IN THE SUPREME COURT OF IOWA

IOWA CITIZENS FOR COMMUNITY IMPROVEMENT, a nonprofit corporation, and FOOD & WATER WATCH, a nonprofit corporation, Plaintiffs-Appellees, v. 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. Defendants-Appellants.	Sup. Ct. No. 19-1644 **RESISTANCE TO APPLICATION FOR INTERLOCUTORY APPEAL** **IN THE ALTERNATIVE, MOTION FOR EXPEDITED BRIEFING AND SUBMISSION PURSUANT TO IOWA R. APP. P. 6.104(2)** **TRIAL COURT NO. EQCE084330**

COMES NOW Plaintiffs-Appellees Iowa Citizens for Community Improvement and Food & Water Watch (collectively "Iowa Citizens"), pursuant to Iowa Rule of Appellate Procedure 6.104(2), by and through counsel, and in support of this Resistance to the Application for Interlocutory Appeal by Defendants-Appellants State of Iowa, *et al.* (collectively "the State" or "State of Iowa"), state as follows:

INTRODUCTION

1. On March 27, 2019, Iowa Citizens filed a Petition for Injunctive and Declaratory Relief to protect their right to clean water in the Raccoon River. The Petition alleges that the State of Iowa has violated the public trust doctrine, which provides the public with a right to use navigable waters. Specifically, the State has allowed unabated water pollution from agricultural nonpoint sources and animal feeding operations to substantially impair the river and has abdicated control of the river to private parties.

2. The State's Application for Interlocutory Appeal incorrectly contends that the Ruling on Motion to Dismiss (1) affects the rights of the legislature and non-parties by rejecting application of the federal political question doctrine; (2) materially affects the final decision by depriving the State of the political question defense; and (3) should be subject to an interlocutory appeal because of non-parties' uncertainty, the expense to the State to proceed

to trial, and the need to obtain interlocutory review of the State's jurisdictional defenses.

3. The Court should deny the Application and allow the Petition to proceed in the District Court for two reasons. First, the Ruling neither implicates any substantial rights nor materially affects the final decision, because the political question doctrine does not apply when the Iowa Constitution does not commit the public trust doctrine or water quality issues to the exclusive authority of the legislative or executive branches. Second, further proceedings in the District Court will better serve the interests of justice because the District Court will consider evidence, make findings of fact, and, if judgment is entered for Iowa Citizens, order specific remedies which will provide a complete record for efficient appellate review.

BACKGROUND

4. Justice Larson, writing for a unanimous court, described the public trust doctrine as providing the public with "inviolable rights to certain natural resources" and placing a "burden" on the State of Iowa, with its role being "only that of a steward" of public trust land. *State v. Sorensen*, 436 N.W.2d 358, 361 (Iowa 1989). In *Sorensen*, the Court held that land adjacent to the Missouri River, and the river itself, were public trust property and that the doctrine protects the public's use of the river. *Id*. at 363. "The public trust

doctrine, however, is not limited to navigation or commerce; it applies broadly to the public's *use* of property, such as waterways, without ironclad parameters on the types of uses to be protected." *Id*. (emphasis in original).

5. In *Witke v. State Conservation Commission*, the Court recognized the right of use as a property interest subject to constitutional protection under the due process clause. 56 N.W.2d 582, 588-589 (Iowa 1953). The Court held that "all persons have a right to use the navigable waters of the state, so long as they do not interfere with their use by other citizens, subject to regulation by the state under its police powers[]" and the state – except to provide improvements for public use – "may not restrict or charge for the use of the waters of navigable streams or lakes, and an attempt on its part to do so is a deprivation of the citizen of his property without due process of law[.]" *Id*. The Court has more recently described the public trust doctrine as "the 'paramount' right of Iowans to use state waterways" when the Court held that the threatened loss of the right to operate a boat weighed against concluding that a warrantless search was voluntary. *State v. Pettijohn*, 899 N.W.2d 1, 35 (Iowa 2017) (quoting *Witke*, 56 N.W.2d at 586). The public's right of use also receives constitutional protection through the unenumerated rights clause, Iowa Const. art. I, § 25, which "secure[s] to the people of Iowa common law rights that pre-existed Iowa's Constitution." *Atwood v. Vilsack*, 725 N.W.2d 641, 651

