

**IOWA DEPARTMENT OF NATURAL RESOURCES
NATURAL RESOURCE COMMISSION**

Business Meeting Date: Thursday, October 10, 2013

Meeting Location: Wallace Building-4th Floor, 502 E 9th Street, Des Moines, IA 50319

BUSINESS MEETING AGENDA

Meeting convenes at 9:30am

Public Participation begins at approximately 10:00a

Lunchtime Presentations:

- American Fisheries Society, Fish Culture Section, Award of Excellence to Mike Mason
- Hunter Access Survey

1.	Approval of Agenda Consent Agenda (<i>*within agenda indicates proposed consent agenda item</i>) *5. Timber Sale Contract with Pilcher Bros. Sawmill, for Stephens State Forest *6 Timber Sale Contract with Yoder Sawmill, LLC, for Stephens State Forest *7 Timber Sale Contract with Wieland & Sons Lumber Company for Walnut Woods SP *12.1 Chapter 18 lease renewal, Dickinson County, Ann Plendl *12.2 Chapter 17 lease renewal, Louisa County, Matteson Marine Service *12.3 Brushy Creek SRA, Webster County, Sunderman Farm Management *12.4 Prairie Lakes Wildlife Unit – Clay & Palo Alto County-MidAmerican Energy Co.	Decision	Commission
2.	Approve Minutes of 09/05/13 NRC Public Meeting	Decision	Commission
3.	Director Remarks	Information	Director
4.	2014 NRC Meeting Recommendations	Decision	Chuck Corell
*5.	Timber Sale Contract with Pilcher Bros. Sawmill, for Stephens State Forest	Decision	Jeff Goerndt
*6.	Timber Sale Contract with Yoder Sawmill, LLC, for Stephens State Forest	Decision	Jeff Goerndt
*7.	Timber Sale Contract with Wieland & Sons Lumber Company for Walnut Woods State Park	Decision	Jeff Goerndt
8.	Construction – Mt Ayr Fish Hatchery Culture Ponds and Harvest Kettles	Decision	Martin Konrad
9.	Rulemaking Petition: Taylor’s Resort and “No Wake” Speed Zone	Decision	Susan Stocker
10.	Service Contract Mimi Wagner Landscape Architect, LLC	Decision	Travis Baker
11.	Land Acquisition Projects		
11.1.	Sac City Wetland Complex, Sac County, Wilhelm	Decision	Travis Baker
11.2.	Lizard Lake WMA, INHF, Pocahontas County	Decision	Travis Baker
11.3.	Gabrielson WMA, INHF, Hancock County	Decision	Travis Baker
11.4.	Lenon Mills WMA, Young, Guthrie County	Decision	Travis Baker
11.5.	City of Woodward, Anderson, Dallas County	Decision	Travis Baker
*12.	Land Management Projects		

For details on the NRC meeting schedule, visit:

<http://www.iowadnr.gov/InsideDNR/BoardsCommissions/NaturalResourceCommission.aspx>

Comments during the public participation period regarding proposed rules or notices of intended action are not included in the official comments for that rule package unless they are submitted as required in the Notice of Intended Action.

*12.1.	Chapter 18 lease renewal, Dickinson County, Ann Plendl	Decision	Travis Baker
*12.2.	Chapter 17 lease renewal, Louisa County, Matteson Marine Service	Decision	Travis Baker
*12.3.	Brushy Creek SRA, Webster County, Sunderman Farm Management Service Contract	Decision	Travis Baker
*12.4.	Prairie Lakes Wildlife Unit – Clay & Palo Alto County – MidAmerican Energy Company	Decision	Travis Baker
13.	REAP Private/Public Open Space Grants	Decision	Tammie Krausman
14.	REAP County Grants	Decision	Tammie Krausman
15.	REAP City Parks and Open Space Grants	Decision	Tammie Krausman
16.	Appeal Of Contested Case Decision On Residency Of Robert J. Schultz	Decision	Jon Tack
17.	Iowa District Court for Hancock County – Ruling on Motion for Reconsideration, <i>Branstad v. Iowa</i>	Decision	Tamara Mullen
18.	Division Administrator Comments	Information	Chuck Corell
19.	General Discussion <ul style="list-style-type: none"> • NRC Goals 		
Upcoming NRC Meeting Dates: <ul style="list-style-type: none"> • 11/14/13 - Henry Wallace State Office Building, Des Moines, 9:30am • 12/12/13 - Henry Wallace State Office Building, Des Moines, 9:30am 			

For details on the NRC meeting schedule, visit:

<http://www.iowadnr.gov/InsideDNR/BoardsCommissions/NaturalResourceCommission.aspx>

Comments during the public participation period regarding proposed rules or notices of intended action are not included in the official comments for that rule package unless they are submitted as required in the Notice of Intended Action.

**Iowa Department of Natural Resources
Natural Resource Commission**

#4

Decision Item

2014 NRC Meeting Recommendations

The Natural Resource Commission is requested to approve the following 2014 meeting recommendations:

Month	Meeting Date / Time (2 nd Thursday of the Month – unless noted*)		Meeting Location (County)
January	01/22/14*	8:30a-10a DNR Legislative Open House	Polk - Capitol, Legislative Dining Rm
		12p-4p NRC/EPC Joint Meeting	Polk
	01/23/14*	8:30a NRC Business Meeting	Polk
OR			
January	01/22/14*	8:30a-10a DNR Legislative Open House	Polk - Capitol, Legislative Dining Rm
		11:00a-4:30p NRC Business Meeting	Polk
OR			
January	01/22/14*	8:30a-10a DNR Legislative Open House	Polk - Capitol, Legislative Dining Rm
		10:45a-12:45p NRC/EPC Joint Meeting	Polk
		1:00p-5:00p NRC Business Meeting	Polk
February	02/13/14	9:30a Business Meeting	Polk
March	03/13/14	9:30a Business Meeting	Polk
April	04/09/14*	tbd Field Tour	Polk
		04/10/14	8:30a Business Meeting	Polk
OR			
April	04/10/14	8:30a-12:00p Field Tour	Polk
		1:00p-4:30p Business Meeting	Polk
May	05/08/14	9:30a Business Meeting	Polk
June	06/11/14*	tbd Field Tour	Appanoose
		06/12/14	8:30a Business Meeting	Appanoose
July	07/10/14	9:30a Business Meeting	Polk
August	08/14/14	9:30a Business Meeting	Polk
September	09/11/14	9:30a Business Meeting	Polk
October	10/08/14*	tbd Field Tour	Allamakee
		10/09/14	8:30a Business Meeting	Allamakee
November	11/13/14	9:30a Business Meeting	Polk
December	12/11/14	9:30a Business Meeting	Polk
January	01/08/15	9:30a Business Meeting	Polk

Chuck Corell, Administrator
Conservation and Recreation Division
October 10, 2013

**Iowa Department of Natural Resources
Natural Resource Commission**

*#5 (*indicates proposed consent item)

Decision Item

Timber Sale Contract with Pilcher Bros. Sawmill, for Stephens State Forest

Commission approval is requested for a timber sale contract with Pilcher Bros. Sawmill of Douds, IA, for Stephens State Forest.

Contract Terms

Income: \$27,316.00

Dates: 10/10/13 to 04/14/15

Funds Deposited to: Conservation Fund - Forestry

Contract Purpose: An even-aged management system will be used in accordance with the Stephens State Forest Management Plan to allow sunlight to stimulate the growth of oak seedlings already present on the site. This contract will facilitate a hardwood timber harvest of an estimated 119,440 board feet in 1080 mixed hardwood trees at Stephens State Forest in Appanoose County. There are an additional 222 cull trees marked for harvest. Cull trees may be harvested, but are not included in the board foot volume of the sale. Seedlings may be planted following the harvest to supplement natural regeneration. Prescribed fire may be used periodically as a management tool to stimulate oak regeneration and control competing vegetation after the harvest. A natural areas inventory was conducted and there are no known threatened and endangered species in the harvest area. Harvesting and regenerating this stand will also help manage oak wilt and improve the overall health and vigor of the forest.

Wildlife den trees will not be marked and will be left standing. Best management practices (BMP's) will apply to the site. No tops or harvesting residue will be left in adjacent waterways. Harvesting is to occur only when ground is firm or frozen to minimize soil disturbance. Skid trails and landing areas will be repaired following the harvest. No skid trails will be allowed in the SMA (within 50 feet of the adjacent waterway) except at designated stream crossings.

Selection Process Summary: An informal bid process was completed. To be qualified, a timber buyer must have on file with the State of Iowa a bond meeting the requirements of Section 456A.36 of the Code of Iowa and Chapter 571-72 of the Iowa Administrative Code. The area forester and supervisor reviewed the bid proposals and the highest bid from the most responsive and responsible bidder was selected.

Date bids received: 09/18/13

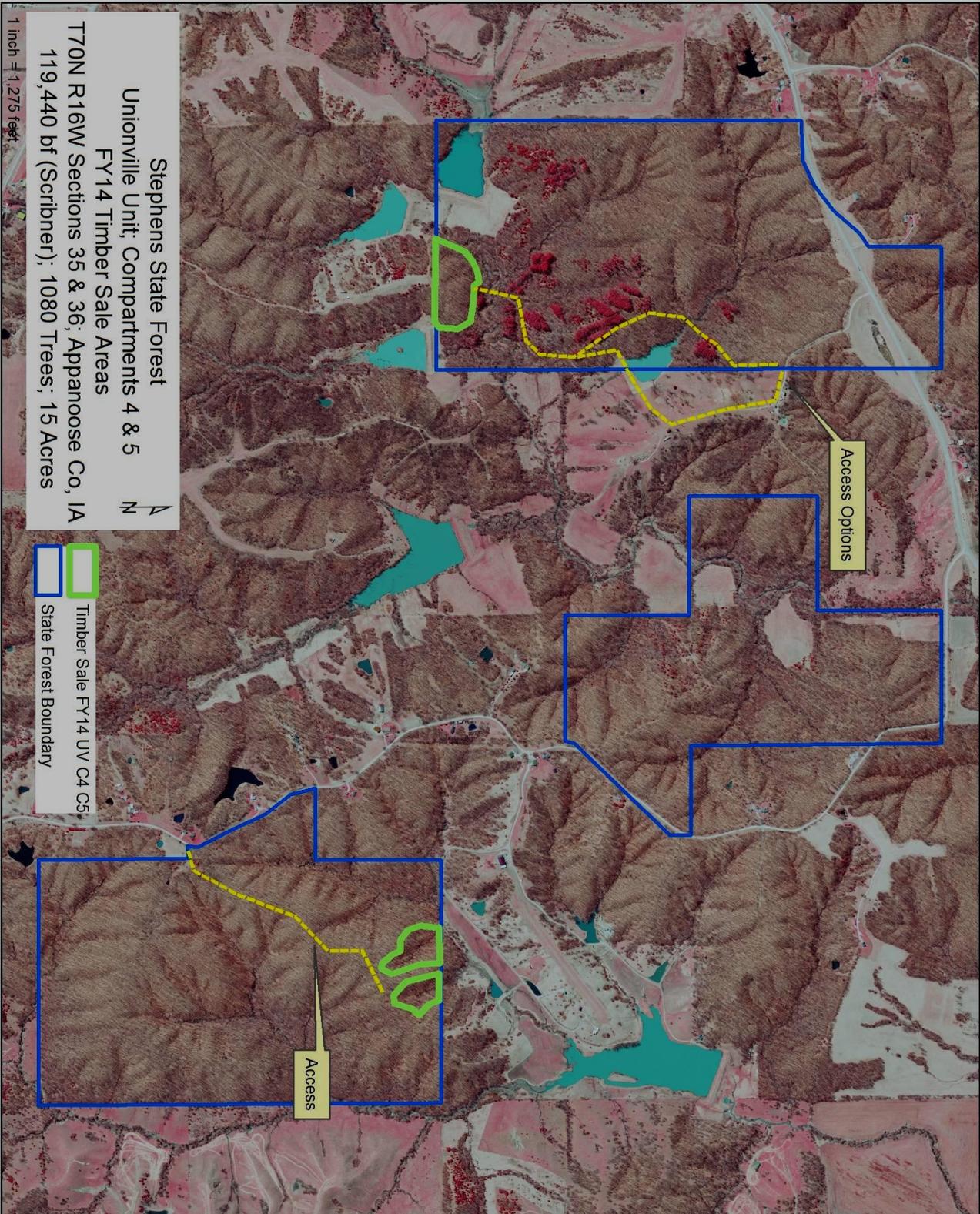
Number of Bids Received: 5

Recommendation: Pilcher Bros. Sawmill

Bidder	City, State	Amount of Bid
Pilcher Bros. Sawmill	Douds, IA	\$27,316.00
Yoder Sawmill, LLC	Bonaparte, IA	\$24,701.00
Gingerich Sawmill	Bloomfield, IA	\$24,652.00
Seals Select Cut Logging	Moravia, IA	\$20,304.80
Dan Jones Logging	Waterville, IA	\$13,580.00

Jeff Goerndt, State Forests Section Chief
Conservation and Recreation Division
October 10, 2013

Attachment: timber sale map



**Iowa Department of Natural Resources
Natural Resource Commission**

*#6 (*indicates proposed consent item)

Decision Item

Timber Sale Contract with Yoder Sawmill, LLC, for Stephens State Forest

Commission approval is requested for a timber sale contract with Yoder Sawmill, LLC, of Bonaparte, IA, for Stephens State Forest.

Contract Terms

Income: \$43,151.00

Dates: 10/10/13 to 04/14/15

Funds Deposited to: Conservation Fund - Forestry

Contract Purpose: An even-aged management system will be used in accordance with the Stephens State Forest Management Plan to allow sunlight to stimulate the growth of oak seedlings already present on the site. This contract will facilitate a hardwood timber harvest of an estimated 106,678 board feet in 993 mixed hardwood trees at Stephens State Forest in Appanoose County. There are an additional 598 cull trees marked for harvest. Cull trees may be harvested, but are not included in the board foot volume of the sale. Seedlings may be planted following the harvest to supplement natural regeneration. Prescribed fire may be used periodically as a management tool to stimulate oak regeneration and control competing vegetation after the harvest. A natural areas inventory was conducted and there are no known threatened and endangered species in the harvest area. Harvesting and regenerating this stand will also help manage oak wilt and improve the overall health and vigor of the forest.

Wildlife den trees will not be marked and will be left standing. Best management practices (BMP's) will apply to the site. No tops or harvesting residue will be left in adjacent waterways. Harvesting is to occur only when ground is firm or frozen to minimize soil disturbance. Skid trails and landing areas will be repaired following the harvest. No skid trails will be allowed in the SMA (within 50 feet of the adjacent waterway) except at designated stream crossings.

Selection Process Summary: An informal bid process was completed. To be qualified, a timber buyer must have on file with the State of Iowa a bond meeting the requirements of Section 456A.36 of the Code of Iowa and Chapter 571-72 of the Iowa Administrative Code. The area forester and supervisor reviewed the bid proposals and the highest bid from the most responsive and responsible bidder was selected.

Date bids received: 09/18/13

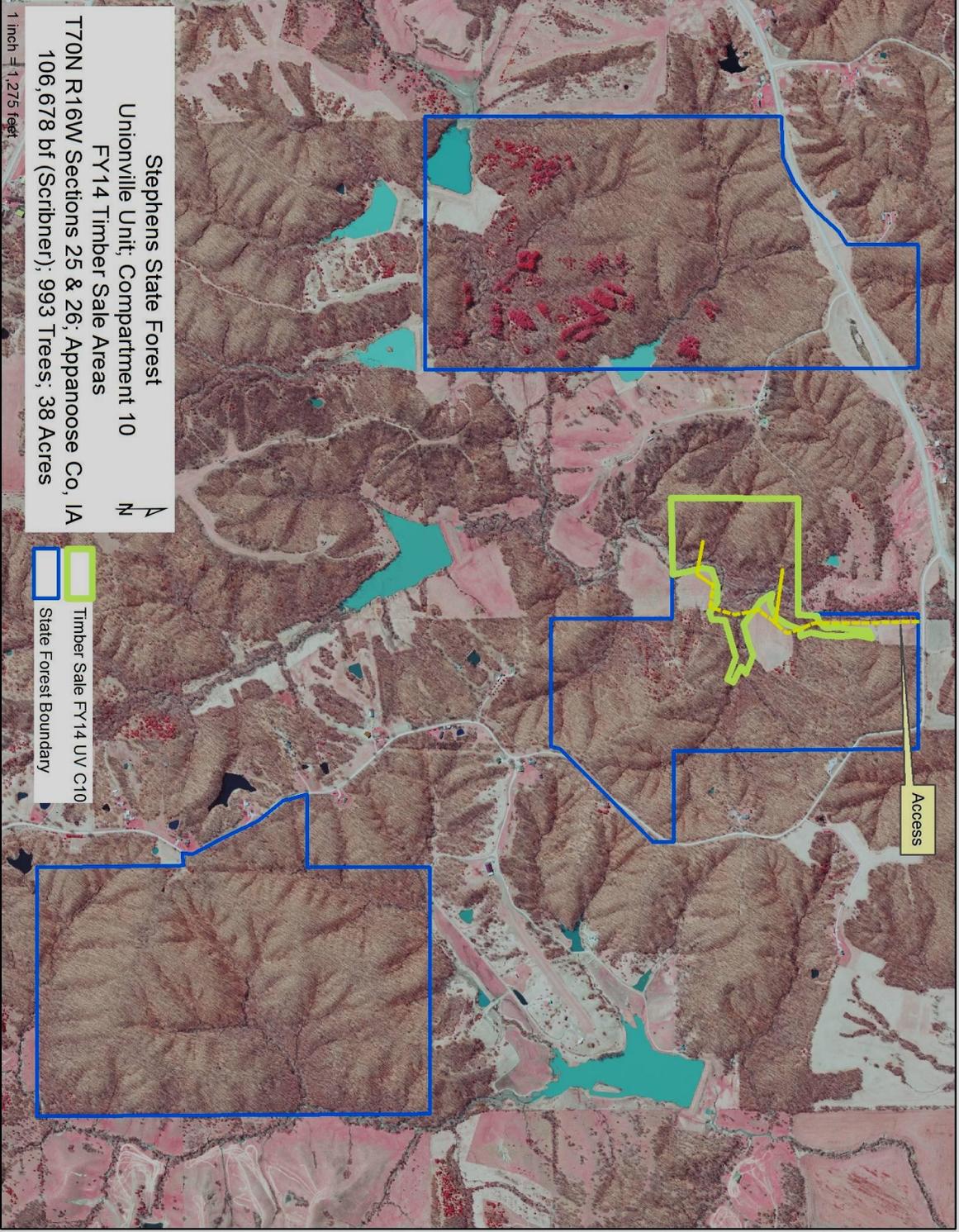
Number of Bids Received: 5

Recommendation: Yoder Sawmill, LLC.

Bidder	City, State	Amount of Bid
Yoder Sawmill, LLC	Bonaparte, IA	\$43,151.00
Pilcher Bros Sawmill	Douds, IA	\$32,000.00
Gingerich Sawmill	Bloomfield, IA	\$29,183.00
Dan Jones Logging	Waterville, IA	\$22,262.80
Seals Select Cut Logging	Moravia, IA	\$21,616.75

Jeff Goerndt, State Forests Section Chief
Conservation and Recreation Division
October 10, 2013

Attachment: timber sale map



**Iowa Department of Natural Resources
Natural Resource Commission**

*#7 (indicates proposed consent item)

Decision Item

Timber Sale Contract with Wieland & Sons Lumber Company for Walnut Woods State Park

Commission approval is requested for a timber sale contract with Wieland & Sons Lumber Company, Winthrop, IA, for Walnut Woods State Park.

Contract Terms

Income: \$37,756.00

Dates: 10/10/13 to 03/14/14

Funds Deposited to: Conservation Fund – State Parks

Contract Purpose: This contract will facilitate a hardwood timber harvest of an estimated 17,000 board feet in 48 black walnut trees at Walnut Woods State Park in Polk County. There are an additional 10 cull trees marked for harvest. Cull trees may be harvested, but are not included in the board foot volume of the sale. The purpose of this harvest is to improve the health and aesthetics of Walnut State Park by salvaging trees that are declining in health due to old age, storms, and flooding in recent years. The trees being harvested are damaged, leaning, or dying and are potentially hazardous to park visitors. Reforestation of trees native to the site, primarily black walnut, along with bur oak and swamp white oak, is planned following completion of the harvest.

A natural areas inventory was conducted and there are no known threatened and endangered species in the harvest area. Best management practices (BMPs) will apply to the site. Harvesting is to occur only when ground is firm or frozen to minimize soil disturbance. Skid trails and landing areas will be repaired following the harvest.

Selection Process Summary: An informal bid process was completed. To be qualified, a timber buyer must have on file with the State of Iowa a bond meeting the requirements of Section 456A.36 of the Code of Iowa and Chapter 571-72 of the Iowa Administrative Code. The district forester, park manager, and supervisor reviewed the bid proposals and the highest bid from the most responsive and responsible bidder was selected.

Date bids received: 09/03/13

Number of Bids Received: 3

Recommendation: Wieland & Sons Lumber Company

Bidder	City, State	Amount of Bid
Wieland & Sons Lumber Company	Winthrop, IA	\$37,756.00
Swanson Big Timber	Vinton, IA	\$30,289.00
Hindman Logging	Winterset, IA	\$10,200.00

Jeff Goerndt, State Forests Section Chief
Conservation and Recreation Division
October 10, 2013

Attachment: timber sale map



**Iowa Department of Natural Resources
Natural Resource Commission**

#8

Decision Item

Construction – Mt Ayr Fish Hatchery Culture Ponds and Harvest Kettles

The Department requests Commission approval of the following construction project:

Project Summary: In 1941, Mt Ayr Hatchery consisted of only three fish culture ponds; in 1959, five more were constructed. Today, the facility is primarily a Fisheries Management office whose staff is also responsible for culturing bluegill, redear sunfish, largemouth bass, and hybrid striped bass. A 2001 Statewide Cool/Warmwater Fish Hatchery Evaluation report assessed the hatchery's pond levees and kettles as deteriorated and all ponds having a history of continuous seepage problems. The consulting firm FishPro conducting the evaluation stated pond repairs, water supply improvements, and new kettles should be given first priority in efforts to improve fish culture. Facility improvements since 2010 have included the construction of three new harvest kettles and dike improvements on the three ponds nearest the office building. The dike improvements increased the production area of the ponds from two surface acres to three.

The purpose of the project is to expand production area by one surface acre, increase culture production capabilities, improve fish health during harvest, expand the Bureau's hybrid striped bass program, and reduce labor and maintenance efforts. To expand the production area, three existing ponds will be combined to make two and existing dike perimeters will be increased in length. Deepening water depth and installing a water supply inlet at east end of each pond will improve and increase production capabilities. New kettles of modern design with freshwater supply will permit staff to concentrate, hold, and harvest fish with limited stress. This will assure a healthier fish ready for transport and with a greater chance of survival after stocking.

Hybrid striped bass (a cross between striped bass and white bass parents) are obtained from states which have striped bass fisheries. Mt Ayr staff has had limited success in culturing hybrid striped bass from fry to fingerling size. The combination of poor culture conditions (water temperature, plankton populations, water quality) and fry health at delivery are reasons for limited success. Reconstructed ponds should improve culture conditions to improve success of the hybrid striped bass program.

Construction Needed: Three culture ponds will be modified into two large ponds with maximum depths of 7 feet. A harvest kettle will be constructed in each pond. Water supply lines will be added at each kettle and at the far end of each pond to improve harvest and culture conditions. Demolition material from old kettles and water lines will be moved offsite and is the responsibility of the contractor. Silt fence will be utilized to minimize soil loss during construction. All disturbed areas will be seeded, fertilized, and mulched to establish permanent ground cover.

Green Features: Seeding and a silt fence to be included to prevent sediment runoff during storm events during and post-construction.

Engineering Project #: 13-04-80-01

Project County: Ringgold

DNR Project Manager: Mike Broderick, PE; Engineering Bureau

Designer: Mike Broderick, PE; Engineering Bureau
DNR Inspector: Mark Johnson; Engineering Bureau

Operating Bureau: Fisheries

Funding Source: 100% Fisheries - Fish and Wildlife Trust Fund

Engineering Cost Estimate: \$ 165,000.00

Plans Issue Date: 8/28/13

Bid Letting Date: 9/19/13

Plan Holders: 5

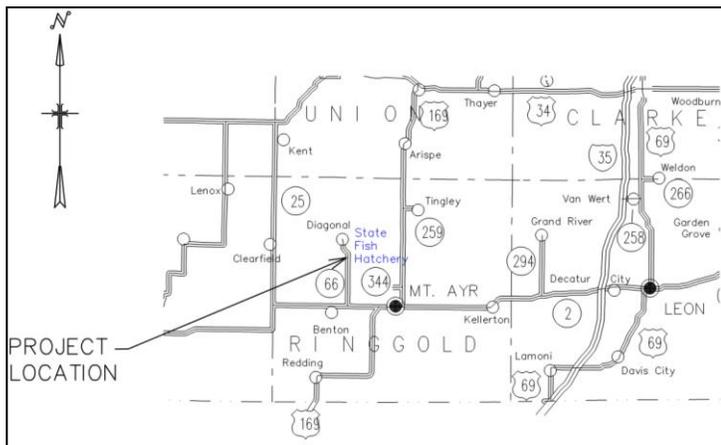
Number of Bids Received: 2

Bidders

TEK Builders Inc.	Mount Ayr, IA	\$137,596.80
C.L. Carroll Co., Inc.	Des Moines, IA	\$190,382.00

Recommendation: IDNR recommends awarding the bid to TEK Builders. Inc.

Martin Konrad, Fisheries Executive Officer
Conservation and Recreation Division
October 10, 2013



Example of a fish kettle under construction



A typical fish kettle in operation

**Iowa Department of Natural Resources
Natural Resource Commission**

#9

Decision Item

Rulemaking Petition: Taylor's Resort and "No Wake" Speed Zone

The Department, on behalf of the Commission, has received a rulemaking petition pursuant to Iowa Code chapter 17A and 571 Iowa Administrative Code Chapter 5. The petitioner, Taylors Resort, is a private hotel/condo business located along the Mississippi waterfront in Harpers Ferry, Iowa. The Petitioner is requesting that water buoys designating a "no wake zone" be placed 200 feet upstream and 200 downstream of their property lines, as well as 100 feet into the river to prevent passing traffic moving at speeds that result in waves crashing into their private shoreline and infrastructure.

Pursuant to Iowa law, within sixty days after submission of a petition, the Commission either shall deny the petition in writing on the merits, stating its reasons for the denial, or initiate rulemaking proceedings in accordance with Iowa Code section 17A.4. A review "on the merits" requires fair consideration but does not require the Commission to take a stand on the substantive issues presented in the Petition. Practical considerations, including unresolved public debate on the issue, may form the basis for a denial of the Petition.

In response to the NRC's questions from last month after the commission reviewed the petition as an "information" item, the Petitioner submitted the following additional information:

1. How will a no-wake zone be implemented/regulated? *The home owners would maintain the buoys. IDNR would regulate the no wake zone.*
2. How will a no-wake zone in the Mississippi affect barge traffic? *There is no barge traffic in the slough where Taylor's resort is located.*

The Department recommends denying the petition for the following reasons:

- 1) It will set an unwanted precedence by establishing speed zones to protect private property, whereas currently only public lands are marked in this fashion. There are numerous little "resorts" or "landings" along the Mississippi, such as Stilwell Island, Lund's Landing, and Hartman's to name a few, that may want similar treatment, creating frequent speed zones all along the Mississippi's Iowa border.
- 2) Even though the Mississippi might be 300 feet wide in certain areas, at times only 75 feet is navigable, thus speed zones can potentially hamper movement of traffic even some distance from shore, including commercial traffic. Speed zones should be limited in number and scope to protect public lands that are maintained with tax dollars, not private property.

Susan Stocker, Boating Law Administrator/Education Coordinator
Conservation and Recreation Division
October 10, 2013

Attachment: Rulemaking Petition from Tony Jacobson (Dated 08/30/13)
Email from Steve Taylor, Taylors Inc., (Dated 09/24/13)

RULEMAKING PETITION FROM TONY JACOBSON (Dated 08/30/13)

August 30, 2013

To Whom It May Concern
Iowa Department of Natural Resources
Wallace State Office Building
502 E 9th Street
Des Moines, IA 50319

Re: Rulemaking petition – no wake zone for Taylor’s Resort

Dear Sir or Ma’am,

Taylor’s Resort would like to formally request the Natural Resource Commission and the Iowa Department of Natural Resource allow it to place ‘5mph’ buoys along its shorefront on the Mississippi River, near Harper’s Slough, Iowa. The Resort’s address is 813 Hwy 364, Harpers Ferry, Iowa 52146. The buoys would designate a 5mph zone 200 feet above and below the Resort’s property line, and extending out 100 feet from shore. The Resort wants to prevent passing traffic to be at speeds that generate waves that crash into the Resort’s private property and infrastructure along the riverbank, as well as neighboring private properties. Such damage, to include personal injuries and erosion to the shoreline has been experienced by and reported to the Resort. Additionally, the Resort is concerned about passing boat traffic involved in the recreational sport of “tubing,” as some of the individuals on these tubes are coming very close to the Resort’s private docks and are in danger of crashing into them. The no wake zone would reduce the speed of the recreational traffic, eliminating the likelihood of injuries.

The following other parties support this petition:

Steve and Dick Taylor
813 Hwy 364
Harpers Ferry, IA 52146

Jerry Everly
Taylor’s Court #55
Harpers Ferry, IA 52146

Residence of Taylor’s Court
Harpers Ferry, IA 52146

Thank you,
Tony Jacobson
Phone: 319-239-6875

EMAIL FROM STEVE TAYLOR REGARDING RENTER'S PETITION (Dated 09/24/13)

From: steve taylor [<mailto:stevetaylor2001@gmail.com>]

Sent: Tuesday, September 24, 2013 8:16 PM

To: Mullen, Tamara [DNR]; Stocker, Susan [DNR]

Cc: Dtaylor; tonybrendaj@mchsi.com

Subject: Taylor Resort rulemaking petition

Hello,

My name is Steve Taylor and together with my brother Richard, are the majority owners of Taylors Inc., the corporation that owns "Taylors Resort" just south of Harpers Ferry Iowa. Our family has owned this property since 1950. Within the last 2 weeks I have been asked by a couple of our renters to support their petition for a no wake zone in front of our property on the Mississippi river. I am writing this to inform you and the Natural Resource Commission that we are opposed to this action. We feel that this would serve no purpose for our property and would be a hindrance to the boaters in our area.

Since we are the property owners, we feel it is important for the commission to be aware of our position on this matter. We respectfully ask that our position be relayed to the commission. We have also conveyed our feelings to our renters that are supporting this petition.

Please contact me if you have any questions or need additional information.

Sincerely,

Steve Taylor
Taylors Inc.
507-251-1505

**Iowa Department of Natural Resources
Natural Resource Commission**

#10

Decision Item

Service Contract Mimi Wagner Landscape Architect, LLC

Commission approval is requested for a service contract with Mimi Wagner Landscape Architect, LLC, of Ames, Iowa.

Contract Terms

Amount: \$126,300.00

Dates: 10/14/13 to 10/14/15

Funding Source(s): Low-head Dam Public Hazard and Water Trails Programs

Contract Purpose: To provide planning assistance and support for several regional water trail project coordinators and planners over a two-year period developing and analyzing geospatial data, graphically designing maps and documents for public communication, facilitating meetings, inventorying accesses, and developing water trail signage plans.

Selection Process Summary: The Department solicited proposals from targeted small businesses and also published a Request for Proposal (RFP) on the Department of Administrative Services website.

Date proposals received: 08/09/13

Review and Selection Committee: 3 members

- DNR River Programs (2)
- DNR Land and Waters Bureau (1)

Scoring Criteria: Proposals were scored based on the criteria as described in the RFP which included their ability to complete the scope of work within the desired timeline, past performance of work that is identical or similar to that in project scope, and description and quality of previous and applicable work experience.

Proposals Received: 3

Recommendation: Mimi Wagner Landscape Architect, LLC.

Vendor	Vendor Location (city, state)	Score	Rank	Cost
Mimi Wagner Landscape Architecture, LLC.	Ames, Iowa	88	1	\$ 126,300.00
Barker Lemar Engineering	West Des Moines, Iowa	81	2	\$ 121,031.00
Sand County Studios	Smyrna, Georgia	78	3	\$ 94,432.00

Travis Baker, Land & Waters Bureau Chief
Conservation and Recreation Division
October 10, 2013

**Iowa Department of Natural Resources
Natural Resource Commission**

#11

Decision Item

Land Acquisition Projects

1. Sac City Wetland Complex, Sac County, Wilhelm

The Natural Resource Commission is requested to approve the acquisition of a tract of land located southwest of Sac City approximately one mile south of U.S. Hwy. 20.

Seller: Keith and Marilyn Wilhelm

Acreage: 112-acre tract

DNR Purchase Price: \$143,360

Appraised Value: \$143,360

Appraised By: Greg Tritle, Vander Werff and Associates, Inc., Sanborn, Iowa

Property Description: The land, except road right-of-way, is encumbered by a Wetland Reserve Program easement. After restoration, the tract will contain 30 acres of restorable, enhanced wetlands with the remainder seeded to native prairie grasses. The tract will provide habitat for upland game and waterfowl. There are no buildings.

Purpose: The tract is approximately ¼ mile south and east of existing DNR-owned land and will increase the outdoor recreation opportunity at the wildlife management area.

DNR Property Manager: Wildlife Bureau

Funding Source(s): NAWCA – Prairie Lakes 5

Incidental Costs: Estimated surveying costs are \$1,000. Incidental closing costs will be the responsibility of the Department.

2. Lizard Lake WMA, INHF, Pocahontas County

The Natural Resource Commission is requested to approve the acquisition of a tract of land located adjacent to the state-owned Lizard Lake in Pocahontas County.

Seller: Iowa Natural Heritage Foundation

Acreage: 116.46-acre tract

DNR Purchase Price: \$920,034

Appraised Value: \$920,034

Appraised By: Steve Badger Real Estate Services, Marshalltown, Iowa

Property Description: The property is located 8 miles southeast of Pocahontas, and 5 miles southwest of Gilmore City. The property consists of approximately 112 acres of non-highly erodible cropland (Corn Suitability Rating 71.86), which includes 16.7 acres enrolled in the Conservation Reserve Program for filter strips, which will expire September 30, 2018. The remaining 4.46 acres are in public road right-of-way, driveway access, and wetlands, grasslands bordering Lizard Lake. The State of Iowa owns approximately 38.51 acres south of the subject tract which is managed by the County for camping.

Purpose: This wildlife management area tract will help protect a large portion of the Lizard Lake shoreline.

DNR Property Manager: Wildlife Bureau

Funding Source(s): Marine Fuel Tax - \$400,000; REAP Open Spaces - \$220,000; Wildlife Habitat Stamp - \$150,034; Fish Habitat Stamp - \$150,000

Incidental Costs: The acquisition funding includes REAP and Wildlife Habitat Stamp therefore the property will stay on the county property tax rolls. No survey costs are anticipated. Incidental closing costs will be the responsibility of the Department.

3. Gabrielson WMA, INHF, Hancock County

The Natural Resource Commission is requested to approve the acquisition of a tract of land located 4 miles Southeast of Forest City and one-half mile west of the Gabrielson Wildlife Management Area and one mile southwest of Pilot Knob State Park.

Seller: Iowa Natural Heritage Foundation

Acreage: 49.86-acre tract

DNR Purchase Price: \$55,000

Appraised Value: \$58,600

Appraised By: Fred Greder, Benchmark Agribusiness, Inc., Mason City, Iowa

Property Description: The subject tract consists of 48.8 acres that are enrolled in the Wetland Reserve Program; 0.23 acre that is unencumbered; and 0.83 acres of road right-of-way. There are no buildings. The tract topography is described as gently rolling and containing a tributary of the Winnebago River.

Purpose: This tract will add important upland grassland habitat to the Gabrielson WMA and Pilot Knob State Park complex of public wildlife habitats.

DNR Property Manager: Wildlife Bureau

Funding Source(s): NAWCA – Prairie Lakes 5

Incidental Costs: No survey costs are anticipated. Incidental closing costs will be the responsibility of the Department.

4. Lenon Mills WMA, Young, Guthrie County

The Natural Resource Commission's approval is requested to purchase a tract of land located in Guthrie County adjacent to state-owned and managed Lenon Mills WMA.

Seller: George & Sarah Young

Acreage: 79-acre tract

DNR Purchase Price: \$225,000

Appraised Value: \$225,600

Appraised By: Dan Dvorak, Licensed Appraiser of Des Moines, Iowa

Property Description: This property is located 3 miles south of Panora in east central Guthrie County. The moderately sloping to steeply tract contains 67 acres to forested land and 12 acres of grassland. There are no building improvements. In addition to access is through state-owned land adjacent north, the sellers will grant a 50 foot wide easement for ingress and egress extending east from Wagon Road for DNR maintenance and management use only. The sellers reserve the right to sell white oak and red oak of minimum dbh (diameter at breast height) of 20 inches through March 15, 2014, and value of the logs not to exceed \$16,500.

Purpose: The property will be managed for outdoor recreation, as well as watershed protection of the Middle Raccoon River.

DNR Property Manager: Wildlife Bureau

Funding Source(s): Pittman-Robertson – \$168,750; REAP PWA - \$38,250; Wildlife Habitat Stamp - \$18,000

Incidental Costs: The acquisition funding includes REAP and Wildlife Habitat Stamp therefore the property will stay on the county property tax rolls. No survey is required. The DNR will provide for a boundary fence along a portion of the west boundary covering approximately 650 feet. Incidental closing costs will be the responsibility of the Department.

5. City of Woodward, Anderson, Dallas County

The Natural Resource Commission's approval is requested to sell the Anderson tract for, or above, the appraised price plus realtor's commission. This tract is located within the corporate limits of Woodward, IA. DNR staff has discussed marketing of the Anderson tract with Hertz Appraisal Farm Management, Inc. A possible replacement property has been identified adjacent to the Kuehn Conservation Area in Dallas County.

Seller: IA DNR

Acreage: 2.49-acre tract

DNR Sale Price: tbd

Appraised By: Tasha K Gould and Dan Dvorak, Licensed Appraisers of Des Moines, Iowa

Property Description: The Natural Resource Commission, in regular meeting held May 2, 1984, accepted Grace and Edward Anderson's offer to donate a city block (2.49 acres) in Woodward, Iowa, in Dallas County. The tract was conveyed to the State Conservation Commission for the State of Iowa on June 21, 1984, with a reserved life use and stipulation that, upon their death, the Iowa Conservation Commission (DNR) manage the property as an "urban wildlife area." After Edward's death and Grace's departure from the property in 2008, the DNR removed the buildings and began managing the tract. The DNR has had difficulty managing the tract for wildlife while, at the same time, trying to comply with city zoning and ordinance regulations. Grace and Edward also left a substantial amount of money to manage the tract.

Purpose: Grace is deceased and her heirs have agreed that it is in the best interest of wildlife to sell the tract within the city limits and apply the funding to the acquisition of a tract outside the city limits.

DNR Property Manager: Wildlife Bureau

Funds Deposited to: Fish and Wildlife Trust Fund

Incidental Costs: realtor fee

Travis Baker, Land & Waters Bureau Chief
Conservation and Recreation Division
October 10, 2013

**Iowa Department of Natural Resources
Natural Resource Commission**

* #12 (*indicates proposed consent item)

Decision Items

Land Management Projects

***1. Chapter 18 lease renewal, Dickinson County, Ann Plendl**

The Natural Resource Commission is requested to approve the renewal of Chapter 18 lease 36-R with Ann Plendl.

Location: An area approximately five feet wide by ten feet long adjacent to Lot 18, Block A, Triboji Beach Subdivision in Section 2, Township 99 North, Range 37 West of the 5th P.M., Dickinson County, Iowa.

Site Purpose: The site contains a small storage shed and steps to access the dock to the lake area.

Lease History: The location has been under lease since 1983.

Lease Fee and Term: The annual fee is \$150.00 with a condition that the fee may be adjusted to comply with adopted administrative rule changes that affect lease fees. The term of the lease will be five years.

***2. Chapter 17 lease renewal, Louisa County, Matteson Marine Service**

The Natural Resource Commission is requested to approve the renewal of Chapter 17 lease 45-R with Matteson Marine Services of Burlington, Iowa.

Location: A parcel in the bed of the Mississippi River including approximately 100 feet of depth by 60 feet of length, Mississippi River Miles 427.7, Louisa County, IA. The leased area begins 400 feet downstream of the Minneapolis and St. Louis Railroad Bridge, which is approximately 25 miles south of Muscatine, Iowa.

Site Purpose: The site is used as an area for barge fleeting.

Lease History: This area has been under a barge fleeting lease since 1988.

Lease Fee and Term: As directed by Iowa Code, a Public Notice was published. No comments were received. The annual fee is \$1,956.00 and will be increased annually based on the percentage increase of the consumer price index. The term of the lease will be five years.

***3. Brushy Creek SRA, Webster County, Sunderman Farm Management Service Contract**

The Natural Resource Commission is requested to approve a service contract with Sunderman Farm Management of Fort Dodge, IA.

Contract Terms

Amount: \$57,500

Dates: 10/11/13 to 10/10/18

Funding Source(s): State Parks District 5 Operations

Contract Purpose: Provide management services for habitat management leases on approximately 1150 acres at Brushy Creek State Recreation Area. The Department leases agricultural land across the state to farmers for habitat management purposes. The Department utilizes private farm management firms to assist in the management of these leases. Currently, the Department has four other firms under contract for similar applications throughout the state.

Selection Process Summary: The Department solicited proposals from targeted small businesses and also published a Request for Proposal (RFP) on the Department of Administrative Services website.

Date proposals received: 09/17/2013

Review and Selection Committee: 3 members

- DNR Realty (2)
- DNR Parks (1)

Scoring Criteria: Proposals were scored based on the criteria as described in the RFP which included sufficient staff to meet project schedule and work requirements, previous experience, information from references, geographical location of the firm, specialized expertise, plan for accomplishing the required services, and the quoted fee.

Proposals Received: 1**Recommendation:** Sunderman Farm Management

Vendor	Vendor Location	Cost
Sunderman Farm Management	Fort Dodge, IA	\$ 57,500

***4. Prairie Lakes Wildlife Unit – Clay & Palo Alto County – MidAmerican Energy Company**

The Natural Resource Commission is requested to approve 4 easements for a transmission line upgrade project.

Project Description: MidAmerican Energy Company is upgrading several miles of transmission lines in northwest Iowa. Four sections, totaling 15.3 acres, are located on wildlife management areas in Palo Alto County and Clay County. MidAmerican’s work is taking place on existing transmission line corridors.

Compensation: MidAmerican is offering \$49,926.26 for the easements.

Travis Baker, Land & Waters Bureau Chief
 Conservation and Recreation Division
 October 10, 2013

**Iowa Department of Natural Resources
Natural Resource Commission**

#13

Decision Items

REAP Private Public Cost-share Grants – September 2013 (FY14)

The Department requests Commission approval based on the recommendations of the Project Review and Selection Committee for the REAP Public/Private Cost-share grants as directed by Iowa Administrative Code 571, Chapter 33.

