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' MEMORANDUM IN SUPPORT OF THEIR MOTION FOR PARTIAL SUMMARY JUDGMENT ON COUNTS I & II**

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Preliminary Statement

On March 16, 2015, Plaintiff Des Moines Water Works ("DMWW") sued various drainage districts primarily located in Sac County, Iowa ("the Drainage Districts" or "the Districts"). Counts I and II, based on the Clean Water Act and Iowa Code Chapter 455B, remain pending before this Court.[1] Those counts seek unprecedented relief against the Drainage

[1] This Court, while Judge Mark Bennett presided, certified four questions regarding Counts III-X to Iowa's Supreme Court and stayed further discovery on those counts.

Districts. DMWW asks this Court to ignore drainage districts' lack of ability to do anything DMWW requests, ignore congressional intent, overturn more than forty years of consistent interpretation by the agencies responsible for administering the relevant statutes that Congress never overturned, and impose permitting requirements for drainage districts. Because the Clean Water Act and Iowa Code Chapter 455B have no such permitting requirements for agricultural drainage water, the Drainage Districts hereby seek summary judgment on Counts I and II.

Statement of Facts

This case has received extraordinary media attention. Unfortunately, DMWW's nearly constant statements to the press tend to distract from the real issues before this Court. The facts of this case are actually straightforward, and resolution of this matter turns on the purely legal task of statutory interpretation. Nevertheless, the following sections provide helpful background as to why this case and these particular parties are before this Court.

I. Background on Drainage Districts.

Drainage districts, as the Iowa Supreme Court explained, are merely "area[s] of land." *See Fisher v. Dallas Cty.*, 369 N.W.2d 426, 428 (Iowa 1985); *see also Chicago Cent. & Pac. R. Co. v. Calhoun Cty. Bd. of Sup'rs*, 816 N.W.2d 367, 370 (Iowa 2012) (same). They are organized upon petition of two or more landowners to allow land—in this case in Sac, Buena Vista, and Calhoun Counties—to be drained and made viable for agricultural production. Iowa Code § 468.6; *see also* Stowe[2] Tr. at 55:10-13 (App. p. 2) (explaining that drainage districts "drain the soils for agricultural production in Iowa"); Corrigan[3] Tr. at 112:4-8 (App. p. 30) (describing the purposes of agricultural drainage as "mak[ing] the land tillable, provid[ing]

[2] Bill Stowe is DMWW's Chief Executive Officer and General Manager.

[3] Ted Corrigan is DMWW's Chief Operating Officer.

access to the land so that it's not too wet to till"). Drainage districts do not tell farmers how to farm their land:

> Q. And do you know of anything [drainage districts] do with regard to telling the farmers how to farm their land?
>
> A. I do not.

Stowe Dep. at pp. 58-59, ll. 23-25, 1 (App. p. 3). This Court previously summarized drainage districts' history and functions:

> Drainage districts were formed to allow wetlands to be turned into agricultural lands. The purpose of drainage districts in Iowa can be traced back to the late 1800s and early 1900s. There were vast areas of flat land that were unable to be farmed due to inadequate drainage. Iowa Code Chapter 468 and Iowa Constitution Article I, § 18 established drainage districts as they exist under Iowa law currently. Drainage districts are a funding mechanism property owners establish to levy for drainage improvements. For a drainage district to be established, at least two land owners must petition for its creation. "The right of a landowner to place tiles in swales or ditches to carry the water from ponds upon and onto lower lands ... is necessary [ ] in order that low and swampy lands may be reclaimed, and a denial thereof would be productive of incalculable mischief." The affairs of drainage districts are managed by the county board of supervisors in a representative capacity. If a repair exceeds $50,000, a hearing is required to determine advisability and appeal is allowed.

Ruling Certifying Questions [ECF No. 50] at 7-8 (internal citations omitted).

Supervisors oversee drainage districts absent other trustees being appointed. Stowe Dep. at pp. 55-57 (App. pp. 2-3); Iowa Code § 468.3(2); *see Chicago Cent. & Pac. R. Co. v. Calhoun Cty. Bd. of Sup'rs*, 816 N.W.2d 367, 368 (Iowa 2012). Trustee/supervisors may pursue two types of changes to drainage districts: "repairs" and "improvements." Iowa Code § 468.126. Repairs "restore or maintain a drainage or levee improvement in its original efficiency or capacity" or "to prolong its useful life." Iowa Code § 468.126(1)(a). Repairs of any size are subject to hearing and appeal. Iowa Code § 468.126(1)(c). Improvements "expand, enlarge, or otherwise increase the capacity of any existing ditch, drain, or other facility above that for which it was designed." Iowa Code § 468.126(4). Landowners can overrule any improvement through

remonstrance. Iowa Code § 468.126(4)(e). DMWW CEO Stowe acknowledged he knows of no improvement landowners cannot stop:

> Q. Do you know if there's any improvement that they can't stop?
> A. I do not.

Stowe Dep. at p. 63 (App. p. 4). There is no claim any drainage district in this case exceeded its authority in any way. Stowe Dep. at p. 256 (App. p. 15) (confirming DMWW cannot "identify anything that [drainage districts] did that was beyond the scope of what they are empowered to do"). Indeed, DMWW acknowledges all drainage districts do is perform duties as Iowa's Code directs. Stowe Dep. at p. 257 (App. p. 15). Drainage tiles are overwhelmingly privately owned. Stowe Dep. at p. 59 (App. p. 3) (indicating drainage tiles are "[o]verwhelming private").

II. DMWW's Obligations to Remove Nitrate from Drinking Water

DMWW's CEO Bill Stowe concedes this case is not about whether Des Moines residents "are getting unsafe drinking water," but rather, who pays the cost of treatment. *See* Stowe Tr. at 121:16-19 (App. p. 5); *see also id.* at 121:20-123:4 (App. pp. 5-6).[4] Under the Safe Drinking Water Act, DMWW must ensure nitrate in drinking water does not exceed 10 milligrams per liter of water. *See* 42 U.S.C. § 300f *et seq*; Compl. at ¶ 5 (App. p. 293); Stowe Tr. at 121:11-14 (App. p. 5). Congress chose to place the burden to clean river water on drinking water utilities wishing to use river water, not those who convey nitrate to rivers. *See* Stowe Tr. at 310:10-311:1 (App. p. 25) (acknowledging Congress could have, but did not, preclude entities from putting more than 10 milligrams per liter of nitrate into waters and instead placed the obligation on water suppliers). Although DMWW may disapprove, Iowa's leaders chose to address nitrate issues through its EPA approved and award winning nutrient reduction strategy. Stowe Dep. at 219

[4] Stowe's testimony is particularly significant. He not only is DMWW's CEO, but its point person for this lawsuit. Stowe Dep. at p. 205:20-25 (App. p. 11) ("yes, certainly")

(App. p. 12); *see, generally,* Iowa Nutrient Reduction Strategy, http://www.nutrientstrategy.iastate.edu/ (last visited April 1, 2016).[5] DMWW asks that this legislative decision be reversed judicially.

DMWW's allegations against Defendant Drainage Districts are remarkable when compared to the evidence. DMWW cannot identify "any day when more than .1 milligrams per liter of nitrate in the water that made it to Des Moines Water Works was attributable to all of the drainage districts Des Moines Water Works sued combined[.]" Stowe Tr. at 244:16-21 (App. p. 13). In other words, DMWW cannot identify even once when all Defendants *combined* contributed even ***1/100th*** of the level necessary for DMWW to treat for nitrate.[6] Nor can DMWW identify a single "day all the drainage districts Des Moines Water Works sued combined caused Des Moines Water Works to have to treat water for nitrate[.]" Stowe Tr. at 245:3-7 (App. p. 13); *see also id.* at 243:18-244:1 (App. p. 13) (acknowledging that **"for Drainage District 32 and all the other districts that we have named as defendants, [] I cannot identify a particular day or circumstance in which they have caused us to have to denitrify or we violated the safe drinking water limits"**) (emphasis added). As will be seen, this admission goes to whether DMWW sued the proper party.

In fact, nitrate levels in the Raccoon River are higher *above* Sac County than below it, as DMWW's Director of Water Production conceded. McCurnin Tr. at 156:13-25 (App. p. 33).

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[5] Although not relevant to this motion, despite all DMWW's criticism and its omnipresent chart showing nitrate increases from 1974 to date, more recent charts show a declining nitrate trend line—with accelerating decline in recent years. Stowe Dep. at p. 197:23-25-198:1 (App. p. 9). DMWW admits the downward trend may, indeed, reflect farmer efforts. Stowe Dep. at p. 196:20-22 (App. p. 9).

[6] The only evidence in the record is that when nitrate at DMWW is 14.15 mg/liter, the highest the Defendants could contribute, giving DMWW the benefit of every doubt, is 0.06 mg/liter—or 4/1,000ths of the total! Chapra Rep. at p. 12 (App. p. 45).

Further, there is no evidence nitrate from any of these Drainage Districts "could reach the surface water intake at the Des Moines Water Works at a concentration above the detection limit used by approved standard USEPA analytical methods." *See* Terracon Water Resources Evaluation Report, p. 10 (App. p. 93).[7]

III. DMWW's Efforts to Change the Longstanding Clean Water Act Framework.

Although DMWW cannot present any evidence that nitrate in drainage water from Drainage Districts in Sac, Buena Vista and Calhoun Counties is even detectable at its water treatment facilities, DMWW argues Drainage Districts over 150 river miles away should be required to seek National Pollutant Discharge Elimination System (NPDES) permits from Iowa's Department of Natural Resources (DNR) for nitrate and failure to do so violates both the Clean Water Act and Iowa Code Chapter 455B.