(Iowa 2006) (citing *State ex rel. Burlington & Mo. River R.R. v. County of Wapello*, 13 Iowa 388, 412 (Iowa 1862)). Justice Larson explained the origins of the public trust doctrine in *Sorensen*, noting that the 1845 act of Congress admitting Iowa into the Union required "forever free" public use of navigable waters and that the public trust doctrine originates from the Code of Justinian. *Sorensen*, 436 N.W.2d at 361.

6. "The Iowa Supreme Court has a long and storied tradition of deciding cutting-edge cases well in advance of later decisions of the United States Supreme Court and other courts." *Godfrey v. State*, 898 N.W.2d 844, 862 (Iowa 2017) (citing cases including *In re Ralph*, Morris 1, 6-7 (Iowa 1839) (the first decision by the Court which held "no man in this territory can be reduced to slavery")). This Court described the role of the judiciary in protecting the rights and liberties of Iowans:

> When individuals invoke the Iowa Constitution's guarantees of freedom and equality, courts are bound to interpret those guarantees. In carrying out this fundamental and vital role, "we must never forget that it is a *constitution* we are expounding."

Varnum v. Brien, 763 N.W.2d 862, 876 (Iowa 2009) (emphasis in original) (quoting *M'Colloch v. Maryland*, 17 U.S. 316, 407 (1819)) (holding that an act of the legislature to deny same-sex couples the right to marry failed to provide equal protection of the law in violation of the Iowa Constitution).

7. The Petition pleads public trust doctrine claims for injunctive and

declaratory relief. Specifically, Count I pleads that Iowa Citizens have constitutionally protected property and common law rights in the recreational use and drinking water use of the Raccoon River, and that such rights are secured by the Iowa Constitution's substantive due process and unenumerated rights clauses, Iowa Const. art. I, §§ 9, 25. Petition at 18-20 (¶¶ 76-88), excerpts attached as Exh. 1. Count II pleads identical violations of the public trust doctrine in a cause of action in equity. Petition at 20-21 (¶¶ 89-99).

8. The Petition alleges that agricultural nonpoint sources and animal feeding operations release unabated nitrogen and phosphorus into the river and its tributaries. Petition at 6-7, 11 (¶¶ 17-19, 21, 23, 40). The Petition alleges that cyanobacteria – toxic blue-green algae that excrete cyanotoxins – are also present in the river, phosphorus and nitrogen provide nutrients for cyanobacteria, and, as recently as 2016, cyanobacteria have released significant levels of microcystins into the river. *Id*. at 7, 10 (¶¶ 24-25, 37-38). The Petition alleges that nitrate concentrations in the Raccoon River at the Des Moines Water Works' intake exceed drinking water standards, exposure to nitrates and microcystins result in adverse health risks, and that the public suffers economic loss by paying for treatment of such pollution. *Id*. at 6, 8-9 (¶¶ 20, 30, 35, 36, 39). Finally, the Petition alleges that increased precipitation and temperatures caused by climate change will exacerbate this pollution,

including the prevalence of cyanobacteria and the associated toxins. *Id*. at 7, 10 (¶¶ 26-27, 37).

9. The Raccoon River provides drinking water for approximately 500,000 – or nearly one in six – Iowans, and public concern and controversy over nitrate pollution has recently been before this Court. *See Board of Water Works Trustees of the City of Des Moines v. Sac County Board of Supervisors*, 890 N.W.2d 50, 53-54 (Iowa 2017). The Court held that drainage districts are immune from injunctive relief and damages claims, the Board could not sue other subdivisions of the state, and that the Board lacked a property interest to support a takings claim. *Id*. at 60, 69-71.