Grant Purpose: Open Space (28% of REAP funds) funds are allocated to DNR for state acquisition and development of lands and waters. One-tenth of this 28% is set aside to cost-share land acquisitions with private organizations. The cost-share arrangement entails 75% of the acquisition costs coming from REAP and the other 25% coming from private contributions. This program provides an excellent opportunity to cost share with private entities for the purchase of high-quality natural areas that become state-owned property. The DNR owns and manages the property that is jointly purchased.

Funding Source(s): Resource Enhancement And Protection Fund - Private/Public Cost Share

Grant Funding Available: \$442,930

Selection Committee Members: As directed by Chapter 33, a review and selection committee consisting of six members (three DNR staff and three representatives of private organizations) scored the applications:

- Private Entity Representation
 - Storm Lake, IA – Jon Kruse
 - Adel, IA – Glenn Vondra
 - Clear Lake, IA – Andrea Evelsizer
- DNR Representation
 - Paul Tauke, Forestry Bureau Chief
 - Kevin Szcodronski, State Parks Bureau Chief
 - Angi Bruce, Wildlife Executive Officer

Summary of Selection Process: As directed by criteria under Chapter 33.50, the selection committee reviewed all applications. Examples of criteria considered include relation to public land, relationship to relevant regional and statewide programs, rare or unique species communities, public benefits, tourism and economic development potential, and multiple use potential.

Recommendation: With sufficient funding for all projects, and with all projects meeting project criteria, the selection committee recommends full funding for all projects. The Department will offer a secondary grant round for the remaining \$125,255. Grants will be due March 15, 2014.

2013 (FY14) REAP Public-Private Cost Share Projects				
Grant Applicant	Project Name, County	Project Description	Grant Amount Requested	Recommended Award
Iowa Natural Heritage Foundation	Loess Hills Wildlife Area Addition – Monona County	Acquisition of 80 acres of prairie. The tract is located within the 15,049 acre Turin Special Landscape Area, one of the twelve priority areas identified by the 2002 National Park Service Special Resources Study and Iowa as important for conserving the unique characteristics of the hills.	\$155,300	\$155,300
Iowa Natural Heritage Foundation	Pictured Rocks Wildlife Management Area Additions – Jones County	Acquisition of 50 acres of woodlands situated along the Maquoketa River. The acreage is split between two parcels of 20 and 30 acres which fit like puzzles pieces into the southernmost section of the Wildlife Area. They are a high quality example of mature oak upland forest, with native hardwood trees and a variety of other plants and wildflowers. One exciting feature of the land is that 10 acres appear to have never been logged, an incredible rarity in Iowa.	\$111,375	\$111,375
Iowa Natural Heritage Foundation	Pine Lake State Park Addition – Hardin County	Acquisition of 13 acres of woodland near Eldora, IA. The acreage contains woodland, bluffs, ravines, lowland, and Iowa River Shoreline across the river from the restored Pine Lake CCC cabins.	\$51,000	\$51,000
TOTALS			\$317,675	\$317,675

Tammie Krausman, REAP Coordinator
Conservation and Recreation Division
October 10, 2013

**Iowa Department of Natural Resources
Natural Resource Commission**

#14

Decision Items

REAP County Grants – September 2013 (FY14)

The Department requests Commission approval of the recommendations of the project review and selection committee for REAP County grants as directed by Iowa Administrative Code 571, Chapter 33.

Grant Purpose: The county conservation account receives 20% of the REAP funds. After initial distributions outlined in Chapter 33, 40% of the remaining funds are available for competitive grants to counties for increasing outdoor recreation opportunities, land protection, capital improvements, stabilization and protection of resources, repair and upgrading of facilities, environmental education, and equipment. This money is available to counties, only if they are dedicating at least 22¢ per \$1,000 of the assessed value of taxable property in the county for county conservation purposes.

Funding Source(s): Resource Enhancement And Protection Fund – County Conservation Account

Grant Funding Available: \$1,346,300

Selection Committee Members: As directed by Chapter 33, a review and selection committee consisting of five members (two DNR staff and three non-DNR appointees) scored the applications:

- County Representation
 Jim Liechty, Madison CCB
 Katie Hammond, Louisa CCB
 Mark Peterson, Woodbury CCB
- DNR Representation
 Angela Corio, State Parks Bureau
 Tom Anderson, ESD Land Quality Bureau

Summary of Selection Process: As directed by criteria under Chapter 33.30, the selection committee reviewed and scored all applications. Examples of criteria considered include quality of site and project, public need, urgency of project, multiple use potential, and economic benefit.

Recommendation: The committee recommends funding for the top four projects listed in the table. Due to limited funding, the fourth ranked project will be offered 69% of its requested amount. REAP was appropriated \$16 million in FY14; if it would have been fully funded at \$20 million, there would have been enough to fully fund the Winneshiek County project.

In the event that any of the grantees are unable to execute their project, the Department requests authority to offer those funds to the next highest scored projects that meet the grant criteria or return the funds to the grant program for distribution in the next grant cycle.

2013 (FY14) REAP County Projects					
Ranked by Score	County Applicant	Project Name	Project Description	Grant Amount Requested	Recommended Award
136.2	O'Brien	Waterman Wildlife Addition	Acquisition of 133.6 acres situation in the heart of the Waterman Prairie Complex. The land adjoins the O'Brien CCB Prairie Heritage Center, which is the headquarters and hub for	\$485,000	\$485,000

			environmental education within the county. This special site is a priority for acquisition because of its proximity to existing county land, location along migratory bird routes, accessibility for education and recreational programs. The result will be over 1,800 acres of connected, protected land – an area that contains one of the largest assemblages of prairie remnants in the state.			
2	136.2	Mitchell	Wyatt Fen	The project is to protect and restore 38.7 acres within Mitchell County that contains rare fens. The area has been pastured in the past but never plowed and 89 native and many rare species remain. The area would be restored via prescribed fire and prairie restoration. Future use includes wildlife and native plant habitat, public hunting, prairie walks, fen and wetland education.	\$105,000	\$105,000
3	136	Floyd	Tosanak Recreation Area Acquisition	The Floyd County Conservation Board has taken on the rare opportunity to place into public ownership and trust nearly 384 acres of native hardwood uplands. These high limestone bluffs shelter Native American mounds and the Winnebago Boy Scout Reservation. The quality of habitats is unrivaled in Floyd County. The intent is to protect the land and repurpose the cabins.	\$269,275	\$269,275
4	135.8	Winneshiek	Neste Valley Recreation and Wildlife Area	This project is a 170 acre land purchase to establish the Neste Valley Recreation and Wildlife Area, 2.5 miles from the City of Decorah. The property includes savannah oaks, 17.2 acres of Klossner muck soils for wetland restoration, native pastures and 2.5 miles of rail bed along Dry Run Trail, which connects Trout Run Trail to the Prairie Farmer Recreational Trail. Long range plans include the development of an interpretive center, campground, cabins and enhancement of existing historic buildings.	\$700,000	\$487,025
5	135.6	Pottawattamie	Wheeler Grove Conservation Area - Initial Acquisition		\$290,000	-0-
6	133.8	Black Hawk	Wilson's Woods		\$32,000	-0-
7	131.6	Fayette	Jacob's Tract Acquisition		\$300,000	-0-
8	130.6	Des Moines	Flint River Trail Phase 1A		\$423,000	-0-
9	129	Poweshiek	Fox Land (Addition to Millgrove Access Wildlife Area)		\$431,000	-0-
10	128.8	Buchanan	Quigley-Slattey Heritage Prairie		\$97,500	-0-
11	128.4	Bremer	Ingawanis Woodland		\$395,000	-0-
12	124.8	Des Moines	Baker Property Acquisition		\$250,000	-0-

13	123.6	Sioux	Sandy Hallow Recreation Area Acquisition		\$600,000	-0-
14	120.8	Polk	North Marsh Acquisition		\$220,000	-0-
15	118.4	Story	Resource Enhancements- Dakins Lake		\$98,521	-0-
16	118.2	Clay	Nelson Addition		\$192,500	-0-
17	118	Allamakee	ACCB Driftless Area Education and Visitor Center		\$185,000	-0-
18	117.8	Linn	Morgan Creek Park, Trail System Expansion		\$400,000	-0-
19	116.4	Dallas	Raccoon River Valley Trail Paved Crossings		\$132,811	-0-
20	116.2	Hamilton	Little Wall Lake Shower House		\$195,000	-0-
21	116	Hardin	Infrastructure Improvement at Pine Ridge County Park		\$248,650	-0-
22	114.4	Keokuk	Lake Belva Deer Trail: Phase 2		\$100,000	-0-
23	111.8	Franklin	Rolling Prairie Trail - Hampton to Hansell		\$84,423	-0-
24	108	Benton	Old Creamery Nature Trail		\$194,293	-0-
25	107.4	Jasper	Ashton Wildwood Park Renovation Project		\$57,350	-0-
26	106.2	Mills	Pony Creek Nature Center		\$175,000	-0-
27	104.4	Ringgold	Ringgold County Nature Center		\$75,000	-0-
28	101.6	Lee	Pollmiller Park Trail Resurfacing and Improvements		\$127,089	-0-
29	88	Ida	Conservation Center Bird Viewing Area/Outdoor Classroom		\$19,415	-0-
TOTALS					\$6,882,827	\$1,346,300

Tammie Krausman, REAP Coordinator
Conservation and Recreation Division
October 10, 2013

**Iowa Department of Natural Resources
Natural Resource Commission**

#15

Decision Items

REAP City Parks and Open Space Grants – September 2013 (FY14)

The Department requests Commission approval of the recommendations from the Project Review and Selection Committee for REAP City Parks and Open Space Grants as directed by Iowa Administrative Code 571, Chapter 33.

Grant Purpose: The City Parks and Open Space account receives 15% of the REAP funds, after initial distributions are made as outlined in Chapter 33, for competitive grants to help cities establish natural areas, encouraging outdoor recreation and resource management. Three categories have been established to assure grants are distributed to all sizes of cities. Projects considered include development of parks, multi-purpose trails (emphasis on connecting existing trails), park shelters, lake or river shoreline restoration, fishing access, and habitat restoration.

Funding Source(s): Resource Enhancement And Protection Fund – City Park and Open Spaces

Grant Funding Available: \$2,789,612

Category	City Population	Funding Available
Small Cities	less than 2,000	\$611,204
Medium Cities	between 2,000 and 25,000	\$912,203
Large Cities	larger than 25,000	\$1,266,205

Selection Committee Members: As directed by Chapter 33, a review and selection committee consisting of five members (four non-DNR appointees and one DNR staff) scored the applications:

- City Representation
 - Michael Moran, Iowa City Park and Recreation Director
 - Ron Walker, Arnolds Park City Administrator
 - Jennifer Davies, Slater Economic Development Director
 - Jack Wardell, Carroll Parks and Recreation Director
- DNR Representation
 - Kim Bogenschutz, Natural Resource Biologist

Summary of Selection Process: As directed by criteria under Chapter 33.40, the selection committee reviewed and scored all applications. Examples of criteria considered include the relationship to relevant regional and statewide programs based on comprehensive plans (i.e. SCORP, County Resource Enhancement Plan, or local, state and federal plans), quality of site for land acquisition projects, environmental benefits, public benefit, and local support.

Recommendation: The committee recommends funding the projects listed in the ALLOCATION DETAILS tables. In the event that any of the grantees are unable to execute their project, the Department requests authority to offer those funds to the next highest scored projects that meet the grant criteria or return the funds to the grant program for distribution in the next grant cycle.

ALLOCATION SUMMARY

CATEGORY	AMOUNT REQUESTED	AMOUNT RECOMMENDED	# OF PROJECTS SCORED	PROJECTS RECOMMENDED FOR FUNDING
SMALL CITIES TOTALS	\$771,255	\$611,204	13	10*
<i>*Westwood (project #10) declined \$4,899 funding recommendation. Grant would have been fully funded at REAP full funding of \$20M.</i>				
MEDIUM CITIES TOTALS	\$2,129,878	\$912,203	25	10*
<i>*Bondurant (project #10) declined \$37,203 funding recommendation. Grant would have been fully funded at REAP full funding of \$20M.</i>				
LARGE CITIES TOTALS	\$1,574,200	\$1,266,205	8	7*
<i>*Sioux City (project #7) declined \$16,205 funding recommendation. Grant would have been fully funded at REAP full funding of \$20M.</i>				
DISTRIBUTION TOTALS	\$4,475,333	\$2,789,612	46	27

ALLOCATION DETAILS

2013 (FY14) REAP City Parks Open Spaces - SMALL CITIES - Population under 2,000

Ranked by Score	City Applicant	Project Name	Project Description	Grant Amount Requested	Recommended Award
99.75	Arnolds Park	Downtown City Park - Renovation	The long range goal of the Downtown Project is to clean up and rejuvenate the downtown along West Broadway and Preservation Plaza. The main city park and maintenance garage area are the last of the long range project. This project is for funding of the shelter house, restrooms, pedestrian walkway, social condensers, lighting and rain gardens. Additionally, this project will serve to aid programming at Preservation Plaza and serve as a friendly park for picnics, gatherings, and a trail head for the Arnolds Park trail system.	\$75,000	\$75,000
98.6	Mapleton	Carhart Conservation Area	The City of Mapleton owns 18 acres of riparian woodland adjacent to the Maple River. The site is currently inaccessible for recreational use, and its ecological functions have been degraded due to a lack of vegetation management. The project developments include: re-establishing a diverse community of native vegetation, establishing a vegetation management plan, establishing trail access for recreational use and wildlife viewing, and introducing interpretive signage about the renowned conservationist, author and Mapleton native, Arthur Carhart.	\$75,000	\$75,000
91	Clarksville	Reading Park	Development of Reading Park on the vacant lot north of the Public Library. Reading Park is envisioned as a shaded park with comfortable benches, turf grass, planting beds, screen wall plantings, shade trees, a brick walkway, and a gazebo that replicates a historic bandstand. The park will serve as an outdoor reading space, an extension of the city library, and as a space for music and other community performances.	\$72,250	\$72,250
84.2	Avoca	Nishnabotna Trail Project	Provide trail connections for the community to Edgington Memorial Park. The trail will connect the	\$75,000	\$75,000

			established area of the community to the park via the pedestrian bridge currently in construction phase. Over one mile of trail will be constructed. Trail will be 8' wide and 4" thick concrete. The trail will be accessible and will be open to pedestrians and bicycles.		
83.6	Eldon	Bike/Pedestrian Trail Additions	Build two trail additions in Eldon. The first is an 850 foot bike/pedestrian trail extension to the existing trail and a 375 bike/pedestrian trail to connect a Des Moines River overlook to the restored Rock Island Depot and Rock Island Park on Highway 16 and to build a stone pathway that will connect the two sections of trail.	\$50,000	\$50,000
79.2	Manning	Manning Park Connector Trail	Provide a 2200 linear foot trail connection from the Manning football and soccer fields, the Manning baseball/softball field, the Manning City Park and the Manning Recreation Center.	\$75,000	\$75,000
78.6	Allison	Wilder Park All Seasons Lodge	Construction of an All Seasons Lodge at Wilder Park. The lodge will be constructed south of the existing shower and restroom facility and north of the campground host site. The lodge will feature a modern kitchen, bathroom, bedroom, loft, living room and a covered porch. Additionally, the facility will be designed to meet ADA standards.	\$75,000	\$75,000
78.5	Slater	Grand Central Station/Trailhead Phase II	Complete Phase II of the Grand Central Station/Trailhead project. Projects details include: construction of the 16'x22' handicap accessible bathroom structure (completing the walls and installation); install drinking fountain; landscaping the area with native vegetation (with interpretive signage for plantings and animals); install way-finding signage with local and state wide trail system maps; install information boards/brochure racks' installation of points of interest and historical markers; and install bike racks which were designed to emulate the cribbing/art work of the High Trestle Trail Bridge.	\$59,095	\$59,095
77.4	Fonda	Straight Park Campground	The Fonda Hometown Pride Committee has identified campground improvements in Straight Park as an outdoor recreation priority in Fonda's 2013-16 Community Pan. This project includes adding ten RV camping sites with electrical and water hookups, the construction of one new camper cabin and adding furnishings for a recently completed camper cabin in the City's Straight Park Campgrounds. The new camper cabin will be constructed by the Newell-Fonda High School Industrial Arts Class.	\$50,000	\$50,000
75.6	Westwood	Westwood Trail Improvement Project	<i>(funding recommendation declined by applicant)</i>	\$50,000	<i>(\$4,899 declined by applicant)</i>
70.2	Redfield	Raccoon River Valley Trail Shelterhouse	Construct an open shelter and planting area adjacent to the Raccoon River Valley Trail. This shelter would be used as a resting shelter for bikers and walkers.	\$22,230	\$4,899
70.2	Callendar	Trail Around City Park		\$25,680	-0-
69	Eddyville	Eddyville Central Park		\$67,000	-0-
SMALL CITIES TOTALS				\$771,255	\$611,204

2013 (FY14) REAP City Parks Open Spaces - MEDIUM CITIES - Population between 2,000 and 25,000

Ranked by Score	City Applicant	Project Name	Project Description	Grant Amount Requested	Recommended Award
134.5	Manchester	Manchester Whitewater Park	Modify the existing Marion St. Dam within the city of Manchester and add five drop structures, creating an 800' whitewater feature on the Maquoketa River. This feature, part of an overall plan to develop an upper Maquoketa River water trail and multi-use trail system in Delaware County, will provide recreation opportunities for residents and tourists.	\$100,000	\$100,000
107.2	Eldora	Gunderson Nature Park	Development and enhancement of a 10 acre donated natural area in Eldora to become a "nature park" with mowed trails, hard surface trail loop, wetland, savannah and prairie. The property adjoins the Iowa River Greenbelt and a prairie restoration at Pine Lake State Park "West."	\$75,000	\$75,000
107	Clive	Alice's Road Greenbelt Acquisition	Acquisition of approximately 15.3 acres, that follows Little Walnut Creek west of Alice's Road in Clive, that will bring the Greenbelt Park in this area of the City to 89.5 acres, with one more parcel to acquire which will bring the total protected property to over 100 acres. This property creates a conservation corridor that will assist in water quantity and quality management, it will provide recreation opportunities, and it will protect the existing wildlife habitat. Future plans include trail development connecting to many of the Central Iowa Trails.	\$125,000	\$125,000
102	Johnston	Terra Lake Construction	The Terra Lake project is a phase within a larger development project that will create a multi-dimensional recreation and education site. Currently a retired holding lagoon is present on the site, which is located in the central part of Johnston. This lagoon will be excavated and redeveloped to create an eight acre lake. Numerous trails, multi-use shelters, natural plantings and finally an education wing to an existing facility will complete the overall project. The project is phased over three years. This first phase is to develop the lake and associated trails.	\$125,000	\$125,000
93	Huxley	Heart of Iowa Nature Trail Enhancement	Hard surface the 1 mile section of the Heart of Iowa Nature Trail (HOINT) located in Huxley from the east side of Highway 69 on the south end of Huxley to Trailridge Park. The increasing number of pedestrians, bicyclists and equestrians are using the HOINT as a means of leisure activity and with that comes the need to increase safety measures and reduce maintenance costs.	\$75,000	\$75,000
92.8	Iowa Falls	North Park Trail Segment	North Park Trail Segment which will be an off-street trail connecting the existing Rock Run Creek Trail to Cadet Road via North Park, a City green space and arboretum. The project will include a 900-1000' of painted bike lane around Rock Run Elementary School, 1900-2000' of off-street, 10' wide hard surface trail and a 100' long prefabricated bridge with two 75-100' boardwalk approaches where the trail will cross Rock Run Creek.	\$100,000	\$100,000
91.75	Spirit Lake	15th St Connection and East-West Rail	The 15 th Street Connection and East-West Trail Phase I serves two purposes: first, the reconnection of the existing Iowa Great Lakes Spine Trail needed as a result of the 2014 reconstruction and widening of 15 th	\$75,000	\$75,000

		Trail Phase I	Street in Spirit Lake; and second, it is the first segment of the East-West Rail Trail on the former Iowa and Northwestern Railroad right of way. This segment also provides the connection to trails which link the cities of Spirit Lake, Orleans, Okoboji, East Lake Okoboji and Big Spirit Lake as well as many area attractions.		
90.2	Decorah	Trout Run Trail Extension through the Upper Iowa River Valley to Freeport	Develop a 1.2 miles trail spur off the Trout Run Trail along the Upper Iowa River Corridor to just beyond the east edge of Decorah to the County Conservation Board owned Freeport Park in the Freeport area. The Freeport area is one of the highest growth areas in the Decorah area. This trail will connect that section to the 11 mile Trout Run Trail thus connecting them to many portions of the city of Decorah and surrounding areas.	\$100,000	\$100,000
84.2	Independence	Independence Riverfront - Connecting Land and Water Trails	Multi-functional components that will work together to enhance land and water trails along the riverfront in the Wapsipinicon River community of Independence. These components are all within 800 feet of each other. Through this project the Independence Riverwalk Trail, which meanders along the east side of the Wapsi. River, will be connected to Independence's downtown district. Additionally portage around the Independence Upper Dam will be developed for river users, universally accessible ramps will replace the steep steps and concrete wall that currently inhibit some users, native vegetation and interpretation will be strategically placed to enhance trails and educate the public about native plants, insects and wildlife communities in the Wapsi. River Corridor.	\$100,000	\$100,000
82.8	Bondurant	Lake Petocka Park Improvement Project	Improvements to Lake Petocka Park, which includes an addition to the existing shelter, modern restrooms, installation of sewer lines, native plantings, erosion stone and storm water treatment cells.	\$75,000	\$37,203
82.6	Algona	Tietz Park Trailhead Expansion		\$79,800	-0-
82	West Branch	West Branch Village Trail		\$75,000	-0-
81.6	Madrid	Main Street Trail Access		\$75,000	-0-
80.8	North Liberty	Centennial Park Improvements		\$125,000	-0-
79	Spencer	Deerfield Park Enhancement Project - Phase II		\$125,000	-0-
77.2	Perry	Iowa Street Trail		\$100,000	-0-
77	Centerville	Water Resource Restoration Project		\$100,000	-0-
75.4	Bondurant	Bondurant City Park		\$75,000	-0-
75	Colfax	Lewis Park Restoration Project		\$39,900	-0-
73	Osceola	Q-Pond Park Trail Project		\$75,000	-0-

71.2	Waukon	Waukon City Park Pond Floating Dock Project		\$9,985	-0-
70.68	Mount Pleasant	Mt. Pleasant Trail Improvements - Phase 1		\$100,000	-0-
70.4	Forest City	Hynes Spur Trail Development		\$50,193	-0-
65.6	Kalona	City Park Trails Project		\$75,000	-0-
60.6	Evansdale	Meyers Lake Aeration System		\$75,000	-0-
MEDIUM CITIES TOTALS				\$2,129,878	\$912,203

2013 (FY14) REAP City Parks Open Spaces - LARGE CITIES - Population larger than 25,000

Ranked by Score	City Applicant	Project Name	Project Description	Grant Amount Requested	Recommended Award
104.2	Des Moines	MacRae Park Improvement	MacRae Park is one of the City's oldest parks and provides some of the best views of downtown Des Moines, Gray's Lake, and the Raccoon River. This project seeks to restore 34 acres of historic oak woodlands and savanna found in MacRae Park. The project will also connect the park to the regional central Iowa trail system and construct a small natural trail loop and provide environmental education opportunities throughout the park.	\$300,000	\$300,000
97.85	Ottumwa	Multiple Trail Expansion	Completing three trail sections will expand the existing Ottumwa trail system adding another 1.75 miles. The first is a 700 foot extension in Ottumwa Park. The second will create a new trail on the west end of the levee that measures approximately 1.2 miles. The last completes a gravel section of the south loop.	\$150,000	\$150,000
95.2	Burlington	Flint River Trail (Phase 1)	Phase I (south) of the Flint River Trail will connect with a ramp that starts at Riverside Park, along the Mississippi River, and travels to the top of Hwy 99, connecting downtown with the northern portions of the Flint River Trail. This part of Phase I will be approximately 2,300 linear feet and will be done in conjunction with a street project along Hwy 99, which was redesigned to allow for the separated trail along the roadside.	\$150,000	\$150,000
90	Urbandale	Walnut Creek Trail - Meredith Drive to 156th Street	This 3,800 foot trail will connect to an existing trail terminus, just north of Meredith Drive and follow Walnut Creek to the north and west to 156 th Street. It will connect to the north/south trail spine through the 220 Walnut Creek Regional Park on the south, and the project includes a bridge over Walnut Creek. Meredith Drive and 156 th Street will have trails constructed on them by 2014 for connection to the east, west and north. This trail will eventually connect to the City of Grimes and Dallas Center.	\$150,000	\$150,000
89.8	Davenport	River Heritage Park	Redevelop seven acres of a former industrial site to public space. This historic riverfront site will be used for scenic, interpretive, recreational and educational opportunities. This project will add riverfront green space for those utilizing the bike path with is part of the Mississippi River Trail and is adjacent to the connection with the American	\$300,000	\$300,000

			Discovery Trail. The site location is integral to the historical interpretation of the founding of the City of Davenport. The promenade, unique natural design features and future site amenities will allow visitors to see and read about history related with the Rock Island Arsenal Quarters One, the Colonial Davenport House, the Antoine LeClaire House, the first bridge that crossed the Mississippi at the site, the Corps o Engineers Clock Tower, the Mississippi Lock and Dam 15 and the 1896 Government Bridge.		
88.6	Dubuque	Phase 4 of the Iowa 32 Hike/Bike Trail	Phase 4 of the Iowa 32 Hike/Bike Trail will extend approximately one mile along Iowa 32 (locally known as the Northwest Arterial) on the northwest side of Dubuque. The project will continue a 10-foot-wide trail physically separated from motorized traffic on Iowa32 by an open space located within the highway right-of-way. The trail will extend along the west side of Iowa 32 from Holliday Drive to Pennsylvania Avenue.	\$200,000	\$200,000
87.4	Sioux City	Sioux City Loess Hills Prairie Corridor	<i>(funding recommendation declined by applicant)</i>	\$174,200	<i>(\$16,205 declined by applicant)</i>
72.2	Mason City	South Monroe Avenue Trail	Construction of an approximate 1.29 mile trail linking Ray Rorick/Lester Milligan Parks with Fredrick Hanford Park. This trail will then connect Fredrick Hanford Park to the regional Trolley Trail.	\$150,000	\$16,205
LARGE CITIES TOTALS				1,574,200	1,266,205

Tammie Krausman, REAP Coordinator
Conservation and Recreation Division
October 10, 2013

**Iowa Department of Natural Resources
Natural Resource Commission**

#16

Decision Items

Appeal Of Contested Case Decision On Residency Of Robert J. Schultz

This matter comes before the Iowa Natural Resource Commission for a second time on the appeal of a Decision on Remand issued by Administrative Law Judge David Lindgren of the Iowa Department of Inspections and Appeals on July 10, 2013. Pursuant to rule 561 IAC 7.17(5), as adopted by reference at 571 IAC 7.1, a party may appeal the decision of the Administrative Law Judge to the Natural Resource Commission (NRC).

In his Decision, the Administrative Law Judge has determined that the Appellant, Robert Schultz, is not an Iowa resident for the purpose of the obtaining of hunting and fishing licenses pursuant to Chapter 483A of the Code of Iowa.

The Administrative Law Judge first issued a Decision in this case on July 18, 2011. This Decision was appealed to the NRC and the NRC upheld the Decision on March 8, 2011. On December 6, 2012, District Court Judge David Christensen returned the case to the Administrative Law Judge for rehearing due to a finding that errors had occurred in the first Decision. The Decision on Remand constitutes a reconsideration of the record in light of the Ruling of the District Court. The Decision on Remand again finds that the Appellant, Robert J. Schultz, is not a resident of Iowa for purposes of obtaining hunting and fishing licenses.

The Commission is being presented with the Decision on Remand and the Appeal. The entire record on appeal is available for the review of the Commission upon request. The record created in these contested cases shall be the record relied upon by the Commission in reaching its Decision, which constitutes final agency action. The parties shall be allowed oral arguments pursuant to rule 561 IAC 7.17(5) "f".

Jon C. Tack, Attorney
Legal Services Bureau
October 10, 2013

Attached: Schultz – Decision on Remand
Schultz – Petitioner’s Brief in Support of Hearing Before Commission

Kyle Jensen is a conservation officer in Lucas and Wayne Counties. Approximately 4-5 years ago he first met Schultz and had occasion to check his hunting license. According to Jensen, he made a mental note as to a potential enforcement action after a "red flag" arose, either in the form of a Minnesota driver's license or a Minnesota license plate on his vehicle. He had occasion to again meet Schultz at a youth pheasant hunt at his father, James's, hunting preserve.

After a new residency law was passed in 2009, conservation officers were asked by their superiors at the Department to consider passing along the names of any individuals that may have potential residency issues. Based on his previous mental note raising a red flag as to Mr. Schultz's residency status, Officer Jensen decided to report his name to supervisors. In doing so, he also considered some additional facts in his decision to provide Schultz's name to his supervisors. For example, Officer Jensen noted that the residence Schultz lists as his Iowa residence is either a single-wide trailer or cabin situated on property owned by James Schultz. As part of his regular duties, Officer Jensen travels past these structures. As a general proposition, he has only seen people at these structures either on the weekends or during hunting season.

Based on this referral, the Department sent Schultz a letter indicating their question as to his residency status and requesting additional information from which to make a determination about his residency. In response, among other things, the appellant provided information that he was employed in Medina, Minnesota; that he does not receive mail in Iowa, but that he does receive mail at his parent's address in Minnesota; that he does not pay any utility bills and that his father pays them; that his principal residence is at his father's home in Chariton, Iowa; that he has no vehicles registered in Iowa; and that he considers himself to have been an Iowa resident since 2000. Along with these responses, Schultz provided the department with copies of his 2007, 2008, and 2009 federal and state income tax returns.

On June 28, 2010, DNR attorney Tamara Mullen placed in the "Robert Schultz File" a memorandum indicating the result of discussions from the Department's License Residency Committee.¹ In that memo, she noted the following information:

- Schultz lists his home address as Minnesota on his tax returns.
- The only property he owns is in Iowa and he pays taxes on it.
- He filed part-residence taxes in Minnesota in 2009.
- His job is based in Medina, Minnesota, a 5-hour drive from Chariton, Iowa.
- The house in Chariton is owned by his father, who pays all utilities and mortgage.
- He does not own a vehicle; rather, he drives his father's vehicle or a company vehicle.

¹ This committee was formed after adoption of a new residency law, Iowa Code sec. 483A.1A(8)-(10). Its task was to review residency applications and consider the situations of individuals identified by officers in the field. Among those serving on this committee were Steve Derrand and Mark Sedlmayer, both of whom testified at this hearing.

Based on this information, the committee determined that “the totality of the circumstances indicate that Mr. Schultz was claiming Iowa residence solely for hunting purposes.” The memo also noted that the Department was sending the appellant a suspension letter along with a right to appeal determination.

Subsequently, on July 7, 2010, a letter signed by Steve Dermand was sent to the appellant indicating that after a review of documents relevant to his residency status, the Department had determined that he did not meet the criteria for residency under Iowa Code section 583A.1A(9) and that he was “establishing residency only for the purpose of hunting.” In particular, the letter noted that (1) the documents show a Minnesota address for bills, taxes, etc., (2) his job is based in Medina, Minnesota, and (3) he pays partial-residency taxes in Minnesota. Schultz filed an appeal from this action, claiming the Department erred in its residency determination.

At the hearing on this appeal, Steve Dermand testified as to his participation in the process by which Schultz was determined not to be a resident of Iowa for purposes of hunting licensure. He first reiterated the many factors noted in the July 7, 2010, letter as supporting the Department’s residency determination. However, he also spoke to the fact that Schultz holds both a Minnesota and an Iowa driver’s license. Although the Department only became aware of this dual licensure after its initial residency determination, Dermand testified that if this matter had been decided again, the Department would find the Minnesota licensure to negate his Iowa residency for purposes of hunting. According to Dermand’s understanding, the concept of “dual residency” prohibits one from taking advantage of residency privileges in two states.

According to Dermand, Schultz has purchased resident licenses in Iowa every year since 2001. Dermand also conceded that the Department incorrectly found that Schultz pays partial residency taxes in Minnesota. In fact, the tax returns supplied by Schultz show that he filed returns only as an Iowa resident at least as far back as 2001, and that he indicated he was a “nonresident” of Minnesota. However, on this return he did list Delano, Minnesota as his “home address.”

Mark Sedlmayer, a Department law enforcement supervisor, also testified at the hearing. He was among those that helped draft the new residency requirements. He testified that the law change came due to the number of complaints the Department received about non-residents receiving resident hunting licenses. The purpose of the new law, in his opinion, was not to restrict the hunting privilege, but rather to give “true residents” the ability to hunt. According to Sedlmayer, no one factor is determinative of the residency issue.

Finally, during the course of the hearing, the parties stipulated to the following facts:

- The appellant is employed in Minnesota as a warehouse manager at Twinco Romax.
- The appellant holds both Iowa and Minnesota driver’s licenses.
- The appellant stays multiple nights per year at residences in Minnesota, Iowa, and Missouri.

CONCLUSIONS OF LAW

The principal issue in this remand is whether the appellant qualifies as a "resident" for purposes of receiving an Iowa hunting license. In 2009, the Iowa General Assembly adopted 2009 Iowa Acts, Chapter 144, sections 34 and 35, which amended the applicable provisions of Iowa Code section 483A.1A relating to the determination of residency for purposes of obtaining Department-issued licenses. These amendments became effective on July 1, 2009. The following provisions of chapter 483A were thus applicable in this case at the time of the determination of the appellant's residency:

8. "*Nonresident*" means a person who is not a resident as defined in subsection 10.
9. "*Principal and primary residence or domicile*" means the one and only place where a person has a true, fixed, and permanent home, and to where, whenever the person is briefly and temporarily absent, the person intends to return. Relevant factors in determining a person's principal and primary residence or domicile include but are not limited to proof of place of employment, mailing address, utility records, land ownership records, vehicle registration, and address listed on the person's state and federal income tax returns. A person shall submit documentation to establish the person's principal and primary residence or domicile to the department or its designee upon request. The department or its designee shall keep confidential any document received pursuant to such a request if the document is required to be kept confidential by state or federal law.
10. "*Resident*" means a natural person who meets any of the following criteria during each year in which the person claims status as a resident:
 - a. Has physically resided in this state as the person's principal and primary residence or domicile for a period of not less than ninety consecutive days immediately before applying for or purchasing a resident license, tag, or permit under this chapter and has been issued an Iowa driver's license or an Iowa nonoperator's identification card. A person is not considered a resident under this paragraph if the person is residing in the state only for a special or temporary purpose including but not limited to engaging in hunting, fishing, or trapping.
 - b. Is a full-time student at either of the following:
 - (1) An accredited educational institution located in this state and resides in this state while attending the educational institution.
 - (2) An accredited educational institution located outside of this state, if the person is under the age of twenty-five and has at least

one parent or legal guardian who maintains a principal and primary residence or domicile in this state.

c. Is a student who qualifies as a resident pursuant to paragraph "b" only for the purpose of purchasing any resident license specified in section 483A.1 or 484A.2.

d. Is a nonresident under eighteen years of age whose parent is a resident of this state.

e. Is a member of the armed forces of the United States who is serving on active duty, claims residency in this state, and has filed a state individual income tax return as a resident pursuant to chapter 422, division II, for the preceding tax year, or is stationed in this state.

Iowa Code § 483A.1A(8)-(10).

Prior to the adoption of this new statute, Iowa law provided for the following:

19. "Nonresident or alien" means a person who does not qualify as a resident of the state of Iowa either because of a bona fide residence in another state or because of citizenship of a country other than the United States. However, "alien" does not include a person who has applied for naturalization papers.

20. "Resident" means a person who is legally subject to motor vehicle registration and driver's license laws of this state, or who is qualified to vote in an election of this state.

Iowa Code § 482.2 (2007).

Moreover, the previous law defined resident in a different fashion:

7. "Resident" means a natural person who meets any of the following criteria:
a. Has physically resided in this state at least thirty consecutive days immediately before applying for or purchasing a resident license under this chapter and has been issued an Iowa driver's license or an Iowa non-operator's identification card.

...
e. Is registered to vote in this state.

Iowa Code § 483A.1A(7).

The Iowa Department of Natural Resources has also adopted administrative rules in order to allow it to implement the new provisions and to help inform its determination as to an applicant's residency. In particular, 571 Iowa Administrative Code 15.9 (483A) now provides as follows:

Proof of residency required.

The department shall have the authority to require persons applying for or who have received resident licenses to provide additional information to determine the person's principal and primary residence or domicile and residency status. Whether a person was issued resident or nonresident licenses by the department in previous years shall not be a determining factor of residency. Persons required to provide additional information under this rule shall be notified in writing by the department and shall have 60 days to submit all required information to the department.

Moreover, 571 Iowa Administrative Code 15.10 (483A) was adopted in response to the new legislation, and provides as follows:

Residency status determination.

Upon receipt of information requested from the person, the department may determine whether the person is a resident or a nonresident for purposes of these rules and Iowa Code chapter 483A. The department shall provide the person with written notice of the finding.

As the district court determined in its judicial review ruling, the appellant, as the license applicant, holds the burden of proof to establish his eligibility for resident status. He must prove, by a preponderance of the evidence, that he qualifies as a "resident" for purposes of receiving an Iowa hunting license. The administrative rules clearly place the burden of production on the applicant as well. This burden plays a significant factor in my decision in this case.

As noted in the previous decision, the department based its residency determination on the following facts:

- He lists his home address as Minnesota on his tax returns.
- The only property he owns is in Iowa and he pays taxes on it.
- He filed part-residence taxes in Minnesota in 2009.
- His job is based in Medina, Minnesota, a 5-hour drive from Chariton, Iowa.
- The house in Chariton is owned by his father, who pays all utilities and mortgage.
- He does not own a vehicle; rather, he drives his father's vehicle or a company vehicle.
- Documents show a Minnesota address for bills, taxes, etc.
- Dual Minnesota and Iowa driver's licenses.

While Schultz's 2009 Federal tax return lists his parent's Delano, Minnesota residence as his "home address," it must also be noted that he lists the Chariton, Iowa home as his address on numerous documents, including his 2009 W-2 statement. Furthermore, the record does not support the Department's position that Schultz filed part-resident taxes in Minnesota in 2009. This was simply a misreading by the Department of Schultz's various tax returns. Finally, Schultz has no utility bills, does not pay rent to his father, and receives mail at his parents' "permanent" address in Chariton, Iowa.

This is essentially the entirety of the record evidence upon which a residence determination must be made. Schultz, who holds the burden of proof and production in this matter, did not present any evidence on some crucial information that would have been helpful to this determination. For example, the amount of time he spends in Iowa versus Minnesota would have been a relevant factor. Moreover, on a question as to proof of his duration of stay in Iowa, Schultz responded that he does not maintain any detailed records of the days that he is either in or out of Iowa. This question is made relevant by Iowa Code section 483A.1A(10)(a) which purports to create a 90-day residency requirement prior to being eligible for an Iowa resident hunting license. Mr. Schultz did not testify at the hearing and this question could not be broached. While it is perhaps understandable that Schultz may not be able to reconstruct his whereabouts to the exact day over that time frame, it certainly would have been reasonable for him to provide generalized statements as to his normal schedule and to have made his best guesses as to his location during the relevant period.

The Iowa Code defines "principal and primary residence or domicile" as "the one and only place where a person has a true, fixed, and permanent home, and to where, whenever the person is briefly and temporarily absent, the person intends to return." Mr. Schultz did not present any evidence on this issue. It appears that he simply wished to rely on the perceived shortcomings in the department's investigation and resulting conclusion.

Moreover, the Iowa Code defines "resident" in pertinent part as "a natural person who . . . has physically resided in this state as the person's principal and primary residence or domicile for a period of not less than ninety consecutive days immediately before applying for or purchasing a resident license" Again, Mr. Schultz simply presented no evidence from which a fact finder could determine his domicile in the ninety days preceding his application.

In light of the paucity of relevant evidence produced by Schultz, and the other evidence submitted by the department showing Schultz's extensive physical and legal ties to the state of Minnesota, I must conclude that Schultz has not carried his burden of proof to establish that he is a resident of the State of Iowa for purposes of enjoying resident hunting privileges. Accordingly, the department's decision must be affirmed.

Alternatively, even though the district court held that Schultz's Minnesota driver's license was not a privilege of residence of Minnesota and therefore did not affect his eligibility for an Iowa resident hunting license, I nonetheless feel compelled to address it. I continue to believe this was an erroneous conclusion by the district court.

Iowa Code section 483A.2 regarding "dual residency" provides as follows:

A resident license shall be limited to persons who do not claim any resident privileges except as defined in section 483A.1A, subsection 10, paragraphs "b", "c", and "e", in another state or country. A person shall not purchase or apply for any resident license or permit if that person has claimed residency in any other state or country.

Under this provision, if a person claims *any* “resident privileges” in another state (except for a short list of enumerated exceptions), that person is not eligible for an Iowa hunting or fishing resident license. I concluded previously that a Minnesota driver’s license is a resident privilege of the state and that therefore Iowa Code section 483A.2 made Schultz statutorily ineligible for an Iowa resident license. I reiterate that conclusion in this decision, but more fully set forth the Minnesota legal authorities on which that conclusion is founded.

First, Minnesota law presumes a person not to have more than one valid driver’s license at a given time. Mn. Stat. 171.02(b). Here, Schultz held both an Iowa and a Minnesota driver’s license. Moreover, Minnesota Administrative Code sections 7410.0100, subpart 12, and 7410.0410 appear to unmistakably require that a person who applies for or seeks renewal of a Minnesota driver’s license be resident of that state and show proof of such residency. See *Jewish Community Action v. Commissioner of Public Safety*, 657 N.W.2d 604, 606 (Minn. App. 2003) (recognizing that “Minn. R. 7410.0410, a new rule, requires license applicants to *prove Minnesota residency* and either U.S. citizenship or lawful short-term, indefinite, or permanent presence in the United States.” [emphasis added]).

Because Schultz holds a privilege of residence in another state—here, a Minnesota driver’s license—he is statutorily ineligible for resident hunting licensing privileges in Iowa. For this reason, in addition to the reason expressed previously in this decision, I would conclude that the department correctly determined that Schultz is not a resident of Iowa for purposes of obtaining a hunting license.

DECISION

The Department’s determination that the appellant does not qualify as a resident for purposes of being issued an Iowa hunting license is AFFIRMED.

DATED THIS 10th DAY OF JULY, 2013.



David Lindgren
Administrative Law Judge

CC: VERLE NORRIS
JON TACK, DNR

ADMINISTRATIVE RULE 561-7.17 (5) (a) (1) TIME ALLOWED TO APPEAL OF DECISION;

Appeal and review. Any adversely affected party may appeal a proposed decision. Except as provided otherwise by another provision of law, all rulings by an administrative law judge acting as presiding officer are subject to appeal to the agency. The agency having jurisdiction shall review the proposed decision.

a. Time allowed. (1) Appeal by party. An appeal by a party shall be made to the agency having jurisdiction of the proceeding and shall be taken within 30 days after receipt of the proposed decision or order.

IOWA DEPARTMENT OF INSPECTIONS AND APPEALS
NATURAL RESOURCE COMMISSION

ROBERT J. SCHULTZ,
PETITIONER

v.

