seek summary judgment because DMWW did not timely challenge the Agency's position. In responding, DMWW argues a statute of limitations does not run for failure to secure an NPDES permit, in the typical case, because the violation renews itself every day as effluent issues without a permit. No argument was necessary for this point because the Districts immediately acknowledged it. *E.g.*, *U.S. Pub. Interest Research Grp. v. Atl. Salmon of Me., L.L.C.*, 257 F. Supp. 2d 407, 426-27 (D. Me. 2003), aff'd *U.S. Pub. Interest Research Grp. v. Atl. Salmon of Me., L.L.C*, 339 F.3d 23 (1st Cir. 2003). The point before this Court, however, is more nuanced. To avoid unfair prejudice to those relying on the Agency, where the gripe is really with the Agency's position as opposed to its failure to enforce, the statute of limitations begins running when the Agency's position becomes clear. *Ecological Rights Found.*, 2013 WL

[7] "Wetland," within the meaning of Section 404 does not capture mere farmland requiring drainage. *See See* LaJuana S. Wilcher & Roland W. Page, U.S. E.P.A. & U.S. Dep't of the Army, *Memorandum: Clean Water Act Section 404 Regulatory program and Agricultural Activities*, (1990), *available at* https://www.epa.gov/cwa-404/memorandum-clean-water-act-section-404-regulatory-program-and-agricultural-activities.

[8] It also has been held that, when the agency is not a party, an action trying to compel the agency to issue permits it does not believe are required is improper. *Ecological Rights Found. v. Pac. Gas & Elec. Co.*, No. C 10-0121 RS, 2013 WL 1124089, at *5-6 (N.D. Cal. Mar. 1, 2013); *see* Stowe Dep. at p. 311 (App. p. 21); Gipp Aff. (App. pp. 128-131). To illustrate the point, what if these Districts simply stipulated to a judgment? Would DNR suddenly be compelled to issue permits it does not believe are required when it is not a party to this suit? DMWW does not appear to address *Ecological Rights Foundation*.

1124089, at *6; *cf. Conservation Law Found. v. Hannaford Bros. Co.*, 327 F. Supp. 2d 325, 334-35 (D. Vt. 2004) (holding citizen suit could not redesignate what requires an NPDES permit), *aff'd*, 139 F. App'x 338 (2d Cir. 2005).

The question that must be answered in this case is whether DMWW challenges a defendant that ignores a standard or, instead, seeks to change an agency position on which reliance can be expected. If DMWW does the latter, the statute of limitations began to run when the Agency made its position known. Here, DMWW's **"suit, although styled as an action to force [Drainage Districts] to obtain NPDES permits . . ., actually seeks to compel the EPA and/or [DNR] to revise their interpretations of the Clean Water Act and the implementing regulations."** *Ecological Rights Found.*, 2013 WL 1124089, at *6:

> Q. And just so we're clear, your position currently in this lawsuit that NPDES permits are required for drainage tile is contrary to the position of the EPA; correct?
>
> A. Yes.
>
> Q. And DNR; correct?
>
> A. Yes.

Stowe Dep. at p. 358; see Stowe Dep. at pp. 275-76, 278 (App. pp. 27, 18-19). Indeed, DMWW knows drainage districts are acting **just as the Agencies directed**:

> **Q. Do you understand that drainage districts have not secured NPDES permits precisely because DNR says they're not required?**
>
> **A. I do.**

Stowe Dep. at p. 277 (App. p. 18) (emphasis added); *see* Gipp. Aff. (App. pp. 132-135).

> Q. [C]an you see why drainage districts would not seek NPDES permits, sir?
>
> A. Yes.
>
> Q. It makes sense, doesn't it?
>
> A. It does, from their vantage.
>
> Q. The regulator is telling them, no, you don't need them; correct?
>
> A. Yes.

Stowe Dep. at p. 286 (App. p. 21). DMWW's brief further makes clear it challenges Agency interpretation by arguing it has standing because its claims will change the law for all drainage districts ***collectively***. Br. at 26. DMWW knows ***no*** drainage district gets a permit because none is required. DMWW cannot properly allow parties to rely on the Agencies' position for decades and then evade the limitations period to challenge the agencies' position through a citizen's suit. *Ecological Rights Found.*, 2013 WL 1124089, at *6.

In response, DMWW insists (1) DNR's position does not matter because DNR is a mere state agency, (2) DNR was unclear, and (3) DNR's statement was not formal enough, and (4) DNR did not consider enough information. DMWW goes so far as to describe DNR's "Delphic ambiguity" in stating drainage tile is not a point source. Curiously, DMWW's CEO Stowe had no difficulty whatsoever understanding DNR's position:

> Q. So DNR went on record in rule-making as to its position in 2009 on whether field tile was a point source, did it not?
>
> A. It did, in opposition to field tile as a point source discharge.
>
> Q. In other words, DNR said in its rule-making field tile is not a point source; correct?
>
> A. That is what this says.
>
> Q. And they said that in 2009; correct?
>
> A. Yes.

Stowe Dep. at pp. 284-85 (App. p. 20). Even accepting DMWW's contradiction of its own testimony, however, EPA made crystal clear ***in 1976*** that it examined the issue and chose only to regulate irrigated, *not unirrigated*, farmland just as the Districts previously noted. *Application of Permit Program to Agricultural Activities*, 41 Fed. Reg. 28,493, 28,493 (July 12, 1976) (Supp. App. 1). Particularly because Congress later acted on it, EPA's explanation for its position is worth reading in its entirety because it leaves no doubt regarding the law. It is located in its entirety at Supplemental Appendix pages 1-5.

As more fully reiterated below, EPA was ordered to critically analyze which aspects of agriculture were subject to NPDES permitting and which were not in 1975. In 1976, after reviewing all agricultural permitting, EPA consciously chose to regulate ***only*** "controlled application of water" and ***not*** unirrigated land. *Id.* at 28,493, 28,494, 28,495. (Supp. App. 1-3). EPA expressly rejected the suggestion "all agricultural runoff that is channeled into ditches, pipes or culverts before being discharged into navigable waters should be subject to the permit program regardless of whether or not such runoff is a result of the controlled application of water." *Id* at 28,493. As DMWW emphasizes in its brief, EPA knew about drainage pipes and chose to "leav[e] dry land farming unregulated" because irrigation flow can be controlled and rainfall cannot. *Id* at 28,495 (Supp. App. 3).

