

IN THE IOWA DISTRICT COURT FOR POLK COUNTY

<p>IOWA CITIZENS FOR COMMUNITY IMPROVEMENT, a nonprofit corporation, and FOOD & WATER WATCH, a nonprofit corporation,</p> <p style="text-align: center;">Plaintiffs,</p> <p>v.</p> <p>STATE OF IOWA; DEPARTMENT OF NATURAL RESOURCES; BRUCE TRAUTMAN, in his official capacity as Acting Director of the Department of Natural Resources; ENVIRONMENTAL PROTECTION COMMISSION; MARY BOOTE, NANCY COUSER, LISA GOCHENOUR, REBECCA GUINN, HOWARD HILL, HAROLD HOMMES, RALPH LENTS, BOB SINCLAIR, JOE RIDING, in their official capacities as Commissioners of the Environmental Protection Commission; NATURAL RESOURCE COMMISSION; MARCUS BRANSTAD, RICHARD FRANCISCO, LAURA HOMMEL, TOM PRICKETT, PHYLLIS REIMER, DENNIS SCHEMMEL, and MARGO UNDERWOOD, in their official capacities as Commissioners of the Natural Resource Commission; DEPARTMENT OF AGRICULTURAL AND LAND STEWARDSHIP; and MICHAEL NAIG, in his official capacity as Secretary of Agriculture.</p> <p style="text-align: center;">Defendants.</p>	<p>No.</p> <p style="text-align: center;">PETITION FOR INJUNCTIVE AND DECLARATORY RELIEF</p> <p style="text-align: center;">Jury Trial Demanded for Declaratory Relief Claims</p>
---	---

COME NOW the Plaintiffs, IOWA CITIZENS FOR COMMUNITY IMPROVEMENT and FOOD & WATER WATCH (collectively “Iowa Citizens”), by and through their counsel, and state for their causes of action against the Defendants STATE OF IOWA, *et al.* (collectively “State of Iowa”) as follows:

INTRODUCTION

1. Iowa Citizens bring this action because the people of Iowa have a right to clean water, and the State of Iowa has violated its duty to protect the Raccoon River for the benefit of the people. To remedy the State of Iowa's violations of Iowa Citizens' drinking water and recreational use rights, Iowa Citizens seek declaratory relief, an order requiring the State of Iowa to adopt a Raccoon River remedial plan with mandatory agricultural water pollution controls, an order prohibiting construction and operation of new and expanding Animal Feeding Operations in the Raccoon River watershed, and an order prohibiting the State of Iowa from taking any further action that would violate Iowa Citizens' rights under the public trust doctrine and the Iowa Constitution with respect to the meandered section of the Raccoon River.

2. The unlawful practices alleged below were committed and resulted in damage in Polk County, Iowa.

3. Venue is proper in this district because the capital of the State of Iowa is located in Polk County, Iowa Citizens for Community Improvement resides in Polk County, and the meandered section of the Raccoon River is located in Polk County.

PARTIES

4. Plaintiff IOWA CITIZENS FOR COMMUNITY IMPROVEMENT ("Iowa CCI") is a membership-based, statewide non-profit corporation with its principle place of business in Des Moines, Polk County, Iowa. Iowa CCI works to enable Iowans from all walks of life – urban and rural, young and old, immigrants, and lifelong Iowans – to make change in their communities by raising their voices and engaging in grassroots advocacy. Iowa CCI has approximately 5,100 dues-paying members in Iowa, with 2,404 members residing in Polk County, in addition to another 17,000 supporters and activists who sign up to receive Iowa CCI

emails, take action online, attend meetings, sign petitions, and engage in other forms of activism with and for Iowa CCI. Many of Iowa CCI's members recreate in, on, or around the Raccoon River in Polk County. Iowa CCI's organizational priorities include fighting factory farms and campaigning to clean up Iowa's polluted waterways, as well as advancing worker justice, racial justice, and immigrants' rights. In carrying out its mission, Iowa CCI has campaigned to obtain stronger water quality protections across Iowa, including by submitting public comments on Department of Natural Resources rulemakings and by filing petitions for rulemakings with the U.S. Environmental Protection Agency ("EPA") and the Department of Natural Resources to strengthen the regulation of agricultural pollution.

5. Plaintiff FOOD & WATER WATCH ("FWW") is a non-profit corporation with its principle place of business in Washington, D.C and staff across the country, including in Iowa. FWW champions healthy food and clean water for all by standing up to corporations that put profits before people and advocating for a democracy that improves people's lives and protects the environment. FWW has more than one million members and supporters nationwide, including 18,460 and 2,804 residing in Iowa and Polk County, respectively. Water pollution from industrial agriculture and factory farming is one of FWW's priority issues, and FWW is engaged in campaigns to hold the animal agriculture industry accountable for its adverse impacts on water quality and to hold the government accountable for the unchecked pollution and consolidation of the livestock industry. FWW's Iowa campaigns have included supporting citizen efforts to obtain stronger federal oversight of Iowa's Clean Water Act program for Concentrated Animal Feeding Operations ("CAFOs"), petitioning the Environmental Protection Commission to strengthen local control by revising the Master Matrix for livestock operations, and advocating for a legislative moratorium on Medium and Large Animal Feeding Operations and CAFOs.