IOWA DEPARTMENT OF
NATURAL RESOURCES,
RESPONDENT

Case No. 10DNR024

**PETITIONER'S BRIEF IN SUPPORT
OF HEARING BEFORE COMMISSION**

COMES NOW, Robert J. Schultz, by and through his Attorney, Verle W. Norris, and submits his Brief in Support of Hearing before the Natural Resource Commission.

I. INTRODUCTION:

This matter comes before the Commission after a hearing on remand by Judge David Lindgren from a decision on December 6th, 2012, by Judge David L. Christensen of the Fifth Judicial District of Iowa. That decision reversed and remanded a previous decision made by Judge David Lindgren on July 18, 2011, in which Judge Lindgren affirmed a decision by the Iowa Department of Natural Resources ("Department") holding that Robert Schultz does not qualify for resident hunting privileges in Iowa. In Judge Christensen's decision, he held that the administrative law judge should not have considered the fact that Robert Schultz held a Minnesota driver's license in determining whether Mr. Schultz was eligible for resident hunting privileges, and, additionally, that the administrative law judge was not allowed to make an adverse inference against Robert Schultz. On remand, the ALJ once again ruled that Robert Schultz was not eligible to hold resident hunting privileges in Iowa.

II. ARGUMENT

In determining whether Robert Schultz is a resident of the State of Iowa for purposes of obtaining a resident hunting license, Robert Schultz is required to show that he meets the definition of "Resident" from Iowa Code § 483A.1A(10), which requires a person to have:

physically resided in this state as the person's *principal and primary residence or domicile* for a period of not less than ninety consecutive days immediately before applying for or purchasing a resident license...A person is not considered a resident under this paragraph if the person is residing in the state only for a special or temporary purpose including but not limited to engaging in hunting, fishing, or trapping.

Iowa Code § 483A.1A(10) (emphasis added). A person's principal and primary residence is:

the one and only place where a person has a true, fixed, and permanent home, and to where, whenever the person is briefly and temporarily absent, the person intends to return. Relevant factors in determining a person's principle and primary residence or domicile include but are not limited to proof of place of employment, mailing address, utility records, land ownership records, vehicle registration, and address listed on the person's state and federal income tax returns.

Iowa Code § 483A.1A(9). Therefore, in order to prove that he is eligible for resident hunting privileges in the state of Iowa, Robert Schultz must show that Iowa is the "one and only place" where he has a "true, fixed, and permanent home." *Id.* If Robert Schultz is able to offer sufficient evidence showing that he is a resident of the state of Iowa, then he will have met his burden of proof and will be presumed eligible for resident hunting privileges in Iowa.

A. ROBERT SCHULTZ MET HIS BURDEN OF PROOF IN SHOWING THAT HE IS A RESIDENT OF THE STATE OF IOWA

In the case at hand, Robert Schultz made an initial showing in the Spring of 2010 to the Department that indicated 1) his principle residence was in Chariton Iowa; 2) his federal and state tax returns for 2007, 2008, and 2009 all clearly indicated his state of residence was in Iowa; 3) he owned property in Appanoose County, Iowa and paid taxes on it; 4) he did not own property in any state besides Iowa; 5) He did not claim any type of homestead exemption in any other state; 6) He had been a resident of the state of Iowa since 2000; 7) His father lived near him and could verify his residency; 8) He had an Iowa driver's license; 9) He did not buy resident hunting or fishing licenses in any other state; and 10) He did not vote in any other state. Hearing Ex. 4. It could be argued that any one of these facts would have been sufficient for Robert Schultz to meet his burden of proof in showing that he is a resident of Iowa; the combination of these facts constitutes overwhelming evidence that Robert Schultz was indeed a resident of Iowa.

Furthermore, Robert Schultz's holding of an Iowa driver's license is conclusive proof that Robert Schultz is an Iowa resident, as Iowa Code § 321.182(3) requires certification that an applicant for an Iowa driver's license is a resident of the State of Iowa. While this is not the only privilege of residency that Robert Schultz enjoys in Iowa, Robert Schultz does not possess or take advantage of any resident privileges of any other State. He does not vote in another State; does not pay or otherwise file taxes to another State; does not have any vehicle's registered with another State; has never owned a resident hunting license in another State (while specifically purchasing non-

resident hunting-licenses in those other States); and does not hold a driver's license in another State that requires Robert Schultz to be a resident in order to receive it (as Iowa does).

Furthermore, it is important to understand what a decision holding that Robert Schultz is not a resident of the State of Iowa would mean – that Robert Schultz is necessarily a resident of another State (Minnesota, according to the Department). In contemplating this, it should be noted that Robert Schultz does not act like a Minnesota resident. He does not vote as one, does not pay or file taxes as one, does not hunt as one, and does not even hold out to his Minnesota employer that he is one (listing his home address as Chariton, Iowa, on his W-2's). By holding Robert Schultz to be a resident of a State other than Iowa, or as being a resident of Iowa solely for *hunting purposes*, it naturally implies that Robert Schultz is a resident of a State other than Iowa for *other purposes*. However, there is a noticeable lack of evidence of this – Robert Schultz does not enjoy any resident privileges of a State other than Iowa. In fact, when presented with easy opportunities to exercise said resident privileges in another State, Robert Schultz denies them (not voting, not hunting as a resident, etc). If Robert Schultz is not a resident of the State of Iowa, then Robert Schultz is not a resident of any State.

Because Robert Schultz met his burden, this Commission should find that Robert Schultz is a resident of Iowa for hunting purposes.

B. THE ALJ IMPROPERLY CONSIDERED ROBERT SCHULTZ'S HOLDING OF A MINNESOTA DRIVER'S LICENSE AGAINST HIM IN VIOLATION OF THE DISTRICT COURT'S RULING.

In Judge Christensen's decision on December 6, 2012, Judge Christensen found that "[t]he ALJ's determination that a driver's license is a resident privilege of Minnesota was incorrect." See Ruling on Petition for Judicial Review, page 15. Judge Christiansen ruled that Robert Schultz's holding of a Minnesota driver's license "should not have been a factor in [the ALJ's] determination." *Id.*

Despite this language, on remand the ALJ once again relied on Robert Schultz's holding of a Minnesota driver's license in determining that Mr. Schultz was not a resident of Iowa. The ALJ stated that "I concluded previously that a Minnesota driver's license is a resident privilege of the state and that therefore Iowa Code section 483A.2 made Schultz statutorily ineligible for an Iowa resident license. I reiterate that conclusion in this decision..." Decision on Remand, page 8. The ALJ went on further to hold that because Robert Schultz possesses a Minnesota driver's license, "[Mr. Schultz] is statutorily ineligible for resident hunting licensing privileges in Iowa. For this reason...I would conclude that the department correctly determined that Schultz is not a resident of Iowa for purposes of obtaining a hunting license."

Therefore, because the ALJ improperly considered an irrelevant factor in determining that Robert Schultz was not an Iowa resident, his decision should be reversed by this Commission.

WHEREFORE, Petitioner Robert J. Schultz, prays that a decision be entered holding him to be a resident of the State of Iowa, and thus, eligible for resident hunting

privileges, and for such other and further relief as the Commission deems just and equitable in the premises.

Respectfully submitted,



Verle W. Norris, AT0005910
300 West Marion
P.O. Box 256
Corydon, Iowa 50060
Telephone No. (641) 872-1363
Facsimile No. (641) 872-2468
**ATTORNEY FOR PETITIONER,
ROBERT J. SCHULTZ**

ORIGINAL FILED.

COPY TO:

Mr. Jon C. Tack
Attorney II
Iowa Department of Natural Resources
900 E. Grand Avenue
Des Moines, Iowa 50319-0034
**ATTORNEY FOR RESPONDENT
IOWA DEPARTMENT OF
NATURAL RESOURCES**

PROOF OF SERVICE

The undersigned certifies that the foregoing instrument was served upon all parties to the above cause by delivering a copy thereof to each of the attorneys of record herein at their respective addresses disclosed on the pleadings on the 23 day of September, 2013.

By: U.S. Mail FAX
 Hand Delivered Overnight Courier
 Certified Mail Other

Signature: Angela Seibert

IN THE IOWA DISTRICT COURT FOR HANCOCK COUNTY

MONROE BRANSTAD
Petitioner,

NO. CVCV019081

STATE OF IOWA, ex rel, NATURAL
RESOURCE COMMISSION and the IOWA
DEPARTMENT OF NATURAL
RESOURCES,
Respondent,

INITIAL BRIEF

OF

MONROE BRANSTAD

JAMES L. PRAY
OF
BROWN, WINICK, GRAVES, GROSS,
BASKERVILLE AND SCHOENEBAUM, P.L.C.
666 Grand Avenue, Suite 2000
Des Moines, IA 50309-2510
Telephone: 515-242-2404
Facsimile: 515-323-8504
E-mail: pray@brownwinick.com

ATTORNEY FOR MONROE BRANSTAD

January 31, 2013

TABLE OF CONTENTS

	<u>Page</u>
I. STATEMENT OF ISSUES PRESENTED FOR REVIEW	4
II. STATEMENT OF THE CASE.....	7
A. Nature of the case.....	7
B. Course of proceedings and disposition before the agency	7
C. Facts relevant to the issues presented for review	8
III. ARGUMENT	13
A. THE DECISION ERRED BY FAILING TO FIND THAT MONROE BRANSTAD IS ELIGIBLE FOR THE ACT OF GOD DEFENSE UNDER THE IOWA CODE.....	13
B. THE DECISION ERRED BY FAILING TO FIND THAT THE IDNR INCORRECTLY APPLIED THE AMERICAN FISHERIES SOCIETY SAMPLING GUIDELINES.....	19
1. Summary of the Counting Methodology.....	21
2. IDNR Used The Incorrect Counting Methodology By Failing To Use The Narrow Streams, Completely Accessible Sampling Method.....	21
3. IDNR used the incorrect definition of an “Inaccessible Stream.”	23
4. The IDNR’s Sampling Methodology Cannot Be Salvaged To Meet The Requirements Of AFS 24 For Sampling Narrow Streams That Are Completely Accessible.....	28
5. The IDNR’s Sampling Methodology Also Failed To Meet The Requirements Of AFS 24 For Sampling Narrow Streams That Are Incompletely Accessible.	29
6. The IDNR Does Not Have A Valid Educational Method.....	32
7. The IDNR failed To Account For The Different Habitat on the Western Reaches of the Winnebago River.	32
C. THE DECISION IS IN ERROR BECAUSE THE DEPARTMENT FAILED TO PROVE CAUSATION.....	34

1.	The IDNR failed To Account For The Effects Of The Three and One-Half Inch Rain.....	38
2.	The IDNR failed To Account For other Possible Causes of the Fish Kill.	40
D.	THE DECISION SHOULD BE REVERSED AS EITHER THE STATUTE OR RULES RELIED UPON BY THE DEPARTMENT ARE UNCONSTITUTIONALLY VOID FOR VAGUENESS OR IN THE ALTERNATIVE ARE UNCONSTITUTIONAL AS APPLIED.	42
D.	THE DECISION SHOULD BE REVERSED AS THE DEPARTMENT'S ACTION VIOLATES PETITIONER'S SUBSTANTIVE AND PROCEDURAL DUE PROCESS RIGHTS UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.	45
III.	CONCLUSION	45

I. STATEMENT OF ISSUES PRESENTED FOR REVIEW

- A. **THE DECISION ERRED BY FAILING TO FIND THAT MONROE BRANSTAD IS ELIGIBLE FOR THE ACT OF GOD DEFENSE UNDER THE IOWA CODE.**

Court Decisions:

Brose v. City of Dubuque, 193 Iowa 763, 187 N.W. 857 (Iowa 1922).
Oakes v. Peter Pan Bakers, Inc., 138 N.W.2d 93 (Iowa 1965).
Thompson v. Kaczinski, 774 N.W.2d 829 (Iowa 2009).

Statutes:

Iowa Code § 455B.186
Iowa Code § 455B.392
Iowa Code § 455B.392(1)-(3)
Iowa Code § 481A.151
Iowa Code § 481A.151(1)

- B. **THE DECISION ERRED BY FAILING TO FIND THAT THE IDNR INCORRECTLY APPLIED THE AMERICAN FISHERIES SOCIETY SAMPLING GUIDELINES.**

Statutes:

Iowa Code § 462A.69
Iowa Code § 481A.151
Iowa Code § 481A.151(3)
Iowa Code § 481A.151(3)(a)

Regulations:

571 IAC § 113.4

Other:

American Fisheries Publication No. 24

- C. **THE DECISION IS IN ERROR BECAUSE THE DEPARTMENT FAILED TO PROVE CAUSATION.**

Court Decisions:

Alladin, Inc. v. Black Hawk County., 562 N.W.2d 608 (Iowa 1997).

Blue Chip Enters. v. State of Iowa Dep't of Natural Res., 528 N.W. 2d 619 (Iowa 1995).

Callahan v. Cardinal Glennon Hosp., 863 S.W.2d 852, 860-62 (Mo. 1993) (en banc).

Gallagher v. Richfield Equities, LLC, No. 283246, 209 WL 997298 (Mich. Ct. App. 2009).

Gerst v. Marshall, 549 N.W.2d 810 (Iowa 1996).

Gould v. Schermer, 588, 70 N.W. 697 (Iowa 1897).

Hagen v. Texaco Refining & Marketing, Inc., 526 N.W.2d 531 (Iowa 1995).

Jamison v. Knosby, 423 N.W. 2d 2 (Iowa 1988).

New Jersey Turnpike Authority v. PPG Industries, Inc., 197 F.3d 96 (3d Cir. 1999).

N.J. Dep't of Env'tl. Prot. v. Dimant, 14 A.3d 780 (N.J. Super. Ct. App. Div. 2011).

Orkin Exterminating Co. v. Burnett, 160 N.W.2d 427 (Iowa 1968).

Schiltz v. Teledirect Int'l, Inc., 524 N.W.2d 671 (Iowa App. Ct. 1994).

Swaim v. Chicago, R.I. & P. Ry., 174 N.W. 384 (Iowa 1919).

Statutes:

Iowa Code § 455B.111

Iowa Code § 455B.392(1)(a)

Iowa Code § 455B.392(1)(a)(3)

Iowa Code § 455G.13(7)

Iowa Code § 481A.151

Iowa Code § 481A.151(1)

Regulation:

571 IAC 113.4(2)

Other:

American Fisheries Publication No. 24

Restatement (Second) of Torts § 431 (1965)

- D. THE DECISION SHOULD BE REVERSED AS EITHER THE STATUTE OR RULES RELIED UPON BY THE DEPARTMENT ARE UNCONSTITUTIONALLY VOID FOR VAGUENESS OR IN THE ALTERNATIVE ARE UNCONSTITUTIONAL AS APPLIED.**

Court Decisions:

ABC Disposal Systems, Inc. v. Department of Natural Resources,
681 N.W.2d 596 (Iowa 2004).

Grayned v. City of Rockford, 408 U.S. 104 (1972).

Luse v. Wray, 254 N.W.2d 324 (Iowa 1977).

State v. Nail, 743 N.W.2d 535 (Iowa 2007).

United States v. Warsame, 537 F.Supp.2d 1005 (D. Minn. 2008).

Williams v. Nix, 1 F.3d 712 (8th Cir. 1993).

Statutes:

Iowa Code section 17A.19(10)(a)

Iowa Code section 17A.19(11)(b)

Iowa Code section 481A.151(3)

Iowa Code section 481A.151(3)(a)

Regulation:

571 IAC 113.2

571 IAC 113.4(a)

571 IAC 113.4(b)

Other:

American Fisheries Publication No. 24

- E. THE DECISION SHOULD BE REVERSED AS THE DEPARTMENT'S ACTION VIOLATES PETITIONER'S SUBSTANTIVE AND PROCEDURAL DUE PROCESS RIGHTS UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.**

Court Decisions:

Reilly v. Iowa Dist. Court for Henry County, 783 N.W.2d 490 (Iowa 2010).

Wolff v. McDonnell, 418 U.S. 539 (1974).

II. STATEMENT OF THE CASE

A. Nature of the case

On the evening of August 27, 2008 the area in and around Forest City received a 3.4 inch rain. This rain increased the inflow of rainwater into the silage collection basin owned by Petitioner Monroe Branstad. The added rainwater and increased water pressure on the tile line and caused the plugged tile line to separate. An outflow of silage leachate and rainwater into the soil around the separation reached a county tile line. On August 29, 2008, Field Office No. 2 in Mason City, Iowa began investigating a suspected fish kill. Nearly two years later, on the 10th day of June, 2010, the Department issued a Restitution Assessment of \$61,794.49 to Petitioner Branstad. Petitioner promptly requested a contested case as he disagreed with the factual assumptions made by the Department and the methods used by the Department to calculate the number of dead fish.

B. Course of proceedings and disposition before the agency

On the 10th day of June, 2010, the Department issued to Branstad a Restitution Assessment of \$61,794.49. Following an appeal and evidentiary hearing, Administrative Law Judge Robert H. Wheeler issued a Proposed Decision affirming the restitution assessment on the 6th day of December, 2011, in DIA NO: 11DNR003. On January 5, 2012, Petitioner Branstad filed a Notice of Appeal, appealing the Proposed Decision to the Iowa Natural Resource Commission. On March 8, 2012, the Iowa Natural Resource Commission affirmed the proposed decision and by operation of law the Proposed Decision became the final decision of the agency ("Final Decision"). This court has jurisdiction over petitions for judicial review. Iowa Code § 17A.19.

Iowa Code § 17A.19(2) provides venue for a proceeding for judicial review to be in either Polk County District Court or the district court for the county in which the petitioner resides or has its principal place of business. Because Branstad resides in Hancock County and has his principal place of business in Hancock County, venue is appropriate in Hancock County.

C. Facts relevant to the issues presented for review

Petitioner Branstad owns and operates a cattle operation located in the southwest quarter of Section 24, Madison Township in Hancock County, Iowa. As part of the cattle operation, Branstad stored silage in an open structure. Approximately one month prior to the events at issue in this case, Branstad built a silage runoff containment basin to collect silage after he noticed that the leachate had killed eight trees that he had planted on his farm. (Branstad, T. p. 183, l. 1-2) (Berg, T. p. 28, ll. 20-24; p. 47 ll 10-14)

The Department did not then and does not now have any rules governing the construction of silage collection basins. (Exhibit 25) (Carl Berg, T. p. 28, ll. 20-24). When Branstad asked the Department if he needed a permit, the IDNR indicated that he did not but that he should try to keep the silage contained and to not let it run into stream. (Branstad, T. p. 182-183, ll. 22-25, 1-2). An old tile line (sometimes referred to in the record as an “office line” was found during the digging of the basin for the silage collection basin and the end of the tile line was plugged. (Branstad, T. p. 183, ll. 8-17) The IDNR agrees that the line had been plugged. (Berg, T. p. 47, ll. 15-19).

On the evening of August 27, the area in and around Forest City received a 3.4 inch rain. (Berg, T. p. 42, l. 24) (Grummer T., 165, ll. 2-7) (Exhibit B, p. 3) This rain increased the inflow of rainwater into the silage collection basin and is believed by the IDNR to have increased water pressure on the tile line, causing the plugged tile line to separate and allowing an outflow of

silage and rainwater into the soil around the separation. (Berg, T. p. 30, l. 7) As further testified by Mr. Carl Berg, an IDNR employee:

- 15 Q. And you indicated that or testified that
16 there was a tile line that had been plugged when this
17 pit was built, but from the hydraulic pressure
18 it burst; is that your testimony?
19 A. Correct.

(Berg, T. p. 47, ll. 15-19).

The silage and rainwater then percolated into a county drainage tile in the vicinity of the leak. (Branstad, T. p. 185, ll. 13-18) The presence of the previously unknown drainage tile was only discovered after Mr. Branstad assisted in trying to find the source of the leak from the silage leachate basin after the IDNR began its investigation.

With regard to the tile lines, the Administrative Law Judge found the facts as follows:

Mr. Branstad trenched around the silage basin to find and cut any tile lines. When Mr. Branstad cut the perforated tile line about 30 feet from the basin berm, silage water poured from the line into the trench. Another trench beyond the location of the tile line revealed two clay tiles underneath the perforated tile line. Another trench revealed another clay tile. Mr. Berg testified that it appeared that a sub-surface tile line existed at the time the basin was constructed Mr. Branstad did not know of the existence of this tile line. Mr. Branstad built the basin on top of this existing unknown tile line. Mr. Branstad testified that a rain storm that produced over three inches of rain in the area. Mr. Berg stated that this rain storm had caused sufficient pressure in the basin to unplug the tile line that was cut during construction. This caused the intersection of the known and the unknown tile lines and allowed the leakage into the unknown line which fed into the discharge into Silver Creek, and ultimately the Winnebago River.

(Proposed Decision, p. 6).

While some of these facts are accurate, the number of unknown tile lines and their placement is at odds with all of the testimony by all of the other witnesses. Mr. Branstad testified as follows:

- 8 So the first thing we did is started looking

9 for it. And then I told him where the tile—where
10 the county tiles were because I knew where they were
11 at, told him where all the tile work was. And I said
12 there is no tile near here that I know of because the
13 plastic tile we cut and packed.
14 Well then he, I believe, proceeded to go
15 down to the county tile intakes and started checking
16 them. And he came back and told me that he felt that
17 there was some kind of smell he thought coming out of
18 one of the intakes right below it.
19 So that's when I got a large backhoe and
20 started digging, excavating and started digging all
21 the way to the perimeter around that looking for it.
22 And I don't-- It wasn't very long, I mean a
23 couple hours, I would say, after that he thought
24 there was something in there. I run across the tile then.
25 Well, when they put the Highway 69 in in

1 front of that farm on it they'd made a wet spot out
2 there. So the State had put an eight-inch clay tile
3 in. What year, I have no idea. And when they put it
4 in that went underneath my buildings, but we didn't
5 even know it was there. We had a building, a hay
6 shed over the top of it, then underneath my building
7 site. And that's what I run across. I finally run
8 across that.

9 Then I traced the tile down that came out of
10 there. I found the four- or five-inch plastic tile
11 and ran over the top of it. Anywhere from 16 to 24
12 inches it had come over the top of that.

13 And I guess what happened is the clay that
14 was in that bank and the tile had blowed up, had
15 gotten a stream into that tile and went three feet
16 through dirt, went into that tile and then that tile
17 was draining out on top of the ground and then
18 seeping into the eight-inch clay tile underneath it.

19 Q. Let me clarify. Were these two tile lines
20 crisscrossing?

21 A. Yeah. Yes, they would be.

22 Q. All right. And were you able to find the
23 location where they were crisscrossing?

24 A. I not only found it, Carl Berg took his
25 camera--my father was there--and took multiple

1 pictures of the tile in there. He said he needed it

2 for his record to show the tile where it's coming
3 out, and it showed the tile that was under the
4 ground. And he had a camera there, and he needed
5 pictures of them.
6 Q. This morning Mr. Berg couldn't really recall
7 whether those were connected, or not. I had him draw
8 a picture of where they were laying. Was it pretty
9 clear to you that based on what you saw that there
10 should be no question that they were not connected?
11 A. Oh, yeah. Well, it's clear to him. He
12 said, "This is where the problem is." And he pointed
13 out--he said, "The water is going through there."
14 And I said, "But it's going through the ground." He
15 said, "It doesn't matter, it's still going out
16 soaking right into the other tile."

(Branstad, T. 184-186).

The IDNR's witness, Carl Berg, testified as follows:

21 We had Mr. Branstad start digging trenches,
22 and that's when we discovered that the tile was
23 flowing with the silage leachate.
24 Q. And where was the tile flowing from?

1 A. From the silage basin.
2 Q. So it was going from the basin—
3 A. And through the tile lines, yeah. It
4 connected through the tile line. Mr. Monte Branstad
5 had stated that the tile line had been clogged or
6 packed with clay when they constructed it. And it's
7 our belief that due to the rain that occurred that
8 the head pressure caused the silage to reconnect with
9 the tile line.

(Berg, T. 29-30)

On the issue of whether the tile line under the basin (Mr. Berg called it an "office line") connected with the county tile line, Mr. Berg testified on cross-examination that he did not know if they actually connected or if the silage simply percolated into the county tile line:

13 Q. So you think-- Did you actually witness
14 anyone dig up a connection where this office line

15 intersects the county line?
16 A. No.
17 Q. Okay. So it's possible--I mean it could
18 have either percolated or it could be attached. You
19 don't know the answer?
20 A. Right.
21 Q. Okay.

(Berg, T. 51)

Taking the testimony of the witnesses together, the Administrative Law Judge was clearly confused regarding the number and placement of the tile lines that were involved. Because this issue is important to the legal arguments by Mr. Branstad, he proposes that a more accurate factual statement would be as follows:

Mr. Branstad trenched around the silage basin to find and cut any tile lines. When Mr. Branstad cut the perforated tile line about 30 feet from the basin berm, silage water poured from the line into the trench. Another trench beyond the location of the tile line revealed two one clay tiles underneath the perforated tile line. Another trench again revealed ~~another~~ clay tile. Mr. Berg testified that it appeared that a sub-surface tile line existed at the time the basin was constructed and that Mr. Branstad had cut the line and plugged the far end of the that tile line. Mr. Branstad did not know of the existence of this the additional county tile line that ran under the plugged line. ~~Mr. Branstad built the basin on top of this existing unknown tile line.~~ Mr. Branstad testified that a rain storm that produced over three inches of rain in the area. Mr. Berg stated that this rain storm had caused sufficient pressure in the basin to unplug the tile line that was cut during construction. This caused the intersection of the known and the unknown tile lines and allowed the leakage into the unknown line which fed into the discharge into Silver Creek, and ultimately the Winnebago River.

On August 29, 2008, Field Office No. 2 in Mason City, Iowa began investigating a suspected fish kill. (Exhibit B, p. 1) As argued later in this brief, the incorrect factual findings of the Administrative Law Judge (and adopted by Department) are not based on any facts in the record and are simply incorrect.

The Department's investigation ran from August 29 through September 2 and included additional work on September 11, 2008. (Exhibit B) Although Scott Grummer was in Fertile at

8:00 a.m. on August 29 with the Field Office staff, the fish kill count did not begin at that time. (Exhibit O) Mr. Grummer followed the Field Office staff up the river while the staff took water quality samples. (Exhibit B, testimony of Berg and Grummer) The fish kill count did not begin until 1:00 p.m. on the 29th (Exhibit O).

Branstad hired his own personnel to investigate the Winnebago River. Some individuals inspected the river from bridges or walked down to the water at selected locations. (Testimony of Branstad witnesses). Two individuals, Gary Taylor and Gene Ambrosen, obtained a boat and floated down the Winnebago River for many miles on the morning of August 31st after first inspecting bridges and approaches on the 30th. (Taylor, T. p. 241, ll 4-13) (Exhibit 21) None of the Branstad fish kill counters found substantial numbers of dead fish. (testimony of Branstad, Newman, Ambrosen, Taylor, Murra and Bowen)

The Department provided all of the photographs of the dead fish to Branstad and the photographs only show, at most, thirty dead fish; a number of the photographs show the same dead fish in different poses and locations. (Grummer, T. p. 132, ll. 12-22) The fish shown in the photographs appear to be many of the same fish found by the personnel hired by Branstad to survey the Winnebago River. A number of the fish shown in the photographs are on mudflats and grassy areas and covered in mud. (Grummer, T. p. 129)

III. ARGUMENT

A. THE DECISION ERRED BY FAILING TO FIND THAT MONROE BRANSTAD IS ELIGIBLE FOR THE ACT OF GOD DEFENSE UNDER THE IOWA CODE.

The Decision is in error because it ignores the Act of God defense set forth in Iowa Code §

455B.392.¹ The Administrative Law Judge's ruling as adopted by the Department correctly noted that there are two separate statutory provisions authorizing the IDNR “to collect reasonable damages or restitution for fish kills and the costs of investigating the fish kill.” The Administrative Law Judge began his discussion of liability and causation by citing Iowa Code §455B.186 which “prohibits the discharge of any pollutant into any water of the state.” The judge next noted Iowa Code § 455B.392 which provides that a person having control over a hazardous substance is strictly liable to the state for reasonable damages to the state for the ‘injury to, destruction of, or loss of natural resources resulting from the hazardous condition caused by that person including the costs of accessing the injury, destruction, or loss.’ (Proposed Decision, p. 12).

The applicable portions of Iowa Code § 455B.392 state as follows:

455B.392 Liability for cleanup costs.

1. a. A person having control over a hazardous substance is strictly liable to the state or a political subdivision for all of the following:

...

(3) The reasonable damages to the state for the injury to, destruction of, or loss of natural resources resulting from a hazardous condition caused by that person including the costs of assessing the injury, destruction, or loss.

...

3. There is no liability under this section for a person otherwise liable if the hazardous condition is solely resulting from one or more of the following

a. An act of God.

b. An act of war.

¹ This defense was preserved when in Mr. Branstad’s Petition filed with the Department requesting a hearing he raised the claim that “the alleged release was the result of an Act of God and that Branstad is not liable under Iowa Code § 481A.151 for an Act of God.” (Petition, p. 2, para II(1)(l)).

Iowa Code § 455B.392.

The second statutory provision identified by the Administrative Law Judge is Iowa Code § 481A.151. That provision states in relevant part as follows:

481A.151 Restitution for pollution causing injury to wild animals.

1. A person who is liable for polluting a water of this state in violation of state law, including this chapter, shall also be liable to pay restitution to the department for injury caused to a wild animal by the pollution. The amount of the restitution shall also include the department's administrative costs for investigating the incident. The administration of this section shall not result in a duplication of damages collected by the department under section 455B.392, subsection 1, paragraph "a", subparagraph (3).

Iowa Code § 481A.151(1).

It is clear from Iowa Code § 481A.151(1) that the two statutes are to be read in harmony. It is also worth noting that Iowa Code § 481A.151(1) is the newer of the statutes having been enacted in 2002. The Iowa legislature was fully aware of the older statute at Iowa Code § 455B.392 when it enacted this provision and this fact is plain from the face of the newer statute because it specifically references the older statute. It is clear that the two statutes are not intended to create duplicate damage claims. But how should this Commission read the two statutes together? First, Iowa Code § 481A.151(1) provides the key initial step in interpreting these two statutes in harmony. Note that this provision begins by stating that it applies to "a person *who is liable* for polluting a water of this state in violation of state law, including this chapter . . ." (emphasis supplied). So, who is liable? We must turn to the older statute, Iowa Code § 455B.392, where we find that this law begins by determining liability. Iowa Code § 455B.392(1)-(3) states that a person is "strictly liable" for certain damages, including damages to natural resources, unless it is an act of God, an act of war, or an act or omission of a third party.

The threshold question is therefore whether Monroe Branstad is legally liable under Iowa Code § 455B.392 for the fish kill. In his Proposed Decision, the Administrative Law Judge focused his attention on whether the fish were killed by the silage leachate that was escaped the silage basin on the Branstad farm. Although the Administrative Law Judge found that the Branstad silage leachate was the “cause in fact” of the fish kill, this leaves open the question of liability or what is called “proximate cause.” The Iowa Supreme Court has held that “causation has two components: cause in fact and legal cause.” Thompson v. Kaczinski, 774 N.W.2d 829, 836 (Iowa 2009). A defense raised by Monroe Branstad in his original Petition was that the fish kill was the result of an Act of God. Despite a very complete record demonstrating a complete Act of God defense, the Administrative Law Judge left this matter untouched. The Act of God defense was again raised before the Natural Resource Commission and briefed and argued in detail.

In Oakes v. Peter Pan Bakers, Inc., 138 N.W.2d 93(1965) the Act of God defense was explored by the Iowa Supreme Court. In Oakes, a blizzard was the cause of a series of rear-end collisions that resulted in damage claims. The Iowa Supreme Court held that an Act of God instruction to the jury was proper under the circumstances:

[A]n act of God, as the term is known to the law, is such an unusual and extraordinary manifestation of the forces of nature that it could not under normal conditions have been anticipated or expected. However, the occurrence need not be unprecedented.... If it could not have been anticipated or expected under normal conditions, that is sufficient.

The question of precedent, therefore, relates to the matter of reasonable anticipation and opportunity to avert the consequences, and it is in that sense that the term “unprecedented” is used with regard to the nature of the catastrophe.

Id. at 98. The Oakes decision identified three requirements which must be established by substantial evidence before an act of God instruction is proper.

1. Acts of God are limited to forces of nature.

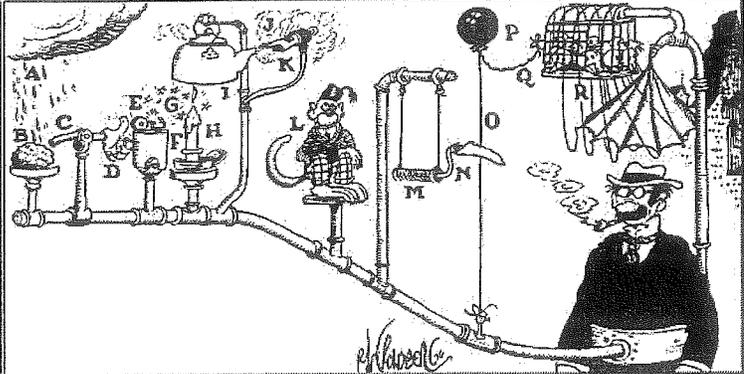
2. Second, the occurrence must be unusual or extraordinary.
3. Third, the occurrence must be such that under normal conditions it could not have been anticipated or expected.

Taking each prong of the Act of God defense separately, it should be clear that this defense was proven by Monroe Branstad. First, the Act of God in this case was a 3.4” rain that hit the area. Rain is clearly a “force of nature.” Brose v. City of Dubuque, 193 Iowa 763, 187 N.W. 857, 861 (Iowa 1922). Second, there are three combined facts that make the release of silage leachate “unusual or extraordinary.” The 3.4” rain is itself a very unusual or extraordinary event. However, the facts found by the Administrative Law Judge² do not end with the rain event itself. This is not a situation where the silage leachate basin was built too small to hold a 3.4” rain. In that instance a fact-finder might well decide that the legal cause of the release was improper design and not an unusual force of nature. Instead, the facts found by the Administrative Law Judge point to a chain of unrelated events that could not have been reasonably anticipated by Mr. Branstad. The facts are clear that Mr. Branstad did discover an “office” tile line when he constructed his leachate silage basin. However, the record is clear that he plugged the end of the line so that the leachate would not escape. What Mr. Branstad did not know, the record is clear, is that there was another county tile line underneath that office tile line. Even still, he could not have anticipated that the 3.4” rain would have sufficient pressure to dislodge the plug in the office tile line and that the leaking silage would percolate into the county tile line buried several feet under that office tile line. This process is reminiscent of a Rube Goldberg contraption such as the one pictured below (which begins, significantly, with a rainstorm):

² Although Petitioner has taken issue with certain detailed facts found by the Administrative Law Judge on this point, it is important to note that the daisy-chain of unrelated events found by

Self Opening Umbrella

PROFESSOR BUTTS TRIES TO WRITE A LETTER ON A PIECE OF FLYPAPER AND WHILE STRUGGLING TO RELEASE HIMSELF, FINDS AN IDEA FOR A SELF-OPENING UMBRELLA.
 RAIN DROPS (A) FALL AGAINST STICK (B) WHICH FORCES IRON HAND (D) TO RUB WHEEL AGAINST FLINT (E) IN EMPTY CIGAR-LIGHTER (F). FLYING SPARKS (G) IGNITE CANDLE (H) WHICH STARTS WATER IN KETTLE (I) BOILING. ESCAPING STEAM (J) BLOWS WHISTLE (K). CIRCUS MONKEY (L) THINKS WHISTLE IS MASTERS' SIGNAL TO START ACT AND JUMPS ON TRAPEZE (M) WHICH SWINGS AND CAUSES EDGE OF KNIFE (N) TO SEVER CORD (O) RELEASING TOY BALLOON (P). AS BALLOON ASCENDS ATTACHED STRING (Q) OPENS DOOR OF CAGE, RELEASING HIKLEBIRDS (R) WHICH FLY IN ALL DIRECTIONS, CAUSING STRINGS TO LIFT ENDS OF UMBRELLA. IF YOU ARE HARD UP AND CAN'T AFFORD A NEW PRUNE FOR EACH SUCCESSIVE RAIN STORM, STAY IN THE HOUSE AND WAIT FOR THE ORIGINAL PRUNE TO GET OLD AND WRINKLED AGAIN.



This daisy chain of unrelated and unanticipated events is similar to another Act of God case that the Iowa Supreme Court considered in 1922. In Brose v. City of Dubuque, 193 Iowa 763, 187 N.W. 857 (Iowa 1922) a 7 year old girl died when a during a rainstorm in Dubuque the family fled their home and ran to the house next door to escape rapidly rising waters. Unfortunately, the sewer tunnel between the homes opened up at the instant that the young girl was in the middle of her crossing. She was sucked into the collapsing tunnel and was found dead the next day many blocks away inside the sewer. The girl's family filed suit against the City of Dubuque, arguing that it was negligent in the design and maintenance of the sewer line. The Iowa Supreme court considered the City's Act of God defense and held:

After all, should it be held, under all the circumstances of this case, that the premises were dangerous, that defendant owed deceased the duty as claimed by appellant, and that the city should have anticipated that this unfortunate circumstance would occur as it did; that the heavy storm would come as it did; that the water would undermine the sod over the sewer; that deceased and her relatives should cross the lawn for safety; that, at the very time deceased was over the sewer, it would cave in under her; that, because of the failure of defendant to fence or barricade, or even to permit the sewer to become obstructed by rocks, brush, etc., at Schillers, some distance below, or even the failure of the city to obstruct by grates, the intake at the lower end of these lots, and that thereby deceased lost her life, or, rather, was there a question for the jury in regard to these matters? We think not. On the contrary, we are of opinion that, under this

the Administrative Law Judge is not materially challenged.

entire record, the accident was one of a class so rare, unexpected, and unforeseen that defendant cannot be charged with negligence of which plaintiff can complain, for failure to guard against it.

Brose v. City of Dubuque, 193 Iowa 763, 187 N.W. 857, 861 (Iowa 1922). In both the present case and the Brose case, the initial event was a rainstorm. In addition, it took a chain of unrelated events, in both cases the failure of tunnels or tile lines that led to an unfortunate eventuality.

Taken together, the chain of events and the result meets the Oakes test for the occurrence must be “unusual or extraordinary” and something that must be such that “under normal conditions it could not have been anticipated or expected.” Rather than demonized, Mr. Branstad should be applauded for having taken actions that were not even required by Iowa law when he built the silage leachate basin and plugged the only tile line that was intersecting that basin.

B. THE DECISION ERRED BY FAILING TO FIND THAT THE IDNR INCORRECTLY APPLIED THE AMERICAN FISHERIES SOCIETY SAMPLING GUIDELINES.

Iowa Code § 481A.151(3) provides that “Rules adopted by the commission shall provide for methods used to determine the extent of an injury and the monetary values for the loss of injured wild animals based on species.” Subpart (a) of that same statute goes on to provide that “The rules shall provide for methods used to count dead fish and to calculate restitution values. The rules may incorporate methods and values published by the American fisheries society. To every extent practicable, the values shall be based on the estimates of lost recreational angler opportunities where applicable.” Iowa Code § 481A.151(3)(a).

Subpart (b) of Iowa Code § 481A.151(3) goes on to provide that “The rules shall provide guidelines for estimating the extent of loss of a species that is affected by a pollution incident but which would not be practical to count in sample areas. The rules may establish liquidated

damage amounts for species whose replacement cost is difficult to determine.”

Iowa Administrative Code further defines how to determine restitution, including: the costs per fish; the value of lost services to the public (fishing trips lost over the period of the resource loss), and; the cost of the investigation. See 571 IAC § 113.4. However, knowing that the Iowa Code’s “use value” restitution is the proper calculator does not completely answer the question on whether a methodology for determining restorative value is proper.

The Iowa Administrative Code provides that in fish loss scenarios the methodologies to be used to prove species, size, and numbers of fish killed are to be determined by methodologies provided by the American Fisheries Society (hereafter, “AFS 24”). See 571 IAC § 113.4. The methods prescribed by AFS 24 use tables with fish size and cost of replacement according to size or weight. Using these methodologies, the Iowa Natural Resource Commission determines the amount of restitution owed by a polluter who by his pollution causes injury to wild animals. Iowa Code § 481A.151. This amount also includes the administrative costs for investigating the incident. Id.

The problems with the IDNR’s fish kill count and its application of AFS 24 are so numerous that it is difficult to know where to start. As a starting point, it is agreed by all that the IDNR’s regulations cite AFS 24 as the source for the correct methodology for counting dead fish. That publication provides different methodologies for different types of streams. First, Mr. Grummer chose the wrong methodology due to a simple misunderstanding of one vital term used in that publication. Second, even if we ignore the fact that he chose the wrong methodology, he admits that did not correctly follow his own methodology. Third, because the watershed had recently experienced a large rain event, Mr. Grummer should have adjusted the methodology. Finally, because of the different habitat in the upper and lower sections of the river, Mr. Grummer should

have adjusted his methodology.

1. Summary of the Counting Methodology

The IDNR is instructed at 571 IAC 113.4 to “follow the methods prescribed by AFS to determine, by species and size, numbers of fish killed.” That publication creates different counting methodologies for the different types of streams. Here are the following categories of streams as set out in Chapter 2 of AFS 24:

1. Narrow Streams.
 - a. Narrow streams, completely accessible.
 - b. Narrow streams, incompletely accessible
 - i. Streams accessible only at road crossings (Strata I and III).
 - ii. Stream accessible at and beyond road crossings (Strata I, II, and III).
 - c. Narrow Streams with Drifting fish
2. Lakes and Wide Streams
 - a. Shoreline Counts
 - b. Open Water Counts
3. Large Meandering Streams

Each of these stream types generates the need to follow significantly different counting methodologies. As an example, in the “Narrow Stream” category there are three different types of streams, those that are completely accessible, those that are incompletely accessible, and those that are narrow with drifting fish. The second type of stream, the narrow stream that is incompletely accessible is further subdivided into two additional types of streams: streams that are accessible at road crossings and those that are accessible at and beyond road crossings.

2. IDNR Used The Incorrect Counting Methodology By Failing To Use The Narrow Streams, Completely Accessible Sampling Method.

It is beyond question that Mr. Grummer used the “Narrow Streams, Incompletely Accessible – streams accessible at road crossings and beyond” category for his count. The Administrative Law Judge specifically found that he had “characterized the river as “incompletely

accessible and applied the procedures for such a stream” Mr. Grummer stated as follows:

20 Q. And what method did you use in accordance
21 with AFS 24 for that?
22 A. The methods we used are--the major heading
23 starts on Page 20, but goes to 21. It's under narrow
24 streams, incompletely accessible. And we used
25 streams accessible at road crossings and beyond

(Grummer, T. p. 87, ll. 20-25). When asked why he used this methodology under direct examination he said “That’s the typical one.” (Grummer, T., p. 88, l. 3) He went on to say that “In Iowa we have road crossings that, you know, go over these streams, and that’s the most frequently used.” (Grummer, T., p. 88, ll. 3-5) This is a telling statement. Mr. Grummer reveals that he decides on the methodology based on the presence of road crossings. However, that characteristic is not a basis under AFS 24. In the opening paragraph describing “Narrow streams, completely accessible” it provides: “When streams are completely accessible for the entire stretch affected by a kill, it is practical to count any designated segment.” (Exhibit N, p. 19). The fact that there may be roads crisscrossing a completely accessible stream does not convert that stream into an “incompletely accessible” stream. Likewise, the accessibility of a stream is not dependent on the presence of a bridge. Under Mr. Grummer’s backwards reasoning, a completely accessible stream would only be a stream that had nothing but bridges every one hundred feet or so. This is clearly not the intent of AFS 24.