Even if DMWW could properly claim what CEO Stowe previously understood without hesitation suddenly is now rife with "Delphic ambiguity," EPA was crystal clear in 1976. *Id.* (Supp. App. pp. 1-5). The fact EPA is a federal agency applying federal law eliminates DMWW's claim that a state agency's statement is insufficient.[9] Nor is it necessary, as DMWW suggests, that an agency's position be stated in formal rulemaking. *See Iowa League of Cities v. E.P.A.*, 711 F.3d 844, 861-62 (8th Cir. 2013) (finding position letters sufficient). An Agency need only be clear enough, as here, to cause reliance. *Id.* at 863. Nonetheless, EPA's 1976 action ***was*** formal, court-ordered rulemaking addressing the very issue presented here. *Agricultural Activities*, 41 Fed. Reg. at 28,493 ("Those regulations were proposed in accordance with the June 10, 1975, court order issued following the decision of the Federal District Court for the District of Columbia…") (Supp. App. 1). Nor can DMWW claim EPA did not adequately analyze the issue. EPA "solicited and received information, statistics and advice from other

[9] Indeed, DNR merely repeated what long had been clear.

Federal agencies, State and local officials, trade associations, agricultural and environmental groups and interested members of the public." *Concentrated Animal Feeding Operations*, 40 Fed. Reg. 54,182, 54,182 (Nov. 20, 1975) (Supp. App. 971). Thus, disregarding DNR's reiteration of EPA's position, as DMWW demands, merely means DMWW's suit is untimely by decades, not mere months.[10] The reason for the rule is clear. It is unfair to thwart years of reliance on the agency position to defeat economic expectations. The architect of DMWW's suit, CEO Stowe, has a simple answer, "Fairness is not my concern." Stowe Dep. at p. 277 (App. p. 18). Unlike Mr. Stowe, however, the law ***is*** concerned with fairness and prevents what DMWW seeks.

III. Congress And The Agencies Clearly Exclude Drainage Districts From NPDES Permitting.

Ultimately, DMWW argues 44 years of consistent interpretation and application are wrong. DMWW devotes several pages to arguing that, *but for the agricultural exclusion*, drainage tiles *would be* a point source. DMWW did not seek summary judgment. Nor did the Districts move for summary judgment on this basis. Thus, whether drainage tile would be a point source ***but for*** being expressly excluded from the Act is not properly before this Court. What *is* before this Court is that Congress expressly directed "runoff . . . from land used for . . .

[10] DNR's recent amendments simply clarified the language to comport with federal regulations. ARC 2482C, XXXVIII 21 Iowa Admin. Bull. 2015, 2015 (April 13, 2016) ("These amendments add the definition of "new discharger" to rule 567—60.2 (455B) for clarification purposes and to comply with federal regulations and amend the definition of "point source to make it equivalent to the definition in the Clean Water Act.") Clarification repeating language in the federal act does not start the statute of limitations running anew—particularly when DMWW claims state pronouncements should be ignored. *See Niagara Mohawk Power Corp. v. F.E.R.C.*, 162 F. Supp. 2d 107, 137-38 (N.D.N.Y. 2001) (holding amendment to statute that simply continued to impose the very same requirements as the original enactment did not restart the statute of limitations); *Perez v. State*, 816 N.W.2d 354, 360-61 (Iowa 2012) (holding statute of limitations is not extended by mere clarification of existing law). Further, DMWW has not, in any event, challenged any subsequent clarification.

crop production" is a "nonpoint source[] of pollution" subject to state control. 33 U.S.C. § 1288(b)(2)(F) (1987).

A. Statutory Interpretation Always Is A Matter Of Law For The Court.

Even if difficult or involving ambiguous statutes, which this case does not, statutory interpretation always is a matter of law for the Court properly decided on summary judgment. *United States v. Upton*, 91 F.3d 677, 683-84 (5th Cir. 1996); *see United States v. Jackson*, 697 F.3d 670, 675 (8th Cir. 2012). The question before the Court, therefore, is straightforward. Does precipitation become a point source the moment it permeates soil and is not coursing over the land's surface or did Congress exclude such runoff from crop producing land from NDPES permitting? If Congress and EPA did not intend to demand NPDES permits when water permeates crop producing land's surface, the Districts must prevail on summary judgment. As the Districts have shown, and will show, Congress and EPA clearly not only considered whether NPDES permits were required for drainage tile, but expressly decided not to require permits for unirrigated farmland—precisely because it involves uncontrolled application of water. Nothing suggests the exclusion was limited to water coursing over the surface.

Statutory interpretations that make no sense are not permitted. *Pub. Citizen v. U.S. Dep't of Justice*, 491 U.S. 440, 454 (1989). All precipitation will infiltrate the land's surface to some extent. Thus, the exception DMWW envisions would swallow the rule and is not allowed. *Bureau of Engraving, Inc. v. Fed. Ins. Co.*, 5 F.3d 1175, 1177-78 (8th Cir. 1993) (upholding summary judgment because any other interpretation would allow the exception to swallow the rule); *Byl v. Van Beek*, No. 11-0802, 2012 WL 299529, at *3 (Iowa Ct. App. Feb. 1, 2012). Most importantly, however, it is 100% clear neither Congress in its statutes, nor EPA in its regulations, supports DMWW's strained interpretation. Both expressly reject it.

B. Because Drainage Districts Do Not Need NPDES Permits for their Drainage, DMWW's Clean Water Act Claim Fails as a Matter of Law.

In resisting summary judgment, DMWW seeks to persuade this Court it discovered a novel issue nobody considered for the last 44 years—an issue of first impression. Nothing could be further from the truth. Congress and the relevant agencies repeatedly considered the issue. Congress, EPA, DNR and every single state in the Union with drainage tiles rejects DMWW's position. DMWW would have this Court believe "EPA interpreted the scope of the 'agricultural stormwater discharges' exclusion as limited to runoff." Br. at 41. In DMWW's view, runoff, then, is limited to water coursing across the surface—*despite EPA never requiring NPDES permits for drainage tile*.[11] DMWW only can reach its conclusion if it did not read what EPA and Congress actually stated. *See*, *e.g.*, *Agricultural Activities*, 41 Fed. Reg. 28,493. (Supp. App. pp. 1-5). Because DMWW overlooks the critical junctures and decisions leading to the law's current state, the Districts will provide direct quotations rejecting DMWW's position. When one