DMWW argues drainage districts should pursue several changes ostensibly to allow compliance with demanded NPDES permits:

> 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.

[7] Based on this evidence (or lack thereof), a serious question exists whether DMWW has standing to bring a citizen suit under 33 U.S.C. § 1365 where it never had to run its nitrate treatment equipment because of anything any Drainage District did and it has not offered evidence that anything even detectable reaches Des Moines from any Drainage District. *See Friends of the Earth, Inc. v. Crown Cent. Petroleum Corp.*, 95 F.3d 358, 362 (5th Cir. 1996) ("At some point, however, we can no longer assume that an injury is fairly traceable to a defendant' conduct solely on the basis of the observation that water runs downstream. Under such circumstances, a plaintiff must produce some proof; here that proof was lacking."). "The relevant showing of injury-in-fact is not injury to the environment but injury to the plaintiff." *Downstream Envtl., L.L.C. v. Gulf Coast Waste Disposal Auth.*, No. CIVA H-05-1865, 2006 WL 1875959, at *10 (S.D. Tex. July 5, 2006); *see W. Wood Preservers Inst. v. McHugh*, 925 F. Supp. 2d 63, 70 (D.D.C.), *on reconsideration in part*, 292 F.R.D. 145 (D.D.C. 2013).

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). DMWW seeks changes it concedes Drainage Districts cannot implement. Infield practices are well beyond a drainage district's control. Stowe Dep. at pp. 58-59 (App. p. 3). Further, changes drainage districts can pursue are limited to repairs to "restore or maintain a drainage . . . improvement in its original efficiency or capacity" or "prolong its useful life," Iowa Code § 468.126(1)(a), or improvements to "expand, enlarge, or otherwise increase the capacity of any existing ditch. . . ." Iowa Code § 468.126(4). Simply put, no change DMWW proposes is within a drainage district's trustee's power:

Q. Do any of the improvements that you just described increase the flow from drainage tiles, to your knowledge?

A. Increase the flow from drainage tiles?

Q. Yes.

A. I'd be hard-pressed to come up with that. No, I don't believe they do.

Stowe Dep. at p. 253 (App. p. 14).

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). Indeed, DMWW concedes drainage districts have no power to compel any of the things it seeks to further reduce nitrate beyond natural denitrification that already occurs in the Districts' ditches. Stowe Dep. at 63, 307-08 (App. pp. 4, 24).

In now arguing drainage districts require NPDES permits, DMWW stands alone. In Iowa, in 1978 the U.S. Environmental Protection Agency ("EPA") delegated NPDES permitting responsibilities to Iowa's DNR (App. pp. 108-131), which now is responsible for writing and enforcing permits. Stowe Dep. at p. 268 (App. p. 13). NPDES permits first came into existence in 1972. National Pollutant Discharge Elimination System (NPDES), https://www3.epa.gov/region6/water/npdes/ (last accessed April 1, 2016); see Stowe Dep. at p. 278 (App. p. 19). In the forty plus years NPDES permits have been issued, drainage districts like those in Iowa have not required NPDES permits. Affidavit of Chuck Gipp, Director of Iowa Department of Natural Resources ("Gipp Aff.") at ¶ 10 (App. p. 134).

> 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). DMWW CEO Stowe agrees "DNR has been 100 percent consistent that NPDES permits are not required for drainage tiles for over 40 years." Stowe Tr. at 278:14-279:5 (App. p. 19). He further confirmed the expert regulators' position has remained consistent since 1972 under Republican and Democratic administrations alike. Stowe Dep. at p. 322:1-9 (App. p. 26). In fact, not one of the 1,606 NPDES permits Iowa's DNR issued as of February 2, 2016 was to a drainage district.

Gipp Aff. at ¶¶ 12, 15 (App. p. 134).[8] DNR makes clear such permits are not required. Gipp Aff. (App. pp. 132-135). Trying to overcome the expert agencies' consistent position, DMWW simply concludes the expert agencies charged with enforcing this complex law have been wrong for over forty years—*and* Congress did nothing to fix it. *See* Stowe Tr. at 280:10-16 (App. p. 19).[9]

DMWW not only disagrees with EPA and state agencies charged with administering the Clean Water Act, it even contradicts its own prior position. For instance, DMWW's point person for this suit, Stowe, presented the following chart describing drainage tile as "Non-point source," "Non-regulated," and "Non-permitted":

[8] Neither DNR's current director of the NPDES permitting program nor his predecessor could recall a single instance of an NPDES permit being issued to a drainage district. *See* Schneiders Tr. at 120:5-10 (App. p. 137); Wicklund Tr. at 11:23-12:17 (App. p. 139).

[9] Nor could DMWW identify a single other state that has ever required NPDES permits for drainage districts; instead, DMWW's position is that all of those states have been wrong for decades as well. *See* Stowe Tr. at 280:17-281:6 (App. p. 19).

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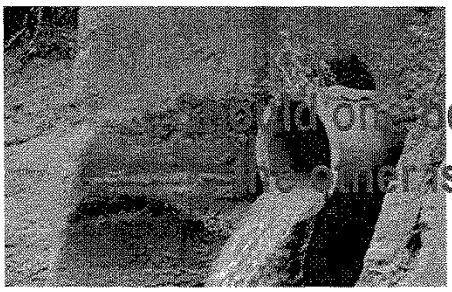
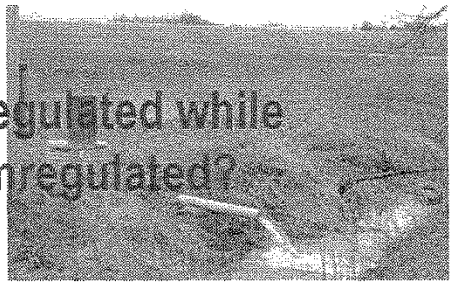
Point Source or Non-point Source: Can You See the Difference?

Wastewater Treatment Plant Discharge



Point source
Regulated
Treated discharge
Permitted (with discharge limits)
Potential contaminants discharged
Nitrates
Microbial
Pharmaceuticals
Location is mapped

Agricultural Tile Drainage



Non-point source
Non-regulated
Non-treated discharge
Non-permitted (no discharge limits)
Potential contaminants discharged
Nitrates
Microbial
Pharmaceuticals
Location is un-mapped
(commonly)

(App. pp. 140-177); *see also* (App. p. 181) (Jan. 2, 2013 letter from DMWW re: Nutrient Reduction Strategy Comments). DMWW's CEO Stowe therefore admits the claims in this lawsuit are at odds with not only expert regulatory agencies' interpretations of the Clean Water Act, but "arguably" those of his "prior self." *See* Stowe Dep. at 359:9-16 (App. p. 27). DMWW wants to change the law, but to do so by sidestepping Congress's role in that process.

The Iowa DNR's position that drainage districts need not seek NPDES permits, however, goes beyond forty-plus years of consistent interpretation of the Clean Water Act's NPDES requirements. In 2008-09, DNR engaged in rulemaking specifically related to the NPDES program. In the context of that rulemaking, the DNR reiterated its longstanding position that drainage tiles are non-regulated, non-point sources. *See* Iowa DNR, Public Participation

Responsiveness Summary (Jan. 27, 2009) (App. pp. 188-189). DMWW's CEO recognizes that, in that rulemaking, DNR addressed the very issue in this case and rejected DMWW's position. *See* Stowe Tr. at 284:16-285:19 (App. p. 20).[10] DNR told the world drainage tiles did not require NPDES permits. Tellingly, DMWW understands why drainage districts would not seek NPDES permits when the permitting agency expressly said they were not required. *See* Stowe Dep. at pp. 277:13-16 (App. p. 18); *see also id.* at 285:20-286:3 (App. pp. 20-21) (agreeing it "makes sense . . . from their vantage" for drainage districts not to seek NPDES permits when the "regulator is telling them no, you don't need them"). Yet, DMWW still seeks penalties from Drainage Districts for not doing what DNR told them not to do. Compl. at ¶ 2 (App. p. 293).

DMWW's attempts to fundamentally alter the longstanding legal framework are curious given its CEO's concession that drainage districts have no power to compel any of the things DMWW seeks to further reduce nitrate beyond natural denitrification that already occurs in the Districts' ditches. Stowe Dep. at 307:20-308:14 (App. p. 24). Nor can drainage districts compel Iowa's DNR to issue NPDES permits DNR concluded are not required. *See* Stowe Dep. at 311:8-15 (App. p. 25). Finally, DMWW's CEO concedes he doubts DNR has staff to police NPDES permits for the over 3,000 drainage districts in Iowa. *Id.* at 311:16-21 (App. p. 25). DMWW therefore must seek an order not only compelling Drainage Districts to seek NPDES permits they cannot fulfill, but also compelling Iowa's DNR to issue them (even though it is not a party to this case), and compelling the Iowa Legislature to appropriate money for more staff to allow Iowa's DNR to issue and enforce them.

[10] DMWW's now CEO, Stowe, participated in that 2009 rulemaking for the City of Des Moines (App. pp. 217-235) and confirms the City was well aware of it. Stowe Dep. at p. 287 (App. p. 19).