If Mr. Grummer and his team had followed the methodologies set out in AFS 24, then the following are just a small sample of the tasks that they would have performed:

- In a preliminary trip through the affected section of stream, stake out segments that are varied in length so that each includes about the same number of fish. “This practice improves precision.” (AFS 24, p. 21)

- Establish the interval between the segments to be examined: a 100-yard segment every half mile or a 100-meter sample segment every kilometer throughout the area of the kill.
(Id.)

It is after following these methods that AFS 24 instructs the counter to expand the number of fish counted in each segment to the whole length of affected stream by either multiplying the average count per sample segment by the total number of segments or by multiplying the total number counted in the sample segments by an expansion factor.

In his testimony, it was clear that Mr. Grummer did not follow the AFS 24 guidelines. He did not conduct a preliminary trip in which he staked out segments and he did not establish a standard interval between segments. Instead, he chose the methodology for “Narrow streams, incompletely accessible.”

3. IDNR used the incorrect definition of an “Inaccessible Stream.”

When asked how he defined an “inaccessible stream”, Mr. Grummer stated “The way the AFS publication defines inaccessible doesn’t mean it’s physically inaccessible, it means that you’d have to seek permission to go back in and traverse quite a ways off a roadway. That’s why the protocol that we use is accessible at road crossings and beyond.” (Grummer, T. p. 158, ll. 14-20). *This definition does not appear in AFS 24.* Despite Mr. Grummer’s assertion to the contrary, AFS 24 does, in fact, define inaccessible areas in terms of physical access. “In undeveloped areas, passage of the biologist on foot or in a boat may be impeded by heavy vegetation, fallen timber and logjams, or wetlands.” (Exhibit N, p. 43). Even when an area is, in fact, inaccessible in an otherwise accessible stream, AFS 24 states “Although partial inaccessibility prevents completion of a sampling survey for the entire area, it should not discourage use of random sampling in the accessible areas.” (Exhibit N, p. 43).

This definition does not help bolster the IDNR's contentions because there is nothing in the record to indicate that Mr. Grummer and his team faced any obstacle to traversing the length of the Winnebago River in a boat or on foot.

Even if the definition of inaccessibility was based on the need to seek permission, the record clearly shows the IDNR not seek permission. Moreover, the IDNR actually did not need permission, and, moreover, the IDNR accessed private property in the 200 yard strata outside of the bridges without even seeking permission. Mr. Grummer was caught in a catch-22 of his own making. Later, he first claimed that he was unable to consider the Winnebago River to be completely accessible because he would have had to seek permission. However, he had to admit that his team had gone up and down the river to measure the 200 yard strata near bridges without seeking any permission! He and his team were either trespassing when they conducted the vast majority of their counts or there was no legal impediment whatsoever. On further cross-examination counsel for Branstad asked Mr. Grummer how he legally justified extending their fish kill count walks in the river and along the bank outside the road easements. It took some questioning, but Mr. Grummer finally admitted that he really did not need permission:

- 14 Q. Now, there wasn't anything magic about the
15 200 yards that you tested or counted and the next 200
16 yards other than the fact that it's just 200 more
17 yards down?
18 A. Right; that's correct.
19 Q. I mean if, as you say, this was not a
20 meandered stream, you don't have permission to go in
21 the river, you don't have permission to go anywhere
22 according to that, do you? Even if it's outside the
23 right-of-way of the bridge, you're trespassing?
24 A. Yeah. The way I've been told and taught
25 through our field office staff is we have the right

1 to go anywhere in that stream.
2 So I theoretically could have sought

3 permission and went clear back in the middle of any
4 section because we're doing an investigation under
5 that Code section. I don't know exactly how it's
6 referenced, but we have the authority to do that.
7 Q. Right. So it's only fishermen that need to
8 get permission on a nonmeandered stream, it's not the
9 DNR?
10 A. It's anybody other than under an
11 investigation on a proceeding.

...

24 Q. So when you talk about inaccessibility from
25 a legal standpoint you really don't have a

1 restriction on it, you can go anywhere on that stream
2 because you have the legal right to do it?
3 A. Right. It's accessible at the road and
4 beyond.
5 Q. Okay. And 100 yards, 200 yards, I mean as
6 you go down you can—it may take you some extra work,
7 but you have the right to go there; right?
8 *A. Correct.*
9 Q. So if you have the legal right to go there
10 and even though it may be a hike, if it's still
11 accessible by way of a road crossing, you could have
12 set up more random sampling all along that 16.1 miles
13 in order to meet the AFS 24 requirements?
14 *A. Correct.* What we did is extended the length
15 on what I would consider a normal investigation to
16 survey more of that unmeandered area.

(Grummer, T. pp. 159-161, emphasis supplied). In Mr. Grummer's last comment he mentions the concept of meandered rivers. This is the legal proposition that the State of Iowa only owns the land under meandered rivers. The Winnebago River is not a meandered river. However, this is only relevant for individuals, such as fishermen, who are not employed by the IDNR and engaged in an ongoing investigation. It is clear from Mr. Grummer's testimony that he had the legal authority to enter the river to conduct his investigation. Mr. Grummer's testimony also touched on

another concept. Fishermen also have the right to *float* down a river. This legal principal is set out in the Iowa Code. Iowa law states:

Water occurring in any river, stream, or creek having definite banks and bed with visible evidence of the flow of water is flowing surface water and is declared to be public waters of the state of Iowa and *subject to use by the public for navigation purposes in accordance with law*. Land underlying flowing surface water is held subject to a trust for the public use of the water flowing over it. Such use is subject to the same rights, duties, limitations, and regulations as presently apply to meandered streams, or other streams deemed navigable for commercial purposes and to any reasonable use by the owner of the land lying under and next to the flowing surface water.

Iowa Code § 462A.69 (emphasis supplied). Therefore, Mr. Grummer not only has the right to float down the river as any other member of the public, but he has the legal right to traverse the streambed as an investigator. Not only is there no legal impediment to investigating the river, but AFS 24 does not include legal access as a reason to deem a physically accessible river in an undeveloped area an “inaccessible river.”

Additionally, Mr. Grummer even admitted on cross-examination that he had not sought anyone’s permission to get in the Winnebago River:

8. Q. Now, accessible, you could ask permission to
9. get in the river; right?
10. A. Definitely.
11. Q. Did you seek anyone’s permission to get in
12. the Winnebago River along—as part of this
13. investigation other than Mr. Ouverson already giving
14. you permission?
15. A. No.

(Grummer, T. 117, ll. 8-15).

The fatal flaw in the IDNR’s sampling methodology is that there is nothing in the record to support any claim by the IDNR (assuming that it were to raise the claim) that there was some reason that the fish kill counters could not have either used bridge access points to gain quick

access to a randomized sampling of the river or gotten in a boat and gone up or down the river to reach those samples. The AFS 24 sampling protocol for narrow streams that are completely accessible only requires one 100 yard segment for every half mile. The extra trouble would have been incremental.

Despite these conclusions, the Administrative Law Judge summarily held that “private property and trespass considerations do figure into the stream classification. The cost and remoteness of the fish count also factor into the investigator’s decision.” (Proposed Decision, p. 17). First, as a state investigator, Mr. Grummer is not encumbered by the same impediments that a fish kill counter employed by a private party might face. Remember, the AFS 24 is a private publication. It was adopted by state law and regulation to take the place of separately promulgated regulations. Second, cost issues should not enter into the picture. The cost of the investigation is assessed against a party that is found to be legally liable for the fish kill. The IDNR should not be allowed to cut corners when counting fish kills and then say that it is a “gift” to the defendant.

Once we remove legal impediments from the definition of a partially accessible stream, then the question is whether there was a physical obstruction that prevented a proper sampling of the river. As noted above, Two of Mr. Branstad’s own fish kill counters managed to cover nearly half of the 16 mile distance in a boat. (Exhibit 21) The two boaters, Ron Ambrosion and Gary Taylor, are not youngsters. Even at their middle and advanced age, they were able to cover a large segment of the river. Surely, the IDNR’s fish kill counting team could have done as well in a boat or, more likely, even much better. It is worth noting that Ron Ambrosion and Gary Taylor managed to do their boating on the upper reaches of the Winnebago River which is more “muddy, shallow and turbid” than the lower half. (Grummer, T. p. 166, l. 22) In other words, they tackled the hard part.

The excuse offered by the Administrative Law Judge just does not hold water. The Court should reject this wholesale relabeling of the proper method that is supposed to be used to count fish.

4. The IDNR's Sampling Methodology Cannot Be Salvaged To Meet The Requirements Of AFS 24 For Sampling Narrow Streams That Are Completely Accessible.

Because Mr. Grummer chose to use the wrong methodology, he had to break his fish kill count down into different strata. The fish count methodology for "Narrow streams, completely accessible" does not use strata. When asked on cross-examination if he agreed that if the stream was totally accessible, there is no stratum III, he responded by saying that "Yeah, when it's completely accessible." (Grummer, T. p. 158, l. 10)

The IDNR's sampling methodology was deficient in other areas. AFS 24 recommends a randomized sample every hundred yards for each half mile of stream. First, the sampling chosen by the IDNR was not randomized. Bridge crossings and alternating (upstream downstream) 200 yard segments were chosen as the sampling points. This resulted in fewer sampling segments. On cross-examination, Mr. Grummer admitted that his sampling method did not meet the AFS 24 standard:

1 Q. For a 16-mile segment if you follow the
2 hundred yards for a half mile recommendation of the
3 AFS 24 that would be a total of 32 samples?
4 A. Yeah, depending on the length. But, yeah,
5 you could do 32.
6 Q. I'm just doing the math here of 16 miles
7 divided in half or multiplied by 2 is 32?
8 A. Yeah.

...

21 Q. And you would agree that you didn't meet the
22 recommendation of AFS 24 to do on average 100 yards

23 per half mile?
24 A. Yeah, we were a little less than that.

(Grummer, T. p. 162) The only reasonable conclusion is that the sampling method that was used by the IDNR cannot be salvaged as it does not fit the sampling protocol that was required to be followed by the regulations.

5. The IDNR's Sampling Methodology Also Failed To Meet The Requirements Of AFS 24 For Sampling Narrow Streams That Are Incompletely Accessible.

The sampling method chosen by the IDNR was described by fish kill counter Scott Grummer as "Stream accessible at and beyond road crossings (Strata I, II, and III)." While it is true that the fish kill data sheets (DNR Exhibit P) demonstrate an attempt to fit the sampling method into this method with the inclusion of all three strata, the fact is that Mr. Grummer threw in an additional, non-random sample.

8 Q. Now, you would also agree--I'll give you a
9 hint, I asked you this question in your deposition--
10 you'd also agree that by testing IIG at the Ouverson
11 location that you actually broke the randomized
12 pattern you had set for selecting the samples of your
13 fish kill counts?

14 A. Correct.

15 Q. I think you called--you admitted that it
16 "breaks the pattern"?

17 A. Yes

18 Q. Now, that's responsible for more than 11 or
19 12 thousand dollars if you take that out of the
20 equation?

21 A. Yeah, if you take that count out completely.

22 Q. That drops your Exhibit--I can't remember
23 which one it was, I think R.

24 THE ADMINISTRATIVE LAW JUDGE: S.

25 Q. It would drop it from \$61,448 to \$47,212.

1 That's Exhibit S. I think that's the final version
2 of your count, your fish kill less liquidated damages
3 calculation?

- 4 A. Yeah. I don't see the exhibit that shows
5 the 47,000.
6 Q. Right. That's an e-mail you sent.
7 A. Yeah; correct.
8 Q. You're not contesting that? It's part of
9 the exhibit?
10 A. Yeah.
11 Q. You admit that would be correct?
12 A. Yeah.

(Grummer, T. p. 153-154). It is important to note that by breaking the pattern, there was not only a large monetary effect (because this was one of the larger areas involving a fish kill (Grummer, T. p. 128 ll. 11-14)) by reducing the charge by \$14,236, but that this invalidates the entire count. It is not possible to reconstruct a scientifically-based study by simply throwing out the counts that are invalidly included. The entire process is necessarily tainted.

Another problem with adding this location to the other counting locations is that in addition to breaking an allegedly random pattern, it was invalid to begin with. Stratum II sections are by definition “accessible portions of the stream beyond the immediate influence of road-crossing structures.” The intent is obviously to avoid areas that may be collecting dead fish as they would throw off the statistical sampling. On cross-examination, Mr. Grummer admitted that he failed to randomize the sample and started at an area that might naturally collect dead fish:

- 2 Q. And you are aware, are you not, that there's
3 a rock rapids or ripple behind his house?
4 A. Yes.
5 Q. And you started your fish investigation at
6 that house; correct?
7 A. Yes.
8 Q. You conducted a fish count at that location?
9 A. On his property, yes.

(Grummer, T. p. 152) Mr. Grummer went on to admit that a rock ripple can disrupt the flow of water:

2 Q. And I know that a bridge is not the same as
3 a dam and a dam is not the same as a rock ripple, and
4 that's not the same as a tree obstruction, but you
5 would agree with me that all of those can disrupt the
6 flow of water?
7 A. They change the current; correct.

(Grummer, T. p. 153, ll. 2-7)

In Mr. Grummer's deposition, which was entered into evidence in the case, Mr. Grummer even admitted that the rock ripple could be the remains of a Native American fish weir.

(Grummer Deposition, p. 81-82, ll. 19-25 and 1-4). A fish weir is designed to catch fish.

There are two other interesting facts related to the dead fish behind the Ouverson house. The first is the fact that of all of the sites in which it was alleged that there were a large number of dead fish found, there are no photographs of dead fish. (Grummer, T. p. 128, ll. 5-10) Second, for some inexplicable reason Mr. Grummer was reluctant to admit that Mr. Ouverson was a close personal friend.

2 BY MR. PRAY:
3 Q. Mr. Grummer, you testified that Dan Ouverson
4 called you about the fish kill?
5 A. That's correct.
6 Q. Is he a personal friend of yours?
7 A. He's an acquaintance through Pheasants
8 Forever. I mean I know him, talk to him a couple
9 times a year.
10 Q. So you wouldn't say he's a personal friend?
11 A. We don't see each other or talk to each
12 other on a frequent basis, no.

(Grummer, T. p. 111) It was only under further cross-examination that Mr. Grummer confirmed that in his earlier deposition he had admitted that he had described Mr. Ouverson as a "personal friend." (Grummer, T. p. 151, lines 1-18) Why is this a significant fact? Perhaps it is because Mr. Grummer was so familiar with that particular site that had that familiarity been known, it

would have been obvious that he would have been fully familiar with the fact that there was not only a rock rapid or rock ripples at that location but also a structure across the water. (Exhibit 26)

6. The IDNR Does Not Have A Valid Educational Method.

The inconsistencies and errors made by the IDNR appear to be systematic and ingrained. There is a reason for this. The IDNR is simply not properly training its fish kill counters. It is the distinct lack of training that Mr. Grummer received in the fish kill counting area that accounts for the errors that have been listed above. Mr. Grummer's training included one hour's worth of training in 1995 at the Spring Brook Education Center. (Grummer, T. p. 112, ll. 5-9). This was two years before he even began working for the IDNR in a full time capacity. Since that training seminar, he has attended one additional one-hour refresher course. (Grummer, T. p. 113, ll. 6-13). There are no tests administered in the training seminar to make sure that the attendees are even paying attention. (Grummer, T. p. 113-114, ll. 23-25, 1-4) It does not matter how many times he has counted fish. Fish kill counting is not a skill, it is learned. If someone is taught that two plus two equals five, then endlessly repeating the wrong answer will not make the student better at adding. If Mr. Grummer never properly learned the procedure for counting fish, then it is unlikely that he knows how to count fish properly no matter how many times he keeps doing it. The guideline that Mr. Grummer was supposed to follow was AFS 24. Repeatedly doing it wrong does not make it right.

7. The IDNR failed To Account For The Different Habitat on the Western Reaches of the Winnebago River.

It is clear from the testimony of all of the witnesses that discussed the issue of habitat that the western section of the Winnebago River has a different fish habitat than the eastern section.

Even Carl Berg, who was taking water samples in the Winnebago, testified that he found zero dead fish in this part of the river:

- 16 Q. Do you find or do you have any listing in
17 your notes as to dead fish anywhere west or upstream
18 from Taylor Avenue?
19 A. I don't believe so.
20 Q. Okay. So the western half, the western
21 portion of this of the Winnebago from about Taylor
22 you just didn't see any dead fish from that point on?
23 A. I don't believe so.

(Berg T. 61, ll. 16-23) When Scott Grummer was questioned regarding the habitat differences between the western and eastern halves of the Winnebago River he readily admitted that the western section was not as hospitable to fish:

- 20 Q. Is that characteristic of the Winnebago in
21 that area like around Forest City? Is it kind of a
22 muddy, shallow, turbid--
23 A. Yeah.
24 Q. --stream?
25 A. The bottom substrate pretty much above

1 Forest City is all earth and bottom. And then
2 between Forest City and Fertile I would consider it a
3 mix of mud to some sand and occasional rock
4 outcroppings. And then below Fertile, then we see a
5 lot more rock in the stream bed.
6 Q. Does the water habitat, fish habitat,
7 improve as you go downstream?
8 A. From what point to what point?
9 Q. Well, let's say from Forest City as you head
10 to Mason City.
11 A. Definitely.
12 Q. Definitely. You don't hesitate?
13 A. No, it's really good habitat when you get
14 over towards Mason City. That's why they have cement
15 plants and lime quarries over there.
16 Q. Okay. All right. So what is-- So the
17 limestone, the rock bottoms, that increases fish
18 habitat?
19 A. It increases habitat diversity; therefore,

20 you increase fish diversity.

(Grummer T. 166, ll. 20-25, 167, ll. 1-20). However, Mr. Grummer made no effort to modify the fish kill count methodology. Had he used the proper technique called for in AFS 24 he might have avoided some of the statistical effects of this failure (but not all). As it was, he persisted in using the “incompletely accessible” sampling technique. With both the added fish kill from the Ouverson farm used as part of the expansion factor and the extra miles from the western leg of the Winnebago added to the expansion factor the result is a gross exaggeration of the number of dead fish.³

C. THE DECISION IS IN ERROR BECAUSE THE DEPARTMENT FAILED TO PROVE CAUSATION.

Iowa Code § 481A.151 sets forth the statutory basis for the Department’s assessment:

1. A person who is liable for polluting a water of this state in violation of state law, including this chapter, shall also be liable to pay restitution to the department for injury *caused* to a wild animal by the pollution. The amount of the restitution shall also include the department's administrative costs for investigating the incident. The administration of this section shall not result in a duplication of damages collected by the department under section 455B.392, subsection 1, paragraph “a”, subparagraph (3).

Iowa Code § 481A.151(1) (emphasis supplied). The statute uses the crucial term “caused.” This means that the Department must prove that it was the silage from Mr. Branstad’s farm that caused the death of the fish that were found by the IDNR. In other words, the Department must still show that Mr. Branstad was the proximate cause of the fish kill.

Although Mr. Branstad signed the Consent Order, Judgment and Decree (“Order”) (filed

³ The testimony of the lay witnesses and fisherman confirms that the western leg of the Winnebago River is lacking in fishing opportunities and good habitat. Mr. Torkelson testified that he has never seen a bass west of Fertile. (Torkelson, T. p. 256, ll 7-11). Mr. Edward Branstad also testified that he has never seen a bass in the river. (E. Branstad, T. p. 271, l. 24). Mr. Ambrosion testified that he is not familiar with game fish other than carp and bullheads being caught in the Winnebago.

into the record as Exhibit “J,”) on the civil penalties case, it needs to be made clear that this Order, while Mr. Branstad admits that a release of corn silage did occur, he: (1) entered the Order “to avoid the expense of proceeding to trial”; (2) “denies that the discharges admitted herein caused the death of fish in the Winnebago River”; and (3) “reserves the right to contest any claim for damages brought by the DNR, pursuant to Iowa Code section 481A.151 and 571 Iowa Admin. Code chapter 113, arising from the discharges admitted herein.”

The Iowa Supreme Court requires strict proof of causation in environmental cases. In Gerst v. Marshall, the Iowa Supreme Court wrangled with a claim regarding a petroleum leak from underground gas storage tanks. See Gerst v. Marshall, 549 N.W.2d 810, 812-13 (Iowa 1996). The plaintiff’s suit was based on Iowa Code section 455B.111. Id. at 814. To recover, the plaintiffs had to show causation, or that the defendant’s conduct in-fact caused the plaintiff’s damages and that they were also legally responsible for the injury. Id. at 815. To show cause-in-fact the claimed injury must be traceable to some degree to the defendant. Id. (citing Swaim v. Chicago, R.I. & P. Ry., 174 N.W. 384, 386 (Iowa 1919); Gould v. Schermer, 588, 70 N.W. 697, 699 (Iowa 1897)). To show legal causation, the plaintiff must prove the defendant’s conduct was a substantial factor in bringing about the injury, and no rule of law exists to relieve the wrongdoer. Id. at 816 (citing Restatement (Second) of Torts § 431 (1965)).

A foundational requirement for legal causation is that there must be some connection between the defendant’s conduct and the event or injury for which damages are sought. Id. at 817-18 (citing Callahan v. Cardinal Glennon Hosp., 863 S.W.2d 852, 860-62 (Mo. 1993) (en banc)). For example, looking at Iowa law, for a land owner to be liable for cleanup costs under Iowa Code section 455B the Department of Natural Resources (“DNR”) or a private citizen

(Ambrosion, T. p. 229 ll. 12-17).

“must prove the owner generated the contamination.” Alladin, Inc. v. Black Hawk Cnty., 562 N.W.2d 608, 615 (Iowa 1997) (citing Iowa Code § 455B.186; Blue Chip Enters. v. State of Iowa Dep’t of Natural Res., 528 N.W.2d 619, 627 (Iowa 1995)). Referring generally to the property owner’s due process rights “[a] property owner has a right to have its liability established in a legal proceeding in which the owner has the opportunity to show that the owner did not cause the water pollution or hazardous condition.” Id. It would be equally proper for the State to prove that it was Mr. Branstad which produced the contamination, *and* that it was that contamination which killed the fish.

State and federal law can differ in the causality requirement when it comes to environmental pollutants. In state environmental cases, causation is something that cannot be ignored. However under federal law, specifically the Comprehensive Environmental Response, Compensation, and Liability Act (“CERCLA”), most courts have held a plaintiff need not prove “a causal connection between the release of a defendant's hazardous substances and the plaintiff's cleanup costs.” Gerst, 549 N.W.2d at 814 (internal citations omitted). However, in Gerst, the court stated the plaintiff’s case was based upon a state claim, not CERCLA, an Act drafted specifically to exclude the need for causation. Id. The court ultimately held that a citizen's claim brought under the state law could not rely on CERCLA and that causation was an element. Id.⁴

⁴ Other states have dealt with the issue of hazardous discharges and their connection to the contamination of surrounding areas. In interpreting the New Jersey’s Spill Act, a New Jersey Court stated “some nexus between the use or discharge of a substance and its contamination of the surrounding area is needed to support a finding of Spill Act liability.” N.J. Dep’t of Env’tl. Prot. v. Dimant, 14 A.3d 780, 788 (N.J. Super. Ct. App. Div. 2011) (citing New Jersey Turnpike Authority v. PPG Industries, Inc., 197 F.3d 96, 106 (3d Cir.1999)). The court held that the plaintiff had a burden to show the defendant had some connection to the damages caused by the environmental contamination. Id. In Michigan, liability is imposed upon the owner or operator who is responsible for *actively causing* a release or threat of release. Gallagher v. Richfield Equities, LLC, No. 283246, 209 WL 997298, at *4 (Mich. Ct. App. 2009) (quoting MICH. COMP.

Looking specifically to the facts in this case, the Department has the burden to prove a causal link between the actions of Mr. Branstad and the dead fish found in the waters. The case law indicates that more than just a “smell” is required. The IDNR did not present substantial evidence to prove that silage from Mr. Branstad’s property first leached into the ground, was then absorbed into the public waterways, and finally, was the cause of the fish kill.

Even in common-law strict liability cases, Iowa courts “have consistently required that the defendant's actions be a proximate cause of the plaintiff's damages.” Hagen v. Texaco Refining & Marketing, Inc., 526 N.W.2d 531, 537 (Iowa 1995). In Hagen, the Iowa Comprehensive Petroleum Underground Tank Board intervened in a civil action to recover cleanup costs paid by Petroleum Underground Storage Tank Fund. The Fund filed a motion for partial summary judgment. The statute involved in that case specifically provided that the “standard of liability for a release of petroleum ... is strict liability.” Iowa Code § 455G.13(7). The court still required that causation be proven:

We presume the legislature understood when it used the term "strict liability" that we have traditionally included a causation component in this theory of liability. Therefore, we conclude that in order for the Board to establish the responsibility or liability of a potentially responsible party, the Board must prove that the actions of that party were a proximate cause of the release of petroleum for which the Board expended cleanup funds.

Hagen, 526 N.W.2d at 537.

Similarly, in Blue Chip Enterprises v. State Dept. of Natural Resources, 528 N.W.2d 619 (Iowa 1995), the Iowa Supreme Court ruled that the causation requirement found in Iowa Code § 455B.392(1)(a) requires that the Department prove causation in cases involving alleged violations of Part 1 of Division III which concern water quality. The court ruled in applicable

LAWS § 324.20126(1)(a)) (emphasis added).

part:

The agency urges that section 455B.392(1)(a) is not applicable in the present case because (1) it only applies to situations in which the state is seeking to recoup cleanup costs already incurred, and (2) it only affects agency action taken under Part 4 of Division IV of chapter 455B dealing with hazardous substances. It argues that its action in the present case is based upon section 455B.186 (located in Part 1 of Division III dealing with water quality) and thus subject to administrative sanctions specified in section 455B.175 without regard to any limitation found in section 455B.392(1)(a).

. . . we conclude that section 455B.392(1)(a) accurately reflects the policy of the state with respect to cleanup costs that may be imposed for the violations alleged in this case. The agency's order requiring implementation of a remedial action plan to abate and eliminate the soil and groundwater contamination must be limited to the extent of contamination caused by each appellant.

Blue Chip, 528 N.W.2d at 623-624. (emphasis supplied)

Finally, in determining whether damages have been sustained or not, speculation and uncertainty proscribes recovery. Orkin Exterminating Co. v. Burnett, 160 N.W.2d 427, 430 (Iowa 1968). A plaintiff cannot recover on overly speculative damages. Schiltz v. Teledirect Int'l, Inc., 524 N.W.2d 671, 675 (Iowa App. Ct. 1994) (citing Jamison v. Knosby, 423 N.W.2d 2, 7 (Iowa 1988)).

1. **The IDNR failed To Account For The Effects Of The Three and One-Half Inch Rain.**

It is clear that the 3.4 inch rain played two related roles in this case. (Grummer T., 165, ll. 2-7) First, the massive rain caused the silage basin to discharge silage. Though Branstad and the IDNR witnesses differ in their recollection or testimony regarding the exact mechanism of the release, nobody disputes the fact that, but for the rain event, the silage would not have discharged. Second, the rain necessarily pushed a surge of water down the river, leaving dead fish on mudflats, sandbars, and in and around bridges. That surge of water necessarily included runoff from

innumerable fields and cattle operations along the river.

Mr. Grummer admitted that the rain would have substantially increased the water level:

19 Q. Is there anything-- Strike that. You
20 testified that it's not surprising to find dead fish
21 downstream of a release of contaminant; right?
22 A. Correct.
23 Q. In fact, you found dead fish at Fertile dam;
24 correct?
25 A. That's correct.

1 Q. Those fish could have died anywhere along
2 the river upstream, as well as downstream; correct?
3 A. That's certainly possible, yes.
4 Q. This three-and-a-half-inch rainfall event would
5 have risen the water levels significantly; correct?
6 A. Yes.
7 Q. And it would have pushed carcasses
8 downstream; right?
9 A. That's correct.

(Grummer T., 117, ll. 19-25; 118, ll. 1-9)

Mr. Grummer also admitted that his sampling methodology did not take into account the effect that this rain would have had:

23 Q. Now, in treating your sampling method you
24 didn't take into account the fact that there had been
25 a major rain event just hours before, did you?

1 A. Not for the sampling method, no.

(Grummer T., 118, ll. 23-25; 119, l. 1) He also stated:

9 Q. Now, if you knew that--we'll call it a rise
10 in the water level event would throw off the numbers,
11 you're going to tell the Administrative Law Judge
12 you're not going to deviate from your AFS count
13 strategy?
14 A. I have no knowledge that it's going to
15 change the numbers by having a rain event. It's the
16 same number of dead fish. It may spread them out
17 over a greater distance.

- 18 Q. Exactly. And you had 16.1 miles; right?
19 A. That's the distance from where Silver Creek
20 enters the Winnebago to the Fertile dam; correct.

(Grummer T., 120, ll. 9-20)

The applicable regulation at 571 IAC 113.4(2) (Exhibit M) states:

571—113.4(481A) Assessment. When wild animals are destroyed or injured by an identifiable source of water pollution, the degree and value of the losses shall be assessed by collecting, compiling, and analyzing relevant information, statistics, or data through prescribed methodologies to determine damages, as set forth in this rule.

113.4(1) General. For species other than fish, the professional judgment of fish and wildlife staff and available literature and guidance normally relied on in the fish and wildlife professions may be used to assess the injuries.

113.4(2) Fish loss. Assessment of damages for fish kills shall be in accordance with the following:

a. Normally investigators will follow the methods prescribed by AFS to determine, by species and size, numbers of fish killed.

b. During periods of ice cover, where local conditions prevent using the methods in “*a*” above, or in other appropriate circumstances, for example, when the resources are known to have been diminished by prior incidents, investigators will utilize the best information available to determine, by species and size, numbers of fish killed. Information may include existing or prior data on population levels in the affected water body or a nearby water body with similar characteristics, including any historical fish kill data.

571 IAC 113.4(2). Because of the large rain event, the fish kill counters had regulatory authority to consider the effect that such an event would have had on the “expansion factor” and the proper sampling technique. However, the IDNR admits that it made no such adjustment and in fact ignored the obvious effect that the rain event had.

2. The IDNR failed To Account For other Possible Causes of the Fish Kill.

Very early in the investigation, the IDNR spoke to a local law enforcement official who

pointed the team to Monty Branstad's farm as a possible source of a silage discharge. Mr. Branstad does not dispute that he had a release of silage from his farm. However, following such a large rain event the IDNR should have investigated other potential sources of contamination. To target Monty Branstad without any additional follow-up shows a total lack of investigatory interest on the part of the IDNR. At a minimum, they should have inquired as to other farms as potential sources. The only other source that the record shows that they considered was the sewage treatment plant in Forest City. Had they made an effort to conduct a proper investigation then they may have found additional sources. As it is, we will never know exactly what other farms may have actually contributed contaminants to the river. It needs to be kept in mind that poor water quality was found in the entire 16 mile stretch of the river. That is a lot of water to attribute to a single farm, especially when considering the large rain event two days before.

Had the IDNR investigators looked, they would have found that there are numerous other farms in the area. Several cattle farms and farms with silage that were mentioned by the lay witnesses called by Branstad include:

- Chris Hagen Farm (Cattle and Silage) (Torkelson, T. p. 263 l. 11)
- Lyle Jepson farm (Branstad, T. p. 200, l. 25)
- Heid Farm (Silage) (Torkelson, T. p. 263 l. 11)
- Bob Ouverson (Cattle Silage) (Torkelson, T. p. 263, l. 5)
- Richardson Farm (Cattle) (Torkelson, T. p. 264, l. 1-2)

Mr. Torkleson testified that both the Heid farm is close to the Ouverson farm and that both handle cattle and silage. (Torkelson, T. 267, ll. 17-25). Those farms are in and around some of the largest collections of dead fish near the Ouverson farm (Site 1). However, the IDNR made

no effort whatsoever to investigate those sites as potential causes or contributors to the fish kill. Instead, the IDNR rushed to judgment and decided that the full assessment would be made against Mr. Branstad. The IDNR was so quick to level its accusation that it even released a press release estimating the fish kill dollar figures before the fish kill calculations had even been completed. The press release (Exhibit 23) issued on August 30th announced that “DNR biologists are expecting the final tally to be at least in the tens of thousands.” An e-mail (Exhibit 24) between Mr. Grummer and the press agent for the IDNR confirms that Mr. Grummer was just beginning his calculation on that same day, September 2nd, several days after the press release went out. This “Carnac Moment” is a good indication that the IDNR had already made its mind up as to both the cause and the amount of damages that would be involved.

D. THE DECISION SHOULD BE REVERSED AS EITHER THE STATUTE OR RULES RELIED UPON BY THE DEPARTMENT ARE UNCONSTITUTIONALLY VOID FOR VAGUENESS OR IN THE ALTERNATIVE ARE UNCONSTITUTIONAL AS APPLIED.

Iowa Code section 17A.19(10)(a) allows a court to grant relief from agency action if the action is “[u]nconstitutional on its face or as applied or is based upon a provision of the law that is unconstitutional on its face or as applied.” Iowa Code § 17A.19(10)(a). Under the doctrine of separation of powers, it is the judiciary and not the administrative agencies of the executive branch that is required to determine the constitutionality of legislation and rules enacted by the other branches of government. Luse v. Wray, 254 N.W.2d 324, 327 (Iowa 1977). Courts do not give any deference to the view of the agency with respect to the constitutionality of a statute or administrative rule, because it is exclusively up to the judiciary to determine the constitutionality of legislation and rules enacted by the other branches of the government. Iowa Code § 17A.19(11)(b). When a party raises constitutional issues in an agency proceeding, review is de

novo. ABC Disposal Systems, Inc. v. Department of Natural Resources, 681 N.W.2d 596, 604-605 (Iowa 2004).

This brief has already outlined the fact that subpart (a) of Iowa Code § 481A.151(3) provides that "The rules shall provide for methods used to count dead fish and to calculate restitution values." And that "The rules may incorporate methods and values published by the American fisheries society. Iowa Code § 481A.151(3)(a). The rules promulgated by the Department at the direction of the legislature 571 IAC 113.4(a) state that "normally investigators will follow the methods prescribed by AFS⁵ to determine, by species and size, numbers of fish killed." There are exceptions for ice cover or local conditions that may require the investigator to resort to prior data on population levels. 571 IAC 113.4(b). Those exceptions were not argued or utilized by the Department in this case.

Petitioner has already outline a number of ways that the investigator in this case failed to follow the AFS procedures. The Department can either argue that the Department's investigator did not deviate from the AFS publication or the Department can argue that the AFS does not have to be strictly followed. To the extent that the Department bases any deviations from the AFS on a position that the AFS does not need to be strictly followed then the Department's action has the effect of violating the Iowa and United States Constitutions.

"It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined" in part because such laws breed arbitrary and discriminatory enforcement. Grayned v. City of Rockford, 408 U.S. 104, 108 (1972). Indeed, "[i]t is axiomatic that due process requires fair notice of prohibited conduct before a sanction can be imposed" and

⁵ "AFS" is defined at 571 IAC 113.2 as the "Special Publication 24, " Investigation and Valuation of Fish Kills," published by the American Fisheries Society.

that "[t]his principle applies within the prison setting." Williams v. Nix, 1 F.3d 712, 716 (8th Cir. 1993). As with over-breadth challenges, "[a] party may challenge a statute on vagueness grounds by arguing either that the statute is vague as applied to the relevant conduct at issue, or that the statute is facially vague." United States v. Warsame, 537 F.Supp.2d 1005, 1017 (D. Minn. 2008).

There are three generally cited underpinnings of the void-for-vagueness doctrine under Iowa case law:

First, a statute cannot be so vague that it does not give persons of ordinary understanding fair notice that certain conduct is prohibited. Second, due process requires that statutes provide those clothed with authority sufficient guidance to prevent the exercise of power in an arbitrary or discriminatory fashion. Third, a statute cannot sweep so broadly as to prohibit substantial amounts of constitutionally-protected activities, such as speech protected under the First Amendment.

State v. Nail, 743 N.W.2d 535 (Iowa 2007).

In this case the statute and the rule require the use of the AFS publication to set the fish kill count standards. If those standards are deemed by the Department to be so loose that the investigator does not need to follow the standards then the application of that statute is so vague that the statute and rule, as applied by the Department, violate that constitutional protections guaranteed to Petitioner Branstad. Conversely, if the court finds that the Department is warranted by the language of the AFS publication to take the position that the investigator is given wide latitude to develop his or her own guidelines and practices, then the statute and rule are unconstitutional on their face. In either instance, there has been a violation of constitutional rights.

D. THE DECISION SHOULD BE REVERSED AS THE DEPARTMENT'S ACTION VIOLATES PETITIONER'S SUBSTANTIVE AND PROCEDURAL DUE PROCESS RIGHTS UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

The arguments pointing out the defects in the fish kill methodology by the Department is incorporated by reference. If the Department's investigator is allowed to deviate from the AFS standards then the Department is violating Petitioner Branstad's substantive and due process rights. First, if the fish kill standard is continuously flexible then the public is not put on notice as to how those counts will be conducted. Second, the government is invited to apply its own arbitrary and capricious standards that will necessarily result in shifting and irrational results. Arbitrary decision making by governmental officials violates the due process rights. Reilly v. Iowa Dist. Court for Henry County, 783 N.W.2d 490 (Iowa 2010) citing, Wolff v. McDonnell, 418 U.S. 539, 571 (1974).

III. CONCLUSION

Branstad requests that the Court strike the assessment in its entirety. The chain of events that led to the spill and the outrageously large assessment is clearly an Act of God as that term is applied by the Iowa Supreme Court. The 3.4" rain event was a "force of nature." Mr. Branstad did not make it rain that day. Second, the rain event caused a chain of unrelated events that acted together to create the failure of the brand new silage leachate basin. Those events, taken together are clearly "unusual or extraordinary," the second prong of an Act of God defense. Third, the failure of his brand new basin was "such that under normal conditions it could not have been anticipated or expected." All three elements of the Act of God defense are met. The Court should reject the findings of the Commission and its administrative law judge.

Next, the Court should find that the sampling process chosen by Mr. Grummer was

simply the wrong one and that the Commission and Administrative Law Judge were wrong to approve it. Mr. Grummer should have chosen random 100 yard segments at approximately every half mile in the affected area. Instead, because he had a misunderstanding of what an inaccessible stream is he used a sampling method that involved using bridge access areas. By using the wrong methodology Petitioner Branstad is being asked to pay an amount that was not lawfully calculated. Iowa law is very clear on the methodology that should be used. The only way to get the IDNR to institute adequate training so that this error is not continuously repeated is to strike the assessment. Any other result will encourage the IDNR to continue business as usual and to potentially over assess parties.

Even if the Winnebago River had been inaccessible, Mr. Grummer still failed to correctly apply the sampling methodology because he broke his random pattern and substituted a Stratum I for a Stratum II (the Ouverson farm), greatly and materially increasing the assessment. Why he did this may be due to the fact that he was personal friends with the farmer who made that call and felt some personal obligation to include the fish in the count. It may also be because he doubted that anybody would be able to figure out that the Ouverson farm had structures (Exhibit 26) and a rock riffle that would boost the collection of dead fish. Regardless, for some reason he not only added that site but classified it as a Stratum II which meant that the fish were counted eight times due to the expansion factor.

Once a randomized sampling protocol has been breached through an error, there is no way to recreate correct numbers if enough time has passed that a new count cannot be conducted. We are obviously long past that time frame. Again, the only way to incentivize the IDNR to correctly teach and apply the sampling methodologies mandated by its own rules is to enforce them.

Another reason that the fish kill assessment should be stricken is that the IDNR did not take into account the fact that the fish kill was accompanied by a very large rain event in that watershed. A rain of 3.4 inches is a significant event that left many fish stranded on mudflats and sandbars. Those fish were counted regardless of whether they died because of the flood conditions, because they were left stranded, or if they had died from other causes and just beached there.

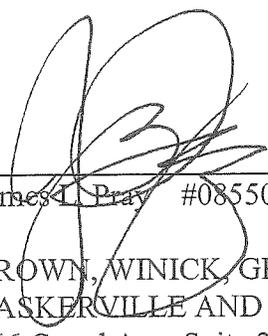
Another factor that was ignored is the fact that the upper reaches of the river is very different fish habitat. If there were no substantial numbers of fish in that part of the river to begin with, the inclusion of those empty miles into the final formulation of the fish kill count would multiply the total number of fish estimated to have died. The IDNR representatives have admitted that the habitat there is different yet no change to the sampling methodology was made. A better approach would have been to separately calculate the fish kill numbers in that part of the Winnebago River.

Finally, the fish kill assessment is flawed for other reasons as well. The IDNR must still prove causation. Branstad has assembled a number of other potential causes that should have been considered but were not. Other silage storage areas, cattle lots, and feeding operations were uniformly ignored once the IDNR had located the Branstad farm. The IDNR should have the burden of proof to prove causation. It must show at least a minimal effort to determine if other causes could have been involved in the fish kill.

The defects in the methodology outlined at length in this brief all support Petitioner Branstad's position that the Department's actions, or the statutes and rules upon which it relies are unconstitutional and violate Mr. Branstad's right to due process.

For all of these reasons Branstad requests that the Court amend the factual findings as

requested in the factual section of this Brief, and strike the assessment in its entirety.



James L. Pray #08550

BROWN, WINICK, GRAVES, GROSS,
BASKERVILLE AND SCHOENEBAUM, P.L.C.
666 Grand Ave. Suite 2000
Des Moines, IA 50309
Telephone: 515/242-2404
Facsimile: 515/323-8504
E-mail: pray@brownwinick.com

ATTORNEY FOR PETITIONER MONROE
BRANSTAD

Original served pursuant to Iowa R. Civ. P. 1.442(4):

Honorable Rustin Davenport
Cerro Gordo County Courthouse
220 N Washington Avenue
Mason City, Iowa 50401

Copy to:

David L. Dorff
Assistant Attorney General
Environmental Law Division
Lucas State Office Building
321 E. 12th St., Ground Floor
Des Moines, IA 50319

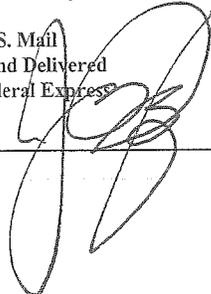
ATTORNEY FOR RESPONDENT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the foregoing instrument was served upon each of the attorneys of record of all parties to the above-entitled cause by enclosing the same in an envelope addressed to each such attorney at such attorney's address as disclosed by the pleadings of record herein on the 31st day of January, 2013.

By: U.S. Mail Facsimile
 Hand Delivered Overnight Courier (Judge)
 Federal Express Other

Signature



IN THE IOWA DISTRICT COURT FOR HANCOCK COUNTY

MONROE BRANSTAD,	)	CASE NO. CVCV019081
)	
Petitioner,)	
)	
vs.)	
	)	RESPONDENTS' BRIEF
STATE OF IOWA, ex rel., NATURAL)	
RESOURCE COMMISSION and the)	
IOWA DEPARTMENT OF NATURAL)	
RESOURCES,)	
)	
Respondents.)	

