

MINUTES
OF THE
ENVIRONMENTAL PROTECTION COMMISSION
MEETING
JANUARY 21, 2014

IOWA DEPARTMENT OF NATURAL RESOURCES
7900 HICKMAN ROAD
WINDSOR HEIGHTS, IOWA

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MEETING MINUTES

CALL TO ORDER

The meeting of the Environmental Protection Commission was called to order by Chairperson Mary Boote at 10:02 a.m. on January 21, 2014 in the DNR Hickman facility in Windsor Heights, Iowa.

COMMISSIONERS PRESENT

- Mary Boote, Chair
- Nancy Couser, Secretary
- Cindy Greiman
- Brent Rastetter (absent except for agenda item #8)
- Bob Sinclair
- Max Smith, Vice-Chair
- Gene Ver Steeg

COMMISSIONERS ABSENT

- Chad Ingels

ADOPTION OF AGENDA

Motion was made by Bob Sinclair to adopt the agenda. Seconded by Max Smith. Motion carried unanimously.

APPROVED AS PRESENTED

APPROVAL OF MINUTES

Motion was made by Cindy Greiman to approve the December 17, 2013 EPC meeting minutes. Seconded by Gene Ver Steeg. Motion carried unanimously.

APPROVED AS PRESENTED

DIRECTORS REMARKS

Director Gipp provided an update to the Commission regarding activities related to the recent legislative appropriation of an additional \$700,000 for field inspections of animal feeding operations. The Department has hired all 7 positions and is currently training the new team members. The Governor's budget has continued funding support for the AFO program along with an Air Quality budget request for replacement of declining revenue for the program.

Director Gipp shared with the Commission DNR ESD Field Office #5 has moved from the SW7th location to the Hickman facility while the Water Supply staff have moved from the SW7th location to the Wallace Building.

INFORMATION

DNR FINANCIAL SUMMARY

Jennifer Nelson, Chief Financial Officer of the Budget & Finance Bureau presented the following item.

The Iowa Department of Natural Resources will provide Commissioners with an educational overview of the Department's financial accounts, budgeting processes, and other related items. During the presentation, Jennifer Nelson distributed the DNR Budget Reference FY2014 booklet. She summarized the Governor's Budget request process and the Department's operational expenditure.

INFORMATION

FINAL ADOPTION, CHAPTER 64, "WASTEWATER CONSTRUCTION AND OPERATION PERMITS"

Joe Griffin, Environmental Specialist Senior of the NPDES section of the Water Quality Bureau presented the following item.

The Commission was asked to approve the Final Rule for Chapter 567-64 IAC "Wastewater Construction and Operation Permits" and changes to storm water General Permit no. 2. These changes to Chapter 64 remove the storm water permitting requirement in subrule 567-64.6(6) to submit to the Department transfer agreements executed when building lots in developments are transferred and reduce the number of proofs of public notice submitted when applying for a storm water general permit authorization required in subparagraph 567-64.6(1)c.(1) from two to one. The latter requirement implements changes in recent legislation, 2013 Iowa Acts, House File 311. These changes in Chapter 567-64 are also to be made in General Permit no. 2 which is adopted in rule 567-64.15.

Public comments were accepted from November 23, 2013 until December 12, 2013. A public hearing was held on December 12 at which no comments were received.

<i>Motion was made by Gene Ver Steeg to approve the agenda item as presented. Seconded by Nancy Couser. Motion carried unanimously</i>
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APPROVED AS PRESENTED

FINAL ADOPTION – CHAPTER 93, “NON-POINT SOURCE POLLUTION CONTROL SET-ASIDE PROGRAMS”

Daniel Olson, Environmental Specialist Senior of the NPDES section of the Water Quality Bureau presented the following item.

The Commission was requested to approve the amendments to Chapter 93, “Non-Point Source Pollution Control Set-Aside Programs”. The changes proposed for this rule are intended to implement section 4 of House File 311 (2013) passed by the Legislature and signed by the Governor April 24, 2013. Section 4 of House File 311 amended Iowa Code section 466.8 to allow homeowners inside city limits and without a public sewer connection to access the low interest loan program known as the Onsite Wastewater Assistance Program to repair or replace failing septic systems. This rulemaking is necessary to implement the revised law.

A public hearing was held December 4, 2013 in Des Moines. The written comment period was open through December 12, 2013. No comments were received on the proposed amendments.

Commissioner Nancy Couser inquired into the educational opportunities available for residents. Daniel Olson shared with the Commission the role of county sanitarians as the front line, onsite inspectors who promote the program. Additionally, educational conferences are held each winter to educate financial lenders, contractors, and operators who then promote the program. Commissioner Nancy Couser recommended that a message on this program be inserted with each water bill.

*Motion was made by Nancy Couser to approve the agenda item as presented. Seconded by Max Smith.
Motion carried unanimously*

APPROVED AS PRESENTED

PUBLIC PARTICIPATION

NONE

CONTRACT WITH IOWA STATE UNIVERSITY FOR 2014-2016 LAKE MONITORING

Roger Bruner, Supervisor of the Watershed Monitoring and Assessment Section of the Iowa Geological and Water Survey Bureau presented the following item. To his aid was Michelle Balmer, Geologist with the Watershed Monitoring and Assessment Section.

Commission approval was requested for a 3 year-service contract with Iowa State University of Ames, Iowa. The contract will begin on February 1, 2014 and terminate on December 31, 2016. The total amount of this contract shall not exceed \$522,131.12. DNR shall have the option to renew this contract long as this contract and any extensions do not exceed a six-year period.

This contract will be funded through Iowa Code section 8.57A Environment First Fund (60%) and Iowa Code 456.33A Lake Restoration Program (40%).

This contract encompasses the majority of lake water quality monitoring conducted as part of the state-wide water monitoring program and is the primary basis for assessing the state's lake water quality. The purpose of this program is to define the condition of Iowa's lakes, characterize the existing and emerging issues, measure changes or trends in water quality, and provide information to citizens and decision-makers. Specific ways the DNR intends to utilize the information gathered and analyzed in this Contract include: to fulfill Clean Water Act requirements of the department including: biennial reports on the status of lake water quality, impaired waters listing, and total maximum daily load reports; manage and evaluate this natural resource; and allocated lake restoration funds most appropriately.

The parties propose to enter into this Contract for the purpose of retaining the Contractor to provide the DNR with lake monitoring data. As part of this contract ISU will provide field and analytical support for monitoring on 138 of Iowa's significantly publicly owned lakes. The lakes are monitored three times during the field season for basic water chemistry, nutrients, plankton composition, and clarity.

Iowa State University was chosen using an intergovernmental agreement. Iowa State University was chosen for this project because of extensive previous lake monitoring experience with the DNR (Iowa State University has completed similar lake monitoring to activities described in the contract for the DNR in 2000-2007, and 2009-2013).

Commissioner Mary Boote inquired into how the monitoring fits into the Iowa Nutrient Strategy. Roger Bruner shared with the Commission the results from the monitoring allows for assessing if there are increases or decreases of nutrients in the lakes.

Commissioner Max Smith requested the definition of Phytoplankton and Zooplankton. Michelle Balmer shared with the Commission the types of organisms and plants in the lake and their importance with the food web.

Commissioner Mary Boote inquired into the option for special projects. Michelle Balmer shared with the Commission the contractual flexibility built into the contract for unplanned/foreseen events occurring during the timeframe.

Motion was made by Cindy Greiman to approve the agenda item as presented. Seconded by Bob Sinclair. Motion carried unanimously

APPROVED AS PRESENTED

EPC ANNUAL REPORT

Mary Boote, Chair of the Environmental Protection Commission presented the following item.

Commissioners developed an Annual Report in accordance to Iowa Code section 455B.105 Powers and duties of the commission.

The commission shall:

...

5. Make a concise annual report to the governor and the general assembly, which report shall contain information relating to the accomplishments and status of the programs administered by the department and include recommendations for legislative action which may be required to protect or enhance the environment or to modernize the operation of the department or any of the programs or services assigned to the department and recommendations for the transfer of powers and duties of the department as deemed advisable by the commission. The annual report shall conform to the provisions of section 7A.3.

Commissioner Mary Boote thanked Commissioners Nancy Couser and Brent Rastetter for compiling the input from Commissioners and summarizing the Commission activities for the year.

Motion was made by Bob Sinclair to approve the agenda item as presented. Seconded by Max Smith. Motion carried unanimously

APPROVED AS PRESENTED

MONTHLY REPORTS

Bill Ehm shared with the Commission a summary of:

CAFO Roundtable National Conference will be hosted in Des Moines in October.

Field Office 5 has moved from SW7th leased offices to Hickman Facility. Water Supply team members have moved to the Wallace Building.

Iowa Geological and Water Survey Bureau team members have been interviewing with the University of Iowa - IIHR. Some IIHR job offers have been extended with more to come.

The Legislature has begun and team members will be supporting their information requests.

The January 29th Legislative Event moved from January 22nd.

The following monthly reports have been posted on the DNR website under the appropriate meeting month:

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

1. Rulemaking Status Report
2. Variance Report
3. Enforcement Status Report
4. Administrative Penalty Report
5. Attorney General Referrals Report
6. Contested Case Status Report

INFORMATION

GENERAL DISCUSSION

The Commission suggested that the January 29th Joint NRC/EPC meeting start earlier than noon. Chair Mary Boote will contact the Chair of NRC to determine a start time.

The Governor's Office is working towards finding a replacement for the vacant EPC seat. To find a balance with gender and political party can be challenging.

Director Gipp encouraged the Commission to seek educational opportunities around the state to learn about environmental regulation.

Blood Run appropriation concerns the creation of a joint state park between Iowa and South Dakota.

February 11th at the Fair Grounds, EPA Regional Administrator, Karl Brooks, and DNR Director Chuck Gipp will be hosting an educational session regarding Iowa's Nutrient Strategy.

INFORMATION

PROPOSED CONTESTED CASE DECISION –JOSEPH AND CAROL JAHNKE

Ed Tormey, Legal Council for the Department of Natural Resources along with Carrie Schoenebaum, Attorney for the Department presented the following item.

On May 13, 2013, the Department issued to the City of Waverly (City) a modified operation plan to Flood Plain Development Permit 2010-184. Joseph and Carol Jahnke appealed this permit alleging the approved modified operation plan, which authorized a summer pool of 905.4 feet, adversely affects their property.

A Proposed Decision was issued on January 8, 2014. The Proposed Decision affirmed the modified operation plan and opined that the evidence presented at hearing did not support the Jahnkes' contention that the modified operation plan adversely affects their property and therefore the City needed to obtain easements. This decision affirmed the Department's finding that the historic normal summer upstream pool elevation was 905.4 feet and because of that the Department correctly approved a modified operation plan which authorized a summer pool of 905.4 feet. Thus, there was no change between the modified operation plan and the historic upstream summer pool level. Because there was no change, there was no adverse impact to property owners and the City did not need to obtain easements from the property owners.

There has been no appeal of this Proposed Decision. However, the 30 day appeal period has not expired. Nevertheless, the Department has brought this Proposed Decision to the Commission pursuant to 567 Iowa Administrative Code (IAC) Chapter 7 (incorporating 561 IAC Chapter 7) which requires that a proposed decision be brought to the Commission within 30 days of its issuance. In the absence of an appeal the Commission may decide on its own motion to review the Proposed Decision. If there is no review of this Proposed Decision, it automatically becomes the final decision of the agency. Should the Proposed Decision be appealed it will be brought to the Commission again for a hearing of that appeal.

Commissioner Mary Boote inquired into the notification process for the Jankes. Carrie Schoenebaum shared with the Commission the Jankes still are within the timeframe to appeal the decision which would bring the item back to the Commission for review.

NO MOTION

APPEAL OF PROPOSED DECISION UPHOLDING ADMINISTRATIVE ORDER

Jon Tack, Attorney of the Legal Service Bureau presented the following item.

The Environmental Protection Commission reviewed an appeal of a Proposed Decision issued by Administrative Law Judge Heather L. Palmer of the Iowa Department of Inspections and Appeals on May 28, 2013 in DIA Case No. 12DNR015. Pursuant to rule 561 IAC 7.17(5), as adopted by reference at 567 IAC 7.1, a party may appeal the decision of the Administrative Law Judge to the Environmental Protection Commission.

A hearing was held on April 8, 2013 at which time testimony and other evidence was presented to the Administrative Law Judge. In her Proposed Decision, the Administrative Law Judge upheld Administrative Order No. 2012-SW-20 issued by the DNR on September 13, 2012. The Administrative Order was issued to Pet Memories, Inc. and imposed an administrative penalty of \$10,000 and directed Pet Memories, Inc. to cease the illegal burial of horse carcasses on its property.

The Commission is being presented with the Proposed Decision of the Administrative Law Judge, the Appeal filed by Pet Memories, Inc., the briefs of the DNR and Pet Memories, Inc. and the transcript from the hearing in this matter.

The entire record on appeal was available for the review of the Commission upon request. The record created in this contested case 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) "e".

Jon Tack shared with the Commission the process and steps of the case review along with the role of the Commission. The Department agrees with the Administrative Law Judge's findings identifying the materials as solid waste. Since the facility is not a rendering plant it is not subject to IDALS laws and rules but rather DNR's solid waste requirements. Jon Tack asked the Commission to uphold the Administrative Law Judge decision.

Commissioner Gene Ver Steeg inquired into the legal opportunities available for residents of Iowa for pets to be disposed. Jon Tack shared with the Commission pet owners may bury on their own property, send pets for cremation at facilities such as Pet Memories, or have the pets rendered. The Commission was made aware that disposal at a sanitary landfill is also allowed.

Jeff Bittner, Attorney for Pet Memories, shared with the Commission in September 2012 the DNR fined Pet Memories \$10,000 for burying horses. He disputed the authority and jurisdiction of the DNR for the disposal of dead animal carcasses and urged that it should be regulated only by IDALS because the Code of Iowa provides that IDALS "shall" regulate animal disposal. The Code of Iowa does not define garbage, trash, or refuse and the DNR rules defining these terms don't specify dead animals. Pet Memories argued that a dead pet is not garbage, trash, or refuse to the owners. Pet Memories also asserted that the DNR's definition of refuse is vague and would not put the common person on notice that a dead pet would be considered a solid waste. A third basis for appeal argued by Pet Memories is equal protection of law. Mr. Bittner acknowledged a legitimate need for the protection of the groundwaters but urged that it violates equal protection to allow a farmer to be able to bury 500 dead animal carcasses but Pet Memories can't bury 2 horses. Mr. Bittner asserted that Pet Memories is not hurting the environment with its environmentally friendly practices while human cemeteries are not regulated by the DNR which place a number of hazards into the earth.

Commissioner Brent Rastetter inquired into the transportation practices of Pet Memories and previous violations. Jeff Bittner shared with the Commission Pet Memories utilizes a pick up truck to transport the horses. Mr. Bittner continued to explain the first violations were with IDALS, appealed, and eventually abandoned by IDALS when the law was changed.

Jon Tack referenced Exhibit F of the Administrative Law Judge materials showing photos of the sites. Mr. Tack further stated that the solid waste laws and rules do not, and could not, have a comprehensive list of every possible material that meets the definition of solid waste. There is nothing in the record that Pet Memories' practices were deemed environmentally friendly. Kurt Levetzow, Environmental Specialist Senior with the Washington Field Office, is a trained professional for waste and ground water protection.

Commissioner Questions:

Commissioner Gene Ver Steeg inquired if a transporter of dead animals needs to be licensed. Jon Tack shared with the Commission he was not in a position to cite the rules of IDALS.

Commissioner Brent Rastetter inquired into the number of other similar companies. Jon Tack expressed he was aware of other pet cemeteries in the state but was not familiar with facilities who offer horse disposal.

Commissioner Cindy Greiman inquired into the options for an individual who is unable to dispose of horses on their own land. Jon Tack shared with the Commission that individuals without land to bury the horse may use incineration or rendering.

Commissioner Gene Ver Steeg inquired into the legality of burying cats and dogs. Jon Tack shared with the Commission three different theories on the subject.

Jeff Bittner responded to Exhibit F that some burial locations do and do not have markers. The photos show freshly disturbed dirt where headstones may be coming at a later date. There is testimony on page 152 reflecting the environmental practices of Pet Memories.

Dave Sheridan, Assistant Attorney General from Attorney Generals Office shared with the Commission its options to affirm, reverse, or modify the decision.

Motion was made by Bob Sinclair to enter into closed session with David Sheridan with the Attorney General's office for the following reason: to discuss the decision to be rendered in a contested case conducted according to the provisions of chapter 17A (Iowa Code section 21.5(1)(f)). Seconded by Cindy Greiman. A roll call vote was conducted as follows: Mary Boote-yea, Brent Rastetter-yea, Nancy Couser-yea, Cindy Greiman-yea, Bob Sinclair-yea, Max Smith-yea, and Gene Ver Steeg-yea. Motion passes.

- - End of Closed Session - -

Commissioner Max Smith inquired into the burial practices of horses with Pet Memories. Jeff Bittner shared with the Commission that the hearing officer attempted to determine and Steve Johnson testified he owned 200-300 acres and has buried hundreds of horses. Jeff Bittner was unable to answer to how many horses are in a grave site.

Motion was made by Brent Rastetter to affirm the decision with a modification the Commission did not find evidence of bias and the alleged bias should have been addressed during the hearing. Seconded by Gene Ver Steeg. Motion carried unanimously

Commissioner Bob Sinclair asked whether an additional amendment that Iowa Code section 167.18 does not apply to the dead horses disposed of by Pet Memories but he made no motion.

AFFIRMED AS AMENDED

ADJOURNMENT

Motion was made by Bob Sinclair to adjourn the meeting. Seconded by Cindy Greiman. Motion carried unanimously

ADJOURNED

Chairperson Boote adjourned the Environmental Protection Commission meeting at 1:32 p.m., Tuesday, January 21, 2014.

Chuck Gipp

Chuck Gipp, Director

Max Smith

Nancy Couser, Secretary *Max Smith for : Nancy Couser*

BUDGET REFERENCE

IOWA DEPARTMENT OF NATURAL RESOURCES

FY 2014

The intent of this Budget Reference is to provide an overview of the major revenue sources available to fund the Iowa Department of Natural Resources programs, both operations and capitals; and a brief review of expenditures.



Jennifer Nelson, Chief Financial Officer
Budget and Finance Bureau

IOWA DEPARTMENT OF NATURAL RESOURCES

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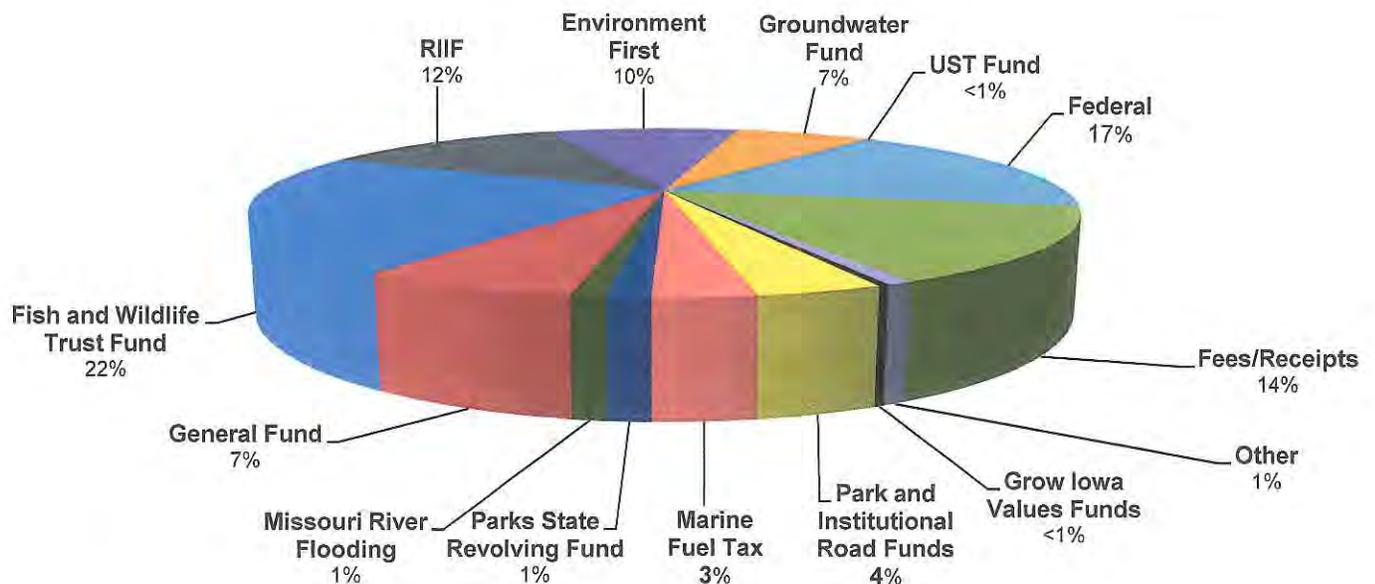
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IOWA DEPARTMENT OF NATURAL RESOURCES

Just the Facts

The Iowa Department of Natural Resources (DNR) is the state agency charged with conserving and enhancing the state’s natural resources. The general direction of DNR operations is set forth in the Code of Iowa 455A.2: “A department of natural resources is created which has the primary responsibility for state parks and forests, protecting the environment, and managing fish, wildlife, and land and water resources in this state.”

The DNR has a combined annual budget of \$222.8 million, which is derived from various revenue sources. Of that, 7% is appropriated from the state general fund with the remainder from a variety of sources including non-general fund appropriations, fees and federal funds. 12% of the DNR’s operating budget is appropriated from the state general fund. While the general fund represents a small portion of the DNR’s overall budget, it is a very critical piece, with approximately 35% used to leverage federal dollars and over 50% used for the operation of Iowa’s State Parks System and State Forests. The remaining serves to bridge other funding sources that make up the operating budget.

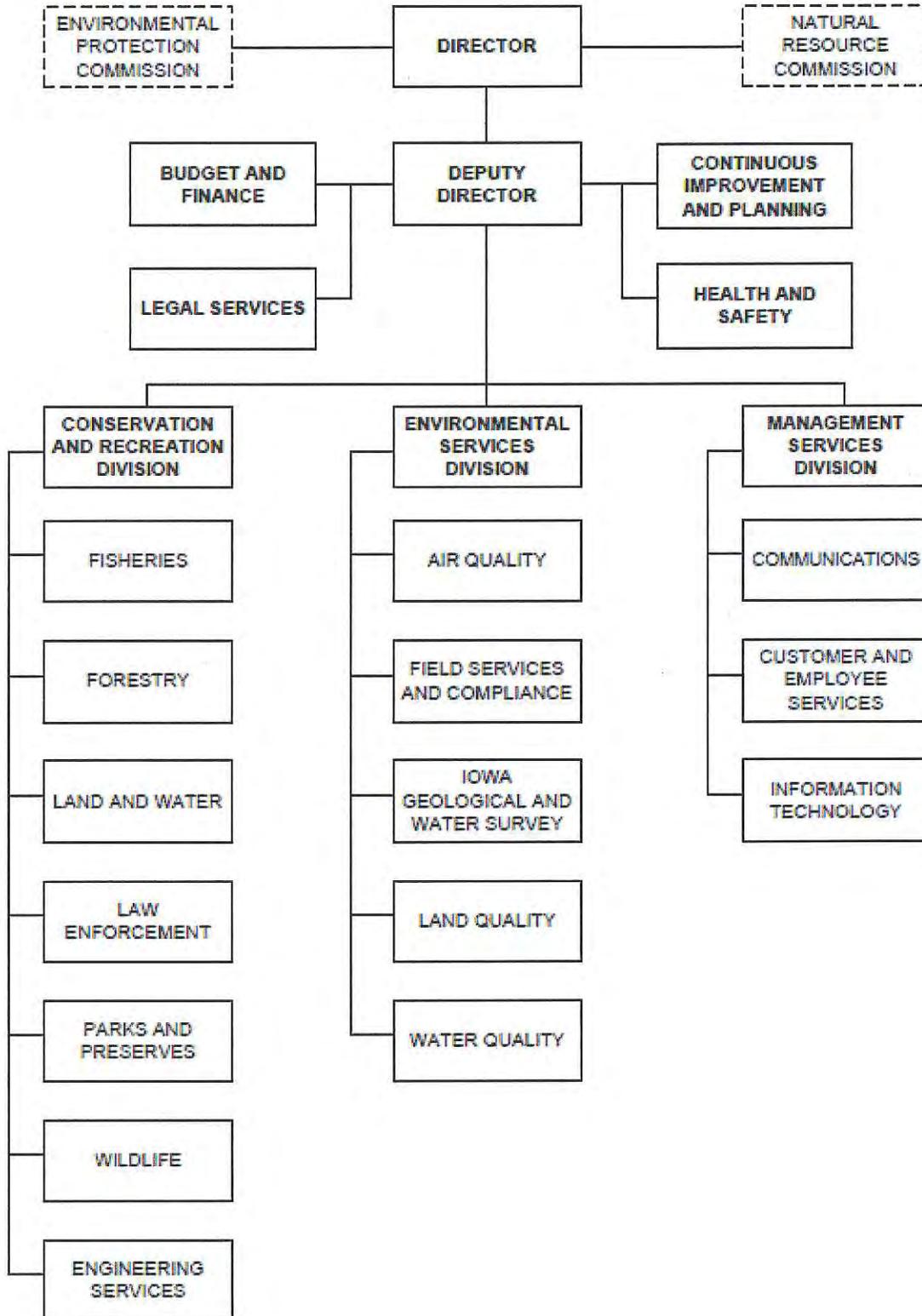


The DNR has a total of 1109.95 budgeted full-time equivalents (FTE); of which 948 are permanent employees. Seasonal employees, interns and contract employees comprise the remaining positions. Employees are located in 83 counties across the state.

The customer base of the DNR is broad. It includes citizens; local, state, and federal government agencies; business and industry; elected officials at all levels and media groups. In addition to its employees and volunteers, the DNR has created strong partnerships with natural resource conservation stakeholder groups, our state universities and various community organizations to help achieve its mission.

IOWA DEPARTMENT OF NATURAL RESOURCES

Table of Organization



IOWA DEPARTMENT OF NATURAL RESOURCES

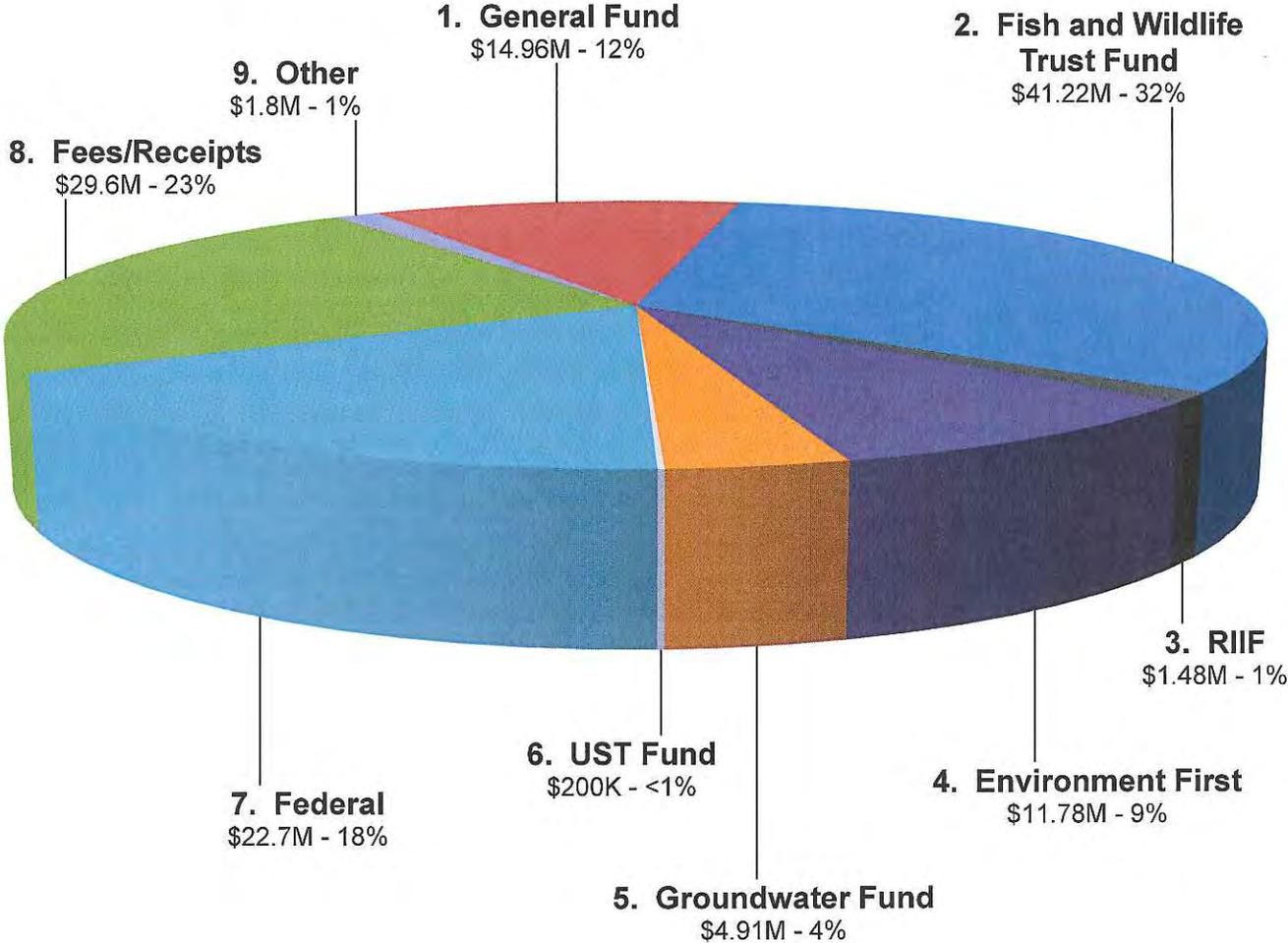
Fund Definitions

<i>Air Contaminant Source Fund - Air Title 5 Fees</i>	This account receives fees for major source emissions by ton to help defray the cost of permits, monitoring and inspection programs for the federal Clean Air Act of 1990. (created by 455B.133B)
<i>Animal Agriculture Compliance Fund</i>	This fund receives state appropriations, federal funding, private funding and fees from annual compliance, construction permit applications, manure management plan filings, educational programs, commercial manure service licenses and collection of civil penalties. These funds are to be used exclusively to pay the expenses of the department in administering and enforcing the provisions of the Animal Agriculture Compliance Act (Iowa Code Ch 459) subchapters II (Animal Feeding Operations - Air Quality) and III (Animal Feeding Operations - Water Quality). (created by Iowa Code 459.401)
<i>ATV Registration Fund</i>	This account receives fees collected from owner registration of ATVs and are used to provide 50% to counties and 50% to the Department of Natural Resources for ATV programs of the state. (created by 321G.7)
<i>Conservation Administration Fund</i>	This account receives transfers from the REAP fund, revenues from the sale of the <u>Iowa Outdoors</u> magazine and other miscellaneous publications, photo copies, plans, lists and data and receipts from other miscellaneous conservation-related fees. The department has spending discretion. (created by 456A.17)
<i>Conservation Memorial Trust Fund</i>	This account receives unspecified donations to support the maintenance of the Parks Bureau. The department has spending discretion. (creation authorized by Executive Council)
<i>Corps of Engineers - Condition 5 Fund</i>	This account receives agricultural lease fees paid to the Department of Natural Resources for the rental of land owned by the Army Corps of Engineers. Fees are used by the department to pay for administration and operation costs of maintaining the areas. Spending from these accounts is controlled by contracts with the Army Corps of Engineers.
<i>DNR Emergency Response Fund</i>	This fund receives environmental civil penalties and fines imposed by the courts. These funds are annually transferred to Emergency Management for use in planning and training for emergency response teams. (created by IA Code 29C.8A)
<i>DNR Refund Clearing Fund</i>	This fund is used as a clearing account for the wide variety of refunds issued by the department and is also used to transfer miscellaneous fees collected by the department to the state's General Fund.
<i>Environment First Fund</i>	This fund consists of appropriations made to the fund (from the Rebuild Iowa Infrastructure Fund) and transfers of interest earnings, and monies from other funds as provided by law. Monies in the fund are to be used as appropriated by the General Assembly for the protection, conservation, enhancement, or improvement of natural resources or the environment. Appropriations are made for projects such as water quality monitoring, REAP, Park Operations and Maintenance, etc. (created by Iowa Code 8.57A)
<i>Fish and Game Capitals Fund</i>	This account receives its funding from the Fish and Wildlife Trust Fund to provide for land acquisition and capital projects related to fish and wildlife. The department has spending discretion. (authorized by 455A.10)

<i>Fish and Game Trust Fund</i>	This account receives money from the sale of hunting and fishing licenses, fines, and federal grants used to fund operations of the Fisheries, Wildlife and Law Enforcement functions of the Department of Natural Resources. The department has spending discretion within the guidelines of the grants and appropriation language. (created by 456A.17)
<i>Forestry Management and Enhancement Fund</i>	This account receives a portion of the monies received from selling nursery stock trees and shrubs as specified in 456A.20, monies appropriated by the legislature and monies received from other sources and this fund is to be used to support the management and enhancement of forests. (created by 456A.21A)
<i>General Fund - Natural Resources Operations</i>	This fund receives annual appropriations, federal receipts, fees, transfers from other funding sources and other miscellaneous revenues which are used to cover expenditures incurred in the general operations of the department.
<i>Ground Water Protection Fund</i>	This account receives fees for underground storage tanks, agricultural management, solid waste and household hazardous waste. This is to provide for operational costs, and research and development for ground water protection projects. The department has spending discretion within the guidelines of the legislative mandate in 455E.11. (created by 455E.11)
<i>Hazardous Waste Remedial Fund</i>	This account receives fees from organizations for the disposal of hazardous waste. Proceeds are used to cover expenses incurred in association with the cleanup and investigation of hazardous waste conditions. The department has spending discretion within the guidelines of the legislative mandate. (created by 455B.423)
<i>Honey Creek Resort State Park Fund</i>	This fund was established to account for the proceeds of the bond that was issued to construct the Honey Creek Resort State Park.
<i>Land Recycling Fund</i>	Monies received from fees, general revenue, federal funds, gifts, bequests, donations, or other monies so designated to provide financial assistance to political subdivisions of the state for activities for an enrolled site in the land recycling program. (created by 455H.401)
<i>Manure Storage Indemnity Fund</i>	The fund consists of monies from indemnity fees remitted by permittees to the department; monies from indemnity fees remitted by persons required to submit manure management plans to the department; sums collected on behalf of the fund by the department through legal action or settlement; monies required to be repaid to the department by a county; interest, property, and securities acquired through the use of monies in the fund; or monies contributed to the fund from other sources. The funds are to be used for the exclusive purpose of providing monies for cleanup of abandoned manure storage facilities and to pay the department for costs related to manure storage indemnity (Iowa Code Ch 459 subchapter V). (created by Iowa Code 459.501)
<i>Marine Fuel Tax Capitals Fund</i>	This account receives revenue from the excise tax on the sale of motor fuel used in watercraft. Proceeds are used for water access acquisitions on a willing seller basis, development projects, water safety stations, marinas, and any other project that improves water recreation. The department has spending discretion. (authorized by 452A.79)
<i>Miscellaneous Fees and Federal Receipts Fund</i>	This account receives miscellaneous fees and federal receipts from a variety of sources such as FEMA advances, forestry and LAWCON grants, groundwater and manure certification fees, etc. that are all passed through to other recipients or transferred to other agencies. The department has spending discretion within the guidelines set by legislative and federal regulations.
<i>On-site Wastewater System</i>	This fund receives state appropriations, federal monies and monies from homeowner loan agreements for the purpose of supporting and administering the on-site wastewater systems assistance program. The program was established with the exclusive purpose of providing financing to homeowners residing outside the boundaries of a city for improving on-site wastewater disposal systems. (created by Iowa Code 466.8 and 466.9)