Argument

A brief recitation of the relevant legal framework illustrates how unprecedented DMWW's claims are. Congress enacted the Clean Water Act in 1972,[11] which established the NPDES program. *See* 33 U.S.C. § 1342. NPDES permits are required for most types of discharges of pollutants from "point sources" to navigable waters. *See id.* §§ 1342, 1362(7), (12), (14). Throughout the Clean Water Act, Congress drew an important distinction between point source and nonpoint source pollution. A "point source" is defined as "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, [or] conduit . . . from which pollutants are or may be discharged." 33 U.S.C. § 1362(14). The statute does not define nonpoint source, but that term generally refers to any source of water pollution other than point source discharge. *See Nat'l Wildlife Fed'n v. Gorsuch*, 693 F.2d 156, 165-66 (D.C. Cir. 1982). Congress, however, made clear "runoff from manure disposal areas, and from land used for livestock and crop production" are "agriculturally [] related nonpoint sources of pollution." 33 U.S.C. § 1288(b)(2)(F). Nonpoint sources of pollution are not subject to NPDES permitting. *See* S. Rep. No. 95-370, at 8-9 (1977) ("Congress made a clear and precise distinction between point sources, which would be subject to direct Federal regulation, and nonpoint sources, control of which was specifically reserved to State and local governments[.]") (App. pp. 382-383). To aid states addressing nonpoint source pollution, Congress directed EPA to issue "guidelines for identifying and evaluating the nature and extent of nonpoint sources of pollutants" and "processes, procedures, and methods to control pollution

[11] In 1972, Congress passed the Federal Water Pollution Control Act Amendments. *See* Pub. L. No. 92-500, 86 Stat. 816 (1972). In 1977, Congress renamed that statute the Clean Water Act. *See* Pub. L. No. 95-217, 91 Stat. 1566 (1977).

resulting from [] agricultural and silvicultural activities, including runoff from fields and crop and forest lands," among other sources. 33 U.S.C. § 1314(f).

Over time, Congress amended the Clean Water Act as necessary to ensure continued exclusion of agricultural runoff from the NPDES program. For instance, in 1977, Congress excluded "return flows from irrigated agriculture" from the point source definition. *See* 33 U.S.C. § 1362(14). The amendment's purpose was to ensure surface return flows from irrigated agriculture, like subsurface return flows and all agricultural runoff above and below the ground's surface for non-irrigated land, were excluded from permitting. Senate Report 95-370, at 35. Ten years later, in 1987, Congress again amended the Clean Water Act to exempt "agricultural stormwater discharges" from the "point source" definition and hence, from the NPDES program. *See* 33 U.S.C. § 1362(14). At that time, Congress fundamentally restructured how the NPDES permitting program applies to stormwater discharges, and "wanted to make it clear that agriculture was not included in this new [stormwater] program." *Concerned Residents for the Env't v. Southview Farm*, 34 F.3d 114, 120 (2d Cir. 1994).

Because the law has been clear for decades that drainage districts are not discharging pollutants from point sources and thus, are not required to secure NPDES permits, the Drainage Districts hereby seek summary judgment.

I. Jurisdiction and Statute of Limitations.

DMWW, to date, has focused on whether agriculture is truly excluded from NPDES permitting and whether the agencies have been wrong for more than forty years, while largely ignoring the nature of the entities they sued and their contribution to any issues. The Drainage Districts, too, are anxious to have this Court confirm the longstanding law of over forty years and, indeed, prefer that this case be decided on agricultural drainage tiles' longstanding exclusion from permitting by both Congress and the agencies. Although the Districts would like

this Court to confirm the agencies are doing as Congress intended, DMWW cannot ignore that it sued a party without power to redress its concerns and did not timely challenge the agency's clear position that drainage tile is not subject to NPDES permits.

A. This Court Lacks Subject Matter Jurisdiction.

For this Court to have subject matter jurisdiction, there must be a case or controversy. Const. Article III, § 2. DMWW seeks to compel the Drainage Districts to secure NPDES permits and comply with discharge requirements thereunder. Complaint, Counts I and II. Even if otherwise a proper party to a suit,[12] if the particular "person" sued lacks power to redress the issue raised, the case or controversy necessary for subject matter jurisdiction is lacking. *Okpalobi v. Foster,* 244 F.3d 405, 427 (5th Cir. 2001) (*en banc*). Subject matter jurisdiction is a matter of law properly resolved on summary judgment. *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560–61 (1992). Trustees who cannot control the outcome may not be sued seeking an outcome they cannot compel. *U.S. v. Carroll*, 667 F.3d 742, 745 (6th Cir. 2012).

Drainage districts have extremely limited existence and "only such power as the legislature grants them . . . ." *Reed v. Muscatine-Louisa Drainage Dist. No. 13*, 263 N.W.2d 548, 551 (Iowa 1978). Drainage districts only can pursue changes to restore or increase water flow. Iowa Code §§ 468.126(1)(a), 468.126(4). DMWW seeks to compel drainage districts to

[12] The Clean Water Act applies to persons. 33 U.S.C. § 1365(a)(1). A "[d]rainage district ... is not a person nor a corporation. It is nothing more than a definite body or district of land constituting an improvement district." *Clary v. Woodbury County*, 113 N.W. 330, 332 (Iowa 1907). Nor can drainage districts compel DNR to issue permits its Director confirms are not required. Stowe Dep. at p. 311 (App. p. 21); Gipp Aff. (App. pp. 128-131); *see 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). Neither proposition, however, is necessary to resolve this case. Even if a Drainage District might otherwise be a person, it must be a *proper* person.

do things they lack power to do. Stowe Dep. at pp. 253, 255 (App. pp. 14-15). Even more fundamentally, DMWW agrees drainage districts lack power to compel <u>any</u> improvement:

> 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.
>
> Q. So the trustees could not compel that on anybody, could they?
>
> A. That's my understanding.
>
> Q. And that's what we described earlier as a remonstrance; correct?
>
> A. That is what you described earlier as a remonstrance.
>
> Q. And you didn't disagree, as I recall; correct?
>
> A. I did not disagree, that's correct.

Stowe Dep. at pp. 307-308, ll. 20-25, 1-14 (App. p. 24); *see* Iowa Code § 468.126(4)(e). Where others can override a proposal, the court lacks jurisdiction to order the particular defendants to perform that act. *E.g.*, *Scott v. Taylor*, 405 F.3d 1251, 1259 (11th Cir. 2005) (concurring opinion). "[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." *Id.*

"Injunctive relief is unavailable when a state official does not have the authority to redress the injuries." *McCreary v. Richardson*, No. 6:11CV559, 2012 WL 1899591, at *4 (E.D. Tex. May 3, 2012) *report and recommendation adopted*, No. 6:11CV559, 2012 WL 1899589 (E.D. Tex. May 24, 2012) *aff'd*, 738 F.3d 651 (5th Cir. 2013), *as revised* (Oct. 9, 2013). A state entity cannot be enjoined to act beyond its authority. *Okpalobi,* 244 F.3d at 427 (injunction against state official is "utterly meaningless" where official against whom the injunction is granted lacks power to redress the asserted injuries); *see Lujan,* 504 U.S. at 560–61; *Turner v. McGee,* 681 F.3d 1215, 1218–19 (10th Cir. 2012); *Ege v. U.S. Dep't of Homeland Sec.*, 784 F.3d

791, 792-93 (D.C. Cir. 2015); *Bronson v. Swensen,* 500 F.3d 1099, 1111 (10th Cir. 2007).[13] "Because these defendants have no powers to redress the injuries alleged, the plaintiffs have no case or controversy with these defendants that will permit them to maintain this action in this court." *Okpalobi*, 244 F.3d at 427.[14]

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

"Informed by basic principles of due process, it is 'a cardinal rule of administrative law' that a regulated party must be given 'fair warning' of what conduct is prohibited or required of it. *Wisconsin Res. Prot. Council v. Flambeau Min. Co.*, 727 F.3d 700, 707 (7th Cir. 2013). Consistent with this basic fairness principle, a party cannot wait forever to challenge an agency's position on which parties rely and then condemn those who followed the law. Here, DMWW had – at most – six years, to challenge the action. *Envtl. Prot. Info. Ctr. v. Pac. Lumber Co.*, 266 F. Supp. 2d 1101, 1120 (N.D. Cal. 2003); 28 U.S.C. § 2401.

When a party fails to secure a required NPDES permit, and continues to discharge, the statute of limitations essentially never runs. Basically, a party required to disclose discharges under a required permit that it failed to secure did not alert those who might have been injured of

[13] *See also Scott*, 405 F.3d at 1259; *McDaniel v. Bd. of Educ. of City of Chicago,* 956 F.Supp.2d 887, 892–93 (N.D. Ill. 2013) (collecting cases); *Clark v. Fomby*, No. 9:11CV42, 2012 WL 3064228, at *8 (E.D. Tex. July 26, 2012); *Scott v. DiGuglielmo,* 615 F.Supp.2d 368, 373 (E.D. Pa.2009); *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).

[14] Because drainage districts lack power to accomplish what DMWW demands, it is unnecessary to reach this issue, but DMWW's claims have another redressability failing. Because DMWW admits it cannot show anything from any Defendant ever caused it to have to treat for nitrate, it similarly cannot show that eliminating nitrate from these districts would eliminate the need to treat. *Downstream Envtl., L.L.C.*, 2006 WL 1875959, at *11 (finding redressability absent where solution plaintiff sought would not redress harm it alleged); *Simmons v. Pilgrim*, No. 2:09-CV-121, 2010 WL 4683745, at *13 (N.D.W. Va. Nov. 10, 2010) (finding no redressability where harm would occur regardless of defendants' actions).

