Image by Edwin Remsberg

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New Agricultural Law Developments

By: Jeff Masson
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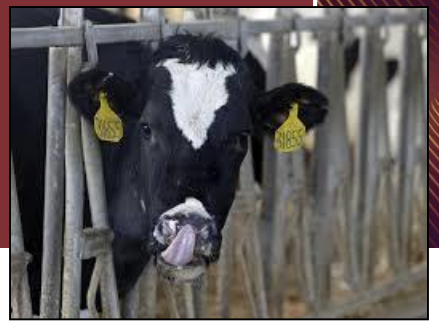
Overview



- Recent Nitrate Cases
  1. Washington's "Cow Palace" Decision
     - Issue: "Solid Waste" under the Resource Conservation and Recovery Act ("RCRA")?
     - Parties entered into a Consent Decree in May 2015
  2. Des Moines Water Works Case
     - Issue: "Point Sources" under the Clean Water Act ("CWA")
     - Trial Date – June 13, 2017
- Syngenta Litigation Update
  - Issue: Misleading Marketing Practices
  - Class Action
  - Class Trial set for the Summer of 2017

Image from washingtontimes.com

THE “COW PALACE” DECISION

Cmty. Ass'n for Restoration of the Env't, Inc. v. Cow Palace, LLC, 80 F. Supp. 3d 1180 (E.D. Wash. 2015)

Image by Edwin Remsberg

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What is the Cow Palace Dairy?

- Located in the Lower Yakima Valley in Granger, Washington

- Characterized as a "Large Concentrated Animal Feeding Operation"
  - In 2012, Cow Palace reported a herd size of over 11,000
  - Produces milk, meat, crops, and manure

- According to estimates, the Dairy produces over 100 million gallons of manure annually. (80 F. Supp. 3d at 1187)
  - About 61 million gallons of manure-contaminated water from washing the cows
  - Over 40 million gallons of liquid manure excreted by the herd

- Manure Management Practices (*Id.* at 1192-97)
  - Land Applied → About 533 of 800 total acres were used for the application of manure.
    - Cow Palace contends the manure was properly used as fertilizer.
  - Lagoons → Millions of gallons of liquid manure were stored in unlined lagoons.
    - Four storage ponds, two settling basins, a safety debris basin, and several catch basins.
    - Collectively, the lagoons span over 9 acres.
  - Composting → Cow Palace composts about 35,000 tons of solid manure annually.

Lagoon Map

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Picture from the May 2015 Consent Decree filed in this case

The Lawsuit

- RCRA: bans the open dumping of “solid waste” in a manner that imposes “imminent and substantial endangerment to human health or the environment.”
  - Among other things, the RCRA is concerned with disposing of solid and hazardous waste in environmentally sound methods.

- Plaintiffs (non-profit environmental organizations) claimed:
  - (i) the manure is being over-applied to the land, and therefore, the manure is no longer fertilizer, but rather, “solid waste” under RCRA;
  - (ii) the leakage from unlined lagoons and compost areas is “solid waste”;
  - (iii) the over-application of solid manure on the land and leaking of liquid manure causes high nitrate levels in the groundwater.

- Cow Palace: The manure is a useful byproduct.
  - Solid manure is applied as fertilizer on agricultural fields
  - Liquid manure is first stored in the lagoons and then is used as fertilizer
  - The high nitrate levels in the groundwater is the result of other sources, like septic systems and irrigated croplands.

Issue: Is Cow Palace's Manure "Solid Waste" under the RCRA?

- Under the RCRA, "solid waste" includes "any garbage, refuse, … and other discarded material, including solid, liquid, semisolid or contained gaseous material resulting from … agricultural operations…." 42 U.S.C. § 6903(27).

- Ninth Circuit: "Discarded" means material "cast aside; reject[ed]; abandon[ed]; give[n] up."
  - *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1041 (9th Cir. 2004)

- "The key to whether a manufactured product is 'solid waste,' then, is whether that product 'has served its intended purpose and is no longer wanted by the consumer.'"
  - *Ecological Rights Foundation v. Pac. Gas & Elec. Co.*, 713 F.3d 502, 515 (9th Cir. 2013) (*citing* H.R. Rep. No. 94-1491(I) at 2 (1976)).