<i>Performance Bond Fund</i>	This fund was established to account for a \$5,000 performance bond required by Iowa Natural Resources Council Order 78-170. This Council Order required that a performance bond or escrow account be established to ensure proper maintenance of the flood protection works for the Woodland Hills Trailer Court. The performance bond must be maintained in perpetuity unless otherwise changed or rescinded by the department.
<i>Pilot Grove Maintenance Fund</i>	This account receives interest earned on the Pilot Grove Trust Fund (745). Proceeds are used for the support and maintenance of the Pilot Grove Area. The department has spending discretion within the guidelines of the trust.
<i>Pilot Grove Trust Fund</i>	This account consists of a \$10,000 donation. The interest from the account is transferred to the Pilot Grove Maintenance account (702). Spending discretion is restricted by trust guidelines.
<i>Rebuild Iowa Infrastructure Fund</i>	This fund consists of appropriations made to the fund (from the Rebuild Iowa Infrastructure Fund) to provide funds for capital projects, etc. Monies in the fund are to be used as appropriated by the General Assembly for the protection, conservation, enhancement, or improvement of natural resources or the environment. Appropriations are made for projects such as State Parks Health & Safety and Lake Water Quality Improvement, etc. (created by HSB 303 2005 Legislative Session)
<i>Resource Enhancement and Protection Fund</i>	This account receives state appropriations to build or reconstruct recreational facilities, acquire land, enhance soil and water, and to provide state aid to county and city capital-type projects. The department has spending discretion within the guidelines of the Legislative mandate. (created by 455A.18(1))
<i>Snowmobile Registration Fund</i>	This account receives snowmobile registration fees used to fund a portion of the law enforcement activities of the Conservation and Wildlife Division and to provide 50% to counties and 50% to the Department of Natural Resources for snowmobile programs of the state. The department has spending discretion. (created by 321G.7)
<i>State Conservation Fund</i>	This fund receives camping, concession and cabin rental fees, agricultural lease receipts, timber sales receipts and other miscellaneous revenues which are used to cover expenditures incurred in the operation and maintenance of the Conservation and Recreation Division, the Parks Bureau and the Forestry Bureau. The department has spending discretion. (created by IA Code 456A.17)
<i>Unassigned Revenue Fund - Iowa Comprehensive UST Fund Board Appropriation</i>	This account receives an annual special appropriation (H30) by the state legislature for administration expenses of the underground storage tank section of the DNR. This money is appropriated from the unassigned revenue fund administered by the Iowa comprehensive underground storage tank fund board. This money is transferred once per year to the UST operations cost center in fund 001.
<i>Waste Tire Management Fund</i>	This fund receives the \$5 surcharge on vehicle certificates of title to be used for closing or bringing into compliance waste tire collection facilities as well as providing grant funds for the development of waste tire disposal programs. (created by 455D.11C)
<i>Waste Volume Reduction & Recycling Fund</i>	This fund is used to account for monies received from a variety of sources, such as civil penalties and fines imposed by the courts, to be used to establish a pollution "Hotline," provide financial assistance for waste reduction and provide education and technical assistance programs to encourage waste reduction and recycling efforts. (created by 455D.15)
<i>Water Quality Protection Fund</i>	This fund receives state appropriations and fees, and may receive federal monies and private donations for administration costs related to the federal Safe Drinking Water Act and for the public water supply system account. (created by 455B.183A)

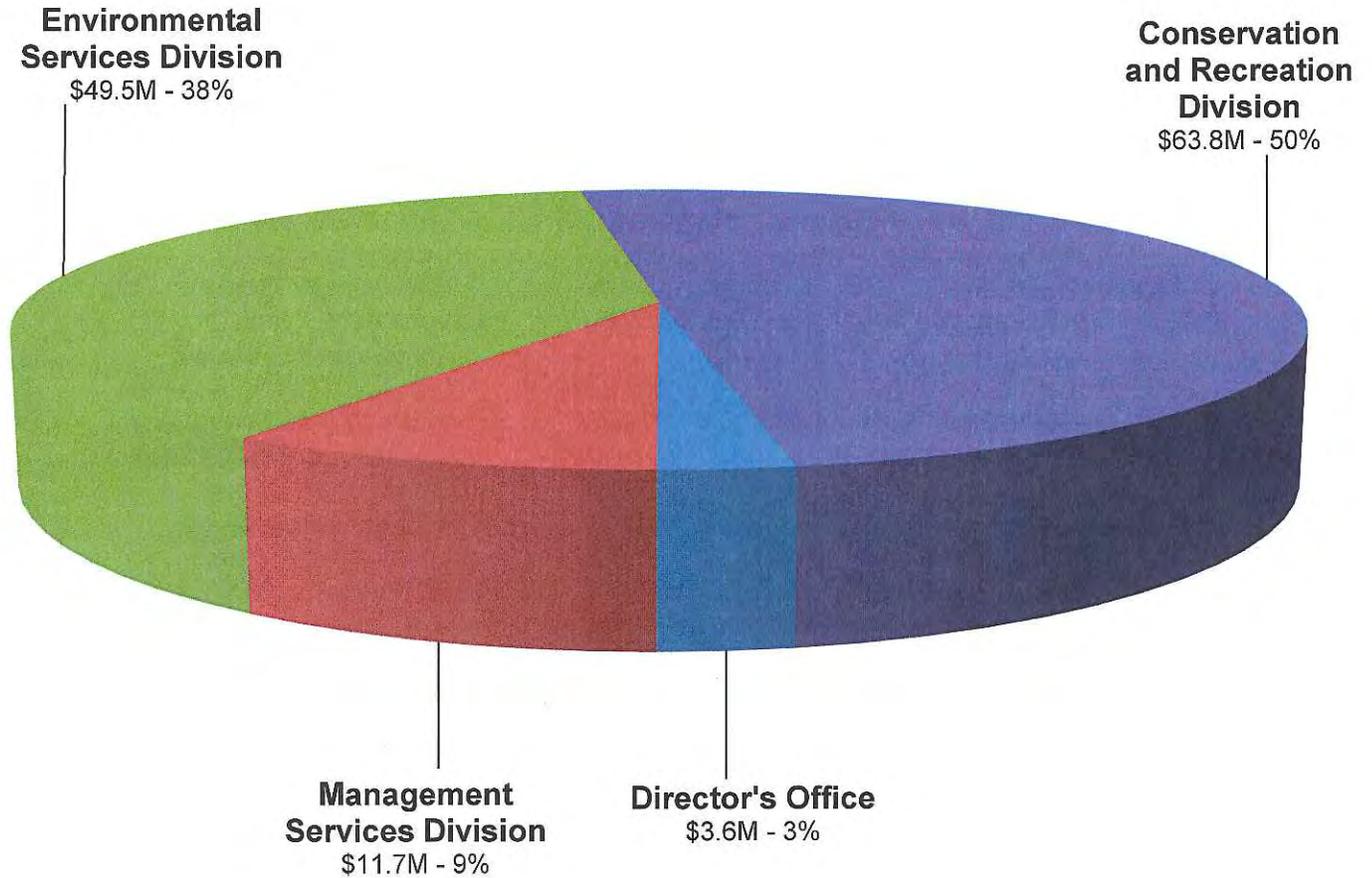
IOWA DEPARTMENT OF NATURAL RESOURCES
FY 2014 Operations Budget Major Funding Sources
\$128.6 Million – 1109.95 FTEs



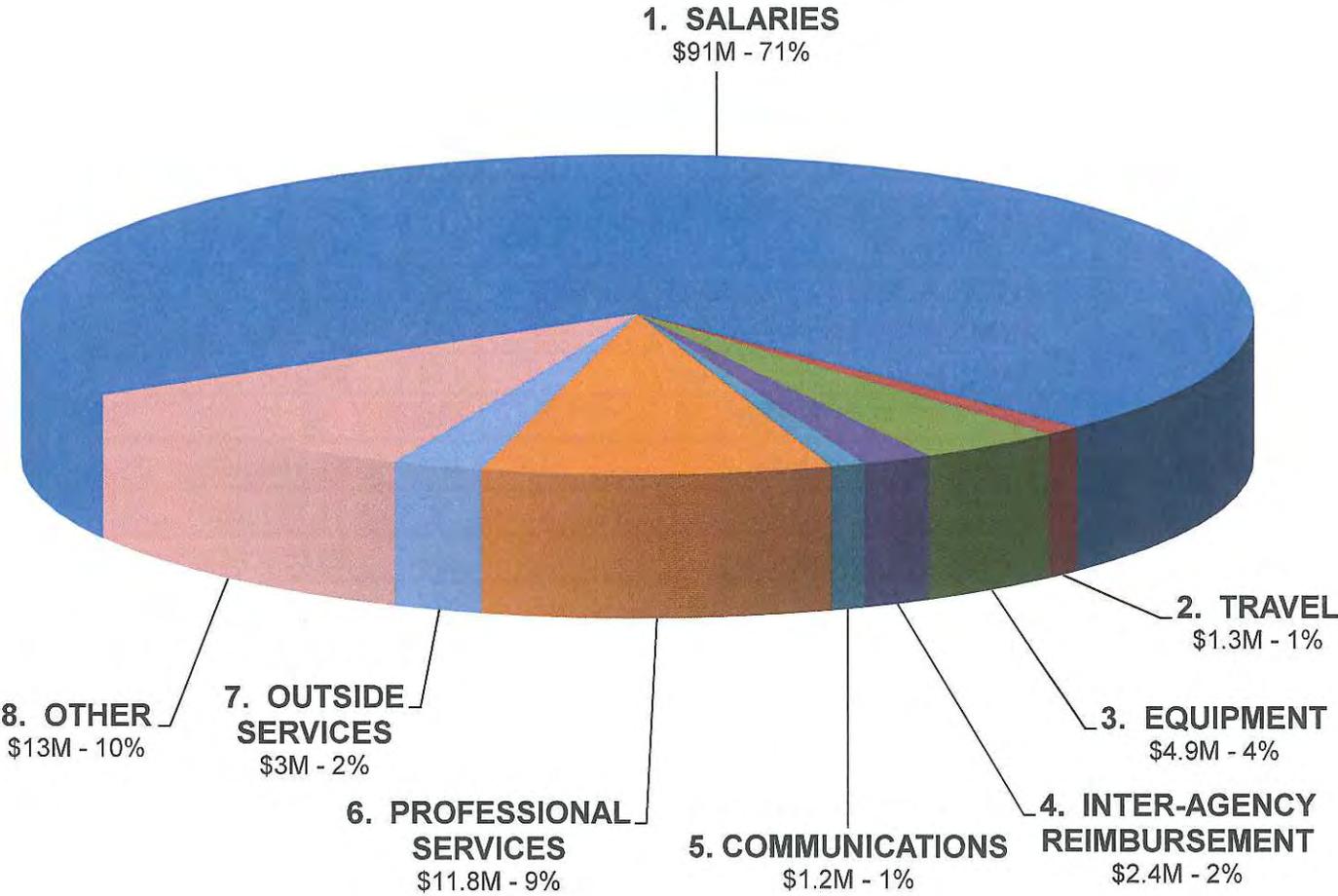
IOWA DEPARTMENT OF NATURAL RESOURCES
 FY 2014 Operations Budget
 \$128.6 Million

Appropriations	\$74.5M	8 Fees/Receipts	\$29.6M
1 General Fund	\$14.96M	Air Title 5	\$9.8M
<i>Department Operations</i>	\$12.77M	Parks Receipts	\$5.3M
<i>Floodplain Management</i>	\$2.1M	Forestry Receipts	\$1.47M
<i>IT Appropriation</i>	\$96K	Animal Agriculture Fees	\$1.87M
2 Fish and Wildlife Trust Fund	\$41.22M	NPDES Permit Fees	\$700K
3 Rebuild Iowa Infrastructure (RIIF)	\$1.48M	Stormwater Permit Fees	\$1.04M
Lake Water Quality Improvement	\$575K	Hazardous Waste Remedial	\$191K
Park Infrastructure	\$811K	Clean Water SRF	\$3.6M
Water Trails/Lowhead Dams	\$97K	Drinking Water SRF	\$1.5M
4 Environment First	\$11.78M	Water Quality Protection Fees	\$719K
Park Operations and Maintenance	\$6.36M	Condition 5 Funds	\$890K
Water Quality Monitoring	\$1.72M	Administration Receipts	\$560K
REAP	\$903K	Laboratory Certification Fees	\$177K
Water Supply	\$500K	Waste Volume Reduction	\$128K
Animal Feeding Operations	\$1.32M	Operator Certification Fees	\$381K
Water Quantity	\$494K	Snowmobile Registration Fees	\$182K
Keepers of the Land Volunteer Program	\$126K	ATV Registration Fees	\$239K
Ambient Air Quality Monitoring	\$50K	Land Recycling Fees	\$45K
GIS Data for Watershed Managers	\$50K	UST Inspector Certification	\$58K
Iowa Geological Survey	\$258K	GW Professional Reg. Fees	\$25K
5 Groundwater Fund	\$4.91M	Geological Survey Income	\$1.5K
6 UST Fund	\$200K	Water Use Permit Fees	\$515K
Administration	\$200K	Trees for Kids Donations	\$60K
Federal	\$22.7M	Time off Transfer Fees	\$79K
7 Grants	\$22.7M	9 Other	\$1.8M
		Misc Non-Federal Grants	\$566K
		Forestry Enhancement Funds	\$135K
		Park & Institutional Road Funds	\$377K
		Marine Fuel Tax	\$791K

IOWA DEPARTMENT OF NATURAL RESOURCES
FY 2014 Operations Expenses by Division/Director's Office



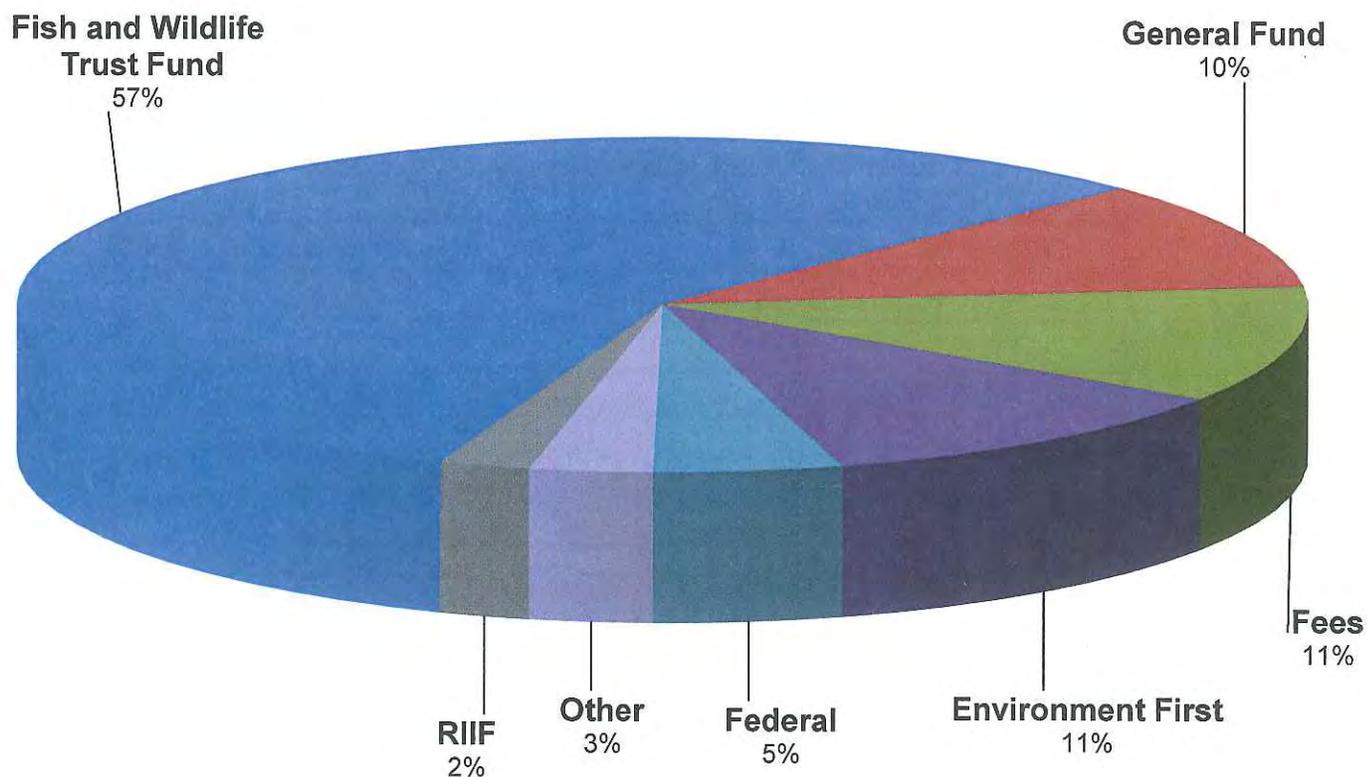
IOWA DEPARTMENT OF NATURAL RESOURCES
FY 2014 Spending Plan by Expense Category



IOWA DEPARTMENT OF NATURAL RESOURCES
 FY 2014 Department Spending Plan Expenditures

1	SALARIES		\$90,963,366	71%
2	TRAVEL		\$1,290,220	1%
	Personal Travel In-State	202	\$936,284	
	Personal Travel - Out-of-State	205	\$353,936	
3	EQUIPMENT		\$4,884,179	4%
	Equipment Maintenance	303	\$1,454,900	
	Equipment Inventoriable	501	\$2,184,997	
	Equipment Non-Inventoriable	503	\$491,912	
	IT Hardware	510	\$752,370	
4	INTER-AGENCY REIMBURSEMENT		\$2,361,597	2%
	Auditor's Reimbursement	412	\$200,000	
	DAS General Reimbursement	414	\$1,258,661	
	DAS - ITE Reimbursement	416	\$902,936	
5	COMMUNICATIONS	401	\$1,154,858	1%
6	CONTRACTUAL (405, 407, 801)		\$11,767,900	9%
7	OUTSIDE SERVICES	406	\$3,050,669	2%
8	OTHER		\$13,122,451	10%
	State Vehicle	203	\$2,483,565	
	Depreciation	204	\$1,993,362	
	Office Supplies	301	\$502,857	
	Facility Maintenance Supplies	302	\$1,480,699	
	Professional Services	304	\$56,450	
	Ag Supplies	307	\$979,583	
	Other Supplies	308	\$802,870	
	Printing and Binding	309	\$559,253	
	Uniforms	312	\$218,040	
	Postage	313	\$483,486	
	Rentals	402	\$1,123,904	
	Utilities	403	\$1,516,721	
	Advertising	408	\$182,465	
	Other Expenses	602	\$630,596	
	Licenses	701	\$108,600	
	TOTAL DIRECT EXPENSES		\$128,595,240	

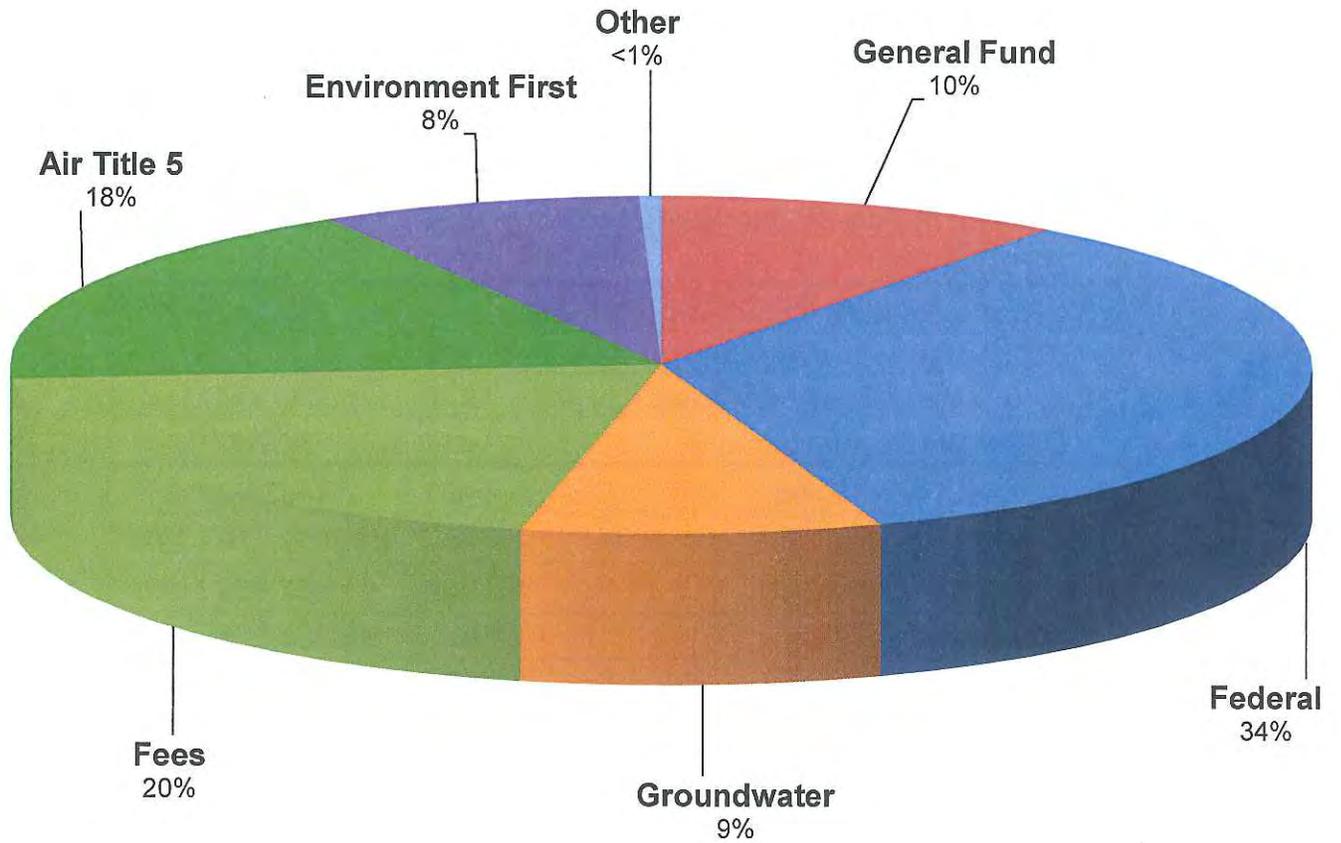
IOWA DEPARTMENT OF NATURAL RESOURCES
Conservation and Recreation Division
FY 2014 Spending Plan by Funding Sources for Expenditures
\$63.8 Million – 643 FTEs



IOWA DEPARTMENT OF NATURAL RESOURCES
 FY 2014 Conservation and Recreation Division Spending Plan

1	SALARIES		\$46,526,764	73%
	Personnel Services	101	\$42,217,641	
	Non-Permanent		\$4,309,123	
2	TRAVEL		\$604,661	1%
	Personal Travel In-State	202	\$484,781	
	Personal Travel - Out-of-State	205	\$119,880	
3	EQUIPMENT		\$3,600,741	6%
	Equipment Maintenance	303	\$1,376,750	
	Equipment Inventoriable	501	\$1,817,740	
	Equipment Non-Inventoriable	503	\$245,730	
	IT Hardware	510	\$160,521	
4	INTER-AGENCY REIMBURSEMENT		\$47,411	<1%
	Auditor's Reimbursement	412	\$0	
	DAS General Reimbursement	414	\$29,261	
	DAS - ITE Reimbursement	416	\$18,150	
5	COMMUNICATIONS	401	\$604,215	1%
6	CONTRACTUAL (405, 407, 801)		\$1,050,563	2%
7	OUTSIDE SERVICES	406	\$1,522,030	2%
8	OTHER		\$9,827,968	15%
	State Vehicle	203	\$2,185,440	
	Depreciation	204	\$1,565,752	
	Office Supplies	301	\$267,717	
	Facility Maintenance Supplies	302	\$1,460,254	
	Professional Services	304	\$500	
	Ag Supplies	307	\$978,233	
	Other Supplies	308	\$596,882	
	Printing and Binding	309	\$279,700	
	Uniforms	312	\$202,150	
	Postage	313	\$102,933	
	Rentals	402	\$186,410	
	Utilities	403	\$1,417,121	
	Advertising	408	\$143,565	
	Other Expenses	602	\$412,211	
	Licenses	701	\$29,100	
	TOTAL DIRECT EXPENSES		\$63,784,353	

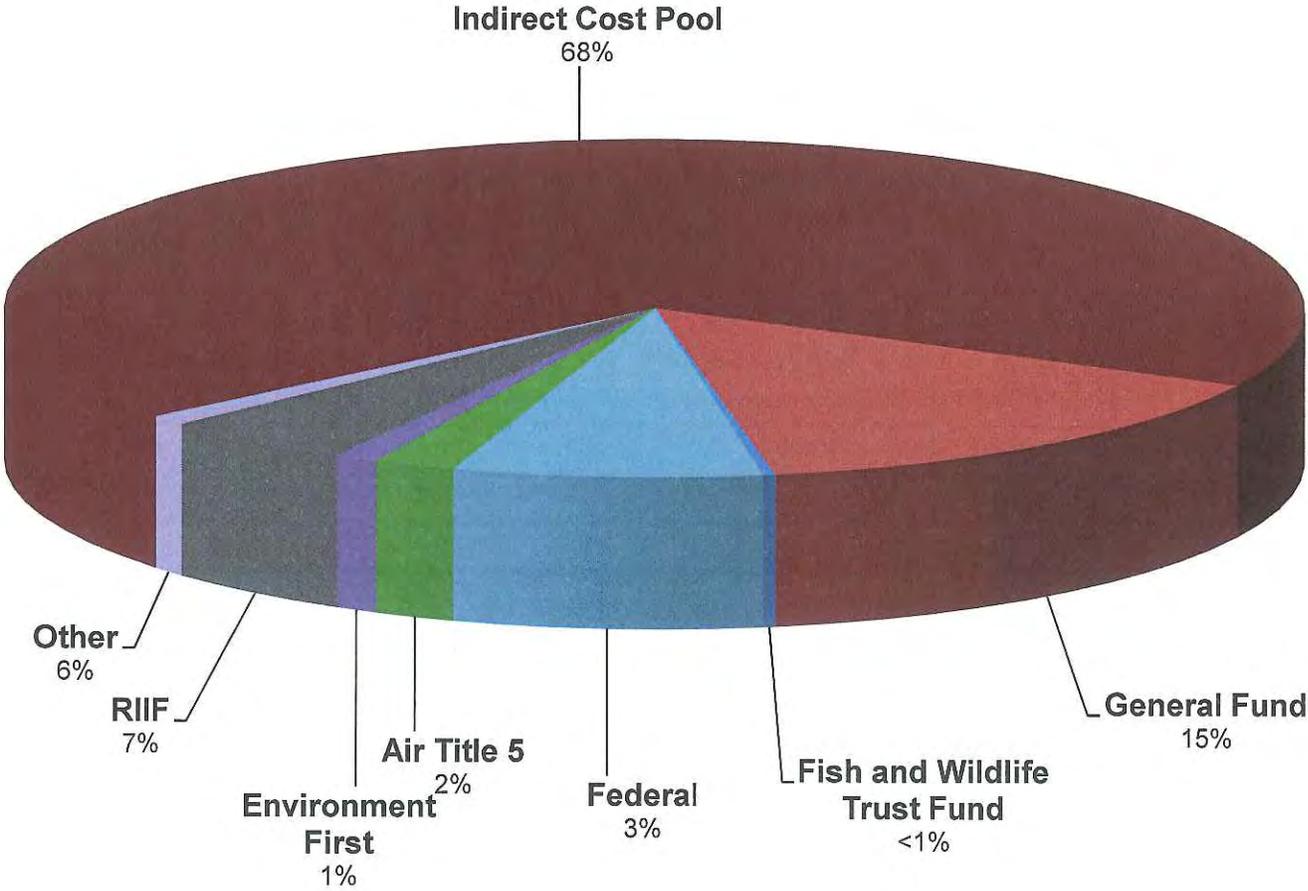
IOWA DEPARTMENT OF NATURAL RESOURCES
Environmental Services Division
FY 2014 Spending Plan by Funding Sources for Expenditures
\$49.5 Million – 352 FTEs



IOWA DEPARTMENT OF NATURAL RESOURCES
 FY 2014 Environmental Services Division Spending Plan

1	SALARIES		\$33,460,670	68%
	Personnel Services	101	\$32,999,179	
	Non-Permanent		\$461,491	
2	TRAVEL		\$542,134	1%
	Personal Travel In-State	202	\$327,078	
	Personal Travel - Out-of-State	205	\$215,056	
3	EQUIPMENT		\$860,879	2%
	Equipment Maintenance	303	\$34,800	
	Equipment Inventoriable	501	\$365,757	
	Equipment Non-Inventoriable	503	\$224,182	
	IT Hardware	510	\$236,140	
4	INTER-AGENCY REIMBURSEMENT		\$58,600	<1%
	Auditor's Reimbursement	412	\$0	
	DAS General Reimbursement	414	\$56,350	
	DAS - ITE Reimbursement	416	\$2,250	
5	COMMUNICATIONS	401	\$344,793	1%
6	CONTRACTUAL (405, 407. 801)		\$10,539,478	21%
7	OUTSIDE SERVICES	406	\$1,267,938	3%
8	OTHER		\$2,404,152	5%
	State Vehicle	203	\$275,025	
	Depreciation	204	\$424,610	
	Office Supplies	301	\$157,434	
	Facility Maintenance Supplies	302	\$11,870	
	Professional Services	304	\$55,950	
	Ag Supplies	307	\$350	
	Other Supplies	308	\$74,688	
	Printing and Binding	309	\$50,453	
	Uniforms	312	\$9,440	
	Postage	313	\$69,853	
	Rentals	402	\$925,494	
	Utilities	403	\$99,000	
	Advertising	408	\$25,900	
	Other Expenses	602	\$144,585	
	Licenses	701	\$79,500	
	TOTAL DIRECT EXPENSES		\$49,478,644	

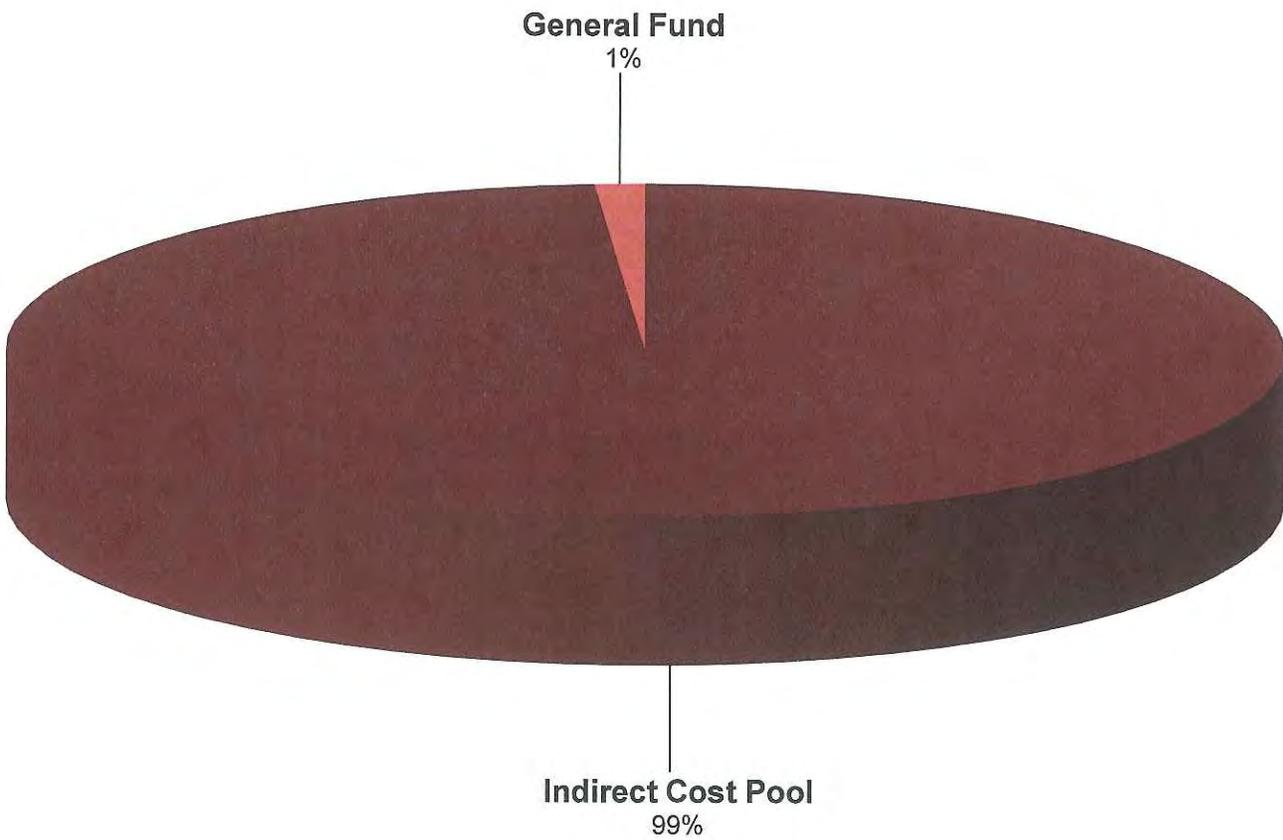
IOWA DEPARTMENT OF NATURAL RESOURCES
Management Services Division
FY 2014 Spending Plan by Funding Sources for Expenditures
\$11.7 Million – 81 FTEs



IOWA DEPARTMENT OF NATURAL RESOURCES
 FY 2014 Management Services Division Spending Plan

1	SALARIES		\$7,721,637	66%
	Personnel Services	101	\$7,572,223	
	Non-Permanent		\$149,414	
2	TRAVEL		\$73,925	1%
	Personal Travel In-State	202	\$65,425	
	Personal Travel - Out-of-State	205	\$8,500	
3	EQUIPMENT		\$384,850	3%
	Equipment Maintenance	303	\$39,350	
	Equipment Inventoriable	501	\$1,500	
	Equipment Non-Inventoriable	503	\$1,500	
	IT Hardware	510	\$342,500	
4	INTER-AGENCY REIMBURSEMENT		\$2,248,486	19%
	Auditor's Reimbursement	412	\$200,000	
	DAS General Reimbursement	414	\$1,166,950	
	DAS - ITE Reimbursement	416	\$881,536	
5	COMMUNICATIONS	401	\$174,850	1%
6	CONTRACTUAL (405, 407, 801)	405	\$145,859	1%
7	OUTSIDE SERVICES	406	\$124,942	1%
8	OTHER		\$819,831	7%
	State Vehicle	203	\$18,100	
	Depreciation	204	\$3,000	
	Office Supplies	301	\$59,806	
	Facility Maintenance Supplies	302	\$5,575	
	Professional Services	304	\$0	
	Ag Supplies	307	\$1,000	
	Other Supplies	308	\$119,300	
	Printing and Binding	309	\$203,100	
	Uniforms	312	\$6,450	
	Postage	313	\$307,100	
	Rentals	402	\$9,500	
	Utilities	403	\$600	
	Advertising	408	\$13,000	
	Other Expenses	602	\$73,300	
	Licenses	701	\$0	
	TOTAL DIRECT EXPENSES		\$11,694,380	

IOWA DEPARTMENT OF NATURAL RESOURCES
Director's Office
FY 2014 Spending Plan by Funding Sources for Expenditures
\$3.6 Million – 33 FTEs