COME NOW Respondents, State of Iowa, ex rel., Natural Resource Commission and the Iowa Department of Natural Resources, and submit their Brief as follows:

TABLE OF CONTENTS

STATEMENT OF THE CASE	3
Nature of the Case.....	3
Course of Proceedings and Disposition Below.....	3
Statement of the Facts.....	3
ARGUMENT	13
I. THE AGENCIES CORRECTLY DETERMINED THAT PETITIONER IS INELIGIBLE TO ASSERT AN ACT OF GOD DEFENSE UNDER IOWA CODE	13
A. Failure to Preserve Error	14
B. No "Act of God" Defense Exists under Iowa Code Section 481A.151	16
C. The Events Leading to the Fish Kill Were Not Attributable to an "Act of God"	16
II. THE AGENCIES CORRECTLY FOUND THAT THE DNR PROPERLY APPLIED THE AMERICAN FISHERIES SOCIETY'S SAMPLING GUIDELINES	18

A.	The DNR Used an Appropriate Counting Methodology to Determine the Extent of the Fish Kill	23
B.	The DNR has a Valid Educational Method for Conducting Fish Kill Assessments	26
C.	The DNR’s Fish Kill Methodology Accounts for Different Habitat on the Western Portions of the Winnebago River	27
III.	THE AGENCIES’ DETERMINATION THAT PETITIONER CAUSED THE FISH KILL IS SUPPORTED BY SUBSTANTIAL EVIDENCE	27
IV.	THE STATUTES AND RULES RELIED UPON BY THE AGENCIES ARE NEITHER UNCONSTITUTIONALLY VAGUE NOR UNCONSTITUTIONAL AS APPLIED	31
V.	THE AGENCIES’ ACTION DOES NOT VIOLATE PETITIONER’S SUBSTANTIVE AND PROCEDURAL DUE PROCESS RIGHTS UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION	36
	CONCLUSION	38
	CERTIFICATE OF SERVICE	39

STATEMENT OF THE CASE

Nature of the Case: This is a judicial review action challenging a Restitution Assessment in the amount of \$61,794.49 levied against Petitioner Monte Branstad by the Iowa Department of Natural Resources (“DNR”) in connection with a fish kill on the Winnebago River in Hancock County in August 2008.

Course of Proceedings and Disposition Below: The DNR issued a Restitution Assessment in the amount of \$61,794.49 to Monte Branstad on June 10, 2010¹ seeking restitution for a fish kill that occurred in a portion of the Winnebago River in August 2008. The assessment was issued pursuant to Iowa Code section 481A.151 which authorizes the assessment and recovery of damages to natural resources. The assessment calculated that 31,244 fish² with a monetary value of \$61,448.47 were killed by the discharge, which coupled with investigatory costs of \$346.02, resulted in an assessed value of \$61,794.49. Branstad appealed the Restitution Assessment and a contested case hearing was held before an Administrative Law Judge on July 25, 2011. On December 6, 2011, the ALJ issued a proposed decision affirming the Restitution Assessment in the full amount of \$61,794.49. Branstad appealed the proposed decision to the Iowa Natural Resource Commission which affirmed the ALJ’s proposed decision on March 8, 2012. Branstad subsequently filed a Petition for Judicial Review with this Court on April 6, 2012.

Statement of Facts: Monroe Branstad owns and operates a cattle operation at 3018 Highway 69, Forest City, Iowa (SW ¼ of Section 24, Madison Township, Hancock County).

¹The Restitution Assessment was issued 30 days after Branstad and the State of Iowa entered into a Consent Decree in which Branstad admitted to violating Iowa Code section 455B.186(1) by discharging sweet corn silage leachate, a pollutant, into the Winnebago River on August 28-29, 2008. *DNR Ex. J.*

²This works out to approximately one dead fish per every two and one half linear feet of the 16.1 mile fish kill.

At the time of the incident, the operation had 900 head of cattle in open lots and 200 head of cattle in confinement buildings. *DNR Exs. I and K.*

On August 28, 2008, Scott Grummer, DNR Fisheries Biologist 2, was notified of dead fish in the Winnebago River at 4582 - 335th Street in Cerro Gordo County, Iowa. Grummer called the emergency spill hotline and notified Dale Adams, DNR Field Office 2 Environmental Specialist, of the fish kill. Grummer and Adams arranged for DNR Field Office 2 personnel to meet Grummer the following morning near Fertile, Iowa. *DNR Exs. B, I, K, and O.*

On August 29, 2008, Carl Berg, DNR Field Office 2 Environmental Specialist, and Clay Swanson, DNR Field Office 2 Environmental Specialist Senior, met Grummer and began the investigation. *DNR Exs. I, and K.* Grummer and Berg started their investigation at the location from which the notification of the fish kill was received³ and worked their way upstream more than 16 miles, recording their observations and performing tests along the way. Their observations and test results are summarized below and in DNR Exhibits B and C.

Site 1 – 4582 - 335th Street (Winnebago River). This is the area where the complaint originated from. The group observed dead fish. Field tests were taken at approximately 8:15 am. The field tests indicated a dissolved oxygen level of 1.5 milligrams per liter (mg/L), a pH level of 7.9, and an ammonia nitrogen level of less than 1.0 mg/L. *DNR Exs. B, E, I, and K.*

Site 2 – Upstream of the Winnebago River Dam in Fertile, Iowa at the City Park. Dead and live fish were observed above the dam. Field tests were taken at approximately 8:35 am. The field tests indicated a dissolved oxygen level of 2.5 mg/L, a pH level of 7.9, and an ammonia nitrogen level of less than 1.0 mg/L. Laboratory samples were also collected. The laboratory

³The dead fish notification came from Dan Ouverson, the owner of property located at 4582 – 335th Street, in Cerro Gordo County. The DNR's observations and test results from the Ouverson property are summarized under "Site 1".

sample results indicated a biochemical oxygen demand (BOD) of 9.0 mg/L, a chemical oxygen demand (COD) of 47.00 mg/L, a total suspended solids level of 36.0 mg/L, and an ammonia nitrogen level of less than 0.05 mg/L. *DNR Exs. B, E, F, I, and K.*

Site 3 – Dogwood Avenue Winnebago River bridge crossing (Winnebago River). The group observed only dead fish at this location. Field tests were taken at approximately 8:50 am. The field tests indicated a dissolved oxygen level of 1.8 mg/L, a pH level of 7.9, and an ammonia nitrogen level of less than 1.0 mg/L. *DNR Exs. B, E, I, and K.*

Site 4 – Kuhn Wildlife Area, Balsam Avenue (Highway S14) (Winnebago River). The group observed dead fish. Field tests were taken at approximately 9:15 am. The field tests indicated a dissolved oxygen level of 1.0 mg/L. Laboratory samples were collected at the Balsam Avenue Bridge. The laboratory sample results indicated a BOD level of 7.0 mg/L, a COD level of 45.0 mg/L, a TSS level of 26 mg/L, and an ammonia nitrogen level of 0.06 mg/L. *DNR Exs. B, E, F, I, and K.*

Site 5 – Apple Avenue Bridge crossing (Winnebago River). The group observed dead fish and field tests were taken at approximately 9:25 am. The field tests indicated a dissolved oxygen level of 1.0 mg/L. *DNR Exs. B, E, I, and K.*

Site 6 – Torkelson Pits Wildlife Area (Winnebago River). The group observed dead fish and field tests were taken at approximately 9:30 am. The field tests indicated a dissolved oxygen level of 1.0 mg/L. *DNR Exs. B, E, I, and K.*

Site 7 – Gabrielson State Wildlife Management Area at Valley Road Bridge (Highway B14) (Winnebago River). The group observed live and dead fish and field tests were taken above the dam at approximately 9:40 am. The field tests indicated a dissolved oxygen level of

1.0 mg/L, a pH level of 8.0, and an ammonia nitrogen level of 0.2 mg/L. *DNR Exs. B, E, I, and K.*

Site 8 – Winnebago Canoe Access southeast of Forest City at River Road. The group observed neither live nor dead fish. Field tests were taken at approximately 10:02 am and laboratory samples were collected at the River Road Bridge. The field tests indicated a dissolved oxygen level of 8.0 mg/L, a pH level of 8.2, and an ammonia nitrogen level of 0.2 mg/L. The laboratory sample results indicated a BOD level of 6.0 mg/L, a COD level of 40.0 mg/L, a TSS level of 57.0 mg/L, and an ammonia nitrogen level of less than 0.05 mg/L. *DNR Exs. B, E, F, I, and K.*

Site 9 – Taylor Avenue Bridge crossing (Winnebago River). The group observed dead fish. Field tests were taken at approximately 10:20 am and laboratory samples were collected at this site. The field tests indicated a dissolved oxygen level of 1.0 mg/L. The laboratory sample results indicated a BOD level of 10.0 mg/L, a COD level of 51.0 mg/L, a TSS level of 69.0 mg/L, and an ammonia nitrogen level of 0.11 mg/L. *DNR Exs. B, E, F, I, and K.*

Site 10 – Downstream of Forest City Wastewater Treatment Plant. At this point in the investigation, Grummer left to begin the fish kill survey and Swanson and Berg proceeded to the treatment plant. Buzz Charleson, the treatment plant operator, stated that the plant was operating normally. He stated he saw live carp near the treatment plant discharge the day before and that parts of the town had received over three inches of rain on the evening of August 27, 2008. Field tests were taken approximately 500 feet downstream of the treatment plant discharge at 10:40 am. The field tests indicated a dissolved oxygen level of 8.0 mg/L, a pH level of 8.2, and an ammonia nitrogen level of 0.9 mg/L. Laboratory samples were also collected at this site and the

results indicated a BOD level of 4.0 mg/L, a COD level of 38.0 mg/L, a TSS level of 57.0 mg/L, and an ammonia nitrogen level of 0.14 mg/L. *DNR Exs. B, E, F, I, and K.*

Site 11 – Silver Creek Bridge crossing at Reed Avenue. Swanson and Berg noted that the water was cloudy and that there was a corn silage smell at the crossing. Berg observed an abundant amount of emergent aquatic vegetation in the stream. Field tests were taken at approximately 11:00 am. The field tests indicated a dissolved oxygen level of 3.5 mg/L, a pH level of 7.4, and an ammonia nitrogen level of 0.3 mg/L. *DNR Exs. B, E, I, and K.*

Site 12 – 320th Avenue west of State Highway 69 (Tributary of Silver Creek). Swanson and Berg observed that the water appeared cloudy and a corn silage odor was noted. Field tests were taken at approximately 11:10 am. The field tests indicated a dissolved oxygen level of 0.0 mg/L, a pH level of 7.2, and an ammonia nitrogen level of 1.5 mg/L. Laboratory samples were also collected at this site. The laboratory sample results indicated a BOD level of 880.0 mg/L, a COD level of 860.0 mg/L, a TSS level of 31.0 mg/L, and an ammonia nitrogen level of 1.80 mg/L. *DNR Exs. B, E, F, I, and K.*

Site 13 – North Highway 69 crossing (Silver Creek). Swanson and Berg noted that the water was cloudy and turbid with a silage odor. Field tests were taken at approximately 11:30 am. The field tests indicated a dissolved oxygen level of 1.5 mg/L, a pH level of 7.1, and an ammonia nitrogen level of 2.6 mg/L. Laboratory samples were also collected at this location. The laboratory sample results indicated a BOD level of less than 2.0 mg/L, a COD level of 36.0 mg/L, a TSS level of 6.0 mg/L, and an ammonia nitrogen level of 0.19 mg/L. *DNR Exs. B, E, F, I, and K.*

Site 14 – 310th Avenue (Tributary of Silver Creek). Swanson and Berg noted that the water south of the culvert was clear. Field tests were taken at approximately 11:45 am. The field

tests indicated a dissolved oxygen level of 8.0 mg/L, a pH level of 7.8 mg/L, and an ammonia nitrogen level of 0.6 mg/L. Laboratory samples were also collected at this location.

The laboratory sample results indicated a BOD level of 2.0 mg/L, a COD level of 38.0 mg/L, a TSS level of 13.0 mg/L, and an ammonia nitrogen level of 0.15 mg/L. *DNR Exs. B, E, F, I, and K.*

Because the field test results at Site 14 indicated normal conditions⁴, Swanson and Berg went back to the South Highway 69 crossing (*See Site 15 below*). Berg began walking a drainage ditch looking for the source of the pollution while Swanson proceeded back to his car where he spoke to a stopped Forest City police officer. After Swanson explained the situation, the police officer stated that Branstad's cattle operation was about a mile south of their location and that he stored silage. Meanwhile, as Berg walked the drainage ditch, he continued to note a strong silage odor. Berg did not observe any fish or discharging tile lines in this portion of the stream. *DNR Exs. B, I, and K.*

Site 15 – South Highway 69 crossing (Tributary of Silver Creek). This location was below the tile discharge line (discussed in Site 16 below). Field tests were taken at approximately 12:58 pm. The field tests indicated a dissolved oxygen level of 1.3 mg/L, a pH level of 6.8, and an ammonia nitrogen level of greater than 3.0 mg/L. Laboratory samples were also collected at this location. The laboratory sample results indicated a BOD level of 880.0 mg/L, a COD level of 860.0 mg/L, a TSS level of 31.0 mg/L, and an ammonia nitrogen level of 1.80 mg/L. *DNR Exs. B, E, F, I, and K.*

⁴Berg testified at hearing that a dissolved oxygen level of 8 mg/L is considered normal. *Tr. p. 26.* Grummer testified at hearing that fish start to stress when dissolved oxygen levels fall below 3 mg/L; that “below 2 you definitely start losing certain species of fish,” and that “anywhere down around 1 is getting pretty critically low for a wide range of species”. *Tr. p. 172.*

Site 16 – Tile outfall about 150 feet upstream of 310th Avenue (Tributary of Silver Creek). The tile outfall was discharging cloudy water with a strong silage odor. Field tests were taken at approximately 12:15 pm. The field tests indicated a dissolved oxygen level of 0.0 mg/L and an ammonia nitrogen level of greater than 3.0 mg/L. Berg collected laboratory samples at this location. The laboratory sample results indicated a BOD level of 7,100.0 mg/L, a COD level of 7,800 mg/L, a TSS level of 140.00, and an ammonia nitrogen level of 9.10 mg/L. Swanson collected laboratory samples upstream on the south side of 310th Avenue. The laboratory sample results indicated a BOD level of 54,000.0 mg/L, a COD level of 68,000.0 mg/L, a TSS level of 1,500.0 mg/L, and an ammonia nitrogen level of 85.0 mg/L. *DNR Exs. B, E, F, I, and K.*

After learning of Branstad's cattle operation and silage storage from the Forest City police officer, Swanson and Berg proceeded to Branstad's cattle operation. There they spoke first to Branstad's son, Andrew, who informed them that the operation had just constructed a silage runoff containment basin within the last month. The younger Branstad also stated that the Branstads had spoken to a DNR construction permit engineer regarding the need for permits; that DNR officials told them that no permits were needed; and that the facility must control any runoff and leachate from entering the groundwater, surface water, and tile lines. *DNR Exs. B, I, and K.*

While Berg was checking the road ditch for tile intakes, Branstad arrived on site. Branstad showed Berg the tile intake west of the cattle operation in the Highway 69 road ditch. Swanson and Berg went to the silage bunker area where they continued to search the site for a tile intake or other pathway for the silage. Berg and Swanson ultimately observed a tile line flowing into the containment basin. Branstad explained that the tile was cut during construction to drain into the containment basin and the other tile was left in the south berm of the

containment basin but was cut about 100 feet out from the berm just beyond the tile intake. *DNR Exs. B, I, and K.*

Scott Wilson and Jeremy Klatt, DNR Field Office 2 Environmental Specialists, subsequently arrived on site to assist with the investigation. Swanson and Berg instructed Branstad to trench around the containment basin to search for and cut any tile and to remove the silage liquid from the collection pit. *DNR Exs. B, I, and K.* As Branstad began to trench the area with a backhoe to find the tile, he cut the plastic perforated tile about 30 feet from the berm and silage leachate runoff water began to pour into the trench. The field office staff collected laboratory samples of the liquid (**Site 17**), as well as the runoff flow entering the leachate basin (**Site 18**). A pH test indicated the sample from the leachate in the basin was 4.0. Branstad dug another trench beyond where the tile intake was prior to cutting the tile for the basin construction. In the second trench, two clay tiles were observed below the perforated tile and in a third trench there was another clay tile. *DNR Exs. B, I, and K.*

Wilson and Swanson subsequently left the site to collect laboratory samples from the Winnebago River. Klatt and Berg meanwhile walked the 300th Avenue road ditches from the operation to the west. They returned to the tile discharge north of 310th Street after failing to find any tile intakes, where they confirmed the strong silage odor. *DNR Exs. B, I, and K.*

Berg and Klatt meanwhile returned to their field office, stopping along the way to conduct field tests on the Winnebago River at the 12th Street bridge crossing in Mason City (**Site 19**). There they observed no fish, either dead or alive. Field tests were conducted at approximately 5:40 pm. The field tests indicated a dissolved oxygen level of 14.0 mg/L and an ammonia nitrogen level of 2.7 mg/L. *DNR Exs. B, E, I, and K.*

The following day, August 30, 2008 at approximately 8:30 a.m., Berg traveled up the Winnebago River from Fertile to the Forest City Wastewater Treatment Plant. Along the way, he checked the dissolved oxygen at four locations (Fertile Dam (Site 2) – 5.0 mg/L, Kuhn Wildlife Area (Site 4) – 5.0 mg/L, Winnebago Canoe Access (Site 8) – 7.5 mg/L, and Taylor Avenue (Site 9) – 7.5 mg/L). He then stopped at the tile discharge (Site 16) and collected a laboratory sample and conducted field tests at approximately 10:25 am. The field tests indicated a dissolved oxygen level of 7.0 mg/L, a pH level of 7.5, and an ammonia nitrogen level of 0.2 mg/L and the laboratory sample results indicated a COD level of 40.0 mg/L and an ammonia nitrogen level of 0.23 mg/L. The discharge water was much less turbid than it had been the day before and there was only a faint odor of silage. Berg returned to the site south of Highway 69 (Site 15) and conducted field tests at approximately 10:40 am. The field tests indicated a dissolved oxygen level of greater than 15 mg/L, a pH level of 7.9, and an ammonia nitrogen level of 1.5 mg/L. *DNR Exs. B, F, H, I, and K.*

Berg next proceeded to Branstad's cattle operation, where he observed leachate being pumped out of the pit and learned that it was being taken to a facility on Drum Avenue. The tile line in the south berm was no longer submerged under the silage runoff and was now visible. The high water line was approximately 15 inches from the base of the 4 inch tile. Branstad agreed with the DNR that the silage runoff entered a tile line and that if the tile discharge smelled of silage it must have been from his operation. He stated that he was the only one in the area putting up silage. He informed Berg that he would dig a trench around the containment basin. Prior to leaving the area, Berg returned to the tile discharge (Site 16) where he noted that it had the same appearance as in the morning but the silage odor was gone. *DNR Exs. B, I, and K.*

On August 31, 2008, Branstad called Berg and requested that he meet with him to discuss the fish findings. Berg met Branstad at Torkelson's Pits Conservation Area. Berg told Branstad that he had observed dead fish at each bridge crossing from Fertile to south of Forest City. Berg provided Branstad with a publication concerning environmental problems with silage effluent. *DNR Ex. T.* They also discussed the oxygen demand associated with corn silage and its environmental impacts to surface waters. *DNR Exs. B, I, and K.*

On September 2, 2008, Berg returned to the tile discharge outlet where he took water quality field tests. Berg detected no odors at this time. Berg returned again on September 11, 2008 and traveled up the Winnebago River conducting field tests. Field tests at the Fertile Dam (**Site 2**) indicated a dissolved oxygen level of 15.0 mg/L, a pH level 8.3, and an ammonia nitrogen level of 0.8 mg/l. Field tests at Taylor Avenue (**Site 9**) indicated a dissolved oxygen level of 8.5 mg/L, a pH level of 8.3, and an ammonia nitrogen level of 0.2 mg/L. Field tests at Reed Avenue (**Site 11**) indicated a dissolved oxygen level of 14.0 mg/L, a pH level of 7.8, and an ammonia nitrogen level of 0.4 mg/L. Field tests at the Winnebago River Canoe Access (**Site 8**) indicated a dissolved oxygen level of 11.0 mg/L, a pH level of 8.4, and an ammonia nitrogen level of 0.2 mg/L. Field tests at 310th Avenue (**Site 14**) indicated a dissolved oxygen level of 9.0 mg/L, a pH level of 8.2, and an ammonia nitrogen level of 0.2 mg/L. Field tests at the tile discharge to the Silver Creek tributary (**Site 16**) indicated a dissolved oxygen level of 7 mg/L, a pH of 7.8, and an ammonia nitrogen level of 1.0 mg/L. *DNR Exs. B, H, I, and K.*

On October 2, 2008, Branstad was issued a Notice of Violation letter for a discharge of a pollutant that resulted in a fish kill. The violations included a prohibited discharge to a water of the state and water quality violations. The letter also informed Branstad that the matter was being referred for further enforcement. *DNR Exs. B, I, and K.*

On May 11, 2010, Branstad entered into a consent decree with the State for the water quality violations that occurred as a result of the sweet corn silage runoff. In the consent decree, Branstad admitted that “on August 28-29, 2008, sweet corn silage leachate, a pollutant, was discharged from a containment basin on his farm operation into the Winnebago River in violation of Iowa Code section 455B.186(1).” *DNR Ex. J.*

Thirty days later, on June 10, 2010, the DNR issued the Restitution Assessment to Branstad which is the subject of this action. The Restitution Assessment seeks restitution in the amount of \$61,794.49 for the fish kill. *DNR Ex. K.*

Further facts will be set forth as relevant to the State’s arguments below.

ARGUMENT

I. THE AGENCIES CORRECTLY DETERMINED THAT PETITIONER IS INELIGIBLE TO ASSERT AN ACT OF GOD DEFENSE UNDER IOWA CODE.

Branstad first claims the final decision is in error because it ignores the “act of God” defense set forth in Iowa Code section 455B.392. He claims he preserved this defense in the petition he filed with the DNR, in which he asserted that “the alleged release was the result of an Act of God and that Branstad is not liable under Iowa Code § 481A.151 for an Act of God.” (Petitioner’s Brief, p. 14, quoting Petitioner’s Petition, ¶ II(1)(1)). He goes on to assert that a 3.4” rain that hit the area near his farm constituted an “act of God,” as did the chain of events which led to the unplugging of a tile line, which in turn led to silage percolating into a county tile line buried several feet under the formerly plugged tile line. Branstad’s arguments are without merit because: 1) he failed to preserve error regarding the alleged applicability of Iowa Code section 455B.392 to the facts of this case; 2) no “act of God” defense exists under Iowa Code section 481A.151; and 3) the circumstances that led to the discharge of silage into the Winnebago River did not constitute an “act of God”.

A. Failure to Preserve Error.

Branstad claims he preserved error with respect to the alleged applicability of Iowa Code section 455B.392 to the facts of this case by asserting in his petition before the DNR that “the alleged release was the result of an Act of God and that Branstad is not liable under Iowa Code § 481A.151 for an Act of God.” He most certainly did not. Branstad never argued before the DNR that he was entitled to invoke an “act of God” defense under section 455B.392. His defense was limited to a purported “act of God” defense under section 481A.151. Accordingly, he failed to preserve error with respect to this issue on judicial review. *See, e.g., Renewable Fuels, Inc. v. Iowa Insurance Commissioner*, 752 N.W.2d 441, 446 (Iowa 2008) (“in cases involving judicial review of final action of an administrative agency, an issue must generally be presented to the agency to satisfy error preservation requirements”); *Soo Line R.R. v. Iowa Dep’t of Transp.*, 521 N.W.2d 685, 688 (Iowa 1994) (“in contested cases our review is limited to those questions considered by the administrative agency”); *Interstate Power Company v. Iowa State Commerce Commission*, 463 N.W.2d 699, 701 (Iowa 1990) (“we have consistently held that a party is precluded from raising issues in the district court that were not raised and litigated before the agency”).

Moreover, Branstad never sought rehearing or an enlargement of the ALJ’s findings when the ALJ’s decision failed to address whether he was entitled to an “act of God” defense under section 455B.392. It is well settled under Iowa law that when an agency fails to address an issue in its ruling, and a party fails to point that out in a motion for rehearing, error has not been preserved for judicial review. *See, e.g., KFC Corporation v. Iowa Department of Revenue*, 792 N.W.2d 308, 329 (Iowa 2010) (“when an agency fails to address an issue in its ruling and a party fails to point out the issue in a motion for rehearing, we find that error on these issues has not

been preserved”); *Soo Line R.R. v. Iowa Dep’t of Transp.*, 521 N.W.2d 685, 688 (Iowa 1994) (stating that the scope of administrative review is limited to questions that were actually considered by the agency).

Branstad is further precluded from raising this issue now as a result of the Consent Order, Judgment and Decree he entered into with the State, filed May 11, 2010. *DNR Ex. J*. In that decree, Branstad admitted that “on August 28-29, 2008, sweet corn silage leachate, a pollutant, discharged from a containment basin on his farm operation into the Winnebago River in violation of Iowa Code section 455B.186(1).” *DNR Ex. J*, p. 1, ¶ 2. Although Branstad reserved the right in the decree “to contest any claim for damages brought by the DNR pursuant to Iowa Code section 481A.151 and 571 Iowa Admin. Code chapter 113 arising from the discharges admitted herein,” *Id.*, p. 2, ¶ 4, he did not reserve a right to assert an “act of God” defense under section 455B.392. Moreover, by admitting to a violation of Iowa Code section 455B.186(1), Branstad obligated himself to pay restitution for the fish kill. *See* Iowa Code § 481A.151(1) (“A person who is liable for polluting a water of this state in violation of state law, including this chapter, *shall also be liable to pay restitution* to the department for injury caused to a wild animal by the pollution.”) (*emphasis added*). Branstad is therefore precluded from asserting an “act of God” defense under section 455B.392. *See, e.g., Iowa Coal Mining Company v. Monroe County*, 555 N.W.2d 418, 441 (Iowa 1996) (recognizing the principle that a party may not split or try his claim piecemeal but must put forth his entire defense in the case on trial; that an adjudication in a former suit between the same parties on the same claim is final as to all matters which could have been presented to the court for determination; and that a party must litigate all matters growing out of his claim at one time and not in separate actions).

B. No “Act of God” Defense Exists Under Iowa Code Section 481A.151.

Perhaps cognizant of his failure to preserve error with respect to an “act of God” defense under section 455B.392, Branstad now seeks to avoid a waiver determination by arguing that he is entitled to raise it as part of an “act of God” defense under section 481A.151 simply because section 455B.392 is referenced in section 481A.151. This argument is without merit. Section 481A.151 provides in pertinent part:

1. A person who is liable for polluting a water of this state in violation of state law, including this chapter, shall also be liable to pay restitution to the department for injury caused to a wild animal by the pollution. The amount of the restitution shall also include the department’s administrative costs for investigating the incident. The administration of this section shall not result in a duplication of damages collected by the department under section 455B.392, subsection 1, paragraph “a,” subparagraph (3).

Iowa Code § 481A.151(1) (2007).

Notwithstanding Branstad’s claim, it is clear that no “act of God” defense exists under section 481A.151. Rather, that section simply mandates liability for restitution for persons liable for polluting waters of the state in violation of state law. As regards section 455B.392, section 481A.151 merely clarifies that the DNR cannot recover both restitution under that section and damages under section 455B.392(1)“a”(3). In other words, section 481A.151 simply limits the state’s recovery for injury to or loss of wildlife to a single, rather than a double, recovery.

C. The Events Leading to the Fish Kill Were Not Attributable to an "Act of God".

Finally, even if Branstad had preserved error on the issue of the alleged applicability of Iowa Code section 455B.392 to the facts of this case, and even if an “act of God” defense were available to him under section 481A.151, the circumstances which resulted in the fish kill were clearly not attributable to an “act of God”.

In order to establish an “act of God” defense, the following characteristics must exist: 1) the act or acts must be limited to forces of nature; 2) the occurrence must be unusual or extraordinary; and 3) the occurrence must be such that under normal conditions it could not have been anticipated or expected. *Lanz v. Pearson*, 475 N.W.2d 601, 603 (Iowa 1991); *Oakes v. Peter Pan Bakers, Inc.*, 258 Iowa 447, 454-55, 138 N.W.2d 93, 98 (1965).

In this case, the 3.4” of rain which fell in the area of Branstad’s farm on August 28-29, 2008, fails to qualify as an “act of God”. While rain is admittedly a “force of nature,” a 3.4” rainfall event in Iowa during the summer is hardly an unusual or extraordinary event. Branstad presented no evidence and offers no authority to support a conclusion that it is. The Iowa Supreme Court has recognized that even floods which occur from time to time, although infrequently, are not “acts of God”. *Schrader v. State*, 213 N.W.2d 539, 542 (Iowa 1973). Accordingly, Branstad has failed to show that the rain event which preceded the fish kill bore all the characteristics necessary to qualify as an “act of God”.

Branstad also attempts to liken the chain of events in his case to those in *Brose v. City of Dubuque*, 193 Iowa 763, 187 N.W. 857 (1922). In *Brose*, a 7-year old girl drowned when the ground over which she was walking to escape floodwaters collapsed, causing her to fall into a sewer which swept her to her death. *Id.* The girl’s parents subsequently filed an action to recover damages against the city based on a claim of negligence. At the close of plaintiff’s evidence, the city moved for a directed verdict, which was sustained by the trial court. *Id.* On appeal, the Iowa Supreme Court opined that under the record “the accident was one of a class so rare, unexpected, and unforeseen that defendant cannot be charged with negligence ... for failure to guard against it. *Id.*, 193 Iowa 763, 187 N.W. at 861.

Brose is inapposite to the present case. *Brose* was a tort action predicated on the alleged negligence of a city. By contrast, this case is one of strict liability for restitution to the state for the consequences of an illegal discharge to a water of the state. Once Branstad admitted to violating section 455B.186(1), section 481A.151 mandated his payment of restitution for the injury caused by his polluting of the Winnebago River. No “act of God” defense is available under that section. Accordingly, Branstad’s first claim of error must fail.

II. THE AGENCIES CORRECTLY FOUND THAT THE DNR PROPERLY APPLIED THE AMERICAN FISHERIES SOCIETY’S SAMPLING GUIDELINES.

Branstad next challenges the methodology used by the DNR to count the number of dead fish in the Winnebago River. He claims DNR Fisheries Biologist Scott Grummer chose the wrong methodology from the publication adopted by the DNR for counting fish; that Grummer admitted to not following his own methodology; that because of the rainfall event, Grummer should have adjusted his methodology⁵; and that because of different habitat in the upper and lower sections of the river, Grummer should have adjusted his methodology. These claims are without merit.

Iowa Code section 481A.151 mandates that the Natural Resource Commission (“NRC”) adopt rules providing for methods to count dead fish and calculate restitution values. Iowa Code § 481A.151(3)“a”. It further authorizes the DNR to recover restitution assessments through contested procedures under Iowa Code chapter 17A. Iowa Code § 481A.151(2). Pursuant to this authority, the DNR adopted rules codified in 571 Iowa Admin. Code chapter 113. 571 Iowa Admin. Code 113.4 provides:

⁵Branstad does not further expound on this claim in Division III. B. of his brief. However, Grummer testified at hearing that “[t]here’s no guideline in the American Fisheries Society to give an alteration to the protocol based on a heavy rain event,” and that a large rain event would not be a circumstance that would require a deviation from the AFS guidelines. *Tr. pp. 119-20.*

Assessment. When wild animals are destroyed or injured by an identifiable source of water pollution, the degree and value of the losses shall be assessed by collecting, compiling, and analyzing relevant information, statistics, or data through prescribed methodologies to determine damages, as set forth in this rule.

113.4(2) *Fish loss*. Assessment of damages for fish kills shall be in accordance with the following:

- a. Normally investigators will follow the methods prescribed by AFS⁶ to determine, by species and size, numbers of fish killed.

The AFS has developed publications which serve as guidebooks for conducting fish kill investigations and determining the value of the fish kills. *Tr. p. 74*. DNR Fisheries Biologist Scott Grummer led the fish kill investigation for the DNR. Grummer testified the DNR's fisheries biologists use the AFS publications as their guidebook in conducting fish kill investigations and assessing monetary values to those fish losses. *Tr. p. 74*. Grummer testified that he does not vary from that guidebook. *Tr. p. 74*.

Grummer explained that in a typical fish kill investigation the first thing the DNR does is determine the upper and lower bounds of the fish kill. *Tr. p. 76*. He testified that “[o]nce the upper and lower bounds are established at least to the point of notification and a preliminary field trip through the kill area, then we start setting up a sampling protocol.” *Tr. p. 76*. Grummer then explained in detail how he developed his fish count method and process. *Tr. pp. 76-81*. He stated that he first got an overview of the fish kill area when he surveyed the area with DNR

⁶ AFS refers to the American Fisheries Society. Iowa Code section 481A.151(2) requires the NRC to “adopt rules providing for procedures for investigations and the administrative assessment of restitution amounts.” Section 481A.151(3) provides that rules adopted by the NRC “shall provide for methods used to determine the extent of an injury and the monetary values for the loss of injured wild animals based on species”. Subsection 481A.151(3) “a” states that “[t]he rules shall provide for methods used to count dead fish and to calculate restitution values” and “[t]he rules may incorporate methods and values published by the American fisheries society.” Subsection 481A.151(3)“b” states that “[t]he rules shall provide *guidelines* for estimating the extent of loss of a species that is affected by a pollution incident but which would not be practical to count in sample areas” (*emphasis added*).

Field Office 2 staff, *Tr. pp. 84-85*, and that he then developed the sampling strategy while his staff gathered the equipment. *Tr. p. 86*.

Grummer testified that he determined that the AFS method to use would be the strategy listed under narrow streams, incompletely accessible, using the streams accessible at road crossings and beyond, Stratum I, II, and III method. *Tr. pp. 87-88*. He stated that this method would be used for fish kills in most Iowa streams. *Tr. p. 88*. When asked why he didn't count all the fish in the river, Grummer responded that "[t]he fish kill was over 16.1 miles, and time allotment, that would have not been possible." *Tr. p. 89*.

Grummer went on to explain that Stratum I is the portion of the stream under the immediate influence of road crossing structures; Stratum II is the accessible portions of the stream beyond the immediate influence of road crossing structures; and Stratum III is the inaccessible remainder of the stream. *Tr. p. 88*. He testified that he located the bridge crossings and the other Stratum I locations and then designated the Stratum II locations. *Tr. p. 90*. He explained that because of the length of the kill and the size of the river he increased the Stratum I areas to 100 yards on each side of the bridges and the Stratum II areas to 200 yards in length. *Tr. p. 136*.

Grummer and his staff began their fish count at the Ouverson Farm⁷, identified as Site 1 on DNR Ex. C. Grummer explained this location was chosen because he looked at maps and determined that the bridge spacing gets quite large below the B20 bridge and he was trying to get some representation in the middle of the large spaces since all Stratum IIs were not being

⁷Although Branstad implies some sort of nefarious connection between Grummer and Mr. Ouverson, there is nothing in the record to suggest that this location was chosen for any reasons other than those testified to by Grummer, or that the characteristics of the location in any way affected the validity of the DNR's fish count methodology or results. Moreover, this was the location from which DNR officials received the dead fish notification on August 28, 2008.

assessed. *Tr. p. 91.* Prior to hearing, Grummer explained at deposition that the Ouverson site was selected since it was about two miles from the end of the kill at Fertile Dam and was spatially in the middle of the Fertile Dam and Site II-F at Cardinal. *Branstad Ex. 7, p. 44.* This was also an area from which DNR personnel had been given permission to access the river. *Tr. p. 91.* Grummer explained that AFS Publication 24 states that a bridge crossing should generally be used, but that other easy access points can be used as well, and that there is nothing in state law or in the AFS publication that requires bridge crossings to be used. *Tr. pp. 91-92.* Grummer further testified that he looked farther downstream for another crossing, but that there were not any other access point road crossings near the river until the park in Fertile. *Tr. p. 92.*

From Site 1, DNR personnel worked their way upstream charting the dead fish located from Site 1 to Site 9 at Taylor Avenue. These locations are depicted in DNR Ex. P. DNR personnel alternated the strata upstream, downstream throughout the investigation at the sites. *Tr. p. 143.* They were physically in the water documenting their findings at each location, and these findings are reflected in DNR Ex. P, which charts the number and type of fish species found at each location. Grummer explained that fish were found on the stream bed bottoms, caught up in debris and some on the stream banks. *Tr. p. 95.* He further explained that it was not uncommon to see fish up on the banks of the stream because of the changing water levels. *Tr. p. 95.*

As DNR personnel traveled upstream toward Mr. Branstad's facility, they found fewer dead fish. *DNR Exhibit P.* Grummer explained that typically when a pollutant enters the water, fish sense it and try to get away. Because of that, he stated that the heaviest counts of dead fish are typically a ways downstream from the entry point. *Tr. p. 99.*

After counting the dead fish, DNR personnel tallied the field sheets to get the numbers for each stratum count and then entered them into an Excel spreadsheet. The spreadsheet uses an expansion factor provided in AFS Publications to calculate the number of dead fish along the entire stretch of a stream. *Tr. pp. 104-05.* Grummer explained the expansion process as a summing up of the yardage of all the stratum II counts and then dividing the entire stream length minus the stratum I and stratum II to obtain the fish count number. *Tr. p. 79.* He explained that in order to get a good stratified count across the whole stream, the areas are broken into the stratum I and stratum II to obtain the fish count number. *Tr. p. 79.* He explained that in order to get a good stratified count across the whole stream, the areas are broken into the stratum I and stratum II to obtain the fish count number. *Tr. p. 79.* He explained that in order to get a good stratified count across the whole stream, the areas are broken into the stratum I and stratum II to obtain the fish count number. *Tr. p. 79.*

Once the numbers of fish were obtained, the DNR entered those numbers into the Excel spreadsheet along with the fish values taken from AFS Special Publication 30 and 571 IAC 113. *Tr. p. 106.* The AFS publication provides the general fish values and 571 Iowa Admin. Code 113 identifies species that have different values than those listed in the AFS publication. In this case, the number of fish killed equaled 31,244 and the fish were valued at \$61,448.47, with investigative costs of \$346.02 for a kill total of \$61,794.49. *DNR Ex. S.* Grummer explained that the initial value of the fish was determined by using AFS Publication 30, but it was later determined that at the time of the kill, Publication 30 had not been promulgated. *Tr. p. 107.* Grummer testified that the values were therefore recalculated using the AFS Publication 24 values. He explained that the only difference between AFS Publication 24 and Publication 30 were in the fish values. *Tr. p. 107.* The Restitution Assessment issued to Branstad by the DNR on June 10, 2010 used AFS Publication 24 to calculate that \$61,794.49 was owed in restitution and investigative costs. *DNR Ex. K.*

On judicial review, Branstad claims: 1) that the DNR used an incorrect counting methodology by failing to use the “Narrow Streams, Completely Accessible” sampling method;

2) that the DNR used the incorrect definition of an “Inaccessible Stream”; 3) that the DNR’s sampling methodology cannot be salvaged to meet the requirements of AFS Publication 24 for sampling narrow streams that are completely accessible; 4) that the DNR’s sampling methodology also failed to meet the requirements of AFS Publication 24 for sampling narrow streams that incompletely accessible; 5) that the DNR does not have a valid educational method; and 6) that the DNR failed to account for different habitat on the western portions of the Winnebago River. These claims are all without merit.

A. The DNR Used An Appropriate Counting Methodology to Determine the Extent of the Fish Kill.

Grummer chose the method described under “Narrow Streams, Incompletely Accessible” as a starting point for the DNR’s fish count. *Tr. pp. 87-88*. Grummer explained that he chose this method because in Iowa “we have road crossings that, you know, go over these streams, and that’s the most frequently used.” *Tr. p. 87*. He further explained that this method was chosen because it would not have been possible to count all the fish that had been killed over a 16.1 stretch of river. *Tr. p. 89*. When asked whether state regulations or the AFS document required him to use only bridge crossings, Grummer responded:

No. It says each fish kill is unique, and it allows for some judgment and discretion based on not every fish kill is going to follow a textbook.

Tr. p. 92.

Although Branstad attacks Grummer’s counting methodology on the basis that he did not use the “Narrow Streams, Completely Accessible” sampling method, neither DNR rules nor AFS Publication 24 required him to do so. In fact, the authors of AFS Publication 24 never intended that its methodologies be rigidly followed. AFS Publication 24 even provides the following caveat to this effect in its introductory pages:

The methods and economic data in this book are guidelines only. They are not intended to supersede existing state, provincial, or federal methods for estimating damages after a fish kill. The American Fisheries Society strongly recommends that fisheries managers use professional judgment and expertise to conduct specific studies and to adjust the economic values herein whenever these steps are needed to reflect local fisheries conditions.

DNR Ex. N, p. xii. And later, in the chapter captioned “*Field Guidelines for Counting Dead Fish,*” the publication states:

There is a limit on how specific these instructions can be because no guidelines are feasible for every set of field conditions. Each kill is unique and requires some adaptation of general methods. Biologists who may be forced to deviate from the methods described here should follow the principles of area sampling as closely as possible.

DNR Ex. N, p. 18.

The ALJ took all these arguments into consideration before concluding that the DNR’s investigation was conducted in accordance with Iowa law:

The evidence established that DNR personnel conducted the investigation pursuant to the guidelines in AFS 24. Although Mr. Branstad argued that deviations from the AFS 24 procedures invalidated the investigation results, AFS 24 itself allows for such adaptation by the investigators. The Iowa Supreme Court has held that an agency should receive deference in its interpretation of the statutes that the agency is charged with enforcing when the agency has broad rulemaking authority. ABC Disposal Systems v. Iowa Department of Natural Resources, 681 N.W.2d 506 (Iowa 2004).

ALJ’s Proposed Decision, p. 19.

Branstad further seeks to cast doubt on the fish kill numbers and values arrived at by Grummer using the sampling protocol for “Narrow Streams, Incompletely Accessible”.

(Petitioner’s Brief, pp. 29-32). However, as the ALJ noted in his decision, AFS Publication 24 provides that:

Estimates of losses based on countable dead fish will be conservative. Very seldom will the counts represent more than a modest fraction of the fish killed. ... Fish die at different rates, and once dead, they float or sink on different schedules; for the same species and toxicant, these rates vary with water quality, temperature,

and size of dish. A count of dead fish will miss many fish that are too deep in the water to be seen, are hidden by debris, or are visible but overlooked. All these factors contribute toward underestimating the numbers of fish killed.

DNR Ex. N, p. 18; ALJ's Proposed Decision, p. 18.