[11] The sole issue, of course, is *Congress's* (or, if the Act could be deemed ambiguous, EPA's) intent for the agricultural exclusion when the Act was passed—not what witnesses may now try to claim the word "runoff" *should* mean. Nonetheless, multiple DMWW witnesses, including their expert, confirmed the common understanding of "runoff" included what comes through tile. Keeney Dep. 107-108 (Supp. App. p. 1403); Skopec Dep. 149 (Supp. App. p. 1434A); Mitchell Dep. 139-140 (Supp. App. p. 1416); McCurnin Tr. 84-86, 96 (Supp. App. pp. 1421-1423); Corrigan Dep. 76-80 (Supp. App. pp. 1428-1429). Indeed, DMWW's Chief Operating Officer Corrigan was quite candid that DMWW is trying to change the common understanding from what was in place when Congress actually enacted the law. Corrigan testified, "the concept of the difference between surface and subsurface evolved over time, and I think very early on the term 'runoff' was used to mean all sorts of runoff. I can't tell you whether in 2006, in the third quarter, whether it was typical to use that term or not. I just know that early on it was more inclusive and now we're drawing a distinction because we think there is a difference . . . I think it was typical that people were not distinguishing between surface runoff and tile drainage when they chose their words . . . **[W]hat I can tell you for sure is 20 years ago we were not distinguishing between surface runoff and tile drainage.**" Corrigan Dep. 97-99 (Supp. App. p. 1429A) (emphasis added). Corrigan said the narrower use of "runoff" coincided with Stowe becoming DMWW's CEO (Corrigan Dep. 99) (Supp. App. p. 1429A), although even Stowe continued to use "runoff" to include drainage tile flow as recently as May 2013. (Corrigan Dep. 129-30 (Supp. App. p. 1430)).

tracks the law's development, Congress and EPA clearly determined *not* to require NPDES permits for unirrigated land.[12]

1. Congress Placed Agriculture under State Control in 1972.

Events leading to 44 years of consistent law begin with passage of the 1972 Federal Water Pollution Control Act ("FWPCA")—which became the Clean Water Act. In 1972, the Act created two avenues for addressing effluent discharges—federal NPDES permitting (Section 402) or state programs (Section 208). *Agricultural Activities*, 41 Fed. Reg. at 28,495 (Supp. App. 1, 3); S. Rep. No. 95-370, at 8 (1977) (Supp. App. 13). Due to its "unique characteristics," agriculture[13] was left out of NPDES permitting and placed within Section 208's purview:

> **Congress recognized the unique characteristics of rural runoff pollution in sections 208 and 304(e)** of the FWPCA. See §§ 208(b) (2) (F) and 304(e) (2) (A). Similarly, the several discussions in the legislative history of the FWPCA of agriculturally and silviculturally-related pollution reveal that **while Congress considered it to be a problem of significant magnitude, Congress believed that technological solutions were not available (apart from solutions for**

[12] There is no need to spend significant time on DMWW's attempt to distinguish Chapter 455B claiming Chapter 455B does not contain the "agricultural stormwater discharge" exclusion and Iowa does not give deference DNR. Chapter 455B's implementing regulations have always excluded "agricultural stormwater runoff" consistent with federal law. Iowa Admin. Code. r. 567-60.2 (2016). Further, DMWW suggests the Court not give any deference to DNR's interpretation because discretion to interpret the statute is vested in the EPC. DMWW ignores that DNR's interpretation was requested as part of the formal rulemaking process by the Administration Rules Review Committee. Indeed, after considering the comments and responses, all which were part of the rulemaking procedure under Chapter 17A, EPC adopted the rules.

[13] DMWW suggests agricultural drainage might not be "agricultural" within the law's meaning. This claim is hard to understand in light of legislative history referring to "drainage" as "a normal management practice in all crop production on lands that have excessive soil moisture" that "is essential to achieve optimum productivity of our important farm . . . resources." 123 Cong. Rec. 26,766 (1977) (Supp. App. 184). It becomes impossible to understand in light of DMWW's own repeated testimony that drainage is to promote agricultural production. Stowe Dep. p. 55 ("They drain lands for agricultural purposes"); 227 (noting "nitrates came from agricultural producers" "[n]ot golf courses, not a municipal wastewater treatment facility, not geese."). Indeed, DMWW always referred to the issue as "Agricultural Tile Drainage." (App. p. 171).

> **feedlot-related pollution) and that the development of non-structural control measures and land use practices should be left to State and Regional agencies under section 208**.

Separate Storm Sewers, 40 Fed. Reg. 56,932, 56,934 (Dec. 5, 1975) (emphasis added) (Supp. App. 86).

The Code makes "runoff . . . from land used for . . . crop production" a nonpoint source, 33 U.S.C. § 1288(b)(2)(F), and this case involves land used for crop production:

> Q. To your knowledge what do drainage districts do?
>
> A. They drain the soils for agricultural production in Iowa.

Stowe Dep. at p. 55 (App. p. 2). Nothing suggests that anything permeating the ground or reaching a tile was excluded from "runoff." Quite the opposite, nonpoint sources include **"natural and manmade changes in the normal flow of surface and ground waters"**:

> **Section 304(e) addresses the problem of nonpoint sources of pollutants. This section and the information on such nonpoint sources is among the most important in the 1972 Amendments.** If our water pollution problems are to be truly solved, we are going to have to vigorously address the problems of nonpoint sources. The Committee, therefore, expects the Administrator to be most diligent in gathering and distribution of the guidelines for the identification of nonpoint sources and the information on processes, procedures, and methods for control **of pollution from such nonpoint sources as agricultural and silvicultural activities including runoff from crop and forest lands**; . . . **and natural and manmade changes in the normal flow of surface and ground waters.**

H.R. Rep. No. 92-911, at 109 (1972), *reprinted in A Legislative History of the Water Pollution Control Act Amendments of 1972*, at 796 (1973), *available at* http://hdl.handle.net/2027/mdp.39015004456722 (Supp. App. 92).[14]

[14] DMWW cites statements in the legislative history from Senators Muskie and Dole repeating the general point source definition, while not addressing the specific crop production exclusion. Quotations from the 1972 legislative history cannot alter subsequent actions as are at issue here. *Waterkeeper Alliance, Inc. v. EPA.*, 399 F.3d 486, 508 (2d Cir. 2005) ("It would be improper for us to rely on statements from 1972 in order to resolve an ambiguity that was not created until 1987."). As will be seen, *infra*, however, when the specific drainage tile issue is addressed, both (Continued...)