IOWA DEPARTMENT OF NATURAL RESOURCES
 FY 2014 Director's Office Spending Plan

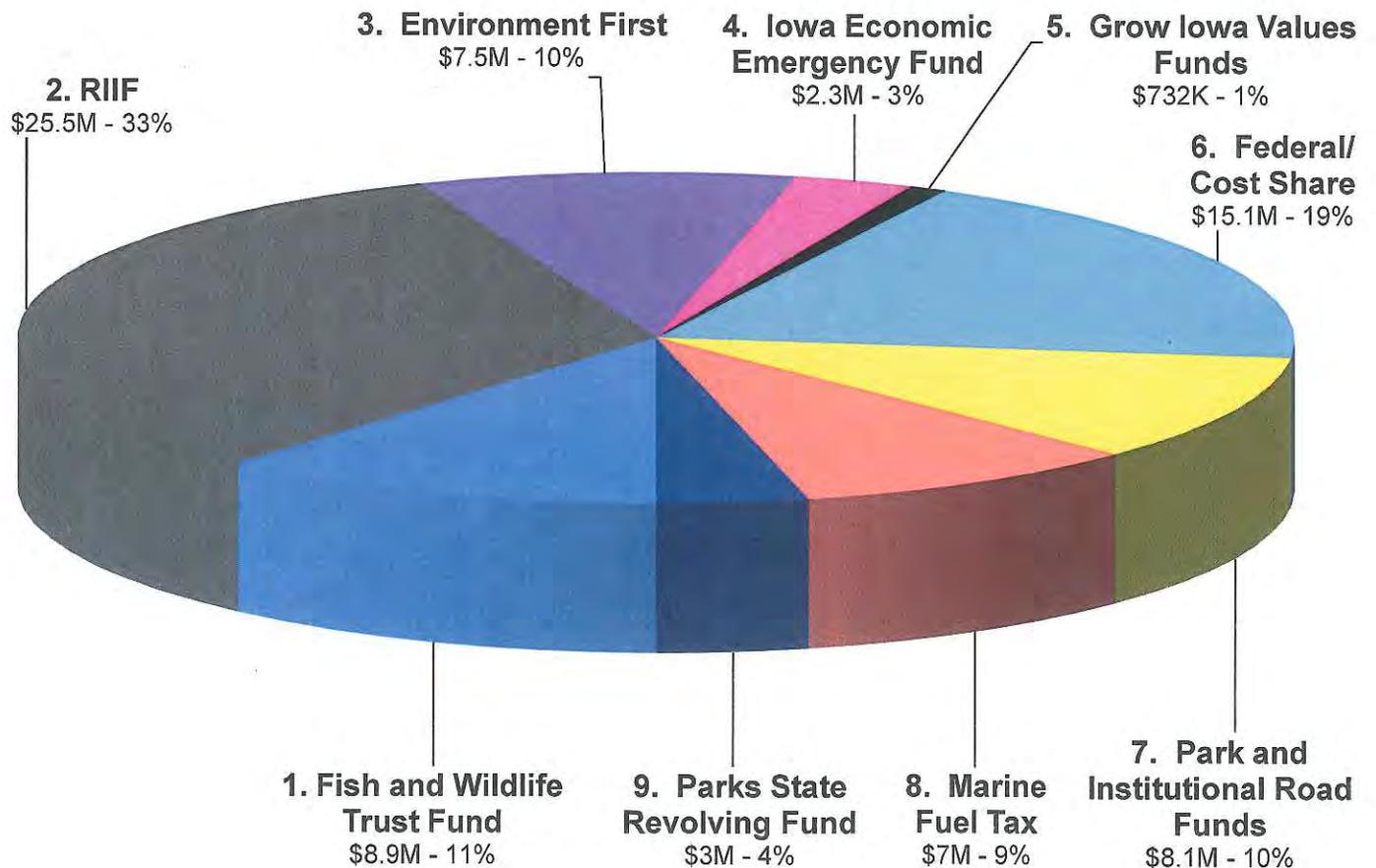
1	SALARIES		\$3,254,295	89%
	Personnel Services	101	\$3,235,518	
	Non-Permanent		\$18,777	
2	TRAVEL		\$69,500	2%
	Personal Travel In-State	202	\$59,000	
	Personal Travel - Out-of-State	205	\$10,500	
3	EQUIPMENT		\$37,709	1%
	Equipment Maintenance	303	\$4,000	
	Equipment Inventoriable	501	\$0	
	Equipment Non-Inventoriable	503	\$20,500	
	IT Hardware	510	\$13,209	
4	INTER-AGENCY REIMBURSEMENT		\$7,100	0%
	Auditor's Reimbursement	412	\$0	
	DAS General Reimbursement	414	\$6,100	
	DAS - ITE Reimbursement	416	\$1,000	
5	COMMUNICATIONS	401	\$31,000	1%
6	CONTRACTUAL (405, 407, 801)		\$32,000	1%
7	OUTSIDE SERVICES	406	\$135,759	4%
8	OTHER		\$70,500	2%
	State Vehicle	203	\$5,000	
	Depreciation	204	\$0	
	Office Supplies	301	\$17,900	
	Facility Maintenance Supplies	302	\$3,000	
	Professional Services	304	\$0	
	Ag Supplies	307	\$0	
	Other Supplies	308	\$12,000	
	Printing and Binding	309	\$26,000	
	Uniforms	312	\$0	
	Postage	313	\$3,600	
	Rentals	402	\$2,500	
	Utilities	403	\$0	
	Advertising	408	\$0	
	Other Expenses	602	\$500	
	Licenses	701	\$0	
	TOTAL DIRECT EXPENSES		\$3,637,863	

IOWA DEPARTMENT OF NATURAL RESOURCES

FY 2014 Conservation and Recreation Capitals Funding Sources

\$78.1 Million

Appropriations		\$44.9M		
1	Fish and Wildlife Trust Fund	\$8.9M	5	Grow Iowa Values Fund
				\$732K
	Rebuild Iowa Infrastructure Fund			
2	(RIIF)	\$25.5M	6	Federal/Cost Share
	<i>Lake Water Quality Improvement</i>	\$16.8M		\$15.1M
	<i>Water Trails</i>	\$1.4M		
	<i>State Park Infrastructure</i>	\$7.3M		Earmarked Funds
				\$18.1M
			7	Park and Institutional Road
3	Environment First	\$7.5M	7	Fund
	<i>REAP</i>	\$7.5M		\$8.1M
			8	Marine Fuel Tax
				\$7M
			9	Parks State Revolving Fund
				\$3M
4	Iowa Economic Emergency Fund	\$2.3M		
	<i>Missouri River Flooding</i>	\$2.3M		



IOWA DEPARTMENT OF NATURAL RESOURCES
DNR Capitals Projects and Programs Plan for FY 2014

Fund Source	FY13 Programmed Funds	FY14 Appropriations	Total Federal/Other	Total
Fish & Wildlife Trust Fund		\$8,870,800	\$7,925,718	\$16,796,518
Park & Institutional Roads Fund	\$2,373,284	\$5,786,716		\$8,160,000
Infrastructure and Capitals				
Lake Water Quality Improvement	\$8,169,588	\$8,600,000	\$158,728	\$16,928,316
Marine Fuel Tax	\$4,700,794	\$2,300,000	\$3,695,571	\$10,696,365
REAP Open Spaces				
<i>Land Acquisition and Development</i>	\$339,181	\$3,794,608		\$4,133,789
<i>Protected Water Area</i>	\$34,838	\$223,212		\$258,050
<i>Public/Private Cost Share</i>	-\$2,084	\$446,425		\$444,341
REAP Land Management	\$284,143	\$1,434,936	\$50,000	\$1,769,079
REAP Non-Game Programs	\$420,000	\$533,957	\$1,459,024	\$2,412,981
Water Trails and Lowhead Dams	\$355,982	\$1,000,000	\$70,000	\$1,425,982
State Parks Infrastructure	\$2,295,052	\$5,000,000	\$725,980	\$8,021,032
State Park 2012 Disaster Funds	\$2,349,930		\$980,576	\$3,330,506
State Parks SRF	\$3,000,000			\$3,000,000
Special Appropriations (IVF)	\$732,120			\$732,120
TOTAL	\$25,052,828	\$37,990,654	\$15,065,597	\$78,109,079

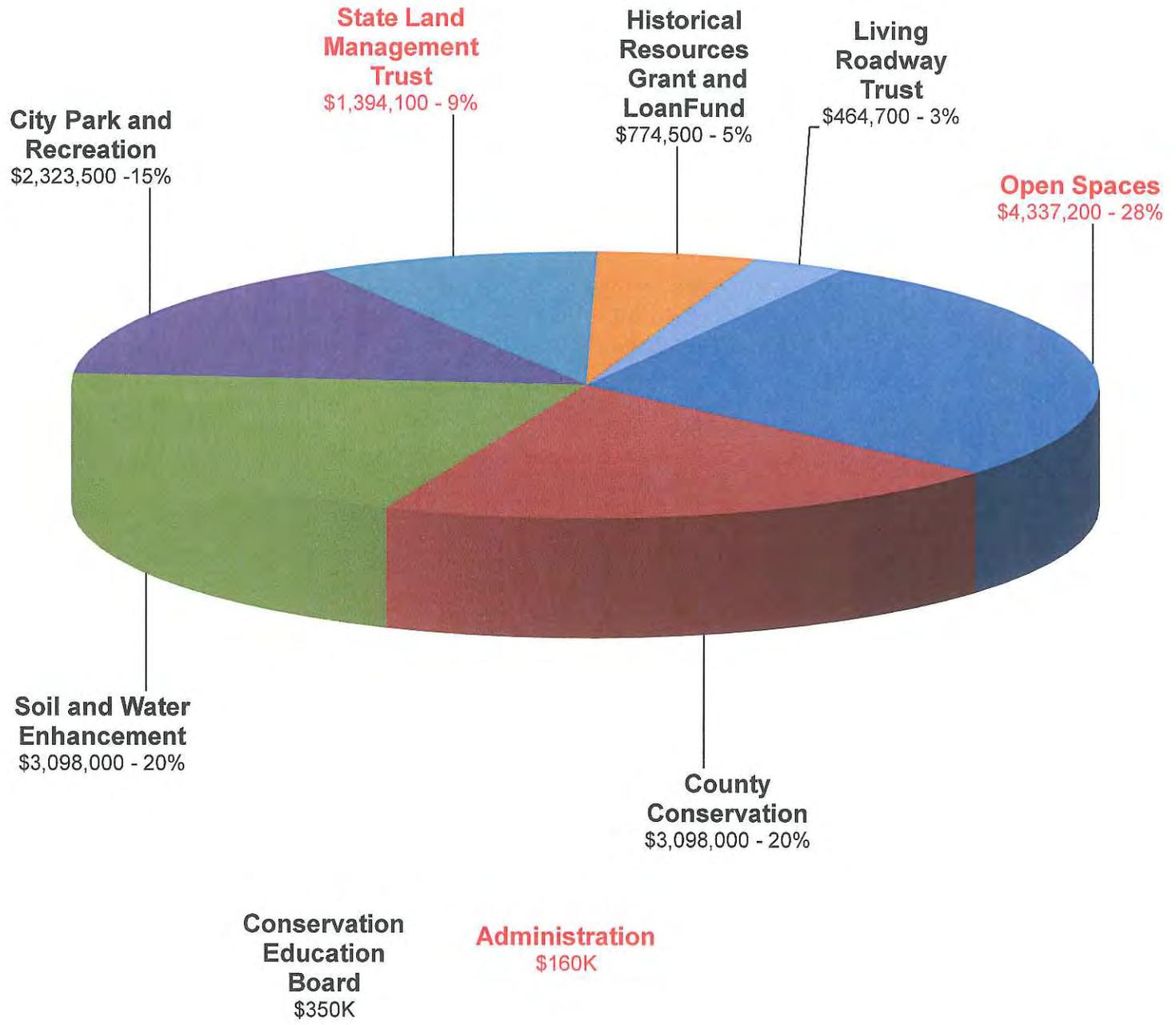
IOWA DEPARTMENT OF NATURAL RESOURCES

Resource Enhancement and Protection Program

FY 2014 Appropriation by Program

\$16 Million

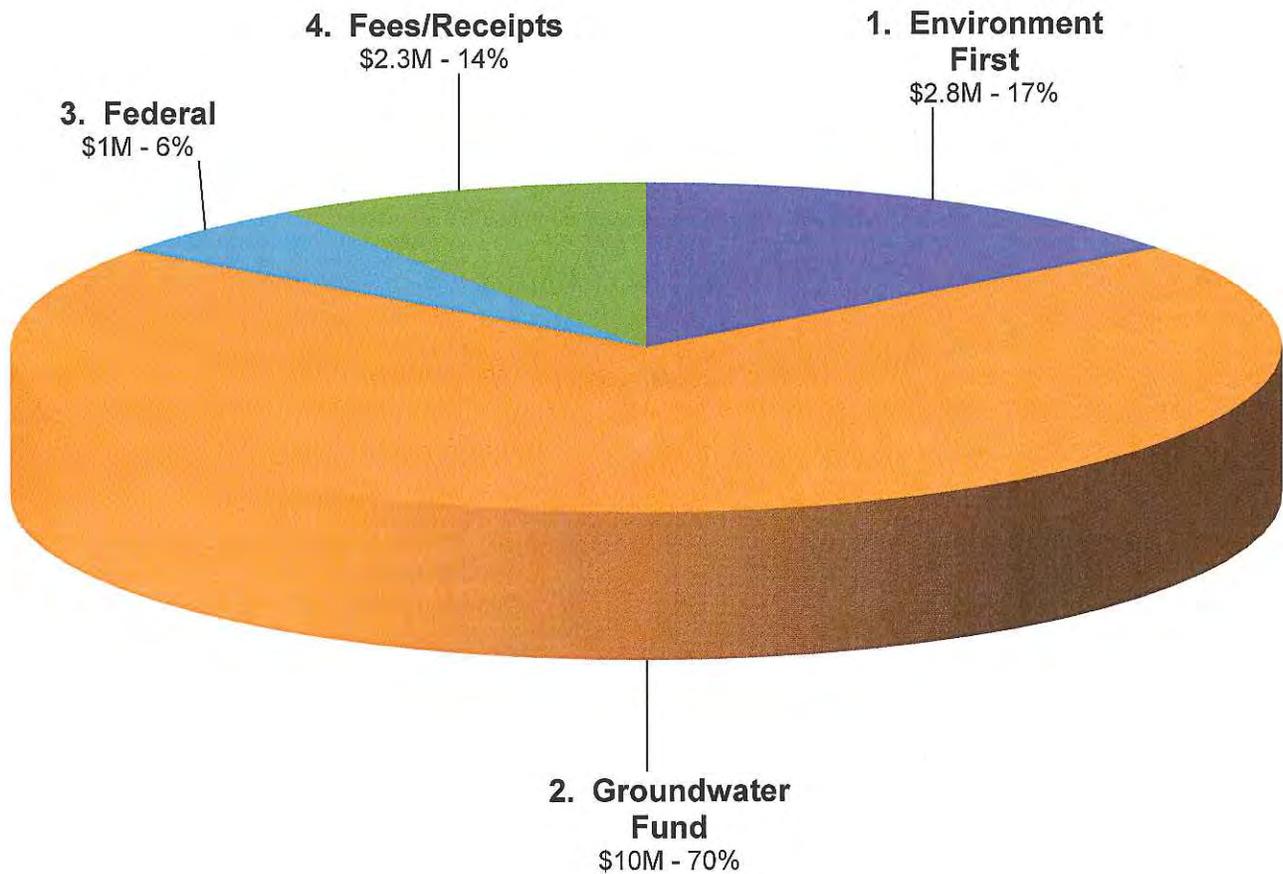
(DNR Share is equal to 37%)



*Items in black are pass through

IOWA DEPARTMENT OF NATURAL RESOURCES
 FY 2014 Special Purpose Funding Sources
 \$16.1Million

Appropriations (Earmarked)		\$12.8M	3 Federal	\$1M
1	Environment First	\$2.8M	Grants	\$1M
	Water Quality Monitoring	\$2M		
	Ambient Air Quality	\$375K		
	GIS Data for Watershed Managers	\$195K		
	Forestry Health Management	\$255K		
2	Groundwater Fund	\$10M	4 Fees/Receipts	\$2.3M
			ATV Registration Fees	\$800K
			Snowmobile Registration	
			Fees	\$795K
			Other	\$660K



IOWA DEPARTMENT OF NATURAL RESOURCES
FY 2015 Recommended Budget

APPROPRIATION NAME	FY 14 Legislative Action	FY 15 Governor's Recommended Budget
GENERAL FUND		
Department Operations	\$12,862,307	\$12,862,307
Floodplain Management	\$2,000,000	\$2,000,000
Air Quality	\$0	\$2,072,000
Forestry Health Management	\$200,000	\$200,000
Total General Fund Appropriations	\$15,062,307	\$17,134,307
REBUILD IOWA INFRASTRUCTURE FUND		
Lake Water Quality Improvements	\$8,600,000	\$8,600,000
Lake Delhi	\$2,500,000	\$0
Water Trails/Lowhead Dam	\$1,000,000	\$1,000,000
Park Infrastructure Improvements	\$5,000,000	\$5,000,000
Good Earth Park (Blood Run)	\$0	\$2,000,000
Iowa Park Foundation	\$0	\$2,000,000
Total Infrastructure Appropriations	\$17,100,000	\$18,600,000
ENVIRONMENT FIRST		
Resource Enhancement and Protection	\$16,000,000	\$16,000,000
Ambient Air Quality Monitoring	\$425,000	\$425,000
Water Quality Monitoring	\$2,955,000	\$2,955,000
GIS Data for Watershed Managers	\$195,000	\$195,000
Keepers of the Land Volunteer Program	\$100,000	\$100,000
Park Operations and Maintenance	\$6,360,000	\$5,885,000
Water Quantity	\$495,000	\$495,000
Animal Feeding Operations	\$1,320,000	\$1,320,000
Water Supply Appropriation	\$500,000	\$500,000
Geological and Water Survey	\$200,000	\$200,000
Keep Iowa Beautiful	\$200,000	\$200,000
Total Environment First Appropriations	\$28,750,000	\$28,275,000
NON-GENERAL FUND		
Fish and Wildlife Operations	\$41,223,225	\$41,223,225
Groundwater Fund	\$3,455,832	\$3,455,832
UST Administration Match	\$200,000	\$200,000
UST Technical Tank Review	\$200,000	\$200,000
Electronic Manure Applicator Cert Program	\$250,000	\$0
Snowmobile Transfer to Fish and Wildlife	\$100,000	\$100,000
Total Non General Fund Appropriations	\$45,429,057	\$45,179,057
TOTAL	\$106,341,364	\$109,188,364

Chuck Gipp, Director
515-281-3388

Bruce Trautman, Deputy Director
515-281-5742

Karen Fynaardt, Executive Secretary
515-281-8650

Jennifer Nelson, Chief Financial Officer
Budget and Finance Bureau
515-281-5697

Jolene Richeson, Management Analyst
Management Services Division
515-242-3399



Agenda

Environmental Protection Commission

Tuesday, January 21, 2014
DNR Air Quality Suite 1
7900 Hickman Road
Windsor Heights, Iowa

10:00 AM – EPC Business Meeting begins

10:30 AM – Public Participation¹ – Requests to speak must be submitted to Jerah Sheets at Jerah.Sheets@dnr.iowa.gov or 515-313-809 prior to the meeting or at the meeting prior to the start of Public Participation

1:00 PM – Appeal of Proposed Decision Upholding Administrative Order – Pet Memories, Inc.

Agenda topics

- 1 Approval of Agenda
- 2 Approval of Minutes
- 3 Director's Remarks
- 4 DNR Financial Summary Jennifer Nelson
(Information)
- 5 Final Adoption, Chapter 64, Wastewater Construction and Operation Permits Joe Griffin
(Decision)
- 6 Final Adoption – Chapter 93, Non-point Source Pollution Control Set-Aside Programs Daniel Olson
(Decision)
- 7 Contract with Iowa State University for 2014-2016 Lake Monitoring Roger Bruner
(Decision)
- 8 Appeal of Proposed Decision Upholding Administrative Order In the Matter of Pet Memories Inc. Jon Tack
(Decision)
- 9 EPC Annual Report Mary Boote
(Decision)
- 10 Proposed Contested Case Decision –Joseph and Carol Jahnke Carrie Schoenebaum
(Decision)
- 11 Monthly Reports Bill Ehm
(Information)
- 12 General Discussion
- 13 Items for Next Month's Meeting
 - January 22, 2014 – NRC/EPC Joint Meeting, Des Moines
 - February 18, 2014 – EPC Business Meeting, Windsor Heights
 - March 18, 2014 – EPC Business Meeting, Windsor Heights

For details on the EPC meeting schedule, visit

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

¹ 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
Environmental Protection Commission

ITEM

4

INFORMATION

TOPIC

DNR Financial Summary

The Iowa Department of Natural Resources will provide Commissioners with an educational overview of the Department's financial accounts, budgeting processes, and other related items.

Jennifer Nelson, Chief Financial Officer
Iowa Department of Natural Resources
Budget and Finance Bureau

**Iowa Department of Natural Resources
Environmental Protection Commission**

ITEM

5

DECISION

TOPIC

Final Adoption, Chapter 64, “Wastewater Construction and Operation Permits”

The Commission is asked to approve the attached Final Rule for Chapter 567-64 IAC “Wastewater Construction and Operation Permits” and changes to storm water General Permit no. 2. These changes to Chapter 64 remove the storm water permitting requirement in subrule 567-64.6(6) to submit to the Department transfer agreements executed when building lots in developments are transferred and reduce the number of proofs of public notice submitted when applying for a storm water general permit authorization required in subparagraph 567-64.6(1)c.(1) from two to one. The latter requirement implements changes in recent legislation, 2013 Iowa Acts, House File 311. These changes in Chapter 567-64 are also to be made in General Permit no. 2 which is adopted in rule 567-64.15.

Public comments were accepted from November 23, 2013 until December 12, 2013. A public hearing was held on December 12 at which no comments were received.

Joe Griffin
NPDES Section
Iowa Department of Natural Resources

January 21, 2013

ENVIRONMENTAL PROTECTION COMMISSION [567]

Adopted and Filed

Pursuant to the authority of Iowa Code sections 455B.105(3) and 455B.173, the Environmental Protection Commission (Commission) hereby adopts amendments to Chapter 64, “Wastewater Construction and Operation Permits,” Iowa Administrative Code.

These amendments will reduce the number of proofs of public notice required to be submitted to the Department of Natural Resources (Department) as part of the application to obtain storm water general permit coverage, also known as the Notice of Intent, from two to one. This reduction is to implement changes in recent legislation, House File 311, which modified Iowa Code section 455B.103A(1)(b) by reducing the public noticing requirements from two newspapers to one newspaper.

These amendments will also remove the requirement that storm water permit holders submit to the Department transfer agreements executed when building lots in developments are transferred. When building lots are transferred and storm water permit coverage will be required for further building activities, the buyer and seller may decide together if the lots are to be covered under the seller’s permit authorization for the development or if the buyer will obtain permit coverage for the lots. An agreement is then signed in which the buyer’s and seller’s intent is specified, as required by subrule 567 IAC 64.6(6). Currently, this agreement is required to be submitted to the Department.

This requirement has proven to be an unnecessary regulatory burden on the public. Therefore, the Commission is removing this requirement from both the Administrative Code and the storm water general permits which are adopted in rule 567-64.15. The transfer agreements will still be required to be retained by the permittee(s).

After analysis and review of this rulemaking, no adverse impact on jobs has been found.

The Notice of Intended Action was published in the Iowa Administrative Bulletin on November 13, 2013 as **ARC 1176C**. Comments were accepted from November 23, 2013 to December 12, 2013. A public hearing was held on December 12, 2013. No comments were received.

These amendments become effective March 26, 2014.

These rules are intended to implement Iowa Code chapter 455B, division I.

The following amendments are adopted.

ITEM 1. Amend subparagraph 567-64.6(1)"c"(1) as follows:

567-64.6(1)"c"(1) General Permits No. 1, No. 2 and No. 3. A demonstration that a public notice was published in at least ~~two newspapers~~ one newspaper with the largest circulation in the area in which the facility is located or the activity will occur. ~~If a facility or activity authorized by General Permit No. 3 is to be relocated to a site not included in the original notice, a public notice need be published in only one newspaper.~~ The newspaper notices shall, at the minimum, contain the following information:

The subparagraph then describes the contents of the public notice which is neither affected by the statutory changes nor is proposed to be changed in this rulemaking.

ITEM 2. Amend subrule 567--64.6(6) as follows:

64.6(6) *Transfer of ownership – construction activity part of a larger common plan of development.* For construction activity which is part of a larger common plan of development, such as a housing or commercial development project, in the event a permittee transfers ownership of all or any part of property subject to NPDES General Permit No. 2, both the permittee and transferee shall be responsible for compliance with the provisions of the general permit for that portion of the project which has been transferred, including when the transferred property is less than one acre in area, ~~from and after the date the department receives written notice of the transfer,~~ provided that:

a. The transferee is notified in writing of the existence and location of the general permit and pollution prevention plan, and of the transferee's duty to comply, and proof of such notice is included with the notice to the department of the transfer.

b. If the transferee agrees, in writing, to become the sole responsible permittee for the property which has been transferred, then the transferee shall be solely responsible for compliance with the

provisions of the general permit for the transferred property ~~from and after the date the department receives written notice of the transferee's assumption of responsibility.~~

c. If the transferee agrees, in writing, to obtain coverage under NPDES General Permit No. 2 for the property which has been transferred, then the transferee is required to obtain coverage under NPDES General Permit No. 2 for the transferred property ~~from and after the date the department receives written notice of the transferee's assumption of responsibility for permit coverage.~~ After the transferee has agreed, in writing, to obtain coverage under NPDES General Permit No. 2 for the transferred property ~~and the department has received written notice of the transferee's assumption of responsibility for permit coverage for the transferred property,~~ the authorization issued under NPDES General Permit No. 2 to the transferor for the transferred property shall be considered by the department as not providing NPDES permit coverage for the transferred property and the transferor's authorization issued under NPDES General Permit No. 2 for, and only for, the transferred property, shall be deemed by the department as being discontinued without further action of the transferor.

d. All notices ~~sent to the department~~ as described in this subrule shall contain the name of the development as submitted to the department in the original Notice of Intent and as modified by any subsequent written notices of name changes submitted to the department, the authorization number assigned to the authorization by the department, the legal description of the transferred property including lot number, if any, and any other information necessary to precisely locate the transferred property and to establish the legality of the document.

ITEM 3. Amend subrules 567 IAC 64.15(1), 567 IAC 64.15(2) and 567 IAC 64.15(3) as follows:

64.15(1) Storm Water Discharge Associated with Industrial Activity, NPDES General Permit No. 1, effective October 1, 2012, to October 1, 2017, as amended on March 26, 2014.

64.15(2) Storm Water Discharge Associated with Industrial Activity for Construction Activities, NPDES General Permit No. 2, effective October 1, 2012, to October 1, 2017, as amended on March 26, 2014.

64.15(3) Storm Water Discharge Associated with Industrial Activity from Asphalt Plants, Concrete Batch Plants, Rock Crushing Plants, and Construction Sand and Gravel Facilities, NPDES General Permit No. 3, effective October 1, 2012, to October 1, 2017, as amended on March 26, 2014.

Date

Chuck Gipp, Director

**Iowa Department of Natural Resources
Environmental Protection Commission**

ITEM

6

DECISION

TOPIC

Final Adoption – Chapter 93, “Non-point Source Pollution Control Set-Aside Programs”

The Commission is requested to approve the amendments to Chapter 93, “Non-Point Source Pollution Control Set-Aside Programs”. The changes proposed for this rule are intended to implement section 4 of House File 311 (2013) passed by the Legislature and signed by the Governor April 24, 2013. Section 4 of House File 311 amended Iowa Code section 466.8 to allow homeowners inside city limits and without a public sewer connection to access the low interest loan program known as the Onsite Wastewater Assistance Program to repair or replace failing septic systems. This rulemaking is necessary to implement the revised law.

A public hearing was held December 4, 2013 in Des Moines. The written comment period was open through December 12, 2013. No comments were received on the proposed amendments.

The Commission is requested to approve this final rule.

Daniel Olson, Environmental Specialist Senior
NPDES Section, Water Quality Bureau
Environmental Service Division
December 19, 2013

ENVIRONMENTAL PROTECTION COMMISSION [567]

Adopted and Filed

Pursuant to the authority of Iowa Code sections 466.8, 455B.291 and 455B.299, the Environmental Protection Commission hereby adopts amendments to Chapter 93, “Nonpoint Source Pollution Control Set Aside Programs,” Iowa Administrative Code.

The changes proposed for this rule are intended to implement section 4 of House File 311 (2013) passed by the Legislature and signed by the Governor April 24, 2013. Section 4 of House File 311 amended Iowa Code section 466.8 to allow homeowners inside city limits and without a public sewer connection to access the low interest loan program known as the Onsite Wastewater Assistance Program to repair or replace failing septic systems. This rulemaking is necessary to implement the revised law.

Prior to the passage of House File 311 only homeowners outside city limits could utilize the Onsite Wastewater Assistance Program for repair and replacement of failing septic systems. However, there are a significant number of homes that are served by septic systems inside city limits. These homes often do not have a sewer connection available because of cost or location. With the legislative change, homeowners inside city limits now have access to the Onsite Wastewater Assistance Program for repair or replacement of failing septic systems. This loan program provides low interest loans, typically 3%, for a term as long as 10 years providing affordable payments to homeowners. The loans are linked deposits loans provided by local lenders and administered by the Iowa Finance Authority.

After analysis and review of this rule making, a positive impact on jobs should result.

The Notice of Intended Action was published November 13, 2013 as **ARC 1177C**.

Comments regarding these amendments were to be accepted during the comment period ending December 12, 2013 and at a public hearing held in Des Moines on December 4, 2013. No comments were received from the public regarding these amendments. The adopted amendments are identical to those published under Notice.

These amendments become effective March 26, 2014.

These rules are intended to implement Iowa Code section 466.8.

The following amendments are proposed.

ITEM 1. Amend subrule **567—93.3(1)(455B, 466)** as follows:

93.3(1) *Onsite wastewater treatment and disposal systems set-aside.* The purpose of this set-aside is to assist ~~rural~~ homeowners to rehabilitate or improve existing onsite wastewater treatment and disposal systems.

ITEM 2. Amend paragraph **567—93.4(2) “a” (455B, 466)** as follows:

93.4(2) “a.” *Location restrictions.* Assistance is available for the improvement or rehabilitation of onsite wastewater treatment systems serving homes that do not have a connection to a publicly owned treatment works located outside of corporate boundaries. ~~Assistance cannot be provided for improvements to or rehabilitation of onsite systems located within incorporated limits.~~

Date

Chuck Gipp, Director

**Environmental Protection Commission
Iowa Department of Natural Resources**

ITEM

7

DECISION

TOPIC

Contract with Iowa State University for 2014-2016 Lake Monitoring

Recommendations:

Commission approval is requested for a 3 year-service contract with Iowa State University of Ames, Iowa. The contract will begin on February 1, 2014 and terminate on December 31, 2016. The total amount of this contract shall not exceed \$522,131.12. DNR shall have the option to renew this contract long as this contract and any extensions do not exceed a six-year period.

Funding Source:

This contract will be funded through Iowa Code section 8.57A Environment First Fund (60%) and Iowa Code 456.33A Lake Restoration Program (40%).

Background:

This contract encompasses the majority of lake water quality monitoring conducted as part of the state-wide water monitoring program and is the primary basis for assessing the state's lake water quality. The purpose of this program is to define the condition of Iowa's lakes, characterize the existing and emerging issues, measure changes or trends in water quality, and provide information to citizens and decision-makers. Specific ways the DNR intends to utilize the information gathered and analyzed in this Contract include: to fulfill Clean Water Act requirements of the department including: biennial reports on the status of lake water quality, impaired waters listing, and total maximum daily load reports; manage and evaluate this natural resource; and allocated lake restoration funds most appropriately.

Purpose:

The parties propose to enter into this Contract for the purpose of retaining the Contractor to provide the DNR with lake monitoring data. As part of this contract ISU will provide field and analytical support for monitoring on 138 of Iowa's significantly publicly owned lakes. The lakes are monitored three times during the field season for basic water chemistry, nutrients, plankton composition, and clarity.

Contractor Selection Process:

Iowa State University was chosen using an intergovernmental agreement. Iowa State University was chosen for this project because of extensive previous lake monitoring experience with the DNR (Iowa State University has completed similar lake monitoring to activities described in the contract for the DNR in 2000-2007, and 2009-2013).

Roger Bruner
Supervisor, Watershed Monitoring and Assessment Section
Geologic and water Survey Bureau, Environmental Services Division
January 21, 2014

Attachment(s): Contract Special Conditions and General Conditions

Section 5 STATEMENT OF WORK

5.1 Statement of Work. ISU shall be responsible to perform the following tasks as described by the Task Milestone Dates set out in the following table. Failure to complete any task or part thereof by the relevant task milestone date shall be cause for DNR to terminate this contract for cause.

Obligation	Task Milestone Date
<p>Task 1: Quality Assurance Description: As a condition precedent to performing Tasks 2, 3, 4, 5, 6, and 7 required by this Contract, the Contractor shall obtain and maintain laboratory certification for the parameters described in Table 4, which is attached to this contract and by this reference made a part hereof, prior to May 1, 2014. Failure by the contractor to obtain the necessary laboratory certification by May 1, 2014, or maintain laboratory certification throughout the term of this contract shall be grounds for DNR to terminate this contract for cause.</p> <p>The contractor shall also complete and follow a DNR-approved Quality Assurance Project Plan (QAPP) prior to sample collection.</p> <p>The contractor shall utilize approved laboratory methods agreed upon with DNR and contained in Table 5, which is attached to this contract and by this reference made a part hereof.</p>	<p>Laboratory certification shall be obtained by no later than May 1, 2014, and shall be maintained thereafter throughout the term of this Contract. All other obligations shall be ongoing throughout the term of this Contract unless noted in Table 4.</p>
<p>Task 2: Project Oversight Description: The contractor shall provide staff members qualified to conduct project activities (e.g. project oversight, field collection operations, laboratory analysis of chemical and biological samples, quality assurance, and reporting).</p>	<p>Ongoing throughout the term of this Contract.</p>
<p>Task 3: Monitoring Description:</p> <ul style="list-style-type: none"> • The contractor shall provide monitoring for Iowa’s principle recreational lakes (described in Table 1, which is attached to this contract and shall by this reference make a part hereof) to characterize current water quality. • Sites: Monitoring samples shall be collected from one site on each lake, as outlined in Table 1. • Frequency: The contractor shall collect three samples per lake per calendar year, one in each of three sampling rounds, during the summers of 2014, 2015, and 2016, according to the schedule outlined in Tables 6 through 14. No deviations from the sampling schedule shall occur without prior written consent of the DNR technical contact with the exception of lakes that are physically inaccessible due to factors such as draw down or flooding. In the case of lakes that are physically inaccessible, the contractor shall notify DNR that the lake was not sampled and reasoning therefor by the end of the sampling round. • Field Monitoring: Required parameters shall include: depth profiles (temperature, pH, dissolved oxygen, specific conductivity, and turbidity), thermocline depth, Secchi transparency (determined by Secchi disk), and photo of the Secchi disk at 0.2 m depth. Samples shall also be collected for processing in the laboratory as described in Task 3 and 4 for the remaining parameters listed in Table 2. Approach: Measurements listed above shall be determined using remote analytical transducers or the Secchi disk. Calibration and maintenance of remote analytical transducers shall follow the DNR-approved QAPP. Collection of water and biological samples for processing at a later date shall 	<p><u>2014</u> First round of monitoring shall be completed no later than June 29, 2014. Second round of monitoring shall be completed no later than August 17, 2014. Third round of monitoring shall be completed no later than September 28, 2014.</p> <p><u>2015</u> First round of monitoring shall be completed no later than June 24, 2015. Second round of monitoring shall be completed no later than August 12, 2015. Third round of monitoring shall be completed no later than September 23, 2015.</p> <p><u>2016</u> First round of monitoring shall be completed no later than June 23, 2016. Second round of monitoring shall be completed no later than August 11, 2016. Third round of monitoring shall be completed no later than September 22, 2016.</p>

<p>follow the DNR-approved QAPP created by the contractor pursuant to Task 1. All contractor requests for deviations from the QAPP shall be submitted to and approved in writing by the DNR technical contacts prior to changing any protocols.</p>	
<p>Task 4: Chemical and Limnological Analysis Description: To provide chemical and limnological analysis of the lakes, the contractor shall process water samples collected during each of the three sampling rounds described in Task 3. A full set of parameters (described in Table 2) shall be analyzed for each lake. Required parameters: Each sample shall be analyzed to determine the presence and amount of chlorophyll a (free of phycoerythrin), total phosphorus, soluble reactive phosphorus, nitrate + nitrite as N, ammonia + ammonium as N, unionized NH₃, total Kjeldahl nitrogen, alkalinity (as CaCO₃), solids (total, volatile, and inorganic), and dissolved organic carbon. Secchi disk photographs collected pursuant to Task 3 of this contract shall also be submitted with chemical and limnological data at the end of each sampling round. Approach: Sampling shall be performed using a 2 meter fixed upper mixed zone sampler. Analyses shall follow standard methods as agreed upon by the DNR and shall follow the DNR-approved QAPP created by the contractor pursuant to Task 1 of this contract.</p>	<p><u>2014</u> First round data update report shall be completed no later than July 29, 2014. Second round data update report shall be completed no later than September 17, 2014. Third round data update report shall be completed no later than October 28, 2014. <u>2015</u> First round data update report shall be completed no later than July 24, 2015. Second round data update report shall be completed no later than September 12, 2015. Third round data update report shall be completed no later than October 23, 2015. <u>2016</u> First round data update report shall be completed no later than July 23, 2016. Second round data update report shall be completed no later than September 11, 2016. Third round of monitoring shall be completed no later than October 22, 2016.</p>
<p>Task 5: Phytoplankton and Zooplankton Analysis Description: To provide biological analysis of the lakes, ISU shall process water samples collected during each of the three sampling rounds described in Task 3. A full set of biological parameters shall be analyzed for each lake (Table 1). Required Parameters: Each sample shall be analyzed to determine the presence and amount of phytoplankton biomass and composition, zooplankton biomass and composition, and the percent cyanobacteria of total phytoplankton biomass. Approach: Integrated mixed-zone samples of phytoplankton shall be collected using the integrated column sampler. Integrated mixed-zone samples of zooplankton shall be collected using the Wisconsin net. Analysis shall follow standard methods as agreed upon by DNR and shall follow the DNR-approved QAPP created by the contractor pursuant to Task 1 of this contract.</p>	<p>December 31, 2014 December 31, 2015 December 31, 2016</p>
<p>Task 6: Data Transfer Description: All chemical, physical, and biological data results from this contract shall be submitted to DNR in electronic form for submittal to the DNR WQX compatible database. The contractor shall generate and submit a summary table of data and appropriate metadata, as described in Table 3, annually. The data summary shall be converted by the contractor to an up-loadable text file for STORET or equivalent WQX database. Depth profile data (temperature, dissolved oxygen, pH, specific conductance, turbidity, and total dissolved solids) shall be submitted to DNR annually in Excel spreadsheets for each individual sample or for each of the lakes listed in Table 1. Phytoplankton and zooplankton biomass and composition data shall be submitted by ISU to DNR annually in Excel spreadsheets.</p>	<p>December 31, 2014 December 31, 2015 December 31, 2016</p>
<p>Task 7: Special Projects Description: The contractor shall complete additional analyses or monitoring as mutually agreed upon in writing by ISU and DNR.</p>	<p>Ongoing throughout the term of this Contract.</p>