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the need to sue to address the issue and, thus, the limitations period does not run. *E.g.*, *U.S. Pub. Interest Research Grp. v. Atl. Salmon of Maine, LLC.*, 257 F. Supp. 2d 407, 426-27 (D. Me. 2003), *aff'd sub nom. U.S. Pub. Interest Research Grp. v. Atl. Salmon of Maine, LLC*, 339 F.3d 23 (1st Cir. 2003). This, however, is ***not*** such a case. Rather than drainage districts failing to secure *required* permits, all parties agree the agencies *did* ***not*** *require them*:

> 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); *see* Gipp. Aff. (App. pp. 132-135).

Where the agency announced its position, the complaining parties' gripe is with the agency, not the party doing exactly as it was told. Here, DMWW concedes Iowa's DNR, which is delegated NPDES permitting authority (App. pp. 108-131), made crystal clear no later than January 27, 2009 (App. pp. 188-189), that NPDES permits are ***not*** required for drainage tile:[15]

> 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). DMWW agrees, in January 2009, DNR addressed the very issue in this case and rejected DMWW's position.

[15] As noted elsewhere in this brief, there also were numerous prior indications of EPA's and DNR's position. *See*, *e.g.*, 41 Fed. Reg. 28,493, 28,493 (July 12, 1976) (distinguishing irrigated from non-irrigated farmland for NPDES purposes by noting that "where the discharge of pollutants is induced by precipitation, the permit program is not applicable."). This position was well-known for years as farmers bought and sold property in reliance on the ability to drain.

Q. And, sir, isn't Iowa's Department of Natural Resources taking exactly the position the drainage districts take in this case?

A. Yes.

Q. And they did that in their rule-making, did they not?

A. This would indicate that, yes.

Stowe Dep. at p. 285 (App. p. 20).

"In short, [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. v. Pac. Gas & Elec. Co.*, No. C 10-0121 RS, 2013 WL 1124089, at *6 (N.D. Cal. Mar. 1, 2013). Where the complaining party's gripe is really with the agency's position, the party has, *at most*, six years to challenge the agency's position. *Envtl. Prot. Info. Ctr.*, 266 F. Supp. 2d at 1120; 28 U.S.C. § 2401. Because DMWW acknowledges DNR restated its (long held) position on January 27, 2009, at the latest, but did not sue until more than six years later, its claims are barred. *Envtl. Prot. Info. Ctr.*, 266 F. Supp. 2d at 1120.

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

Although the Drainage Districts believe the foregoing arguments properly decide this case, the easier issue and the issue with broader effect in resolving any disputes is the simple fact Congress and the agencies both made crystal clear NPDES permits are ***not*** required for agricultural drainage tiles. This fact can and should decide this case.

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

Ultimately, putting timeliness and justiciability questions aside, to prevail on its Clean Water Act claim, DMWW must establish "the discharge of any pollutant into navigable waters from a point source [without] an NPDES permit issued by EPA or by an authorized state

agency," such as Iowa's DNR. *Serv. Oil, Inc. v. EPA*, 590 F.3d 545, 547 (8th Cir. 2009). DMWW's Clean Water Act claim fails as a matter of law because drainage districts' flows are excluded from NPDES permitting by statute. Statutory interpretation is a matter of law for the Court. *Kaibel v. Mun. Bldg. Comm'n*, 742 F.3d 1065, 1067 (8th Cir. 2014), *reh'g denied* (Feb. 14, 2014). Thus, this is a matter of law to be decided on summary judgment. *Id.*

As explained with citations below, Congress clearly considered subsurface agricultural drainage nonpoint source runoff not subject to NPDES permitting. Although the 1972 Act proclaimed agricultural land runoff was an agriculturally related nonpoint source of pollution, there was confusion in early years following the statute's enactment over whether water flowing from *irrigated* farmlands required NPDES permits. EPA believed such flows were exempt and promulgated a regulation broadly exempting both surface and subsurface return flows. A federal district court disagreed, so EPA reluctantly required NPDES permits for *surface* return flows from irrigated farmlands, while continuing to exempt *subsurface* return flows, as well as surface *and* subsurface runoff from *non-irrigated* farmlands. Because Congress disagreed with even EPA's limited permitting requirement, it overrode it in the 1977 Clean Water Act amendments by excluding *all* return flows from irrigated agriculture from permitting. Congress saw no meaningful distinction between surface return flows from irrigated agriculture and all other agricultural runoff that was exempt from permitting. When Congress overrode EPA's limited permitting requirement for surface return flows from irrigated farmlands, it did not disturb EPA's view that *subsurface* flows (whether from irrigated or non-irrigated farmlands) *are* exempt from permitting. The 1977 amendments' legislative history, how courts have interpreted those amendments, and how EPA and Iowa's DNR have administered the statute since the 1970s all confirm agricultural drainage flows at issue in this case are nonpoint sources.

As explained below, Drainage Districts' drainage flows likewise are exempt as "agricultural stormwater discharges," which is a term that did not appear in the statute until 1987. Congress's 1987 Clean Water Act amendments created a new program governing which stormwater discharges would be regulated and which would be excluded from NPDES permitting. To ensure nothing altered its longstanding view that agricultural runoff was nonpoint source pollution, Congress broadly exempted "agricultural stormwater discharges" from the point source definition (and hence, from NPDES permitting). Put simply, discharges that result from precipitation or are precipitation-related fall within the exclusion's scope. Here, once agencies receive their due deference, there can be no genuine dispute that Drainage Districts' drainage flows properly may be considered "agricultural stormwater discharges," just as they are, and that exemption provides an independent reason why DMWW's Count I must fail.

B. Congress Regarded Agricultural Drainage as Nonpoint Source Runoff.

Taking into account all traditional statutory construction tools, including legislative history, Congress clearly considered surface and subsurface agricultural drainage to be nonpoint sources of pollutants not subject to NPDES permitting. *See Senger v. City of Aberdeen,* 466 F.3d 670, 672 (8th Cir. 2006) (explaining courts "look first to whether the statute's language and legislative history clearly demonstrate what Congress intended" and "[w]hen they do, that intent controls").[16]

[16] Legislative history is particularly relevant when construing the Clean Water Act, and where the legislative history and the statutory language are consistent, they control. *See E.I. DuPont de Nemours & Co. v. Train*, 430 U.S. 112, 130-32 & n.21 (1977).

1. The Statutory Text and Legislative History Clearly Demonstrate that Congress Did Not Intend to Require Permits for Agricultural Drainage.

a. The 1972 Act Provided for Control of Agricultural Runoff Under the Nonpoint Source Pollution Sections of the Act.

In 1972, Congress decided runoff from agricultural lands would be addressed by area-wide waste treatment management plans created by States. Section 208 of the Act requires that those plans identify "agriculturally . . . related nonpoint sources of pollution" including "runoff . . . from land used for livestock and crop production." 33 U.S.C. § 1288(b)(2)(F). Congress recognized that "[a]gricultural runoff, animal wastes, soil erosion, fertilizers, pesticides, and other farm chemicals that are a part of runoff . . . are major contributors to the Nation's water pollution problem," but it nevertheless regarded those as nonpoint sources subject to state control requirements, not NPDES permitting. *See also* S. Rep. No. 92-414, at 39 (1971) (App. pp. 379-381).

Section 304(f) of the Clean Water Act likewise confirms agricultural field runoff is nonpoint source pollution. *See* 33 U.S.C. § 1314(f). That section requires EPA, in conjunction with other federal and state agencies, to issue guidelines for identifying and evaluating the nature and extent of nonpoint source pollutants and for controlling pollution resulting from, among other practices, "agricultural and silvicultural activities, including runoff from fields and crop and forest lands." *Id.* § 1314(f)(2)(A). When Congress enacted Section 304(f) in 1972, it proclaimed that "[t]his section . . . on . . . nonpoint sources is among the most important in the 1972 Amendments[.]") *See* H.R. Rep. No. 92-911, at 109 (1972) (App. pp. 376-378); *see also* S. Rep. No. 92-414, at 52 (1971) (describing how EPA would provide such information "on the processes, procedures, and methods to control pollution related to nonpoint sources"). Regarding agricultural sources in particular, Congress directed EPA to enter into an agreement with the Department of Agriculture, which was given authority to provide technical and financial

assistance and to conduct research on various issues, including the control of pollution by "reducing erosion and runoff, *providing for the orderly removal of excess water* and efficient use of irrigation water." S. Rep. No. 92-414, at 52 (emphasis added) (App. pp. 379-381).

b. The 1977 Clean Water Act Amendments Confirmed that both Surface and Subsurface Agricultural Drainage Flows from Croplands are Nonpoint Sources.