10. The Application admits that the State does not limit nitrogen and phosphorus runoff from crop fields, which the State classifies as agricultural nonpoint sources. "Iowa farms are nonpoint sources of nitrogen and phosphorus that are not subject to regulation." Application at 6. Similarly, federal and state law classifies stormwater runoff from Concentrated Animal Feeding Operations' (CAFOs) land-applied manure as nonpoint source agricultural stormwater when applied pursuant to a manure management plan.[1]

[1] CAFOs are large confinement operations that house significant numbers of animals such that, in 1972, the federal Clean Water Act classified such facilities as point sources. *See* 33 U.S.C. § 1362(14) (definition of "point source" includes CAFOs and exempts "agricultural stormwater discharges and return flows from irrigated agriculture"); 40 C.F.R. § 122.23(e), (e)(1)

11. In 2018, the legislature passed section 20 of Senate File 512, codified at Iowa Code § 455B.177(3), to declare that the voluntary Iowa Nutrient Reduction Strategy was the official policy of the state to reduce nitrogen and phosphorus pollution.

12. The most recent Iowa Nutrient Reduction Strategy progress report for the years 2017-2018 was released on March 7, 2019. Petition at 15-16 (¶ 62). The report acknowledges that "early NRS efforts only scratch the surface of what is needed across the state to meet the nonpoint source nutrient reduction." *Id.* The report further found that progress to date was "not at the scale that would impact statewide water quality measures" and "[s]tatewide improvements affected by conservation practices will require a much greater degree of implementation than has occurred so far." *Id.*

13. Senate File 512 (2018) funds the Water Quality Infrastructure Fund and the Water Quality Financial Assistance Fund with $270 million from 2019 to 2030, or $22.5 million per year. Application at 2. The Iowa Policy Project has analyzed the impact of this additional revenue and concluded that the revenue increase from Senate File 512 "turns out to be a figurative drop in the bucket compared to what is needed if Iowa is serious about meeting its

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(federal stormwater exemption for land-applied manure); Iowa Code § 459.311(2) (prohibition on regulations more stringent than federal law).

obligations to reduce nutrient pollution."[2] The Iowa Environmental Council also performed an analysis and found that at current rates of implementation, it would take approximately 90, 913, and 30,000 years to meet the Strategy's cover crop, wetland, and bioreactor adoption goals, respectively.[3]

RESISTANCE TO APPLICATION FOR INTERLOCUTORY APPEAL

14. Interlocutory appeals occur only in "exceptional situations" where the "interest of sound and efficient judicial administration can best be served[.]" *Banco Mortg. Co. v. Steil*, 351 N.W.2d 784, 787 (Iowa 1984). In deciding whether to grant an application for interlocutory appeal, the Court considers the "substantial rights of the parties and the interests of judicial efficiency." *Beuchel v. Five Star Quality Care, Inc.*, 745 N.W.2d 732, 736 (Iowa 2008); *see also* IOWA R. APP. P. 6.104(1)(d) (factors to consider are the substantial rights affected by the Ruling, why the Ruling will materially affect the final decision, and why the interlocutory appeal will better serve the interests of justice). The "main factor in determining whether such an

[2] Lip Service: Iowa's Inadequate Commitment to Clean Water, State water quality spending and the Nutrient Reduction Strategy at 8, April 2019, available at https://www.iowapolicyproject.org/2019docs/190424-WQfunding.pdf (visited October 16, 2019).

[3] *See* The Slow Reality of the Nutrient Reduction Strategy at 1, 4, Iowa Environmental Council, July 2019, available at https://www.iaenvironment.org/webres/File/NRS%20Summary%20Report.pdf (visited October 16, 2019).

interlocutory appeal should be granted is whether the consideration of the issues would serve the 'interest of sound and efficient judicial administration.'" *Beuchel*, 745 N.W.2d at 735-736 (Iowa 2008) (quoting *Hammer v. Branstad*, 463 N.W.2d 86, 89 (Iowa 1990)).