6. Members of Iowa CCI and FWW recreate on the Raccoon River between the confluence of the Des Moines River and the Polk/Dallas county line (the meandered section of the Raccoon River). Members suffer aesthetic injury and injury to their recreational use and enjoyment of the meandered section of the Raccoon River as a result of nitrogen and phosphorus pollution from agricultural sources, which causes many harmful impacts including cyanobacteria and exposure to cyanotoxins. Members suffer injury and fear of injury from drinking water provided by Des Moines Water Works that contains nitrates and cyanotoxins, and suffer injury by paying the costs incurred by Des Moines Water Works to treat, monitor, and mitigate nitrate and cyanotoxin contamination in the meandered section of the Raccoon River.

7. Defendant STATE of IOWA, is a sovereign state and the trustee of Iowa public trust assets, and has its principal place of business in Des Moines, Polk County, Iowa.

8. Defendant DEPARTMENT OF NATURAL RESOURCES is the state agency that has the primary responsibility for state parks and forests, protecting the environment, and managing fish, wildlife, and land and water resources in Iowa. The Department has developed and implemented the Iowa Nutrient Reduction Strategy. The Department has its principle place of business in Des Moines, Polk County, Iowa.

9. Defendant BRUCE TRAUTMAN is the Acting Director of the Department of Natural Resources.

10. Defendant ENVIRONMENTAL PROTECTION COMMISSION is the decision-making body to establish policy and adopt administrative rules for administration of the water quality programs under the jurisdiction of Department of Natural Resources. The programs within the Commission's authority include Animal Feeding Operations and water quality standards. The Commission has its principle place of business in Des Moines, Polk

County, Iowa.

11. Defendants MARY BOOTE, NANCY COUSER, LISA GOCHENOUR, REBECCA GUINN, HOWARD HILL, HAROLD HOMMES, RALPH LENTS, BOB SINCLAIR, and JOE RIDING are Commissioners of the Environmental Protection Commission.

12. Defendant NATURAL RESOURCE COMMISSION is a decision making body of the Department of Natural Resources and has jurisdiction over all meandered lakes and streams with respect to Iowa Code chapters 461A (Public Lands and Waters) and 462A (Water Navigation Regulations).

13. Defendants MARCUS BRANSTAD, RICHARD FRANCISCO, LAURA HOMMEL, TOM PRICKETT, PHYLLIS REIMER, DENNIS SCHEMMEL, and MARGO UNDERWOOD are Commissioners of the Natural Resource Commission.

14. Defendant DEPARTMENT OF AGRICULTURE AND LAND STEWARDSHIP (“IDALS”) is the state agency with primary responsibility for encouraging, promoting, and advancing the interests of agriculture. IDALS includes the Division of Soil Conservation and Water Quality. IDALS has developed and implemented the Iowa Nutrient Reduction Strategy. IDALS has its principle place of business in Des Moines, Polk County, Iowa.

15. Defendant MICHAEL NAIG is the Secretary of Agriculture.

FACTUAL BACKGROUND

16. Iowa leads the United States in corn and pork production, and is one of the leaders in soybean production. Approximately twenty-five percent of pork produced in Iowa is exported, primarily to Canada, Mexico, and China. A significant percentage of the corn and soybeans grown in Iowa is used as animal feed at Animal Feeding Operations in Iowa and other

states.

17. Iowa farmers apply vast amounts of fertilizer to grow corn and soybeans. The applied fertilizer provides nitrogen and phosphorus to promote plant growth and increase yields. Animal Feeding Operations also apply animal manure to crops, including corn and soybeans, as fertilizer. Manure contains nitrogen and phosphorus.

18. Application of nitrogen to soil initiates a conversion to several forms of reactive nitrogen called the “nitrogen cascade.” In the nitrogen cascade, bacteria convert nitrogen into water-soluble nitrate and then into nitrous oxide, nitric oxide, and nitrogen gas. Fertilizer and manure applications thus create nitrate and release reactive nitrogen into the biosphere.

19. Nitrate enters surface water from farming operations through precipitation events, which create storm water runoff into surface water systems. Nitrate also enters surface water through tile drains, which directly transport the water-soluble nitrate from soil below the surface and discharge that nitrate-infused runoff water into surface waters. Because of the geography and hydrology of Iowa, tile drains have been used to increase farmable acreage and the state’s agricultural production.