Consistent with Congress's dictates, no NPDES permits were required for agricultural drainage tiles in 1972 when the Act was passed—or at any point since. When construing a statute, deference to a longstanding interpretation:

> is particularly appropriate where the administrative practice at stake involves a contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new. The construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong.

Fed. Deposit Ins. Corp. v. Sumner Fin. Corp., 451 F.2d 898, 902 (5th Cir. 1971) (internal quotations omitted); *Davis v. United States*, 495 U.S. 472, 484 (1990) ("[W]e give an agency's interpretations and practices considerable weight where they involve the contemporaneous construction of a statute and where they have been in long use"); *Udall v. Tallman*, 380 U.S. 1, 16 (1965) ("Particularly is this respect due when the administrative practice at stake involves a contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion; of making the parts work efficiently and smoothly while they are yet untried and new" (internal quotations omitted)); *United States v. Wis. Power & Light Co.*, 38 F.3d 329, 334 (7th Cir. 1994). As will be seen, far from there being any compelling indication the Agency was wrong, forty-four years of consistent application, through multiple Acts of Congress, under Republican and Democratic administrations alike, show it was right.

2. Post-1972 Regulations and the *Train* Decision.

After NPDES permitting was established in 1972, "the Administrator of EPA promulgated regulations which exempted certain sources from the NPDES permit requirements. These included . . . irrigation return flow from point sources where the flow is from less than

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Senators Muskie and Dole are clear and contradict DMWW's position. Both confirm drainage tile falls within Section 208—not NPDES permitting.

3000 acres." *Nat. Res. Def. Council, Inc. v. Train*, 396 F. Supp. 1393, 1395 (D.D.C. 1975), aff'd sub nom, *Nat. Res. Def. Council, Inc. v. Costle*, 568 F.2d 1369 (D.C. Cir. 1977). The Natural Resources Defense Council, however, challenged this exemption. There was no dispute "The [FWPCA] does seem to indicate that at least some agricultural … sources are apparently of a nonpoint nature and are thus not subject to the more detailed requirements applicable to point sources." *Id.* at 1398. For ***irrigation*** return flow, however, the EPA's position faced an issue. Specifically, "[t]he House rejected an amendment designed to avoid the problems of including irrigation return flows in the permit program." *Costle*, 568 F.2d at 1376 n.17; *see Pac. Coast Fed'n of Fishermen's Ass'n v. Glaser*, No. CIV S-2:11-2980-KJM-CKD, 2013 WL 5230266, at *13 (E.D. Cal. Sept. 16, 2013) (describing failure of amendment to exempt irrigated return flow from 1972 NPDES requirements as motivating *Train* decision). The *Train* lawsuit followed.

Ultimately, the *Train* court concluded "the power to define point and nonpoint sources ***is*** vested in EPA," *Train*, 396 F. Supp. at 1396 (emphasis added), where Congress has not been definitive, but the Agency abdicated its role, in this instance, by issuing a blanket exemption of point sources from regulation. The court held, "[I]t appears that Congress intended for the agency to determine, at least in the agricultural and silvicultural areas, which activities constitute point and nonpoint sources." *Id*. at 1401. Thus, the court ordered EPA to conduct a reasoned review and to issue rules as to what should be deemed point sources and what should be deemed nonpoint sources in the agricultural realm. EPA did exactly that. EPA specifically addressed which "discharges of pollutants from agricultural activities . . . are point sources, and thus subject to the NPDES permit program." *Agricultural Activities*, 41 Fed. Reg. at 28,493 (Supp. App. 1). EPA expressly set out to answer the very question presented in this case and forcefully rejected DMWW's position. EPA determined ***only*** "controlled application of water" through

irrigation, and ***not*** unirrigated land, was subject to NPDES permitting. *Id* at 28,493, 28,494, 28,495 (Supp. App. 1-3). Even then, just surface run off from irrigated land was deemed to need an NPDES permit—not underground flow. *Glaser*, 2013 WL 5230266, at *14 (concluding "the regulatory backdrop that existed before Congress passed the CWA was that surface irrigation return flows required permits; non-surface irrigation flows did not").

When reaching its conclusion, EPA knew, just as DMWW indicates, agricultural drainage was "collected in pipes before discharging into streams," yet EPA found such drainage was properly regulated under Section 208—***not*** the NPDES system:

> EPA's position was and continues to be that most rainfall runoff is more properly regulated under section 208 of the FWPCA, whether or not the rainfall happens to collect before flowing into navigable waters. **Agricultural** and silvicultural **runoff**, as well as runoff from city streets, **frequently** flows into ditches or **is collected in pipes** before discharging into streams.[15] EPA contends that most of these sources are nonpoint in nature and should not be covered by the NPDES permit program.

Separate Storm Sewers, 40 Fed. Reg. at 56932 (emphasis added) (Supp. App. 84). Fully aware of the pipes, EPA specifically rejected the suggestion "all agricultural runoff that is channeled into ditches, pipes or culverts before being discharged into navigable waters should be subject to the permit program regardless of whether or not such runoff is a result of the controlled application of water." *Agricultural Activities*, 41 Fed. Reg. at 28,493 (Supp. App. 1). EPA likewise expressly rejected the claim "there is no legal authority to distinguish and regulate irrigation, while leaving dry land farming unregulated." *Id*. (Supp. App. 1). EPA knew about drainage pipes, yet chose to "**leav[e] dry land farming unregulated**" because irrigation flow can be controlled and rainfall cannot:

[15] Reflecting the understanding of the term, being "collected in pipes" clearly did not stop EPA from believing the discharge was still "runoff" and still "nonpoint."

> **The man-controlled application of water is the key to utilizing the NPDES permit program most effectively.** For example, there is minimal control over siltation and runoff as a result of a rainstorm or flash flooding, but such siltation and runoff could be reduced through changes in the man-controlled application of water. Thus, where regulation through the permit program is possible and appropriate, such regulation was proposed. In other words, pollution sources amenable to effective regulatory control within the NPDES permit program have been included in the definition of point source in the agricultural activities category, whereas sources for which the NPDES permit program is inappropriate and infeasible have been excluded from that definition.