Nothing in the 1972 Act's text or legislative history suggests Congress's understanding of nonpoint source agricultural runoff was limited to *surface* runoff. Indeed, five years later, Congress left no doubt that it considered both *surface and subsurface* agricultural runoff to be nonpoint sources of pollutants that do not require NPDES permits. In 1977, Congress amended the definition of "point source" to exclude "return flows from irrigated agriculture," while simultaneously clarifying that NPDES permits are not required for such flows. *See* 33 U.S.C. §§ 1362(14), 1342(*l*)(1). The legislative history clearly shows Congress viewed all surface and subsurface flows from croplands as nonpoint sources, regardless of whether the flows resulted from storm events or controlled application of irrigation water and regardless of whether such flows are collected and channeled through discrete conveyances. The statutory text mentions only return flows from irrigated agriculture because Congress already considered similar flows from non-irrigated agricultural lands (like those at issue in this case) to be nonpoint source. Senate Report 95-370 (at p. 35) (App. pp. 382-383); *cf. Pac. Coast Fed'n of Fishermen's Ass'ns v. Glaser*, No. 11-cv-2980, 2013 WL 5230266, at *14 (E.D. Cal. Sept. 16, 2013) There was no need for Congress to add an exemption for the sorts of flows at issue in this case because it understood they were already exempt from NPDES permitting.

i. EPA's "Discriminatory" Regulation of Irrigated Agriculture.

Prior to the 1977 Clean Water Act amendments, EPA attempted to exclude "irrigation return flow" from NPDES permitting, which EPA defined to include "tailwater, *tile drainage, surfaced groundwater flow* or bypass water" from areas of less than 3,000 contiguous acres or 3,000 noncontiguous acres that use the same drainage system. 40 C.F.R. § 125.4(j)(4) (1973) (emphasis added). A federal district court concluded that exemption was contrary to the statute. *See Natural Res. Def. Council v. Train*, 396 F. Supp. 1393, 1402 (D.D.C. 1975). Although EPA appealed that decision, it reluctantly promulgated a revised regulation that exempted most surface and subsurface agricultural drainage flows, but required NPDES permits for "irrigation return flow," which EPA defined to include only "*surface* water, other than navigable waters, containing pollutants which result from the controlled application of water by any person to land used primarily for crops, forage growth, or nursery operations." 40 C.F.R. § 125.53(a)(2) (1977) (emphasis added).

Before finalizing that revised regulation, EPA received comments urging it to require NPDES permits for "subsurface as well as surface irrigation return flow." 41 Fed. Reg. 28,493, 28,493 (July 12, 1976). EPA noted those commentators urged EPA to require NPDES permits for "all agricultural runoff that is channeled into ditches, pipes or culverts . . . regardless of whether or not such runoff is a result of the controlled application of water." *Id.* Making clear that drainage tile is not a point source, EPA "carefully considered" those comments, but decided "*not to expand* the definition of point source." *Id.* (emphasis added). EPA clearly interpreted "point source" to exclude things like subsurface irrigation return flows, as well as any kind of runoff—surface or subsurface—"from water reaching the land as a result of precipitation (dry land farming)." *Id.* at 28,494; *see also Pac. Coast Fed'n of Fishermen's Ass'ns*, 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").

ii. Congress Responded to EPA's "Discriminatory" Regulation by Enacting the Return Flows from Irrigated Agriculture Exemption, Which Applies to Subsurface Flows such as Tile Drainage.

After EPA responded to *Train* by requiring permits only for *surface* runoff from *irrigated* lands, while continuing to exclude subsurface flows from *either* irrigated on non-irrigated or surface flows from non-irrigated land, Congress quickly interceded to restore broader exclusion. In 1977, to address the issue that had arisen, Congress enacted an unqualified exemption for all "return flows from irrigated agriculture." *See* 33 U.S.C. §§ 1342(*l*)(1), 1362(14). By overriding EPA's 1976 rule—and the *Train* decision that prompted that rule—Congress went even further than EPA's original (1973) rule, which tried to exempt surface and subsurface return flows, including tile drainage and surfaced groundwater flows, only from drainage areas of 3,000 acres or less. *See* 40 C.F.R. § 125.4(j)(4) (1973).

It bears emphasis that nothing in either the statutory text or the legislative history limits "return flows" to runoff that remains above the surface at all times. Congress's exclusion covers *all* return flows, including tile drainage, surfaced groundwater flow, tailwater, and any other return flows from irrigated agriculture. In articulating the breadth of the new exemption from NPDES permitting, the Senate Report noted that return flows from irrigated agriculture are indistinguishable from all other agricultural runoff. *See* S. Rep. No. 95-370 (1977), at 35 (App. pp. 382-383). The following passage clearly reflects that Congress intended for all these flows to be exempt from permitting:

> Testimony in field hearings suggested that effluent limits based on technological methods may not be appropriate for control of return flow pollutants and the

> committee determined that these sources were *practically indistinguishable from any other agricultural runoff*, which may or may not involve a similar discrete point of entry into a watercourse. *All such sources, regardless of the manner in which the flow was applied to the agricultural lands, and regardless of the discrete nature of the entry point, are more appropriately treated under the requirements of Section 208(b)(2)(F)*.

Id. (emphasis added).

Because return flows from irrigated agriculture and all other agricultural runoff were so similar, Congress made sure farmers relying on irrigation were treated the same as farmers in areas receiving plentiful rain:

> The conferees agreed to remove return flows from irrigated agriculture, from the definition of 'point source' and that [t]his amendment corrects what has been a discrimination against irrigated agriculture. In addition, the administrator will be prohibited from requiring permits for this type of discharge.
>
> This amendment corrects what has been a discrimination against irrigated agriculture. Return flows, composed of water which had been applied to crops through irrigation, were subject to permit requirements. *Farmers in areas of the country which were blessed with adequate rainfall were not subject to permit requirements on their rainwater run-off, which in effect had been used for the same purpose and contained the same pollutants*. Only the manner of application differed.

123 Cong. Rec. 39,210 (Dec. 15, 1977) (statement of Sen. Wallop) (emphasis added) (App. pp. 372-373). Senator Wallop's references to "remov[ing]" return flows from the point source definition and exempting them from permitting *like other agricultural runoff*, further confirms drainage from non-irrigated agricultural lands—like those at issue in this case—was never within the NPDES program.

Senator Stafford similarly explained that "the committee adopted an amendment which, in effect, exempts irrigated agriculture from all permit requirements under section 402 of the act, and instead insures that areawide waste treatment management plans under section 208 include consideration of irrigated agriculture." 123 Cong. Rec. S21, 26,702 (daily ed. Aug. 4, 1977) (App. pp. 374-375). He went on to explain how the 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 discrete conveyances" and noting that "[w]hile this amendment may appear to be a minor matter to those of us from the east, to the farmers in the semiarid and arid West this amendment is a critical feature of the bill." *Id.*

These Senators' statements closely resemble testimony concerning the need for equitable treatment among farmers provided on behalf of the Colorado Association of Soil Conservation Districts during a field hearing:

> Let us move to a consideration of section 402. Under the regulations implementing this section, we find a case of gross discrimination. The irrigation farmer is, by definition in the regulation, singled out from all other farmers and is forced to meet unusual demands.
>
> The irrigation return flows from his lands have been placed in the category of point sources of pollution *while his farmer-cousin in the high rainfall sections of the country—utilizing the same tile drains and drainage ditches—are placed in the category of nonpoint sources polluters* and exempt from the permit structure with its system of penalties.

2 Federal Water Pollution Control Act Amendments of 1977: Hearing Before the Subcomm. on Envtl. Pollution of the Senate Comm. On Env't. & Pub. Works, 95th Cong., 1st Sess., Part 4, at 232 (June 13, 1977) (emphasis added) (App. p. 385). Based on "[t]estimony in field hearings," the Committee passed the new exemption after determining return flows from irrigated agriculture are "practically indistinguishable from any other agricultural runoff." S. Rep. No. 95-370 (App. pp. 382-383).[17]

[17] As far back as 1977, Congress knew the permitting nightmare that would ensue if return flows from irrigated agriculture required NPDES permits. *See* 123 Cong. Rec. 38,956 (Dec. 15, 1977) (stating "[t]he problems of permitting every discrete source or conduit returning water to the streams from irrigated lands is simply too burdensome to place on the resources of EPA") (App. pp. 372-373).

c. The 1977 Clean Water Act Amendments Control the Outcome in this Case.

That Congress saw the need in 1977 to ensure equality among farmers who irrigate and those who do not is particularly important in this case. There would have been no need for Congress to correct any discrimination if farmers that did not rely on irrigation to water crops required permits for their drainage flows. To recap, when Congress amended the Act in 1977 to exclude return flows from irrigated agriculture from NPDES permitting, it was legislating against the following regulatory backdrop: (i) due to EPA's 1976 regulation, surface return flows from irrigated agriculture required a permit; (ii) EPA's regulation did not affect subsurface flows from irrigated agriculture, which did not require permits; (iii) surface flows from agricultural lands that relied on rainfall to water crops did not require permits; and (iv) subsurface flows from agricultural lands that relied on rainfall to water crops did not require permits. The 1977 Clean Water Act amendments leveled the playing field among farmers by ensuring permits were not required for the first category of flows—just like for all the others.

Nothing in the legislative history remotely hints that Congress disapproved of EPA's interpretation by simultaneously—and *silently*—establishing *new* permitting requirements for either of the subsurface flows in categories (ii) and (iv) above. *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). "[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); *see also United States v. Amirnazmi*, 645 F.3d 564, 587 (3d Cir. 2011) (holding that when, as in this case, "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."). This Court should reject DMWW's invitation to rewrite the statute in place of Congress.