20. The EPA has established a primary drinking water standard for nitrate of 10 mg/l. This standard is also the Iowa Class C water quality standard for drinking water.

21. A portion of the nitrogen in fertilizer and manure volatilizes as reactive nitrogen and returns to soil and surface waters through atmospheric deposition.

22. Nitrous oxide is a greenhouse gas (GHG) two hundred ninety six times more powerful than carbon dioxide. The State of Iowa recognizes nitrous oxide and carbon dioxide as primary drivers of human-caused climate change. In Iowa, nitrous oxide accounts for seventeen percent of Iowa’s total GHG emissions, and agriculture accounts for ninety-three percent of such

nitrous oxide emissions.

23. Farmers' application of phosphorus as fertilizer binds phosphorus to soil particles in the fields of Iowa, which then enters surface water systems through agricultural storm water runoff and soil erosion. Phosphorus can also dissolve in water, and tile drains can contribute dissolved phosphorus loads to streams and lakes.

24. Cyanobacteria are aquatic photosynthetic bacteria also known as "blue-green algae." Cyanobacteria excrete cyanotoxins. Cyanotoxins, including microcystins and cylindrospermopsin, are toxic to humans and animals. Phosphorus and nitrogen in surface waters provides nutrients for cyanobacteria, and thus serve as a driver for cyanobacteria growth and the resulting harms.

25. Cyanobacteria thrive in lake water and slow-moving, nutrient rich water during the warmer months of the year. Climate change increases both air and water temperatures, and will thus increase the severity of cyanobacteria proliferation and impacts to water quality.

26. Climate change increases the frequency of heavier than normal precipitation events, which will increase nitrate and phosphorus discharges from agricultural sources into streams and lakes.

27. Iowa DNR acknowledges that Iowa is already experiencing the effects of climate change. In 2011, the Iowa Climate Change Impacts Committee delivered a report to the Governor and Iowa legislature as required by Iowa Code section 473.7(12) entitled "Climate Change Impacts on Iowa." The Committee identified, among other things, that increased precipitation frequency and intensity will produce more nitrate and phosphorus pollution and sediment due to increased surface water runoff and subsurface drainage through tile drains.

The Raccoon River

28. The Raccoon River from its confluence with the Des Moines River upstream to the west line of Section 30, Township 78 North, Range 25 West, Polk County – the Polk/Dallas county line – is a meandered river and a navigable water. This petition refers to this river segment as the meandered section of the Raccoon River.

29. The Raccoon River is an entirely intrastate watershed that drains 3,625 square miles, or 2.3 million acres, in west-central Iowa. Approximately seventy-three percent of those acres are planted with corn and soybeans while approximately half – 1.15 million acres – have tile drains.

30. The Department of Natural Resources has classified the meandered section of the Raccoon River as impaired for nitrate because it does not meet the Class C drinking water standard for nitrate at the Des Moines Water Works intake. At the time of this petition, the meandered section of the Raccoon River remains impaired for nitrate.

31. In 2008, the Iowa DNR established a cleanup plan, known as a Total Maximum Daily Load (“TMDL”), for the Raccoon River, including the meandered section of the Raccoon River.

32. The 2008 Raccoon River TMDL determines the origin of nitrate pollution and the pollution reductions necessary to meet the Class C drinking water standard for nitrate in the meandered section of the Raccoon River. The TMDL addresses nitrate pollution from both nonpoint sources and point sources, the latter of which is defined in Iowa law as “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, or vessel or other floating craft, from which pollutants are or may be

discharged.” Pollution originating from sources other than point sources is referred to as “nonpoint source” pollution, including but not limited to agricultural storm water discharge and return flows from irrigated agriculture.

33. According to Table 3-10 of the 2008 Raccoon River TMDL, agricultural uses contribute 85.3 percent of the nonpoint source nitrate load at Van Meter, the monitoring station located upstream of the meandered section of the Raccoon River. Atmospheric deposition contributes another 13.3 percent of the nonpoint source nitrate load at Van Meter. The TMDL states that “[p]oint sources do not contribute substantially to the nitrate impairment at the [Des Moines Water Works] in the City of Des Moines.”