Nothing in the DNR's investigation suggests that it acted outside of its authority. The fish count and valuation was done in accordance with Iowa regulations. The ALJ confirmed that, stating: "the evidence further establishes that DNR personnel conducted an investigation into the extent of the fish kill in accordance with the applicable rules and procedures." *ALJ's Proposed Decision, p. 19.*

Branstad himself presented no evidence suggesting alternate or preferred procedures. The record contains no expert evidence attacking the DNR's investigation. *ALJ's Proposed Decision, p. 18.* Branstad did present evidence through a group of Branstad family friends who travelled parts of the Winnebago River following the DNR's investigation who testified to seeing only a few dead fish. None of the witnesses were familiar with the state's regulations on fish kill counts or the AFS Publication 24, however. *Tr. pp. 221, 230-31, 242, 249.* None had college degrees in biology, wildlife or fisheries. *Tr. pp. 209, 224, 232, 245, 254.* The ALJ stated in his proposed decision regarding Branstad's witnesses, "these fine people meant well but lacked any understanding of scientific methodology and appropriate training." *ALJ's Proposed Decision, p. 18.* The ALJ went on to note that Branstad's witnesses admitted that they did not get in the water, and that their counts included only fish visible from their boats or from the banks and bridges. *ALJ's Proposed Decision, p. 18.*

By contrast, Grummer testified that a good portion of fish that the DNR observed and counted were "less than ten inches and many of them probably less than four to six inches." *Tr. p. 283.* He explained that there were many reasons that Branstad's witnesses did not see many

fish, including the fact that a majority of the observations were done from bridges. *Tr. pp. 283-84.* Grummer testified that a lot of fish are not visible from a distance and that you have to be in the stream to assess the counts. *Tr. p. 77.* He indicated that the majority of the fish were small and would have been difficult to count unless the counter was in the water. *Tr. pp. 77, 283-84.* Grummer also cited scavenging by other animals as a possible reason for Branstad's witnesses seeing fewer fish. *Tr. pp. 109, 283.* Grummer went on to explain that fish rise and float or sink at different rates depending on the species and size, *Tr. p. 109,* and that the fish count his staff conducted was from what they saw on the afternoon of August 29, 2008. *Tr. pp. 273-74.*

B. The DNR Has a Valid Educational Method for Conducting Fish Kill Assessments.

Branstad further argues that DNR personnel were not properly trained to use the AFS guidelines. The record does not support Branstad's claim. All of the DNR personnel involved in this investigation had at least four year degrees in the areas of biology, fisheries, or wildlife. Grummer testified that he has been with the DNR for close to 15 years; that he has a Bachelor of Science degree from Iowa State University where he majored in fisheries and wildlife biology; and that he has been involved with 30-40 fish kills, leading at least 15 of those investigations. *Tr. pp. 72-73.* He further testified regarding specific training he had on AFS fish kill investigations at DNR Fisheries Bureau statewide meetings, *Tr. p. 73,* and then later taught the refresher course on AFS fish kill investigations at the annual meeting. *Tr. p. 114.* Grummer explained in his deposition that he is considered by others in the DNR to be an expert in fish kill investigations and that that he is the person who Department personnel contact when they have questions regarding a fish kill investigation. Branstad Ex. 7, p. 12. Based on this evidence, the ALJ rejected Branstad's argument that Grummer was not properly trained, stating that "[b]ecause the evidence established Mr. Grummer attained a Bachelor of Science degree in Fisheries

Wildlife Biology, has taught the AFS 24 methodology, and has conducted more than 30 fish kill investigations over his 15 years of experience, that argument does not have merit.” *ALJ’s Proposed Decision*, p. 18. Branstad’s claim that DNR personnel were not properly trained to use the AFS guidelines is without merit.

C. The DNR’s Fish Kill Methodology Accounts for Different Habitat on the Western Portions of the Winnebago River.

Branstad’s final challenge to the methodology used by the DNR to conduct the fish kill is that it failed to take into account different habitat on the western portions of the Winnebago River. However, when asked whether the process allowed him “to take into account different fish habitats,” Grummer responded:

That’s right. They’re stratified throughout the entire length of the kill from beginning to end, so you’re covering the whole stream reach that was impacted.

Tr. p. 79. When later asked during cross-examination whether his sampling methodology treats all miles equally with the same expansion factors even though there is a difference in habitat from the upper and the lower reaches of the stream, Grummer responded:

Yeah, that’s why we do the stratified sampling. We’re sampling all habitats in the full length of the stream, not just one portion of the impacted stream.

Tr. p. 168. It is therefore clear that the DNR’s methodology did in fact account for varying fish habitat on different portions of the river. Branstad’s argument to the contrary is without merit.

III. THE AGENCIES’ DETERMINATION THAT PETITIONER CAUSED THE FISH KILL IS SUPPORTED BY SUBSTANTIAL EVIDENCE.

Branstad next argues that the agencies failed to prove that silage from his farm was the proximate cause of the fish kill. On the contrary, there is abundant evidence in the record from which a reasonable person could conclude that silage from his farm caused the fish kill.

Branstad’s argument is without merit.

Causation in fact is established when there is proof that: 1) the conduct was a substantial factor in bringing about and producing the damages, and 2) the damages would not have occurred but for the conduct. *State v. DeCoster*, 596 N.W.2d 898, 903 (Iowa 1999). Direct or circumstantial evidence are equally probative. Iowa R.App.P. 6.904(3)(p).

The following clearly establish substantial evidence to support the agencies' conclusions that the discharge of silage from Branstad's farm caused the fish kill:

- a. this enormous fish kill, involving thousands of fish, extended over a 16.1 mile stretch of the Winnebago River (*Tr. pp. 17, 46, 89, 120; DNR Exs. K, R, and S*);
- b. the only dead fish were those found downstream of where the silage discharge occurred (*DNR Exs. B, D, I, and K*);
- c. immediately upstream of the confluence of Silver Creek and an unnamed tributary thereof, field test results were near normal (*Tr. pp. 25-27; DNR Exs. E, F, I, and K*);
- d. the record contains no evidence of leakages from other sources in the area (*Tr. p. 31*);
- e. at the time of the initial investigation, Branstad told DNR Environmental Specialist Berg that he was the only one putting up silage and that the discharge must have been from his operation if it smelled like silage (*Tr. pp. 31-32*);
- f. Branstad stipulated in the consent decree filed May 11, 2010 in the Hancock County District Court that on August 28-29, 2008, sweet corn silage, a pollutant, discharged from a containment basin on his farm operation in violation of Iowa Code section 455B.186(1) (*Tr. p. 38; DNR Ex. J*);
- g. neither Berg nor Grummer saw evidence of flash flooding along the Winnebago River such as could cause a significant rise in the water level in the river which might kill fish by stranding them around bridges, banks and sandbars (*Tr. pp. 68, 164*);
- h. USGS data reflecting the water level of the Winnebago River at Mason City indicated that the river rose less than a half an inch as a result of the rainfall event (*Branstad Ex. 29*);
- i. Berg traced the tile line on Branstad's property to its discharge point at Site 16 where he smelled silage (*Tr. pp. 26-27; DNR Exs. I, and K*);

- j. the dissolved oxygen level at Site 16, the point of the tile line discharge, was zero (*Tr. p. 27; DNR Exs. E, and F*);
- k. at all test sites downstream from the discharge except Site 8, the dissolved oxygen level was below normal and below the standard (*Tr. pp. 19-27; DNR Exs. E, and F*);
- l. evidence at hearing established that sweet corn silage consumes oxygen when discharged into surface waters, and DNR Ex. T shows that a small amount of silage leachate can lower oxygen content of river water to critical levels for fish survival (*Tr. p. 36*);
- m. when Branstad cut the tile line with his trencher, the flow into the Winnebago River stopped (*Tr. pp. 33-34*);
- n. with the flow stopped and silage diverted, the dissolved oxygen levels in the river returned to normal the day following the initial tests, as documented in samples taken by Berg on August 30, 2008 (*Tr. pp. 33-34*);
- o. when Berg revisited the point of the tile line discharge on August 30, 2008, he noted that the water looked much less turbid and had only a faint silage odor (*Tr. pp. 33-34; DNR Exs. B, I, and K*);
- p. when Berg tested the water at the tile line discharge on September 2, 2008, the dissolved oxygen levels had risen from zero to 7mg/L and no silage odor was detected (*DNR Exs. B, H, I, and K*);
- q. additional Winnebago River tests on September 11, 2008 showed average to high levels of dissolved oxygen (*DNR Exs. B, and I*);
- r. Berg testified that if the discharge had been a manure discharge, there would have been more of a manure odor and significantly more nitrogen in the water (*Tr. p. 66*).

Given this record, a reasonable person could easily reach the same conclusion made by the DNR, ALJ, and NRC: namely, that the discharge of silage from Branstad's facility caused the enormous and unnatural fish kill observed.

Branstad suggests that other inferences could be drawn from the evidence but that is not enough to invalidate the agencies' decisions. Evidence is not insubstantial merely because it would have supported contrary inferences. *University of Iowa Hospitals and Clinics v. Waters*,

674 N.W.2d 92, 95 (Iowa 2004); *Wal-Mart Stores, Inc. v. Caselman*, 675 N.W.2d 493, 499 (Iowa 2003).

In holding that the discharge from Mr. Branstad's facility caused the fish kill, the ALJ noted:

The discharge of sweet corn silage leachate from the Branstad property into Silver Creek and the Winnebago River occurred. When the silage leachate entered the waters, oxygen levels downstream dropped to below the acceptable standard for a distance of 16.1 miles. This is lethal for fish. When the silage leachate flow from the Branstad property ceased the oxygen levels quickly returned to normal. This evidence suffices to prove causation by a preponderance of the evidence. The evidence established that Mr. Branstad's storage of sweet corn silage and the subsequent discharge was a substantial factor in bringing about and producing the damages; and that the damages would not have occurred but for that conduct. The preponderance of the evidence further established that the policy of the applicable law does extend responsibility to Mr. Branstad for those consequences which were produced. Mr. Branstad's conduct regarding the discharge was not superseded by later independent forces or conduct.

ALJ's Proposed Decision, p. 15.

Branstad nevertheless argues that the DNR failed to account for the effects of the 3.4" rain which fell in the area of his farm on August 27, 2008. However, the undisputed evidence at trial was that, if anything, the rainfall diluted the pollutant levels. *Tr. p. 53.* Furthermore, DNR Fisheries Biologist Grummer testified that there is no guideline in the American Fisheries Society handbook to alter the fish kill protocol based on a heavy rain event. *Tr. p. 119.* Therefore, there was neither a factual basis nor an appropriate methodology for the DNR to "account for" the effects of the 3.4" rain which fell in the area of his farm on August 27, 2008.

Branstad further argues that the DNR failed to account for other possible causes of the fish kill. He points to other facilities in the area with cattle and silage. However, the evidence at hearing was that the closest neighboring cattle operation was one and half to two miles from Silver Creek. *Tr. pp. 201, 204.* Branstad offered no evidence to remotely suggest that the fish

kill was a result of a discharge of pollutants from this neighboring cattle operation. Branstad further testified at hearing about two facilities that stored silage near the location where the DNR first began its investigation. *Tr. pp. 267-68.* However, even if those facilities did store silage, and even if silage was discharged from them at the same time that silage was being discharged from Branstad's facility, this would not explain the fish kills observed miles upstream of those facilities. As for the possibility that manure discharges from other cattle operations in the area could have caused or contributed to the fish kill, DNR Environmental Specialist Berg testified that had that been the case, there would have been more of a manure odor and significantly more nitrogen in the water than was detected. *Tr. p. 66.* Furthermore, Berg testified as to steps taken by the DNR to look for other possible sources of discharges, including looking at aerial photos, DNR Animal Feeding Operation Databases, and visual inspection for all potential causes of oxygen depletion. *Tr. p. 31.* The DNR took these steps despite Berg being told by Branstad at the time of the inspection that Branstad was the only one who stored silage in a five mile area. *Tr. pp. 31-32.* Finally, the fact that water quality in Silver Creek and the Winnebago River improved within 24 hours after the silage basin tile line was cut, *Tr. pp. 33- 34,* is strong evidence of the fact that the DNR correctly identified the discharge of silage from Branstad's facility as the true cause of the fish kill.

In summary, there is simply no evidence that any other facility had an active discharge of pollutants at the same time as Branstad's discharge which either caused or contributed to the fish kill observed in this case. Branstad's arguments to the contrary are without merit.

IV. THE STATUTES AND RULES RELIED UPON BY THE AGENCIES ARE NEITHER UNCONSTITUTIONALLY VAGUE NOR UNCONSTITUTIONAL AS APPLIED.

Branstad next argues that the statute and rules relied upon by the DNR to support its Restitution Assessment are unconstitutionally void for vagueness or, alternatively, unconstitutional as applied. This claim is also without merit.

As a general proposition, the principles governing examination of constitutional questions are as follows:

- 1) all presumptions are in favor of the constitutionality of a statute and it will not be held invalid unless it is clear, plain and palpable that such decision is required;
- 2) the General Assembly has power to enact any kind of legislation it sees fit provided it is not clearly and plainly prohibited by some provision of the state or federal constitutions;
- 3) it is not the Court's province to pass upon the policy, wisdom, advisability or justice of a statute. The remedy for unwise or oppressive legislation within constitutional bounds is not to be found in the courts but by appeal to the legislators;
- 4) the burden does not rest upon defendants to convince a court that an act is constitutional. Plaintiff has the burden to satisfy a court beyond a reasonable doubt that the act violates the constitutional provision invoked and to point out the manner or respect in which it violates them. In other words, a plaintiff must point out and state with particularity the details of supposed invalidity; and,
- 5) it is plaintiff's burden to negative every conceivable basis which may support a statute.

Borden v. Selden, 259 Iowa 808, 812-13, 146 N.W.2d 306, 310 (1966) (quoting *Dickinson v. Porter*, 240 Iowa 393, 35 N.W.2d 66, 71 (1949)).

The Due Process Clause prohibits enforcement of vague statutes under the void-for-vagueness doctrine. *State v. Nail*, 743 N.W.2d 535, 539 (Iowa 2007). “Only where the statute clearly, palpably and without doubt infringes the constitution will this court declare it to be unconstitutionally vague.” *State v. Robinson*, 618 N.W.2d 306, 314 (Iowa 2000). Void for vagueness challenges are analyzed under the following principles:

There are three generally cited underpinnings of the void-for-vagueness doctrine. First, a statute cannot be so vague that it does not give persons of ordinary understanding fair notice that certain conduct is prohibited. Second, due process requires that statutes provide those clothed with authority sufficient guidance to prevent the exercise of power in an arbitrary or discriminatory fashion. Third, a statute cannot sweep so broadly as to prohibit substantial amounts of constitutionally-protected activities, such as speech protected under the First Amendment.

Nail, 743 N.W.2d at 539.

Branstad argues that the statute and rule require the use of the AFS publication to set the fish kill standards and that if those standards are deemed by the DNR to be so loose that the investigator does not need to follow the standards then the application of the statute is so vague that the statute and rule, as applied by the DNR, violate the constitutional protections guaranteed to him. Alternatively, he argues that if the Court finds that the DNR is warranted by the language of the AFS publication to take the position that the investigator is given wide latitude to develop his or her own guidelines and practices, then the statute and rule are unconstitutional on their face. Branstad is wrong on both counts.

First, Iowa Code section 481A.151 clearly states that a person who is liable for polluting a water of this state in violation of state law shall also be liable to pay restitution to the DNR for the injury caused to a wild animal by the pollution. There is nothing confusing about this language. The statute is perfectly clear that persons who pollute Iowa water bodies will be held liable for restitution for the injury to wildlife caused by such pollution. In entering into the May 11, 2010 consent decree with the state, Branstad admitted liability for polluting a water of this state in violation of Iowa Code section 455B.186(1). Notwithstanding his reservation of a right in that decree “to contest any claim for damages brought by the DNR pursuant to Iowa Code section 481A.151 and 571 Iowa Admin. Code chapter 113 arising from the discharges admitted herein,” section 481A.151 clearly put Branstad on notice that the DNR could seek restitution for

the fish kill which resulted from the August 2008 discharge from his operation. The fact that Branstad reserved a right within the May 11, 2010 consent decree to contest any claim for damages under section 481A.151 and 571 Iowa Admin. Code chapter 113 arising from the discharges shows that Branstad was aware of the possibility that the DNR might seek restitution for the fish kill that resulted from the discharge from his facility. Section 481A.151 gives persons of ordinary understanding fair notice of the fact that the state will seek restitution for injury to or loss of wildlife attributable to a pollution event caused by such persons.

Second, section 481A.151 provides the DNR officials charged with enforcing it sufficient guidance to prevent the exercise of power in an arbitrary or discriminatory fashion. The statute mandates the adoption of administrative rules providing for procedures for investigation and assessment of restitution amounts and requires that the rules provide for methods used to count dead fish and calculate restitution values, including the incorporation of methods and values published by AFS. Iowa Code § 481A.151(2),(3)“a”. It goes on to require that the rules “provide *guidelines* for estimating the extent of loss of a species that is affected by a pollution incident but which would not be practical to count in sample areas.” Iowa Code § 481A.151(3)“b”. Section 481A.151 thus provides DNR sufficient guidance to prevent exercise of power in an arbitrary or discriminatory fashion.

Third, Branstad makes no claim that section 481A.151 sweeps “so broadly as to prohibit substantial amounts of constitutionally-protected activities, such as speech protected under the First Amendment”. Nor does the record in the case suggest that it does.

The administrative rules adopted pursuant to section 481A.151, namely 571 Iowa Admin. Code chapter 113, contain clear standards as to how the DNR will determine the value of wildlife losses. 571 Iowa Admin. Code 113.4 states that the degree and value of wildlife

losses will be determined by “collecting, compiling and analyzing relevant information, statistics, or data through prescribed methodologies” which will normally involve following the methods prescribed by AFS to determine, by species and size, numbers of fish killed. 571 Iowa Admin. Code 113.4(2)“a”. Persons of ordinary understanding are thus given fair notice of the fact that the state will normally follow the methods prescribed by AFS to determine the extent of a fish kill and to seek restitution for injury to or loss of wildlife attributable to a pollution event caused by such persons. Likewise, the AFS publication clearly states that “the methods and economic data in this book are guidelines only” and that fisheries managers are strongly encouraged to “use professional judgment and expertise to conduct specific studies and to adjust the economic values herein whenever these steps are needed to reflect local fisheries conditions”. *DNR Ex. N, p. xii*. Similarly, the AFS 24 chapter containing guidelines for counting dead fish clearly provides that “there is a limit on how specific” the instructions contained therein can be because: 1) no guidelines are feasible for every set of field conditions; 2) each kill is unique and requires some adaptation of general methods; and 3) biologists who may be forced to deviate from the methods described here should follow the principles of area sampling as closely as possible. *DNR Ex. N, p. 18*.

The fact that the AFS guidelines permit state officials latitude in determining the value of fish killed by a pollution event does not render the rules adopted at 571 Iowa Admin. Code chapter 113 vague. Branstad was still given notice of how DNR officials would determine the extent of the loss, as well as ample opportunity to challenge the DNR’s methodology either through cross-examination of the DNR’s witnesses or by calling his own experts. Similarly, the DNR officials investigating the fish kill were provided sufficient guidance to prevent the exercise of power in an arbitrary or discriminatory fashion. The fact that the rules and AFS publication

allow DNR officials latitude to “use professional judgment and expertise to conduct specific studies and to adjust the economic values herein whenever these steps are needed to reflect local fisheries conditions” actually ensures that fish kill investigators adapt their methodologies to the circumstances of specific cases. In so doing, the rules guard against enforcement powers being used by DNR officials in an arbitrary or discriminatory fashion. Finally, Branstad makes no claim that the rules and publication sweep “so broadly as to prohibit substantial amounts of constitutionally-protected activities, such as speech protected under the First Amendment,” nor does the record in the case suggest that it does.

For all these reasons, neither Iowa Code section 481A.151 nor the administrative rules codified at 571 Iowa Admin. Code chapter 113 are unconstitutionally vague. *Nail*, 743 N.W.2d at 539. Branstad has therefore failed to show entitlement to relief under the standards articulated in *Borden v. Selden*, 259 Iowa at 812-13, 146 N.W.2d at 310 or *Dickinson v. Porter*, 240 Iowa 393, 35 N.W.2d at 71.

V. THE AGENCIES’ ACTION DOES NOT VIOLATE PETITIONER SUBSTANTIVE AND PROCEDURAL DUE PROCESS RIGHTS UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

Branstad’s final argument is that if the DNR is allowed to deviate from the AFS standards, then his procedural and substantive and due process rights under the 14th Amendment to the United States Constitution are being violated. He argues that if the fish kill standard is continuously flexible, then the public is not put on notice as to how such counts will be conducted. *Petitioner’s Brief*, p. 45. He further argues that such application is an invitation to the government to apply its own arbitrary and capricious standards, and that this will necessarily result in shifting and irrational results, thereby violating his due process rights. *Id.* These claims are without merit.

The agencies' arguments in response to Branstad's arguments alleging defects in the DNR's fish kill methodology are incorporated here by reference. The principles governing examination of constitutional questions articulated in *Borden* and *Dickinson* are also incorporated here by reference. See *Borden v. Selden*, 259 Iowa 808, 812-13, 146 N.W.2d 306, 310 (1966) (quoting *Dickinson v. Porter*, 240 Iowa 393, 35 N.W.2d 66, 71 (1949)).

As regards Branstad's claim that the DNR's action violates his procedural due process rights under the 14th Amendment to the United States Constitution, the United States Supreme Court has held that some form of hearing is required before an individual is deprived of a property interest. *Mathews v. Eldridge*, 424 U.S. 319, 333, 96 S.Ct. 893, 902 (1976). The "right to be heard before being condemned to suffer grievous loss of any kind, even though it may not involve the stigma and hardships of a criminal conviction, is a principle basic to our society." *Id.* (quoting *Joint Anti-Fascist Comm. V. McGrath*, 341 U.S. 123, 168, 71 S.Ct. 624, 646 (1951)). The fundamental requirement of due process is the opportunity to be heard "at a meaningful time and in a reasonable manner." *Id.* (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552, 85 S.Ct. 1187, 1191 (1965)).

The DNR has preserved procedural due process in its regulations requiring evidence prior to making restitution assessments. See 571 Iowa Admin. Code 7.1 (incorporating the rules of practice in contested cases set out in 561 Iowa Admin. Code chapter 7); 571 Iowa Admin. Code chapter 113. The DNR cannot simply bill persons for injury to or loss of wildlife without providing them an opportunity to contest the assessment. Branstad was given an opportunity to contest the assessment and he availed himself of that opportunity.

As discussed in the preceding Division of this brief, the fish kill standards put the public on adequate notice as to how the DNR's fish kill counts will be conducted. The flexibility of

which Branstad complains is expressly authorized under section 481A.151, under the rules adopted by the DNR at 571 Iowa Admin. Code chapter 113, and under the AFS publication referenced in those rules. The DNR's fish kill methodology therefore does not violate Branstad's procedural due process rights.

As for Branstad's claim that the DNR's action violates his substantive due process rights under the 14th Amendment, respondents first note that substantive due process claims follow a set path. First, the nature of the violated right must be determined. *State v. Seering*, 701 N.W.2d 655, 662 (2005). If the right is a fundamental right, it must pass strict scrutiny. *Id.* If not, rationale basis review applies. *Id.*

In this case, Branstad does not argue that a fundamental right is involved. Therefore, the applicable standard for reviewing his claim is a rational basis test. Branstad presented no evidence that DNR officials applied the standards of section 481A.151, 571 Iowa Admin. Code chapter 113, and AFS Publication 24 in an arbitrary or capricious manner. Nor does the record reflect that they did. Accordingly, Branstad's final claim must fail. *See Wolff v. McDonnell*, 418 U.S. 539, 571, 94 S.Ct. 2963, 2982 (1974) (finding no "warrant in the record" for concluding that "such a hazard of arbitrary decisionmaking" exists as to be "held violative of due process of law").

CONCLUSION

For all these reasons, Respondents State of Iowa, ex rel., Iowa Natural Resource Commission and the Iowa Department of Natural Resources respectfully request that the Court affirm the final decision of the NRC upholding the Proposed Decision of the ALJ in this matter.

Respectfully submitted,

THOMAS J. MILLER
Attorney General of Iowa

DAVID R. SHERIDAN
Assistant Attorney General



DAVID L. DORFF, AT0002110
Assistant Attorney General
Environmental Law Division
Lucas Building, Ground Floor
321 E. 12th St., Room 018
Des Moines, IA 50319
Phone: (515) 281-5351
Fax: (515) 242-6072
E-mail: ddorff@ag.state.ia.us
ATTORNEYS FOR RESPONDENTS

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the foregoing document was sent

via ~~email~~ to each party of record addressed as follows:

James L. Pray
BROWN, WINICK LAW FIRM
666 Grand Avenue, Suite 2000
Des Moines, IA 50309
Email: JLP@brownwinick.com

Hon. Rustin Davenport, Judge
Cerro Gordo Co. District Court
220 N. Washington
Mason City, IA 50401
Email: Rustin.Davenport.iowacourts.gov
(Hard copy also sent via US Mail)

on this 14th day of March, 2013



IN THE IOWA DISTRICT COURT FOR HANCOCK COUNTY

MONROE BRANSTAD
Petitioner,

CV CV019081

STATE OF IOWA, ex rel, NATURAL
RESOURCE COMMISSION and the IOWA
DEPARTMENT OF NATURAL
RESOURCES,
Respondent,

REPLY BRIEF

OF

MONROE BRANSTAD

JAMES L. PRAY
OF
BROWN, WINICK, GRAVES, GROSS,
BASKERVILLE AND SCHOENEBAUM, P.L.C.
666 Grand Avenue, Suite 2000
Des Moines, IA 50309-2510
Telephone: 515-242-2415
Facsimile: 515-323-8515
jlp@brownwinick.com
ATTORNEYS FOR MONROE BRANSTAD

April 9, 2013

I. ARGUMENT

A. Petitioner Preserved Error on the Act of God Defense.

Respondent State of Iowa argues on page 14 of its Brief that Petitioner Branstad “never argued before the DNR that he was entitled to invoke an ‘act of God’ defense under section 455B.392.” Respondent’s Brief, p. 14. Respondent State is wrong for several reasons. First, the Act of God defense was raised throughout the proceedings before the agency, couched both as a substantial factor test and a classic "Act of God" defense. Second, the Administrative Law Judge ("ALJ") specifically addressed the Act of God defense in the Proposed Decision, though couched in terms of a substantial factor test. Clearly, if the matter was discussed in the Proposed Decision, which was later adopted in total by the IDNR's Natural Resource Commission, then there can be no dispute that the error was fully preserved. Third, it was the State that first raised Iowa Code § 455B.392 as a basis for jurisdiction through the ALJ's Proposed Decision¹, not Petitioner Branstad. Interestingly, this statute contains an Act of God defense. Because this jurisdictional basis was first raised by the ALJ, Petitioner Branstad is entitled to apply his general Act of God defense against that particular statute as well. Fourth, even ignoring the IDNR’s own decision to add Iowa Code § 455B.392 as a basis for the decision, it is not necessary to plead and brief the Act of God defense with the level of specificity argued by Respondent State in order to preserve error. Fifth, Respondent State cites inapplicable cases to support its contention that a party cannot raise arguments at the District Court level if those arguments were not raised before the agency do not apply to this case. Under IDNR procedural rules, the ALJ's ruling is preliminary only and is not a

¹ The IDNR’s Notice of Assessment, the document that launched this administrative proceeding only alleged Iowa Code § 481A.151 as a basis for its jurisdiction. Restitution Assessment, p. 1.

final order unless the appeal period either passes without an appeal by either side or, the IDNR's Natural Resource Commission ("NRC") adopts, modifies, or rejects the ALJ's Proposed Decision. Consequently, when Petitioner raised the Act of God defense in the specific context of Iowa Code § 455B.381 in its arguments to the NRC it perfectly preserved error on that issue. Finally, the Act of God defense is not constrained by a necessity that the IDNR's jurisdiction is based upon Iowa Code § 455B.381 in this case. The Act of God defense is also an element of Respondent's argument that the State failed to prove legal causation in this case.

1. *Petitioner Raised the Act of God Defense throughout the Appeal Process.*

On July 21, 2010, after receipt of the Notice of Assessment by the State of Iowa, Branstad filed a timely Notice of Appeal of Restitution Assessment. Notices of Appeal must be filed within thirty days of receipt of notice of the Department's action. 561 IAC § 7.5(1). The Notice of Appeal need only state the "name and address of the appellant, identify the specific portion or portions of the action of the department that is being appealed, and include a short and plain statement of the reasons the specific action is being appealed." *Id.* In that Notice, the following appeal issues were raised:

"The Proposed Decision failed to find that the contamination was caused in part by events outside of the control of Monroe Branstad, including, but not limited to, a very large rain event."

Notice of Appeal of Restitution Assessment para 24.

"The contamination was caused by events outside of the control of Branstad, including, but not limited to, a very large rain event."

Notice of Appeal of Restitution Assessment para. 13.

After receipt of a Notice of Appeal, the IDNR's rules next provide that a Notice of Hearing be sent out. 561 IAC § 7.6(1). Following the receipt of the IDNR Notice of Hearing dated February

11, 2010, Petitioner Branstad filed his formal Petition² on March 4, 2011. In that Petition he alleged numerous errors by the IDNR, including:

h. That Branstad cannot be held responsible for the acts complained of in the Administrative Order as the alleged release was caused by an event beyond the control or contemplation of Branstad;

...

i. That the alleged release was the result of an Act of God and that Branstad is not liable under Iowa Code § 481A.151 for an Act of God.³

Petition, p. 2.

The post-hearing brief filed by Petitioner Branstad following the hearing before the ALJ went into more detail regarding the nature a 3.4 inch rain that triggered the release:

It is clear that the 3.4 inch rain played two related roles in this case. (Grummer T., 165, II. 2-7) First, the massive rain caused the silage pit to discharge silage. Though Branstad and the IDNR witnesses differ in their recollection or testimony regarding the exact mechanism of the release, nobody disputes the fact that, but for the rain event, the silage would not have discharged. Second, the rain necessarily pushed a surge of water down the river, leaving dead fish on mudflats, sandbars, and in and around bridges. That surge of water necessarily included runoff from innumerable fields and cattle operations along the river.

Post-Hearing Brief, p. 21.

Another reason that the fish kill assessment should be stricken is that the IDNR did not take into account the fact that the fish kill was accompanied by a very large rain event in that watershed. A rain of 3.4 inches is a significant event that left many fish stranded on mudflats and sandbars. Those fish were counted regardless of whether they died because of the flood conditions, because they were left stranded, or if they had died from other causes and just beached there.

Post-Hearing Brief, p. 26.

When the case was presented to the ALJ, it is clear that the Act of God defense (in both its classic and "substantial factor" guises) was raised in all of the pleadings. As a result,

² The procedural rules for the IDNR require that the appellant file the Petition following the filing of the Notice of Appeal and notification that the matter is set for a hearing. 561 IAC § 7.8(1).

³ The Act of God defense was specifically raised in both the general context and the specific context in relation to

the ALJ specifically addressed this argument in the Proposed Decision. The Act of God defense (whether described as such or as a substantial factor test) was a continuing theme throughout the pleadings filed in this case. Petitioner Branstad raised the issue at every opportunity, beginning with its Notice of Appeal and ending with the concluding paragraph of its final brief filed before the NRC⁴.

2. *The Administrative Law Judge ("ALJ") specifically addressed the Act of God defense in the Proposed Decision.*

On page 13, the ALJ addressed Petitioner Branstad's Act of God defense in the context of a "substantial factor" test and as a "superseding cause" from State ex rel. Miller v. DeCoster, 596 N.W.2d 898, 903 (Iowa 1999). In describing the causation issue, the ALJ stated:

Two showings are required to establish cause in fact: (1) proof that a defendant's conduct was a substantial factor in bringing about and producing the damages; and (2) proof that the damages would not have occurred but for the conduct. [citing the DeCoster case]

In contrast with cause in fact, legal causation, presents a question of whether the policy of the law will extend responsibility to those consequences which have in fact been produced. Legal causation will not be found if the defendant's conduct is superseded by later independent forces or conduct.

NRC Decision, p. 13. The ALJ noted that Branstad offered two possible alternative causes for the fish kill. The ALJ dismissed the first, which was the allegation that the discharge may have been caused by other cattle and silage operations. With regard to the second alternate cause, the ALJ wrote:

Mr. Berg and Mr. Grummer both testified to a large rain storm that hit the area shortly before the fish kill event. Mr. Branstad entered Exhibit 29, data from the USGS, which established that on the evening of August 27, 2008, the Forest City area received 3.4 inches of rain. *While all parties agreed that this rainfall caused*

Iowa Code § 455B.151.

⁴ See section 4 of this brief point for a full description of how Petitioner Branstad raised this argument before the NRC.

the storage facility on the Branstad property to leak silage, Mr. Branstad also argued that such a rainfall could cause flash flooding and a significant rise in the water level in the river, stranding fish around the bridges, on the river banks and sandbars, and killing them.

NRC Decision, p. 13. (emphasis supplied). Although the ALJ dismissed the prospect that the flash flooding did the damage alleged by Mr. Branstad, it is clear that according to the ALJ "*all parties agreed that this rainfall caused the storage facility on the Branstad property to leak silage.*" The ALJ went further, noting:

Mr. Berg determined that the rain event the night prior to the reporting of the fish kill increased the volume of the silage storage basin to a level sufficient to provide enough pressure to reconnect the unknown existing tile line with the tile line that had been cut and plugged during the construction. This allowed the silage to enter the tile line that discharged into the tributary to Silver creek, which flowed and discharged into the discharge point at Site 16.

NRC Decision, p. 14. This is the essence of Petitioner's Act of God defense, whether characterized as an Act of God defense, a substantial factor test, or a superseding cause defense. Regardless, the facts supporting the argument could not have been better written if written by Petitioner Branstad. Also, those facts leave no room for doubt that the cause of the release was the rainfall and the effect that the water pressure had on the unknown existing tile line. Because the NRC Decision was adopted without modification by the NRC, those underlying facts cannot be challenged now by the State.

However couched, it is clear that the ALJ found that had it not been for the rainfall event that this discharge would not have occurred. This is the essence of Petitioner's Act of God defense. Even though the ALJ ultimately concluded that "The evidence established that Mr. Branstad's storage of sweet corn silage and the subsequent discharge was a substantial factor in bringing about and producing the damages; and the damages would not have occurred but for that conduct" it is not necessary for Petitioner Branstad to win the argument in order to preserve error; it is only

necessary that the matter was brought to the attention of the Department. This issue was beyond a doubt fully preserved.

3. *The IDNR itself first raised Iowa Code § 455B.392 as a basis for jurisdiction through the ALJ's Proposed Decision.*

Although Petitioner Branstad does not argue that the Act of God defense is limited to an application of Iowa Code § 455B.392, it is noteworthy that the ALJ (not Petitioner Branstad) first suggested that this statute was applicable to this case. Prior to that ruling, both Petitioner Branstad and the Respondent State omitted any reference to Iowa Code § 455B.392. Although Petitioner Branstad consistently argued that it was entitled to an Act of God defense, it was only after the IDNR based its decision on § 455B.392 in the ALJ's Proposed Decision that there was a reason to marry the Act of God defense to Iowa Code § 455B.392. To hold that Petitioner Branstad could have waived an argument by not anticipating how the ALJ would rule is to require that parties challenging administrative action have the mystical powers of Carnac the Magnificent. Once that basis for jurisdiction was proposed by the ALJ, Petitioner Branstad preserved error by appealing that Proposed Decision to the Natural Resource Commission and by arguing its Act of God defense in the specific context of Iowa Code § 455B.392. Put another way, once the IDNR's⁵ ALJ held that Iowa Code § 455B.392 was a basis for the IDNR's jurisdiction and that decision was adopted without modification by the governing board, Petitioner Branstad had a right to challenge the ruling.

4. *It is not necessary to plead and brief the Act of God defense with the level of*

⁵ Although the ALJ is assigned to the case by the Department of Inspection and Appeals, the governing body of the Department, the Natural Resource Commission, has the authority to adopt the decision as its own. Only after the appeal period passes without action by a party or after the Natural Resources Commission adopts the Proposed Decision does the Proposed Decision become final (assuming it is adopted without change). 561 IAC § 7.15(2)(b).

specificity argued by Respondent State in order to preserve error.

The Act of God defense is evident in: the State's specific discussion of the causation issue that is at the heart of Petitioner Branstad's Act of God argument, the consistent briefing and mention of the doctrines in all pleadings, and the ALJ's own decision to add Iowa Code § 455B.392 which has an embedded Act of God defense; it is axiomatic that in order to preserve error it is not necessary to plead and brief the Act of God defense with the level of specificity argued by Respondent State. See Summy v. City of Des Moines, 708 N.W.2d 333, 338 (Iowa 2006) (Error preservation does not turn, however, on the thoroughness of counsel's research and briefing so long as the nature of the error has been timely brought to the attention of the district court.) Griffin Pipe Products Co., Inc. v. Board of Review of County of Pottawattamie, 789 N.W.2d 769, 772 (Iowa 2010) (Our issue preservation rules are not designed to be hypertechnical.).

5. The cases cited by Respondent State to support its argument that a party cannot raise at the District Court level arguments that were not raised before the agency do not apply to this case.

Respondent State's argument that cases holding that a party cannot raise arguments at the District Court level that were not raised before the agency are misplaced because under IDNR procedural rules the ALJ's Proposed Decision is not a final order until after the appeal period either passes without an appeal by either side or, if an appeal is filed, the IDNR's Natural Resource Commission either adopts, modifies, or rejects the ALJ's ruling. 561 IAC § 7.15(2)(b) ("When the agency does not preside at the reception of evidence, the presiding officer shall make a *proposed* decision.")(emphasis supplied). Therefore, when Petitioner Branstad raised the Act of God defense in the specific context of Iowa Code § 455B.381 in its arguments to the IDNR's Natural Resources Commission, it perfectly preserved error on that issue. The procedural rules for the IDNR provide

that on appeal or review of the Proposed Decision to the agency that the agency "has all the power which it would have in initially making the final decision except as it may limit the issues on notice to the parties." 561 IAC § 7.15(4)(d).

The Respondent State's legal argument was addressed and disposed of in Chicago and Northwestern Transp. Co. v. Iowa Transp. Regulation Bd., 322 N.W.2d 273, 276 (Iowa 1982). In that case the Iowa Supreme Court addressed a railroad's challenge of a city ordinance that restricted the time that the railroad could block a city street. The railroad failed to raise a due process argument in its first hearing before the Transportation Regulation Board. On rehearing the railroad raised the argument, which was rejected. The Iowa Supreme Court held that in the review of a contested case by a court that its "review is limited to those questions considered by [the administrative agency]" Id. at 275 (brackets in original, citation omitted). However, the Supreme Court held that "although the argument the statute as applied violated due process was not raised in the initial proceeding before the board, the board had the opportunity to consider it when the railroad filed its application for rehearing." The Court concluded that "Thus error on this ground was preserved since the railroad's application was deemed denied by the board's refusal to grant it." Id. Similarly, in this case the NRC not only had a Proposed Decision that fully addressed the Act of God defense but it also heard additional argument from Petitioner Branstad on the subject.

In Petitioner Branstad's Brief filed with the NRC, Petitioner noted that the ALJ "begins his discussion of liability and causation by citing Iowa Code §455B.186 which 'prohibits the discharge of any pollutant into any water of the state' and Iowa Code § 455B.392 which provides that a person having control over a hazardous substance 'is strictly liable to the state for reasonable damages to the state for the 'injury to, destruction of, or loss of natural resources resulting from the

hazardous condition caused by that person including the costs of accessing the injury, destruction, or loss.” Petitioner’s NRC Brief, p. 7. Petitioner Branstad went on to cite Iowa Code § 455B.392(3) which provides that there is “no liability under that section for a person otherwise liable if the hazardous condition is solely resulting from one or more of the following a. An act of God. . . .” Petitioner’s NRC Brief, pp. 7-8. Petitioner Branstad’s brief filed with the IDNR’s NRC concluded the Act of God argument by stating:

Branstad requests that the Natural Resource Commission strike the assessment in its entirety. The chain of events that led to the spill and the outrageously large assessment is clearly an Act of God as that term is applied by the Iowa Supreme Court. The 3.4” rain event was a “force of nature.” Mr. Branstad did not make it rain that day. Second, the rain event caused a chain of unrelated events that acted together to create the failure of the brand new silage leachate basin. Those events, taken together are clearly “unusual or extraordinary,” the second prong of an Act of God defense. Third, the failure of his brand new basin was “such that under normal conditions it could not have been anticipated or expected.” All three elements of the Act of God defense are met. The Commission should reject the findings of the Administrative Law Judge.

Petitioner’s NRC Brief, p.33.

6. Storms can Work in Concert with Other Factors to Create an Act of God or Superseding Cause.

Respondent State cites Schrader v. State, 213 N.W.2d 539, 542 (Iowa 1973) for the proposition that a flood is not an Act of God. See, Respondent’s Brief, p. 17. However, that determination is fact-specific and the Supreme Court in the Schrader case did in fact hold: “the trial court believed that this storm was an act of God *and so do we*.” Id. at 542 (emphasis supplied). Regardless, the test is whether the particular event could have been “anticipated or expected.” Id. In this case, the question is not just whether a 3.4” rain could have been anticipated. Instead, it is a question of whether the totality of unexpected circumstances, acting together, could have been anticipated. As consistently argued

throughout this case, Petitioner Branstad has taken the position that it could not have been reasonably foreseen that the sudden 3.4" rain would have increased the head pressure on the blocked tile line to the point that it would have failed, that the then-unplugged tile line was in an area shared by yet one or more unknown additional tile lines, that the silage in the retaining pond would migrate underground through the soil into a different, unconnected tile line, and that the silage would then be able to flow through that separate tile line into a river. It is not a mere 3.4" rain or the resulting rise in waters down the stream that is the issue or causative factor in this case. Instead, it is a chain of otherwise unconnected events, both antecedent and superseding, that triggered this release. The law regarding superseding causes has been explained as follows:

In *Iowa Electric*, we identified factors from section 442 of the Restatement (Second) of Torts to consider in determining whether an intervening act or force constitutes a superseding cause. *Id.* Three of these factors have application to the case at bar. They are:

- a. The fact that its intervention brings about harm different in kind from that which would otherwise have resulted from the actor's negligence;
- b. The fact that its operation or the consequences thereof appear after the event to be extraordinary rather than normal in view of the circumstances existing at the time of its operation;
- c. The fact that the intervening force is operating independently of any situation created by [the] actor's negligence, or, on the other hand, is or is not a normal result of such a situation.

Id. (quoting Restatement (Second) of Torts § 442).

Scoggins v. Wal-Mart Stores, Inc., 560 N.W.2d 564, 570 (Iowa 1997). In the *Scoggins* case the Supreme Court held that the suicide of a minor was a superseding cause of that minor's death, rejecting the contention that the illegal sale of the ammunition was actionable by itself. Mr. Branstad could not have reasonably foreseen that the unknown tile line could

have intercepted and carried silage from a failed plug in a different tile line after the 3.4" rain forced the failure. This inability to reasonably foresee this disparate chain of events makes it impossible for Respondent State to meet its burden to prove proximate cause.

B. The Consent Order does not Preclude Petitioner Branstad from raising the Act of God defense.

The State's argument that the Act of God defense is precluded due to the entry of a Consent Order, Judgment and Decree ("Consent Order") is a new and novel argument by Respondent. It is also wrong. First, as a new and novel argument, it is Respondent State that is precluded from raising the argument at this stage for all of the same reasons erroneously argued by the Respondent State against Petitioner on the Act of God defense. Second, in that Consent Order, Petitioner Branstad only admitted that sweet corn silage leachate had discharged from his farm "into the Winnebago River in violation of Iowa Code section 455B.186(1)." DNR Ex. J, 1, para. 2. He admitted to a violation, but he did not admit to causation for any damages. In fact, the Decree specifically provides that Petitioner Branstad reserved the right to contest any claim for damages brought by the DNR . . ." Id. Respondent State argues that there was no reservation of an Act of God defense. However it was not necessary to reserve that defense as he reserved the right to contest "any claim" for damages. Although the Respondent State cites Iowa Coal Mining Company v. Monroe County, 555 N.W.2d 418, 441 (Iowa 1996) for the proposition that a "party may not split or try his claim piecemeal," it is *Respondent State* that is the claimant in this case. Petitioner Branstad was a defendant in the underlying action and as such he reserved his rights to raise defenses to any claim for damages. It was the duty of the Respondent State to extract a waiver from Mr. Branstad if it wanted to use the argument that he waived that defense.