7.4 Budget. The budget for this Contract shall be as follows:

2014 Budget

Task	Amount of compensation allotted to Task
Task 1: Quality Assurance	\$ 0.00
Task 2: Project Oversight	\$ 31,861.00
Task 3: Monitoring	\$ 42,778.62
Task 4: Analysis	\$ 58,374.00
Task 5: Phytoplankton and Zooplankton Analysis	\$ 17,802.00
Task 6: Data Transfer	\$ 10,451.00
Task 7: Special Projects	\$ 8,028.00
Total	\$ 169,294.62

2015 Budget

Task	Amount of compensation allotted to Task
Task 1: Quality Assurance	\$ 0.00
Task 2: Project Oversight	\$ 32,817.00
Task 3: Monitoring	\$ 43,718.40
Task 4: Analysis	\$ 60,125.22
Task 5: Phytoplankton and Zooplankton Analysis	\$ 18,336.06
Task 6: Data Transfer	\$ 10,750.00
Task 7: Special Projects	\$ 8,253
Total	\$ 173,999.68

2016 Budget

Task	Amount of compensation allotted to Task
Task 1: Quality Assurance	\$ 0.00
Task 2: Project Oversight	\$ 33,802.00
Task 3: Monitoring	\$ 44,749.26
Task 4: Analysis	\$ 61,876.44
Task 5: Phytoplankton and Zooplankton Analysis	\$ 18,870.12
Task 6: Data Transfer	\$ 11,057.00
Task 7: Special Projects	\$ 8,482.00
Total	\$178,836.82

7.5 Payment Schedule. This Contract is being entered into on a fixed-cost basis, with the following payments due to ISU based on the budget identified in Section 7.4:

2014 Budget

Task Milestone Date	Amount Due	Invoice due from ISU:
Task 2: Project Oversight	Round 1: \$ 7,965.00 Round 2: \$ 7,965.00 Round 3: \$ 7,965.00 Final Payment: \$ 7,966.00	August 12, 2014 October 1, 2014 November 11, 2014 December 31, 2014
Task 3: Monitoring	Round 1: \$ 14,259.54 Round 2: \$ 14,259.54 Round 3: \$ 14,259.54	August 12, 2014 October 1, 2014 November 11, 2014
Task 4: Analysis	Round 1: \$ 19,458.00 Round 2: \$ 19,458.00 Round 3: \$ 19,458.00	August 12, 2014 October 1, 2014 November 11, 2014
Task 5: Phytoplankton and Zooplankton Analysis	\$ 17,802.00	December 31, 2014
Task 6: Data Transfer	\$ 10,451.00	December 31, 2014
Task 7: Special Projects	\$ 8,482.00	December 31, 2014
Total	Not to exceed \$169,294.62	

2015 Budget

Task Milestone Date	Amount Due	Invoice due from ISU:
Task 2: Project Oversight	Round 1: \$ 8,204.00 Round 2: \$ 8,204.00 Round 3: \$ 8,204.00 Final Payment: \$ 8,205.00	August 7, 2015 September 26, 2015 November 6, 2015 December 31, 2015
Task 3: Monitoring	Round 1: \$ 14,572.80 Round 2: \$ 14,572.80 Round 3: \$ 14,572.80	August 7, 2015 September 26, 2015 November 6, 2015
Task 4: Analysis	Round 1: \$ 20,041.74 Round 2: \$ 20,041.74 Round 3: \$ 20,041.74	August 7, 2015 September 26, 2015 November 6, 2015
Task 5: Phytoplankton and Zooplankton Analysis	\$ 18,336.06	December 31, 2015
Task 6: Data Transfer	\$ 10,750.00	December 31, 2015
Task 7: Special Projects	\$ 8,253.00	December 31, 2015
Total	Not to exceed \$ 173,999.68	

2016 Budget

<u>Task Milestone Date</u>	<u>Amount Due</u>	<u>Invoice due from ISU:</u>
Task 2: Project Oversight	Round 1: \$ 8,450.00 Round 2: \$ 8,450.00 Round 3: \$ 8,451.00 Final Payment: \$ 8,451.00	August 6, 2016 September 25, 2016 November 5, 2016 December 31, 2016
Task 3: Monitoring	Round 1: \$ 14,916.42 Round 2: \$ 14,916.42 Round 3: \$ 14,916.42	August 6, 2016 September 25, 2016 November 5, 2016
Task 4: Analysis	Round 1: \$ 20,625.48 Round 2: \$ 20,625.48 Round 3: \$ 20,625.48	August 6, 2016 September 25, 2016 November 5, 2016
Task 5: Phytoplankton and Zooplankton Analysis	\$ 18,870.12	December 31, 2016
Task 6: Data Transfer	\$ 11,057.00	December 31, 2016
Task 7: Special Projects	\$ 8,482.00	December 31, 2016
Total	Not to exceed \$ 178,836.82	

. Laboratory Analyte List

Ammonia Nitrogen	Total Volatile Suspended Solids
Nitrate+Nitrite Nitrogen	Total Suspended Solids
Total Kjeldahl Nitrogen	Total Alkalinity
Un-ionized Ammonia	Dissolved Organic Carbon
Soluble Reactive Phosphorus	Chlorophyll a
Total Phosphate	Phytoplankton Biomass and Composition
Total Fixed Suspended Solids (Inorganic Suspended Solids)	Zooplankton Biomass and Composition
Laboratory pH	

2014 Budget for Tasks 3, 4, and 5

Parameter:	Cost/Test:	# Sampling Sites:	Frequency of Sampling:	Total Cost:
Task 3 Monitoring*	\$103.33	138	3	\$42,778.62
SUB-TOTAL	\$103.33			
Task 4 Analysis				
Total Kjeldahl Nitrogen as N	\$25.00	138	3	\$10,350
Ammonia as N	\$12.00	138	3	\$4,968
Nitrate+Nitrite as N	\$15.00	138	3	\$6,210
Un-ionized Ammonia as N	Included	138	3	-
Total Phosphorus	\$15.00	138	3	\$6,210
Soluble Reactive Phosphorus	\$14.00	138	3	\$5,796
Total Fixed Suspended Solids	Included	138	3	-
Total Volatile Suspended Solids	Included	138	3	-
Total Suspended Solids	\$19.00	138	3	\$7,866
Total Alkalinity	\$10.00	138	3	\$4,140
Chlorophyll a	\$15.00	138	3	\$6,210

Dissolved Organic Carbon	\$16.00	138	3	\$6,624
SUB-TOTAL	\$141.00			
Task 5 Analysis				
Phytoplankton biomass and composition	\$22.00	138	3	\$9,108
Zooplankton biomass and composition	\$21.00	138	3	\$8,694
Cyanobacteria biomass (calculated from phytoplankton composition)	Included	138	3	-
SUB-TOTAL	\$43.00		TOTAL:	\$ 118,954.62

* Cost listed reflect cost for sampling an individual lake and collecting field parameters: Secchi depth, Secchi photo, YSI lake profile, temperature, pH, turbidity, conductivity, dissolved oxygen (mg/L and % saturation), and total dissolved solids.

2015 Budget for Tasks 3, 4, and 5

Parameter:	Cost/Test:	# Sampling Sites:	Frequency of Sampling:	Total Cost:
Task 3 Monitoring*	\$105.60	138	3	\$43,718.40
SUB-TOTAL	\$105.60			
Task 4 Analysis				
Total Kjeldahl Nitrogen as N	\$25.75	138	3	\$10,660.50
Ammonia as N	\$12.36	138	3	\$5,117.04
Nitrate+Nitrite as N	\$15.45	138	3	\$6,396.30
Un-ionized Ammonia as N	Included	138	3	-
Total Phosphorus	\$15.45	138	3	\$6,396.30
Soluble Reactive Phosphorus	\$14.42	138	3	\$5,969.88
Total Fixed Suspended Solids	Included	138	3	-
Total Volatile Suspended Solids	Included	138	3	-
Total Suspended Solids	\$19.57	138	3	\$8,101.98
Total Alkalinity	\$10.30	138	3	\$4,264.20
Chlorophyll a	\$15.45	138	3	\$6,396.30
Dissolved Organic Carbon	\$16.48	138	3	\$6,822.72
SUB-TOTAL	\$145.23			
Task 5 Analysis				
Phytoplankton biomass and composition	\$22.66	138	3	\$9,381.24
Zooplankton biomass and composition	\$21.63	138	3	\$8,954.82
Cyanobacteria biomass (calculated from phytoplankton composition)	Included	138	3	-
SUB-TOTAL	\$44.29		TOTAL:	\$ 122,179.68

* Cost listed reflect cost for sampling an individual lake and collecting field parameters: Secchi depth, Secchi photo, YSI lake profile, temperature, pH, turbidity, conductivity, dissolved oxygen (mg/L and % saturation), and total dissolved solids.

2016 Budget for Tasks 3, 4, and 5

Parameter:	Cost/Test:	# Sampling Sites:	Frequency of Sampling:	Total Cost:
Task 3 Monitoring*	\$108.09	138	3	\$44,749.26
SUB-TOTAL	\$108.09			
Task 4 Analysis				
Total Kjeldahl Nitrogen as N	\$26.50	138	3	\$10,971.00
Ammonia as N	\$12.72	138	3	\$5,266.08
Nitrate+Nitrite as N	\$15.90	138	3	\$6,582.60
Un-ionized Ammonia as N	Included	138	3	-
Total Phosphorus	\$15.90	138	3	\$6,582.60
Soluble Reactive Phosphorus	\$14.84	138	3	\$6,143.76
Total Fixed Suspended Solids	Included	138	3	-
Total Volatile Suspended Solids	Included	138	3	-

Total Suspended Solids	\$20.14	138	3	\$8,337.96
Total Alkalinity	\$10.60	138	3	\$4,388.40
Chlorophyll a	\$15.90	138	3	\$6,582.60
Dissolved Organic Carbon	\$16.96	138	3	\$7,021.44
SUB-TOTAL	\$149.46			
Task 5 Analysis				
Phytoplankton biomass and composition	\$23.32	138	3	\$9,654.48
Zooplankton biomass and composition	\$22.26	138	3	\$9,215.64
Cyanobacteria biomass (calculated from phytoplankton composition)	Included	138	3	-
SUB-TOTAL	\$45.58		TOTAL:	\$ 125,495.82

* Cost listed reflect cost for sampling an individual lake and collecting field parameters: Secchi depth, Secchi photo, YSI lake profile, temperature, pH, turbidity, conductivity, dissolved oxygen (mg/L and % saturation), and total dissolved solids.

**Iowa Department of Natural Resources
Environmental Protection Commission**

ITEM

8

DECISION

TOPIC

APPEAL OF PROPOSED DECISION UPHOLDING ADMINISTRATIVE
ORDER.

In The Matter of Pet Memories, Inc.
Administrative Order No. 2012-SW-20
DIA Docket No. 12DNR015

This matter comes before the Iowa Environmental Protection Commission on appeal of a Proposed Decision issued by Administrative Law Judge Heather L. Palmer of the Iowa Department of Inspections and Appeals on May 28, 2013 in DIA Case No. 12DNR015. Pursuant to rule 561 IAC 7.17(5), as adopted by reference at 567 IAC 7.1, a party may appeal the decision of the Administrative Law Judge to the Environmental Protection Commission.

A hearing was held on April 8, 2013 at which time testimony and other evidence was presented to the Administrative Law Judge. In her Proposed Decision, the Administrative Law Judge upheld Administrative Order No. 2012-SW-20 issued by the DNR on September 13, 2012. The Administrative Order was issued to Pet Memories, Inc. and imposed an administrative penalty of \$10,000 and directed Pet Memories, Inc. to cease the illegal burial of horse carcasses on its property.

The Commission is being presented with the Proposed Decision of the Administrative Law Judge, the Appeal filed by Pet Memories, Inc., the briefs of the DNR and Pet Memories, Inc. and the transcript from the hearing in this matter.

The entire record on appeal is available for the review of the Commission upon request. The record created in this contested case 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) "e".

Jon C. Tack
Legal Services Bureau
January 21, 2014

Iowa Department of Inspections and Appeals
Division of Administrative Hearings
Wallace State Office Building – Third Floor
Des Moines, Iowa 50319

IN THE MATTER OF:) **PROPOSED DECISION**
)
PET MEMORIES, INC.) Docket No. 12DNR015

The parties to this proceeding are the Iowa Department of Natural Resources ("Department") and Pet Memories, Inc. A contested case hearing was held on April 8, 2013. Attorney Jon Tack represented the Department. Kurt Levetzow appeared and testified on behalf of the Department. Attorney Jeffrey Bittner represented Pet Memories. Dr. Joseph Seng and Stephen Johnson appeared and testified on behalf of Pet Memories. Exhibits A through G and 1 through 30 were admitted into the record. The record was left open for the receipt of post hearing briefs from the parties.

FINDINGS OF FACT

Pet Memories operates an animal crematorium and pet cemetery in Cedar County, Iowa. Pet Memories has operated the pet cemetery since 1998. Pet Memories operates the animal crematorium pursuant to Iowa Air Quality Construction Permit No. 04-A-552 and Air Quality Facility ID No. 16-01-006. Johnson is the primary owner and operator of Pet Memories. Pet Memories has not obtained a permit from the Department allowing for the disposal of solid waste on its land or any land owned by Johnson. Johnson testified he is the principal for Pet Memories.

Pet Memories receives dead horse carcasses from owners and veterinarians. Johnson testified that when he receives a dead animal, he legally becomes the owner of the animal and is responsible for its disposal, whether the animal is cremated or buried. Johnson reported the pet owner picks the method of disposal. He charges \$.04 per pound for general disposal. If the horse is cremated and the owner wants the cremains returned, he charges \$.50 per pound. Johnson testified that in the previous year he accepted 30 to 35 horses at Pet Memories for disposal and earns more than \$10,000 per year for disposal of dead horses.

The Department entered into a Consent Administrative Order with Pet Memories in June 2004 resolving violations related to the operation of an incinerator with an air quality permit. Pursuant to an administrative consent order, Pet Memories obtain a construction permit and paid an administrative penalty.

On March 28, 2008 the Department sent Pet Memories a letter documenting the illegal disposal of nineteen horse carcasses on its property. The Department directed Pet Memories to properly dispose of the horse carcasses.

On March 31, 2008, the Iowa Department of Agriculture and Land Stewardship ("IDALS") issued a cease and desist order directing Johnson and Pet Memories to cease the transportation and disposal of dead animals. Johnson and Pet Memories appealed the order.

On April 7, 2008, while investigating a complaint, the Department observed approximately twelve horse carcasses had been buried on Pet Memories' property and an additional nineteen horse carcasses were piled on the property. The Department sent Pet Memories a letter on April 11, 2008 directing Pet Memories to properly dispose of all horses carcasses.

In late August 2010, the Department received a complaint that black smoke and odors were coming from Pet Memories' incinerator and that horse carcasses were being buried on the site.

On September 7, 2011, Levetzow contacted Johnson by telephone. During the conversation Johnson acknowledged he was burying horse carcasses on Pet Memories' property. Johnson averred Pet Memories was operating a lawful pet cemetery.

The Department inspected Pet Memories' property on September 23, 2011.

The Department issued a letter to Pet Memories on October 12, 2011, specifying operational procedures that should be followed for the incinerator. The letter also advised Johnson that burial of dead animal carcasses was prohibited.

On November 22, 2011, the Department inspected Pet Memories' property and met with Johnson. Johnson acknowledged he had continued to bury dead horse carcasses on Pet Memories' property. The Department observed a recent burial. On December 6, 2011, the Department issued a Notice of Violation.

On June 15, 2012 the Department received a complaint that Pet Memories was continuing to bury horse carcasses on its property.

On September 13, 2012, the Department issued Administrative Order No. 2012-SW-20 finding Pet Memories had violated Iowa Code section 455B.307 and 567 IAC 100.4 by depositing of dead horse carcasses on its property. The Department ordered Pet Memories to cease and desist from burying dead animal carcasses on its property except as authorized by 567 IAC 100.4, and to pay a \$10,000 administrative penalty. Pet Memories timely appealed.

CONCLUSIONS OF LAW

Iowa Code sections 455B.301 through .315 govern solid waste disposal. The Iowa Supreme Court liberally construes environmental statutes, including the statutes governing solid waste disposal.¹ The Environmental Protection Commission ("Commission") is charged

¹ *First Iowa State Bank v. Iowa Dep't of Natural Res.*, 502 N.W.2d 164, 166 (Iowa 1993) (noting liberal construction in case involving dumping of solid waste under Iowa Code section 455B.307).

with adopting rules for the administration of Iowa Code sections 455B.301 through .316.² The Commission has adopted rules governing the disposal of solid waste under 567 IAC chapter 100.

Iowa Code section 455B.307(1) and 567 IAC 100.4 preclude private and public agencies from dumping or depositing "any solid waste at any place other than a sanitary disposal project approved by the director" unless the agency has obtained a permit from the Department allowing for the disposal of solid waste on land owned or leased by the agency. The Department avers Pet Memories has violated Iowa Code section 455B.307 and 567 IAC 100.4, by depositing of dead horse carcasses on its property without a permit. Pet Memories alleges the Department does not have jurisdiction in this case, and if it does, the dead horse carcasses are not solid waste.³

I. Jurisdiction

Pet Memories contends the Department lacks jurisdiction over this matter because IDALS has exclusive jurisdiction over the disposal of dead horse carcasses. The Department counters that while IDALS has jurisdiction over the disposal of dead horse carcasses, IDALS' jurisdiction is not exclusive, and alternatively, Pet Memories' actions do not fall under Iowa Code chapter 167.

Iowa Code section 159.6(5) requires IDALS to enforce the law relative to the use and disposal of dead animals under Iowa Code chapter 167. The Iowa Legislature has not provided IDALS with exclusive jurisdiction over the disposal of dead animals.⁴

More than one governmental agency may oversee or govern the same or similar conduct. For example, the Iowa Board of Medicine oversees the practice of medicine in Iowa.⁵ Physicians and surgeons are able to prescribe pharmaceuticals. And their prescribing practices may be subject to disciplinary proceedings by the Iowa Boards of Pharmacy and/or Medicine.⁶ Pet Memories' claim that IDALS has exclusive jurisdiction over this matter is without merit. Because the Iowa Legislature has not provided IDALS with exclusive jurisdiction over the disposal of dead horse carcasses, it is unnecessary to determine whether Pet Memories' action would also be governed by Iowa Code chapter 167.

II. Dead Horse Carcasses Meet the Definition of Solid Waste

The Department contends dead horse carcasses are solid waste and must be disposed in either a sanitary waste disposal approved by the Department, or pursuant to a permit issued by the Department allowing for the disposal. Pet Memories avers the dead horse carcasses are not solid waste and may be buried on its property without a permit from the Department.

² *Id.* § 455B.304.

³ Pet Memories also raises constitutional arguments that are preserved for further review.

⁴ Compare Iowa Code chapter 159 with Iowa Code § 232.61 (statute providing the juvenile court with exclusive jurisdiction over proceedings alleging a child is a child in need of assistance).

⁵ Iowa Code chapter 148.

⁶ *Id.* chapters 148 and 155A.

Iowa Code section 455B.301(23) defines solid waste as:

garbage, refuse, rubbish, and other similar discarded solid or semisolid materials, including but not limited to such materials resulting from industrial, commercial, agricultural, and domestic activities. Solid waste may include vehicles, as defined by section 321.1, subsection 90. This definition does not prohibit the use of rubble at places other than a sanitary disposal project.

The statute excludes hazardous waste, petroleum contaminated solid, and source, special nuclear, or by-product material from the definition of solid waste and also states the definition does not prohibit the use of rubble at places other than a sanitary disposal project. The statute defines "rubble" as "dirt, stone, brick, or similar inorganic materials used for beneficial fill, landscaping, excavation, or grading at places other than a sanitary disposal project."⁷ The dead horse carcasses do not fall under the statutory definition of "rubble." The dead horse carcasses are not excluded under the express terms of the statute.

Iowa Code section 455B.301 does not define the terms garbage, refuse or rubbish. The Commission has adopted rules defining these terms pursuant to its delegated rulemaking authority under Iowa Code section 455B.303. 567 IAC 100.2 defines garbage, refuse and rubbish as follows:

"Garbage" means all solid and semisolid, putrescible animal and vegetable wastes resulting from the handling, preparing, cooking, storing, serving and consuming of food or material intended for use as food, and all offal, excluding useful industrial byproducts, and shall include all such substances from all public and private establishments and from all residents.

* * *

"Refuse" means putrescible and nonputrescible wastes including but not limited to garbage, rubbish, ashes, incinerator ash, incinerator residues, street cleanings, market and industrial solid wastes and sewage treatment wastes in dry or semisolid form.

* * *

"Rubbish" means nonputrescible waste consisting of combustible and noncombustible wastes, such as ashes, paper, cardboard, tin cans, yard clippings, wood, glass, bedding, crockery or litter of any kind.

The administrative rules do not define the term "putrescible." "When a statute or rule is plain and its meaning is clear, the rules of statutory construction do not permit courts to search for meaning beyond its express terms."⁸ The courts generally presume words in agency rules "are used in their ordinary and usual sense with the meaning commonly attributed to them."⁹ Webster's Dictionary, a source of the ordinary meaning of words,

⁷ *Id.* § 455.301(20).

⁸ *Office of Consumer Advocate v. Iowa Utilities Bd.*, 744 N.W.2d 640, 643 (Iowa 2008) (citing *State v. Snyder*, 634 N.W.2d 613, 615 (Iowa 2001).

⁹ *Id.* (citing *Am. Home Prods. Corp. v. Iowa State Bd. of Tax Rev.*, 302 N.W.2d 140, 142-43 (Iowa 1981)).

defines the term "putrescible" as something "liable to become putrid."¹⁰ The term "putrid" means "to be rotten."¹¹

The Department contends the dead horse carcasses are solid waste. During the hearing Levetzow testified he views animal carcasses as meeting the definition of "refuse." In addition, the Department contends the dead horse carcasses meet the statutory definition of solid waste under Iowa Code section 455B.301(23) because solid waste includes "garbage, refuse, rubbish, and other similar discarded solid or semisolid materials."

Pet Memories contends the dead horse carcasses are not solid waste because the former owners of the horses loved and cared for their pet animals. The evidence at hearing established the dead horse carcasses on Pet Memories' property are discarded. The former pet owners, veterinarians and Pet Memories do not seek to recover any portion of the horse carcasses after burial. The burials are permanent. The horse carcasses are in a solid state when Pet Memories accepts and buries the horse carcasses. The horse carcasses rot as they decompose. The definition of refuse includes a list of putrescible and nonputrescible wastes, but also includes the expansive phrase "including but not limited to."¹² This phrase indicates other putrescible and nonputrescible wastes may fall under the definition of refuse. The evidence presented at hearing supports the Department's finding that the dead horse carcasses are solid waste.

The Department has adopted a rule providing an exemption for the disposal of dead farm animals. Under this rule

A private agency may dispose of dead farm animals without first having obtained a sanitary disposal project permit, provided that the disposal is in accordance with paragraph 100.4(2)"c," the rules of the department of agriculture and land stewardship, and:

(1) The dead farm animals result from operations located on the premises where disposal occurs.

(2) A maximum loading rate of 7 cattle, 44 swine, 73 sheep or lambs or 400 poultry carcasses on any given acre per year. All other species are limited to 2 carcasses per acre. Animals that die within two months of birth may be buried without regard to number.

(3) The dead animals are buried in soils listed in tables contained in the county soil surveys and soil interpretation records (published by the U.S. Soil Conservation Service) as being moderately well drained, well drained, somewhat excessively drained, or excessively drained soils. Other soils may be used if artificial drainage is installed to obtain water-level depth more than two feet below the burial depth of the waste.

(4) The lowest elevation of the burial pit is six feet or less below the surface.

¹⁰ *Merriam-Webster's Collegiate Dictionary* (10th Ed. 1998).

¹¹ *Id.*

¹² *Cf. In re Estate of Gist*, 763 N.W.2d 561, 565 (Iowa 2009) (noting definition of "estate" with language "including but not limited to" was expansive).

(5) The dead farm animals are immediately covered with a minimum of 6 inches of soil and finally covered with a total minimum of 30 inches of soil.¹³

Horses fall under the definition of farm animals.¹⁴ However, the dead horses buried on Pet Memories' property do not "result from operations located on the premises where disposal occurs."¹⁵ Pet Memories receives the horses from third parties. And Johnson acknowledged the burials exceed 2 carcasses per acre. Pet Memories' activities do not fall within the exemption for dead farm animals.

Pet Memories has not obtained a permit from the Department to dispose of solid waste on its property or property owned by Johnson. The Department's decision should be affirmed.

III. Penalty

The Department seeks to impose a \$10,000 administrative penalty on Pet Memories. Iowa Code section 455B.307(3) authorizes the assessment of civil penalties for up to \$5,000 per day for solid waste disposal violations. Iowa Code section 455B.109 authorizes the Commission to establish civil penalties, which may be administratively assessed, of up to \$10,000, up to \$10,000. The Commission has adopted rules governing administrative penalties in 567 IAC chapter 10. Under the administrative rules, the maximum administrative penalty under 455B.307 is \$5,000 per day for each violation.¹⁶

In determining the amount of an administrative penalty, the Department considers: (1) the costs saved or likely to be saved by noncompliance by the violator; (2) the gravity of the violation; and (3) culpability.¹⁷ Pet Memories receives a fee when it accepts each dead horse. Johnson testified he received 30 to 35 horses at Pet Memories for disposal within the last year and earns more than \$10,000 per year for disposal of dead horses.

The Department presented evidence Pet Memories has continued to bury dead horse carcasses since 2008. The Department contends the repeated burial of multiple dead horse carcasses in a relatively small area threatens to contaminate the groundwater. Pet Memories countered that human burials and animals killed on the highways can also contaminate the groundwater and pose a greater health risk to the public. These arguments directly related to Pet Memories' constitutional arguments that are preserved for further review.

With respect to culpability, the Department presented evidence Pet Memories has been repeatedly warned and has willfully ignored the requirements of the law. Pet Memories is in the business of disposing of dead animals and is aware of applicable requirements. Pet Memories has earned more than \$10,000 each year for many years through its disposal of

¹³ 567 IAC 100.4(2)b(1)-(5).

¹⁴ *Id.* 100.4(1).

¹⁵ *Id.* 100.4(2)b(1).

¹⁶ *Id.* 10.2(4).

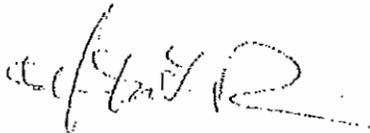
¹⁷ *Id.* 10.2(1)-(3).

dead horse carcasses. Based on the analysis of the three factors, I cannot conclude the Department erred in imposing a \$10,000 penalty.

ORDER

The Department's decision is **AFFIRMED**. The Department shall take any steps necessary to implement this decision.

Dated this 28th day of May, 2013.



Heather L. Palmer
Administrative Law Judge
515-281-7183

cc: Jeffrey Bittner
Jon Tack

Any party may appeal a proposed decision to the Director of the Department of Natural Resources within 30 days after receipt of the proposed decision and order. The agency may also decide on its own to review a proposed decision, notwithstanding the absence of a timely appeal by a party.¹⁸

¹⁸ 561 IAC 7.17(5).

Iowa Environmental Protection Commission

IN THE MATTER OF:
PET MEMORIES INC.,
Cedar County, Iowa.

**DNR BRIEF ON APPEAL
TO THE IOWA
ENVIRONMENTAL
PROTECTION
COMMISSION.**

DIA NO. 12DNR015

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Comes now the Iowa Department of Natural Resources (DNR) and in support of the Proposed Decision issued in Contested Case DIA NO. 12DNR015 submits the following Brief:

I. Procedural History

The contested case arises from the appeal of DNR Administrative Order No. 2012-SW-20, issued to Pet Memories, Inc. on September 13, 2012. A timely appeal of the Administrative Order was filed by Appellant Pet Memories, Inc. and received by the DNR on October 1, 2012. Hearing in the above-entitled contested case was held on April 8, 2013 before Administrative Law Judge Heather L. Palmer. A Proposed Decision affirming Administrative Order No. 2012-SW-20 was issued on May 28, 2013. A timely Notice of Appeal was filed by Pet Memories, Inc. on June 19, 2013.

II. Brief and Argument

A. The burial of dead animal carcasses constitutes solid waste disposal.

It is undisputed in this case that the DNR has been granted authority under Iowa law to regulate the disposal of solid waste. This authority arises from Iowa Code Chapter 455B, Division IV "Solid Waste Disposal", Part 1 "Solid Waste".

Iowa Environmental Protection Commission

Iowa law prohibits the unauthorized disposal of solid waste. Iowa Code section

455B.307(1) states in part:

(1) A private agency or public agency shall not dump or deposit or permit the dumping or depositing of any solid waste at any place other than a sanitary disposal project approved by the director unless the agency has been granted a permit by the department which allows the dumping or depositing of solid waste on land owned or leased by the agency. The department shall adopt rules regarding the permitting of this activity which shall provide that the public interest is best served, but which may be based upon criteria less stringent than those regulating a public sanitary disposal project provided that the rules adopted met the groundwater protection goal specified in section 455E.¹⁴

The dispute in this case is therefore not whether the DNR may prohibit solid waste disposal but, instead, whether dead animal carcasses constitute solid waste. Iowa Code section 455B.301(23) states in part:

(23) "Solid waste" means garbage, refuse, rubbish, and other similar discarded solid or semisolid materials, including but not limited to such materials resulting from industrial, commercial, agricultural, and domestic activities. Solid waste may include vehicles, as defined by section 321.1, subsection 90.²

DNR Environmental Specialist Kurt Levetzow testified, that he views animal carcasses as meeting the definition of "refuse" which is defined at 567 IAC 100.2 as follows:

"Refuse" means putrescible and nonputrescible wastes including but not limited to garbage, rubbish, ashes, incinerator ash, incinerator residues, street cleanings, market and industrial solid wastes and sewage treatment wastes in dry or semisolid form.

Testimony of Kurt Levetzow, Tr. p.44, lines 18-20; p.47, lines 6-8.

If animal carcasses are refuse, then they are solid waste and Pet Memories, Inc. cannot dispose of this solid waste except in compliance with the statutes and rules

¹ 455E.4 Groundwater protection goal. The intent of the state is to prevent contamination of groundwater from point and nonpoint sources of contamination to the maximum extent practical, and if necessary to restore the groundwater to a potable state, regardless of present condition, use, or characteristics.

Iowa Environmental Protection Commission

governing such disposal. However, it is very important to note that the animal carcasses need not be “refuse” in order to be solid waste. Iowa Code section 455B.301(23) also includes “other similar discarded solid or semisolid materials”.

Therefore the animal carcasses need only be:

1. discarded; and
2. solid; and
3. similar to garbage, refuse, rubbish.

The testimony at hearing established that neither the former pet owners nor Pet Memories, Inc. seek to recover any portion of the buried animal carcasses, once they have been buried. *Testimony of Stephen Johnson, Tr. p.116, l.22 – p.117, l.5.* The animal carcasses are discarded by the former owners or veterinarians when they are turned over to Pet Memories, Inc. and they are permanently buried by Pet Memories, Inc. *Testimony of Dr. Joseph Seng, Tr. P.158, lines 18-24.* All parties further agreed that the animal carcasses are in a solid form when accepted and when buried.

If the animal carcasses are solid and have been discarded then the only issue is whether the carcasses are, at a minimum, similar to garbage, refuse, or rubbish. The DNR urges that the animal carcasses are either refuse or are similar to both refuse and garbage. The carcasses are putrescible animal wastes. Such wastes are included within the definitions of both “garbage” and “refuse”. In determining whether carcasses fall within these definitions, the general principal applies that environmental protection statutes are liberally construed. *First Iowa State Bank v. Iowa Dept. of Natural Resources*, 502 N.W.2d 164, 166 (Iowa 1993).

² Certain aspects of motor vehicle recycling are regulated by Iowa Code Chapter 321H, while the final disposal of vehicles would be regulated pursuant to the solid waste provisions.

Iowa Environmental Protection Commission

Because the animal carcasses are a solid waste, they may only be disposed on in accordance with Chapter 455B and the rules adopted pursuant thereto. It is undisputed that Pet Memories, Inc. has buried hundreds of horse carcasses on its property. *Testimony of Stephen Johnson, Tr. p.122, lines 15-22.* Such burial clearly constitutes dumping or depositing as prohibited by Iowa Code section 455B.307 and is therefore illegal unless otherwise authorized by the DNR through a permit or by rule. Pet Memories, Inc. does not have a DNR-issued sanitary disposal project permit to bury animal carcasses.

Pet Memories, Inc. is not authorized by rule to bury animal carcasses. The DNR has adopted 567 IAC 100.4, which provide a limited exemption for the disposal of certain farm waste, including dead farm animals. For this exemption to apply, the animals must result from operations located on the premises where the disposal occurs and horse carcasses are limited to 2 carcasses per acre. In the case at hand, Pet Memories, Inc. acknowledges that the horses died at locations other than the site of burial³.

For the reasons set forth herein, the burial of animal carcasses by Pet Memories, Inc. constitutes multiple violations of Iowa Code section 455B.307. The Proposed Decision affirms these legal and factual conclusions and must be upheld.

B. The Iowa Department of Agriculture and Land Stewardship does not have exclusive jurisdiction over the burial of animal carcasses.

As an initial proposition, the DNR disputes that exclusivity can exist between executive agencies of the State of Iowa. As executive agencies, both the DNR and the Department of Agriculture and Land Stewardship (IDALS) are the “State of Iowa”.

Iowa Environmental Protection Commission

Issues of preemption arise between differing levels of government, rather than within a single governmental body. The issues therefore are whether the DNR has the authority to act, as addressed above, and whether the actions or authority of the DNR are in conflict with the authorizing statutes of IDALS.

As stated by the Appellant, IDALS is mandated to implement and oversee Iowa Code Chapter 167 "Use and Disposal of Dead Animals". For purposes of that chapter, "disposing" is defined at Iowa Code section 167.3 as:

167.3 "Disposing" defined.

1. A person who receives from any other person the body of any dead animal for the purpose of obtaining the hide, skin, or grease from such animal, in any way whatsoever, or any part thereof, shall be deemed to be engaged in the business of disposing of the bodies of dead animals, and must be the operator or employee of a licensed disposal plant.

2. A disposal plant does not include an operation where the body of a dead animal is cremated, so long as the operation does not use the body of a dead animal for any other purpose described in subsection 1.

The activity which is the subject of this contested case does not fall within the definition of disposal for purposes of chapter 167. The Appellant has at all times and in all circumstances asserted that his activities do not meet the "disposing" definition of Iowa Code section 167.3(1). Steve Johnson, owner and operator of Pet Memories, Inc., testified that Pet Memories does not obtain the hide, skin or grease from any animal which they accept and do not fall within the definition of disposing found at Section 167.3. *Testimony of Stephen Johnson, Tr. p.116, lines 9-24.* Therefore, IDALS regulation through Chapter 167 does not apply to the activities of Pet Memories.

³ Pet Memories acknowledge the burial of numerous horses and did not present evidence to attempt to establish compliance with the 2 horse per acre maximum disposal rate. The DNR asserts that, without such showing, Pet Memories cannot be considered "similarly situated to" those producers subject to rule 100.4.

Iowa Environmental Protection Commission

Pet Memories, Inc. asserts that its carcass burial activities are authorized by Chapter

167. However, the only authorization for burial found in Chapter 167 is found at section

167.12(6) which states:

167.12 Disposing of bodies.

The following requirements shall be observed in the disposal of such bodies:

1. Cooking vats or tanks shall be airtight, except proper escapes for live steam.
2. Steam shall be so disposed of as not to cause unnecessary annoyance or create a nuisance.
3. The skinning and dismembering of bodies shall be done within said building.
4. The building shall be so situated and arranged, and the business therein so conducted, as not to interfere with the comfortable enjoyment of life and property.
5. Such portions of bodies as are not entirely consumed by cooking or burning shall be disposed of by burying as hereafter provided, or in such manner as the department may direct.
6. In case of disposal by burying, the burial shall be to such depth that no part of such body shall be nearer than four feet to the natural surface of the ground, and every part of such body shall be covered with quicklime, and by at least four feet of earth.
7. All bodies shall be disposed of within twenty-four hours after death.

In order to harmonize the definition of disposal at section 167.3 with the language of section 167.12, there must be some purpose of obtaining the hide, skin, or grease from such animal for each of the activities described in section 167.12, including prior to burial. The Iowa Supreme Court has stated, "We consider all portion of the statute together, without attributing undue importance to any single or isolated portion." *Harden v. State*, 434 N.W.2d 881, 884 (Iowa 1989) When subsection 167.12(6) is read in conjunction with subsection 167.12(5), which refers to the burial of material left over after cooking or burning, and it is clear that these authorizations do not apply to the Appellant.