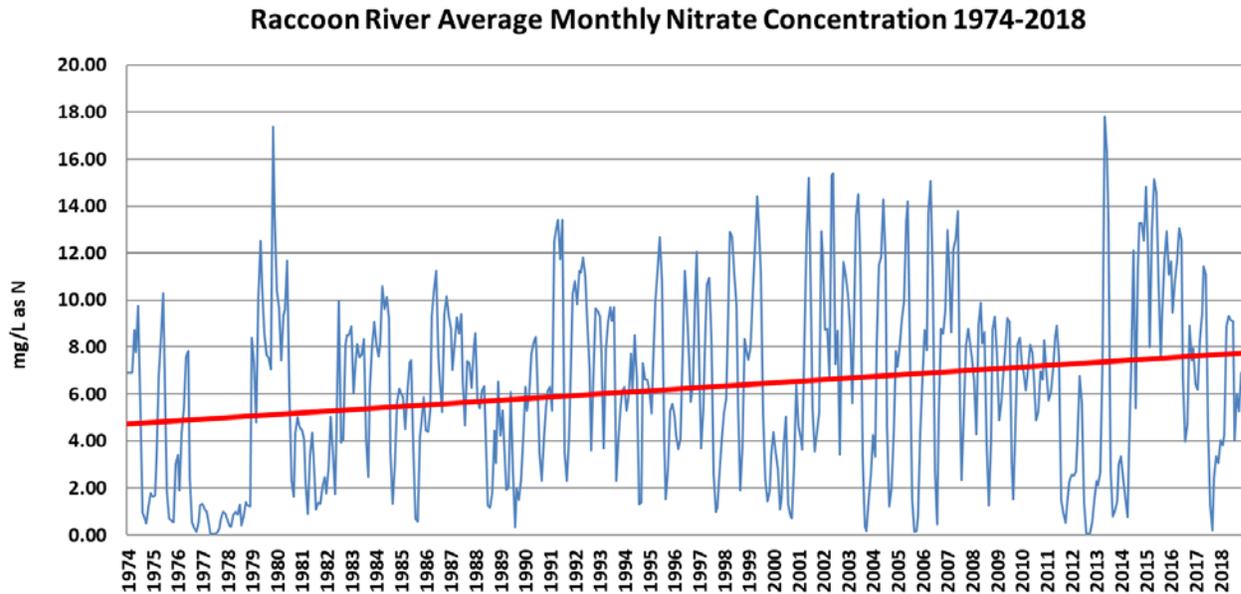
34. The 2008 Raccoon River TMDL calls for nonpoint sources to reduce nitrates by 48.1 percent to meet the Class C drinking water standard, but TMDLs are pollution budgets rather than regulations with the force and effect of law. The Raccoon River TMDL does not require agricultural sources to limit nitrates or implement Best Management Practices.

35. The Des Moines Water Works is a municipal utility and political subdivision of the state. The Des Moines Water Works provides drinking water to approximately 500,000 Iowans in four counties in the Des Moines area. The Des Moines Water Works draws water from the meandered section of the Raccoon River. The Des Moines Water Works incurs capital, operational, maintenance, and monitoring costs to reduce nitrate and cyanotoxins in the water drawn from the meandered section of the Raccoon River, to dispose nitrate removed from water, and to obtain alternative substitute water. The Des Moines Water Works passes these costs on to its customers.

36. The Des Moines Water Works monitors water at its intake point on the meandered section of the Raccoon River for nitrates and cyanotoxins. The Des Moines Water

Works' nitrate monitoring shows historical and ongoing nitrate levels greater than the Class C nitrate water quality standard, and which have increased over time as depicted in Figure 1.

Figure 1



37. The Des Moines Water Works' cyanotoxin monitoring since 2016 indicates the ongoing presence of cyanobacteria, microcystins, and cylindrospermopsin in the meandered section of the Raccoon River. Cyanobacteria combined with nitrogen, phosphorus, heat, and sunlight can produce a cyanobacteria bloom that releases cyanotoxins, including microcystins and cylindrospermopsin. The frequency, probability, and severity of such blooms will increase as a direct result of climate change.

38. The Des Moines Water Works sampling since 2016 demonstrates several days when levels of microcystins in the meandered section of the Raccoon River presented human health risks and impaired water contact recreation, including swimming and kayaking.

39. Exposure to nitrate levels both above and below the Class C drinking water quality standard of 10 mg/l results in adverse health risks to the people of Iowa. Exposure to

microcystins as a result of drinking contaminated water or through water contact recreation results in adverse health risks to the people of Iowa.

The Failure to Regulate Animal Feeding Operations

40. Animal Feeding Operations confine animals in buildings or corrals, bringing the feed to the animals and collecting their manure, in liquid or solid form, rather than stocking the animals on pasture. The operations must then dispose of the large quantities of collected waste, and typically apply it to fields as a fertilizer. Animal Feeding Operations in Iowa typically use manure as fertilizer for corn and soybeans.

41. The Iowa Department of Natural Resources' Animal Feeding Operations database lists more than 9,000 Animal Feeding Operations in the state.

42. On September 20, 2007, Iowa CCI and other organizations filed a petition with the EPA to withdraw Iowa's Clean Water Act program authority as a result of the state's failure to regulate water pollution from Concentrated Animal Feeding Operations.