- Fertilizer is NOT considered "solid waste" under the RCRA
  - Agricultural waste that is "returned to the soil as fertilizers or soil conditions" is NOT considered to be "solid waste." 40 C.F.R. § 257.1(c)(1).
  - Plaintiff's Argument: The "over-application" of manure is "solid waste," because the extra manure is simply being discarded onto the land or into lagoons.
  - If over-applied manure is no longer considered fertilizer, but instead, is "solid waste," the farm must discard the manure subject to the regulations and permitting scheme in the RCRA.

The Ruling
(80 F. Supp. 3d 1180)

- Plaintiff moved for Summary Judgment and Cow Palace moved to Dismiss.
  - In January 2015, the court denied Cow Palace's Motion to Dismiss.
  - The court granted, in part, Plaintiff's Motion for Summary Judgment

- The court held that Cow Palace was violating the RCRA with open dumping of a solid waste.
  - Whether manure is considered "solid waste" depends on the facts of the specific situation.
  - Must consider whether the manure was "discarded" and whether the manure ceased to be "useful or beneficial."

- The court found that:
  - (i) Cow Palace's manure management practices transformed manure from fertilizer to "solid waste" under the RCRA.
    - The court held that, by over-applying the fertilizer, the manure was no longer useful or beneficial, but was simply discarded.
  - (ii) Cow Palace's manure management practices with respect to the lagoons and composting contaminated the groundwater with high levels of nitrate.

- The court rejected the Cow Palace's claim that fertilizer can NEVER be "waste" under the RCRA
  - The court noted that not all agricultural wastes were excluded from RCRA regulations.
  - Rather, only wastes that are "returned to the soil as fertilizers or soil conditions" were excluded. 40 C.F.R. § 257.1(c)(1).

The Ruling re Cow Palace's Manure Management Practices

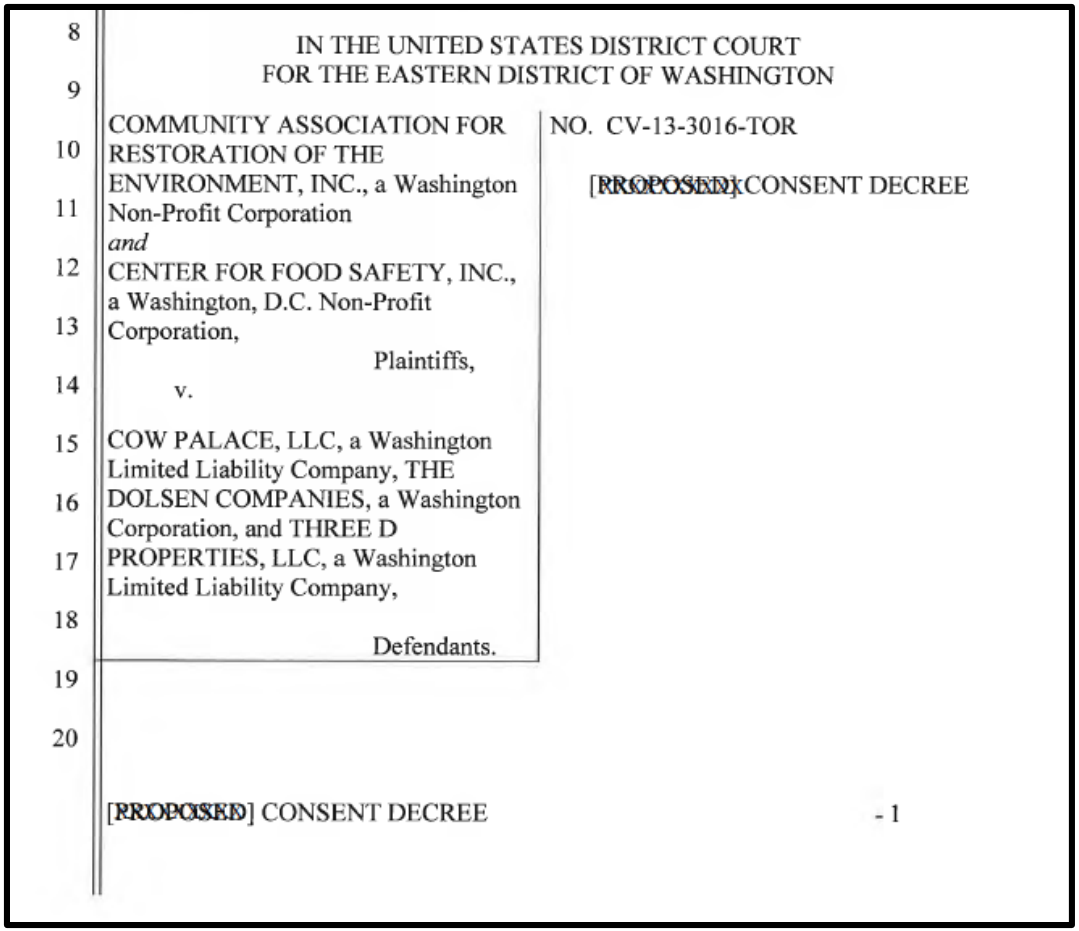
- Land Applied Manure. (80 F. Supp. 3d at 1222)
  - The court found that the manure was not being used as fertilizer, but instead, was discarded without any concern for soil nutrient levels or crop needs.
  - Cow Palace did have a nutrient management plan, but when it tested the land to determine nutrient concentration, Cow Palace:
    - Only tested 1 of 11 lagoons and used these results for all lagoons;
    - Failed to take into account nutrients that were already in the soil when they applied new nutrients;
    - Applied nutrients to bare ground (areas with no crops).
  - Cow Palace also gave away manure to third-parties for free.