Id. at 28,495 (Supp. App. 3) (emphasis added).[16] Excluding unirrigated land from NPDES permitting, of course, was done under the watchful eye of the *Train* Court and the Natural Resource Defense Council (the *Train* plaintiff). Consistent with Congress's directive that "runoff . . . from land used for . . . crop production" is a "nonpoint source[] of pollution," 33 U.S.C. § 1288(b)(2)(F), neither the Court nor the Plaintiff challenged EPA's decision to "leav[e] dry land farming unregulated." *Agricultural* Activities, 41 Fed. Reg. at 28,493 (Supp. App. 1). Indeed, as will be seen, only Congress reacted to EPA's decision. Congress's response, however, forcefully defeats DMWW's position in this case.

EPA continued specifically rejecting DMWW's notion that water must be regulated if it seeps or percolates into the ground. Not only did EPA recognize that "runoff that is channeled

[16] EPA distinguishing between controlled application of water and precipitation is consistent with the case law. *Nat'l Pork Producers Council v. EPA*, 635 F.3d 738, 743 (5th Cir. 2011) (explaining "agricultural stormwater discharges" occur "for example, when rainwater comes in contact with manure and flows into navigable waters"); *Concerned Area Residents for Env't v. Southview Farm*, 34 F.3d 114, 121 (2d Cir. 1994) (holding the exemption applies to "any discharges [that] were the result of precipitation"); *Waterkeeper Alliance*, 349 F.3d at 507 ('[W]hen Congress added the agricultural stormwater exemption to the Clean Water Act, it was affirming the impropriety of imposing, on 'any person,' liability for agriculture-related discharges triggered not by negligence or malfeasance, but by the weather—even when those discharges came from what would otherwise be a point source."); *Alt v. EPA*, 979 F. Supp. 2d 701, 715 (N.D. W.V. 2013) (holding "litter and manure which is washed from the Alt farmyard to navigable waters by a precipitation event is an agricultural stormwater discharge and therefore not a point source discharge, thereby rendering it exempt from the NPDES permit requirement of the Clean Water Act").

into . . . pipes" remains a nonpoint source, it also recognized percolation and seepage *are* nonpoint source events. *Application of Permit Program to Silvicultural Activities*, 41 Fed. Reg. 24,709, 24,710 (Jun. 18, 1976) (Supp. App. 97) (noting "nonpoint sources of water pollution" include discharges "induced by natural processes, including precipitation, seepage, percollation [sic], and runoff . . . .". Not coincidentally, just as in 1972, *still* no NPDES permits were required for unirrigated agricultural drainage tiles in 1976. This fact remains compelling. *E.g.*, *Davis*, 495 U.S. at 484.

3. Congress's Reaction to *Train*.

Far from some ignored issue suddenly discovered forty years later, after EPA's response to *Train*, Congress squarely took up DMWW's issue. If DMWW's interpretation were correct, Congress would have overturned EPA's express decision to "leav[e] dry land farming unregulated." *Agricultural Activities*, 41 Fed. Reg. at 28,493 (Supp. App. 1). Leaving no doubt where the law stands, **Congress did the exact opposite.** Congress left undisturbed EPA's conclusion that unirrigated land is excluded from NPDES permitting and reversed EPA by putting irrigated land back under Section 208 along with unirrigated land. "[C]ongressional failure to revise or repeal the agency's interpretation is persuasive evidence that the interpretation is the one intended by Congress." *NLRB v. Bell Aerospace*, 416 U.S. 267, 275 (1974). Where, as here, "Congress is aware of an agency's interpretation of a statute and takes no action to correct it while amending other portions of the statute, it may be inferred that the agency's interpretation is consistent with congressional intent." *United States v. Amirnazmi*, 645 F.3d 564, 587 (3d Cir. 2011); *cf. United States v. Philip Morris Inc.*, 116 F. Supp. 2d 131, 140 (D.D.C. 2000) ("Congressional action (or inaction) can, in certain circumstances, be viewed by courts as having 'effectively ratified' an agency's long-standing position.") (citing *Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 144 (2000)).

Congress, like EPA, was well aware of drainage tile and agriculture's contribution to pollution. During debate on the 1977 Act, Senator Allen expressly noted the existence of this nation's vast drainage network and that drainage "is essential to achieve optimum productivity of our important farm, ranch, and forest resources." 123 Cong. Rec. 26,766 (Supp. App. 184). Senator Dole likewise recognized that "ditching, tiling, and the construction of related facilities for the removal of excess soil moisture incidental to planting, protecting, or harvesting crops or to improve the productivity of land devoted to agriculture, silviculture, or ranching does indeed constitute normal farming or forestry practice." *Id*. at 26,767 (Supp. App. 185). Our state's own senator confirmed Congress knew agricultural nonpoint sources can contribute to pollution reaching navigable waters—while confirming such drainage remained "**nonpoint**" pollution:

> MR. CULVER: **Routine farming operations release substantial quantities of** contaminants including sediment, salts, **nutrients**, pesticides, organic materials, and pathogens **into our waterways**. It has been estimated, for instance, by the U.S. Soil Conservation Service, that cropland is responsible for 50 percent of the total sediment entering inland waterways. The problems of **nonpoint** source pollution have increased significantly over the last several years, and a growing number of recent studies have demonstrated the magnitude of **nonpoint** water pollution. The suspended solids reaching our Nation's streams from agricultural runoff are 700 times greater than those from sewer discharges. Over 400 million acres of cropland contribute 2 billion tons of sediment annually to our streams, lakes, and rivers; and total phosphorus emissions from nonpoint sources may be as high as 800,000 tons annually.

Id. at 26,774 (emphasis added) (Supp. App. 192). Senator Culver repeatedly emphasized farming was a nonpoint source addressed under Section 208. *Id.* at 26,773-774 (Supp. App. 191-192).

DMWW is correct that Congress knew of the issue for decades—including while debating NPDES permitting's application to agriculture. Equally clear is that, fully aware of the issue, Congress chose to deal with it ***not*** through NPDES permitting, but through state 208

programs. The 1977 Act addressed Section 404 (wetlands), Section 402 (NPDES permitting), and Section 208 (state programs). *Id.* at 26,700 (Supp. App. p. 118).

> The committee hearings focused on the progress of the 208 program, methods developed for nonpoint source control, and the relationship of the regulatory program under 402 and 404 to the section 208 program, with a specific view as to the way water pollution programs related to agriculture.