43. In July of 2012, the EPA issued a Preliminary Investigation Report in response to the Petition, finding that Iowa had failed to issue Clean Water Act permits to polluting Concentrated Animal Feeding Operations when required, was not issuing adequate penalties for violations by these operations, and had not been conducting adequate inspections, among other deficiencies. In 2013, EPA and Iowa DNR entered into a Work Plan Agreement intended to address these issues and bring the program into compliance with federal law.

44. Through implementation of the Work Plan requirements, Iowa DNR discovered more than 5,000 potential Animal Feeding Operations that were missing from the agency's database altogether. These so-called "unknowns" have seemingly escaped all applicable regulations and manure management plan requirements.

45. Despite numerous documented manure spills and EPA's findings that Iowa has not issued permits when appropriate, at the time of this Petition's filing, Iowa DNR has still not issued a single Clean Water Act NPDES permit to a hog confinement Animal Feeding Operation anywhere in Iowa.

46. The Iowa DNR has allowed Animal Feeding Operations to discharge manure to non-navigable tributaries to navigable waters and to navigable waters themselves by authorizing application of manure on frozen, snow covered ground. In 2019, the Iowa DNR authorized more than 100 Animal Feeding Operations to apply manure to frozen, snow covered ground.

47. The Iowa legislature has appropriated insufficient funds for Iowa DNR to implement and enforce water quality protections at Animal Feeding Operations.

48. On March 8, 2019, the House Environmental Protection Committee, the House Agriculture Committee, and the Senate Agriculture Committee of the Iowa legislature declined to pass House File 203, House File 142, and Senate File 518, respectively, before the legislative procedural deadline for further consideration. These bills sought to impose a moratorium on new and expanding Medium and Large Animal Feeding Operations and CAFOs. The Iowa legislature also declined to pass a similar bill during the 2018 legislative session.

The Failure to Set Numeric Stream and Lake Water Quality Standards

49. The State of Iowa has not adopted numeric nitrogen and phosphorus water quality standards to address eutrophication, algae, and cyanobacteria.

50. In June 2007, the Director of the Iowa DNR convened a body of water quality experts called the Nutrient Science Advisors to recommend nitrogen and phosphorus nutrient criteria for Iowa lakes and streams.

51. On February 14, 2008, the Nutrient Science Advisors submitted

recommendations for lake recreational use criteria. In December 2009, the Iowa DNR proposed adoption of the recommended criteria, but the Environmental Protection Commission did not act. The Iowa DNR re-proposed action in February 2011. The Environmental Protection Commission solicited public comment, but did not hold a hearing to consider the proposed action, and did not take action on the proposed rulemaking.

52. On July 30, 2008, the Iowa Environmental Council, the Environmental Law and Policy Center, and other environmental groups petitioned the EPA to promulgate numeric water quality standards for nitrogen and phosphorus.

53. On March 16, 2011, the EPA issued a memorandum by Nancy Stoner entitled “Working in Partnership with States to Address Phosphorus and Nitrogen Pollution through Use of a Framework for State Nutrient Reductions” (“Stoner Memorandum”). The Stoner Memorandum announced an EPA policy to defer to states on nitrogen and phosphorus regulation and to support states’ efforts. The Memorandum recommended elements for state actions, including voluntary agricultural nonpoint source controls.

54. On July 29, 2011, EPA responded to the July 30, 2008 petition by declining to decide the petition on the merits because EPA preferred its cooperative approach with states to reduce nitrogen and phosphorus pollution. *See Gulf Action Network v. EPA*, 224 F.Supp.3d 470, 474-475 (E.D. LA 2016) (holding that EPA provided a reasonable explanation for its decision to not make a necessity determination and promulgate water quality standards).

55. On August 20, 2013, the Iowa Environmental Council and the Environmental Law and Policy Center filed a petition with the Environmental Protection Commission to adopt the Nutrient Science Advisors’ recommended nutrient criteria as lake water quality standards under the Clean Water Act. On October 14, 2013, the Commission denied the petition on the

ground that the “recently-issued Iowa Nutrient Reduction Strategy represents the State of Iowa’s primary effort to reduce statewide nutrient-related impacts and Gulf of Mexico hypoxia impacts, including the impacts described in the Petition.”

56. On November 1, 2018, the Iowa Environmental Council and the Environmental Law and Policy Center filed a second petition with the Environmental Protection Commission to adopt the Nutrient Science Advisors’ recommended nutrient criteria as lake water quality standards under the Clean Water Act. On February 19, 2019, the Commission denied the petition on several grounds, including: (1) numerical nutrient water quality standards were not required by law; and (2) the “State of Iowa continues to dedicate significant resources to efforts to reduce nutrient loadings to the waters of the state” and the petition failed to show how the numerical water quality standards “will substantially hasten or add to these efforts to reduce nutrient loadings to Iowa lakes.”

The Iowa Nutrient Reduction Strategy

57. Nitrogen and phosphorus entering the Gulf of Mexico from the Mississippi/Atchafalaya River Basin has created a hypoxic zone spanning thousands of square miles.