- Lagoons. (*Id.* at 1223)
  - The court held that the leaks from the unlined lagoons were "a consequence of the poorly designed temporary storage features of the lagoons."
  - The permeable storage techniques converted beneficial product (stored manure) into "waste" because the manure is knowingly abandoned into the underlying soil.
  - It could not be "affirmatively established" that the lagoons met National Resources Conservation Service standards, as Cow Palace asserted.

- Composting. (*Id.* at 1224-25)
  - The court held that the manure used in the unlined composting area was not actually used for a beneficial purpose because the manure was also knowingly abandoned into the underlying soil.

Picture from Agweb.com

May 2015 Consent Decree



IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WASHINGTON

COMMUNITY ASSOCIATION FOR RESTORATION OF THE ENVIRONMENT, INC., a Washington Non-Profit Corporation
and
CENTER FOR FOOD SAFETY, INC., a Washington, D.C. Non-Profit Corporation,

Plaintiffs,

v.

COW PALACE, LLC, a Washington Limited Liability Company, THE DOLSEN COMPANIES, a Washington Corporation, and THREE D PROPERTIES, LLC, a Washington Limited Liability Company,

Defendants.

NO. CV-13-3016-TOR

[PROPOSED] CONSENT DECREE

[PROPOSED] CONSENT DECREE - 1

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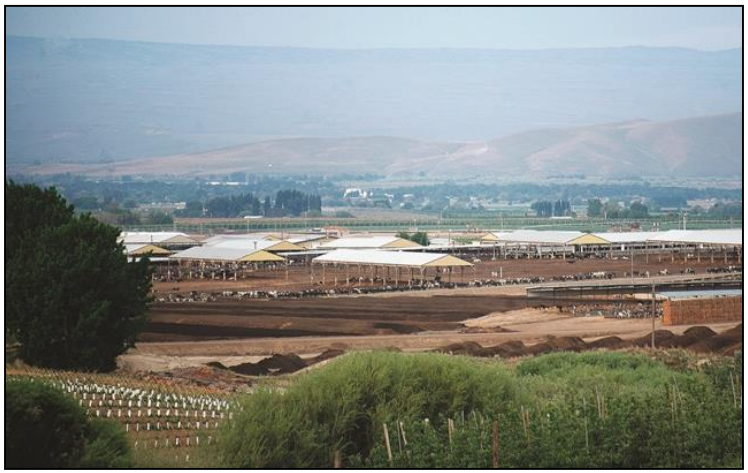
May 2015 Consent Decree

- In light of the Jan. 2015 ruling, the parties entered into a Consent Decree in May 2015.

- As part of the Consent Decree, among other things, Cow Palace agreed to:
  - Double line all lagoons with a Geosynthetic Clay Liner ("GCL") and a 40 mil synthetic liner;
  - Apply liquid and solid manure to agricultural fields based upon a determined nutrient management budget;
  - Install concrete aprons in its cow pens in order to redirect the collected wastewater to the lagoon system.