Id. at 26,697. It is just not true to say drainage was not considered. Concerns existed about the red tape involved in permitting agriculture. When questions arose on where drainage tile fits on the 208 (state programs)/402 (NPDES)/404 (wetlands) spectrum, Senator Muskie repeatedly made clear state run 208 programs were the answer for agriculture. Discussing Section 404, Senator Muskie broadly reiterated, in trying to address agricultural concerns, "Mr. President, the drainage exemption is very clearly intended to put to rest, once and for all, the fears that permits are required for draining poorly drained farm or forest land, of which millions of acres exist. **No permits are required for such drainage**." *Id.* at 26,767 (Supp. App. 185) (emphasis added).[17]

Rather than NPDES permits, Congress reiterated that farm runoff is addressed through Section 208 (later 319) designed to provide state control. *Id.* at 26,697 (Supp. App. 115) ("The committee hearings focused on the progress of the 208 program . . . with a specific view as to the way water pollution programs related to agriculture."). Senator Muskie again made clear:

> We leave those kinds of activities and other activities which involve agricultural runoff or runoff from any activities whatsoever to States under the section 208 program, and that is very clear.

[17] Not only was Senator Muskie very clear that "***No*** permits are required for such drainage," but "Section 402 discharge requirements are more restrictive than those for Section 404." Claudia Copeland, Cong. Research Serv., RL31411, *Controversies over Redefining 'Fill Material' Under the Clean Water Act*, 9 (2013), Congressional Research Service (August 21, 2013) (Supp. App. pp. 1435-1447). It makes no sense to assure Congress no permits are required to "once and for all" eliminate "fears" if all one really means is *more* restrictive requirements apply. Again, everything contradicts DMWW's position.

Id. at 26,721 (Supp. App. 139). Thus, Congress did ***not*** reverse the decision to "leav[e] dry land farming unregulated," but, instead, reversed the decision to require NPDES permits for irrigated land. The explanation could not be more compelling for purposes of this case:

> **This amendment promotes equity of treatment among farmers who depend on rainfall to irrigate their crops and those who depend on surface irrigation which is returned to a stream in discreet conveyances.**

Id. at 26,702 (Supp. App. 120). Congress expressly placed irrigated land back in the same category as unirrigated land—no NPDES permits—so all agriculture would be treated the same.

DMWW claims NPDES permitting must be required for seepage and percolation, yet nonpoint sources expressly included "precipitation, seepage, percollation [sic], and runoff . . . ." *Silvicultural Activities*, 41 Fed. Reg. at 24,710 (Supp. App. 97). EPA has remained 100% consistent on this issue in the agricultural arena through the decades and up to today:

> Nonpoint source pollution generally results from *land runoff, precipitation*, atmospheric deposition, ***drainage, seepage*** *or hydrologic modification*. Nonpoint source (NPS) pollution, unlike pollution from industrial and sewage treatment plants, *comes from many diffuse sources*. NPS pollution is caused by rainfall or snowmelt moving over ***and through the ground***. As the runoff moves, it picks up and carries away natural and human-made pollutants, finally depositing them into lakes, rivers, wetlands, and coastal waters and ground waters.

What is Nonpoint Source, US Environmental Protection Agency (May 24, 2016), https://www.epa.gov/polluted_runoff_nonpoint_source_pollution/what-nonpoint-source (Defs.' App. in Supp. of Mot. for Summ. J. 213). Nonpoint source pollution is caused by "rainfall or snowmelt moving over ***and through the ground***." *See Nonpoint Source Management Progress Grants Guidance*, 55 Fed. Reg. 35,248, 35,248 (Aug. 28, 1990) (Supp. App. 299). Iowa notes the same. *Iowa's Nonpoint Source Management Program, 2012 Annual Program Report* (Supp. App. 1255-1338) ("Nonpoint source (NPS) pollution occurs when rainfall, snowmelt or

irrigation water runs over land **or through ground** . . . .") (emphasis added)) (Supp. App. 1257).[18]

Not coincidentally, ***still*** no NPDES permits were required for agricultural drainage in 1977. How could they be? Congress's 1977 intent was unmistakable. Again, continuing, contemporaneous practice receives substantial weight. *Davis*, 495 U.S. at 484.

4. The Same Rules Continued To Apply Right Through 1987.

DMWW ultimately is left to claim Congress and EPA, in 1987, somehow silently reversed themselves to create the very discrimination Congress meticulously prevented between irrigated and unirrigated land. *See Glaser*, 2013 WL 5230266, at *14 (concluding Congress could not have silently imposed permitting requirements for subsurface return flows while creating an exemption for surface return flows). Congress itself, however, described the opposite intent—and not silently. Congress made clear its intent to continue treating agricultural runoff as a nonpoint source and "purposely avoided implementing a mandatory regulatory program for nonpoint pollution."

> For the first time **we are authorizing a new nonpoint source pollution control program which is meant to reduce water degradation caused by different types of agricultural runoff** and soil erosion. **Congress has chosen to create a new nonpoint program** which is a demonstration and grant program **that will assist the agricultural community** in its efforts to develop more efficient farming methods which will have the secondary benefit of protecting our Nation's waters. **We purposely avoided implementing a mandatory regulatory program for nonpoint pollution.** Assistance from all sectors of the public are needed if we are to effectively control nonpoint pollution and to mandate a

[18] Iowa's Code likewise belies any suggestion there is some exception created by calling drainage groundwater. Iowa's Legislature went out of its way to ensure liability would ***not*** adhere for farm-related nitrate in groundwater barring improper application. *See* Iowa Code § 455E.6 ("Liability shall not be imposed upon an agricultural producers for the costs of active cleanup, or for any damages associated with or resulting from the detection of groundwater of any quantity of nitrates . . . ."). Every facet of the law—and forty-four years of history—confirms DMWW is wrong.

> mandatory regulatory program at this time would only alienate those who must comply with Federal regulations.

133 Cong. Rec. S1003-02 (daily ed. Jan. 21, 1987) (Statement of Sen. Simpson) (emphasis added) (Supp. App. 1089); *see* 133 Cong. Rec. S18-01 (daily ed. Jan. 6, 1987) (Supp. App. 349) ("**This measure also includes a new section designed to reduce pollution from so-called nonpoint sources, such as runoff from agricultural land** . . . ." (emphasis added)) (Supp. App. 348) ("It also provides new requirements for management of **nonpoint sources of pollution**, **such as runoff** from cities and **agricultural areas**." (emphasis added)).