C. The State failed to prove Causation.

Petitioner Branstad's Initial Brief, at page 34, argued that the NRC Decision was in error because the Respondent State failed to prove causation. Petitioner Branstad pointed out that Iowa Code § 481A.151 provides that a person "who is liable for polluting a water of this state" shall also be liable to pay restitution to the department for injury *caused* to a wild animal by the pollution." (emphasis supplied). Therefore, the Department must show that Mr. Branstad was the proximate cause of the fish kill even if a violation is assumed. Respondent State argues on page 18 of its brief that Iowa Code § 481A.151 is a strict liability statute. However strict liability does not eliminate the requirement to prove actual cause ("cause in fact") and legal ("proximate") cause. Mead v. Adrian, 670 N.W.2d 174, 182 (Iowa 2003). In his Initial Brief, Petitioner Branstad argued that Respondent State had not proven causation, including a complete failure to address the large 3.4" rain event. This failure has two related consequences for this case. First, it was the rain event itself that triggered the long chain of unanticipated events and unknown pre-existing conditions that resulted in a release of silage. This brief has already explained the legal implications of this rainfall event in the context of an Act of God defense. However, the rainfall event can also be viewed in the context of legal causation. The Iowa Supreme Court has more recently clarified the legal or proximate cause standard. In Thompson v. Kaczinski, 774 N.W.2d 829 (Iowa 2009), the defendant was charged with breaching a statutory duty to avoid obstructing a highway right-of-way. The defendant had been accused of failing to properly secure a trampoline that was blown onto a highway. The court rejected the previously followed cases that applied the test articulated in the Restatement (Second) of Torts. Id. at 837. The court went on to first note that "Tort law does not impose liability on an actor for all harm factually caused by the actor's tortious conduct." Id. (quoting the Restatement (Third) of Torts, ch. 6 Special Note on Proximate Cause, at 574). Next, the court held that proximate cause "no longer includes a

determination of whether the actor's conduct was a substantial factor in causing the harm at issue." That factor would instead be relegated to factual cause determinations. *Id.* at 837-838.

The court then summarized its new position on proximate cause:

Most importantly, the drafters of the Restatement (Third) have clarified the essential role of policy considerations in the determination of the scope of liability. "An actor's liability is limited to those physical harms that result from the risks that made the actor's conduct tortious." *Id.* § 29, at 575. This principle, referred to as the "risk standard," is intended to prevent the unjustified imposition of liability by "confining liability's scope to the reasons for holding the actor liable in the first place." *Id.* § 29 cmt.*d.*, at 579–80. As an example of the standard's application, the drafters provide an illustration of a hunter returning from the field and handing his loaded shotgun to a child as he enters the house. *Id.* cmt. *d.*, illus. 3, at 581. The child drops the gun (an object assumed for the purposes of the illustration to be neither too heavy nor unwieldy for a child of that age and size to handle) which lands on her foot and breaks her toe. *Id.* Applying the risk standard described above, the hunter would not be liable for the broken toe because the risk that made his action negligent was the risk that the child would shoot someone, not that she would drop the gun and sustain an injury to her foot. *Id.*

Id. at 838. The resulting determination is therefore "fact-intensive as it requires consideration of the risks that made the actor's conduct tortious and a determination of whether the harm at issue is a result of any of those risks." *Id.* Foreseeability was recognized in Thompson v. Kaczinski as having played an "important role in our proximate cause determinations." The court went on to note that foreseeability is also linked to the role of intervening or superseding causes: "When, as in this case, we have been called upon to consider the role of intervening or superseding cause, the question of the foreseeability of the superseding force has been critical." *Id.* at 839 (citing Summy v. City of Des Moines, 708 N.W.2d 333, 342 (Iowa 2006)). The court concluded that the Restatement (Third) also agreed that "foreseeability is still relevant in scope-of-liability determinations." *Id.* The court quoted the Restatement (Third) to hold:

Properly understood, both the risk standard and a foreseeability test exclude liability for harms that were sufficiently unforeseeable at the time of the actor's tortious conduct that they were not among the risks—potential harms—that made

the actor negligent.... [W]hen scope of liability arises in a negligence case, the risks that make an actor negligent are limited to foreseeable ones, and the factfinder must determine whether the type of harm that occurred is among those reasonably foreseeable potential harms that made the actor's conduct negligent.

Id. (quoting Restatement (Third) at § 29 cmt. J, at 594). The Supreme Court in Thompson v. Kaczinski ultimately concluded that there were fact issues that precluded a dismissal of the case on liability issues. In this case the large rain event was the factual cause of the release of silage from the Branstad farm. But for the large rain event the chain of events that resulted in the release would not have occurred. Proximate cause does not exist because Mr. Branstad could not have reasonably foreseen that the rain would have increased the head pressure on the blocked tile line, that the then-unplugged tile line was in an area shared by yet one or more additional tile lines and that the silage would migrate underground through the soil into different, unconnected tile line, and that the silage would be able to flow through that separate tile line into a river. The District Court should therefore find that the Respondent State has failed to prove proximate cause and reverse the Department's decision.

D. The State's Argument that the State need not consider the Rain Event to Determine Causation is in Error.

Respondent State argued that there "is no guideline in the American Fisheries Society handbook to alter the fish kill protocol based on a heavy rain event. Therefore, there was neither a factual basis nor an appropriate methodology for the DNR to 'Account for' the effects of the 3.4" rain which fell in the area of his farm on August 27, 2008." Respondent's Brief, p. 30 (citing the testimony of biologist Grummer, at p. 119 of the transcript). Respondent State is either arguing that it can prove causation because the standard it chose to use to determine causation is so imprecise that it cannot take into account the actual facts (the 3.4" rain) or that Petitioner Branstad cannot argue that an intervening, superseding or "Act of God" cause must be considered

because the Respondent State's own methodology is so imprecise and inflexible that it cannot account for a full examination of proximate cause. The constitutional implications of the Respondent State's argument is addressed below. However, for purposes of discussing causation, it should be noted that whichever argument is being pursued by Respondent State that they both run afoul of the fact that Respondent State must still prove causation.

E. THE DEPARTMENT FAILED TO FOLLOW THE METHODS SET OUT IN AFS 24.⁶

Both the Proposed Decision and the Respondent State's Brief attempt to justify the vast deviations in procedure by Mr. Grummer by arguing that the regulations and AFS 24 allow the Department's fish kill counters to deviate from the requirements set out in the regulations. This is an interesting argument as the State usually does not hesitate to argue that private landowners and citizens must follow the letter of the law. No deviation is allowed. While not technically a legal argument, it is worth putting into perspective the State's argument. Now with the shoe firmly on the other foot, Respondent State wiggles valiantly to escape from the enforcement of its own regulations against itself.

The Initial Brief filed by Petitioner Branstad outlined the requirement of Iowa Code § 481A.151(3) that “Rules adopted by the commission shall provide for methods used to determine the extent of an injury and the monetary values for the loss of injured wild animals based on species.” Iowa Code § 481A.151(3) (2011) (emphasis supplied). Subpart (a) of that same statute goes on to provide that “The rules shall provide for methods used to count dead fish and to calculate restitution values. The rules may incorporate methods and values published by the

⁶ The arguments that AFS 24 and the enabling statute create a duty to follow specific methods for counting fish and the argument made in the brief points that follow that there is a lack of guidance for counting dead fish are made in the alternative.

American fisheries society. Iowa Code § 481A.151(3)(a) (2011)(emphasis supplied). The Iowa Administrative Code provides that in fish loss scenarios the methodologies to be used to prove species, size, and numbers of fish killed are to be determined by methodologies provided by the American Fisheries Society. See 571 IAC § 113.4 (emphasis supplied). It is clear that there must be a purpose for the statute and the rules to require that the Department follow “methods” and “methodologies.” AFS 24 does indeed contain a number of methodologies that can be used to count fish. Unfortunately, the Department chose to follow none of them as outlined in the AFS 24. How did the ALJ, the NRC, and the State deal with those deviations? They argued that the methods do not have to be followed. In the Proposed Decision accepted by the NRC, we find the conclusion that AFS 24 “does not lay down rigid requirements for the mechanism of an investigation.” This is found to be true despite the clear prescription in both the statute and the rules that the Department has a duty to provide for specific methods.

Although there is language in AFS 24 suggesting that it is a guideline, the status of AFS 24 as a mere guideline should have vanished once the IDNR chose to use AFS 24 a regulation that is incorporated by reference. The American Fisheries Society is a private organization made up of academics, economists, scientists, researchers, and some government employees. (see pages x-xi of AFS 24). These individuals cannot create a “regulation” by their own action and the comments by those society members and authors that they are drafting a guideline simply reflect that reality. But once their publication was adopted by the Department, the methodologies should take on the force of law, assuming that they are specific enough to pass muster under the constitutional requirements that laws not be vague. Assuming specificity, once AFS 24 is converted into an enforceable regulation, the AFS 24 methodologies should be enforced with the same rigor and fairness against the Department as the Department enforces its regulations against

the citizens of Iowa. However, that is not what Respondent State is seeking. Instead, what the Respondent State asks is that the government should be held to a lesser standard than that to which it holds its own citizens.

If, contrary to this argument by Petitioner Branstad, the court finds that AFS 24 and the enabling statute and regulations do *not* provide any specific methodology, then the alternative to this argument is that this very lack of specificity in AFS 24 and the enabling statute and regulations is a violation of Petitioner Branstad's constitutional rights. This argument is in more detail immediately below.

F. Petitioner Branstad's Constitutional Rights were violated because the Statutes upon which the State relies are unconstitutionally vague

The State argues (apparently at odds with its other arguments) that adequate notice of possible liability for restitution may be found in both the Iowa Code, and the Iowa Administrative Code, and that sufficient guidance is provided to officials to prevent arbitrary and discriminatory exercises of power. Respondent's Brief pp. 33-36. Therefore, the State argues, the statute and administrative rules are not unconstitutionally vague. Respondent's Brief at 36. *This is in error.*

Contrary to the State's argument on page 34 of its Brief, Iowa Code § 481A.151 does *not* provide sufficient guidance to prevent the exercise of arbitrary and discriminatory power by officials. Section 481A.151(2) provides:

The [natural resource] commission shall adopt rules providing for procedures for investigations and the administrative assessment of restitution amounts. The rules shall establish an opportunity to appeal a departmental action including by a contested case proceeding under chapter 17A. A final administrative decision assessing an amount of restitution may be enforced by the attorney general at the request of the director.

Iowa Code § 481A.151(2). Iowa Section 481A.151(3) provides:

Rules adopted by the commission shall provide for methods used to determine the extent of an injury and the monetary values for the loss of injured wild animals based on species.

a. The rules shall provide for methods used to count dead fish and to calculate restitution values. The rules may incorporate methods and values published by the American fisheries society. . . .

b. The rules shall provide guidelines for estimating the extent of loss of a species that is affected by a pollution incident but which would not be practical to count in sample areas. The rules may establish liquidated damage amounts for species whose replacement cost is difficult to determine.

Id. § 481A.151(3).

This statutory configuration does not pass constitutional muster and is void for vagueness as no guidance is provided on how to determine whether an investigator should use counts in certain sample areas. While § 481A.151(3)(a) provides that the AFS may be relied upon for methods and values, § 481A.151(3)(b) provides no such ability to rely on the AFS for methods and values when “it would not be practical to count in sample areas.” *Id.* § 481A.151(3)(a), (b). As the AFS was not referenced in § 481A.151(3)(b), the legislature intended that other methods and calculations be used. See Oyens Feed & Supply, Inc. v. Primebank, 808 N.W.2d 186, 193 (Iowa 2011) (providing that where a legislative body includes particular language in one section of a statute, but omits it in another section of the same Act, it is generally presumed the legislative body acts intentionally and purposefully in both the inclusion and exclusion). The legislature’s failure to provide guidance to the NRC regarding how to determine whether to rely on the AFS, or other methodologies and calculations, renders the statute facially void for vagueness. See City of Cedar Falls v. Flett, 330 N.W.2d 251, 256 (Iowa 1983) (“laws must provide explicit standard for those who apply them”).

Nor may the administrative rules promulgated by the NRC save the vague statute. See, State v. Speck, 242 N.W.2d 287, 293 (Iowa 1976) (recognizing that an interpretation of a statute

by an administrative agency charged with the statutes implementation may cure an otherwise unconstitutionally vague statute). The NRC promulgated rules under Iowa Code § 481A.151 at 571 IAC §113.4. Therefore, Department investigators refer to AFS 24 when investigating fish kills. 571 IAC §113.4(2)(a). The AFS provides that “the methods and economic data in this book are guidelines only” and that individuals referencing the book are strongly encouraged to “use professional judgment and expertise to conduct specific studies and to adjust economic values herein whenever these steps are needed to reflect local fisheries conditions.” DNR Ex. N, p. xii. However, the AFS is not used “in other appropriate circumstances[,] . . . investigators will utilize the best information available to determine, by species and size, numbers of fish killed.” 571 IAC § 113.4(2)(b).

These rules promulgated by the NRC, just as Iowa Code § 481A.151, fail to provide guidance to individuals or officials looking to determine whether an investigation should conform to the AFS, or whether an investigation is an “other appropriate circumstance[]” mandating that an investigator instead use “best information” to determine the number and value of fish killed.. 571 IAC §113.4(2)(a), (b). The phrases “other appropriate circumstances” and “best information” are each hopelessly vague, and neither bring the constitutional clarity needed to overcome the vagueness inherent in § 481A.151.

“[D]ue process requires that statutes provide those clothed with authority sufficient guidance to prevent the exercise of power in an arbitrary or discriminatory fashion.” State v. Nail, 743 N.W.2d 535, 539 (Iowa 2007). The more important aspect of the vagueness doctrine is the requirement that a legislature establish minimal guidelines to govern the enforcement of a law. Saadig v. State, 387 N.W.2d 315, 321 (Iowa 1986).

The AFS is merely a “guide” and strongly encourages DNR investigators to use their own judgment when conducting studies and determining economic values. DNR Ex. N, p. xii. 571 IAC §113.4(2)(a) and (b) fail to provide sufficient guidance to an investigator when determining whether to refer to the methods and calculations in the AFS, or to use other “best information” in a fish kill investigation. Iowa Code § 871A.151 fails to provide guidance to the NRC or to an investigator regarding how to determine whether to look to the AFS, or to other methods and calculations when investigating a fish kill. The lack of sufficient guidance from the legislature, the NRC, or even the AFS, renders the statute and administrative rules promulgated facially vague and therefore, unconstitutional. See Flett, 330 N.W.2d at 256.

Finally, even if the statute is not unconstitutionally vague on its face, the statute as applied in this case is void for vagueness. When investigating the fish kill in 2008, Grummer “devised a procedure for the fish count” relying on AFS 24. NRC Decision p. 8. According to Mr. Grummer, the AFS 24 document “provided only limited guidance” for a river with characteristics such as the Winnebago, so Grummer “elected to use a method for narrow streams accessible at and beyond road crossings.” NRC Decision p. 8. Grummer took dead fish counts at specified areas, then applied expansion factors to extrapolate the fish kill count to the whole section of the river affected. NRC Decision pp. 8-9.

Grummer clearly used discretion to apply methods from the AFS to the Winnebago River, even though the AFS provided “limited guidance” on rivers such as the Winnebago. NRC Decision p. 8. The Iowa Administrative Code provided no guidance to Grummer regarding whether to use the “normal” methods in the AFS under Rule 571-113.4(2)(a), or whether the investigation fell under the “other appropriate circumstances” exception in Rule 571-113.4(2)(b). Likewise, Iowa Code § 481A.151 provided Grummer no guidance on whether the fish kill should

be investigated using the rules provided by the NRC, or by some method to be used in investigation when it “would not be practical to count in sample areas.” Id. § 481A.151(3)(b).

Grummer was not told how to determine whether the counting should be by sampling or another method. He was not told how to determine whether to use the methods and calculations in the AFS, or whether the investigation constituted a circumstance in which he should deviate from the AFS. He received no input on whether he should look to the AFS as only “guidelines” or whether he should strictly “follow the methods prescribed by AFS.” Iowa Admin. Code r. 571-113.4(2)(a). Simply put, Grummer received no input or guidance, rendering his decision to use the AFS, as well as other investigative decisions, “arbitrary or discriminatory [in] fashion.” Nail, 743 N.W.2d at 539. The statutory and administrative rules enforced against Petitioner Branstad are unconstitutionally vague as applied.

G. Petitioner Branstad’s Due Process Rights Were Violated.

The State asserts that Petitioner Branstad’s arguments that his due process rights were violated “are without merit.” Respondent’s Brief p. 36. The State argues that Branstad’s procedural due process rights were protected by the opportunity to be heard at the contested case hearing. Respondent’s Brief pp. 37-38. The State argues that Branstad presented no evidence that the DNR applied the statutory or administrative standards in an arbitrary or capricious manner, and therefore there was no substantive due process violation. Respondent’s Brief p. 38. The State erred in analyzing this claim.

Substantive due process forbids the government from infringing certain fundamental liberty interests *at all*, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest. Substantive due process analysis must begin with a careful description of the asserted right. Narrow tailoring is required only when fundamental rights are involved. The impairment of a lesser interest demands no more than a reasonable fit between governmental purpose ... and the means chosen to advance that purpose.

Bowers v. Polk County Bd. of Supervisors, 638 N.W.2d 682, 694 (Iowa 2002) (internal citations and quotations omitted). Where no fundamental right is at issue, the government must provide “a reasonable fit between the governmental purpose and the means chosen to advance that purpose.” Id. at 695. Arbitrary and capricious actions under a statute violate the due process clause. See Wolff v. McDonnell, 418 U.S. 539, 571, 94 S.Ct. 2963, 2982 (1974); In re Det. of Garren, 620 N.W.2d 275, 284 (Iowa 2000) (“Under principles of substantive due process, the government is prohibited from engaging in arbitrary or wrongful actions regardless of the fairness of the procedures used to implement them.” (internal quotations omitted)).

Here, as discussed above, Grummer investigated the fish kill by “devis[ing] a procedure for the fish count” from the AFS. NRC Decision p. 8. The AFS “provided only limited guidance” for a river with characteristics such as the Winnebago, so Grummer “elected to use a method for narrow streams accessible at and beyond road crossings.” NRC Decision p. 8. Grummer took dead fish counts at specified areas, then applied expansion factors to extrapolate the fish kill count to the whole section of the river affected. NRC Decision pp. 8-9. Grummer clearly used discretion to apply methods from the AFS to the Winnebago River, even though the AFS provided only “limited guidance” on rivers such as the Winnebago. NRC Decision p. 8. The Iowa Administrative Code provided no guidance to Grummer regarding whether to use the “normal” methods in the AFS under Rule 571-113.4(2)(a), or whether the investigation fell under the “other appropriate circumstances” exception in Rule 571-113.4(2)(b). Likewise, Iowa Code § 481A.151 provided Grummer no guidance on whether the fish kill should be investigated using the rules provided by the NRC, or by some method to be used in investigation when it “would not be practical to count in sample areas.” Id. § 481A.151(3)(b).

“Arbitrary’ is defined as ‘arising from unrestrained exercise of will, caprice, or personal preference.’” Sec. State Bank, Hartley, Iowa v. Ziegeldorf, 554 N.W.2d 884, 894 (Iowa 1996). Grummer was provided no guidance from the Iowa Administrative Code or the Iowa Code on how to determine whether his investigation should refer to the methods in the AFS, or to other methodologies and calculations. In the absence of guidance, Grummer decided, on his own, to use the “guidelines” in the AFS even though the methods ill-fit the Winnebago River characteristics. Grummer’s decision-making constituted arbitrary and capricious action and violated Petitioner Branstad’s due process rights. See Wolff, 418 U.S. at 571, 94 S.Ct. at 2982; In re Det. of Garren, 620 N.W.2d at 284.

II. CONCLUSION

Petitioner Branstad has maintained from the filing of the first appeal in this case that the events that caused this release were not foreseeable. Whether construed as an act of God or a superseding cause, the bottom line is that Mr. Branstad could not have known that the pond that he built specifically to prevent harm to the environment could leak. He knew that there was an existing tile line going through the excavated pit, but he took steps to seal that line. He did not know that there was another tile line in the vicinity of that plugged tile line or that the plug would come loose when the pond suddenly rose due to the 3.4" rain. Therefore, The Respondent State did not and cannot meet its burden to prove proximate cause. Proximate cause remains a requirement even if this is a strict liability statute.

Petitioner Branstad has also challenged the Respondent State's ability to accurately measure the number of fish supposedly counted by the fish kill counters. Numerous deviations from the standard methods set out in AFS 24 have been outlined in great detail in the Initial Brief. In response, Respondent State takes the position that the AFS 24 guidelines adopted by the

State pursuant to Iowa law need not be followed because they are merely guidelines. Ignoring the supreme irony that the State wants to avoid having to follow the law when it is inconvenient for it to do so, it is clear that the State cannot have it both ways. Either it must follow specific guidelines (which it seems to admit that it did not) or those guidelines are unconstitutionally vague.

Therefore, for the reasons stated above, Petitioner Branstad's petition for judicial review should be granted and the decision below should be reversed. Costs should be assessed against Respondent State.



James L. Pray #08550

BROWN, WINICK, GRAVES, GROSS,
BASKERVILLE AND SCHOENEBAUM, P.L.C.
666 Grand Ave. Suite 2000
Des Moines, IA 50309
Telephone: 515/242-2404
Facsimile: 515/323-8504

ATTORNEY FOR PETITIONER MONROE
BRANSTAD

Copy to:

David L. Dorff
Assistant Attorney General
Environmental Law Division
Lucas State Office Building
321 E. 12th St., Ground Floor
Des Moines, IA 50319

ATTORNEY FOR RESPONDENT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the foregoing instrument was served upon each of the attorneys of record of all parties to the above-entitled cause by enclosing the same in an envelope addressed to each such attorney at such attorney's address as disclosed by the pleadings of record herein on the 9th day of April, 2013.

By: U.S. Mail Facsimile
 Hand Delivered Overnight Courier
 Federal Express Other

Signature 

IN THE IOWA DISTRICT COURT FOR HANCOCK COUNTY

FILED

2013 JUL 16 AM 9:24

MONROE BRANSTAD,)
)
 Petitioner,)
 v.)
)
 STATE OF IOWA, ex rel., NATURAL)
 RESOURCES COMMISSION and the)
 IOWA DEPARTMENT OF NATURAL)
 RESOURCES)
 Respondent.)

Cause No. CVCV019081

CLERK OF DISTRICT COURT
FOR HANCOCK COUNTY

RULING ON PETITION FOR
JUDICIAL REVIEW

The Winnebago River flows from Bear Lake in Minnesota, travels through Winnebago, Hancock, Cerro Gordo and Floyd counties in Iowa, and merges with the Shell Rock River outside of Rockford, Iowa. Originally named Lime Creek, it was renamed in 1930 to honor the Native Americans who had previously lived in North Iowa. Nate Hoogeveen, Paddling Iowa, 166 (Trail Books 2004). Purportedly "Winnebago" has been interpreted as "stinky water" or "dirty water people," an apparent reference to the quality of the water in the environs of the Winnebago people, not to their cleanliness. Harold E. Dilts, From Ackley to Zwingle: The Origins of Iowa Place Names, 26 (Iowa State University Press, 2nd ed. 1993).

Despite the purported origin of its name, the Winnebago River has become a popular river for recreation. However the river was seriously damaged on or about August 28, 2008, resulting in a major fish kill. The State of Iowa has assessed damages as the result of this fish kill against Monroe Branstad. This dispute is now before the District Court on Branstad's appeal of the Department of Natural Resources agency action.

PROCEDURAL HISTORY

On June 10, 2010, the Iowa Department of Natural Resources (DNR) issued a Restitution Assessment to Monroe "Monty" Branstad in the amount of \$61,794.49 as the result of a fish kill in the Winnebago River on or about August 28, 2008. Branstad appealed the assessment and a hearing was held in front of Administrative Law Judge (ALJ) Robert H. Wheeler on July 25, 2011. On December 6, 2011, ALJ Wheeler issued his proposed decision affirming the Restitution Assessment in full. Branstad appealed to the Iowa Natural Resource Commission which affirmed the proposed decision by a vote of 4-1 on March 8, 2012, without further written findings. Branstad filed his petition for judicial review on April 6, 2012.

Branstad is represented by attorney James L. Pray. Assistant Attorney General David L. Dorff appears on behalf of the respondents. Pursuant to a scheduling order entered January 2, 2013, the above captioned matter has been deemed submitted by both parties filing briefs. Branstad served his initial brief on January 31, 2013. The respondents filed their brief on March 14, 2013. Branstad filed a reply brief on April 9, 2013.

STATEMENT OF FACTS AS FOUND BY THE AGENCY AND ISSUES

On the night of August 28, 2008, Scott Grummer, a DNR Fisheries Biologist, received a phone call from Dan Ouverson, an acquaintance, regarding dead fish in the Winnebago River near his farm. The next day Grummer met with Carl Berg, a DNR Environmental Specialist, to investigate. Berg and other DNR employees performed field tests and took water samples from nineteen sites along the Winnebago River and smaller tributaries. They noted decreased dissolved oxygen levels and increased

ammonia nitrogen levels over a 16.1 mile stretch of the river, as well as a strong silage odor in some areas. They also observed dead fish at a number of the sample sites. During their investigation, they were informed that Monty Branstad had a cattle operation nearby and stored silage. Silage has an extremely high biochemical oxygen demand (BOD) which means it can remove enough oxygen from water to kill fish and other marine wildlife. One gallon of silage can lower the oxygen level of 10,000 gallons of water. Berg proceeded to the Branstad property and began looking for tile lines that were discharging into the river.

Branstad and his son told Berg that they had recently installed a silage leachate runoff basin on the property. During construction, Branstad cut and plugged the tile line that ran through the area. Branstad began digging trenches near the basin looking for tile lines that may have caused the discharge. Branstad and Berg discovered that the previously cut tile line had been unplugged. They also discovered that below the unplugged tile line was a county tile line of which Branstad was previously unaware. Berg determined that a recent heavy rain (3.4") had caused sufficient pressure in the basin to unplug the cut line. This caused the silage leachate to leak into the previously unknown county line, which ultimately led to the Winnebago River. Branstad contained the leakage and had the remaining leachate hauled away. Branstad told Berg that he was the only one in the area who stored silage. After Branstad cut the tile line, the discharge stopped and over the next few days, the dissolved oxygen increased to normal levels and the silage odor disappeared.

Scott Grummer was responsible for counting the number of dead fish. Grummer used American Fisheries Society (AFS) Special Publication No. 24 to create a method

for counting the dead fish over a 16.1 mile area of the river. Grummer used the method for narrow streams accessible at and beyond road crossings. Given the size of the suspected fish kill area, Grummer and other DNR employees drove (by land vehicle) to particular sites and then waded in 200 yard sections of the river in order to count, and then used an expansion factor to account for the sections that they did not personally count. Using the count and the equation from the AFS publication, Grummer determined that there were 31,244 dead fish as a result of the silage leachate discharge. The monetary value of those fish per the AFS publication and Iowa Administrative Code combined with investigative costs totaled \$61,448.47.

Grummer has a Bachelor of Science Degree in Fisheries and Wildlife Biology from Iowa State University. In 1995 Grummer attended a one-hour course on fish kill investigations. In 2004 he co-taught a one-hour "refresher" course on the topic. His only other training has been from reviewing the AFS 24 publication. Grummer had participated in thirty to forty fish kill investigations prior to this one. He led at least fifteen of those investigations. Grummer testified that he is considered by others at the DNR to be an expert in fish kill investigations.

In the days following the DNR investigation, Branstad asked a few of his friends to investigate the fish kill. They conducted their searches for dead fish from the bridges that crossed the affected area and floated a portion of the river, but did not actually wade in the river. Branstad's friends are avid outdoorsmen who grew up around the river, but they did not have training or experience in fish kill investigations. They found very few dead fish.

On May 11, 2010, Branstad entered into a consent order with the State and admitted that his silage leachate, a pollutant, discharged into the Winnebago River in violation of Iowa Code §455B.186(1). He denied that the discharge of the silage leachate caused the death of any fish in the river and reserved his right to contest a claim for damages for the fish kill. He agreed to pay a civil penalty of \$10,205.00. Additional facts will be discussed below.

Branstad alleges five errors: (1) the agency erred by failing to consider the act of God defense; (2) the agency erred by failing to find that the DNR incorrectly applied the American Fisheries Society guidelines for fish kill investigations; (3) the agency erred in finding causation; (4) the statutes or rules relied upon by the agency are unconstitutionally void for vagueness or are unconstitutional as applied; and (5) the agency's actions violate Branstad's substantive and procedural due process rights under the Fourteenth Amendment.

SCOPE OF REVIEW

The District Court acts in an appellate capacity when reviewing administrative actions. Mycogen Seeds v. Sands, 686 N.W.2d 457, 463 (Iowa 2004). Judicial review of agency actions is governed by the Iowa Administrative Procedure Act, Iowa Code Chapter 17A. The court's role in judicial review of administrative proceedings is closely and strictly circumscribed. Morrison v. Century Engineering, 434 N.W.2d 874, 876 (Iowa 1989). The court shall reverse, modify or grant other relief if it determines that substantial rights of the petitioner have been prejudiced because the agency action is any of the following (grounds not raised by Branstad are omitted):

- a. Unconstitutional on its face or as applied or is based upon a provision of law that is unconstitutional on its face or as applied.

- b. Beyond the authority delegated to the agency by any provision of law or in violation of any provision of law.
- c. Based upon an erroneous interpretation of a provision of law whose interpretation has not clearly been vested by a provision of law in the discretion of the agency.
- d. Based upon a procedure or decision-making process prohibited by law or was taken without following the prescribed procedure or decision-making process.
- e. Based upon a determination of fact clearly vested by a provision of law in the discretion of the agency that is not supported by substantial evidence in the record before the court when that record is viewed as a whole.
- f. Action other than a rule that is inconsistent with a rule of the agency.
- g. The product of reasoning that is so illogical as to render it wholly irrational.
- h. The product of a decision-making process in which the agency did not consider a relevant and important matter relating to the propriety or desirability of the action in question that a rational decision maker in similar circumstances would have considered prior to taking that action.
- i. Not required by law and its negative impact on the private rights affected is so grossly disproportionate to the benefits accruing to the public interest from that action that it must necessarily be deemed to lack any foundation in rational agency policy.
- j. Based upon an irrational, illogical, or wholly unjustifiable interpretation of a provision of law whose interpretation has clearly been vested by a provision of law in the discretion of the agency.
- k. Based upon an irrational, illogical, or wholly unjustifiable application of law to fact that has clearly been vested by a provision of law in the discretion of the agency.
- l. Otherwise unreasonable, arbitrary, capricious, or an abuse of discretion.

Iowa Code §17A.19(a)-(d), (f), (g), (i)-(n).

CONCLUSIONS OF LAW

1. Act of God Defense

Branstad argues that the act of God defense is available as to the fish kill. He argues that while the defense is not specifically referenced in the code section regarding restitution for wildlife injury (Iowa Code §481A.151), that code section must be read in conjunction with the section regarding loss of natural resources (Iowa Code §455B.392). Branstad goes on to the merits of the defense, comparing the course of events that gave rise to the silage discharge to a Rube Goldberg machine. Branstad contends that the 3.4" inch rain, which unplugged the cut tile line, combined with the previous unknown county tile line that discharged into the river, constitutes an act of God.

The DNR argues that Branstad failed to preserve error. In his petition before the DNR, Branstad raised the act of God defense pursuant to Iowa Code §481A.151, not §481A.392 where it is found, and did not seek rehearing or enlargement when the ALJ and the Natural Resource Commission did not address the act of God defense specifically. The DNR also argues that Branstad waived the act of God defense by entering into a consent order on May 11, 2010, wherein he admitted that his silage discharged into the river. Lastly, if the act of God defense is available, the DNR contends that the events at issue were not the result of an act of God.

Iowa Code §455B.186 prohibits the discharge of any pollutant into any water of the state. A person having control of a hazardous substance is strictly liable for the reasonable damages to the state for the injury, destruction of, or loss of natural resources. Iowa Code §455B.392(1)(a)(3). However, there is no liability if the hazardous

condition is solely the result of an act of God. Iowa Code §455B.392(3). There are three requirements for the act of God defense: (1) acts of God are limited to forces of nature; (2) the occurrence must be unusual or extraordinary; and (3) the occurrence must be such that under normal conditions it could not have been anticipated or expected. Lanz v. Pearson, 475 N.W.2d 601, 603 (Iowa 1991). The act of God defense may be used only if there is evidence that it is the sole proximate cause of the harm in question. Iowa Civil Jury Instruction 700.9 citing Renze Hybrids, Inc. v. Shell Oil Company, 418 N.W.2d 634, 641 (Iowa 1988).

A person who is liable for polluting water in violation of state law shall also be liable to pay restitution for injury caused to a wild animal by the pollution. Iowa Code §481A.151(1)¹. Defenses, including act of God, are not specifically referenced in Iowa Code §481A.151.

“The goal of statutory interpretation is to ascertain legislative intent, and that intent is determined by ‘the words chosen by the legislature.’” Iowa Ass’n of School Boards v. Iowa Dept. of Educ., 739 N.W.2d 303, 309 (Iowa 2007) quoting Auen v. Alcoholic Beverages Div., Iowa Dept. of Commerce, 679 N.W.2d 586, 590 (Iowa 2004). The court considers the context of the provision at issue and interprets it in a way that is consistent with the entire statute. Id. quoting State v. Kamber, 737 N.W.2d 297, 299 (Iowa 2007).

The court agrees with the DNR’s argument regarding waiver. Section 481A.151 is clear that a person who is liable for polluting Iowa waters shall pay restitution for the corresponding fish kill. Branstad is liable for polluting the Winnebago River and

¹ Per Iowa Code §481.151, administration of that section and of Iowa Code §455B.392 shall not result in duplicate damages.

tributaries by his own admission and as such, is required to pay restitution for the fish killed by the pollution, if any. Liability in this sense is addressed in §455B.392, not in §481A.151, and is separate from the causation discussion below. If Branstad wanted to raise an act of God defense he should have continued with his defense instead of entering into the consent order. As a result of the consent order, Branstad has limited his claim to contesting the fish kill count methodology.

Even if the court were to consider the act of God defense pursuant to Iowa Code §455B.392, it would find that Branstad has not established all three elements of the defense. Acts of God are limited to forces of nature. Here, although the discharge of pollution into the river stems from a heavy rainfall there were man-made forces at play. The heavy rainfall was assisted by the unplugged tile line and the previously unknown county tile line. See 6 Am.Jur.3d Proof of Facts 319 §3 (updated 2013) (“The damaging effects blamed on the phenomenon must not have been caused, contributed to, or worsened by the presence of human participation, whether it be in the form of act or omission.”).

2. Causation

Branstad next argues that the agency decision is in error because the department failed to prove causation. In other words, Branstad argues that the causation determination is not supported by substantial evidence in the record. See Iowa Code §17A.19(10)(f). Substantial evidence is:

the quantity and quality of evidence that would be deemed sufficient by a neutral, detached, and reasonable person, to establish the fact at issue when the consequences resulting from the establishment of that fact are understood to be serious and of great importance.

Iowa Code §17A.19(10)(f)(1). “The fact that two inconsistent conclusions can be drawn from the evidence does not mean that one of those conclusions is unsupported by substantial evidence.” Vosberg v. A.Y. McDonald Mfg. Co., 519 N.W.2d 405, 408 (Iowa 1994). “[T]he question on appeal is not whether the evidence supports a different finding than the finding made by the commissioner, but whether the evidence ‘supports the findings actually made.’” Meyer v. IBP, Inc., 710 N.W.2d 213, 218 (Iowa 2006) quoting St. Luke’s Hosp. v. Gray, 604 N.W.2d 646, 649 (Iowa 2000). The agency’s fact findings should be liberally applied by the court on judicial review to uphold rather than defeat the decision made by the agency. IBP, Inc. v. Al-Gharib, 604 N.W.2d 621, 632 (Iowa 2000).

There are two elements of causation: cause in fact and legal causation. In order to establish cause in fact, the evidence must show that the defendant’s conduct was a substantial factor in bringing about the damage and that the damage would not have occurred but for the defendant’s conduct. State ex rel. Miller v. DeCoster, 596 N.W.2d 898, 903 (Iowa 1999). Legal causation “presents a question of whether the policy of the law will extend responsibility to those consequences which have in fact been produced.” Id. quoting Hagen v. Texaco Refining & Marketing, Inc., 526 N.W.2d 531, 537 (Iowa 1995).

The court has reviewed the administrative record and finds that substantial evidence has been presented to support the agency’s finding of causation. The tile line that was discharging silage into the Winnebago River was traced back to the Branstad property and when the line was cut, the flow stopped. Once the flow stopped, the dissolved oxygen level of the water increased. The color and odor of the polluted water

was consistent with silage, not manure, and after the tile line was cut, the water became less turbid and did not smell of silage. Further, the dead fish were all found downstream from the tile line in question. It is uncontroverted that silage leachate can be lethal to fish. Based on this evidence, a reasonable person could conclude that the silage from Branstad's property killed the fish.

Branstad has presented theories of alternate causation including runoff from other farms and heavy rain but these theories were not supported by the evidence or expert testimony. The DNR investigators did not find other sources of runoff and the water nitrogen levels were not consistent with manure. The investigators were cognizant of the recent rainfall but testified that the rain spread the fish out over a greater distance. They did not testify that the rain increased the number of dead fish. Even if these theories of alternate causation are plausible, there is substantial evidence in the record to support the conclusion actually made by the agency.

3. American Fisheries Society Guidelines

In 2002 the Iowa Legislature adopted 2002 Acts, Chapter 1137, §58. Codified at §481A.151, the law provides for restitution for injuries to wild animals caused by pollution. The legislature's adoption of this code section appears to be a reaction to the difficulty of placing a true cost of injury to wild animals. The legislature was attempting to create a method whereby the cost of injury to wild animals could be fully assessed against the party responsible for those injuries.

Iowa Code §481A.151(2) requires the Natural Resource Commission (NRC) to adopt rules providing for procedures for investigating fish kills and the administrative assessment of restitution amounts. "The rules shall provide for methods used to count

dead fish and to calculate restitution values. The rules may incorporate methods and values published by the American fisheries society [AFS].” Iowa Code §481A.151(3)(a). The rules shall also provide guidelines for “estimating the extent of loss of a species that is affected by a pollution incident but which would not be practical to count in sample areas.” Iowa Code §481A.151(3)(b).

The Iowa Administrative Code provides that normally, investigators will follow the methods prescribed by the AFS to determine the number of fish killed. Iowa Admin. Code 571-113.4(2)(a). When conditions (ex. ice cover) prevent the investigators from using the AFS methods or in other appropriate circumstances, investigators use the best information available to determine the number of fish killed. Iowa Admin. Code 571-113.4(2)(b). For animals other than fish, “the professional judgment of fish and wildlife staff and available literature and guidance normally relied on in the fish and wildlife professions may be used to assess the injuries.” Iowa Admin. Code 571-113.4(1).

The DNR uses American Fisheries Society Special Publication 24 (hereinafter referred to as AFS 24), entitled “Investigation and Valuation of Fish Kills,” for fish kill investigations.² Iowa Admin. Code 571-113.2; 571-113.4(2)(a). The publication includes a number of methods for counting dead fish in streams and lakes. DNR Biologist Scott Grummer used the “narrow streams accessible at and beyond road crossings” method for this fish kill count.

² The parties agree that at the time of the fish kill in question, AFS 24 was the appropriate publication for use in investigations. Since then, the regulation has been amended and AFS 30 is now used. Scott Grummer testified that the investigation methods for fish kills are nearly identical in the publications; however there are changes to the monetary values attached to particular species of fish.

Branstad argues that (1) the DNR should have used the “narrow streams completely accessible” method from AFS 24; (2) the DNR did not correctly apply the “narrow streams accessible at and beyond road crossings” method; and (3) the DNR failed to adjust its methodology to account for the heavy rainfall in the area and the different types of fish habitats over the large kill area.³

The DNR argues that Grummer was not required to use the “completely accessible” method and properly applied the “narrow streams accessible at and beyond road crossings” method because AFS 24 is not meant to be rigidly followed. The DNR contends that because each fish kill is unique, Grummer was required to use his professional judgment and discretion in his investigation. Indeed, the following is found at the beginning of AFS 24:

Important: Read This First

The methods and economic data in this book are guidelines only... The American Fisheries Society strongly recommends that fishery managers use professional judgment and expertise to conduct specific studies and to adjust the economic values herein whenever these steps are needed to reflect local fishery conditions... Department Exhibit N, p. xii.

Further, chapter two states:

There is a limit on how specific these instructions can be because no guidelines are feasible for every set of field conditions. Each kill is unique and requires some adaptation of general methods. Biologists who may be forced to deviate from the methods described here should follow the principles of area sampling as closely as possible. Deviations from these methods and reasons for making them should be described in the field notes and in the fish kill investigation report. Department Exhibit N, p. 18 (internal references omitted)

In considering rules to implement Iowa Code §481A.151 the DNR should have had concerns for two objectives. First:

³ Branstad separately argues that the DNR does not have a valid education model for training its staff on how to conduct fish kill investigations pursuant to AFS 24. The court will treat this argument as support for Branstad’s arguments that the wrong method was selected and the method actually selected was incorrectly applied.

A rule or regulation of a public administrative agency or officer should be definite and certain. It should not be subject to the objection that it fails to lay down adequate legislative standards, or that it is designed in a way that may lead to arbitrary or discriminatory enforcement. A rule must contain a guide or standard applicable alike to all individuals similarly situated so that anyone interested may be able to determine his or her own rights or exemptions thereunder.

73 C.J.S. Public Administrative Law and Procedure §173. The standard laid down by an administrative agency must afford a fair degree of predictability and intelligibility of decision. 73 C.J.S. Public Administrative Law and Procedure §173, Cumulative Supplement. Professor Arthur E. Bonfield wrote:

Agencies must make a real and substantial effort to provide by *rule*, procedural protections that are adequate, under the particular circumstances, to protect persons affected by agency action against improper exercise of agency power. It also requires agencies to make a real and substantial effort to elaborate, by *rule*, the substantive standards used in the application of the laws they administer in order to provide fair notice in their contents and some assurance they will be consistently applied.

Arthur E. Bonfield, Amendments to Iowa Administrative Procedure Act, Report on Selected Provisions to the Iowa State Bar Association and Iowa State Government, p. 18 (1998).