58. The 2008 Gulf Hypoxia Action Plan calls for Iowa and states along the Mississippi River to develop strategies to reduce nitrogen and phosphorus loadings to the Gulf of Mexico. The Gulf Hypoxia Action Plan establishes a goal of at least a forty-five percent reduction in total nitrogen and total phosphorus loads.

59. In November 2012, IDALS, the Iowa DNR, and Iowa State University released the draft of the Iowa Nutrient Reduction Strategy. In May 2013, these three entities adopted the Iowa Nutrient Reduction Strategy, and then jointly adopted revisions to the Strategy in 2014,

2016, and 2017. In order to meet the goal of a forty-five percent reduction in both nitrogen and phosphorus, the Strategy calls for a voluntary, incentive-based program for agricultural nonpoint sources to achieve the majority of the overall reductions needed.

60. In 2013, the Iowa legislature enacted Senate File 435 (2013) to authorize and fund the Iowa Nutrient Reduction Strategy, codified as Chapter 466B, Subtitle 2, Title XI of the Iowa Code. In Section 60 of Senate File 435, the legislature directed IDALS' Division of Soil Conservation and Water Quality to "establish a water quality initiative in order to assess and reduce nutrients in this state's watersheds" and "shall establish and administer projects to reduce nutrients in surface waters from nonpoint sources in a scientific, reasonable, and cost-effective manner."

61. The Iowa Nutrient Reduction Strategy identifies best management practices that reduce nitrogen and phosphorus discharges to surface waters, including but not limited to cover crops, no till, conversion to perennial grasses, conversion to grazed pasture, and land retirement. These best management practices also reduce nitrous oxide emissions and sequester carbon dioxide in soil. The Strategy does not require adoption or implementation of any limitations on nitrogen and phosphorus water pollution from agricultural nonpoint sources.

62. The most recent Iowa Nutrient Reduction Strategy Progress Report was released on March 7, 2019. The report acknowledges that adoption of the Strategy's agricultural best management practices was not making sufficient progress towards its nonpoint source nutrient reduction goal. "While annual progress continues in the implementation of these practices, early NRS efforts only scratch the surface of what is needed across the state to meet the nonpoint source nutrient reduction. Progress has occurred, but not at the scale that would impact statewide water quality measures. Local water quality improvements may be realized in

the short term where higher densities of conservation practices are in use, but the ability to detect early trends in measured water quality will vary from case to case. Statewide improvements affected by conservation practices will require a much greater degree of implementation than has occurred so far.”

63. Effective July 1, 2018, the Iowa legislature enacted section 20 of Senate File 512 (2018) which declared the Iowa Nutrient Reduction Strategy the state policy for nitrogen and phosphorus water pollution controls. Iowa Code § 455B.177(3) (“The general assembly further finds and declares that it is in the interest of the people of Iowa to assess and reduce nutrients in surface waters over time by implementing the Iowa nutrient reduction strategy”).

LEGAL BACKGROUND

Public Trust Doctrine

64. The public trust doctrine originates from the Code of Justinian, and is based on the notion that the public possesses inviolable rights to certain natural resources. The doctrine was adopted into English common law and subsequently into the common law of the original thirteen states upon independence from England.

65. At the time of Iowa’s admission to the United States in 1845, the State of Iowa took title to navigable waters under the equal footing doctrine and subject to the rights of the public under the public trust doctrine.

66. As trustee, the State of Iowa shall not dispense with its duties as the trustee, shall not abdicate control of navigable waters, and shall not allow substantial impairment of navigable waters.

67. The public has the right of use of navigable waters as the public trust beneficiary. The right of use is protected as both a common law right and as an unenumerated

right within the Constitution of the State of Iowa.

68. The scope of the public trust doctrine in Iowa extends to navigable waters, including the meandered section of the Raccoon River.

69. The public trust doctrine broadly protects the public's use of navigable waters without ironclad parameters on the types of uses to be protected.

Federal Clean Water Act

70. The Clean Water Act, 33 U.S.C. §§ 1251, *et seq.* is a model of cooperative federalism. Section 319 of the Act, 33 U.S.C. § 1329, defers to states on the issues of whether and how to limit water pollution from agricultural nonpoint sources.

71. CAFOs are expressly listed in the Clean Water Act's definition of "point source," such that discharges of pollutants from CAFOs to waters of the United States are prohibited unless in compliance with a National Pollutant Discharge Elimination System ("NPDES") permit.

72. Agricultural storm water runoff and return flows from irrigated agriculture are specifically exempt from the Clean Water Act's point source discharge prohibition in section 301 of the Act, 33 U.S.C. § 1311. As such, agricultural storm water runoff and return flows from irrigated agriculture are considered nonpoint source discharges.