The 1987 Act, indeed, created a new state program to address nonpoint sources of pollution called Section 319 to replace Section 208. 133 Cong. Rec. S733-02 (daily ed. Jan. 14, 1987) (noting Section 319 "would establish the same requirement in terms of management programs" as Section 208) (Supp. App. 1014). Section 319 allows regulatory and other control programs to be run by the state. 33 U.S.C. § 1329(b)(2)(B). Senator Dole reiterated the propriety of leaving farm regulation to states:

> I am particularly pleased that the controversial issue of nonpoint source pollution has been addressed in a manner that meets our environmental needs without crippling the agricultural segment of our economy. Runoff from agricultural and mining areas, construction sites, and urban areas present a serious pollution problem. Obviously these problems vary widely between the States. This legislation encourages the States to implement management programs that will target critical areas, identify nonpoint sources and set timetables for program implementation.

131 Cong. Rec. 15,663 (1985) (Supp. App. 496). Agricultural programs fell within Section 319 just as they previously fell under Section 208. 133 Cong. Rec. S733-02 (daily ed. Jan. 14, 1987) (statement of Sen. Chafee) (Supp. App. 982); *see* 132 Cong. Rec. S16424-02 (1986) ("It establishes a new program for managing nonpoint sources of pollution, such as polluted runoff from agricultural lands.") (Supp. App. 622); 132 Cong. Rec. S16424-02 (daily ed. Oct. 16, 1986) (statement of Sen. Stafford) (noting Section 319 encompasses "cropland" and is intended to

provide "States' flexibility" with regard to "best management practices" like "conservation tillage, grassed waterways, cover crops, undisturbed field perimeters near waterways, and terracing") (Supp. App. 639). Congress expressly left agricultural land in the nonpoint category regulated by state programs—now Section 319. 133 Cong. Rec. S18-01 (daily ed. Jan. 6, 1987) (statement of Sen. Mitchell) ("**Another key amendment of the bill provides for State programs to identify and control nonpoint source pollution, such as runoff from** city streets and **agricultural lands**." (emphasis added)) (Supp. App. 335).

DMWW inappropriately tries to borrow definitions expressly limited to the storm sewer context to apply them to agriculture. DMWW's arguments are misleading.[19] Indeed, agricultural land distinctly was ***not***[20] included in Congress's new stormwater programs:

> Because Congress mandated comprehensive regulations of certain forms of industrial and municipal stormwater run-off under 33 U.S.C. § 1342(p), one can infer that **Congress wanted to make it clear that agriculture was not included in this new program**.

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[19] For example, DMWW provides a quotation suggesting "infiltration" is not included within "stormwater," but fails to inform this Court that "infiltration" expressly is defined to address ***only*** storm sewers: "Infiltration. **Water other than wastewater that enters a sewer system**…." 40 C.F.R. § 35.2005 (emphasis added).

[20] In defining "stormwater," EPA again clarified its "definition would encompass **municipal separate storm sewers**." It confirmed "storm water discharge subject to NPDES regulation does not include storm water that enters the waters of the United States via means other than a 'point source'" and that a "point source . . . does not include . . . agricultural storm water runoff." *National Pollutant Discharge Elimination System Permit Application Regulations for Storm Water Discharges*, 55 Fed. Reg. 47,990, 47,996 (Nov. 16, 1990) (Supp. App. 1122). EPA continued to make clear agricultural stormwater cannot be required to secure a permit. "The Administrator or NPDES State may also designate storm water discharges **(except agricultural storm water discharges)**, that contribute to a violation of a water quality standard or that are significant contributors of pollutants to waters of the United States for a permit." *Regulations for Storm Water Discharges*, 55 Fed. Reg. at 48,061 (emphasis added). (Supp. App. 1221-1222). It is impossible to find a seismic shift in how agriculture was addressed from EPA defining the word stormwater for purposes of storm sewers, while expressly noting it does not change what is a point source. In any event, even had EPA intended to do so (while inexplicably still ***not*** requiring permits), Congress's intent was clear.

Southview Farm, 34 F.3d at 120. Congress did not suddenly—and silently—create the same discrimination between irrigated and unirrigated land it meticulously avoided. *See Glaser*, 2013 WL 5230266, at *14. Not coincidentally, ***still*** no NPDES permits were required for agricultural drainage in 1987. *Decker v. Nw. Envtl. Def. Ctr.*, 133 S. Ct. 1326, 1337-38 (2013) (rejecting attempt to reinterpret the law where the "agency has been consistent in its view that the types of discharges at issue here do not require NPDES permits"). Contemporaneous, universally consistent, practice—confirmed by Congress—remains entitled to great weight. *Davis*, 495 U.S. at 484; *Udall*, 380 U.S. at 16; *Sumner Fin. Corp.*, 451 F.2d at 902; *Wis. Power & Light Co.*, 38 F.3d at 334.

Further, states ***did as directed*** by addressing drainage tile in 319 programs. EPA's 2011 review of nonpoint management programs described state programs addressing nonpoint agricultural drainage tiles. *See* Nonpoint Source Control Branch, Office of Wetlands, Oceans, & Watersheds, U.S. EPA, *A National Evaluation of the Clean Water Act Section 319 Program* (2011) (Defs.' App. in Supp. of Mot. for Summ. J. 36, 47, 70, 72, 101, 262, 267, 270, 272) (noting with approval programs in California, Wisconsin, North Dakota, Indiana, and Minnesota). State plans are also consistent with Congress's directive. *See e.g.*, Ill. EPA, *Illinois Nonpoint Source Management Program*, 25 (2013) (Defs.' App. in Supp. of Mot. for Summ. J. 280) (noting "[a]gricultural activities that cause [nonpoint source] pollution include . . . tile drainage. . ."); Watershed Planning & Restoration Section, Ind. Dep't of Envtl. Mgmt., *Indiana State Nonpoint Source Management Plan 2014 Update*, 15 (2014) (Defs.' App. in Supp. of Mot. for Summ. J. 286) ("Note that even though a tile drainage system delivers stream discharge through a series of 'pipes,' any pollutants carried by the discharge would still be considered nonpoint source."); Ohio EPA, *Nonpoint Source Management Plan Update* 33 (Defs.' App. in

Supp. of Mot. for Summ. J. 290-93) (discussing nonpoint source reduction strategies and goals for FY14 to FY19 for tile drainage). Likewise, Iowa's 319 plan addresses drainage tile. E.g., *Iowa's Nonpoint Source Management Program, 2012 Annual Program Report* (Supp. App. pp. 1285, 1309).[21]

In short, everything is consistent with Congress's intent to address drainage tile outside the NPDES context and contradicts DMWW's theory. States *have* acted, EPA *has* vast expertise, and states *have* established programs just as in *Decker*. *Decker*, 133 S. Ct. at 1338 (declining to overrule state permitting program in such circumstances). Still, no NPDES permits are required for drainage tile because everyone agrees they are not covered by the NPDES program. Ultimately, the proof is in the pudding. If EPA truly intended to overturn decades of consistent law, as DMWW claims, *why did EPA not start requiring NPDES permits when DMWW claims it intended to do so*, but, instead, continued just as it was? "Proof is in the pudding," in fact, has legal effect. When agencies uniformly, from day one, follow the same interpretation and practice, without Congress intervening, the law makes clear the interpretation deserves special weight. *Davis*, 495 U.S. at 484; *Udall*, 380 U.S. at 16; *Sumner Fin. Corp.*, 451 F.2d at 902; *Wis. Power & Light Co.*, 38 F.3d at 334.