The second concern is implementing a scientifically valid basis for determining the extent of loss of each fish species. The statute specifically contemplates the situation where it would not be practical to count all of the lost animals. The guidelines by the American Fisheries Society provide instruction as to how to take scientifically accurate samples that can be used as input data for use in the Society's fish value matrix. With a proper sampling design, resources can be directed at collecting the most accurate data on a smaller number of people, things or events. Modern Scientific Evidence: The Law and Science of Expert Testimony §5:13 (West 2009). Sampling

methods include probability sampling, random sampling and stratified sampling. Probability sampling involves selecting cases from the population in such a way that there is a known probability of any case appearing in the sample. This permits use of the probability theory to draw inferences about the nature of the population. Id. at §5:15. Simple random sampling involves drawing a sample from the relevant population so that every member of the population has equal chance of being selected into the sample. A stratified sample is one in which subgroups of the population have been specified in advance and then sampling takes place from within each stratum. Id. A major defect of any sampling project is the failure to select representative elements from the population of interest. Selection bias occurs when a sample is drawn in a way that makes it unrepresentative of the population about which inferences are to be made. Id. at §5:16.

The DNR argues that AFS 24 is merely a guideline but the court disagrees. The enabling statute specifically calls for rules for investigating fish kills. Iowa Code §481A.151(2), (3)(emphasis added). Guidelines are appropriate when it is not practical to count in sample areas. Iowa Code §481A.151(3)(b)(emphasis added). There is no question that here it was practical to count in sample areas along the Winnebago because that is what the DNR did. The standard for counting dead fish is not professional judgment. If it was, there would be no need for AFS 24 or separate provisions in the Iowa Administrative Code for fish kill investigations and investigations regarding other species. Iowa Admin. Code §571-113.4(1), (2). The court notes that there are other types of statutes and regulations in place, including the child support guidelines and sentencing guidelines that, despite their name, do not act as mere

guidelines and are considered authority. Although AFS 24 anticipates some deviation, it requires those deviations to be justified and documented.

Branstad argues that the DNR should have used the AFS 24 method for completely accessible streams. According to AFS 24, when a stream is completely accessible, it is practical to count any designated segment. There is no reference to specifically counting at bridge crossings. The AFS recommends examining a 100 yard segment every ½ mile. Then the biologist either multiplies the average fish count per sample segment by the total number of segments in the body of water or multiplies the total number of fish counted in the sample segments by an expansion factor. This method does not use the strata discussed below.

There are three methods that can be used when a stream is incompletely accessible. The DNR chose the “narrow streams accessible at and beyond road crossings” method. The operative word for the purposes of this case is, therefore, “accessible.” Unfortunately, AFS 24 does not explicitly define accessible. It does say, however, that:

In undeveloped areas, passage of the biologist on foot or in a boat may be impeded by heavy vegetation, fallen timber and logjams, or wetlands. In developed areas, fences, trespass restrictions, or human activity may prevent access. Remoteness itself may render an area essentially inaccessible if the cost of reaching it is too high. Anything that inhibits the cost per sample unit inhibits sampling. (Exhibit N, p. 43).

DNR Biologist Scott Grummer defined accessible as follows:

The way the AFS publication defines inaccessible doesn't mean it's physically inaccessible, it means that you'd have to seek permission to go back in and traverse quite a ways off the roadway. (Tr. 158).

It appears that AFS 24 considers both physical impediments and trespassing in characterizing stream accessibility. This makes sense given the very broad dictionary

definition of accessible as “easily approached or entered.” Webster’s II New College Dictionary (2001). No testimony or evidence was presented as to heavy vegetation, wetlands, log jams, etc. that would prevent the DNR from collecting samples throughout the fish kill area. In fact, the Branstad witnesses testified that they drove a boat through the western portion of the kill area, which is known as the shallower, murkier portion. It would follow that one would be able to boat through the eastern, clearer portion of the kill area. However the DNR did not utilize a boat during the fish kill portion of the investigation.

The DNR’s conclusion that the Winnebago River is not completely accessible seems to be at odds with the state’s view regarding navigable streams. The fact that the Winnebago has been defined as a non-meandering river does not appear to control the analysis. The directive upon Iowa’s entry into the Union to determine the “meander lines” of navigable waters was done in a haphazard manner. See Iowa Attorney General Opinion No. 96-2-3 (Smith to Kremer, State Representative February 6, 1996). Per the DNR website, Iowa has 18,000 miles of navigable streams across the state. Yet only Iowa’s border rivers and lengthy segments of the Iowa, Des Moines, and Cedar Rivers were designated as meandering in the public land surveys. Much shorter segments of the Raccoon, Wapsipinicon, Maquoketa, Skunk, Turkey, Nishnabotna, Upper Iowa and Little Maquoketa Rivers were designated as meandering as well. Id.

In 1982 Iowa Code §462A.69 was adopted. This code section clarified that rivers are public waters and subject to use by the public for navigation purposes. Use of rivers was subject to the same rights and duties as meandered streams. Navigable waters includes all rivers which can support a vessel capable of carrying one or more persons

during a total of six months out of every ten years. Iowa Code §462A.2(22). Rivers are navigable even if wading is necessary to get over shoals or log jams. Iowa Attorney General Opinion No. 96-2-3 (Smith to Kremer, State Representative February 6, 1996).

A Winnebago River paddling trail has been created from the north part of Winnebago County into Forest City. The water trail is promoted by the City of Forest City and by the DNR website. Farther downstream, the stretch from Mason City to Claybanks Forest State Preserve is included as one of the "96 Great Trips by Canoe and Kayak." Hoogeveen, p. 166-167. For all these reasons, the DNR's conclusion that the Winnebago was not accessible seems inconsistent with the AFS guidelines.

DNR biologist Scott Grummer testified that one of the reasons he counted dead fish at the Ouverson farm, discussed below, is because he had permission from Mr. Ouverson. However, on cross-examination, Grummer admitted that as a DNR investigator he did not need permission to float or wade in the Winnebago. Grummer and his staff did not ask for permission to enter the river and count fish at any other site. Ultimately, the counting method was selected because it is the method the DNR typically uses:

Ms. Book: Now, why did you choose this method?

Mr. Grummer: That's the typical one. In Iowa we have road crossings that, you know, go over these streams, and that's the most frequently used. There have been a few short kills where it's all within a section and never does cross a road. But for the most part that's the typical method used for fish kills. (Tr. 88).

The fish kill area in question spanned 16.1 miles, and as such it was neither possible nor reasonable to count every dead fish. However, there was no evidence presented that the DNR staff could not or should not have followed the AFS 24 method for narrow streams completely accessible.

The DNR opted to use the “narrow streams accessible at and beyond road crossings” method. This method requires the biologist to take counts at the parts of the stream under the immediate influence of the road crossings (Stratum I) and at accessible parts of the stream beyond the immediate influence of the road crossings (Stratum II). Stratum III is the inaccessible portion of the stream that it is not counted, however, per AFS 24, the data from Stratum II provides a reasonable basis for judging the status of Stratum III.

Grummer and his assistants counted fish at a total of 12 sites. The sites were each 200 yards long. The Stratum I sites are numbered, and the Stratum II sites are lettered. The five Stratum I sites started at bridge crossings and spanned 100 yards in both directions from the crossing. AFS 24 recommends setting the Stratum I sites 40-50 yards in each direction from the bridge crossing. Grummer extended the Stratum I sites because the fish kill area was large. However, per AFS 24, Stratum I is only supposed to extend far enough to escape possible physical influences of the road crossing structure, which may collect dead fish. Exhibit N, p. 21. There is no evidence that the influence of the bridge crossing was greater because of the length of the fish kill. Therefore, the DNR’s counting method for Stratum I does not follow AFS 24.

Six of the seven Stratum II sites abutted a bridge crossing on one side, either upstream or downstream. The seventh stratum II site was at Dan Ouverson’s farm. The Stratum II counts were added together and were used to extrapolate the number of dead fish in the sections of the kill area that were not counted (Stratum III) based on the total length of the Stratum II sites (less the Stratum I sites). A very simple example of this is the following: if a total of 5 largemouth bass were found in the Stratum II areas,

and the counted portion was 1/5 of the total kill area (less Stratum I), then 25 largemouth bass is the count for Stratum III.

The DNR did not count at all the bridge crossings in the kill area. It is unclear how it selected crossings, but Grummer testified that he would typically choose every other or every third bridge. It is also unclear how he chose his Stratum II sites. Not all Stratum I counts were accompanied by a Stratum II count at the same location. For example, there was no Stratum II count at the Dogwood bridge crossing (Stratum I-5) and there was no Stratum I count at the Torkelson Pit bridge crossing (Stratum II-C). The Stratum II counts alternated between upstream and downstream from the bridge crossing. For example, the Stratum II-A count at Taylor Avenue was taken upstream from the bridge, and the Stratum II-B count at the Gabrielson bridge was taken downstream from the bridge. The method of alternating upstream and downstream for Stratum II counts is not in AFS 24, which the DNR acknowledges. AFS uses systematic sampling with a random start. An example of this is found on page 23 of AFS 24 (Exhibit N) where there are twelve possible Stratum II sites and one systematic sample of four is selected at random for counting.

It should also be noted that the bridges over this portion of the Winnebago do not appear to be evenly spaced. The greater number of bridges is located downstream, close to the Fertile dam, and may reflect a greater concentration of fish.

As stated above, the only count that was not taken at or near a bridge crossing was at the Ouverson farm (Stratum II-G). Branstad finds issue with this site for a number of reasons including: (1) Mr. Ouverson is at least an acquaintance of Scott Grummer; (2) there is a rock riffle at that part of the river which may naturally collect

fish; (3) it was not at a bridge crossing like the other Stratum II sites; and (4) it was a site where the largest number of dead fish were allegedly found. Testimony and evidence was presented that if the fish found at the Ouverson farm were not included, the value of the dead fish would drop from \$61,448 to \$47,212. This is likely a conservative figure given the fact that Stratum II sites, like the Ouverson farm, were used to determine the number of dead fish in the uncounted area, Stratum III. Grummer admitted that by counting at the Ouverson farm, he broke the pattern he had been operating under.

On multiple occasions during the hearing in front of the Administrative Law Judge, Grummer was faced with the fact that his method for this fish kill count is not found in AFS 24. Each time he responded that AFS 24 says that each fish kill is unique and that a biologist needs to use his discretion.

This court is mindful of the deference that should be given to the DNR. Iowa Code §17A.19(11) provides that upon judicial review of agency action, the reviewing court must give appropriate deference to the view of the agency with respect to particular matters that have been vested by a provision of law in the discretion of the agency. Here Iowa Code §481A.151(2) vests discretion concerning interpretation of this statute to the DNR, and reviewing courts should give appropriate deference to the view of the agency. City of Marion v. Dept. of Revenue & Fin., 643 N.W.2d 205, 207 (Iowa 2002). However administrative agencies are bound by and must follow their own regulations even if the adoption of the regulations was discretionary. 2 Am.Jur.2d. Administrative Law §241. The reviewing court must grant appropriate relief if it determines that substantial rights of the person seeking judicial relief have been

prejudiced because the agency action is an “action other than a rule that is inconsistent with a rule of the agency.” Iowa Code §17A.19(10)(g).

Although language in AFS 24 discusses the rules as guidelines, once the DNR adopted the AFS 24 as rules of the State of Iowa, they were no longer guidelines. To allow the DNR to choose a methodology contrary to the AFS 24 violates the requirement that the rules should provide fair notice to the public, and that the rules will be consistently applied. The actual method used by the DNR in this case was not a method that was subject to review prior to the adoption of the DNR regulations.

Further the DNR's decisions regarding sampling are contrary to the sampling methods that are suggested by the AFS 24. This creates uncertainty as to whether the input data obtained could be properly used in the AFS fish value matrix. Clearly sampling a 100 yard segment every ½ mile, as recommended in the AFS 24 would be a more accurate measure of fish than taking fewer samples and adjusting its method to account for bridges. If the length of the fish kill was a concern, the DNR could have increased the length of each sample and proceeded with the ½ mile counting method. Instead the DNR chose a sampling method that raises questions regarding the scientific certainty of the result.

The court finds that the method used by the DNR to determine the number of dead fish is inconsistent with its rules it adopted to implement Iowa Code §481A.151(2). Based upon Iowa Code 17A.19(10)(g), the agency action is inconsistent with a rule of the agency.

Branstad's next argument is that the DNR failed to take into account the heavy rainfall that occurred prior to the fish kill. Iowa Administrative Code 571-113.4 provides

that when resources are known to have been diminished by prior incidents, investigators will utilize the best information available to determine the number of fish killed. Branstad argues that the 3.4" rain is a prior incident. Grummer testified that he did not adjust his sampling method to account for the 3.4" rain that caused the silage to enter the Winnebago. AFS 24 does not have separate provisions for counting after a heavy rain and Grummer testified that he had no knowledge of the rain increasing the number of dead fish; rather, the rain would spread the dead fish out over a greater distance. Branstad lacked expert testimony to support his theory and did not prove that the heavy rain killed the fish; therefore, the DNR did not need to adjust to account for the rain. The ALJ and NRC did not err in this respect.

Branstad's final argument concerning the fish count process is that the DNR failed to take into account the differing fish habitats along the kill area. Testimony was presented from both sides that the western portion of the kill area is shallower, murkier and not as conducive to a diverse fish habitat. At least one of Branstad's witnesses testified that he had not seen certain game fish in this western portion of the kill area, closer to Forest City. The DNR did not alter its counting method to account for these differences; however it appears it counted sections in both portions of the river at issue. Counts from both the western and eastern portions of the kill area were used for Stratum II, therefore both portions of the kill area are accounted for in Stratum III. Branstad does not appear to argue how the counting method should have been altered and the court finds no error in this respect.

In summary the court finds that the DNR was required to follow the methods prescribed by American Fisheries Society Special Publication 24 when investigating the

Winnebago River fish kill. The ALJ and NRC erred in finding that the DNR did not need to apply the narrow streams completely accessible model and that it correctly applied the narrow streams incompletely accessible at bridge crossings and beyond model. The court finds no error in the ALJ and NRC's assessment of the DNR's counting method regarding the heavy rain and the diverse habitats.

4. Constitutional Issues

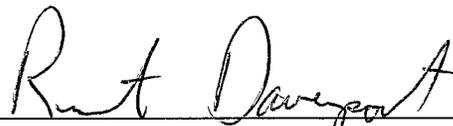
Lastly, Branstad argues that if the DNR is not required to follow AFS 24, then the statute and rules are unconstitutionally vague, and arbitrary application of AFS 24 is a violation of his due process rights. Given the court's ruling in section three above that the DNR is required to follow AFS 24 and failed to do so, the court will not address these constitutional arguments.

ORDER

For the reasons stated above, the December 6, 2011, Proposed Decision and March 8, 2012, Final Decision of the agency are reversed. The order for restitution in the amount of \$61,794.49 is reversed and stricken.

It is so ORDERED.

July 15, 2013



Rustin Davenport

Judge of the Second Judicial District of Iowa

Clerk shall furnish copies to:
James L. Pray
David L. Dorff

IN THE IOWA DISTRICT COURT FOR HANCOCK COUNTY

MONROE BRANSTAD,	)	CASE NO. CVCV019081
)	
Petitioner,)	
)	
vs.	)	RESPONDENTS' RULE 1.904(2) MOTION
	)	FOR RECONSIDERATION,
STATE OF IOWA, ex rel., NATURAL	)	CORRECTION, AMENDMENT AND
RESOURCE COMMISSION and the	)	ENLARGEMENT OF FINDINGS AND
IOWA DEPARTMENT OF NATURAL	)	CONCLUSIONS, AND FOR
RESOURCES,	)	MODIFICATION OF RULING
	)	ACCORDINGLY OR FOR
Respondents.	)	SUBSTITUTION OF DIFFERENT
	)	RULING

COME NOW Respondents, State of Iowa, ex rel., Natural Resource Commission, and the Iowa Department of Natural Resources, and for their Rule 1.904(2) Motion for Reconsideration, Correction, Amendment and Enlargement of Findings and Conclusions, and for Modification of Ruling Accordingly or for Substitution of Different Ruling, state as follows:

I. INTRODUCTION.

A. Legal Standard.

Iowa Rule of Civil Procedure 1.904(2) provides that “[o]n motion joined with or filed within the time allowed for a motion for new trial, the findings and conclusions may be enlarged or amended and the judgment or decree modified accordingly or a different judgment or decree substituted.”

B. District Court’s Ruling.

In its July 16, 2013 Ruling on Petition for Judicial Review, the court reversed the December 6, 2011 Proposed Decision of the ALJ and March 8, 2012 Final Decision of the NRC. The court found that the method used by the DNR to determine the number of dead fish caused

by Branstad's illegal discharge of pollutants into the Winnebago River in August, 2008, was inconsistent with administrative rules adopted to implement Iowa Code section 481A.151(2). Specifically, the court held that the ALJ and NRC erred in finding: 1) that the DNR did not need to apply the narrow streams completely accessible model, and 2) that the DNR correctly applied the narrow streams incompletely accessible at bridge crossings and beyond model. The court then reversed and struck the order for restitution in the amount of \$61,794.49. Respondents respectfully submit the court erred in doing so, and accordingly request that it reconsider and correct, amend and modify its ruling for the following reasons.

II. ASSUMING THE COURT WAS CORRECT IN DETERMINING THAT THE DNR USED THE INCORRECT METHODOLOGY TO CONDUCT ITS FISH COUNT, THE APPROPRIATE REMEDY WAS A REMAND TO THE AGENCY TO DETERMINE THE VALUE OF THE DEAD FISH ACTUALLY OBSERVED BY DNR OFFICIALS.

Respondents first submit that even if the court was correct in determining that DNR officials used the incorrect methodology to conduct their fish kill count, the court nevertheless erred in failing to take into account the number of dead fish *actually* observed and counted by DNR officials during their investigation. DNR Fisheries Biologist, Scott Grummer, testified at hearing regarding the dead fish that he and his colleagues observed and counted during their investigation. Tr. pp. 92-99. These observations are summarized in DNR Ex. P, which consists of maps and fish kill investigation worksheets reflecting the species, sizes, and numbers of dead fish that DNR officials actually counted at each of the 12 sampling locations.¹ These worksheets reflect that a total of 2,233 dead fish were observed and counted at these sites. The court expressly found substantial evidence in the record to support the agency's finding that the

¹ See also Tr. pp. 92-99.

discharge from the Branstad property was the cause of the fish kill. Thus, even if the DNR applied an incorrect methodology in extrapolating the number of fish killed over the entire 16.1 mile stretch of river where dead fish were observed, the court erred in failing to take into account the value of the dead fish actually observed and counted at the 12 sites. Rather than reversing and striking the DNR's restitution assessment in its entirety, the court should have remanded the matter to the agency for purposes of determining the value of the dead fish *actually observed and counted* by DNR officials. See e.g., *Loeb v. Employment Appeal Board*, 530 N.W.2d 450, 452 (Iowa 1995) ("After holding the administrative decision was based on error, the district court should ordinarily remand the case to the agency for redetermination in accordance with the proper rule of law"). Failure to do so was error. Respondents accordingly request the court to reconsider its decision and, at minimum, remand this matter to the agency for purposes of determining the value of the dead fish actually observed and counted by DNR officials.

III. THE COURT'S DETERMINATION THAT THE DNR USED THE INCORRECT METHODOLOGY TO CONDUCT ITS FISH COUNT IS UNSUPPORTED BY SUBSTANTIAL EVIDENCE AND CONTRARY TO IOWA LAW REQUIRING THAT APPROPRIATE DEFERENCE BE GIVEN TO AGENCIES IN MATTERS OVER WHICH THEY HAVE JURISDICTION.

Respondents further request that the court reconsider its finding that the method used by the DNR to determine the number of dead fish is inconsistent with rules it adopted to implement Iowa Code section 481A.151(2). Those rules, codified at 567 Iowa Admin. Code chapter 113, provide in relevant part that "[n]ormally investigators will follow the methods prescribed by AFS to determine, by species and size, the number of fish killed." 567 Iowa Admin. Code 113.4(2)(a).

The record in this case contains substantial evidence that the DNR did in fact follow the methods prescribed by AFS to determine by species and size the number of fish killed by the Branstad discharge. DNR Fisheries Biologist, Scott Grummer, a veteran investigator of “probably somewhere between 30 and 40”² fish kills, testified in detail as to how he used methods described in AFS 24 to set up his sample locations and strata. Tr. pp. 74-80; 87-92; 105-08; 134-36. Per AFS 24, those methods are not intended to be rigid and, in fact, specifically contemplate “some adaptation of general methods” in each case. DNR Ex. N, p.18.

The court found that “there was no evidence presented that DNR staff could not or should not have followed the AFS 24 method for narrow streams completely accessible.”³ Ruling, p. 18. To the contrary, substantial evidence exists in the record to support Grummer’s decision to use the “narrow streams accessible at and beyond road crossings” method in this case. The Winnebago River does not parallel and abut roadways over the entire 16.1 mile stretch of the fish kill.⁴ Access to the river by means other than walking or boating upstream from the Ouverson farm would thus have required him to trespass across private property or seek permission from riparian landowners in order to access portions of the river. Tr. p. 158. It is unreasonable to assume that Grummer and his colleagues could have simply walked or boated *upstream* for over 16 miles, setting up 100-yard segments every ½ mile, in order to perform their

² See Tr. p. 73.

³ The court noted, for example, that the DNR did not use a boat during the fish kill portion of the investigation. Ruling, p. 17. However, according to Grummer:

The risky part of putting a boat in and traveling downstream is you’re going to be dislodging fish yourself, and then that causes another problem with the drifting fish. You’re going to be adding to that downstream movement that you referred to.

Tr. p. 127.

⁴ See e.g., DNR Exs. C & P.

fish kill count. Substantial evidence exists in the record to support Grummer's decision to use public road crossings in order to obtain access to the river.

The court further found that the DNR's method for Stratum I does not follow AFS 24. Ruling, p. 19. Specifically, the court found that Grummer used 200-yard long counting segments at all 12 sites. This conclusion is contradicted by the evidence presented at hearing. Grummer in fact used 100-yard long counting segments at all Stratum I sites, as reflected in the fish kill investigation worksheets introduced at hearing. DNR Ex. P, pp. 3, 5, 6, 9, 13. AFS 24 provides with respect to Stratum I sites that "[s]ubject to the biologist's judgment, a uniform distance of *40-50 yards in each direction* is suggested, although this distance can be varied in either direction." DNR Ex. N, pp. 21-22 (emphasis added). Grummer thus complied with the recommended 80-100 yard segments at the Stratum I sampling locations.⁵

Despite attempts by Branstad's counsel during cross-examination to cast doubt on the validity of the methods employed by Grummer to conduct the fish kill, Branstad offered no evidence of his own that the methodology employed by DNR officials to count the dead fish violated AFS criteria or led to unreliable results. The Iowa Supreme Court has held that "if there is substantial evidence to support findings upon which a lower tribunal arrives at a challenged conclusion of law, it acts illegally. *Sueppel v. Eads*, 156 N.W.2d 115, 117 (Iowa 1968). The record not only contains substantial evidence to support the counting methodology Grummer chose and used, but contradicts the district court's findings and conclusions.

⁵ It should be noted that Grummer likewise complied with AFS 24 with respect to the Stratum II sites he chose. AFS 24 provides with respect to Stratum II sites that "[t]he more of the stream that can be included in Stratum II (at the expense of Stratum III), the better the information on total numbers of dead fish will be." DNR Ex. N, p. 22.

Finally, to the extent the court's ruling holds that the DNR's restitution assessment must be reversed and struck because AFS methods were not rigidly followed, the court arbitrarily limits the flexibility given to DNR officials by both Iowa Code section 481A.151 and 567 Iowa Admin. Code 113.4 in performing their fish kill counts. Under Iowa law, the court was required to apply a deferential standard of review and uphold the agency's application of law to fact in its determination unless it was "irrational, illogical, or wholly unreasonable". *Iowa Code §17A.19(10)(l); Iowa Medical Society v. Iowa Board of Nursing*, 831 N.W.2d 826, 841 (Iowa 2013). The court failed to follow this standard in reviewing the decisions of the ALJ and NRC in this case. Absent evidence that the methodology resulted in invalid or unreliable data, or otherwise prejudice Branstad,⁶ the court's findings and conclusions amount to an impermissible substitution of its interpretation of applicable methodology for that of an experienced fisheries biologist, which again violates the deferential standard of review the court was required to follow under Iowa Code section 17A.19(10)(l) and the principles articulated in *Iowa Medical Society v. Iowa Board of Nursing*, 831 N.W.2d at 841.

⁶ In fact, AFS 24 expressly states:

Counts underestimate numbers killed. – Estimates of losses based on countable dead fish will be conservative. Very seldom will the counts represent more than a modest fraction of the fish killed: the counts are based only on fish actually seen once during a dynamic, ongoing process. Fundamental problems prevent accurate estimation of the total number of dead fish (*The Nature of Fish Kills*, page 33). Fish die at differing rates, and once dead, they float or sink on different schedules; for the same species and toxicant, these rates vary with water quality, temperature, and size of fish. A count of dead fish will miss many fish that are too deep in the water to be seen, are hidden by debris, have been taken by predators or scavengers, have decomposed, or are visible but overlooked (human error). All these factors contribute toward underestimating the numbers of fish killed.

DNR Ex. N, p.18.

For all these reasons, Respondents respectfully request the court to reconsider its ruling reversing and striking the restitution assessment made in this case and reinstate the agency's order in the full amount of \$61,794.49.⁷

Respectfully submitted,

THOMAS J. MILLER
Attorney General of Iowa

DAVID R. SHERIDAN
Assistant Attorney General


DAVID L. DORFF, AT0002110
Assistant Attorney General
Environmental Law Division
Lucas Building, Ground Floor
321 E. 12th St., Room 018
Des Moines, Iowa 50319
Phone: (515) 281-5351
Fax: (515) 242-6072
Email: ddorff@ag.state.ia.us
ATTORNEYS FOR RESPONDENTS

⁷ The court intimates in its Ruling that an artificially high restitution figure was arrived at by virtue of DNR officials counting the number of dead fish at the Ouverson farm. While Grummer admitted that by counting at the Ouverson farm he broke the pattern he had been operating under, there is no evidence that this tainted the results obtained. Even if it did, Respondents submit the appropriate remedy is a remand to the agency to recalculate the restitution assessment without relying on the results obtained from this particular sampling location. *See e.g., Loeb*, 530 N.W.2d at 452 (“After holding the administrative decision was based on error, the district court should ordinarily remand the case to the agency for redetermination in accordance with the proper rule of law”).

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the foregoing document was sent regular U.S. mail to each party of record addressed as follows:

James L. Pray
BROWN, WINICK LAW FIRM
666 Grand Avenue, Suite 2000
Des Moines, IA 50309
Email: JLP@brownwinick.com
ATTORNEYS FOR PETITIONER

Judge Rustin Davenport
Cerro Gordo Co. District Court
Courthouse
220 N. Washington Ave.
Mason City, IA 50401
Email: rustin.davenport@iowacourts.gov

on this 26th day of JULY, 2013



IN THE IOWA DISTRICT COURT FOR HANCOCK COUNTY

MONROE BRANSTAD
Petitioner,

CV CV019081

STATE OF IOWA, ex rel, NATURAL
RESOURCE COMMISSION and the IOWA
DEPARTMENT OF NATURAL
RESOURCES,
Respondent,

PETITIONER'S RESISTANCE TO RULE
1.904(2) MOTION

Comes Now Petitioner Monroe Branstad, by and through this attorneys, and resists each and every claim and issue raised in Respondent's Motion for Reconsideration, Correction, Amendments and Enlargement of Findings and Conclusions, and for Modification of Ruling Accordingly or for Substitution of Different Ruling, as follows:

I. A REMAND TO USE A NON-AFA COUNTING METHOD IS INAPPROPRIATE.

Respondent begs that the court remand this matter to the agency so that it can count the number of actual fish observed during the investigation. Respondent asserts that the legal basis for this request is an unemployment benefits case, Loeb v. Employment Appeal Bd., 530 N.W.2d 450, 452 (Iowa 1995). In Loeb, the Iowa Supreme Court did hold that after holding that an agency decision was based on error, a "district court should *ordinarily* remand the case to the agency for redetermination in accordance with the proper rule of law." (emphasis added). However the Loeb decision goes on to find that no such remand was required in that case because the right (or no right) to benefits "was established as a matter of law." Because the court in this case has determined that the fish kill counting method used by the Department was in error as a matter of law, no remand to the agency is necessary.

A remand to the agency to recalculate the damage claim as requested by Respondent is also

inappropriate. Both the Court and Petitioner have noted the requirement of Iowa Code § 481A.151(3) which provides that the “Rules adopted by the commission shall provide for methods used to determine the extent of an injury and the monetary values for the loss of injured wild animals based on species.” Iowa Code § 481A.151(3) (2011) (emphasis supplied). The Iowa Administrative Code provides that in fish loss scenarios the methodologies to be used to prove species, size, and numbers of fish killed are to be determined by methodologies provided by the American Fisheries Society. See 571 IAC § 113.4 (emphasis supplied). Allowing Respondent to utilize the dregs of a failed fish kill counting method cannot, as a matter of law, constitute compliance with the fish loss methodologies mandated by Iowa law and the Iowa Administrative Code. To allow Respondent to substitute one non-compliant method for another would make a mockery of the reasoning supporting the Court's ruling.

II. THE TRIAL COURT'S DETERMINATION THAT THE DNR USED THE INCORRECT METHODOLOGY IS SUPPORTED BY SUBSTANTIAL EVIDENCE.

The Trial Court's decision is amply supported by evidence that Mr. Grummer chose the wrong counting methodology:

- Mr. Grummer used the “Narrow Streams, Incompletely Accessible – streams accessible at road crossings and beyond” category for his count. The Administrative Law Judge specifically found that he had “characterized the river as “incompletely accessible” and Mr. Grummer admitted this fact during the hearing, stating “The methods we used are--the major heading starts on Page 20, but goes to 21. It's under narrow streams, incompletely accessible. And we used streams accessible at road crossings and beyond.” (Grummer, T. p. 87, ll. 20-25).
- When asked why he used this methodology under direct examination Mr. Grummer said

“That’s the typical one.” (Grummer, T., p. 88, l. 3)

- Mr. Grummer went on to say that “In Iowa we have road crossings that, you know, go over these streams, and that’s the most frequently used.” (Grummer, T., p. 88, ll. 3-5)
- It is clear that Mr. Grummer did not take preliminary trip through the affected section of stream, stake out segments that are varied in length so that each includes about the same number of fish. (AFS 24, p. 21)
- It is clear that Mr. Grummer did not establish the interval between the segments to be examined: a 100-yard segment every half mile or a 100-meter sample segment every kilometer throughout the area of the kill. (Id.)
- It is clear that Mr. Grummer did not next expand the number of fish counted in each segment to the whole length of affected stream by either multiplying the average count per sample segment by the total number of segments or by multiplying the total number counted in the sample segments by an expansion factor.
- When asked how he defined an “inaccessible stream”, Mr. Grummer used a definition that does not appear in the AFS: “The way the AFS publication defines inaccessible doesn’t mean it’s physically inaccessible, it means that you’d have to seek permission to go back in and traverse quite a ways off a roadway. That’s why the protocol that we use is accessible at road crossings and beyond.” (Grummer, T. p. 158, ll. 14-20). As a matter of law, AFS 24 does, in fact, define inaccessible areas in terms of physical access. “In undeveloped areas, passage of the biologist on foot or in a boat may be impeded by heavy vegetation, fallen timber and logjams, or wetlands.” (Exhibit N, p. 43).

- Even when an area is, in fact, inaccessible in an otherwise accessible stream, AFS 24 states “Although partial inaccessibility prevents completion of a sampling survey for the entire area, it should not discourage use of random sampling in the accessible areas.” (Exhibit N, p. 43).
- On cross-examination counsel for Branstad asked Mr. Grummer how he legally justified extending their fish kill count walks in the river and along the bank outside the road easements. It took some questioning, but Mr. Grummer finally admitted that he really did not need permission:

9 Q. So if you have the legal right to go there
 10 and even though it may be a hike, if it’s still
 11 accessible by way of a road crossing, you could have
 12 set up more random sampling all along that 16.1 miles
 13 in order to meet the AFS 24 requirements?
 14 A. *Correct.* What we did is extended the length
 15 on what I would consider a normal investigation to
 16 survey more of that unmeandered area.

(Grummer, T. pp. 159-161, emphasis supplied).

- Mr. Grummer admitted on cross-examination that he had not sought anyone’s permission to get in the Winnebago River:

8 Q. Now, accessible, you could ask permission to
 9 get in the river; right?
 10 A. Definitely.
 11 Q. Did you seek anyone’s permission to get in
 12 the Winnebago River along—as part of this
 13 investigation other than Mr. Ouverson already giving
 14 you permission?
 15 A. No.

(Grummer, T. 117, ll. 8-15).

- Two of Mr. Branstad’s own fish kill counters managed to cover nearly half of the 16 mile distance in a boat. (Exhibit 21).

- Ron Ambrosion and Gary Taylor managed to do their boating on the upper reaches of the Winnebago River which is more “muddy, shallow and turbid” than the lower half.
(Grummer, T. p. 166, l. 22)
- It is clear that Mr. Grummer broke his fish kill count down into different strata. The fish count methodology for “Narrow streams, completely accessible” does not use strata. When asked on cross-examination if he agreed that if the stream was totally accessible, there is no stratum III, he responded by saying that “Yeah, when it’s completely accessible.”
(Grummer, T. p. 158, l. 10)
- Although AFS 24 recommends a randomized sample every hundred yards for each half mile of stream, the sampling chosen by the IDNR was not randomized. Bridge crossings and alternating (upstream downstream) 200 yard segments were chosen as the sampling points. This resulted in fewer sampling segments. On cross-examination, Mr. Grummer admitted that his sampling method did not meet the AFS 24 standard:

1 Q. For a 16-mile segment if you follow the
 2 hundred yards for a half mile recommendation of the
 3 AFS 24 that would be a total of 32 samples?
 4 A. Yeah, depending on the length. But, yeah,
 5 you could do 32.
 6 Q. I'm just doing the math here of 16 miles
 7 divided in half or multiplied by 2 is 32?
 8 A. Yeah.
 ...
 21 Q. And you would agree that you didn't meet the
 22 recommendation of AFS 24 to do on average 100 yards
 23 per half mile?
 24 A. Yeah, we were a little less than that.

(Grummer, T. p. 162)

- It is clear that Mr. Grummer threw in an additional, non-random sample not allowed by the AFS. (Grummer, T. p. 153-154).

- It is important to note that by breaking the pattern, there was not only a large monetary effect (because this was one of the larger areas involving a fish kill (Grummer, T. p. 128 ll. 11-14)) by reducing the charge by \$14,236, but that this invalidates the entire count. It is not possible to reconstruct a scientifically-based study by simply throwing out the counts that are invalidly included. The entire process is necessarily tainted.
- Mr. Grummer admitted that he failed to randomize the sample and started at an area that might naturally collect dead fish (the rock rapids at the Ouverson house). (Grummer, T. p. 152, 153, ll. 2-7 and Grummer Deposition, p. 81-82, ll. 19-25 and 1-4).

There are numerous facts set forth not only in the decision by the Trial Court but also outlined in the briefs and in the extensive record developed below. The arguments made by Respondent are meritless.

III. THE TRIAL COURT DOES NOT OWE THE RESPONDENT DEFERENCE ON ISSUES OF LAW.

Relying on Iowa Code §§ 17A.19(10) & (11), the Supreme Court recently summarized the applicable law on deference to agency interpretation of statutes after the 1998 amendments to the Iowa Administrative Procedure Act, stating in relevant part:

In Renda, we explained that "each case requires a careful look at the specific language the agency has interpreted as well as the specific duties and authority given to the agency with respect to enforcing particular statutes." Renda, 784 N.W.2d at 13. We give deference to the agency's interpretation if the agency has been **clearly vested** with the discretionary authority to interpret the specific provision in question. Id. at 11. If, however, the agency has not been clearly vested with the discretionary authority to interpret the provision in question, we will substitute our judgment for that of the agency if we conclude the agency made an error of law. Id. at 14–15. Deference may be given to an agency's interpretation in a specific matter or an interpretation embodied in an agency rule. Sherwin–Williams Co. v. Iowa Dep't of Revenue, 789 N.W.2d 417, 422–23 (Iowa 2010). Indications that the legislature has delegated interpretive authority include "rule-making authority, decision-making or enforcement authority that requires the agency to interpret the statutory language, and the agency's expertise on the

subject or on the term to be interpreted." Id. at 423.

Neal v. Annett Holdings, Inc., 814 N.W.2d 512, 518 (Iowa 2012) (emphasis added). Importantly, before a court may conclude that an agency's interpretation is entitled to deference, the court "must have a firm conviction from reviewing the precise language of the statute, its context, the purpose of the statute, and the practical considerations involved, that the legislature actually intended (or would have intended had it thought about the question) to delegate to the agency interpretive power with the binding force of law over the elaboration of the provision in question." Doe v. Iowa Dept. of Human Services, 786 N.W.2d 853, 857 (Iowa 2010) (quoting Arthur E. Bonfield, Amendments to Iowa Administrative Procedure Act, Report on Selected Provisions to Iowa State Bar Association and Iowa State Government 63 rptr. cmt. (1998)). To aid in this determination, this Court has articulated several principals, stating:

We also think certain guidelines have become evident that may inform our analysis of whether the legislature has clearly vested interpretative authority with an agency. We note that when the statutory provision being interpreted is a substantive term within the special expertise of the agency, we have concluded that the agency has been vested with the authority to interpret the provisions When the provisions to be interpreted are found in a statute other than the statute the agency has been tasked with enforcing, we have generally concluded interpretive power was not vested in the agency When a term has an independent legal definition that is not uniquely within the subject matter expertise of the agency, we generally conclude the agency has not been vested with interpretative authority.

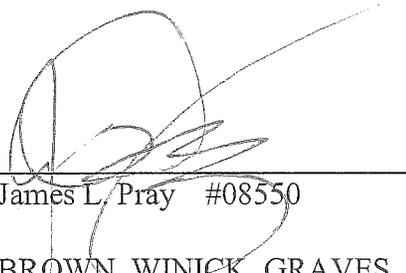
Renda, 784 N.W.2d at 14. See also, NextEra Energy Resources LLC v. Iowa Utilities Bd., 815 N.W.2d 30, 38 (Iowa 2012) (concluding that "the general assembly did not delegate to the [IUB] interpretive power with the binding force of law."). This is in line with the "normal [understanding that] the interpretation of a statute is a pure question of law over which agencies are not delegated any special powers by the General Assembly" even if such agencies granted broad authority. Renda, 784 N.W.2d at 11; see also NextEra, 815 N.W.2d at 38 (noting that

"simply because the general assembly granted the Board broad general powers to carry out the purposes of chapter 476 and granted it rulemaking authority does not necessarily indicate the legislature clearly vested authority in the Board to interpret all of chapter 476").

In this case the Iowa legislature clearly set out the methods that were to be used by this agency in conducting its fish kill counts. The fish kill counter clearly deviated from not only the mandated methods but failed to even apply correctly the method that he developed on the fly.

II. CONCLUSION

Numerous deviations from the standard methods set out in AFS 24 have been outlined in great detail in the briefs and were identified by the Court in its ruling. Therefore, for the reasons stated above, Petitioner Branstad's asks that the Court deny the motion in its entirety.



James L. Pray #08550

BROWN, WINICK, GRAVES, GROSS,
BASKERVILLE AND SCHOENEBAUM, P.L.C.
666 Grand Ave. Suite 2000
Des Moines, IA 50309
Telephone: 515/242-2404
Facsimile: 515/323-8504

ATTORNEY FOR PETITIONER MONROE
BRANSTAD

Copy to:

David L. Dorff
Assistant Attorney General
Environmental Law Division
Lucas State Office Building
321 E. 12th St., Ground Floor
Des Moines, IA 50319

ATTORNEY FOR RESPONDENT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the foregoing instrument was served upon each of the attorneys of record of all parties to the above-entitled cause by enclosing the same in an envelope addressed to each such attorney at such attorney's address as disclosed by the pleadings of record herein on the 7th day of August, 2013.

By: U.S. Mail Facsimile
 Hand Delivered Overnight Courier
 Federal Express Other

Signature



IN THE IOWA DISTRICT COURT FOR HANCOCK COUNTY

FILED

2013 SEP 30 AM 9:35

MONROE BRANSTAD,)
)
 Petitioner,)
 v.)
)
 STATE OF IOWA, ex rel., NATURAL)
 RESOURCES COMMISSION and the)
 IOWA DEPARTMENT OF NATURAL)
 RESOURCES,)
)
 Respondents.)

CLERK OF DISTRICT COURT
 FOR HANCOCK COUNTY
 Cause No. CV 13-1008

RULING ON RESPONDENTS'
 RULE 1.904(2) MOTION FOR
 RECONSIDERATION

This case is before the Court on Respondents' Rule 1.904(2) Motion for Reconsideration filed July 29, 2013. Petitioner filed his resistance on August 8, 2013. The parties did not request a hearing on the matter and the Court does not believe that a hearing is necessary.

The State seeks to have the Court reconsider its July 16, 2013, ruling which reversed the agency's order for restitution in the amount of \$61,794.49. Prior to the Court's ruling, the State contended that the agency determination should be upheld.

The State of Iowa now argues that the Court should remand this case, to allow the Department to impose restitution based upon the actual number of dead fish counted by the Department. Iowa Code § 481A.151(3)(a) provides that the rules adopted by the commission shall provide for methods used to count dead fish. Iowa Admin. Rule 571-113.4(2)(a) provides that "normally investigators follow the methods prescribed by AFS to determine, by species and size, numbers of fish killed."

(Emphasis added). American Fisheries Society Publication No. 24 (AFS 24) states in relevant part, "the best way to determine the number of dead fish in an area is to count

them all. (Ex. N, p. 35). The publication goes on to say that complete enumeration is rarely practical and therefore sampling must be used. Respondents do not claim to have counted all of the fish killed by Petitioner's silage leak.

The statute, rule, and AFS publication do not preclude the DNR from requiring restitution on the basis of the number of dead fish counted. Even if the AFS publication primarily deals with the methods of counting dead fish through sampling methods, it appears to contemplate the possibility of counting the dead fish.

The Court's concerns that the sampling methods used by the DNR were inconsistent with the rules adopted do not extend to a determination based upon the actual dead fish. The statute, rule, and AFS publication leave open the possibility of restitution based upon the number of dead fish counted. A party subject to a claim for restitution for killing of fish should not be surprised if restitution is based upon an actual count of dead fish.

Additionally, the Court's concerns that the sampling method used by the DNR might not be scientifically valid do not extend to an actual fish count. No doubt the actual fish count understates the number of dead fish. However, there is little prejudice to Branstad if there is valid count which minimizes the number of fish killed.

The Court finds that this matter shall be remanded to the agency to recalculate damages based upon the 2,233 dead fish actually counted by the DNR.

The Court has considered the State's further arguments the Court's July 16, 2013, ruling is in error. The Court is aware of the deference to the view of the agency with respect to particular matters that have been vested by a provision of law in the discretion of the agency. Iowa Code § 17A.19(11). However, the Court determined that

Branstad was prejudiced because the agency action was inconsistent with a rule of the agency. The Court reaffirms its determination that the sampling method used by the DNR was inconsistent with the rules adopted by the agency.

Accordingly, the State's Rule 1.904(2) motion is granted in part. This matter is remanded to the agency to recalculate damages based upon the 2,233 dead fish actually counted by the DNR. The State's motion is otherwise denied.

Dated: September 25th, 2013.



Rustin Davenport
Judge of the Second Judicial District of Iowa

Clerk shall furnish copies to:
James L. Pray
David L. Dorff