2. Courts Have Refused to Require NPDES Permits for Subsurface Drainage.

Nor has any court ever accepted DMWW's novel theory. Indeed, the only two courts to consider whether the "return flows from irrigated agriculture" exclusion encompasses allegedly polluted groundwater held it does. *See Fishermen's Against Destruction of Env't, Inc. v. Closter Farms, Inc.*, 300 F.3d 1294, 1298 (11th Cir. 2002) ("We also conclude that the discharged groundwater and seepage can be characterized as 'return flow from irrigation agriculture.'"); *Pac. Coast Fed'n of Fishermen's Ass'ns v. Murillo*,[18] No. 11-cv-2980, 2014 WL 1302102, at *5 (E.D. Cal. Mar. 27, 2014) (dismissing allegations of discharges of "contaminated groundwater that pre-dates all farming in the area" and "contaminated groundwater discharged at times, such as the fall and winter months, when little or no irrigation occurs and whose source is not irrigation water" because "th[o]se two allegations do not amount to a plausible claim that such groundwater, discharged to prevent damage to crops' root zones, is unrelated to crop production").

Closter Farms and the two *Pacific Coast* opinions signal the correct outcome here. Congress plainly intended for farmers who relied on irrigation to receive the same exclusion from NPDES permitting as farmers relying on rainfall, whether water that drains from their land is above or below the surface. Congress saw no practical difference between the two, which is why it enacted the 1977 Clean Water Act amendments. A ruling in DMWW's favor, however, would lead to a result Congress could not possibly have intended: tile drainage, surfaced

[18] During the pendency of this litigation, David Murillo succeeded Donald Glaser as the Regional Director of the U.S. Bureau of Reclamation. Both the *Glaser* and *Murillo* opinions cited in this brief refer to Case No. 11-cv-2980 in the Eastern District of California.

groundwater flow, and any other flows or runoff from irrigated croplands would be exempt from NPDES permitting under the 1977 amendments, while the very same sorts of flows from croplands that rely on precipitation to water crops suddenly would require NPDES permits. In other words, the discrimination against irrigated agriculture Congress worked so hard to correct in 1977 would operate in reverse from 2016 onward. This Court should decline DMWW's invitation to thwart Congress's intent. *See FDA v. Brown & Williamson*, 529 U.S. 120, 161 (2000) ("In our anxiety to effectuate the congressional purpose of protecting the public, we must take care not to extend the scope of the statute beyond the point where Congress indicated it would stop."); *see also EPA v. EME Homer City Generation, L.P.*, 134 S. Ct. 1584, (2014) (noting that "a reviewing court's task is to apply the text of the statute, not to improve upon it").

3. Agencies Charged with Administering the Clean Water Act Consider Subsurface Agricultural Drainage to be Nonpoint Sources of Pollutants.

Since the Clean Water Act's enactment, agencies charged with administering the statute have carried out Congress's intent that agricultural drainage is nonpoint source pollution outside the scope of the NPDES program.[19] EPA, the Iowa DNR, and other agencies responsible for administering the Clean Water Act have consistently implemented Congress's intent that agricultural drainage flows are nonpoint source pollution beyond the scope of the NPDES program, notwithstanding that such flows could be considered groundwater under state law. That these agencies have not required NPDES permits for agricultural drainage for so long "strongly suggests that [they do] not read the statute as granting such power." *BankAmerica*

[19] As explained above, the statute is clear that agricultural drainage is not subject to NPDES permitting. But even if it were not clear, "*Chevron* deference requires courts to give considerable weight to an executive department's construction of a statutory scheme it is entrusted to administer." *Friends of Boundary Waters v. Bosworth*, 437 F.3d 815, 821-22 (8th Cir. 2006).

Corp. v. U.S., 462 U.S. 122, 131 (1983). Added deference is appropriate where, as here, "[t]he agency has been consistent in its view that the types of discharges at issue here do not require NPDES permits." *Decker v. Northwest Envtl. Def. Ctr.*, 133 S. Ct. 1326, 1337-38 (2013); *see also Bell Aerospace Co.*, 416 at 274-75 (holding deference "to the longstanding interpretation placed on a statute by an agency charged with its administration" is even more appropriate "where Congress has re-enacted the statute without pertinent change").

As a general matter, EPA describes nonpoint source pollution as follows:

> 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.

Dep. Ex. 120 (emphasis added) (App. pp. 213-214).[20] EPA plainly considers agricultural runoff, whether over the surface or through the soil, to be a nonpoint source of pollutants that does not require NPDES permits. Similarly, Iowa's DNR never issued or required an NPDES permit for drainage districts' subsurface tile lines or drainage ditches. *See* Gipp Aff. at ¶¶ 7, 15 (App. pp. 133, 134).

Decision documents relating to total maximum daily loads established under Clean Water Act Section 303(d) refer to tile drainage in discussions of nonpoint sources of pollutants, and not

[20] EPA for decades has described nonpoint source pollution as being caused by "rainfall or snowmelt moving over *and through the ground*." *See* 55 Fed. Reg. 35,248, 35,248 (Aug. 28, 1990) (request for comments on Clean Water Act Section 319 nonpoint source management programs guidance document); *accord* 63 Fed. Reg. 45,504, 45,504 (Aug. 26, 1998) (request for comments on guidance on coordination among State and Federal agencies relating to nonpoint source management programs); 68 Fed. Reg. 60,653, 60,655 (Oct. 23, 2003) (notice of availability of guidelines for States' implementation of nonpoint source management programs under Clean Water Act Section 319).

in discussions of point source discharges. *See, e.g.*, (App. p. 240) Iowa DNR, *Water Quality Improvement Plan for Raccoon River, Iowa* (May 19, 2008), at 120 *available at* http://www.iowadnr.gov/portals/idnr/uploads/water/watershed/tmdl/files/final/raccoon08tmdl.pdf. ("Results indicate that the vast majority of nonpoint source nitrate loads are delivered to streams with groundwater and tile flow."); (App. p. 246) Illinois EPA, *Vermillion River Watershed (IL Basin) TMDL Report*, at 28 (July 2009) *available at* http://www.epa.state.il.us/water/tmdl/report/vermilion-river/vermilion-final.pdf ("Nonpoint sources are not as easy to quantify because they do not directly discharge, are not regulated by permits and are dependent on facilitators such as precipitation that results in runoff and tile drainage."); (App. p. 251) Indiana Dep't of Envtl. Mgmt., *Decision Document for the Pigeon River Watershed TMDL, Indiana*, at 8 (Oct. 15, 2012) *available at* https://secure.in.gov/idem/nps/files/tmdl_pigeon_decision.pdf (identifying various nonpoint sources of pollution, including "[t]ile lined fields and channelized ditches [which] enable particles to move into surface waters"); (App. p. 257) Staff Report of the California EPA, *Selenium TMDL for Grasslands Marshes*, at 3 (Apr. 2000) *available at* http://www.swrcb.ca.gov/rwqcb5/water_issues/tmdl/central_valley_projects/grasslands_se/grasslands_se_tmdl.pdf (noting that "[s]ubsurface tile drainage water . . . is the primary source of selenium" and that "[t]here are no NPDES permitted sources" within the watershed). This is just a sampling of documents indicating Iowa and other states implemented the Act just as Congress intended.

Documents prepared pursuant to Clean Water Act Section 319 (33 U.S.C. § 1329), governing state nonpoint source management control programs, further confirm how EPA and states follow Congress's command to deal with agricultural drainage under state nonpoint source

management programs, not the NPDES permit program. When EPA conducted a national review of states' nonpoint source management programs in 2011, it described how numerous states were addressing pollutants conveyed by nonpoint source agricultural tile drains and drainage ditches. *See* (App. pp. 262, 267, 270, 272, 277) U.S. EPA, *A National Evaluation of the Clean Water Act Section 319 Program* (Nov. 2011), at 36 (California), at 47 (Wisconsin), at 70 (North Dakota), at 72 (Indiana), and at 101 (Minnesota) *available at* https://www.epa.gov/sites/production/files/2015-09/documents/319evaluation.pdf. State-specific nonpoint source management plans and accompanying documents contain the same sorts of discussions. *See, e.g.*, (App. p. 280) *Illinois Nonpoint Source Management Program*, at 25 (Sept. 2013) *available at* http://www.epa.state.il.us/water/watershed/publications/nps-management-program/index.pdf (noting that "[a]gricultural activities that cause [nonpoint source] pollution include . . . tile drainage. . ."); (App. p. 286) *Indiana State Nonpoint Source Management Plan 2014 Update*, at 15 (Feb. 2014) *available at* http://www.in.gov/idem/nps/files/nps_management_plan_2014_only.pdf ("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."); (App. pp. 290-293) Ohio EPA, *Nonpoint Source Management Plan Update*, at Section 3.0 *available at* http://www.epa.ohio.gov/Portals/35/nps/NPS_Mgmt_Plan.pdf (discussing nonpoint source reduction strategies and goals for FY14 to FY19 for addressing tile drainage).