Because Iowa Code section 167.3 only applies to a person who receives from any other person the body of any dead animal for the purpose of obtaining the hide, skin, or

Iowa Environmental Protection Commission

grease from such animal, in any way whatsoever, or any part thereof, it does not apply to the activities of Appellant Pet Memories, Inc. Therefore, the determination of the Administrative Law Judge should be affirmed.

C. The Penalty Assessed is Appropriate.

The Proposed Decision affirms the administrative penalty of \$10,000 assessed by Administrative Order No. 2012-SW-20. In so affirming, the Administrative Law Judge succinctly sets forth the justification for this penalty and the DNR requests that the Commission review the Penalty statement at Page 6, Section III of the Proposed Decision.

At hearing, the DNR proved the following propositions:

1. Pet Memories, Inc. has realized an economic benefit in excess of \$10,000 from the burial of horses. *Testimony of Stephen Johnson, Tr.p.110, lines 3-21, testifying to in excess of \$10,000 per year for combined incineration and burial of horses.*

2. The actions of Pet Memories, Inc. endanger groundwater. Testimony of Kurt Levetzow, Tr. p.76, lines 14-22.

3. Pet Memories, Inc. continued to bury horse carcasses after years of notices to cease this illegal activity. *See DNR Exhibits A through F, Testimony of Kurt Levetzow. Tr. pp.11-22.*

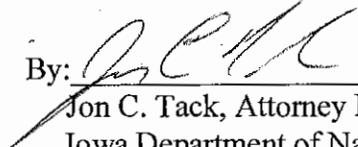
For these reasons the penalty of \$10,000 is warranted and the Proposed Decision should be affirmed.

Iowa Environmental Protection Commission

III. Conclusion

WHEREFORE, the Department hereby requests that the Iowa Environmental Protection Commission uphold the Proposed Decision issued on May 28, 2013 by Administrative Law Judge Heather L. Palmer in contested case Docket No. 12DNR015.

IOWA DEPARTMENT OF NATURAL RESOURCES

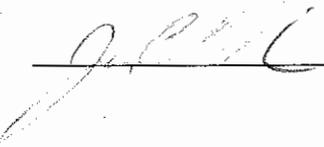
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PROOF OF SERVICE

The undersigned hereby certifies that a true copy of the foregoing was sent by regular mail to each party of record at their last known address on November 22, 2013.



Iowa Department of Natural Resources
Wallace State Office Building
Des Moines, Iowa 50319

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IN THE MATTER OF: PET MEMORIES, INC., Cedar County, Iowa	Hearing No. 12DNR015 PETITIONER'S BRIEF APPEALING PROPOSED DECISION OF ADMINISTRATIVE LAW JUDGE
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I. OVERVIEW

Hearing was held the 8th day of April 2013, at the Wallace State Office Building, Des Moines Iowa before the Honorable Heather Palmer, Administrative Law Judge (hereinafter “the ALJ”). On or about May 28, 2013 the ALJ issued a Proposed Decision finding Petitioner Pet Memories, Inc. (hereinafter, “Pet Memories”) in violation of Iowa Code Section 455B.307 and 567 IAC 100.4 for burying horse carcasses in its pet cemetery in November 2011. The ALJ fined Pet Memories ten thousand dollars (\$10,000). On or about June 18, 2013, Petitioner filed a timely Notice of Appeal.

The Proposed Decision is in error for the following reasons. First, the Department of Agriculture and Land Stewardship has been conferred exclusive jurisdiction to regulate “the use and disposal of dead animals” by the Iowa legislature under Iowa Code §§ 159.6(5), 159.1(3) and Chapter 167. Second, the dead horses in question are not “solid waste” as that term is defined in Iowa Code §455B.301(23). Relatedly, 567 IAC 100.2, the administrative rule upon which the DNR basis its claim that horse carcasses are “solid waste” is not readily understandable by the common person. Consequently, this administrative rule cannot be enforced as it is void for vagueness. Third, the DNR’s rules and regulations as applied to Pet Memories in this case are arbitrary, capricious and lack a rational basis constituting a denial of Petitioner’s equal protection rights. Fourth, the decision was the result of improper bias on the part of ALJ. The details of each assertion are set forth below.

II. BRIEF AND ARGUMENT

A. THE DEPARTMENT OF AGRICULTURE AND LAND STEWARDSHIP HAS EXCLUSIVE JURISDICTION TO REGULATE THE DISPOSAL OF THE DEAD HORSES IN QUESTION.

Iowa Code §159.6(5) provides, "...(T)he department *shall* enforce the law relative to:...(5) Use and disposal of dead animals, chapter 167" (emphasis added). Iowa Code § 159.1(3) defines "Department" as, "the *department of agriculture and land stewardship...*". Chapter 167 is captioned, "Use and Disposal of Dead Animals".

The law in Iowa is clear. When the word "shall" is used in a statute, the directive of the legislature is mandatory., *\$99 Down Payment, Inc. v. Garad*, 592 N.W. 2d 691, 694 (Iowa 1999); *State v. Bartuske*, 383 N.W. 2d 582, 584 (Iowa 1986); *Schmidt v. Abbott*, 156 N.W. 2d 649, 651 (Iowa 1968).

In *Minnesota Valley Canning Co., v. Rehnblom*, 49 N.W. 2d 553, 555 (Iowa 1951), the Iowa Supreme Court quoted its earlier rulings, with favor:

In the case of *Macklot v. City of Davenport*, 17 Iowa 379, 387 (1864), we stated: ...It may, therefore, be safely held that where a statute upon a particular subject has provided a tribunal for the determination of questions connected with that subject, that *the jurisdiction thus conferred is exclusive, unless otherwise expressed or clearly manifested...*" See also *Call Bond & Mortgage Co. v. City of Sioux City*, 219 Iowa 572, 584, 259 N.W. 33. (Emphasis added).

The ALJ ignored this authority. She found that the DNR had concurrent jurisdiction to regulate the disposal of dead animals despite the fact there is no *clearly manifested* legislative intent confer in the DNR concurrent jurisdiction over the disposal of dead animals. The ALJ *correctly* noted that, "Iowa Code section 455B.301 does *not* define garbage, refuse or rubbish." (Emphasis added)(Proposed Decision p.4) This correct finding directs the proper analysis of the jurisdictional issue in this case. In this case there is one clearly written unambiguous *statute* that

confers jurisdiction over the disposal of dead animals to an administrative agency. That is Iowa Code Section 159.6(5). The clear language of this statute creates the *legal presumption* that the jurisdiction of IDALS is *exclusive*. *Minnesota Valley Canning Co., v. Rehnbloom*, 49 N.W. 2d 553, 555 (Iowa 1951); *Call Bond & Mortgage Co. v. City of Sioux City*, 219 Iowa 572, 584, 259 N.W. 33 (1934); *Macklot v. City of Davenport*, 17 Iowa 379, 387 (1864); On the opposing hand, there does not exist *a clearly manifested legislative intent* for concurrent jurisdiction over the disposal of dead animals in the DNR's enabling statute, Iowa Code Chapter 455B. This fact is underscored by the testimony of Kurt Levetzow, the DNR's enforcement officer:

Q. And the definitional section of Iowa Code, Exhibit 11, 455B .301(23) does not say that dead animals are solid waste; right?

A. It does not state dead animals, you're correct.

Q. Okay and there is no section of the Iowa Code that clearly states that dead animals are garbage, refuse or rubbish, right. I'm just talking about the Iowa Code right now.

A. Okay. Yes. (Levetzow testimony, Tr. pp. 50:24-51:3).

Instead of following the mandate of the Iowa Supreme Court regarding exclusivity of agency jurisdiction which is discussed above, the ALR relied on one instance in the Iowa Code where the legislature had given concurrent jurisdiction to two different administrative agencies to support her incorrect conclusion that there exists a similar legislative regarding the disposal of dead animals in this case. On page 3 of the Proposed Decision, the ALJ found that under Iowa's statutory scheme the Iowa Board of Pharmacy and the Iowa Board of Medicine can both institute disciplinary proceedings against persons dispensing drugs under Iowa's statutory scheme. The

situation relied upon by the ALJ is not analogous to the instant case. Iowa Chapter 147 governs the licensing of health care professionals. Iowa Chapter 155A is the Iowa Pharmacy Practice Act. *Iowa Code Chapter 155A specifically cross-references provisions of Chapter 147.* Specifically, Iowa Code Section 155A.4(1) provides “A person shall not dispense prescription drugs unless the person is a licensed pharmacist *or is authorized to by section 147.107 to dispense or distribute prescription drugs.*” (emphasis added). In this case, there is no statutory cross-reference between Chapter 159, which confers jurisdiction in IDALS to regulate “the Use and Disposal of Dead Animals” to Chapter 455B which regulates “solid waste”.

In addition, it is a universally accepted rule of statutory construction that specific statutory language takes precedent over more general statutory language, *State v. Broten*, 295 N.W. 2d 453, 455 (Iowa 1980); *Ritter v. Dagele* 156 N.W. 2d 318, 324, 261 Iowa 870 (1968); *Grant v. Norris* 85 N.W. 2d 261, 267, 249 Iowa 236 (1957). “Dead animals” is a very specific reference to the subject matter of dead animals. If “garbage, refuse or rubbish” is a reference to “dead animals” at all, it is certainly a much less specific reference to dead animals than the term “dead animals”.

In the context of this case, there is no evidence that the legislature intended “dead animals” to be regulated by the DNR as statutorily undefined “garbage, refuse or rubbish” when Iowa Code Section 159.6(5) uses clear language to provide that IDALS “shall” regulate the use and disposal of dead animals.

Dr. Joseph Seng, an Iowa State Senator, testified to this fact.

Q. ...What administrative body is in charge of the disposal of dead animals?

A. The agriculture; IDALS, Iowa Department of Land Stewardship. (Dr. Seng Testimony, Tr. p. 134:10-13).

...

Q. In your experience as a veterinarian and an Iowa legislator, are dead animals solid waste, to your knowledge and belief, with the one exception that you read (which was related to contaminated animals).

A. They are not solid waste. (Seng Testimony, Tr. p. 140:20-24)(Emphasis and parentheticals added).

It is also important to note that there are other important public policy reasons which support Pet Memories' position on the jurisdictional issue. This is not simply a case of the more specific IDALS *statutory* language ("dead animals") prevailing over the more general DNR *statutory* language ("garbage, refuse or rubbish"). This is a case where the DNR's *interpretation of one of its own ambiguous administrative rules* constitutes an attempt by one administrative agency to encroach on another agency's statutorily conferred jurisdiction.

It is hornbook law that an agency cannot, by rule, expand or limit authority granted by statute, *Smith-Porter v. Iowa Department of Human Services*, 590 N.W. 2d 541, 545 (Iowa 1999); *Sommers v. Iowa Civil Rights Commission*, 337 N.W. 2d 470, 475 (Iowa 1983); Iowa Code §17A.19(8)(a)(court shall grant relief if agency violates statute). Power conferred by the legislature upon an administrative agency will not be extended by implication, *Llewellyn v. Iowa State Commerce Com'n*, 200 N.W. 2d 881, 884 (Iowa 1972); *Huxley v. Conway*, 226 Iowa 268, 284 N.W. 136, 137 (1939).

An administrative rule which does not comport with the intent of the enabling legislation may be abrogated as an act in excess of the agency's authority. *Cruise v. Iowa Department of Transportation*, 390 N.W. 2d 602, 604 (Iowa App. 1986); *Lenning v. Iowa Department of*

Transportation, 368 N.W.2d 98, 103 (Iowa 1985); *Hiserote Homes, Inc. v. Riedemann*, 277 N.W.2d 911, 913 (Iowa 1979). A rule is beyond the scope of delegation if it is at variance with the enabling act or if it amends or nullifies legislative intent. *Elliott v. Iowa Dep't of Transportation*, 377 N.W. 2d 250, 254 (Iowa App. 1985); *Sommers v. Iowa Civil Rights Commission*, 337 N.W.2d 470, 475 (Iowa 1983).

An agency may not interpret a regulation so as to violate a statute, *University of Iowa Hospitals and Clinics v. Shalala*, 180 F.3d 943 (8th Cir. 1999); *Unites States v. La Bonte*, 520 U.S. 751, 756-63 (1997).

Moreover, courts recognize a distinction between a rule promulgated pursuant to an administrative agency's rulemaking power (legislative rule) and a rule by the agency which interprets its enabling statute. While an administrative agency's interpretation of its own legislative rules is given deference by the courts, an administrative agency's rules interpreting its own enabling statute is not. *Popowsky v. Pennsylvania Public Utility Commission*, 910 A.2d, 38, 53 (Pa. 2006); *Girard School Dist. v. Pittinger*, 392 A.2d 261, 263 (Pa. 1978); *United States v. Cartwright*, 411 U.S. 546, 93 S.Ct. 1713, 36 L.Ed.2d. 528 (1973); *Skidmore v. Swift & Co.*, 323 U.S. 134, 139-40, 65 S.Ct. 161, 89 L.Ed. 124 (1944). *Retirement Board v. Annarino*, No. 02-5196 at p. 30 (R.I. Super 9/8/09). The rationale behind this rule is as follows:

(T)he meaning of a statute is essentially a question of law for the court, and when convinced that the interpretive regulation adopted by the administrative agency is unwise or violative of legislative intent, courts disregard the regulation.

Popowsky v. Pennsylvania Public Utility Commission, 910 A.2d at 53.

Iowa law is in accord. In *Holland v. State*, 115 N.W. 2d 161, 163-64 (Iowa 1962) the Court stated:

(A)ministrative rules cannot go farther than the law permits. An administrative body may not use the device of promulgating rules to change or add to the law; they are not to be taken as law themselves but, must be reasonable and used for the purpose of carrying out legislative enactments. *An administrative body may not make law or change the legal meaning of common law or statutes.* (Emphasis added).

See also *Smith-Porter v. Iowa Department of Human Services*, 590 N.W. 2d 541, 545

(Iowa 1999). In *Lynnvile Transportation, Inc. v. Chao*, 316 F. Supp. 790, 796 (S.D. Iowa 2004), the Court stated, “A court generally does not defer to an agency’s interpretation or construction of law.”

Other jurisdictions are in agreement. In *Michigan Farm Bureau v. Department of Environmental Quality*, 807 N.W. 2d 866, 883 (Mich. App. 2011), the Court stated:

...(Rulemaking authority) of a state administrative agency “derives from powers that the Michigan Legislature has granted” (citation omitted). “It is firmly established that the legislature may authorize the adoption by an administrative agency, charged with the administration of a particular enactment, of rules and regulations designed to effectuate the purposes of the enactment (citation omitted). *At the same time, however, it is well settled that “[a] statute that grants power to an administrative agency must be strictly construed and the administrative authority drawn from such power must be granted plainly, because doubtful power does not exist.* (Emphasis added).

Similarly in *City of San Antonio v. BSR Water Company*, 190 S.W.3d 747, 755 (Tex. App. 2005), the Texas Court of Appeals noted:

There is no presumption that administrative agencies are authorized to resolve disputes. *Id.* Instead, an agency may exercise only those power the law, in clear and express statutory language, confers upon it. *Id.* “Courts will not divine, by implication, additional authority to agencies, nor may agencies create for themselves any excess powers. *BCY Water Supply Corp. v. Residential Investments, Inc.* 170 S.W.3d 596,600-Tex. App.-Tyler 2005).

The ALJ also concluded that jurisdiction over the use and disposal of dead animals is not exclusive to IDALS because Iowa Code Section 159.6(5) does not use the verbiage “exclusive

jurisdiction” dissimilar to Iowa Code § 232.61, (See Footnote 4, Proposed Decision p.3). This finding is also not supported by the law. Chapter 216, the Iowa Civil Rights Law, uses statutory language similar to Iowa Code Section 159.6(5) but does not use the term, “exclusive jurisdiction”, either. Iowa Code section 216.16 (1) states, “A person claiming to be aggrieved by an unfair or discriminatory practice *must* initially seek an administrative relief by filing a complaint with the commission...” (emphasis added). This language is similar to the language employed by Iowa Code Section 159.6(5) which states, “(IDALS) *shall* enforce the law relative to....use and disposal of dead animals... (emphasis added). Despite the failure of Iowa Chapter 216 to use the term, “exclusive jurisdiction”, the courts have repeatedly and consistently ruled that the statutory language set forth in Chapter 216 confers exclusive jurisdiction on the Iowa Civil Rights Commission to hear complaints which are based upon unfair discrimination. *Northrup v. Farmland Industries, Inc.*, 372 N.W. 2d 193, 197 (Iowa 1985); *Hamilton v. First Baptist Elderly Hous. Found.*, 436 N.W.2d 336, 342 (Iowa 1989); *Napreljac v. John Q. Hammonds Hotels, Inc.* 461 F.Supp 2d 981, 1038 (S.D. Iowa 2006).

It is, further, noteworthy that on page 34, Mr. Levetzow testified as follows:

Q. The fact of the matter is that the DNR has no authority to cite human cemeteries for the disposal of human remains because jurisdiction over that subject matter is with the Insurance Commissioner.

A. I agree. (Levetzow testimony, Tr. p. 34:16-21).

This testimony is remarkable because Mr. Levetzow’s later testimony establishes that under his interpretation of the DNR definition of “refuse” set forth in 567 IAC 100.2, human remains are also “solid waste” .

Q. All right. If we use the same logic that's being implemented by the DNR in this case, then a dead human being is also solid waste, isn't it? That would be putrescible waste.

A. It would be, yes. (Levetzow testimony, Tr. pp. 64:23-65:2).

Plaintiff asserts that Mr. Levetzow's initial impression was the correct one. The Department of Insurance has exclusive jurisdiction over the disposal of human remains because the Iowa legislature stated, *in very specific language* that the Insurance Commissioner has jurisdiction over human remains. Just as is the case with "dead animals", the Iowa legislature did *not* use sufficiently specific language to include "human remains" in its definition of "solid waste" set forth in Chapter 455B. It naturally follows that if "human remains" are not subject to regulation by the DNR, as Mr. Levetzow stated in his initial testimony, "dead animals" are not subject to regulation by the DNR for the exact same reason. That reason is that regulation of the "Use and disposal of dead animals" has been specifically delegated to another administrative agency.

As it relates to the jurisdictional issue in this case, the observations of the Iowa Supreme Court in *Litterer v. Judge*, 644 N.W. 2d 357, 364 (Iowa 2002) are dispositive:

If our legislature had wanted to grant rulemaking authority to... include the regulation for the percentage of ethanol in motor fuel, we think it would not have done so under the guise of specification language used in the statute. Instead, we believe the legislature would have provided for the regulation of the blending in ethanol in motor fuel.

In this instance, had the legislature intended to give the DNR the ability to regulate the disposal of "dead animals" as "solid waste", the legislature would have said that "dead animals" were "solid waste" in the DNR's enabling statute. Instead, the legislature said, "dead animals" are

“dead animals” subject to regulation by the Department of Agriculture and Land Stewardship, Iowa Code §§ 159.6(5); 159.1(3). Rules which contravene statutory provisions or exceed an agency’s statutory authority are invalid, *Dunlap Care Center v. Iowa Dep’t of Social Services*, 353 N.W. 2d 389, 397 (Iowa 1984); *Sorg. v. Iowa Department of Revenue*, 269 N.W. 2d 129, 131 (Iowa 1978). “Dead animals” are “dead animals” not “solid waste”. The DNR lacks jurisdiction over the use and disposal of the dead horses involved in this case.

B. THE DEFINITION OF “SOLID WASTE” IS IMPERMISSIBLY VAGUE. PEOPLE OF ORDINARY INTELLIGENCE MUST GUESS AT THE MEANING OF “REFUSE” IN THE DNR STATUTE AND RULES.

Both parties appear to be in agreement that regardless of the disposition of the other issues, there is no cause of action against Petitioner if dead horses are not “garbage, refuse or rubbish” under either Iowa Code § 455B.307 or under 567 IAC 100.2. As previously noted, the ALJ correctly found that the terms “garbage, refuse and rubbish” were *not* defined by the Iowa Code. (Proposed Decision p. 3). Mr. Levetzow conceded in his testimony that dead animals were not “garbage” or “rubbish” (Levetzow Testimony, Tr. pp. 40:4-5, 45:1-3). There is nothing in the ALJ’s opinion that would suggest that she came to a contrary conclusion regarding the terms “garbage” and “rubbish”. Accordingly, whether dead animals are capable of regulation by the DNR, at all, in these circumstances boils down to whether “dead animals” fall within either the statutory or administrative definition of “refuse”.

As it relates to the statute, Iowa Code § 455B.307(23), common, ordinary meanings are applied when statutory terms are not defined.

The Google online dictionary defines, “refuse” as “matter thrown away or rejected as worthless; trash”. Witness testimony established that former owners of these pets no more regard

their deceased pets as “worthless” or “trash” than humans regard their deceased loved ones as “worthless” or “trash” (Levetzow Testimony Tr. p. 48:6-11). Deceased pets do not fit the *common law definition* of “refuse”.¹

However, both Kurt Levetzow testified and the ALJ found that “dead animals” fell within the administrative definition of “refuse” set forth in 567 IAC 100.2. The fatal flaw in maintaining this position is that the administrative rule in question is: 1) capable of more than one interpretation, 2) not readily understandable by the common man and 3) leaves interpretation of the rule within the complete discretion of the officer enforcing the law. As a consequence it is unconstitutionally vague. Under 567 IAC 100.2, the DNR defines “refuse” as:

(P)utresible and nonputrescible wastes including but not limited to garbage, rubbish, ashes, incinerator ash, incinerator residues, street cleanings, market and solid wastes and sewage treatment wastes in dry or semisolid form.

It is conceded by the DNR that dead horses are not “nonputrescible waste” which is defined as:

“(N)onputrescible solid waste consisting of combustible and noncombustible wastes, such as ashes, paper, cardboard, tin cans, yard clippings, wood, glass, bedding, crockery and litter of any kind.”, 567 IAC 100.2.

However, both Mr. Levetzow and the ALJ found that the dead horses in question were “putrescible waste” and hence, “refuse”. The fatal flaw to Mr. Levetzow’s interpretation and the ALJ’s finding is their *necessary* preliminary conclusion that the definition of “refuse” includes *all*

1

As argued elsewhere in this brief, Petitioner *also* prevails in this case if it can establish *any* of the following: a) exclusive jurisdiction in IDALS ; b) a denial of equal protection under the law or c) a denial of procedural due process attributable to impermissible bias on the part of the administrative law judge.

“putrescible and non-putrescible waste”. This conclusion is in error. “Refuse” as used in 567 IAC 100.2 *cannot* include *all* putrescible waste for two reasons. First, the *statutory* definition of “refuse” excludes *some* putrescible waste from the definition of “solid waste”. Accordingly, if the *administrative* definition of “refuse” includes *all* putrescible waste, it contradicts the enabling statute and is, thus, considered “ultra-vires”. Specifically, the definition of “solid waste” set forth in Iowa Code Section 455B.307(23) *excludes* “hazardous waste”. The definition of “hazardous waste” is set forth in Iowa Code Section 455B.411. The definition of “hazardous waste” *includes* some putrescible waste. “‘Hazardous waste’ means a waste or combination of wastes that, because of its quality, concentration, *biological degradation*....(1) Causes, or significantly contributes to an increase in mortality or an increase in serious irreversible, or incapacitating, reversible illness (2) Poses a substantial present or potential hazard to human health or the environment when improperly treated, stored or disposed of....”, Iowa Code Section 455B.411 (emphasis added).

Accordingly, if the administrative rule relied upon by Mr. Levetzow and the ALJ² includes *all* putrescible waste, that rule is ultra vires because *some* putrescible waste which is also “hazardous waste” is excluded from the *statutory* definition of “solid waste”. Accordingly, because the definition of refuse under 567 IAC 100.2, cannot mean “*all* putrescible waste” the definition *must* mean “*some* (unspecified) putrescible wastes”, by process of elimination. Because the “*some*” other putrescible waste is not quantified further (i.e. defined further) by administrative rule, it is void for vagueness as the ordinary person must guess at which putrescible waste is

² Which defines “refuse”, i.e. 567 IAC 100.2

included in the administrative definition of “refuse” and which putrescible waste is excluded from that definition.

The second reason Mr. Levetzow’s and the ALJ’s interpretation of the definition of the term “refuse” fails is attributable to another rule of construction. The administrative definition of “garbage” includes use of the word, “all”. 567 IAC 100.2 defines “garbage” as:

(A)ll solid and semi solid, putrescible animal and vegetable wastes, resulting from the handling, preparing, cooking, storing, serving and consuming of food or of material intended for use as food...(emphasis added).

By contrast the DNR’s definition of “refuse” does *not* include the word, “all”. Our courts’ rules for construction of administrative rules and the courts’ rules of construction for statutes are the same. “Legislative intent” is expressed by words of omission as well as words of inclusion, *State ex. rel. Miller v. Santa Rosa Sales and Marketing, Inc.*, 475 N.W. 2d 210, 218 (Iowa 1991); *Barnes v. Iowa Department of Transportation*, 385 N.W. 2d 260, 263 (Iowa 1986); *Crees v. Chiles*, 437 N.W. 2d 249, 252 (Iowa App. 1988). Perhaps this rule was best articulated by the 8th Circuit in the case of *U.S. v. Gonzalez-Chavez*, 122 F. 3d 15, 17 (8th Cir. 1997):

"[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello v. United States*, 464 U.S. 16, 23, 104 S.Ct. 296, 300, 78 L.Ed.2d 17 (1983) (quoting *United States v. Wong Kim Bo*, 472 F.2d 720, 722 (5th Cir.1972)) (alteration in Russello).

Because 567 IAC 100.2's definition of “refuse” does not and cannot include *all* putrescible waste, by process of elimination, the definition must mean *less than all* putrescible waste.

Because it is left entirely to the discretion of the enforcing officer as to which of the “less than all” putrescible waste is included in the definition of “refuse”, the rule is unconstitutionally vague, as

written.

The void for vagueness doctrine serves two purposes. First, all persons receive a fair notice of what is punishable and what is not. Second, the vagueness doctrine helps prevent arbitrary enforcement of the laws and arbitrary prosecutions. It is premised on a notion of fundamental fairness which recognized that a person should not risk penalization by the government merely because he or she cannot reasonably understand what conduct is prohibited under the law.

Numerous cases are instructive on this issue. Most directly on point is *Vandehoef v. National Transportation Safety Board*, 850 F. 2d 629, 630-31 (10th Cir. 1988) where the Court stated, “In so holding we agreed that an administrative regulation which is so vague that persons of common intelligence must necessarily ‘guess at its meaning’ violates due process. The ‘test’ we said in *Brennan* was whether the regulation ‘delineated its reach’ in words of common understanding”.

Vandehoef quoted *Cameron v. Johnson*, 390 U.S. 611, 616, 88 S.Ct. 1335, 1338, 20 L.Ed. 182 (1968). *Cameron* provided that a statute which was “so vague that men of common intelligence must guess at its meaning and differ as to its application” was impermissibly vague. *Id.* In *Connally v. General Construction Co.*, 269 U.S. 385, 391, 46 S.Ct. 126, 127, 70 L.Ed. 322 (1926), the U.S. Supreme Court, stated:

That the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law; and a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law. *International Harvester Co. v.*

Kentucky, 234 U. S. 216, 221, 34 S. Ct. 853, 58 L. Ed. 1284; *Collins v. Kentucky*, 234 U. S. 634, 638, 34 S. Ct. 924, 58 L. Ed. 1510.

The testimony of Mr. Levetzow concedes that a person of common intelligence must guess at the meaning of "refuse" set forth in 567 IAC 100.2.

Q. All right. Would you assume that somebody just going through exhibit 10 (567 IAC 100.2) is going to pick up under that definition of refuse that that covers a dead horse?

A. No. I don't know. (Levetzow Testimony, Tr. p. 50:14-18)(parenthetical added).

...

Q. And there's really no section in the Iowa Administrative Code that clearly says that dead animals are garbage, refuse or rubbish; right?

A. Not word for word. You are right. (Levetzow testimony, Tr. p. 51:4-7).

This view is supported by Senator Joe Seng.

Q.Did you see anything in those sub-categories that would lead you to believe that a dead animal was solid waste as they (the DNR) was defining things.

A. If I remember right, reading that animals are not even mentioned in those categories, the word "animal" or "dead animal". It's like we have stated metal, things of that nature.

Q. So you saw nothing that defined a dead animal as solid waste when you were going through those- -

A. Yes, except for that one exception.

Q. All right.

A. That would be more medical waste, but they would involve animal parts.

(Seng Testimony, Tr. p. 141:5-18).

Iowa has, steadfastly, applied these same rules of construction. A statute which imposes a penalty is strictly construed, *State v. Bevins*, 230 N.W. 865, 868, 210 Iowa 1031 (1930); *State v. Niehaus*, 228 N.W. 308, 309, 209 Iowa 533 (1929); *Drazich v. Hollowell*, 223 N.W. 253, 254, 207 Iowa 427; *State v. Selestan*, 515 N.W. 2d 356, 359 (Iowa App. 1993).

Accordingly, the DNR may not penalize Pet Memories or anyone else for disposal of “dead animals” under the claim that “dead animals” are “refuse” as persons of ordinary intelligence looking at the definition of “refuse” under 567 IAC 100.2 must guess at which “putrescible waste” is included in the definition of “refuse” and which “putrescible waste” is excluded from that definition. *Connally v. General Construction Co.*, 269 U.S. 385, 391, 46 S.Ct. 126, 70 L.Ed. 322 (1926).

C. THE DNR’S REGULATION OF PET MEMORIES BURIALS FAILS TO WITHSTAND RATIONAL BASIS SCRUTINY AND, THUS, CONSTITUTES A DENIAL OF PETITIONER’S EQUAL PROTECTION RIGHTS

Pet Memories claims that the DNR’s imposition of a ten thousand dollar fine for burying pet horses is conduct that lacks a rational basis and, as such, constitutes a denial of equal protection under the Constitutions of the United States and, especially, the State of Iowa. This claim has multiple sources. First, The DNR rules allow a farmer to bury 524 animals per acre. 567 IAC 100.4(2)(b)(2). These same rules only allow Petitioner to bury two animals per acre. (Levetzow testimony, Tr. p. 79:18-21). On direct examination, Mr. Levetzow testified that the solid waste rules were designed to protect against groundwater contamination. (Levetzow

testimony p. 23:1-5). When asked to comment on the DNR's disparate treatment of farmers and owners of pet cemeteries, Mr. Levetzow offered the following testimony:

Q. Can we agree that there is no rational environmentally sound reason for allowing a farmer to bury 520 animals per acre while allowing Mr. Johnson to bury only one animal per acre?

A. None that I am aware of.

Q. All right. We're not treating similarly-situated people in a similar manner, are we?

A. I have a hard time disagreeing with that. (Levetzow testimony, Tr. p. 79:1-8).

Underscoring the equal protection violation in this case is the testimony Mr. Levetzow provided on direct examination.

Q. Do you believe it is any more harmful to bury horses on the property where they died or on some other property not where they died?

A. I don't see a big difference.

Q. So would you say that the exemption for farmers is based on any sort of groundwater protection?

A. I don't know what the exemption was written for.

Q. So you are asserting today that there's a groundwater exemption or rational basis for the exemption for farmers?

A. I'm not exactly sure why there would be an exemption for one but not another, but that's the way the regulations are written. (Levetzow testimony, Tr. p. 23:6-20).

Mr. Levetzow's candid testimony on this issue establishes a violation of Petitioner's equal protection rights under the Iowa Constitution. "Although equal protection does not demand that a

statute apply equally to all persons, it does require that persons similarly situated with respect to the legitimate purpose of the law receive like treatment." *Racing Ass'n of Central Iowa v. Fitzgerald*, 675 N.W.2d 1, 7 (Iowa 2004) quoting, with favor, *McLaughlin v. Florida*, 379 U.S. 184, 191, 85 S.Ct. 283, 288, 13 L.Ed.2d 222, 228 (1964); accord *College Area Renters & Landlord Ass'n v. City of San Diego*, 50 Cal.Rptr.2d 515, 520 (Ct.App.1996). See also, *King v. State*, 818 N.W.2d 1, 30 (Iowa 2012).

The second denial of equal protection stems from the DNR's disparate treatment of human cemeteries and pet cemeteries. Mr. Levetzow asserted that both human remains and dead animals are "solid waste" under his interpretation of "refuse" under 567 IAC 100.2. (Levetzow testimony, Tr. pp. 64:23-65:2). Mr. Levetzow conceded that jurisdiction over human remains is exclusive to the Insurance Commissioner. (Levetzow testimony p. 34:16-21). Notwithstanding this testimony, the DNR challenges the exclusivity of IDALS jurisdiction over the disposal of dead animals.

Even more supportive of Petitioner's claim of a denial of equal protection as it relates to the DNR's disparate treatment of human remains and animal remains is the undisputed testimony that compares environmentally damaging human burials to Pet Memories' environmentally friendly "natural burials" or "green burials" of horse carcasses.

Q. I want to talk about human cemeteries a little bit. Just for the record, I'm getting into the rational basis for these rules here. Just from what you know, what you've heard, picked up in the course of your employment, is arsenic a harmful chemical?

A. Yeah.

Q. What about mercury?

A. Yes.

Q. In fact, both are considered heavy metals and potent toxins, right?

A. Yes.

Q. Bad stuff, very bad stuff?

A. Yes. (Levezow testimony, Tr. pp. 66:16-67:4)

Mr. Levezow's testimony on the subject continued:

Q. Okay. What do you know about formaldehyde? Is it a pretty bad chemical to your knowledge?

A. I would assume it is.

Q. You don't want it anywhere— just knowing what you know, you don't want it anywhere close to your drinking water; right?

A. Correct. (Levezow testimony, Tr. pp. 67:19-25).

Mr. Johnson offered additional testimony.

Q. Would you take a look at Exhibit 25.

A. Yes.

Q. Is that an article you brought to my attention?

A. Yes, it is.

Q. Would you summarize that article for the Judge?

A. For about 100 years, before the Civil War and after the Civil War, they were embalming a lot of soldiers, and it got to be more people and more people they embalmed with arsenic, lead and mercury....It happened in all of the cemeteries.

(Johnson testimony, Tr. pp. 98:19-99:8).

Dr. Seng's testimony added to Petitioner's assertion that human burials are very hazardous

to the environment.

Q. And formaldehyde is a harmful chemical, right.

...

A. Very dangerous.

Q. It's bad stuff?

A. It is bad....We used formaldehyde to send tissues to Iowa State for diagnostic purposes. And the old skull and crossbones is rarely used any more. I mean, that's one bottle that still, I think-- some of them have the skull and crossbones on them.

(Dr. Joseph Seng Testimony. Tr. p. 145:1-7).

Q. All right. And you're the one who told me that human embalming involves formaldehyde, right...?

A. Yes. Yes. Yes. (Dr. Joseph Seng Testimony, Tr. pp. 143:24-144:3).

In contrast to human burials, Steven Johnson's testimony established that Pet Memories' animal burials are environmentally friendly.

Q. ...Have you ever embalmed a horse?

A. I don't embalm anything.

Q. ...Never...?

A. No.

Q. Is there a term for the type of burial that you perform?

A. It's called a natural burial and a green burial?

...

Q. Are natural or green burials being promoted now as an environmentally friendly

way to dispose of pets and animals?

A. Big time.

Q. Why is your industry promoting natural burials or green burials?

A. It's more environmentally friendly, you don't use chemicals. We're all thinking about drinking water. It's not hurting the environment at all. (Johnson testimony, Tr. pp. 100:13-102:8).

Dr. Seng echoed these sentiments.

A. ...In answer to your question, if I would just give my honest opinion, I don't think there's a problem putting an animal in the ground and letting it go back to natural decomposition....So, it's more of a quantity issue but, I would say decomposition is normally not a problem whatsoever. (Dr. Joseph Seng Testimony, Tr. p. 152:6-19).

Mr. Levetzow's testimony on the environmental impact of Pet Memories' burials was as follows:

Q. Okay. From an environmental point of view, is there anything wrong with ashes to ashes, dust to dust?

A. Not that I am aware of.

Q. Okay. We are simply returning the same elements to the ground in the form of a dead body that were taken from the ground when the body was alive, right?

A. Okay.

Q. Okay. And are you aware that all of Mr. Johnson's burials are natural burials?

A. In that he just digs a hole, puts the animal in, and covers it up?

Q. Correct?

A. I am aware of that. (Levetzow Testimony, Tr. p. 71:3-17).

The summation of both the Petitioner's testimony and the DNR's testimony was that human burials create a significant risk to the environment whereas Petitioner's pet burials (including horses) do not. Unfortunately, the record further establishes that while the DNR engages in no effort to regulate environmentally hazardous human burials it has, in this case, imposed a ten thousand dollars (\$10,000) fine upon Pet Memories for its environmentally friendly animal burials.

