

## **Current legal issues impacting crop production**

Kristine A. Tidgren, attorney and assistant director, Center for Agricultural Law and Taxation, Iowa State University

### **Des Moines Water Works litigation and water quality update**

On March 16, 2015, the Des Moines Board of Water Works Trustees (DMWW) filed a federal Clean Water Act (CWA) lawsuit against the supervisors and drainage districts of three Iowa counties (Sac, Buena Vista, and Calhoun). The lawsuit, which was filed in the United States District Court for the Northern District of Iowa, alleged that the supervisors, in their capacity as trustees for the drainage districts. The lawsuit, among its many demands, asked the federal court to order the drainage districts to cease “all discharges of nitrate that are not authorized by an NPDES or state operating permit.”

DMWW alleged that the concentration of nitrate in the Raccoon River, which is a primary source for DMWW’s raw water supply, has steadily increased since the 1970s. The lawsuit states that the nitrate removal system costs DMWW up to \$7,000 per day to operate.

The complaint set forth nine causes of action, each of which is summarized briefly:

#### ***Federal and state water quality laws***

The primary claim by DMWW was that discharges from drainage districts are “point sources” of nitrate pollution. As such, DMWW alleged that the drainage districts must comply with the federal CWA and the National Pollutant Discharge Elimination System (NPDES) permit program, which is administered by the Iowa Department of Natural Resources. The complaint asked the federal court to declare that the drainage districts had violated federal and state law and to enjoin them from all discharges of nitrate not authorized by an NPDES or state operating permit. DMWW sought civil penalties for each continuing day of violation.

#### ***Nuisance***

The complaint also asserted three separate nuisance claims: public, statutory, and private. The claims asserted that drainage districts—including all similarly situated districts—were public nuisances contributing to a single, indivisible harm to the public. The drainage districts, the suit contended, created a substantial and unreasonable interference with DMWW’s property right to withdraw high quality water from the Raccoon River. DMWW asked the court to order the districts to take all actions necessary to abate the nitrate pollution and to award DMWW damages.

#### ***Trespass***

DMWW contended that the districts’ discharge of nitrate was a substantial physical invasion of DMWW’s use and enjoyment of its property. DMWW asked the court to declare that DMWW has created a trespass and to award DMWW damages.

#### ***Negligence***

DMWW alleged that the supervisors were negligent in creating and maintaining the network of drainage facilities because harm to DMWW was a “reasonably foreseeable consequence” of the drainage districts’ “normal and intended operation.” Again, DMWW asked the court to order the districts to abate the nitrate pollution and pay damages to DMWW.

#### ***Constitutional claims***

In addition to its tort claims, DMWW asserted several constitutional claims, one that the drainage districts, as “political subdivisions” of Iowa, had taken DMWW’s property without just compensation by invading it with nitrate pollution. The other is that DMWW would be deprived of due process and equal protection under the United States Constitution if the court were to enforce Iowa law declaring that drainage districts

cannot be sued for money damages. DMWW sought a declaration that the districts are subject to a suit at law for damages in tort and other relief.

### ***Injunctive relief***

The complaint asked the court to order the drainage districts to “take all steps reasonably necessary within a reasonable period of time to reduce the discharge of nitrate to the Raccoon River.”

DMWW sought money damages, costs, attorney fees, and other relief “deemed just, equitable and proper.”

### ***Case resolution***

Two years and one day after DMWW filed its controversial lawsuit against the drainage districts in three northwest Iowa counties, the federal court dismissed the action in its entirety.

The merits of the case were never considered. The court dismissed the lawsuit after finding that—even if DMWW was able to prove an injury—the drainage districts would have no ability to redress (or remedy) that injury. In other words, the drainage districts were not the proper defendants for this Clean Water Act lawsuit.

The Supreme Court of Iowa had long held that a drainage district is “merely an area of land, not an entity subject to a judgment for tort damages.” Iowa courts have allowed lawsuits against drainage districts only where the claims implicate a specific statutorily granted power or duty granted to the district. In other words, a court can compel a drainage district to fix damaged drainage tile.

DMWW acknowledged Iowa law, but argued that it was outdated and inapplicable to the facts at hand. DMWW asserted that this was a “new day” and that the court should have applied a “new rule of liability and responsibility for drainage districts concerning pollution.” DMWW urged that “implied immunity has survived through repetition rather than critical analysis.”