In sum, agencies charged with administering the Clean Water Act have consistently given effect to Congress's intent that drainage districts not be required to secure NPDES permits. Typically, such interpretations stand unless clearly irrational, illogical or wholly unjustifiable. *See ABC Disposal Sys., Inc. v. Dep't Of Natural Res.*, 681 N.W.2d 596, 602 (Iowa 2004). Here,

DMWW boldly claims uniform interpretations by EPA and state regulatory agencies for over forty years have all been wrong. Stowe Tr. at 322 (App. p. 26). DMWW tried unsuccessfully to get EPA and DNR to change their longstanding positions and it also failed to get the Iowa Legislature to address its nitrate concerns according to its wishes. Stowe Dep. at pp. 273-76, 298 (App. pp. 17-18, 22). Having failed in other branches of government, DMWW now asks this Court to hold that the expert agencies have been wrong all this time. Stowe Tr. at 280 (App. 19). There is simply no basis to ask this Court to legislate and overturn agencies so clearly giving effect to Congress's intent.

4. DMWW's Attempts to Distinguish Between "Agricultural Stormwater" and "Groundwater" Miss the Point.

Trying to overcome Congress's 1977 amendments and decades of uniform interpretation, DMWW asserts that, if rain water or snowmelt goes below the ground's surface, it becomes "groundwater," not "agricultural stormwater" and thus, is subject to NPDES requirements. Congress, however, did not define either term in the statute, and the legislative history does not reflect any attempt to differentiate them.

These misguided attempts to distinguish between groundwater and agricultural stormwater appear rooted in the fact EPA (but not Congress) defined "storm water"[21] (but not "agricultural stormwater") in regulations governing stormwater discharges from industrial facilities and municipal separate storm sewer systems. *See* 40 C.F.R. § 122.26(b)(13) ("Storm water means storm water runoff, snow melt runoff, and surface runoff and drainage."). EPA promulgated that definition after Congress's 1987 amendments to the Clean Water Act which,

[21] EPA's regulations refer to "storm water," whereas Congress used the term "stormwater." *Compare* 40 C.F.R. § 122.26 *with* 33 U.S.C. § 1342(p). Those terms appear to be interchangeable.

among other things, overhauled how the NPDES permitting program applies to stormwater discharges. *See infra* Part I.B. EPA's definition of "stormwater" has no bearing in this case for two reasons:

First, EPA never defined the term "*agricultural* stormwater"[22] in its regulations governing industrial and municipal stormwater discharges. *See* 40 C.F.R. § 122.26. In fact, when EPA amended the industrial and municipal stormwater regulations in 1999, it was careful to clarify that those regulations do ***not*** address agricultural stormwater discharges. *See* 64 Fed. Reg. 68,722, 68,724-25 (Dec. 8, 1999) ("Although water quality problems also can occur from agricultural storm water discharges and return flows from irrigated agriculture, this area of concern is statutorily exempted from regulation as a point source under the Clean Water Act and is not discussed here."). More recently, when EPA promulgated regulations for concentrated animal feeding operations, it stated that "precipitation-related discharge[s]" constitute "agricultural stormwater" provided that certain conditions are met. *See* 40 C.F.R. § 122.23(e). Nothing in that regulation purports to limit such discharges to surface flows. That EPA would define "agricultural stormwater" differently from "stormwater" is neither unlawful nor surprising. *See Envtl. Def. v. Duke Energy Corp.*, 127 S. Ct. 1423, 1433 (2007) (holding that there is "no effectively irrebuttable presumption that the same defined term in different provisions of the same statute must be interpreted identically" because "[c]ontext counts"). Both the Clean Water Act and its implementing regulations reflect that Congress and EPA considered agriculturally-related discharges to be unique.

[22] The use of different words indicates a different intent. *S.E.C. v. McCarthy*, 322 F.3d 650, 656 (9th Cir. 2003) ("It is a decision that is imbued with legal significance and should not be presumed to be random or devoid of meaning."); *Miller v. Marshall Cty.*, 641 N.W.2d 742, 749 (Iowa 2002) ("We assume the legislature intends different meanings when it uses different terms in different portions of a statute.").

Second, regardless of how EPA chose to define "storm water" in the context of regulating industrial and municipal stormwater discharges following the 1987 Clean Water Act amendments, EPA could not have superseded Congress's clear intent—most clearly reflected in the 1977 amendments—to exclude surface and subsurface agricultural runoff from NPDES permitting as described above. "It is a basic tenet that regulations, in order to be valid, must be consistent with the statute under which they are promulgated." *Decker*, 133 S. Ct. at 1334 (internal quotation marks and citation omitted). Here, there is no indication EPA intended to undermine Congress's intent to exclude agricultural drainage from NPDES permitting using the regulatory definition upon which DMWW relies. Quite the opposite in fact—EPA kept right on excluding agricultural drainage from NPDES permitting. Further, even if EPA had tried to create a new permitting obligation for agricultural drainage as DMWW suggests (despite then requiring no permits!), such regulations would be invalid. *See Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2446 (2014) ("We reaffirm the core administrative-law principle that an agency may not rewrite clear statutory language to suit its own sense of how the statute should operate.").

5. Conclusion.

The text of the Clean Water Act, its legislative history, court decisions, and various decision documents from several agencies responsible for administering the Act all show agricultural drainage flows, whether collected and channeled through tile drains and ditches to a navigable water and whether they contain groundwater, are nonpoint sources of pollution that do not require NPDES permits. Thus, DMWW's Clean Water Act claim fails as a matter of law.

C. Subsurface Agricultural Drainage Flows Are Exempt from NPDES Permitting as "Agricultural Stormwater Discharges."

Even if this Court does not agree that the statutory text and its legislative history clearly reflect that Congress has, since 1977 at the latest, regarded agricultural drainage to be nonpoint sources of pollutants excluded from NPDES permitting, DMWW's Clean Water Act claim still fails as a matter of law because such drainage fits within the "agricultural stormwater discharges" exclusion from the "point source" definition. 33 U.S.C. § 1362(14).

In 1987, Congress amended Clean Water Act Section 402 and established a new program governing regulation of stormwater discharges. *See Decker*, 133 S. Ct. at 1331-32 (quoting 33 U.S.C. § 1342(p)). The legislative history for the 1987 amendments is reminiscent of that for the 1977 amendments in showing Congress intervened to correct how the Clean Water Act was being interpreted and applied. *See Conservation Law Found. v. Hannaford Bros. Co.*, 327 F. Supp. 2d 325, 332 (D. Vt. 2004) ("[T]he legislative history is replete with evidence that Congress was concerned with the overwhelming and unnecessary regulation created by the absolute prohibition on all stormwater discharges that existed before the enactment of the [1987 amendments]."). Out of concern the NPDES program was growing to unworkable proportions due to permits for stormwater discharges, Congress "exempt[ed] from the NPDES permitting scheme most 'discharges composed entirely of stormwater.'" *Decker*, 132 S. Ct. at 1332. The general exemption did not apply to certain industrial and municipal stormwater discharges. *See id.*; *see also* 33 U.S.C. § 1342(p)(2). Congress also gave EPA (or a state NPDES permitting authority) discretion to require a permit for any discharge of stormwater that it determines is "contribut[ing] to a violation of a water quality standard or is a significant contributor of pollutants to waters of the United States." 33 U.S.C. § 1342(p)(2)(E). Congress simultaneously clarified that this new program for regulating stormwater discharges would not change its

longstanding view that agricultural drainage does not require NPDES permits. *See Concerned Residents for the Env't v. Southview Farm*, 34 F.3d 114, 120 (2d Cir. 1994) ("[O]ne can infer that Congress wanted to make it clear that agriculture was not included in this new [stormwater] program."). To ensure agriculture was not swept into the new program, Congress enacted a blanket exemption for "agricultural stormwater discharges" from the definition of point source. *See* 33 U.S.C. § 1362(14).[23]

Congress did not define the term "agricultural stormwater discharges" in the statute, and that term has no common meaning among either laypeople or scientists.[24] What is important, however, is Congress placed no restrictions on the term. Thus, nothing in the statute limits that term to surface flows, nor does the statute impose any temporal or geographic limitations. *Cf. Closter Farms*, 300 F.3d at 1297 ("Nothing in the language of the statute indicates that stormwater can only be discharged where it naturally would flow."). Courts agree the exclusion covers discharges that might otherwise be defined as point source discharges. *See, e.g.*, *Waterkeeper Alliance*, 399 F.3d at 501 (affirming an EPA rulemaking exempting agricultural stormwater discharges from concentrated animal feeding operations even though such feeding operations appear in the definition of "point source"); *Closter Farms*, 300 F.3d at 1297 ("The fact that the stormwater is pumped into Lake Okeechobee rather than flowing naturally into the lake does not remove it from the exemption.").

EPA's current regulations governing NPDES permits for concentrated animal feeding operations come closest to defining "agricultural stormwater discharges." Those regulations

[23] EPA's regulations likewise made clear that, however EPA or state NPDES permitting authorities choose to exercise discretion in designating stormwater discharges for NPDES permits, they cannot under any circumstance require permits for nonpoint sources of pollutants such as "agricultural storm water runoff." *See* 40 C.F.R. § 122.26(a)(1)(v).

[24] Indeed, no witness in this case offered a definition for that term.

provide that a "*precipitation-related* discharge of manure, litter or process wastewater from land areas under the control of a CAFO is an agricultural stormwater discharge," as long as certain conditions are met. *See* 40 C.F.R. § 122.23(e) (emphasis added). Applying *Chevron* deference to that regulation, the Second Circuit upheld that rule finding it "reasonable to conclude that when 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." *Waterkeeper Alliance, Inc. v. EPA*, 399 F.3d 486, 507 (2d Cir. 2005).