- With respect to its Compost Operations, Cow Palace agreed to:
  - reduce the acreage of its Compost Operations to 30 acres or less;
  - implement an aeration system to accelerate the reduction of moisture, increase oxygen levels, and provide temperature control;
  - and conduct all Compost Operations on surfaces with a permeability rating of at least $1x10^{-4}$ cm/sec.



Picture from Agweb.com

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Implications

- Consent Decree has no precedential value
  - BUT the RCRA is a Federal Act and the District Court's Summary Judgment Order could impact future interpretations of the RCRA

- Recap of the court's ruling: What can be "solid waste" under the RCRA?
  - Manure that is over-applied to agricultural fields
  - Manure that leaks from unlined lagoons
  - Composting manure in unlined composting areas that leaks into groundwater

- The RCRA still does NOT apply to agricultural "waste" used as a fertilizer or soil conditioner.
  - In determining if "waste" is used as fertilizer consider:
    - Whether the manure was applied without regard to a nutrient management plan or agronomic rates;
    - Whether manure stored for later use as fertilizer is being stored in leaking lagoons or unlined compost areas.

- What could Cow Palace have done to avoid this outcome?
  - Conduct proper nutrient testing
  - Apply nutrients to match yield goals (Avoid applying nutrients to bare ground)
  - Test soil to take into account residual nutrients
  - Line lagoons and compost areas so manure does not seep into groundwater

Des Moines Water Works v. Drainage Districts of Sac, Calhoun, And Buena Vista Counties

U.S. District Court for the Northern District of Iowa Western Division, No.: 5:15-cv-04020

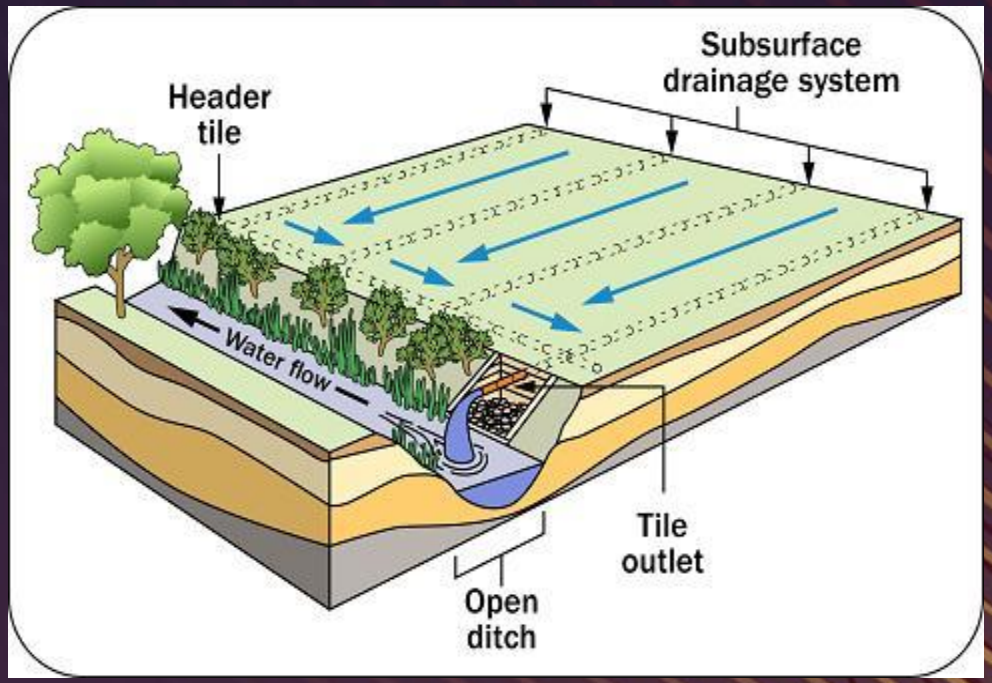

Image from www.omafra.gov.on.ca

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Image from prosedrainage.com

Des Moines Water Works ("DMWW")

- DMWW is a water utility in Des Moines, Iowa that provides nearly half a million Iowans with drinking water.
- DMWW obtains its raw water supply primarily from the Racoon and Des Moines Rivers.
- Under the Safe Drinking Water Act, DMWW is obligated to meet the maximum contaminant level ("MCL") set by the EPA in its finished water.
  - The MCL for nitrate is 10 mg/L.