But the Iowa Supreme Court disagreed, ruling in response to a certified question addressed to it by the federal court, that Iowa drainage districts are immune from claims for damages or injunctive relief. The Court affirmed that such districts have a “limited, targeted role—to facilitate the drainage of farmland in order to make it more productive.” The Court declared that it is for the Iowa Legislature, not the courts, to change that result.

The federal court found that this ruling applied equally to DMWW’s tort claims and Clean Water Act claims. In other words, the court found that even if DMWW were to prevail in its Clean Water Act claims against the districts, drainage districts would have no legal ability to redress DMWW’s alleged injuries. If a claim is not redressable, meaning that the party against whom the suit is brought cannot provide a remedy, a federal court has no jurisdiction to hear it. Consequently, the federal court dismissed the lawsuit for lack of standing.

The federal court also found no merit to DMWW’s claims that its constitutional rights were violated. The court ruled that the immunity Iowa law affords to drainage districts does not violate the Equal Protection Clause or the Due Process Clause of the United States Constitution. The court noted that DMWW’s policy arguments are best directed to the Iowa Legislature. Finally, the court also fully agreed with the Iowa Supreme Court’s analysis of DMWW’s takings claim. “A public entity such as DMWW cannot assert a Fifth Amendment takings claim against another political subdivision of the state.”

DMWW did not appeal the order. The lawsuit, although dismissed, brought increased attention to Iowa’s water quality issues. The Water Quality Initiative, implementing the Iowa Nutrient Reduction Strategy, began in 2013. State legislators have not yet created a comprehensive framework for funding water quality projects. Legislation proposed in 2016 and 2017 failed, largely due to budget constraints.

## **Liabilities and remedies for off-target herbicide injury**

As the reports of damages stemming from dicamba drift increase, questions swirl. Just what is the problem? Who's responsible? What can be done to prevent future damage? While there are no clear answers to many of these questions, it may be useful to review the general legal principles that apply to herbicide drift and discuss how they apply to the current problem.

### ***Regulatory framework***

Pesticide applicators and manufacturers are regulated by both state and federal law.

Iowa Code chapter 206 governs the use of pesticides in Iowa. The definition of “pesticides” includes herbicides designed to control weeds. The law tasks the Iowa Department of Agriculture and Land Stewardship (IDALS) with licensing and regulating pesticide applicators. Even those applying pesticides to their own lands must obtain a license before applying restricted use pesticides. Commercial applicators must also submit evidence of financial responsibility. IDALS additionally regulates the distribution and sale of pesticides within the state, although federal law also applies. The Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) authorizes the Environmental Protection Agency (EPA) to regulate the sale, use, and distribution of pesticides. The EPA is responsible to register new formulations of chemicals throughout the United States. States are allowed to implement more restrictive laws or regulations with respect to the use of pesticides. They can also pass laws consistent with FIFRA. They cannot, however, create labeling or packaging requirements “in addition to or different from” those imposed by FIFRA.

Pesticide drift occurs when the chemicals land outside of the target area. When farmers suspect that their land has been damaged because of pesticide drift from a neighboring farm, they should consider two courses of action. First, they should file an “incident report” with IDALS’ Pesticide Bureau. Second, they should consider whether to pursue a private action to recover damages. Once an incident report is filed, IDALS will decide whether to open an investigation to determine if a pesticide was misused or if any state or federal law was violated. Farmers must file incident reports within 60 days of the date of damage and before 25 percent of the crop has been harvested.

Depending upon the results of the investigation, IDALS may initiate enforcement actions, which can result in any of the following:

- Notice of Violation
- Official Notice
- Civil Penalty of commercial applicators of up to \$500
- Pesticide License Suspension or Revocation
- Referral to EPA for review and enforcement action
- License and/or certification suspension or revocation
- Product Stop Sale, Use or Removal Order
- Crop Embargo or Detainment

IDALS may find a violation, for example, if the applicator operated in a “faulty, careless or negligent manner” or “made a pesticide recommendation or application inconsistent with the labeling.” While IDALS can impose civil penalties, it does not have the authority to collect damages on behalf of private landowners. The enforcement action may provide helpful evidence to a landowner, but the landowner must initiate a private legal action to seek monetary damages against the parties responsible for the harm if the parties who caused the harm are not willing to pay for the damage. Crop insurance will not cover losses caused by pesticide drift.