The Ruling does not Affect the State of Iowa's Substantial Rights

15. The District Court held that the federal political question doctrine did not apply in Iowa and, even if it did, "this Court declines to find that Plaintiffs' claims represent a political question for the purposes of Defendants' motion to dismiss." Ruling, section III.iii., attached as Exh. A to the Application. The State asserts this Ruling affects its "rights" to continue to allow, as a nonjusticiable political question, agricultural sources to pollute the Raccoon River.

16. The State of Iowa holds no right to alienate, or allow substantial impairment of, navigable waters. Rather, it "is the duty of the Legislature to enact such laws as will best preserve its use for all persons, and for all purposes." *Board of Park Commissioners of City of Des Moines v. Diamond Ice Co.*, 105 N.W. 203, 205 (Iowa 1905). In *Illinois Central Railroad v. State of Illinois*, the U.S. Supreme Court held that the Illinois legislature's act to convey submerged lands in the harbor of Chicago to a railroad company was either void or always revocable. 146 U.S. 387, 453 (1892). "The state can no

more abdicate its trust over property in which the whole people are interested, like navigable waters and soils under them . . . than it can abdicate its police powers in the administration of the government and the preservation of the peace." *Id.* The U.S. Supreme Court held that alienation of public trust property could only occur "except as to such parcels as are used in promoting the interests of the public therein, or can be disposed without any substantial impairment of the public interest in the lands and waters remaining." *Id.*

17. The State incorrectly contends that the Ruling affects the legislature's "rights" to make policy choices and value determinations without judicial accountability by virtue of the legislature's general legislative authority, Iowa Const. art. III, § 1. Application at 5-6. If such a proposition were true, then every action of the legislature under its general legislative authority would be beyond the reach of the courts as a political question, a notion plainly at odds with the Iowa Constitution and the judiciary's role in interpreting and enforcing the Constitution.

18. The political question doctrine only operates in Iowa, if at all, when the Iowa Constitution textually commits an issue to a specific branch of government. In *Freeman v. Grain Processing Corp.*, this Court discussed the controversy surrounding application of the doctrine in state courts and noted that "the United States Supreme Court has made clear that the federal political

question doctrine does not apply to state courts." 848 N.W.2d 58, 91 (Iowa 2014). The Court observed that it had only found the presence of a nonjusticiable political question in only two cases. *Freeman*, 848 N.W.2d at 92 (citing *Des Moines Register and Tribune Co. v. Dwyer*, 542 N.W.2d 491, 493 (Iowa 1996) and *State ex rel. Turner v. Scott*, 269 N.W.2d 828, 828 (Iowa 1978)).

19. The Application cites no textual commitment of the public trust doctrine or water quality issues to the exclusive purview of the legislative or executive branches. Nor could the State cite authority for this position, because the Iowa Constitution makes no such commitment. *See* Application at 7 (citing only to the legislature's general legislative authority, Iowa Const. art. III, § 1). There is thus no political question committed to the legislature here and no "rights" held by the legislature to operate without judicial oversight.

20. Furthermore, notwithstanding the political question doctrine, a court will always have jurisdiction to hear a constitutional claim. In the case on which the State relies, Application at 5, the Court observed that the "exercise of the judiciary's power to interpret the constitution and review the constitutionality of laws does not offend these principles." *King v. State*, 818 N.W.2d 1, 17 (Iowa 2012) (citing *Luse v. Wray*, 252 N.W.2d 324, 327-328 (Iowa 1977) and *Marbury v. Madison*, 5 U.S. 137, 177-178 (1803)). Because

Count I of the Petition alleges constitutional claims for relief, the State has no "rights" to the political question safe harbor. *See also Varnum*, 763 N.W.2d at 876 (courts are bound to hear constitutional claims).