To Mr. Levetzow's knowledge, the DNR has never attempted to regulate the disposal of human remains, despite the fact that Mr. Levetzow considers human remains to constitute "solid waste" under Iowa's administrative scheme. (Levetzow testimony, Tr. pp. 65:23-66:2).

Moreover, the DNR has no regulations regarding the disposal of human remains despite the fact that human remains pose a significant environmental risk according to both sides of this case. By contrast, the DNR's \$10,000 fine levied against Pet Memories was upheld by the ALJ despite the *undisputed* testimony in this case is that Pet Memories burials are "environmentally friendly". (Johnson testimony Tr. pp. 100:13-102:8); Dr. Joseph Seng Testimony Tr. p. 152:6-19; Levetzow testimony, Tr. p. 71:3-17).

"[A]lthough the rational basis standard of review is admittedly deferential to legislative judgment, 'it is not a toothless one' in Iowa.", *State v. Mitchell*, 757 N.W.2d 431, 437 (Iowa 2008) quoting, *Racing Ass'n of Central Iowa v. Fitzgerald*, 675 N.W.2d 1, 9 (Iowa 2004).

"[O]ur obligation not to interfere with the legislature's right to pass laws is no higher than our obligation to protect the citizens from discriminatory class legislation violative of the

constitutional guaranty of equality of all before the law." *Racing Ass'n of Cent. Iowa*, 675 N.W.2d at 16 [quoting *Sperry & Hutchinson Co. v. Hoegh*, 246 Iowa 9, 24, 65 N.W.2d 410, 419 (1954)].

There is no rational basis whatsoever for the DNR not to even attempt to regulate environmentally hazardous human cemeteries while simultaneously fining environmentally friendly pet cemeteries \$10,000 when both types of cemeteries are allegedly disposing of "solid waste" according to the DNR's interpretation of its own administrative rules. Because the DNR's enforcement scheme in this instance is devoid of a rational basis, it is in violation of Pet Memories' equal protection rights.

The third violation of equal protection results from the fact that the DNR promotes composting but significantly penalizes animal burial when both processes result in the same constituent chemicals being returned to the ground. (Johnson testimony, Tr. p. 102:13-20; Seng testimony Tr. p. 152:6-19).

The fourth violation of equal protection in this case results from the fact that the DNR does not even attempt to regulate pets buried in human cemeteries despite the fact that this practice is commonplace. (Johnson testimony Tr. p. 99:23-25, Seng testimony, Tr. p. 142:6-21).

The fifth violation of equal protection in this case results from the DNR's failure to regulate the disposal of other pets despite the fact that dogs, cats, birds and goldfish are also "solid waste" under its interpretation. (Levetzow testimony Tr. p. 64:19-22).

"Iowa's constitutional promise of equal protection is essentially a direction that all persons similarly situated should be treated alike". *Varnum v. Brien*, 763 N.W. 862, 878 (Iowa 2009); *Racing Ass'n of Cent. Iowa v. Fitzgerald*, 675 N.W.2d 1, 7 (Iowa 2004). As it relates to the environmental impact on Iowa's groundwater, Pet Memories disposal of dead animals is

“similarly situated” to farmers and human cemeteries. Farmers are allowed to bury literally tons more animals per acre than Pet Memories. (Johnson Testimony, Tr. p. 105:5-9). The DNR makes no effort to regulate the disposal of human remains despite the fact that both human remains and dead animals are “solid waste” according to the DNR’s interpretation of its own rules. This violation of equal protection is amplified by the fact that human burials create a significant environmental hazard while Pet Memories’ burials, for which it has been fined ten thousand dollars create no environmental risk, at all. (Levetzow Testimony Tr. p. 71:3-17; Johnson testimony Tr. p. 102:3-8; Seng testimony Tr. p. 152:6-19) Because the DNR’s regulatory enforcement of groundwater protection lacks a rational basis, Petitioner’s equal protection rights have been violated.

D. THE PROPOSED DECISION IS THE RESULT OF IMPROPER BIAS ON THE PART OF THE ALJ

In the very beginning of the undersigned’s career, certain municipalities within Eastern Iowa still maintained traffic court. One local magistrate was of particular notoriety. Even prosecutors conceded, in private, that the judgment of the Court was all but inevitable as the magistrate was not fond of any effort designed to distract his inevitable finding of guilt through confusion that might be caused by the court’s consideration of either the law or the facts. Every aspect of these proceedings also suggests a hearing officer who had made up her mind, in advance, to rule against Petitioner in contravention of Petitioner’s procedural due process rights.

Accusing an officer or tribunal of bias is not a trivial matter. The undersigned has been practicing this profession for almost thirty years. Never before has he accused the officer in charge of a tribunal of impermissible bias. He hopes that similar circumstances never rise in the future.

These circumstances are not comfortable for anyone. Regrettably, an accusation of improper bias is warranted by this record.

The ALJ's bias is shown by the totality of the circumstances in this case. In this case, the ALJ engaged in all of the following conduct: 1) Coaching the DNR's witness on more than one occasion; 2) Requiring the DNR's very capable defense counsel to conduct a voir dire examination of Petitioner's witnesses after the DNR's counsel had initially declined to conduct a voir dire examination; 3) Accusing Petitioner's counsel on the record of wasting his clients' money; 4) Making an open, false accusation that Petitioner's counsel was mocking the tribunal (the ALJ); 5) Interrupting Petitioner's counsel during witness examination; 6) Scolding Petitioner's counsel for allowing exhibits to get out of order; 7) Consistently sustaining the DNR's objections and overruling Petitioner's despite the relaxed evidentiary standards that apply to administrative proceedings; 8) Repeatedly refusing to acknowledge, address or distinguish controlling authority in Petitioner's favor that was dispositive of this case; 9) Ignoring critical parts of the record that were dispositive of this case in Petitioner's favor; 10) Asking questions of Petitioner's owner which were for the sole purpose of attempting to bolster the ALJ's predetermined outcome and; 11) Supporting the severity of penalty imposed by referencing prior administrative proceedings that were, ultimately, abandoned at the district court level. Each of these matters is discussed below.

1. The Administrative Law Judge Impermissibly Coached the DNR's Witness.

On page 43 of the proceedings Petitioner's counsel was examining Mr. Levetzow regarding certain language in the Iowa Administrative Code. The ALJ interrupted.

PETITIONER'S COUNSEL: Okay. You don't see anything—as you're looking

down there, you don't see anything in 567 IAC 100.2 that would equate farm animals with waste, right?

ADMINISTRATIVE LAW JUDGE: If the witness doesn't know, he should just say, "I don't know".

MR. LEVETZOW: I really don't know. I'd have to sit here and read through it all. (Tr. pp. 43:22-44:4).

On page 55, the witness coaching by the ALJ continued:

PETITIONER'S COUNSEL: Okay. And composting. Chapter 167.18 applies to Pet Memories situation, doesn't it.

ADMINISTRATIVE LAW JUDGE: And if the witness doesn't know, the witness can say, "I don't know". That's a proper answer also. (Tr. p. 55:18-22)

2. The ALR Improperly Adopted The Role Of Advocate.

On page 147, Petitioner's counsel was examining Dr. Joseph Seng, a witness who has practiced veterinary medicine for years on the issue of the biochemistry of animal decomposition. At time the DNR's counsel objected and the following exchange took place.

ADMINISTRATIVE LAW JUDGE: Do you want to voir dire the witness?

DNR'S COUNSEL: I really don't, your honor.

PETITIONER'S COUNSEL: I think we have established his expertise as a veterinarian. And obviously, as a veterinarian, Your honor, you have to take your basic science, chemistry and things of that nature...

ADMINISTRATIVE LAW JUDGE: I think we have no choice but to voir dire the witness. *I'm certain he doesn't have that background, but we will see.*

[DNR'S COUNSEL CONDUCTS VOIR DIRE EXAMINATION WHICH SHOWS WITNESS HAS SUFFICIENT EXPERTISE TO TESTIFY ON THE SUBJECT].

ADMINISTRATIVE LAW JUDGE: I'm going to let the witness testify regarding his knowledge of that, and I'll give it the weight that it's due. I do not conclude that he's an expert that would meet the Daubert³ requirements to testify as an expert on this issue... (Transcript pp. 147:15-150:22)(Emphasis added).

The preceding exchange first shows a predisposition on the part of the ALR to rule against Petitioner despite lacking a basis for that determination at that time (i.e. "I'm certain he doesn't have that background, but we will see""). Moreover, after the ALJ's "certainty" was proven erroneous, she declared that she would apply an incorrect legal standard (*Daubert*) to discount testimony of an expert who was clearly qualified to testify to the biochemistry involved in animal decomposition. The biochemistry of animal decomposition is clearly not a "novel scientific area" requiring exclusion under the *Daubert* standard.

3. The ALJ improperly Accused Petitioner's Counsel Of Wasting His Client's Money.

Critical to the outcome of this case is whether the rule relied upon by the DNR to assess a

³ The ALJ's reference is to the United States Supreme Court case of *Daubert v. Metro Dow Chemicals*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993), which allowed the district court to serve as a "gatekeeper" when certain, novel expert testimony was offered by one of the parties. In *Johnson v. Knoxville Community School District*, 570 N.W. 2d 633, 637 (Iowa 1999) the Iowa Supreme Court *specifically rejected* the strict Daubert analysis ruling *Daubert* was only to applicable to "novel scientific testimony". Dr. Seng did not offer "novel science testimony" but, rather, testified on matters regarding what might colloquially be referred to as, "Chemistry 101".

ten thousand dollar penalty was, “so vague that men of common intelligence must guess at its meaning”, *Connally v. General Construction Co.*, 269 U.S. 385, 391, 46 S.Ct. 126, 127, 70 L.Ed. 322 (1926). Part of Petitioner’s strategy was to show that the statutes and rules involved in this case are confusing even to those sworn to enforce the laws. On page 54, Petitioner’s counsel was pursuing this strategy through a line of questioning of Mr. Levetzow when, without being prompted by an objection, the ALJ interrupted and inferred that Petitioner’s counsel was wasting his clients money:

ADMINISTRATIVE LAW JUDGE: I’m going to allow this line of questioning, but your clients are incurring legal expenses and have driven a great distance. (Tr. p. 54:15-16).

4. The ALJ Falsely Accused Petitioner’s Counsel Of Mocking The ALJ.

The behavior of the ALJ’s conduct was so out of the ordinary that at one point in the proceedings she falsely accused Petitioner’s counsel of making fun of her.

ADMINISTRATIVE LAW JUDGE: Yeah, it’s overruled. It’s overruled. Sorry. You need not laugh at me. I mean it’s not- -

PETITIONER’S COUNSEL: No, I’m not. No, I’m not at all. I would never do that. I say things I don’t mean all the time. (Tr. p. 120:14-20).

5. The ALJ Interrupted Plaintiff’s Counsel.

In addition to the occasions previously referenced where the ALJ coached Mr. Levetzow on pages 44 and 55, she also interrupted Plaintiff’s counsel during witness examination on pages 54 and 69. (Tr. pp. 55:11-23; 69:6-24)

6. The ALJ Scolded Plaintiff’s Counsel For Getting Exhibit Out Of Order.

This is a case where the DNR had almost ten exhibits and Petitioner had over thirty

exhibits. In virtually every case where witnesses are asked to handle this much paper, exhibits get shuffled and “messed up”. In this case, the ALJ admonished Petitioner’s counsel for this occurrence. (Tr. pp. 73:22-74:8).

7. The ALJ Consistently Sustained The DNR’s Objections and Overruled Pet Memories’ Objections.

On only one occasion did the ALJ overrule an objection made by the DNR. That was the occasion when the ALJ allowed Dr. Seng to testify regarding the chemistry of animal decomposition after the ALJ had declared, “I’m certain he doesn’t have that background, but we will see” and “I’m going to let the witness testify regarding his knowledge of that, and I’ll give it the weight that it’s due. I do not conclude that he’s an expert that would meet the Daubert requirements to testify as an expert on this issue...” (Tr. pp. 147:15-150:22). On all other occasions the ALJ sustained the DNR’s objections and overruled Petitioner’s objections, despite the relaxed evidentiary standards applicable to administrative proceedings, Iowa Code Section 17A.14. (Tr. pp. 49:3;75:17-18; 117:19-118:2).

8. The ALJ Repeatedly Refused To Acknowledge, Address or Distinguish Controlling Authority.

The jurisdiction issue is dispositive of this case. The ALJ refused to even acknowledge controlling precedent which provides, where a statute upon a particular subject has provided a tribunal for the determination of questions connected with that subject, that the jurisdiction thus conferred is exclusive, unless otherwise expressed or clearly manifested, *Minnesota Valley Canning Co., v. Rehnblom*, 49 N.W. 2d 553, 555 (Iowa 1951); *Call Bond & Mortgage Co. v. City of Sioux City*, 219 Iowa 572, 584, 259 N.W. 33 *Macklot v. City of Davenport*, 17 Iowa 379, 387 (1864). Instead, the ALJ went to great lengths to find one instance of concurrent jurisdiction in

the Iowa Code then make the quantum leap that concurrent jurisdiction must exist here when the comparative statutory language which applies to each of the situations is very different.

The ALJ further refused to even acknowledge the abundance of cited authority which provides that when an administrative rule is written in such language that persons of common intelligence must guess at its meaning, that the rule is void for vagueness. Numerous cases are instructive on this issue. Most directly on point are *Vandehoef v. National Transportation Safety Board*, 850 F. 2d 629, 630-31 (10th Cir. 1988); *Cameron v. Johnson*, 390 U.S. 611, 616, 88 S.Ct. 1335, 1338, 20 L.Ed. 182 (1968); *Connally v. General Construction Co.*, 269 U.S. 385, 391, 46 S.Ct. 126, 70 L.Ed. 322. The ALJ refused to address this issue despite clear testimony on behalf of Mr. Levezow that the definition of “refuse” was *not* easily understandable to the common person. (Levezow testimony, Tr. pp. 50:14-18 and 51:4-7).

9. The ALJ Ignored Critical Parts Of The Record That Would Have Resulted In A Judgment In Petitioner’s Favor.

The ALJ ignored that portion of Mr. Levezow’s 2008 memorandum, exhibit 29, and his testimony in this case which provides that Iowa Code Section 167.18 applies to Petitioner’s conduct. (Levezow testimony, Tr. p. 56:19-23). The ALJ ignored the part of Mr. Levezow’s testimony and Mr. Seng’s testimony where they agreed that no part of the Iowa Code clearly states that “dead animals” are “solid waste. (Levezow testimony, Tr, pp. 50:14-18 and 51:4-7; Seng testimony Tr. p. 139:22-140:24).

10. The ALJ Engaged In Questioning Which Was Only Designed To Achieve Her Predetermined Result.

On page 122 of the proceedings, the following exchange took place:

ADMINISTRATIVE LAW JUDGE: All Right. Actually, before we proceed with

your redirect, I did have a question.

PLAINTIFF'S COUNSEL: Uh-huh

ADMINISTRATIVE LAW JUDGE: What is the size of Pet Memories?

MR. JOHNSON: It's 120 acres.

ADMINISTRATIVE LAW JUDGE: Are burials done on the whole 120 acres?

MR. JOHNSON: Yes.

ADMINISTRATIVE LAW JUDGE: How many animals are buried there?

MR. JOHNSON: Over the years? I have no idea.

ADMINISTRATIVE LAW JUDGE: Thousands?

MR. JOHNSON: Oh not that many?

ADMINISTRATIVE LAW JUDGE: Hundreds?

MR. JOHNSON: Yeah. Yup.

ADMINISTRATIVE LAW JUDGE: All right, Redirect. (Tr. p. 122:5-24).

Petitioner submits that the *only possible* motivation behind the ALJ's asking these questions was an attempt on the part of the ALJ to create a record of Pet Memories' prior violations in order to justify the penalty the ALJ had already decided to impose. It should be noted that despite these efforts, the ALJ failed to make an adequate record to support her pre-determined result. Even under the DNR rules, Pet Memories is allowed to bury two animals per acre. Accordingly, Mr. Johnson's estimate of "hundreds" of animals buried on a 120 acre plot does not, necessarily, result in more than two animal burials per acre.

11. The ALJ Supported The Sanction With Prior Administrative Proceedings That Were Ultimately Dismissed.

After the efforts of the ALJ that were referenced in the previous subsection failed, she resorted to penalties that were imposed on Petitioner by IDALS in 2008 in order to justify the ten thousand dollar penalty she imposed in this case. On page 6 of the Proposed Decision, the ALJ states, "The department presented evidence that Petitioner has continued to bury horses since 2008". On page 119 of the transcript, the DNR's counsel offered exhibit G into evidence with the following statement, "...I thought it was important to get into the record, the final resolution". The "final resolution" was brought into the record on redirect examination.

PETITIONER'S COUNSEL: Well, you do know that this (exhibit G) was the final say-so. At the end of the day, the charges against you were dismissed, correct?

MR. JOHNSON: They were dismissed. (Johnson testimony, Tr. p. 123:9-12).

Accordingly, the ALJ's attempt to punish Pet Memories on the basis of the 2008 incident is the same as attempting to base a sentence in a criminal case on a prior conviction that was vacated on appeal. The ALJ's consideration of prior proceedings which were, ultimately, vacated is another reflection of the ALJ's bias against Petitioner.

In Iowa the law on the issue of administrative bias is both recent and straight-forward. A party in an administrative proceeding is entitled to procedural due process. *Botsko v Davenport Civil Rights Commission*, 774 N.W. 2d 841, 848 (Iowa 2009). Due process always involves a constitutional floor of a "fair trial and a fair tribunal". *Id.* This basic requirement of due process applies to "administrative agencies which adjudicate as well as to courts." "Not only is a biased decision maker constitutionally unacceptable but our system of law has always endeavored to prevent even the probability of unfairness." *Withrow v. Larkin*, 421 U.S. 35, 46-47, 95 S.Ct. 1456, 1464, 43 L.Ed. 2d 712 (1975).

Administrative proceedings have the potential of significantly impacting a party's rights by serving as the first level of adjudicatory review. In *Nightlife Partners, Ltd v. City of Beverly Hills*, 108 Cal. App 4th 81, 133 Cal Rptr. 2d 234, 242-243 (Ct App 2003), the Court explained:

Just as in a judicial proceeding, due process in an administrative hearing also demands an appearance of fairness and the absence of even a probability of outside influence on the adjudication. In fact, the broad applicability of administrative hearings to the various rights and responsibilities of citizens and businesses, and the undeniable public interest in fair hearings in the administrative adjudication arena, militate in favor of assuring that such hearings are fair.

In *Botsko*, our Supreme Court held as a matter of law that the Davenport Civil Rights director engaged in advocacy on behalf of the complainant. *Botsko* 774 N.W. 2d at 853. The legal analysis was as follows:

... (W)hen a staff member becomes involved in (a party's)' litigation strategy or assumes a personal commitment to a particular result, he or she becomes an adversary with the 'will to win'. *Asimow*, 81 Colum. L. Rev. at 778. In *Withrow* terminology, when an agency staffer functions as an advocate, experience teaches that the probability of actual bias is too high to allow the staffer to also participate in the adjudicative process.

Botsko, 774 N.W. 2d at 852; (emphasis added)(parentheticals added).

When the ALJ's conduct in this case is examined as a whole, it requires "(N)o citation of authority exactly on all fours with this fact pattern in order to justify the conclusion that [the ALJ's] role as advisor to the [the DNR] violates [Pet Memories'] right to due process. There [is] a clear appearance of unfairness and bias." *Nightlife Partners, Ltd. v. City of Beverly Hills*, 133 Cal. Rptr. 2d at 246.

As in *Botsko*, the ALJ's advocacy is of sufficient nature to preclude her findings of fact and conclusions at law of being afforded any weight under the due process clauses of the Iowa and U.S. Constitution. *Botsko*, 774 N.W. 2d at 853. This "combination of advocacy and adjudicative

functions has the appearance of fundamental unfairness” to Pet Memories “in this administrative process. Further, because of the risk of injecting bias in the adjudicatory process,” Pet Memories “is not required to show actual prejudice.” *Botsko*, 774 N.W. 2d at 853.

Pet Memories asks the Department of Natural Resources to find that the ALJ’s findings of fact and conclusions of law were a violation of Pet Memories’ procedural due process rights and to resolve this case in Pet Memories favor based upon the undisputed record and the law of the State of Iowa.

E. PET MEMORIES IS THE ‘OWNER’ OF THE CARCASSES

Because this appeal process does not appear to call for the filing of reply briefs, Petitioner wishes to address an issue that the DNR has attempted to argue in the past. It is an issue Petitioner believes that the DNR may attempt to argue on appeal. Despite the DNR’s attempted argument to the contrary, Chapter 167 applies to Petitioner. Chapter 167.18 provides, “A person who has been caring for an animal or who owns an animal that has died, shall not allow the carcass to lie about the person’s premises. The carcass shall be disposed of within a reasonable time after the death by cooking, composting, burying or burning, as provided in this chapter, or by disposing of it, within the allowed time to a person licensed to dispose of it.” “Pet Memories” is a “person” which is defined by Iowa Code Section 4.1(20) to include corporations. Moreover, it is the undisputed and unchallenged testimony in this case that when Pet Memories agrees to dispose of a dead animal, it becomes the “owner”.

PETITIONER’S ATTORNEY: When a customer agrees with you to dispose of a dead animal carcass through a general disposal, whose animal does it become?

STEVEN JOHNSON: They become my responsibility. They’re mine.

DNR'S ATTORNEY. And that's always been the case, correct?

MR. JOHNSON: Right.

DNR'S ATTORNEY: You've never engaged in rendering at any time in your business.

MR. JOHNSON: I don't sell by-products.

DNR'S ATTORNEY: And the horses that have been buried on your property, you don't remove any of the parts of those horses, either, do you? (Johnson Testimony, Tr. p. 116:9-21).

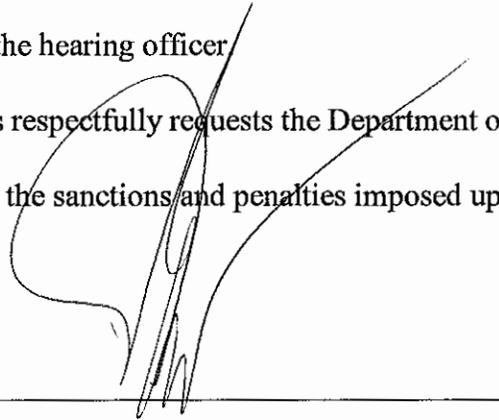
While Chapter 167 requires that the reader pay attention, it is clear that the licensing requirements of that chapter apply only to those who are renderers. See Iowa Code Sections 167.2, 167.3. The disposal requirements for those who are "owners" and not "renderers" are governed by Iowa Code Section 167.18. Pet Memories complied with 167.18, which is the only statute or regulation which applies to this case, by disposing of the horse carcasses in question within a "reasonable time". There has never been any contrary allegation made by the DNR.

III. CONCLUSION

The DNR has overstepped its bounds in this case. The DNR's attempt to regulate the "dead animals" that Pet Memories buries in its cemetery is in contravention of the exclusive authority conferred in the Department of Agriculture and Land Stewardship by the Iowa Legislature to regulate the "use and disposal of dead animals", Iowa Code §159.6(5). "Dead animals" are not "solid waste" as that term is defined in Iowa Code §455B.301(23). "Dead animals" are not sufficiently defined as "refuse" under 567 IAC 100.2 so as to inform a common person of what activities are prohibited under the law. Accordingly, the definition of "refuse" in 567 IAC 100.2

is void for vagueness under Iowa law. There is no rational basis to the DNR's proposed regulatory scheme in this instance. Pet Memories' horse burials are environmentally friendly not environmentally dangerous. Pet Memories uses no hazardous chemicals in conjunction with its animal burials. Pet Memories' buried animals break down into the same constituent chemicals as were originally extracted from the ground by the horses while they were alive. For all of these reasons, the DNR's attempted enforcement of Iowa Code Section 455B.307 and 567 IAC 100.4 constitutes a violation of Pet Memories' equal protection rights. Finally, the Proposed Decision is the consequence of demonstrated bias on the part of the hearing officer.

For the reasons set forth above, Pet Memories respectfully requests the Department of Natural Resources to dismiss its charges and to abate the sanctions and penalties imposed upon Pet Memories in the above-referenced cause.



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CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing instrument was served on all parties to the above cause to each of the attorneys

of record herein at their respective addresses disclosed on the pleadings on March 22, 2013

By: U.S. Mail Fax
 Hand Delivered Overnight Courier
 Certified Mail Other: e-mail PDF

Signature _____

**Iowa Department of Inspections and Appeals
Division of Administrative Hearings
Wallace State Office Building-Third Floor
Des Moines, Iowa 50319**

IN THE MATTER OF:

PET MEMORIES, INC.,

Cedar County, Iowa

Hearing No.

12DNR015

NOTICE OF APPEAL

To:
Director
Iowa Department of Natural Resources
Wallace State Office Building
502 East 9th Street
Des Moines, Iowa 50319-0034

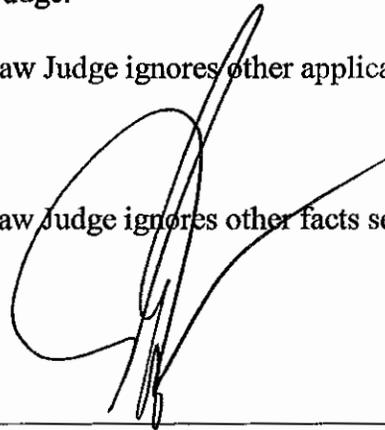
On behalf of Petitioner, Pet Memories, Inc., the undersigned does hereby appeal the Proposed Decision of Administrative Law Judge Heather Palmer dated May 28, 2013, and, in support thereof, states as follows:

1. The party appealing the proposed decision is Petitioner, Pet Memories, Inc.
2. The decision appealed from is the Proposed Decision of Administrative Law Judge Palmer dated May 28, 2013 and all adverse rulings inhering therein.
3. The undersigned is appealing all adverse Findings of Fact and Conclusions of Law including, without limitation:
 - a. The Finding of Fact on page 1 of the Proposed Decision related to events of March 28, 2008 that were never subject to a final adjudication resulting in a ruling adverse to Petitioner and are, accordingly, not relevant to the instant proceedings.

- b. The Finding of Fact on page 2 of the Proposed Decision related to events of March 31, 2008 that were never subject to a final adjudication resulting in a ruling adverse to Petitioner and are, accordingly, not relevant to the instant proceedings.
- c. The Finding of Fact on page 2 of the Proposed Decision related to events of April 7, 2008 that were never subject to a final adjudication resulting in a ruling adverse to Petitioner and are, accordingly, not relevant to the instant proceedings.
- d. The Finding of Fact on page 2 of the Proposed Decision related to events of late August 2010 which never resulted in a final adjudication resulting in a ruling adverse to Petitioner and are, accordingly, not relevant to the instant proceedings.
- e. The Finding of Fact on page 2 of the Proposed Decision related to alleged events of June 15, 2012 which were not the subject of the administrative orders in question and which have no bearing on the instant proceedings.
- f. The Conclusion of Law finding that the DNR has concurrent jurisdiction over the disposal of dead animals and refusing to find that IDALS jurisdiction over the disposal of dead animals is exclusive.
- g. The Conclusion of Law finding that the dead animals in question are "solid waste" as defined by Iowa Code 455B.301 (or under any other provision of the Iowa Code).
- h. The Conclusion of Law finding that the dead animals in question are "solid waste" under 567 IAC 100.2 (or under any other provision of the Iowa Administrative Code).
- i. The portion of the Administrative Law Judge's characterization/summarization of Petitioner's argument set forth on page 5 of the Proposed Decision that dead horses are not "solid waste". Specifically, the ALJ's proposed decision fails to address the following issues: 1) It is clear from the language of 567 IAC 100.2 and 455B.301(B) that less than all "putrescible waste" and "non-putrescible waste" is included in the definition of "solid waste" 2) It is not clear from the language of 567 IAC 100.2 which "putrescible waste" is included in the definition of "solid waste" and which "putrescible waste" is excluded from the definition of "solid waste". Accordingly, a person of common intelligence must guess at the meaning of "solid waste". Accordingly, 567 IAC 100.2 may not be enforced, as written, as it is void for vagueness.
- j. The Administrative Law Judge's Conclusions of Law set forth on page 5 regarding the application of 567 IAC 100.4, including, but not limited to the ALJ's failure to address the positions that: 1) The DNR is attempting to regulate the disposal of "dead animals" by these rules when Iowa Code Section 159.3, 159.6(5) and Iowa Chapter 167 provide that the Iowa Department of Agriculture and Land

Stewardship is conferred exclusive jurisdiction to dispose of 'dead animals' 2) That 567 IAC 100.4 attempts to regulate the disposal of "dead animals" when there is no provision of the Iowa Code or Iowa Administrative Code that clearly defines "solid waste" as including "dead animals" and in a manner that does not require a person of common intelligence must guess at the meaning of "solid waste" as being inclusive of a "dead animal".

4. All of the Administrative Law Judge's findings under the "Penalty" portion of the Proposed Decision (with the exception of the finding that all of Pet Memories Constitutional argument are preserved for further review) including but not limited to: 1) the finding that the proposed penalty of ten thousand dollars (\$10,000) was appropriate 2) The ALJ's consideration of matters that have never resulted in a previous adverse adjudication against Petitioner.
5. The Proposed Decision of the Administrative Law Judge is further challenged on the basis of bias on the part of said Administrative Law Judge.
6. The Proposed Decision of the Administrative Law Judge ignores other applicable law and legal authority.
7. The Proposed Decision of the Administrative Law Judge ignores other facts set forth in the record.



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CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing instrument was served on all parties to the above cause to each of the attorneys of record herein at their respective addresses disclosed on the pleadings on June 17 2013

By: U.S. Mail Fax
 Hand Delivered Overnight Courier
 Certified Mail Other e-mail PDF

Signature _____

RECEIVED
NOV 26 2013
Director's Office

Iowa Department of Natural Resources
Wallace State Office Building
Des Moines, Iowa 50319

IN THE MATTER OF:

PET MEMORIES, INC.,

Cedar County, Iowa

Hearing No.

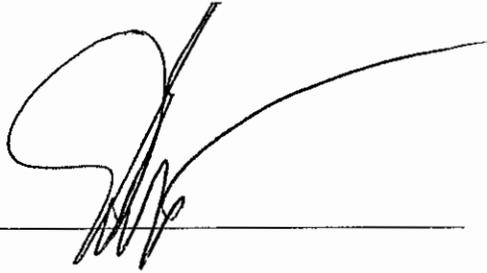
12DNR015

**PETITIONER'S TRANSMISSION
OF TRANSCRIPT AND
PROPOSED DECISION**

1. On or about November 20, 2013, the undersigned communicated with opposing counsel, Jon Tack, Esq.
2. It was jointly agreed that the undersigned would submit at the time both parties are submitting their briefs:
 - A. Transcript of the hearing which occurred April 8, 2013.
 - B. A copy of the Proposed Decision dated on or about May 28, 2013.

Accordingly, these documents are enclosed herewith.

3. It was further understood by counsel that the Department of Natural Resources would have all exhibits available to it for purposes of appeal. Accordingly, counsel determined not to make and transmit additional copies of said exhibits unless and until so requested by the Department.



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CERTIFICATE OF SERVICE

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By: Jeffrey S. Bittner
 U.S. Mail Fax
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Signature _____

ORIGINAL

THE IOWA DEPARTMENT OF INSPECTIONS AND APPEALS
DIVISION OF ADMINISTRATIVE HEARINGS

----- X
IN THE MATTER OF: :
: Docket No. 12DNR015
PET MEMORIES, INC. :
----- X

Monday, April 8, 2013

The above-entitled matter came on for hearing
at 9 a.m.

BEFORE: HEATHER L. PALMER, Administrative Law Judge

APPEARANCES:

For the Appellant: JEFFREY S. BITTNER, ESQ.
Jeff Bittner Law, PC
201 West Second Street
Suite 1000
Davenport, Iowa 52801

For the Respondent: JON TACK, ESQ.
Department of Natural Resources
Wallace Building
502 East Ninth Street
Des Moines, Iowa 50319

TRANSCRIBED FROM TAPE RECORDING

I N D E X

<u>WITNESSES</u>	<u>DIRECT</u>	<u>CROSS</u>	<u>REDIRECT</u>	<u>RECROSS</u>	<u>VOIR DIRE</u>
<u>For the DNR</u>					
Kurt Levetzow	9	24	79	83	
<u>For the Appellant</u>					
Stephen Johnson	88	108	123		
Dr. Joseph Seng	127	157	163		148

E X H I B I T S

<u>DNR EXHIBITS</u>	<u>OFFERED</u>	<u>RECEIVED</u>
A through F	7	7
G	120	120
<u>APPELLANT EXHIBITS</u>		
1 through 30	8	8

P R O C E E D I N G S

1
2 THE ADMINISTRATIVE LAW JUDGE: We're on the
3 record in DIA No. 12DNR015. This is the matter of
4 Pet Memories, Inc. Today's date is April 8th, 2013.
5 It's just slightly after 9 o'clock in the morning.
6 We're here at the Wallace State Office Building.

7 I'm Heather Palmer, the administrative law
8 judge assigned to this case. Appearing this morning
9 on behalf of the DNR is its attorney, Jon Tack. Also
10 appearing is the DNR's witness, Kurt Levetzow.
11 Appearing on behalf of Pet Memories is its attorney,
12 Jeffrey Bittner. Also appearing is principal Steve
13 Johnson, and Dr. Joseph Seng is also present on
14 behalf of Pet Memories, as well as Beverly and
15 Stephen Whitmore.

16 This case concerns a solid waste issue. We
17 have a copy of the order that's been appealed from in
18 the Petitioner's--actually through the Pet Memories'
19 exhibits.

20 MR. BITTNER: Be Exhibit 30, Your Honor.

21 THE ADMINISTRATIVE LAW JUDGE: Yup, Exhibit
22 30. That exhibit sets forth the DNR's basis for its
23 decision in the case.

24 I have received Exhibits A through F from
25 the Department. I also received Exhibits 1 through

1 30 from Pet Memories. There were repeat exhibits in
2 Pet Memories' exhibit submission. Exhibit 33 is DNR
3 Exhibit A, Exhibit 32 is DNR Exhibit C, and Exhibit
4 31 is DNR Exhibit E. I prefer not to have duplicates
5 in the file because I think it gets confusing, and
6 there's no difference, as I can see, in those three
7 exhibits. So Exhibits 31 through 33 will not be
8 admitted separately.

9 I'm going to go through the remaining documents
10 in the administrative appeal file at this time. I
11 have the post-hearing brief that was prepared by Pet
12 Memories; I also have the DNR's--excuse
13 me--prehearing briefs. I have a letter dated April
14 2nd sent to me by Mr. Bittner; I have an order of
15 notice of objection to testimony; I have a subpoena
16 that was issued; I have a January 10th, 2013, letter
17 sent by Mr. Bittner; I have the motion to amend
18 answer to amended petition by the DNR; I have the
19 DNR's notice of objection to testimony; I have some
20 e-mail correspondence that was sent directly to me by
21 Mr. Bittner, and the DNR was included on that.

22 I have a March 1st, 2013, letter attaching
23 the motion to amend petition, attaching the amended
24 petition; I have a motion to amend petition; I have
25 the Department's witness list; I have the answer to

1 petition of Pet Memories; I have the original
2 petition that was filed; I have a cover letter sent
3 by Mr. Bittner with the petition; I have the original
4 notice of hearing; I have the notice of rescheduled
5 prehearing conference; notice of prehearing
6 conference; I have the transmittal slip sent by the
7 Agency; I have the notice of appeal; I have the
8 administrative order, Exhibit 30.

9 That's the administrative appeal file in its
10 entirety.

11 I'll afford the parties the opportunity to
12 make brief opening statements.

13 Mr. Tack, would you like to make an opening
14 statement?

15 MR. TACK: I would waive that opportunity,
16 Your Honor.

17 THE ADMINISTRATIVE LAW JUDGE: Mr. Bittner?

18 MR. BITTNER: Very briefly. Pet Memories'
19 contention in this case, their defense is three-fold.

20 First, it is their assertion that the
21 Department of Agriculture and Land Stewardship has
22 exclusive subject matter jurisdiction, or
23 jurisdiction over the subject matter of this case,
24 which is dead animals.

25 THE ADMINISTRATIVE LAW JUDGE: And,

1 Mr. Bittner, I know that we're just doing an opening.
2 I actually did a hearing with Mr. Tack a couple of
3 years ago where we had some trouble on judicial
4 review with the recording, so--

5 MR. BITTNER: Speak up?

6 THE ADMINISTRATIVE LAW JUDGE: --if we can
7 get everybody to speak up, because I was contacted
8 about that, and it's--you know, it's fine to be loud,
9 it doesn't bother me, but I want to make sure that
10 we're getting a good recording in case there's an
11 appeal, okay?