Already in 2017, IDALS has received a record number of incident reports of crop damage stemming from pesticide misuse. About half of the 250 or so 2017 complaints are dicamba related. Although this number is not as high as that in some other states, it continues to climb.

### ***Private lawsuits***

Farmers injured by pesticide drift may bring private legal actions to recover damages. Depending upon the facts, such lawsuits may be brought against the applicator, the manufacturer, or both. Several legal causes of action may be included in such lawsuits, including claims of negligence, nuisance, trespass, or strict liability, as well as allegations of statutory violations.

The primary cause of action against an applicator is generally negligence. If the landowner can prove damage caused by the applicator's failure to use reasonable care, the action will be successful. Negligence can be proven, for example, by showing that the applicator did not follow the directions on the label, use the pesticide in the manner for which it was intended, or apply the chemical in a careful manner, taking into account weather and other key factors. To prevail in a negligence action against the manufacturer, a party who has been damaged must, for example, show that the manufacturer did not use reasonable care in its marketing, labeling, or distribution of the product. Negligence claims can also include allegations of product defects and failure to warn, although manufacturers can sometimes be found responsible for a manufacturing defect under a strict liability standard, even in the absence of proof of negligence.

### ***How does the law apply to the dicamba situation?***

Although dicamba has been around for decades, its use was restricted. Because of its volatility or tendency to spread uncontrollably beyond its targeted area, dicamba was not approved for post-emergent use. Because of the increasing resistance of many weeds to glyphosate (Roundup), however, manufacturers such as Monsanto, BASF, and DuPont have been working to reduce the volatility of dicamba, which is highly effective against difficult weeds. As part of their system, they developed genetically modified versions of soybeans and cotton that are dicamba tolerant. During the last year, EPA approved certain formulations of dicamba for use over the top of these dicamba resistant plants. These systems were marketed for use during the 2017 crop year.

The implementation has been less than seamless. Thousands of acres of crops are damaged due to dicamba drift, and various parties are pointing fingers. In some cases, the manufacturers are asserting that the applicators have not followed the specific instructions given for the use of this chemical or that they are using unapproved formulations of dicamba. Applicators and their insurers allege that despite using reasonable care, dicamba drifted to neighboring fields or pastures, harming crops, fruit, and trees. Some scientists contend that dicamba is prone to vaporize or turn from a liquid to a gas during warm weather, even when the label instructions are carefully followed. This vapor, they contend, can insidiously travel several miles to harm non-dicamba-resistant crops, particularly soybeans. The farmers suffering loss are left with no easy remedy.

Already, multiple lawsuits have been filed and many more are sure to follow. These include class actions, as well as individual lawsuits. Much like we have seen with the Syngenta litigation, these actions will likely drag on for years. The questions are complex and facts will continue to emerge. Further regulatory action will likely ensue.

On October 13, EPA announced that it had reached an agreement with Monsanto, BASF and DuPont on measures to further minimize the potential for drift to damage neighboring crops from the use of dicamba formulations used to control weeds in genetically modified cotton and soybeans. Manufacturers agreed to make label changes that impose additional requirements for "over the top" use of dicamba products in 2018, including:

- Classifying products as "restricted use," permitting only certified applicators with special training, and those under their supervision, to apply them; dicamba-specific training for all certified

applicators to reinforce proper use;

- Requiring farmers to maintain specific records regarding the use of these products to improve compliance with label restrictions;
- Limiting applications to when maximum wind speeds are below 10 mph (from 15 mph) to reduce potential spray drift;
- Reducing the times during the day when applications can occur;
- Including tank clean-out language to prevent cross contamination; and
- Enhancing susceptible crop language and record keeping with sensitive crop registries to increase awareness of risk to especially sensitive crops nearby.

Farmers damaged by pesticide drift should promptly contact IDALS at 515-281-8591 to initiate an investigation. They should also contact the manufacturer to report the injury. Monsanto has asked farmers to contact them at 1-844-RRXTEND immediately with reports of leaf cupping. They will send an agronomic specialist to evaluate the damaged field. Farmers facing damage should also consider hiring legal counsel to assist them in assessing their legal rights. In some cases, private settlements may be reached without resorting to a lawsuit. As the facts shake out, legal remedies may become more apparent. In the meantime, those with damage need to protect their rights by documenting and preserving evidence of their claims.

