

Update on Water Issues – Supreme Court to Hear WOTUS and IA Supreme Court Rules in Favor of Drainage Districts

The Supreme Court has agreed to hear the Waters of the US (WOTUS) case. Many industry and agricultural groups asked the Supreme Court to hear the case after the Sixth Circuit Court of Appeals decided it had original jurisdiction opposed district courts. The Sixth Circuit decision is in direct conflict with the North Dakota District Court which decided it had jurisdiction, not the appellate courts.

When the Sixth Circuit Court of Appeals decided it had original jurisdiction, it directly cited its *National Cotton Council v. EPA* case from 2009, which requires pesticide applicators applying near water to get a Clean Water Act National Pollutant Discharge Elimination System permit in addition to the Federal Insecticide, Fungicide, and Rodenticide Act permits.

The case now before the Supreme Court should clear up which courts (appellate or district) are the appropriate courts to hear the WOTUS cases and could potentially determine that the *National Cotton* case was wrongly decided.

The Iowa Supreme Court ruled last week that the three counties being sued by the Des Moines Water Works (DMWW) are immune from damage claims.

The Des Moines Water Works sued 10 drainage districts in the Iowa counties of Sac, Calhoun, and Buena Vista in federal court alleging the illegal discharge of pollutants into the Raccoon River, which is Des Moines' primary source of drinking water.

The county defendants moved the federal court to dismiss the lawsuit because drainage districts have been statutorily immune

from lawsuits for more than a century. The federal court asked the Iowa Supreme Court to decide whether the drainage districts and counties were immune from the lawsuits. The opinion reaffirms immunity for the drainage districts and counties.

“This is a big win for Iowa drainage districts and the agricultural community nationwide,” said Steve Nielsen, General Counsel for United Suppliers, Inc. which is headquartered in Ames, Iowa. “Bill Stowe and the Des Moines Water Works are essentially asking a judge to re-write the Environmental Protection Agency’s Clean Water Act, which would change well-established policy and set a dangerous precedent. Since its inception, the CWA has defined farm runoff as a non-point source, similar to storm water, and exempted drainage districts from liability. Any change to that exemption would subject farmers to a burdensome and totally unnecessary permitting process.”

The Iowa Supreme Court opinion does not resolve the federal Clean Water Act (CWA) issues still before the federal district court. However, previous rulings and established regulations suggest any federal decision would favor drainage districts.

Should the federal court rule in favor of DMWW, drainage districts could be subject to permitting under the CWA, but it will not be able to collect damages from the drainage districts or the counties. The drainage districts and DMWW are slated to go to federal court in late June.