21. Iowa Citizens respectfully direct the Court to the requested relief in the Petition to further demonstrate that the Ruling affects no "rights" held by the State. Iowa Citizens requested the District Court to "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[.]" Petition at 22. Iowa Citizens also requested the District Court to "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." *Id.* The requested relief neither asks the Court to fashion the mandatory remedial plan itself, nor does it ask the Court to prohibit the "operation of CAFOs in the Raccoon River watershed." Application at 7. The District Court correctly held that "[n]one of the proposed remedies encroach upon the powers of the other branches of government." Ruling, section III.iii.

22. Finally, the State contends that the Ruling affects the rights of

farmers. Application at 6-7. The State cites no authority for this proposition, does not explain what rights are allegedly affected, and does not explain why the Court should consider non-parties' rights when deciding whether to grant an application for interlocutory appeal. *See Beuchel*, 745 N.W.2d at 735 (the Court should consider "the substantial rights of the parties"). Even if the rights of non-parties are relevant, those private rights are subordinate to the paramount use rights held by the public. *See Diamond Ice Co.*, 105 N.W. at 205 (riparian landowners "have no rights which may be exercised to the exclusion of all others, and, the ownership of the stream being in the state in trust for all of the people, it is the duty of the Legislature to enact such laws as will best preserve its use for all persons, and for all purposes").

23. The Application presupposes that *all* Iowa farmers would be adversely affected by a state-adopted mandatory remedial plan and a moratorium in the Raccoon River watershed. Application at 6-7. Most Iowa farms are located outside the watershed, and more importantly, not all farmers oppose stronger efforts to clean up Iowa's waterways.[4] Moreover, the State, when adopting the mandatory remedial plan, can and should adopt technical

[4] *See, e.g.*, Opinion, Farmers do care about clean water, Des Moines Register, September 9, 2019, available at https://www.desmoinesregister.com/story/opinion/columnists/2019/09/09/farmers-iowa-clean-water/2266117001/ (visited October 16, 2019).

assistance to support farmers' implementation of the plan, while holding integrators accountable for implementation on operations where animals they own are raised.[5] Iowa Citizens support broader reforms to farm policy that are needed to increase the economic viability of independent farms while they implement the mandatory remedial plan, including commodity policy reform to ensure that farmers can receive a fair price for their crops and livestock.

The Ruling does not Materially Affect the Final Decision

24. The Application misrepresents the remedies Iowa Citizens seek and argues that the Ruling materially affects the final decision. First, the State claims the Petition "seek[s] a court order requiring the Iowa General Assembly to comply with a nutrient reduction policy adopted by the trial court[.]" Application at 7. Second, the State claims that "the trial court has already concluded it has the authority to adopt a mandatory water policy and impose this policy on the Iowa General Assembly." Application at 8. To the contrary, the Petition asks the District Court to order *the State* to adopt the mandatory plan, *see* paragraph 21, *supra*, and the District Court's Ruling in no way held that the Petition sought a court-adopted plan or that the District Court had the

[5] For the purposes of this resistance only, an integrator is an entity that both processes and owns livestock, such as Smithfield, whether in Smithfield-owned confinement operations or in contract grower-owned confinement operations.

authority to specify the contents of the mandatory plan:

> Plaintiffs' requested relief is not for the judicial branch to act in the stead of the other branches of government. They seek a declaration of the public's right in the recreational and functional use of the meandered section of the Raccoon River, declaration of Section 20 of Senate File 512 as null and void, and injunction of the mandatory remedial plan/construction and operation of certain new types of animal feeding operations. None of the proposed remedies encroach upon the powers of the other branches of government.

Ruling, Section III.iii.

25. The Application then asserts that the Ruling materially affects the final decision because it removes the State's political question defense. Application at 8. For the reasons set forth above and in *Freeman*, the federal political question doctrine does not apply in Iowa and the Iowa Constitution does not commit the public trust doctrine issue to a specific branch of government. As a result, the unavailability of the defense will not affect the outcome of this case.

An Interlocutory Appeal will not Serve the Interests of Justice.