## **Current legal landscape for unmanned aerial vehicles**

On June 21, 2016, the FAA issued its long-awaited final rule, 14 CFR part 107 (Part 107), for integrating small unmanned aircraft systems (UAS) into the U.S. airspace. Part 107, which changed little from the proposed rule issued in February of 2015, paved the way for the widespread use of small commercial unmanned aircraft. The new rule, which was effective August 29, 2016, was good news for agriculture.

The requirements of Part 107 are summarized as follows.

### ***Remote pilot in command certification***

Part 107 establishes a new airman's certificate called a "remote pilot airman certificate with a small UAS rating." This is a change in name from the proposed "unmanned aircraft operator certificate with a small UAS rating." The requirements, however, are very similar to those suggested in the proposed rule. To become a remote pilot, a person would have to:

- Pass an initial aeronautical knowledge test at an FAA-approved knowledge testing center (there are 9 Iowa centers) or (1) hold a current sport pilot's license, (2) complete a flight review in the past 24 months, and (3) complete a small UAS online training course
- To retain the certificate, the remote pilot would be required to pass a test every two years.
- Complete a Transportation Security Administration (TSA) vetting process
- Be at least 16 years old
- Be able to read, speak, write, and understand English (except in the case of certain medical impairments)

### ***Aircraft and flight requirements***

Part 107 applies only to UAS weighing less than 55 pounds. Standard airworthiness certificate requirements continue to apply to larger unmanned aircraft. Similarly, aircraft meeting the definition of model aircraft are not subject to the Rule; however, all model aircraft must be flown in a safe manner. Violators are subject to FAA enforcement actions.

Part 107 eliminates the need for an airworthiness certificate for small UAS, but requires the pilot to conduct a pre-flight check to make sure that it's in a condition for safe operation. The aircraft must also be registered by the FAA and properly marked, as announced last December.

Part 107 requires that a person other than the certified remote pilot may operate the controls of the UAS, as long as he or she is under the direct supervision of the remote pilot. This means that the remote pilot is on the ground, ready and able to take the controls at any time. It also means that the remote pilot can supervise only one unlicensed operator at a time. Both the operator and the remote pilot must keep the aircraft within their visual line of sight at all times. This visual line of sight must be accomplished through unaided vision. However, glasses or contacts are allowed. An operator may use a visual observer who is in communication with the operator to “supplement situational awareness.” However, visual observers are not required.

The operator cannot fly the aircraft over people not directly participating in the operation. Nor can the operator fly the aircraft inside of a covered structure. Of course, the operator must also remain clear of other aircraft. Remote pilots may operate their UAS in uncontrolled airspace without prior permission; however, if they wish to fly in a controlled airspace (such as near an airport), they must obtain prior permission from air traffic control.

Although the proposed rule required daylight-only operations, Part 107 allows for “civil twilight” operations as well. This means that the aircraft may be flown 30 minutes before the official sunrise or 30 minutes after the official sunset, as long as appropriate anti-collision lighting is employed.

Part 107 allows the remote pilot to fly the aircraft at a maximum altitude of 400 feet above ground, unless within 400 feet of a structure (and then not more than 400 feet above that structure). The operator may not exceed a groundspeed of 100 miles per hour.

Part 107 requires remote pilots to report “flight accidents” to the FAA within 10 days if the following has occurred:

- Serious injury or loss of consciousness to any person OR
- Damage to property (other than the aircraft) if the cost is greater than \$500 to repair or replace (whichever is lower)

### ***Other operations***

The FAA notes in Part 107 that it the new rule was created to allow for the immediate integration of the “safest” types of flights into the airspace. The agency recognizes, however, that some operations that could be conducted in a safe manner are not authorized by Part 107. Consequently, those wishing to engage in such operations may apply for a “certificate of waiver” to deviate from certain restrictions, so long as the FAA administrator finds that the operation can be “safely conducted” outside of those parameters. The waiver process should allow flights, for example, outside of visual range in unpopulated areas for specific purposes such as crop scouting.

### ***Registering a UAS***

Small unmanned aircraft weighing more than .55 pounds and less than 55 pounds that do not fly exclusively under the Special Rule for Model Aircraft, must be registered with the FAA and marked with a registration number, either by registering online or by using the legacy paper based registration process. Model aircraft (those not used for commercial purposes) are no longer subject to the registration requirement.