12 MR. BITTNER: Reporters in the past have
13 told me that I need to crank up the volume.

14 THE ADMINISTRATIVE LAW JUDGE: I just want--
15 I just want to make sure--I just want to make sure
16 that we're speaking loud enough. And so if someone
17 appears not to be today, I also will tell you,
18 because I want to make sure we're getting a good
19 record, okay?

20 MR. BITTNER: That's what I was going to ask
21 you, if I'm trailing off, please tell me that I am.

22 THE ADMINISTRATIVE LAW JUDGE: All right.

23 MR. BITTNER: The second contention is that
24 dead horses, or the dead horses in question in this
25 case, are not solid waste either under the Iowa Code

1 definitions, or the Iowa Administrative Code
2 definitions.

3 And our third contention is that there is no
4 rational basis for the rules, regulations, and
5 interpretation of the rules and regulations
6 applicable in this case given the DNR's other
7 policies, practices, and procedures.

8 And with that we are--that would conclude my
9 opening statement. Thank you.

10 THE ADMINISTRATIVE LAW JUDGE: Mr. Tack,
11 you'll proceed with your case first. Are you
12 offering Exhibits A through F at this time?

13 MR. TACK: Yes, Your Honor.

14 THE ADMINISTRATIVE LAW JUDGE: Any
15 objection?

16 MR. BITTNER: No.

17 THE ADMINISTRATIVE LAW JUDGE: A through F
18 are deemed admitted.

19 (DNR Exhibits A through F were
20 offered and received in evidence.)

21 THE ADMINISTRATIVE LAW JUDGE: Are you also
22 offering 1 through 30 at this time?

23 MR. BITTNER: We are, Your Honor.

24 THE ADMINISTRATIVE LAW JUDGE: Any objection
25 to the admission of 1 through 30, Mr. Tack?

1 MR. TACK: No, Your Honor.

2 THE ADMINISTRATIVE LAW JUDGE: All right.

3 Exhibits 1 through 30 are also deemed admitted.

4 (Appellant's Exhibits 1 through 30
5 were offered and received in evidence.)

6 THE ADMINISTRATIVE LAW JUDGE: You may call
7 your first witness, Mr. Tack.

8 MR. TACK: Thank you. I will call
9 environmental specialist Kurt Levetzow at this time.

10 THE ADMINISTRATIVE LAW JUDGE: Mr. Levetzow,
11 if you'll please raise your right hand.

12 KURT LEVETZOW,
13 called as a witness by the DNR, being first duly
14 sworn by the Administrative Law Judge, was examined
15 and testified as follows:

16 THE ADMINISTRATIVE LAW JUDGE: You may
17 proceed.

18 MR. TACK: Your Honor, for purposes of the
19 exhibits, I'm presuming that the offered and entered
20 are the ones that I have given you--

21 THE ADMINISTRATIVE LAW JUDGE: Yes.

22 MR. TACK: --as the official exhibits?

23 THE ADMINISTRATIVE LAW JUDGE: Yes.

24 MR. TACK: Then I'll have the witness work
25 off his own book. It should be identical to those.

1 THE ADMINISTRATIVE LAW JUDGE: Terrific.

2 DIRECT EXAMINATION

3 BY MR TACK:

4 Q. Mr. Levetzow, can you describe how you're
5 currently employed?

6 A. I'm an environmental specialist with the
7 Iowa Department of Natural Resources, Field Office 6,
8 in Washington, Iowa. I do complaint investigations,
9 spilled response activities, and conduct routine
10 and--inspections.

11 Q. How long have you been an environmental
12 specialist?

13 A. In my current position, since 2001, and
14 prior to that I was with the Department's Air Quality
15 Bureau.

16 Q. And what's your educational background?

17 A. Agricultural studies from Iowa State
18 University.

19 Q. When did you graduate?

20 A. May of 1998.

21 Q. As a part of your environmental specialist
22 job duties, what program areas have you worked in?

23 A. Primarily air quality and solid waste.

24 Q. Would that include landfill inspections?

25 A. Yes, it does.

1 Q. Are you familiar with the protections
2 employed at landfills for groundwater protection?

3 A. Yes.

4 Q. Are you familiar with a business known as
5 Pet Memories, Incorporated?

6 A. Yes.

7 Q. And who is the operator of that business?

8 A. Steve Johnson.

9 Q. And how did you become familiar with that
10 business?

11 A. I did an air inspection there several years
12 ago, and then investigating complaints that were
13 filed against his operation.

14 Q. Could you generally describe for the Court
15 what this operation consists of?

16 A. He has an animal incinerator that's
17 permitted through the DNR's Air Quality Bureau. And
18 then he has at least two farms, one located across
19 the street from his operation, and one to the south
20 of, and that's where I've observed the issues that
21 brought us here today.

22 Q. And what issue is that?

23 A. Burying horses that did not--that were not
24 generated or raised on his property.

25 Q. I'm going to ask you to please look at

1 what--the exhibit that's been marked DNR A. Are you
2 familiar with that document?

3 A. Yes.

4 Q. And are you the author of that document?

5 A. Yes.

6 Q. What is this, generally? What type of
7 document is this?

8 A. This is in response to a complaint that was
9 filed against Steve back in 2008. It was the letter
10 that I sent to him that summarizes what I observed
11 that day.

12 MR. TACK: And, Your Honor, I guess I don't
13 need to go through the preliminaries of offering, so
14 I'll try to move right into the substance, if that's
15 acceptable.

16 MR. BITTNER: Yeah. I was going to do the
17 same thing. We'll save time. Thank you.

18 MR. TACK: Sure.

19 BY MR TACK:

20 Q. Mr. Levetzow, did you inspect the Pet
21 Memories' property on March 27, 2008?

22 A. Yes.

23 Q. And is this letter a result of that
24 inspection?

25 A. Yes.

1 Q. Could you please describe for us what you
2 observed on that day?

3 A. Approximately 19 horse carcasses that were
4 piled around Steve's primary operation, where he has
5 an incinerator, his office.

6 Q. And did you discuss that--this situation
7 with Mr. Johnson at that time?

8 A. Yes.

9 Q. And was there any information offered to
10 you, or explanation of the conditions of the site?

11 A. It was in the spring of 2008, so as I
12 recall, Steve indicated that he's got the horses
13 piled outside because the ground had been frozen
14 throughout the fall, through the winter, and he was
15 planning on burying them when the ground conditions
16 were favorable.

17 Q. Did you provide any information to him on
18 rules and regulations related to such a burial at
19 that time?

20 A. Yes. That's when we went into explaining
21 that there are no exemptions that allow the burial of
22 horses that were not generated on his property, and
23 that we--we discussed alternatives to proper
24 disposal. That included composting, incineration in
25 his incinerator, or potentially even landfilling.

1 Q. Did you take pictures at the site at that
2 time?

3 A. Yes.

4 Q. And are those the pictures that are attached
5 to Exhibit 1?

6 A. Yes.

7 MR. BITTNER: You said Exhibit 1.

8 MR. TACK: Oh. Exhibit A. I'm sorry.
9 Thank you.

10 BY MR. TACK:

11 Q. Could you please describe for us what you
12 see in those pictures, and what you were intending to
13 depict with the taking of those photos?

14 A. Just verifying the allegations against Steve
15 that there were horses piled up around his property,
16 and just the fact that they were there.

17 Q. Did anyone accompany you on this inspection?

18 A. Yes. There was--I'll refer here to my
19 notes, sorry. Phil LaRue, the Cedar County
20 sanitarian; Lyle Fitch, Cedar County Sheriff's
21 Deputy, or--I assume he's a deputy; Wayne Grier from
22 IDALS; and I think Steve was there that day.

23 Q. And then you did send this letter to
24 Mr. Johnson; correct?

25 A. I did.

1 Q. And did you at that time, through your
2 letter and in person, instruct Mr. Johnson burial of
3 horses was not--was prohibited by Iowa law?

4 A. Yes.

5 Q. At the time of your inspection, did
6 Mr. Johnson have horses on his property, live horses
7 living on the property?

8 A. Not that I'm aware of.

9 Q. Based on your discussions with him at that
10 time, what was your understanding about these 19
11 horses, where they had come from?

12 A. They take at least a day or two to
13 incinerate fully, so he was piling them there. There
14 are some--in some cases he will incinerate horses,
15 and in some cases, if the people that owned them do
16 not want the ashes back, then he'll just bury them.
17 I think he refers to them as generals.

18 Q. Were these horses--to the best of your
19 knowledge, were these horses that Mr. Johnson had
20 been keeping as live horses prior to their death?

21 A. Were they his?

22 Q. Yeah.

23 A. They were not his.

24 MR. BITTNER: I am going to object to the
25 question and answer. I'm sorry I didn't get it fast

1 enough. I think that he is commenting on a condition
2 of ownership of those dead horses that he doesn't
3 know for a fact existed or did not exist at the time
4 he observed the bodies. So that's my objection.

5 MR. TACK: May I respond?

6 THE ADMINISTRATIVE LAW JUDGE: You may.

7 MR. TACK: Your Honor, I asked Mr. Levetzow
8 questions about his own observations of living horses
9 on the site, and his understanding based on his
10 observation and discussions with Mr. Johnson. I
11 think that is within the evidentiary standard of the
12 administrative law hearing.

13 THE ADMINISTRATIVE LAW JUDGE: The objection
14 is overruled. Certainly you'll be able to present
15 testimony regarding ownership of those horses.

16 MR. BITTNER: Thank you.

17 BY MR. TACK:

18 Q. Mr. Levetzow, could you please look at what
19 has been marked as DNR Exhibit B. Would you please
20 tell us what this document is?

21 A. This is a complaint form that was received
22 by our office on August 30th of 2011. It was filed
23 by John Behrle against Pet Memories, Steve
24 Johnston--Johnson, excuse me.

25 Q. And who is John Behrle?

1 A. As I am aware, he is the neighbor, he's
2 Steve's neighbor.

3 Q. And what was the nature of the complaint?

4 A. It was regarding odor and smoke coming from
5 Pet Memories' incinerator on-site, and that there
6 were dead animals laying around the property.

7 MR. BITTNER: Your Honor, I'm going to
8 object on the basis of relevance. I don't think
9 we're here for the incinerator in this case. I think
10 we're here for the burial of the dead horses, and I
11 don't think--I don't believe it's relevant.

12 Besides that--I understand hearsay's
13 admissible, but I think that this does not go to
14 prove the facts in question, or disprove the facts in
15 question. I just--I don't think it should be
16 allowed.

17 THE ADMINISTRATIVE LAW JUDGE: Mr. Tack?

18 MR. TACK: Your Honor, I'm offering this and
19 this statement to provide a basis for why
20 Mr. Levetzow would have continued an additional
21 investigation and gone back to the property. We will
22 stipulate to the fact that we are not alleging
23 incinerator violations by Mr. Johnson. That is a
24 permitted incinerator, and this hearing is not
25 attempting to allege any sort of violations or

1 wrongdoing in regard to the incinerator.

2 THE ADMINISTRATIVE LAW JUDGE: All right.
3 I'm going to overrule the objection. I think the
4 document is relevant to the issue that's before me,
5 and the DNR has stipulated that there is no
6 incinerator violation alleged.

7 THE WITNESS: And then just--I was just
8 reading off the complaint form, Your Honor, that the
9 last statement from the complainant to the Department
10 was that the runoff from the horses onto the
11 neighbor's property.

12 MR. BITTNER: Again, same objection.

13 THE ADMINISTRATIVE LAW JUDGE: Overruled.

14 BY MR. TACK:

15 Q. Mr. Levetzow, as a result-- Was this
16 complaint assigned to you for investigation?

17 A. Yes, it was.

18 Q. And as a result of this complaint, did you
19 conduct an inspection of the Pet Memories,
20 Incorporated, property?

21 A. Yes.

22 Q. And was that inspection on September 7th,
23 2011?

24 A. Yes.

25 Q. Could you, please--well, first could you

1 please look at DNR Exhibit C.

2 A. Yes.

3 Q. Is that a memorandum you prepared as a
4 result of your inspections on September 7th, 2011,
5 and November--and November 22nd, 2011?

6 A. Yes.

7 Q. Could you please describe for the Court what
8 conditions you found when you visited the property on
9 September 7th, 2011?

10 A. I found, again, that there were ongoing
11 burial issues with horse--regarding horses.

12 Q. Did you discuss this matter with
13 Mr. Johnson?

14 A. Yes. I'm just trying to review this quick
15 to see if I had talked to him in person or on the
16 phone.

17 I know on the 22nd I talked to Steve via
18 telephone call.

19 Q. Okay. Did Mr. Johnson acknowledge, during
20 this investigation, that he, in fact, was engaging in
21 the burial of horses?

22 A. Yes.

23 Q. And did you, yourself, observe indications
24 that horses had been buried on the site?

25 A. Yes.

1 THE ADMINISTRATIVE LAW JUDGE: I'm sorry. I
2 was distracted by the whispering. If you will please
3 repeat the question and the answer.

4 BY MR. TACK:

5 Q. My question was, did you observe indications
6 of burial of horses on the site?

7 A. Yes.

8 Q. Did you notify Mr. Johnson of your findings?

9 A. Yes. I think that was via the letter sent.

10 Q. Would that be Exhibit D you're referring to?

11 A. Yes.

12 Q. And did you notify him at that time that the
13 burial of horses on his property is prohibited?

14 A. Yes.

15 Q. Are you aware that there are exceptions in
16 the DNR rules that allow the burial of dead animal
17 carcasses under certain conditions?

18 A. Yes.

19 Q. And what is your understanding as an
20 enforcement officer of what those exceptions are?

21 A. They're exempt for farming operations, where
22 the animals were raised on that property, died on
23 that property, and are allowed to be buried on that
24 property in a specific number per species.

25 Q. And in regard to horses, what is your

1 understanding of the number of horses per acre that
2 can be disposed of?

3 A. It would be for all other animals, excluding
4 the certain ones that are exempt, so it would be two
5 per acre.

6 Q. Was it your belief, during your
7 investigation, that that exemption would apply to
8 Mr. Johnson or to Pet Memories, Incorporated?

9 A. No.

10 Q. And why was that your belief?

11 A. Because the animals were brought onto his
12 property by himself that were raised or generated on
13 a different property.

14 Q. Is that based on your observations of the
15 site?

16 A. And his statements to me in the past that he
17 would go out and bring them to his property.

18 Q. All right. I think I may have misspoken,
19 Mr. Levetzow. You did, in fact, send DNR Exhibit D;
20 correct?

21 A. Yes.

22 Q. But your final determination and
23 notification to Mr. Johnson, would that be DNR
24 Exhibit E that was mailed November 22nd?

25 A. I believe both letters were in response to

1 that same complaint.

2 Q. Okay.

3 A. In both letters I stated the same rules
4 citation.

5 Q. And I would like you next to look at DNR
6 Exhibit F. Can you tell me what this exhibit is?

7 A. I believe this was the last time that I'd
8 been on the property, and it was on--in 2011,
9 November 22nd, 2011, regarding photographs that we
10 took of recent burial, at least evidence of something
11 that had been buried.

12 Q. Was that burial consistent with your past
13 observations of horse burial?

14 A. Yes.

15 Q. And did your discussions with Mr. Johnson
16 lead you to believe that these are, in fact, areas
17 where horses were buried?

18 A. Yes.

19 Q. Did you, during these-- During the
20 investigation of this case, you saw dead horse
21 carcasses on the property; correct?

22 A. Yes.

23 Q. And were those--what level of decomposition
24 were those in?

25 A. The one particular photo that I took was

1 where a carcass had been partially dug up in the same
2 area where other horses had been buried in the past.
3 And then there was a couple of photos where there was
4 a horse under a tarp.

5 Q. Do the--I'm sorry to interrupt. I guess I'm
6 not trying to ask that difficult--that much of a
7 question. I guess I'm simply asking are the horses
8 in a solid state when they arrive?

9 A. Yes.

10 Q. And have you ever seen evidence that
11 Mr. Johnson has dug up horses after they've been
12 buried?

13 A. Not that I'm aware of.

14 Q. Are you aware of any authorization or permit
15 that has been issued by the Department of Natural
16 Resources to Pet Memories, Incorporated, for the
17 burial of horse carcasses?

18 A. No.

19 Q. You said that you have experience enforcing
20 solid waste laws; correct?

21 A. Yes.

22 Q. Would that include landfill inspections?

23 A. Yes.

24 Q. And would also include open dumping?

25 A. Yes.

1 Q. Based on your understanding and your job
2 duties, what is your belief, vis-à-vis intent--what
3 are the solid waste rules trying to protect?

4 A. Groundwater contam--to prevent groundwater
5 contamination.

6 Q. Do you believe it is any more harmful to
7 bury horses on the property where they died, or on
8 some other property not where they died?

9 A. I don't see a big difference.

10 Q. So would you say that the exemption for
11 farmers is based on any sort of groundwater
12 protection?

13 A. I don't know what the exemption was written
14 for.

15 Q. So are you asserting today that there's a
16 groundwater or other rational basis for the exemption
17 for farmers?

18 A. I'm not exactly sure why there would be an
19 exemption for one but not another, but that's the way
20 the regulations are written.

21 Q. Are you aware of any DNR responsibility, or
22 DNR actions in regard to roadkill?

23 A. DNR doesn't deal with roadkill.

24 MR. TACK: Okay. I think that's all the
25 questions I have, Your Honor.

1 THE ADMINISTRATIVE LAW JUDGE: Cross?

2 MR. BITTNER: Thank you, Your Honor.

3 CROSS-EXAMINATION

4 BY MR. BITTNER:

5 Q. Mr. Levetzow--is that the correct
6 pronunciation?

7 A. Levetzow.

8 Q. Levetzow. I'm awful with names. And if I
9 butcher it, it's not--

10 A. Don't worry.

11 Q. Levetzow?

12 A. Levetzow.

13 Q. All right. I'll try. I've handed you the
14 exhibits that we're going to be discussing this
15 morning. I've handed you them pretty close to the
16 order that we're going to be discussing them. I know
17 this normally applies for deposition rules, but if I
18 ask you a question you don't understand what I'm
19 asking, will you tell me?

20 A. Yes.

21 Q. I'll try to rephrase it. Okay.

22 And some of these questions that I'm asking
23 are just for purposes of clarification of the record.
24 In case this goes on appeal, I want a clean record,
25 and I want the reviewer to understand why we're here,

1 okay?

2 A. (No audible response.)

3 Q. The reason we're here is essentially in
4 Exhibit 30, and that is because of Mr. Johnson's
5 burial, or Pet Memories' burial of the horses on
6 their property; correct?

7 A. Yes.

8 Q. And it is the DNR's claim in this case that
9 the horses that Pet Memories is burying are, quote,
10 solid waste, close quote; correct?

11 A. Correct.

12 Q. And if we look at Exhibit 31, which is the
13 second exhibit in front of you, and we go to the--do
14 you have that in front of you, sir?

15 A. Yes, sir.

16 THE ADMINISTRATIVE LAW JUDGE: And why don't
17 you just wait until I flip to it and opposing
18 counsel, too.

19 MR. BITTNER: Okay.

20 THE ADMINISTRATIVE LAW JUDGE: Exhibit 31 is
21 Exhibit E.

22 MR. BITTNER: I'm sorry.

23 THE ADMINISTRATIVE LAW JUDGE: All right.

24 MR. BITTNER: Exhibit E. Thank you.

25 THE ADMINISTRATIVE LAW JUDGE: Uh-huh.

1 A. Do you care if I write "Exhibit E" on here,
2 just so I'm--

3 BY MR. BITTNER:

4 Q. Please do. I'll try to be consistent with
5 that reference from now on.

6 Exhibit E, again, for the record, is your
7 letter to Mr. Johnson dated December 6th, 2011;
8 correct?

9 A. Yes.

10 Q. If we go to the middle of the first page in
11 the italicized writing, essentially the essence of
12 this claim in this case is that Mr. Johnson is in
13 violation of Iowa Code Section 455B.307 and Rule 567
14 IAC 100.4; correct?

15 A. Correct.

16 Q. And the reason he is in violation, according
17 to the DNR, is because he has been disposing of horse
18 carcasses on his property, right? On the property of
19 Pet Memories?

20 A. Correct.

21 Q. All right. And just for the record, we're
22 not here regarding the operations of the Pet
23 Memories' crematorium?

24 A. Correct.

25 Q. We're not here regarding any zoning matters,

1 right? We're here--and you have to answer audibly.

2 A. Correct.

3 Q. Sorry.

4 A. Sorry.

5 Q. And particularly since we have a tape
6 recorder, not a court reporter.

7 We're here because Pet Memories is disposing
8 of, quote/unquote, solid waste in a place other than
9 a landfill; right?

10 A. Correct.

11 Q. Now, have you been advised that one of our
12 primary defenses in this case is that a dead horse is
13 a dead animal covered under Chapter 167 and not solid
14 waste under Iowa Chapter 455B? Have you been advised
15 that? Are you aware of that?

16 A. Yes.

17 Q. Would you agree with me that any dead horse
18 is a dead animal?

19 A. Yes.

20 Q. All right. And will you agree with me,
21 then, that it's the Department of Agriculture and
22 Land Management that has jurisdiction over the
23 disposal of dead animals, not the DNR?

24 A. No.

25 Q. Would you agree with me--

1 MR. TACK: Your Honor, I'm sorry for my
2 comments. I would object to the question as being--
3 asking for a legal conclusion, and Mr. Levetzow
4 isn't--outside the scope of his employment or his
5 understanding.

6 MR. BITTNER: Well, he cited them, so he
7 obviously made a conclusion as to--

8 THE ADMINISTRATIVE LAW JUDGE: Well, the
9 legal conclusion is for me to determine--

10 MR. BITTNER: Oh, I'm sorry.

11 THE ADMINISTRATIVE LAW JUDGE: --in the
12 case. So, you know, I'm going to allow the witness
13 to answer to the extent that he knows, but that's a
14 determination for me to make.

15 MR. BITTNER: Okay. Thank you, Your Honor.

16 BY MR. BITTNER:

17 Q. Will you agree with me that if we were going
18 to apply a common, ordinary, everyday meaning of the
19 terms, most people are going to believe that a dead
20 horse is a dead animal and not solid waste?

21 A. I don't know what the normal people would
22 think in that case.

23 Q. Okay. And, again, for the record, Pet
24 Memories has not been cited by you for any violation
25 of Chapter 167 of the Iowa Code; correct?

1 A. Correct.

2 Q. And not any administrative rule promulgated
3 pursuant to the authority set forth in Chapter 167 of
4 the Iowa Code; correct?

5 A. You have to rephrase that. I don't know
6 what you're talking about there.

7 Q. Okay.

8 THE ADMINISTRATIVE LAW JUDGE: I think for
9 the purposes of the record, this hearing is not
10 brought by the Department of Agriculture and Land
11 Stewardship. I do do hearings for that agency.

12 Is the DNR in agreement that there's no
13 action brought here pursuant to Iowa Code Chapter
14 167, or any rules promulgated by IDALS?

15 MR. TACK: Yes. We are not attempting to
16 enforce those provisions.

17 THE ADMINISTRATIVE LAW JUDGE: All right.

18 BY MR. BITTNER:

19 Q. So we're here under--because of Chapter 567
20 of the Iowa Administrative Code, and 455B.307 of the
21 Iowa Code, right?

22 A. Chapter 100, correct.

23 Q. Okay. Now, Exhibit--my Exhibit 32, for the
24 record, is Exhibit C, and that is your record--or
25 your letter of September 30, 2011; right?

1 A. Yes. It's a memo I prepared.

2 Q. Okay. And you see in the third paragraph
3 down, about the middle of the page--is everybody
4 there--you're talking to David Schmitt, the state
5 vet. You see where he says that, "IDALS' regulations
6 do not prohibit on-site burial of dead animals,"
7 right? Do you see where he wrote that?

8 A. Yes. My conversation with David Schmitt,
9 correct.

10 Q. Okay. And IDALS is the Iowa Department of
11 Agriculture and Land Stewardship. I know the Judge
12 knows, but I'm not sure that somebody reviewing the
13 record would. Correct, IDALS is Iowa Department of
14 Agriculture and--

15 A. Correct.

16 Q. And that is the body put in charge of dead
17 animals under Iowa Code Section 159.6(5) in Chapter
18 167; correct? And if you would like to refer to
19 Exhibit 12 in front of you, please do so. And that's
20 just a copy of certain statutes.

21 Turn to the second page where it says
22 159.6(5).

23 A. I see that.

24 Q. Okay. And what's that say?

25 A. It says--it just says, "Use and dispose of

1 dead animals."

2 Q. Okay. What's the whole thing read? And I'm
3 sorry I don't have my copy.

4 A. "In addition to the duties imposed by
5 Section 159.5, the Department shall enforce the law
6 relative to use and dispose of dead animals."

7 Q. All right. And, "the Department," in that
8 case, if we want to take a look at the first part,
9 which is 159.1(3), "the Department" in that instance
10 means the Department of Agriculture and Land
11 Stewardship; right?

12 A. Yes.

13 Q. And basically, if we go back to Exhibit
14 32--I'm sorry, Exhibit C--I'll get that straight--
15 that sort of sums up the entire case, that exchange
16 there between you and Dr. Schmitt. He's saying that
17 dead animals are dead animals, and you're saying that
18 no, dead animals are solid waste, and for horses you
19 can only bury one per acre; right?

20 A. Two per acre, actually.

21 Q. Okay. But in that--here it says "and for
22 horses it would be one per acre," right? That's what
23 you wrote?

24 A. Is it only one per acre?

25 Q. "I explained"--

1 A. I thought it was one or two per acre.

2 Q. "I explained to Dr. Schmitt that the IDNR
3 solid waste regulations limit the number of dead
4 animals per acre, and for horses it would be one per
5 acre." You wrote that, correct?

6 A. That's correct. I did write that.

7 Q. You're saying that it might be two per acre?
8 You're not sure?

9 A. It's in Chapter 100. I think I must have
10 misspoke there. I believe it was--I thought it was
11 two per acre, other than--if it's anything other than
12 hogs, poultry, cattle.

13 Q. Okay. Did you ever admit to anyone that it
14 was IDALS that enforces the regulation that govern
15 the amount of time that horses can be buried--can be
16 on-site prior to burial?

17 A. I'm aware of that.

18 Q. Okay. In fact, if you take a look at
19 Exhibit 33, which is your--which is Exhibit A, my
20 Exhibit 33--do you have that in front of you now?

21 A. Yes.

22 Q. If we go to the next to the last paragraph
23 at the end of the first page--

24 THE ADMINISTRATIVE LAW JUDGE: The first
25 page.

1 THE WITNESS: Sorry.

2 BY MR. BITTNER:

3 Q. Are we all on the same page now literally?

4 A. Yes.

5 Q. All right. Next to the last paragraph,
6 first sentence. It says, "IDALS enforces regulations
7 that limit (inaudible) livestock (carcasses) can be
8 on-site prior to consideration of burial, which is a
9 maximum of 24 hours, Iowa Code Section 167." You
10 wrote that, didn't you?

11 A. Yes.

12 Q. And then back to C, and the fourth paragraph
13 down. You're now talking to Wayne Grier, IDALS
14 livestock inspector, and you say that he advises you
15 that the 24-hour disposal time frame has now been
16 changed to within a reasonable amount of time. Do
17 you see where you wrote that?

18 A. Yes.

19 Q. Would you agree with me that the DNR does
20 not have jurisdiction over human cemeteries?

21 A. I would agree.

22 Q. Okay. In fact, the Insurance Commissioner
23 does, right?-

24 A. Could be. I don't know.

25 Q. You don't know? Okay.

1 Just for the record, to your knowledge has
2 the DNR ever taken the position that a dead human is
3 solid waste under the DNR rules?

4 A. I don't know.

5 Q. To your knowledge have you ever heard of
6 that?

7 A. I've never referred to a dead person as
8 solid waste.

9 Q. Okay. And how long have you been on your
10 job, sir?

11 A. Twelve years.

12 Q. Okay. And in that 12 years' experience,
13 have you ever heard of anybody in the DNR citing a
14 human cemetery for violation of solid waste rules?

15 A. No.

16 Q. The fact of the matter is that the DNR has
17 no authority to cite human cemeteries for the
18 disposal of human remains because jurisdiction over
19 that subject matter is in the Insurance Commissioner;
20 correct?

21 A. I agree.

22 Q. Okay. In fact, human remains are human
23 remains, and not solid waste under Iowa law; right?
24 Would you agree with that?

25 A. I would agree that human remains are not

1 solid waste.

2 Q. Okay. Fair enough. And just for the
3 record, again, I may be repeating myself,
4 Mr. Johnson, i.e. Pet Memories, has been charged for
5 burying solid waste in violation of the DNR's rules;
6 right?

7 A. Correct.

8 Q. The solid waste in this case is the dead
9 horses?

10 A. Correct.

11 Q. Okay. Now, do you have in front of you
12 Exhibit 10?

13 A. Yes.

14 Q. Okay. And if we take a look at Exhibit 10,
15 under 567 IAC 100.2 we have definitions, don't we?

16 A. Yes.

17 Q. And if we turn to the definition of solid
18 waste--

19 THE ADMINISTRATIVE LAW JUDGE: And I just
20 wanted to clarify for the record, because the rules
21 are updated often on the Iowa Administrative Code,
22 I'm not sure what time period these come from that
23 have been printed in Exhibit 10. I'm not sure when
24 they were most recently changed, so I thought I'd
25 just clarify it because there's no time stamp on

1 here.

2 MR. BITTNER: And let me clarify this for
3 the record, Your Honor, and who knows if it's
4 up-to-date. Those exhibits, Exhibits 10, 11, and 12,
5 I downloaded from the Iowa Supreme Court's website--

6 THE ADMINISTRATIVE LAW JUDGE: As opposed to
7 the Iowa Legislature, which is--

8 MR. BITTNER: The Iowa Supreme Court
9 has--it's cross-referenced and it says, like, rules
10 and forms, or something like that, and then they have
11 a key to the Iowa Code, and then the Iowa
12 Administrative Code. And I did it within the last
13 month, and I do have a specific recollection that
14 when I was doing the statutes, they said 2013, and
15 I'm just assuming that the ones on the website are
16 the most current version, but I could be wrong.

17 THE ADMINISTRATIVE LAW JUDGE: Well, these
18 are administrative rules.

19 MR. BITTNER: Right.

20 THE ADMINISTRATIVE LAW JUDGE: And you don't
21 know for sure when they were published?

22 MR. BITTNER: I do not know for sure.

23 THE ADMINISTRATIVE LAW JUDGE: Okay.

24 MR. BITTNER: However, for the record, those
25 administrative rules I got from the same source.

1 Again, it is the--you sort of go to the Supreme Court
2 website--

3 THE ADMINISTRATIVE LAW JUDGE: Right.

4 MR. BITTNER: --and one of the options they
5 give you is the administrative rules, and so I got
6 those fairly recently.

7 THE ADMINISTRATIVE LAW JUDGE: Okay. All
8 right.

9 MR. BITTNER: Within the last month, I would
10 say, or two months for certain.

11 THE ADMINISTRATIVE LAW JUDGE: Okay.

12 MR. BITTNER: Could they have changed since
13 then? Certainly, I suppose.

14 THE ADMINISTRATIVE LAW JUDGE: All right.

15 BY MR. BITTNER:

16 Q. Okay. So are we all on the definition of
17 solid waste--

18 A. Yes.

19 Q. --under Exhibit 10, the Iowa Administrative
20 Rules?

21 A. Yes.

22 Q. That cross-references the Iowa Code, doesn't
23 it?

24 A. Yes.

25 Q. Okay. In fact, why don't you just read that

1 into the record?

2 A. "Solid waste is defined in Iowa Code Section
3 455B.301."

4 Q. Okay. 301 sub 20 or sub 23? It just says
5 355B.301, that's all it says?

6 A. That's all it says, yup.

7 Q. Okay. Because I think they have changed
8 that subsection. I had one in my brief, and I think
9 the current section Mr. Tack pointed out is
10 subsection 23.

11 Do you have Exhibit 11 in front of you?

12 A. Yes.

13 Q. Can you flip to the definition of solid
14 waste? And I should have that--that's on the second
15 page of the exhibit, about two-thirds down the page.

16 A. Yes.

17 Q. Okay. And that says--it starts out, "Solid
18 waste means garbage, refuse, or rubbish," right?
19 Those are the first words?

20 A. Correct.

21 Q. And if we take a look at the rest of that
22 statute that I can find there, we don't have any
23 statutory definitions of garbage, refuse, or rubbish.
24 Would you see any there? I mean, just flipping
25 through Exhibit 10?

1 A. I don't see rubbish, garbage, or refuse.

2 Q. Okay. And I didn't either when I did the
3 research (inaudible).

4 But if we take a look at Exhibit--and, I'm
5 sorry, Exhibit 11 is the statute--Exhibit 10, which
6 is the administrative rule, those terms are defined
7 under 567 IAC 100.2, are they not?

8 A. I see garbage.

9 Q. Okay.

10 A. Rubbish and refuse I see.

11 Q. Okay. I want to talk about those for a
12 second here.

13 Turn to garbage. Bottom of--third page of
14 the exhibit. See where it says, "Garbage means all
15 solid and semisolid, putrescible"--if that's the
16 correct pronunciation--"animal and vegetable waste
17 resulting from the handling, preparing, cooking,
18 storing, serving, and consuming of food, or of
19 material intended for use as food, and all offal,
20 excluding useful industrial byproducts, and shall
21 include all such substances from all public and
22 private establishments and from all residences."

23 Did I read that correctly?

24 A. Yes.

25 Q. Can we agree that the horse carcasses you

1 observed on Mr. Johnson's property did not result
2 from the handling, preparing, cooking, storing,
3 serving, or consuming of food?

4 A. I would agree they're not considered
5 garbage.

6 Q. Okay. That gets rid of a number of
7 questions.

8 Let's turn to refuse. That would be--one,
9 two, three, four, five, six--seventh page, top of the
10 page. "Refuse means putrescible and nonputrescible
11 wastes including but not limited to garbage, rubbish,
12 ashes, incinerator ash, incinerator residues, street
13 cleanings, market and industrial solid wastes, and
14 sewage treatment wastes in dry or semisolid form."

15 Did I read that correctly?

16 A. Yes.

17 Q. Okay. So in order for something to be
18 refuse it either has to be putrescible waste--

19 THE ADMINISTRATIVE LAW JUDGE: Refuse?

20 MR. BITTNER: Refuse.

21 THE ADMINISTRATIVE LAW JUDGE: Refuse. All
22 right.

23 MR. BITTNER: Yes.

24 BY MR. BITTNER:

25 Q. So in order to be refuse to be--it either has

1 to be putrescible waste or nonputrescible waste; right?

2 A. Right.

3 Q. That's what it says. But if we take a look
4 at the rules, the term "waste" isn't defined
5 anywhere, right, in at least 100.2, 567 IAC 100.2?
6 Do you see where waste is defined anywhere there?

7 A. I don't see the word "waste."

8 Q. Okay. But if we go to subsection 100.4, for
9 the record 567 IAC 100.4(1), we have some more
10 definitions, don't we?

11 A. I'm there. Yes.

12 Q. Okay. Towards--

13 MR. BITTNER: About two-thirds down the
14 page, Your Honor.

15 THE ADMINISTRATIVE LAW JUDGE: I'm just
16 using my official copy here.

17 MR. BITTNER: Okay.

18 THE ADMINISTRATIVE LAW JUDGE: I have a copy
19 here from the (inaudible).

20 MR. BITTNER: All right. Thank you.

21 BY MR BITTNER:

22 Q. We have farm animals defined; right?

23 A. Yes.

24 Q. And then we skip one paragraph, and then we
25 have farm waste defined; right?

1 A. Yes.

2 Q. Can we agree that based upon the definition
3 of farm waste found in 567 IAC 100.4(1) that farm
4 waste does not include farm animals?

5 A. May I read it quick?

6 Q. Please.

7 A. Okay. I've read it. What was your question
8 again, sir?

9 Q. Can we agree that based on the definition of
10 farm waste contained in 567 IAC 100.4(1), that farm
11 waste does not include farm animals in that
12 definition?

13 A. Yeah. It's talking about equipment,
14 vehicles, feeding operations. So I don't see the
15 definition of horses.

16 Q. Correct. We know that farm animals are not
17 machinery, equipment, or vehicles; correct?

18 A. Correct.

19 Q. So farm animals aren't farm waste under 567
20 IAC 100.4, and farm animals are also not waste under
21 567 IAC 100.2; correct?

22 THE ADMINISTRATIVE LAW JUDGE: Will you
23 repeat the question, please?

24 MR. BITTNER: Sure.

25

1 BY MR. BITTNER:

2 Q. If farm animals are not farm waste under 567
3 IAC Section 100.4, then farm animals also would not
4 be waste under 567 IAC 100.2; correct?