73. The EPA's regulations implementing the Clean Water Act exempt some runoff from manure application by CAFOs as agricultural storm water. A "precipitation-related discharge of manure, litter or process wastewater from land areas under the control of a Concentrated Animal Feeding Operation is an agricultural storm water discharge" when manure "has been applied in accordance with site specific nutrient management practices that ensure appropriate agricultural utilization of the nutrients in the manure." 40 C.F.R. § 122.23(e).

74. Although CAFO manure spills and land application runoff contribute to water pollution in Iowa, the Iowa DNR deems the vast majority of Iowa CAFOs to be “zero discharge” facilities because it considers spills to be isolated incidents, and considers runoff to be nonpoint source agricultural storm water. As a result, the agency does not require CAFOs to obtain NPDES permits.

75. Aside from NPDES permits, the only restrictions the State of Iowa imposes on application of manure and CAFO waste are manure management plans, which Iowa requires of Animal Feeding Operations 500 Animal Units or larger. This size threshold includes all Large CAFOs, but excludes some Medium Animal Feeding Operations and all Small Animal Feeding Operations. And notwithstanding the requirement for the largest Animal Feeding Operations to apply manure in compliance with a manure management plan, the State of Iowa has failed to mandate nitrogen and phosphorus limits for runoff from Animal Feeding Operation land application areas.

COUNT I

SUBSTANTIVE DUE PROCESS

IOWA STATE CONSTITUTION ARTICLE I, § 9

76. Iowa Citizens hereby re-allege and incorporate by reference each of the allegations set forth above.

77. Iowa Citizens have no other plain, speedy, and adequate remedy at law.

78. The Constitution of the State of Iowa guarantees that no person shall be deprived of life, liberty, or property, without due process of law.

79. Iowa Citizens are beneficiaries of rights under the public trust doctrine which are secured by the Unenumerated Rights Clause of the Constitution of the State of Iowa.

80. As the sovereign trustee, the State of Iowa has a duty to protect the public use of navigable waters and to prevent substantial impairment of navigable waters.

81. Iowa Citizens have protected property interests in the recreational use and drinking water use of the meandered section of the Raccoon River.

82. The State of Iowa has abdicated control of the meandered section of the Raccoon River to private parties. Specifically, the State of Iowa has pursued a voluntary nitrogen and phosphorus control strategy for agricultural nonpoint sources, followed a *de facto* policy of under-regulating Animal Feeding Operations, adopted voluntary agricultural nonpoint source controls in the Iowa Nutrient Reduction Strategy, and adopted Section 20 of Senate File 512 (2018) to declare “it is in the interest of the people of Iowa to assess and reduce nutrients in surface waters over time by implementing the Iowa nutrient reduction strategy.”

83. The State of Iowa has allowed nitrogen and phosphorus discharges from agricultural sources, including Animal Feeding Operation land application areas, to substantially impair recreational and drinking water use of the meandered section of the Raccoon River.

84. The State of Iowa has failed in its duty of care to safeguard the interests of Iowa Citizens as public trust beneficiaries.

85. Iowa Citizens’ members incur harms to their recreational use and enjoyment of the meandered section of the Raccoon River. They also incur monetary costs to obtain drinking water, costs that directly result from the Des Moines Water Works’ treatment of water substantially impaired by nitrogen and phosphorus from agricultural nonpoint sources. Iowa Citizens’ members are concerned about health risks from consuming water containing nitrate and microcystins.

86. Instead of protecting the public’s use of the meandered section of the Raccoon

River, the State of Iowa has abdicated control in favor of the interests of private parties, and has allowed agricultural nonpoint sources to discharge nitrogen and phosphorus without restriction into the meandered section of the Raccoon River and its non-navigable tributaries.

87. The State of Iowa has deprived Iowa Citizens of their constitutionally protected property interest without due process of law.

88. The actions and omissions by the State of Iowa are the proximate cause of injuries to Iowa Citizens.

WHEREFORE, Iowa Citizens pray for relief as more fully set forth below.

COUNT II

PUBLIC TRUST DOCTRINE

COMMON LAW IN EQUITY

89. Iowa Citizens hereby re-allege and incorporate by reference each of the allegations set forth above.

90. Iowa Citizens have no other plain, speedy, and adequate remedy at law.

91. Iowa Citizens are beneficiaries of rights under the public trust doctrine.

92. As the sovereign trustee, the State of Iowa has a duty to protect the public use of navigable waters and to prevent substantial impairment of navigable waters.

93. Iowa Citizens have protected interests in the recreational use and drinking water use of the meandered section of the Raccoon River.

94. The State of Iowa has pursued a voluntary nitrogen and phosphorus control strategy for agricultural nonpoint sources, followed a *de facto* policy of under-regulating Animal Feeding Operations, adopted voluntary agricultural nonpoint source controls in the 2013 Iowa Nutrient Reduction Strategy, and adopted Section 20 of Senate File 512 (2018) to declare “it is in

the interest of the people of Iowa to assess and reduce nutrients in surface waters over time by implementing the Iowa nutrient reduction strategy.”