26. The Application fails to demonstrate that an interlocutory appeal would serve the interests of justice, the main factor in whether the Court should grant the Application. *Beuchel*, 745 N.W.2d at 735-736 (main factor is the interest of sound and efficient judicial administration). Instead, the State contends that an interlocutory appeal is warranted because (1) "of the

significant issues at stake," Application at 9 (citing *Banco*, 351 N.W.2d at 787); (2) of the "time and resources of the state necessary for discovery and to prepare for a trail will be unprecedented," Application at 8-9; and (3) continued litigation "will produce substantial uncertainty and grave concerns for every member of Iowa's agricultural economy[.]" *Id*. at 9. As such, the State seeks interlocutory review in the Supreme Court to give "certainty to the applicable legal standards for standing in environmental cases, the political question doctrine and the Iowa Administrative Procedures Act in this action." Application at 9.

27. An interlocutory appeal here will not promote judicial efficiency with respect to the political question doctrine issue. As discussed above, this Court recently cast serious doubt on the viability of the federal political question doctrine as a matter of Iowa law. *Freeman*, 848 N.W.2d at 90-93 (discussing the tenuous status of the political question doctrine and holding the doctrine did not apply for the purposes of the case when no party suggested a different standard under Iowa law). And the Iowa Constitution lacks a textual commitment of the public trust doctrine or water quality issue to a specific branch of government. The *only* Iowa cases that held a claim nonjusticiable as a political question involved textual commitments of the issue. *See Dwyer*, 542 N.W.2d at 493 (textual commitment to the Senate to make its own rules under

article III, section 9 made claim nonjusticiable); *Scott*, 269 N.W.2d at 828 (textual commitment to each house of the legislature to judge the qualifications of its members under article III, section 7 made claim nonjusticiable). Thus, an interlocutory appeal in this case to determine the viability of a questionable defense with no textual commitment of the issue in the Iowa Constitution does not promote judicial efficiency but rather unjustly delays Iowa Citizens' claims from adjudication. To the extent the State believes that a remedy may infringe on the separation of powers, then such an issue should be raised after final judgment in the context of a fully developed evidentiary record with the contours of the remedial order established for efficient appellate review.

28. The standing analysis for an environmental claim, including a public trust doctrine claim, requires no clarification to promote judicial efficiency either. Five months ago, the Court reaffirmed the standing analysis for environmental cases. *See Puntenney v. Iowa Utilities Board*, 928 N.W.2d 829, 837-838 (Iowa 2019). The Court held that the environmental injury analysis did not require property ownership along the contested pipeline, but rather rested on the plaintiff's use of the area and injury to aesthetic and recreational values. *Id*. at 837. The Court relied on its prior decision in a case involving a public trust doctrine claim, which adopted the aesthetic and recreational injury standard from the federal Article III standing analysis. *Id.*

(citing *Bushby v. Washington County Conservation Board*, 654 N.W.2d 494, 496-497 (Iowa 2002)). The District Court correctly ruled that standing under Iowa law does not require a plaintiff to meet federal Article III causation and redressability requirements, and that Iowa Citizens established a legal interest and injury sufficient to establish standing under *Bushby*. *See* Ruling, section III.i and III.ii. Even if such additional federal Article III elements applied, the District Court held that the "case currently before the court does involve causation and redressability." Ruling, section III.ii. Accordingly, the Court need not clarify the standing analysis any further after *Puntenney* to promote judicial efficiency.

29. Finally, resolution of the Iowa Administrative Procedures Act issue in an interlocutory appeal will not serve the interests of justice when exhaustion of administrative remedies before state agencies is plainly fruitless. The State of Iowa admits that "Iowa farms are nonpoint sources of nitrogen and phosphorous that are not subject to regulation." Application at 6. And although CAFOs are point sources of pollution, precipitation-related runoff of CAFO manure land-applied according to a manure management plan is exempt from regulation in Iowa. *See* 40 C.F.R. § 122.23(e), (e)(1) (federal exemption); Iowa Code § 459.311(2) (prohibition on regulations more stringent than federal