The law is clear. "[R]unoff . . . from land used for . . . crop production" is a "nonpoint source[] of pollution," 33 U.S.C. § 1288(b)(2)(F). When EPA tried to subject irrigated land to NPDES permitting, Congress stepped in to overrule that attempt and to restore "equity" with unirrigated land as not subject to NPDES permitting. 123 Cong. Rec. 26,721 (1977) (Supp. App. 139). It is hard to imagine how Congress could have been clearer. Decades of Congress

[21] Again, DMWW *knows* agricultural tile is addressed through Section 319, because it raised the issue in the state's 319 review process. May 21, 2012 Kinman Letter (Supp. App. pp. 1389-1395).

discussing this very issue and choosing not to intervene as EPA continued to effectuate Congress's will by not requiring permits for unirrigated agriculture is compelling. As courts recognize, Congress did "seem to indicate that at least some agricultural … sources are apparently of a nonpoint nature and are thus not subject to the more detailed requirements applicable to point sources." *Train*, 396 F.Supp. at 1398. Agricultural runoff, such is at issue here, *is* precisely such an area Congress addressed.[22]

Even if Congress had not been so clear, however, the outcome would be identical. For those areas not specifically addressed, "it appears that Congress intended for the agency to determine, at least in the agricultural and silvicultural areas, which activities constitute point and nonpoint sources." *Train*, 396 F. Supp. at 1401. Again, EPA did just that. EPA expressly rejected the suggestion "all agricultural runoff that is channeled into ditches, pipes or culverts before being discharged into navigable waters should be subject to the permit program regardless of whether or not such runoff is a result of the controlled application of water," and decided to "leav[e] dry land farming unregulated." Application of Permit Program to *Agricultural Activities*, 41 Fed. Reg. at 28,493 (Supp. App. p. 1). "To hold that these facilities are nonetheless 'point sources' under the statutory definition would . . . undermine the agency's interpretation of the Clean Water Act." *Ass'n to Protect Hammersley, Eld, & Totten Inlets v. Taylor Res., Inc.*, 299 F.3d 1007, 1019 (9th Cir. 2002).

"Because we do not want to undermine or throw into chaos the EPA's . . . construction of the statute that establishes the reach of the CWA, *Chevron* deference is required, even in this citizen suit." *San Francisco Baykeeper v. Cargill Salt Div.*, 481 F.3d 700, 706 (9th Cir. 2007);

[22] No matter how EPA or state NPDES permitting authorities exercise discretion in designating stormwater discharges for NPDES permits, they cannot require permits for nonpoint sources of pollutants such as "agricultural storm water runoff." *See* 40 C.F.R. § 122.26(a)(1)(v).

ABC Disposal Sys., Inc. v. Dep't Of Natural Res., 681 N.W.2d 596, 602 (Iowa 2004) ("[W]e can disturb the Commission's interpretation of the law based only upon an irrational, illogical or wholly unjustifiable interpretation of this provision of the law.").

> The fair measure of deference to an agency administering its own statute has been understood to vary with circumstances, and courts have looked to the degree of the agency's care, its consistency, formality, and relative expertness, and to the persuasiveness of the agency's position, see *Skidmore, supra,* at 139–140, 65 S.Ct. 161.

United States v. Mead Corp., 533 U.S. 218, 228 (2001). Here: (a) "EPA solicited and received information, statistics and advice from other Federal agencies, State and local officials, trade associations, agricultural and environmental groups and interested members of the public," *Concentrated Animal Feeding Operations*, 40 Fed. Reg. at 54,182 (Supp. App. 971), (b) EPA has "unique experience and expertise," *E. I. du Pont de Nemours & Co. v. Train*, 430 U.S. 112, 135 n.25 (1977); (c) EPA's position arose from formal rulemaking under court supervision, (d) the interpretation has been 100% consistent for 44 years, and (e) Congress reacted to reinforce EPA's interpretation regarding unirrigated land. *Decker*, 133 S. Ct. at 1337-38 (granting added deference where "[t]he agency has been consistent in its view that the types of discharges at issue here do not require NPDES permits."). Nothing suggests EPA and DNR have been so arbitrary and capricious in applying and interpreting Congress's intent to warrant this Court intervening to reverse the expert agencies' contemporaneous and long-standing interpretation.

DMWW asks this court to wade into a policy debate with staggering implications.[23] DMWW asks the Court to align itself against every state and agency to touch the issue for almost

[23] A former EPA lawyer, for example, recently was quoted as indicating regulation could render vast areas of land unproductive. *Iowa Public Radio News: Paying the Price for Clean Water in Des Moines* (IPR Rado Broadcast May 18, 2016) *available at* http://iowapublicradio.org/post/paying-price-clean-water-des-moines.

half a century. It asks this Court to disregard Congress's intent to ensure equity between irrigated and unirrigated farmland by establishing exactly the discrimination Congress sought to avoid. It asks this Court to take its chances on the consequences and join DMWW to make a "majority of two." In short, DMWW asks this Court to legislate policy, not apply the law. Even if Congress had not been clear, regardless of whether it is *Auer* or *Chevron* deference, or merely an interpretive tool, this Court should defer to the Agencies' longstanding, contemporaneous interpretation that Congress not only did not overturn, but reaffirmed. *Decker*, 133 S. Ct. at 1337-38.

Conclusion

For all the foregoing reasons, and for all the reasons previously stated, the Districts ask that their motion be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing document was served upon the parties to this action by serving a copy upon each party listed below on May 31, 2016, by

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