Other courts that have analyzed the agricultural stormwater exemption applied the same basic test: whether discharges result from precipitation. *See Nat'l Pork Producers Council v. EPA*, 635 F.3d 738, 743 (5th Cir. 2011) (explaining that "agricultural stormwater discharges" occur "for example, when rainwater comes in contact with manure and flows into navigable waters"); *SouthviewFarms*, 34 F.3d at 121 (holding that the exemption applies to "any discharges [that] were the result of precipitation"); *Alt v. EPA*, 979 F. Supp. 2d 701, 715 (N.D. W.V. 2013) (holding that "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"). These cases confirm that the exemption covers far more than just pure rainwater. Discharge containing groundwater, litter, or manure, just as a few examples, is agricultural stormwater discharge if precipitation-related or caused by rainfall.

Here, there can be no genuine dispute that drainage district drainage is exempt from NPDES permitting as agricultural stormwater discharges. Both DMWW's former and current

CEOs described agricultural drainage carrying nitrate from farm fields as being precipitation-related. *See* Stowe Tr. at 180-81 (App. p. 8) (agreeing that variations in nitrate loads relate to annual precipitation because subsurface drains provide the "primary path [for precipitation] into the stream and river network"); *id.* at 171-72 (App. p. 7) (acknowledging that the "transport of [nitrate] into the waters of the state are [sic] precipitation related"). Other DMWW witnesses provided virtually identical testimony. *See, e.g.*, Mitchell[25] Tr. 38:3-16 (explaining tile drainage results from precipitation or irrigation) (App. p. 216); McCurnin[26] Tr. at 72:17-73:21 (stating water from drainage districts comes from "primarily precipitation") (App. p. 32); Corrigan Tr. at 106:21-24 ("It takes a little while after a significant rain event for the groundwater levels to come up such that the tiles will flow; and when they flow, the nitrate concentrations go up.") (App. p. 29).

Because drainage districts' tile drains and ditches move excess water from the surface and the root zone following precipitation, those flows are exempt from NPDES permitting as "agricultural stormwater discharges." Where every DMWW employee who testified agreed field drainage is precipitation-related, it simply cannot be concluded the agencies' interpretation of "agricultural stormwater" is so far out of bounds or irrational that it can be disregarded. Thus, DMWW cannot overcome the deference afforded to consistent and long held interpretations of expert agencies in the field. *See ABC Disposal Sys., Inc.*, 681 N.W.2d at 602.

[25] Jeff Mitchell is DMWW's Laboratory Supervisor.

[26] Mike McCurnin is DMWW's Director of Water Production.

II. Because Drainage Districts Do Not Require Permits Under Iowa Law, DMWW's Chapter 455B Claim Fails as a Matter of Law.

A. Drainage Districts Do Not Require NPDES Permits.

DMWW's claim that drainage districts require an NPDES permit under Iowa Code Chapter 455B fails for the same reasons as Count I. Like the federal Clean Water Act and its implementing regulations, the Iowa DNR regulations implementing Chapter 455B do not require NPDES permits for nonpoint source agricultural activities, including storm water runoff. *See* Iowa Admin. Code § 567-64.1(1)(e). Moreover, "return flows from irrigated agriculture and agricultural storm water runoff" are excluded from the definition of "point source" under Iowa's regulations. *See id.* § 567-60.2(455B). Just like under the federal Clean Water Act, no NPDES permit ever has been required for drainage districts under Iowa Code Chapter 455B. *See* Stowe Tr. at 277, 278-279 (App. pp. 18-19); Gipp Aff. ¶ 7 (App. p. 133) ("The Department has neither issued nor required a National Pollutant Discharge Elimination System (NPDES) permit to a Drainage District for subsurface drainage tile lines or drainage ditches."). Not one of the 1,606 NPDES permits the Iowa DNR had issued as of February 2, 2016 was to a drainage district. *Id.* ¶¶ 12, 15. (App. p. 134).

Beyond the Iowa DNR's consistent pattern of conduct, and DNR's Director confirming the expert agency's position, when Iowa's DNR amended its regulations implementing the NPDES program in 2008-09 to add a definition of "discharge of a pollutant," it made it clear the sorts of drainage at issue in this case is not subject to NPDES permitting. *See* Iowa Dep't of Nat. Res., Public Participation Responsive Summary for Rulemaking on Chapters 60, 62, 63, and 64 (Jan. 27, 2009) (App. pp. 184-212). Iowa's DNR received comments from stakeholders stating "field tile drainage" and "other soil drainage infrastructure" should not be included within the new definition. *See id.* at 5-6 (App. pp. 188-189). DNR agreed, and reiterated its longstanding

view that the term "discharge of a pollutant" does not include things like return flows from irrigated agriculture and agricultural storm water runoff because those are not point sources. *See id.* The definition of "discharge of a pollutant" Iowa's DNR ultimately codified therefore does not include field tile drainage and other soil drainage. *See* Iowa Admin. Code § 567-60.2(455B).

Even if there were ambiguity, this Court should defer to the agency's interpretation "unless that interpretation is plainly erroneous or inconsistent with the regulation." *Decker*, 133 S. Ct. at 1337 (internal quotation marks and citation omitted); *see also ABC Disposal Sys., Inc.*, 681 N.W.2d at 603. "It is well established that an agency's interpretation need not be the only possible reading of a regulation—or even the best one—to prevail." *Decker*, 133 S. Ct. at 1337. Here, the Legislature's intent not to do as DMWW suggests is clear.[27] If DMWW disagrees, it needs to go to the Legislature to address this inherently political balancing. Because nothing in either the Iowa Code or the Iowa Administrative Code imposes NPDES permitting obligations beyond the federal Clean Water Act, DMWW's claim that Drainage Districts require an NPDES permit under Iowa law also fails as a matter of law.

B. Drainage Districts Do Not Require Operation Permits.

DMWW's claim that Drainage Districts require an "operation permit" under Chapter 455B is similarly unfounded. Iowa Code Chapter 455B and its implementing regulations require operation permits only for "disposal systems" that dispose of sewage, industrial waste, or other waste. *See* Iowa Admin. Code § 567-60.2(455B). But Drainage Districts are not "disposal

[27] The Iowa Legislature has gone out of its way to protect agricultural producers from liability for nitrate in groundwater. *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 provided that" certain conditions are met.). There has been no claim in this suit that any of those conditions set forth in the Iowa Code were violated. *See* Stowe Tr. at 181 (App. p. 8).

systems" subject to the operation permit requirement. *See* Gipp Aff. ¶ 10 ("Historically, the Department has not considered agricultural field tile lines or drainage ditches managed by Drainage Districts as 'disposal systems' which require a permit under Iowa law."); *id.* ¶ 9 ("The Department has neither issued nor required a state of Iowa construction or an Iowa operation permit for a discharge from a Drainage District to its tile lines or drainage ditches."). (App. p. 133).

Iowa's DNR addressed whether operation permits are required for agricultural drainage in its 2008-09 rulemaking revising its permitting regulations. In response to a comment requesting Iowa's DNR specifically exempt "agricultural storm water discharges (including soil conservation drainage structures)" from state operation permit requirements, the agency clarified that state operation permits are not required for those discharges because they are not "disposal systems." *See* Iowa Dep't of Nat. Res., Public Participation Responsive Summary for Rulemaking on Chapters 60, 62, 63, and 64, at 25. (App. pp. 188-189). Because Iowa's DNR believed this was clear, it found it unnecessary to provide a specific exclusion from the operation permit requirement in the rule's text. *See id.* Even if there were any ambiguity in the Iowa DNR's regulations, however, this Court should defer to the agency's interpretation "unless that interpretation is plainly erroneous or inconsistent with the regulation." *Decker*, 133 S. Ct. at 1337 (internal quotation marks and citation omitted); *see also Des Moines Area Reg'l Transit Auth. v. Young*, 867 N.W.2d 839, 842 (Iowa 2015) ("We give an agency substantial deference when it interprets its own regulations, so long as such interpretation is not in violation of the rule's plain language and clear meaning."). Indeed, "[i]t is well established that an agency's interpretation need not be the only possible reading of a regulation—or even the best one—to prevail." *Decker,* 133 S. Ct. at 1337 (2013).

Not only is Iowa DNR's interpretation consistent with the regulatory text, it is the regulation's most sensible reading. The Iowa Administrative Code conceives of "disposal systems" as being separate and distinct from "waters of the state," which is defined broadly to include "drainage systems." *See* Iowa Admin. Code § 567-60.2(455B). The Iowa Administrative Code further defines an "operation permit" as a permit that authorizes "the discharge of wastes *from* the disposal system or part thereof or discharge source *to* waters of the state." *Id.* (emphasis added). That the regulations classify "disposal systems" separate from "waters of the state" suggests the Drainage Districts (and the over 3,000 other drainage districts in the State of Iowa) are *not* disposal systems requiring an operation permit. *Cf. Rapanos v. United States*, 547 U.S. 715, 735-36 (2006) (plurality opinion) (concluding ditches and "waters of the United States" should not be significantly overlapping categories because "the definition of 'discharge of a pollutant' would make little sense" if that were the case). The fact no court or agency in Iowa ever interpreted Iowa law as requiring an operation permit for agricultural drainage from Drainage District tile drains and ditches is consistent with these facts.

Conclusion

For all the foregoing reasons, the Court should reject DMWW's request that this Court step into the legislative realm to alter the law after years of consistent application and grant the Drainage Districts' motion for summary judgment on Counts I and II.

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 April 1, 2016, by

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