95. The State of Iowa has allowed nitrogen and phosphorus discharges from agricultural sources, including Animal Feeding Operation land application areas, to substantially impair recreational and drinking water use of the meandered section of the Raccoon River.

96. The State of Iowa has failed in its duty of care to safeguard the interests of Iowa Citizens as public trust beneficiaries.

97. Iowa Citizens’ members incur harms to their recreational use and enjoyment of the meandered section of the Raccoon River. They also incur monetary costs to obtain drinking water, costs that directly result from the Des Moines Water Works’ treatment of water substantially impaired by nitrogen and phosphorus from agricultural nonpoint sources. Iowa Citizens’ members are concerned about health risks from consuming water containing nitrate and microcystins.

98. Instead of protecting the public’s use of the meandered section of the Raccoon River, the State of Iowa has abdicated control in favor of the interests of private parties and has allowed agricultural sources to discharge nitrogen and phosphorus without restriction into the meandered section of the Raccoon River and its non-navigable tributaries.

99. The actions and omissions by the State of Iowa are the proximate cause of injuries to Iowa Citizens.

WHEREFORE, Iowa Citizens pray for relief as more fully set forth below.

PRAYER FOR RELIEF

WHEREFORE, Iowa Citizens pray for the following relief:

- (a) DECLARE that the public has a property interest as the public trust beneficiary

in the recreational use and drinking water use of navigable waters, that the State of Iowa has a duty to protect the public's recreational and drinking water use, and that the State of Iowa's actions and inactions violated Iowa Citizens' property interest under the public trust doctrine as secured by section 25 of Article I of the Iowa Constitution;

(b) DECLARE that the public has a right as the public trust beneficiary in the recreational use and drinking water use of navigable waters, that the State of Iowa has a duty to protect the public's recreational and drinking water use, and that the State of Iowa's actions and inactions violated its duty as trustee under the common law public trust doctrine;

(c) DECLARE Section 20 of Senate File 512 (2018) null and void as inconsistent with the public trust doctrine;

(d) ENJOIN the State of Iowa to adopt and implement a mandatory remedial plan to restore and protect public use that requires agricultural nonpoint sources and CAFOs to implement nitrogen and phosphorus limitations in the Raccoon River watershed;

(e) ENJOIN Defendants from authorizing the construction and operation of new and expanding Medium and Large Animal Feeding Operations and CAFOs in the Raccoon River watershed until the State of Iowa implements the mandatory remedial plan and monitoring data demonstrate viable recreational and drinking water use.

(f) ENJOIN the State of Iowa from taking any further action that would violate Iowa Citizens' rights under the public trust doctrine and the Iowa Constitution with respect to the meandered section of the Raccoon River.

(g) AWARD Iowa Citizens their attorney's fees and costs of litigation; and

(h) GRANT such other appropriate relief as the Court finds may be just and equitable.

JURY DEMAND

Iowa Citizens hereby demand a trial by jury of the declaratory relief issues arising out of the matters pled herein.

Dated: March 27, 2019

/s/ Roxanne Conlin
ROXANNE BARTON CONLIN AT0001642
DEVIN KELLY AT0011691
ROXANNE CONLIN & ASSOCIATES, P.C.
3721 SW 61st Street, Suite C
Des Moines, IA 50321
Phone: (515) 283-1111; Fax: (515) 282-0477
Email: roxanne@roxanneconlinlaw.com
dkelly@roxanneconlinlaw.com
cc: dpalmer@roxanneconlinlaw.com
ATTORNEYS FOR PLAINTIFFS

/s/ Brent Newell
BRENT NEWELL
PUBLIC JUSTICE, P.C.
475 14th Street, Suite 610
Oakland, CA 94612
Phone: (510) 622-8209; Fax: (202) 232-7203
Email: bnewell@publicjustice.net,
cc: lreed@publicjustice.net
ATTORNEYS FOR PLAINTIFFS
Pro Hac Vice Application Pending

/s/ Tarah Heinzen
TARAH HEINZEN
FOOD & WATER WATCH
2009 NE Alberta St., Suite 207
Portland, OR 97211
Phone: (202) 683-2457
Email: theinzen@fwwatch.org
ATTORNEYS FOR PLAINTIFFS
Pro Hac Vice Application Pending

///

///

///

/s/ Channing Dutton

CHANNING DUTTON AT0002191
LAWYER, LAWYER, DUTTON & DRAKE
1415 Grand Ave.
West Des Moines, IA 50265
Phone: (515) 224-4400; Fax: (515) 223-4121
Email: cdutton@LLDD.net
ATTORNEY FOR PLAINTIFFS