Image from agweb.com

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Drainage Districts

- What is a Drainage District?
  - A drainage district is an area of land, managed by the country board of supervisors, that is subject to assessment for drainage improvements within the area.
    - *State v. Olson*, 249 Iowa 536, 548 (1958).
    - Drainage Improvements include things like ditches, drains, levees, and settling basins. Iowa Code § 455.

- Drainage Districts have authority to:
  - Establish Drainage Districts
  - Maintain/Improve Drainage Lines
  - Buy, Lease, or Condemn Land

- Who pays for the cost of establishing a Drainage District and constructing maintaining its drainage lines and other improvements?
  - The cost is defrayed by assessing the landowners within the district in proportion to the benefit that accrues to each owner's land from the establishment and maintenance of the District.
    - *Fisher v. Dallas County*, 369 N.W.2d 426, 428 (Iowa 1985) (citing Art I § 18 Iowa Constitution; Iowa Code §§ 455.45-47).
  - "The board however has no power to impose a general tax for the benefit of a drainage district."
    - *Fisher v. Dallas County*, 369 N.W.2d at 428.

Allegations of Nitrate in the Raccoon and Des Moines Rivers (DMWW Complaint at ¶ ¶ 93-106)

- **1992** – DMWW opened the world's largest ion exchange facility to remove nitrate from its water. The facility is operated on an "as needed" basis.
  - Construction Cost – $4.1 million
  - Operation Cost – $4,000 - 7,000 per day.
- **1995-2005** – The facility is operated for more than 500 total days.
- **Summer 2013** – DMWW operates the facility for 74 consecutive days.
  - DMWW alleges that it spent over $500,000 to treat the water in the Summer of 2013.
- **July 2014** – The average nitrate concentration in the Raccoon River was 11.98 mg/L, the third highest average in 40 years.
- **December 2014** – DMWW operates the facility for 96 consecutive days, the longest continuous operation in the facility's history.
- **Before 2020** – DMWW anticipates that it will need a new facility with a larger capacity. Estimated capital cost is between $76-183.5 million.

DMWW's Nitrate Removal Facility

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Image from http://www.dsmh2o.com/

The Lawsuit

- In March 2015, DMWW filed the lawsuit in the US District Court for the Northern District of Iowa.

- The lawsuit was filed against 10 agricultural drainage districts in three Northern Iowa Counties: Sac, Calhoun, and Buena Vista Counties.

- The Complaint included 10 Counts
  - **Clean Water Act ("CWA") Claims**
    - Counts 1 alleges violations of the Clean Water Act ("CWA")
    - Count 2 alleges violations of Chapter 455B (Iowa's CWA equivalent)
  - Tort Claims
    - Counts 3-5 – Nuisance Claims
    - Count 6 – Trespass
    - Count 7 – Negligence
  - Constitutional Claims
    - Count 8 – Taking Without Just Compensation
    - Count 9 – Due Process and Equal Protection
  - Count 10 – Injunctive Relief

Image from the
Des Moines Register

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The Lawsuit and The Iowa Nutrient Reduction Strategy

- The Iowa Nutrient Reduction Strategy is a 204-page report developed by the Iowa Department of Agriculture, the Iowa Department of Natural Resources, and Iowa State University.
  - The Strategy was developed to assess nutrients in Iowa waters and the Gulf of Mexico.
  - The Strategy Documents can be found at: http://www.nutrientstrategy.iastate.edu/documents

- In support of its position, the DMWW Complaint explains why it believes The Iowa Nutrient Reduction Strategy has been ineffective in regulating water pollution. DMWW Complaint at ¶ ¶ 39-42.

- According to DMWW's Complaint and the Strategy, 92 percent of the nitrate pollution entering Iowa's waterways come from sources not currently regulated as "point sources." DMWW Complaint at ¶¶ 40-41.
  - DMWW argues that, despite these factual findings, "the Strategy addresses pollution only through voluntary measures implemented by private parties."

- DMWW further alleges: "The Strategy lacks: (i) a timeframe for when the nutrient reduction will be achieved, (ii) numeric nutrient criteria standards, (iii) guidance on water quality monitoring, and (iv) any required conservation practices." DMWW Complaint at ¶ 42.