law).[6] Thus, agencies have no authority to limit agricultural nutrients polluting the Raccoon River and exhaustion of piecemeal administrative remedies is fruitless. *Ghost Player, L.L.C. v. State*, 860 N.W.2d 323, 328-329 (Iowa 2015) (exhaustion required when action or inaction is related to the authority of the agency); *Rowen v. LeMars Mutual Ins. Co. of Iowa*, 230 N.W.2d 905 (Iowa 1975) (the exhaustion inquiry is whether the relief sought is within the jurisdiction of the agency). Moreover, the State contends that the Iowa Administrative Procedures Act does not allow for a programmatic challenge such as that pleaded here. *See* Memorandum of Law in Support of Motion to Dismiss at 25, excerpts attached as Exhibit 2. Iowa Citizens agree, which is exactly why Iowa Citizens pleaded claims for relief pursuant to the Iowa Constitution and at common law, and did not plead claims pursuant to the Iowa Administrative Procedures Act. An interlocutory appeal will thus not promote judicial efficiency in this case.

30. In conclusion, the interests of justice warrant denial of the

[6] Only the largest Animal Feeding Operations shall comply with and submit manure management plans to the DNR. Iowa Code § 459.312(1)(a). Small Animal Feeding Operations, which Iowa defines as all Animal Feeding Operations with 500 animal units or fewer, are exempt from this requirement. *Id.*; Iowa Code § 459.102(51). This translates to all confinement or feedlot operations with 1,250 or fewer finishing hogs or 500 beef cattle being exempt from any manure management obligation. Iowa Code § 459.102(6).

Application when appellate review after final judgment will allow distillation of facts and remedies in the District Court. In 2017, Chief Justice Cady observed that proceeding to the merits in *Board of Water Works* would have allowed the U.S. District Court to consider the evidence and apply remedies for water pollution in the Raccoon River.

> Nevertheless, the equitable remedies now asserted are not new to our law; they are only difficult to see in the context of this case. That difficulty is not, however, a reason to dismiss the case, especially when the facts in evidence have not yet been presented. The seriousness of facts can often help to see the availability of equitable relief. Furthermore, law develops through our changed understanding, including our understanding of the environmental impact of drainage districts. One of the fundamental principles of law is for remedies to be available when we discover wrongs. Pollution of our streams is a wrong, irrespective of its source or its cause.
>
> I believe the focus of our attention should be the end to which this lawsuit is directed. This state is blessed with fertile soil, vast expanses of teeming wilderness, and an overwhelming abundance of fresh water. The role and purpose of drainage districts in Iowa is important, but no more important than this state's enduring role of good stewardship. This lawsuit serves to reinforce the critical balance at stake and asks the rhetorical question posited years ago by one of the founders of modern conservation, "What good is an undrained marsh anyhow?" We should respond when this balance has shifted too far in either direction.

Board of Water Works, 890 N.W.2d at 73 and n.15 (Cady, C.J., concurring in part and dissenting in part) (quoting Aldo Leopold, *A Sand County Almanac and Sketches Here and There* 100 (Spec. Commemorative ed. 1989) and noting that "Aldo Leopold, perhaps not

surprisingly, was an Iowan").

IN THE ALTERNATIVE, THE COURT SHOULD ORDER EXPEDITED BRIEFING AND SUBMISSION

31. In the alternative, should the Court grant the Application, then the Court should order expedited briefing and submission pursuant to Iowa Rule of Appellate Procedure 6.104(2). Such an order for expedited review would reflect the urgency here where paramount, constitutionally protected rights of the public are at issue, when an interlocutory appeal will delay adjudication of Iowa Citizens' claims, and when 500,000 Iowans use the Raccoon River as a source of drinking water.

WHEREFORE, Iowa Citizens respectfully request that the Court deny the State of Iowa's Application for Interlocutory Appeal or, in the alternative, order expedited briefing and submission pursuant to Iowa Rule of Appellate Procedure 6.104(2).

Respectfully Submitted,

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