Image from iowanrec.org

Money Damages and Drainage Districts

- DMWW is seeking money damages to compensate DMWW for the unlawful discharge of nitrate by the Districts.

- In January 2016, Federal Judge Mark Bennett sent four questions to the Iowa Supreme Court.
  - The Legal Issue: Can the Drainage Districts, created by the Iowa Legislature, be sued for money damages caused by pollution from the drainage systems?
  - The Practical Issue: Since Drainage Districts are merely areas of land, if DMWW is awarded damages, will the farmers in the Drainage Districts have to pay?

- In September 2016, the Iowa Supreme Court held oral arguments regarding this issue.
  - This is where the Case is now. Depending on when the ruling is made, the June 13, 2017 trial date may need to be continued.

- Iowa Supreme Court case law unambiguously states that Drainage Districts cannot be sued for damages. *Fisher*, 369 N.W.2d at 429.
  - "Suits have been allowed only to compel, complete, or correct the performance of a duty or the exercise of a power by those acting on behalf of the drainage district. ***Our cases have consistently held that a drainage district is not susceptible to suit for money damages***."

- DMWW CEO, Bill Stowe, commented in an article for the Des Moines Register: ""We think the idea that the drainage districts should have a free drop to downstream damages without any accountability is not consistent with state law or good public policy."
  - Donelle Eller, *Water lawsuit fate may rest with Iowa Supreme Court*, Des Moines Register, Jan. 11, 2016.

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The CWA Issue: Is the Discharge of Nitrate a "Point Source" of Pollution under the CWA?

- The CWA and Iowa Code Chapter 455B prohibit the discharge of any pollutant from a "point source" into navigable water unless authorized (and regulated) by an NPDES or state permit.

- Nitrate Discharge from Drainage Tiles clearly falls under the "Point Source" definition under the CWA and the Iowa Code.
  - Point Source: "any discernible, confined, and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation…." Iowa Code § 455B.171(19).

- BUT the CWA and Iowa Code's definition of "Point Source" also specifically excludes "return flows from irrigated agriculture or agricultural stormwater runoff."
  - Drainage discharge has historically been considered to fall this exception.

- And the EPA's Clean Water Rule Summary Factsheet explicitly states that the CWA "does not regulate most ditches or regulate groundwater, shallow subsurface flows or ***tile drains***." (emphasis added).
  - The EPA's Clean Water Rule Summary Factsheet can be found at: https://www.epa.gov/cleanwaterrule.

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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

Looking Forward

Image from iowapublicradio.org

- Trial Date is set for June 13, 2017

- Uphill Battle for DMWW
  - To sue the Drainage Districts for money damages, DMWW will need the Iowa SC to overturn a century of legal precedent.
  - The Iowa SC is expected to announce their decision on this issue soon.

- If DMWW wins, what are the implications?
  - Will Permits be required to comply with the CWA?
    - The EPA or the State of Iowa could require permits for all of Iowa's 3,000 Drainage Districts, effectively leading to regulation of individual farms.
      - This may also lead to regulations and permits in other states that uses a similar drainage tile system on their land.
    - The EPA could also establish a general permit category for farms. This would allow the Drainage Districts to continue operating with little or no change.
      - This may be more likely considering that the EPA's position is clear: The CWA does not regulate tile drains.
  - Legislative Action?
    - The Legislature could redefine "point source" so that discharge from drainage tiles would be exempt from CWA regulations.

Syngenta Litigation Update

Image from wsj.com

In Re: Syngenta Timeline

- **March 2010** – Syngenta files its application of approval with China for its corn seed with a genetically modified ("GM") trait, known as MIR 162. China typically takes 3-4 years to approve GM traits.
  - MIR 162 gave crops an increased resistance to certain insects.
- **April 2010** – The US Department of Agriculture ("USDA") authorizes MIR 162. The EPA and the US Food and Drug Administration had already approved the trait.
- **2011 Growing Season** – Syngenta commercializes MIR 162 under the brand name "Viptera."
  - Syngenta also commercializes its "Duracade" seed, which also was not yet approved by China.
- **2012-13** – China purchases about 5 million tons of US corn, making China the third-largest export market for US corn.
- **November 2013** – China begins rejecting the import of US corn, claiming it is tainted with traces of MIR 162, an unapproved trait.

In Re: Syngenta Timeline (cont.)

- **Summer 2012 - Fall 2014** – The average price of corn per bushel drops by more than half. Many corn exporters, handlers, and farmers allege the drop in price was largely caused by China's rejection of US corn.

- **2014-15** – Several lawsuits are filed by corn producers, exporters, and handlers alleging that Syngenta wrongly marketed Viptera and Duracade before China agreed to accept it.
  - Plaintiffs allege the premature commercialization of the seeds cost the corn industry at least $1 billion.

- **December 2014** – Many federal and state lawsuits are consolidated into multi-district litigation ("MDL") in the US District Court for the District of Kansas.
  - By February 2015, more than 360 individual lawsuits were filed against Syngenta.

- **December 2014** – China approves Viptera and Duracade nearly 5 years after Syngenta applied for approval.

- **September 2016** – A Kansas federal judge grants certification to nationwide group of corn producers, as well as statewide classes in eight states.

- **June 2017** – Trial Date

Image from wsj.com

Chuck Lee on China's Approval of Viptera (MIR 162)

China Approves Viptera (MIR162)

"This is great news for U.S. farmers. Agrisure Viptera has been in strong demand for years because it offers corn growers incredible protection against the broadest spectrum of above-ground corn pests including corn earworm, black cutworm and Western bean cutworm."

Chuck Lee, Head of Corn, Syngenta - North America

Image and Quote from vipterachinafacts.com

The Claims

Image from agweb.com

- Many different federal and state claims have been asserted, but most claims allege:
  - (i) Syngenta violated the Lanham Act by misleading the public, and government regulators regarding the status of Viptera and Duracade and releasing the seeds to the market prematurely.
    - The federal Lanham Act governs unfair competition.
  - (ii) Syngenta was negligent by prematurely commercializing the GM corn trait and by failing to prevent the contamination of the US corn supply.
    - Plaintiffs argue that Syngenta neglected its duty to participate in separating non-Viptera corn from Viptera corn.
    - Many producers who did not purchase Viptera or Duracade still had their corn supply contaminated either by cross-pollination or when their corn was mixed with other producers' corn in grain elevators.

The Classes

- In September 2016, the MDL judge certified a nationwide group of corn producers that are suing under the federal Lanham Act.
  - The Nationwide Class include corn producers who priced any corn for sale after Nov. 18, 2013, and have brought claims under the Lanham Act – excluding those who bought Syngenta seed strains Viptera and Duracade.

- The judge also certified Statewide Classes from 8 states. These Plaintiffs are suing under state law negligence claims.
  - There are statewide classes from Arkansas, Illinois, Iowa, Kansas, Missouri, Nebraska, Ohio and South Dakota.

- In December 2016, the judge ruled that the trials can be combined for the nationwide Lanham Act claims and the state-law negligence claims.
  - This ruling was made over Syngenta's objection that evidence of alleged misrepresenations may be relevant to the Lanham Act Claims, but are not relevant for the simple negligence claims.
  - Both classes allege that Syngenta's promotion of Viptera and Duracade cost the industry at least $1 billion dollars.

- In an interview with Law360, a Syngenta representative commented on the judge's decision to certify the class: "Syngenta respectfully disagrees with this ruling, particularly given the widely varying ways in which farmers grow and sell corn in different markets across the U.S."
  - Emily Field, *Corn Producers Get Class Cert. In Syngenta GMO MDL*, Sept. 26, 2015, https://www.law360.com/articles/844822.

Syngenta's Response

- Syngenta has argued that its marketing of Viptera and Duracade was consistent with industry expectations and that China wrongfully rejected the corn.
  - Syngenta has also filed counterclaims and a third-party complaint alleging that any US liability rests with the grain elevators, transporters, and exporters.
  - Syngenta argues that these parties were in a position to separate GM seed from non-GM seed, according to Syngenta.

- In a court filing on January 14, 2015, Syngenta's lawyers wrote: "In short, this litigation constitutes an unprecedented effort to hold a company liable for selling a U.S.-approved product in the U.S., simply because the product was not yet approved by a foreign country like China."

- Syngenta continues to believe that American farmers should have access to the latest agricultural innovations and that the farmers should not be prevented from using the latest technology due to approval from a single importing country.

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QUESTIONS?