5 MR. TACK: I'm going to object to the form
6 of the question. It asks for Mr. Levetzow to make a
7 legal conclusion.

8 THE ADMINISTRATIVE LAW JUDGE: As I
9 indicated before, the legal conclusions are for me to
10 determine. The witness is not a trained attorney.
11 So he can answer to the extent of his knowledge.
12 But, you know, all those questions relate to issues
13 for me to decide, and certainly they can be briefed
14 by the parties. They don't require any testimony, as
15 far as I'm concerned, you know, to explain what the
16 law is. That's for me to do.

17 I'll allow it.

18 MR. BITTNER: Thank you.

19 A. Sir, I'm most familiar with Chapter 100.4 of
20 solid waste definitions.

21 BY MR. BITTNER:

22 Q. Okay. You don't see anything--as you're
23 looking down there, you don't see anything in 567 IAC
24 100.2 that would equate farm animals with waste;
25 right?

1 THE ADMINISTRATIVE LAW JUDGE: If the
2 witness doesn't know, he should just say, "I don't
3 know."

4 A. I don't really know. I'd have to sit here
5 and read through it all.

6 BY MR. BITTNER:

7 Q. And I should say that. If you don't
8 know--I'm not asking a trick question. I'm just
9 trying to represent my client here. If you don't
10 know, say you don't know, okay?

11 A. Okay. I don't know about the 100.2.

12 Q. Okay. If we go back to the definition of
13 refuse, farm animals really doesn't fit well into
14 that category of--quote/unquote, laundry list of
15 items, does it? It doesn't really fit in with
16 garbage, rubbish, ashes, incinerator ash, incinerator
17 residues, et cetera, right?

18 A. I would argue that it fits into refuse in
19 that it's putrescible. Anything exposed to oxygen
20 and moisture will rot, and a horse certainly will.

21 Q. Okay. Well, we're going to get to that, and
22 we're going to get to that pretty quick.

23 You've already said that horse carcasses
24 aren't garbage, right--aren't garbage?

25 A. Correct.

1 Q. And if you take a look at the definition of
2 rubbish on the same page, can you agree with me that
3 it's not rubbish?

4 A. I would agree.

5 Q. Okay. Can we also agree that they're not
6 ashes, incinerator ash, incinerator residues, street
7 cleanings, market and industrial solid wastes, or
8 sewage treatment waste?

9 A. I would agree with all of those, although
10 I'm not exactly sure what market and industrial solid
11 wastes are.

12 Q. Okay. That's a fair answer.

13 And can we agree, if we go to rubbish, that
14 a dead horse is not rubbish?

15 A. I would agree with that.

16 Q. Okay. Now, back to the comment you made.
17 We take a look at that definition, that doesn't
18 define refuse as all putrescible and nonputrescible
19 wastes, because if it did, then that would also have
20 to include hazardous waste, which are specifically
21 excluded from the definition of solid waste under the
22 Iowa Code; correct?

23 A. I don't know.

24 Q. Okay. You certainly don't see the word that
25 says "All putrescible or nonputrescible waste," do

1 you?

2 A. I would agree.

3 Q. Okay. But, of course, if we go to the word
4 garbage, see where garbage starts out, "means all
5 solid and semisolid waste"?

6 A. Yes.

7 Q. So we know at the very least that some
8 putrescible and nonputrescible wastes are excluded
9 from the definition of refuse, right?

10 A. I'm sorry. I was reading while you were
11 talking. I apologize.

12 Q. That's all right. This is complex.
13 We know, because hazardous waste, among
14 other things, is excluded from the definition of
15 solid waste, we know that at least some putrescible
16 and nonputrescible wastes are excluded from the
17 definition of refuse, right?

18 A. Okay.

19 Q. Okay. And going back to the definition of
20 solid waste, we go to rubble, and can we agree that
21 it's not rubble?

22 A. Yes. It's definitely not rubble.

23 Q. Okay. Can we agree that if the dead horses
24 in question in this case are not garbage, refuse, or
25 rubbish, that the DNR has no jurisdiction in this

1 case?

2 A. I can't agree with that.

3 Q. You can't-- If it is not garbage, refuse or
4 rubbish, you don't concede that the DNR lacks
5 jurisdiction?

6 A. I believe that solid waste--or, excuse me--a
7 dead horse carcass fits into the definition of
8 refuse.

9 Q. Even though it doesn't say "All putrescible
10 waste," correct? We went through that?

11 A. Correct.

12 Q. And even though, if we take a look at the
13 list there, garbage, refuse, rubbish, ashes,
14 incinerator ash, incinerator residues, street
15 cleanings, market and industrial solid wastes, or
16 sewage treatment waste, horse carcass really doesn't
17 fit nicely within that list, does it? It doesn't
18 match the other items within that list. Would you
19 agree with that?

20 A. All due respect, I think that's up to the
21 Judge to make that determination. In my line of work
22 I investigate and respond to complaints. And if
23 there's not an exemption for burial or burning,
24 that's what I deal with.

25 Q. Would you agree that most people are not

1 going to think of their dead pets as garbage, refuse,
2 or rubbish?

3 A. I don't agree with that because refuse is
4 something that is putrescible. Therefore--now, do
5 people think about it in those terms? Probably not.

6 Q. In fact, if you went up to a pet owner whose
7 horse had just died and you referred to it as
8 garbage, refuse, or rubbish in front of that pet
9 owner, you'd probably get a pretty strong negative
10 reaction to that?

11 A. I would agree with that.

12 Q. Would you agree with me that if we go
13 through the code section definitions that we went
14 through, that it is not clear that a dead animal is
15 solid waste, even if a person has a law degree, that
16 it is not very clear from those definitions that we
17 just went through?

18 A. No, I wouldn't, just because refuse
19 is--solid waste is a refuse, and something that is
20 going to rot is putrescible, and refuse is something
21 that is putrescible.

22 Q. So you think that the common ordinary
23 citizen that reads that definition is going to say
24 "That applies to dead horses"? Is that your
25 testimony?

1 MR. TACK: I'm going to object to the
2 question. It calls for speculation.

3 THE ADMINISTRATIVE LAW JUDGE: Sustained.
4 BY MR. BITTNER:

5 Q. Well, let's take a look at Exhibit 12 and
6 Exhibit 10.

7 THE ADMINISTRATIVE LAW JUDGE: I'm sorry.
8 Exhibit 10?

9 MR. BITTNER: Exhibit--yeah. I want to do a
10 comparison between Exhibit 10 and Exhibit 12, Your
11 Honor.

12 BY MR. BITTNER:

13 Q. Would you agree if the average person picks
14 up both of them, both Exhibit 12 and the Iowa
15 Administrative Code sections that we just went
16 through in Exhibit 10, they're going to be inclined
17 to believe that a dead horse is a dead animal covered
18 under Chapter 167, rather than solid waste covered
19 under the section that we just reviewed?

20 A. I don't really know how to answer that
21 because I'm not necessarily a general person. I'm a
22 person who goes out and investigates and responds to
23 the rules that I am paid to respond to, and that's
24 Chapter 100 of 567.

25 Q. It's pretty clear in Exhibit 10 that a dead

1 horse is a dead animal, right--or Exhibit 12. It's
2 pretty clear under Exhibit 12 that a dead horse is a
3 dead animal, is it not?

4 A. Again, these are rules that I'm not real
5 familiar with, so if you want to lead me right to
6 that rule citation, I'll be happy to go through it.

7 Q. Yeah. Chapter 167, Exhibit 12, is entitled
8 "Use and disposal of dead animals," correct?

9 A. Yes.

10 Q. And would you think that if you just read
11 that caption, that dead horses is going to be covered
12 under that?

13 A. I would assume so.

14 Q. All right. Would you assume that somebody
15 just going through Exhibit 10 is going to pick up
16 under the definition of refuse that that covers a
17 dead horse?

18 A. No. I don't know.

19 Q. All right. And the definitional section of
20 the Iowa Code, Exhibit 11, 455B.301(23) does not say
21 in it that dead animals are solid waste; right?

22 A. It does not state dead animals, you're
23 correct.

24 Q. Okay. And there is no section of the Iowa
25 Code that clearly says that dead animals are garbage,

1 refuse, or rubbish; right? I'm just talking about
2 the Iowa Code right now.

3 A. Okay. Yes.

4 Q. And there's really no section in the Iowa
5 Administrative Code that clearly says that dead
6 animals are garbage, refuse, or rubbish; right?

7 A. Not word for word. You are right.

8 Q. All right. Now, if we--are you still on
9 Exhibit 10, which is the administrative code?

10 A. No.

11 Q. Can you get that, and turn to 567 IAC 100.4.
12 We've looked at this before. I just have a couple of
13 brief questions.

14 THE ADMINISTRATIVE LAW JUDGE: Sub 1?

15 MR. BITTNER: Sub--let's see. 100.4(1).

16 BY MR. BITTNER:

17 Q. Do you see the definition of farm animals
18 there?

19 A. Yes.

20 Q. Does that mean live farm animals, or dead
21 farm animals?

22 A. I suppose it could mean both.

23 Q. Okay. You don't know? You can't tell from
24 the context, can you?

25 A. I can't.

1 Q. All right. Now, assuming for our--what you
2 just said, that it's really not all that clear, if
3 it's not picked up in the definition of refuse, as it
4 says, on that caveat, okay, there is nothing in this
5 particular code section, IAC 100.4(1), that says farm
6 animals are solid waste, does it? There's nothing
7 there that spells it out; right?

8 A. In farm waste where it talks about--it means
9 machinery, vehicles and equipment used in conjunction
10 with crop production or with livestock. There I see
11 the word "livestock," which is a farm animal.

12 Q. Yeah, but then--that phrase modifies the
13 first part, which we went over in the beginning of
14 your testimony, machinery, vehicles, and equipment,
15 and you said that farm animals are not machinery,
16 vehicles, and equipment; right?

17 A. I did say that.

18 Q. All right. Basically, if we take out the
19 definition of refuse, this section here just assumes
20 that farm animals are solid waste and goes ahead and
21 regulates them; right?

22 A. I don't know.

23 Q. Okay. If we take a look at 100.4(2), that
24 starts out, "Special requirements for farm waste,
25 farm buildings, and dead animals," right?

1 A. Yes.

2 Q. All right. And that's basically 100.4.
3 That's what Pet Memories is accused of violating;
4 right?

5 A. Yes.

6 Q. And the DNR is using the same term here,
7 that is, dead animal, as is used in Chapter 5--159.6,
8 which is in Exhibit 12, which starts out, "In
9 addition to the duties imposed by Section 159.5, the
10 Department"--which in that case means the Department
11 of Agriculture and Land Stewardship and not the DNR--
12 "shall enforce the law relative to by the use and
13 disposal of dead animals," right? That's what it
14 says? It says what it says, right?

15 A. I'll believe you.

16 Q. Okay. So 567, 100.4(2) uses the term "dead
17 animals," and that's the exact same term that's used
18 in the Iowa Code, 159.5; right?

19 A. Okay.

20 Q. Okay. And 159.6(5) says "The Department"--
21 the Department--"shall enforce the disposal of dead
22 animals," right? That's what it says?

23 A. Okay.

24 Q. Okay. And in that instance they're
25 referring to the Department of Agriculture and Land

1 Stewardship?

2 A. Okay.

3 Q. Okay. We know that because of 159.13.

4 Okay. Now if we turn to--on Exhibit 12,
5 okay? Let's go to Chapter 167.18?

6 A. Point--excuse me?

7 Q. Point 18.

8 A. Point 18.

9 Q. Do you have that? Make sure everybody has
10 that.

11 THE ADMINISTRATIVE LAW JUDGE: We're dealing
12 with Agriculture--the Department of Agriculture
13 again?

14 MR. BITTNER: Yes, Your Honor.

15 THE ADMINISTRATIVE LAW JUDGE: And I'm going
16 to allow this line of questioning, but I know your
17 clients are incurring legal expenses to attend the
18 hearing today, and have driven a great distance.

19 MR. BITTNER: Right.

20 THE ADMINISTRATIVE LAW JUDGE: These are all
21 legal issues that can be briefed, and that are within
22 the purview of me to decide. So...

23 MR. BITTNER: I understand.

24 THE ADMINISTRATIVE LAW JUDGE: I'm going to
25 allow this line of questioning, but it's--the witness

1 is a lay witness, these are legal issues that can be
2 briefed. I don't--I personally do not see the need
3 to--you know, this can be briefed. It's not evidence
4 in the sense that--it's not any sort of fact evidence
5 that's going to have any bearing on the outcome of
6 the case. It's a legal issue.

7 MR. BITTNER: I understand the Court's
8 position. Nonetheless, I'd like to make a record.
9 Thank you.

10 BY MR. BITTNER:

11 Q. 167.18 provides that a person caring for an
12 animal, or who owns an animal that has died, "shall
13 not allow the carcass to lie about the person's
14 premises." It then says, "The carcass shall be
15 disposed of within a reasonable time after death by
16 cooking, burying, or burning," right?

17 A. It also has the word "composting," yes.

18 Q. Okay. And composting. Chapter 167.18
19 applies to Pet Memories' situation; doesn't it?

20 THE ADMINISTRATIVE LAW JUDGE: And if the
21 witness doesn't know, the witness can say "I don't
22 know." That's always a proper answer also.

23 A. Well, the one thing I'd like to point out
24 here is a person who has been caring for or owns an
25 animal.

1 BY MR. BITTNER:

2 Q. Okay.

3 A. Steve did not care for--well, he may have
4 cared for, but he does not own those horses. That's
5 my contention.

6 Q. That's your contention. Did you, or any
7 other DNR investigator, ever write down notes that
8 suggested that 167.18 did apply to Pet Memories'
9 burial of horse carcasses?

10 A. Not that I'm aware of.

11 Q. Now take a look at Exhibit 29, will you,
12 second page, towards the bottom of the page. Are
13 these your notes?

14 A. These are.

15 Q. Okay. It says--we're talking about--it says
16 right up there, "Pet Memories site visit," right? So
17 we're talking about Pet Memories; correct?

18 A. That's correct.

19 Q. And it says IDALS requires animals to be
20 buried, or buried in 24 hours in Iowa Code Section
21 167.18 and 21 IAC.31 (sic), and you wrote that as it
22 pertained to your Pet Memories site visit; correct?

23 A. I did.

24 Q. All right.

25 THE ADMINISTRATIVE LAW JUDGE: What page are

1 we on? I'm sorry.

2 MR. BITTNER: I'm Sorry.

3 THE ADMINISTRATIVE LAW JUDGE: I'm not
4 following. I have my own copy. You can just tell me
5 where. All right. Page 2?

6 MR. BITTNER: Yes.

7 THE ADMINISTRATIVE LAW JUDGE: The last--
8 3-27?

9 MR. BITTNER: Yes.

10 THE ADMINISTRATIVE LAW JUDGE: All right.

11 MR. BITTNER: And, I'm sorry, I got ahead of
12 myself.

13 BY MR. BITTNER:

14 Q. Now, are you aware, and if you're not, just
15 say you're not, but since the time that that report
16 was originally issued, which appears to be 3-27-08,
17 that 167.18 has been amended to replace a 24-hour
18 requirement with a reasonable time requirement, do
19 you know that?

20 A. I'm vaguely aware of that, yes.

21 Q. Okay. All right. Thank you.

22 MR. BITTNER: I'll just let the record
23 reflect, rather than ask the witness, Exhibit 17 in
24 fact reflects that fact.

25

1 BY MR. BITTNER:

2 Q. Would you agree with me that if we look at
3 Exhibit 10, that the DNR--

4 A. Bear with me, sir. I'm not there yet.
5 Okay. Okay.

6 Q. --Exhibit 10, 100.4(2), that the DNR is
7 imposing requirements as they relate to the disposal
8 of dead animals that are in addition to the
9 requirements under Chapter 167, and the rules of the
10 Iowa Department of Land Stewardship?

11 Maybe it will help--it will be easier if we
12 looked at the next page, which is sub 8 sub b. And
13 my question, again, is would you agree with me that
14 the DNR is imposing requirements that are in addition
15 to the requirements imposed by the Iowa Department of
16 Agriculture and land Stewardship? It says so right
17 at the beginning of that rule, doesn't it?

18 A. Are we looking at (8)(b) here?

19 Q. Yeah, (8)(b), "A private agency may dispose
20 of dead farm animals without having first obtained a
21 sanitary disposal project permit, provided that the
22 disposal is in accordance with 100.4(2)(c), the rules
23 of the Department of Agriculture and Land Stewardship
24 and..."

25 So the question is, the DNR is imposing

1 requirements in addition to the requirements of the
2 Department of Agriculture and land Stewardship in
3 accordance with the plain language of that rule,
4 right?

5 A. "In addition to" would assume that what
6 you're saying is that IDALS has the primacy--or
7 primacy of the regulatory matter at hand; correct?

8 Q. Correct. I mean this rule says that we
9 are--"we" meaning the DNR--and maybe my question
10 isn't a good one. This rule is saying that the DNR
11 is imposing rules in addition to the rules of the
12 Department of Agriculture and Land Stewardship,
13 right?

14 A. It does appear that both are regulating the
15 same matter.

16 Q. Would you agree with me if and in the event
17 that the power to regulate the disposal of dead
18 animals is given to IDALS by the Iowa Code, that they
19 have the statutory authority to adopt the rules and
20 regulations that govern the disposal of dead animals,
21 and not the DNR?

22 A. If it was put in their hands to deal with,
23 then I guess we wouldn't have to regulate it any
24 more.

25 Q. Okay. Fair enough. Can we go back to

1 Exhibit 11? Maybe we'll come back to (inaudible). I
2 want to go back to the statutory definition of solid
3 waste. Are you there?

4 A. Yes.

5 Q. Can we agree that it's not industrial solid
6 waste, a dead horse would not be?

7 A. I don't know.

8 THE ADMINISTRATIVE LAW JUDGE: Mr. Tack, is
9 the Department willing to stipulate that the waste at
10 issue is not industrial, commercial, or domestic?

11 MR. TACK: No, Your Honor, we're not.

12 THE ADMINISTRATIVE LAW JUDGE: You do not
13 agree?

14 MR. TACK: No.

15 THE ADMINISTRATIVE LAW JUDGE: Okay.

16 BY MR. BITTNER:

17 Q. Okay. Can we agree that's not industrial
18 solid waste?

19 A. If I had to make that determination, I'd
20 probably call Mr. Tack any day of the week, so I
21 don't know.

22 Q. Okay. Well, unfortunately we can't put him
23 on the stand. We have a definition, I think, in
24 Exhibit 11, if I'm not correct, with the page--

25 A. This is Exhibit 11?

1 Q. Is that Exhibit 11?

2 A. Yeah. I'm on 11 right here.

3 Q. I think we have some administrative
4 regulations or a statutory definition. Do you see
5 industrial solid waste somewhere there?

6 A. Yes.

7 Q. Okay. Can we agree that it doesn't fall
8 within that definition?

9 A. Yes, I would agree with that.

10 Q. All right. If the horses that he used were
11 not used for commercial purposes--and I'll just tell
12 you commercial solid waste is not defined by the
13 Code--do you believe that they would be commercial
14 solid waste under the assumption that they weren't
15 used for commercial purposes, the pets that he--or
16 the horses that he disposed of?

17 THE ADMINISTRATIVE LAW JUDGE: Are you
18 referring to the same rules that you referred to for
19 industrial also to define commercial, are you
20 referring to that?

21 MR. BITTNER: Yes. I don't find a
22 definition--I don't find a definition of commercial
23 solid waste anywhere, anyplace, Your Honor. Maybe I
24 missed it, but I didn't find it.

25 THE ADMINISTRATIVE LAW JUDGE: On your own

1 exhibit you pointed to the definition of industrial.
2 Doesn't that also contain the definition of--

3 MR. BITTNER: Oh, it does. I'm sorry. Yes.

4 THE ADMINISTRATIVE LAW JUDGE: --commercial?

5 BY MR. BITTNER:

6 Q. Okay. Would it fall within that definition--
7 thank you. I stand corrected in that instance--if
8 those horses were not used in commercial purposes?

9 A. They definitely were not solid waste
10 generated by a store, an office, a restaurant, or a
11 warehouse.

12 Q. Okay.

13 A. But what is a non-manufacturing activity?

14 Q. You don't know, right?

15 A. I don't know.

16 Q. Okay. And if we--and if we stipulate that
17 the horses he buried were used as pets, and not used
18 in a farming operation--

19 THE ADMINISTRATIVE LAW JUDGE: Is there any
20 stipulation as to that?

21 MR. TACK: That they were pets?

22 THE ADMINISTRATIVE LAW JUDGE: Yes.

23 MR. TACK: We have no idea, Your Honor. No
24 idea.

25 THE ADMINISTRATIVE LAW JUDGE: All right.

1 All right. So there doesn't appear that there is a
2 stipulation on that, whether they're pets.

3 BY MR. BITTNER:

4 Q. All right. If we can assume that they were
5 not used in farming operations, okay, (inaudible)
6 testimony, can we agree that they're not the result
7 of any agricultural activity, either?

8 A. I don't know what they were used for.

9 Q. Okay. Would you agree with me that--maybe
10 the Judge is going to correct me again, but the term
11 "domestic activity" was not defined anywhere?

12 A. I don't know.

13 Q. Okay. You don't know?

14 A. Yes.

15 Q. All right. That's a fair answer.

16 Do you agree with me that the horse carcass
17 is the result of a biological process called death,
18 and not the consequence of a domestic activity?

19 A. Can you repeat that again? I'm sorry.

20 Q. Sure. Would you agree with me that a horse
21 carcass is the result of a biological process known as
22 death, and not the consequence of a domestic activity?

23 A. Yes.

24 Q. In fact, death is a cessation of domestic
25 activities and all other activities; right?

1 A. Sure.

2 Q. Okay. And then if we go back to
3 455B.301(23) can we agree that solid waste is not a
4 vehicle--or a dead horse is not a vehicle?

5 A. It depends if you're in Kalona, because
6 there's an awful lot of Amish that are using them as
7 vehicles.

8 Q. Yeah, but they're not using any dead horses
9 as vehicles?

10 A. I'll agree with that.

11 Q. All right. Pretty tough to ride a dead
12 horse, isn't it, sir?

13 A. Yes.

14 Q. All right. Would you agree with me that if
15 a horse was used as a pet and is solid waste under
16 Iowa law, that a cat, dog, and a goldfish that is
17 used as a pet is also solid waste under Iowa law?

18 A. I would agree.

19 Q. Okay. So is it your position that all dead
20 cat, dogs, and goldfish must go to a sanitary
21 disposal project approved by the Commissioner?

22 A. By rule, yes.

23 Q. All right. If we use the same logic that's
24 being implemented by the DNR in this case, then a
25 dead human being is also solid waste, isn't it? That

1 would be putrescible waste?

2 A. It would be, yes.

3 Q. All right. How many times has anybody been
4 cited for burying their dead dog in their backyard as
5 unlawful disposal of solid waste, to your knowledge?

6 A. I personally have not done that.

7 Q. How many times would you guess in your
8 experience as an officer of the Department of Natural
9 Resources?

10 A. Someone burying their own animal?

11 Q. How many times has somebody been cited
12 for--and we'll just lump them altogether--for burying
13 their dog, cat, bird, or goldfish?

14 A. I would guess not too many.

15 Q. Probably none?

16 A. It's hard to speak when there's 70 of us in
17 the state.

18 Q. You haven't done it, have you?

19 A. I have not.

20 Q. All right. And you don't have personal
21 knowledge that anybody else has ever done it, do you?

22 A. No.

23 Q. Okay. And I may be repeating myself, but
24 you don't have any knowledge that anybody has ever
25 been cited for violation of solid waste rules for

1 burying a dead human; right?

2 A. No. I don't know of any.

3 Q. Okay. Now, the DNR gets payments from
4 landfills in the state based upon the poundage of
5 solid waste that's disposed of; right?

6 A. That is correct.

7 Q. And a horse weighs a whole lot more than a
8 dead human or a bird or a dog or a cat; right?

9 A. Agreed.

10 Q. About half a ton or more?

11 A. Yeah.

12 Q. Okay. And if pet horses can be buried in
13 pet cemeteries, then the DNR wouldn't get any revenue
14 from those burials; correct?

15 A. That would be correct.

16 Q. I want to talk about human cemeteries a
17 little bit. Just for the record, I'm getting into
18 the rational basis for these rules here. Just from
19 what you know, what you've heard picked up in the
20 course of your employment, is arsenic a harmful
21 chemical?

22 A. Yeah.

23 Q. What about mercury?

24 A. Yes.

25 Q. In fact, both are considered heavy metals

1 and potent toxins, right?

2 A. Yes.

3 Q. Bad stuff, very bad stuff?

4 A. Yes.

5 Q. Were you aware that arsenic and mercury were
6 both commonly used in embalming human beings once
7 upon a time?

8 A. No.

9 Q. Okay. You're not disputing that, you're
10 just not aware of that?

11 A. Correct.

12 Q. Okay. Are you aware, and I suppose you
13 wouldn't be, given your answers, but for the record,
14 are you aware that human cemeteries are now creating
15 significant groundwater hazards because of prior
16 burials that contained mercury and arsenic that were
17 used in the embalming process?

18 A. I wasn't aware of that.

19 Q. Okay. What do you know about formaldehyde?
20 Is that a pretty bad chemical, to your knowledge?

21 A. I would assume it is.

22 Q. You don't want it anywhere--just knowing
23 what you know, you don't want it anywhere close to
24 your drinking water; right?

25 A. Correct.

1 Q. Do you know for a fact that today's human
2 bodies are embalmed using formaldehyde?

3 A. Yes.

4 Q. Okay. But, again, to your knowledge and
5 your experience, the DNR has not cited a human
6 cemetery despite the fact that bodies may be buried
7 there that contain mercury, arsenic, and/or
8 formaldehyde; correct?

9 A. Are human bodies enclosed in a coffin,
10 entombed?

11 Q. Some can be, some can't be, I suppose--well,
12 let's go into that.

13 It we have a coffin, most coffins are wood,
14 right? Most coffins are wood?

15 A. I don't know.

16 Q. If we don't have--

17 A. I would assume they're leak-proof.

18 Q. Assuming that we do have--well, do you think
19 that's a safe assumption when we're dealing with
20 people buried 50, 60, 100 years ago?

21 A. Probably not.

22 Q. Okay. And so wood deteriorates, it rots
23 underground; right?

24 A. Yes, it does.

25 Q. And if we have a casket that deteriorates

1 underground, and it's involved with arsenic,
2 formaldehyde, or mercury, that deterioration, that
3 decomposition can definitely lead to some dangerous
4 groundwater situations, can it not? Would you agree?

5 A. Yes.

6 Q. Okay. Are you familiar with the term--

7 THE ADMINISTRATIVE LAW JUDGE: I just want
8 to also clarify, for the record, it wasn't clear to
9 me that you were raising a constitutional issue in
10 your brief. It appears maybe you are. It was
11 unclear to me, but constitutional issues are not
12 within my jurisdiction. They're issues that can be
13 raised to the District Court, but I don't have the
14 authority to decide constitutional issues.

15 MR. BITTNER: And that's fine, Your Honor.
16 We did amend the petition to include rational basis,
17 and obviously--

18 THE ADMINISTRATIVE LAW JUDGE: Well, the
19 constitutional issue would be is there an equal
20 protection problem--

21 MR. BITTNER: Right.

22 THE ADMINISTRATIVE LAW JUDGE: --is there a
23 due process problem? Rational basis is not a
24 constitutional claim itself, so...

25 MR. BITTNER: Rational basis ties into equal

1 protection, exactly, and that's where we're going
2 with this line of questioning, okay? And that was
3 contained in the last portion of our brief.

4 THE ADMINISTRATIVE LAW JUDGE: Right. It
5 discusses rational basis. It does not list the
6 constitutional violation alleged, the brief does not.

7 MR. BITTNER: Well, it cites that Racing and
8 Gaming versus Fitzgerald--

9 THE ADMINISTRATIVE LAW JUDGE: Right.

10 MR. BITTNER: --and that basically was an
11 equal protection case.

12 THE ADMINISTRATIVE LAW JUDGE: Right. So
13 the claim that you're raising is an equal protection
14 claim?

15 MR. BITTNER: Correct.

16 THE ADMINISTRATIVE LAW JUDGE: All right.

17 MR. BITTNER: We're almost done here.

18 BY MR. BITTNER:

19 Q. Have you ever heard of the term "green
20 burial" or "natural burial"?

21 A. I believe I have, but only with what you
22 have provided to Jon.

23 Q. Okay. A natural burial is simply putting a
24 dead body in the ground and letting it (inaudible)
25 constituent elements, ashes to ashes, dust to dust.

1 Do you understand the concept?

2 A. Yes.

3 Q. Okay. From an environmental point of view,
4 is there anything wrong with ashes to ashes, dust to
5 dust?

6 A. Not that I'm aware of.

7 Q. Okay. We're simply returning the same
8 elements to the ground in the form of a dead body
9 that were taken from the ground when the being was
10 alive, right?

11 A. Okay.

12 Q. Okay. Are you aware that all of Mr. Johnson's
13 burials are natural burials?

14 A. In that he just digs a hole, puts the animal
15 in, and covers it?

16 Q. Correct.

17 A. I am aware of that.

18 Q. All right. The fact of the matter is the
19 DNR promotes environmentally friendly burials,
20 correct?

21 A. I don't know that.

22 Q. Well, they promote composting, don't they?

23 A. That's correct, yes.

24 Q. And all composting is, from what I
25 understand, is above-the-ground decomposition of an

1 animal; right?

2 A. In a controlled manner, yes.

3 Q. Yeah. And because it's above the ground,
4 the decomposition occurs faster; correct?

5 A. Yeah.

6 Q. All right. If I remember my high school
7 chemistry, the heat serves as a catalyst, speeds up
8 the chemical reaction, right? Is that your
9 understanding?

10 A. Yeah. Moisture, temperature, oxygen, yes.

11 Q. But at the end of the day the chemical
12 reaction is the same whether a body is composted on
13 top of the ground, or it's buried in the ground?
14 They breakdown to the same constituent chemicals.
15 Would you agree with me there?

16 A. Overall, yes. Can I add one thing to that?

17 Q. Sure.

18 A. In that composting, there's typically a
19 layer of residue that will absorb the stuff that we
20 don't want running into the groundwater.

21 Q. All right. But I think in some of your--one
22 of your exhibits, somebody asked the DNR
23 representative if a dead box is required.

24 A. A dead box?

25 Q. A dead box. Are you familiar with that

1 term?

2 A. No.

3 Q. Exhibit 1, is that there?

4 A. I don't see it.

5 Q. It's not--wait a second. Just a second. Of
6 course because we're in the hearing, everything has
7 been messed up.

8 MR. TACK: I've got--

9 MR. BITTNER: You've got it?

10 MR. TACK: Yeah.

11 MR. BITTNER: You have the second page here?

12 MR. TACK: Yup.

13 THE ADMINISTRATIVE LAW JUDGE: Maybe with
14 our next witness we can have all the exhibits in the
15 correct order and just have the witness go to the
16 document. That's what I do--

17 MR. BITTNER: (Inaudible).

18 THE ADMINISTRATIVE LAW JUDGE: But what I
19 think works best is to just have Exhibits 1 through
20 30 in a pile--

21 MR. BITTNER: Okay.

22 THE ADMINISTRATIVE LAW JUDGE: --and then
23 we'll pull out each one, like the DNR has theirs in a
24 binder. And we can do that on a break, get them back
25 in order, but I don't want to take up a lot of

1 hearing room--hearing time going through finding
2 exhibits.

3 MR. BITTNER: Okay. I'm sorry. Exhibit 1
4 is Mr. Tack's copy. He was kind enough to lend it to
5 me. The DNR does not allow (inaudible).

6 THE ADMINISTRATIVE LAW JUDGE: I have my
7 copy. Thank you. I just want to make sure the
8 witness has it.

9 A. Oh, dead box.

10 BY MR. BITTNER:

11 Q. Yeah.

12 A. Back page. Sorry.

13 Q. Sorry. I should have pointed it out to you.
14 So they don't require a dead box; right?

15 A. Is not required, that's what it says. Okay.

16 Q. Okay. So there's really no rational reason
17 for the DNR to promote composting on the one hand,
18 but to fine Mr. Johnson \$10,000 on the other hand for
19 really engaging in the exact same chemical process,
20 is there?

21 A. It's a rule violation. As to why it was
22 made--

23 Q. Okay.

24 A. --wasn't my call.

25 Q. Does it make sense to you?

1 A. That's not my decision to make. I'm an
2 enforcement person.

3 Q. But I want to ask you that. Does this rule,
4 as a DNR representative, I'd like you to answer that,
5 does it make sense on the one hand to be promoting
6 composting, and yet punishing Pet Memories in the
7 form of a \$10,000 fine for engaging in exactly--in
8 the exact same chemical process?

9 A. I guess--

10 MR. TACK: I'm going to object to the form
11 of the question. It presumes that they're identical
12 processes. If he wants to ask Mr. Levetzow first if
13 he has any knowledge of the differences or similarities
14 of the processes, then maybe we can get to a point--

15 MR. BITTNER: I already did, and he
16 answered--

17 THE ADMINISTRATIVE LAW JUDGE: Well, I'm
18 going to sustain the objection because I think the
19 witness testified that above the ground involves a
20 layer of residue, that's what my notes say. That
21 would differ from burial within the ground. I mean,
22 that's what I have in my notes from your questioning
23 of the witness.

24 BY MR. BITTNER:

25 Q. Okay. But at the end of the residue--at the

1 end of the decomposition with the residue, those--
2 that animal decomposes and then it's put in the
3 ground, right?

4 A. You mean at the end of the composting cycle?

5 Q. The end of the composting cycle.

6 A. Typically that's land applied, spread
7 across at an agronomic rate, so it turns into
8 fertilizer.

9 Q. It turns into fertilizer, just like--it
10 turns into fertilizer. We're putting the same
11 animals--same elements, same chemicals back in the
12 ground that we are if we just put the dead body right
13 in the ground? Same chemicals?

14 A. With all due respect, it's a completely
15 different situation. If you dig a hole and put an
16 animal in it, it's going to turn to soup, and it's
17 going to be nasty, anybody knows what that's like.
18 But if you compost it, Mother Nature takes it's toll
19 on it, it breaks it down slowly, bugs eat away at the
20 nasty stuff--sorry, that's not scientific terms--and
21 then it's land applied. Dr. Seng could probably
22 explain it better than I could.

23 Q. But if you compost it, it turns to soup
24 above the ground?

25 A. And it's absorbed into the residue, the

1 litter, yes.

2 Q. All right. And you're returning the exact
3 same elements to the ground in the composted animals
4 as you are the buried animals?

5 A. I would argue it would be different. There
6 are chemical processes that take place. I don't know
7 exactly what those are because I'm not a chemist.

8 Q. Okay. You said you don't know what the
9 differences are. I thought you told me earlier that
10 when we're composting an animal, it has the same
11 chemicals, if you compost it, that it does when you
12 bury it?

13 A. Okay. I was wrong.

14 Q. You were wrong?

15 A. I don't know. I don't know. I should have
16 said I don't know.

17 Q. Well, let's--

18 A. I do know composting is an approved method.

19 Q. Okay.

20 A. It's widely used, you know, and if it's done
21 appropriately, the runoff is not a concern.

22 Q. But you don't know why?

23 A. Correct.

24 Q. All right. Now, if I'm reading 567 IAC
25 100.4(2)(b) correctly--

- 1 A. Are we in Exhibit 10?
- 2 Q. Yup?
- 3 A. 100.4?
- 4 Q. Yup.
- 5 A. Sub (2)(b)(4)?
- 6 Q. 567 IAC 100.4(2)(b).
- 7 A. (2)(b). I'm there.
- 8 Q. All right. The DNR allows a farmer to bury
9 seven of its own cattle; right?
- 10 A. Yes.
- 11 Q. Forty-four swine?
- 12 A. Yes.
- 13 Q. Seventy-three sheep or lambs?
- 14 A. Yes.
- 15 Q. And 400 poultry carcasses per acre, right?
- 16 A. That is correct.
- 17 Q. Not composted, buried?
- 18 A. That's correct.
- 19 Q. All right. But Mr. Johnson is required to
20 take his horse carcasses to a landfill, right?
- 21 A. No--well, that, or he can incinerate them or
22 compost them, are options.
- 23 Q. All right. But he's not allowed to bury
24 them?
- 25 A. That is correct.

1 Q. Can we agree that there is no rational
2 environmentally sound reason for allowing a farmer to
3 bury 520 animals per acre while allowing Mr. Johnson
4 to bury only one animal per acre?

5 A. None that I'm aware of.

6 Q. All right. We're not treating similarly-
7 situated people in a similar manner here, are we?

8 A. I have a hard time disagreeing with that.

9 Q. All right.

10 A. Other than some are farmers, and some are
11 businessmen.

12 MR. BITTNER: All right. Thank you, sir. I
13 have no further questions.

14 THE ADMINISTRATIVE LAW JUDGE: Redirect?

15 MR. TACK: Yes, Your Honor.

16 REDIRECT EXAMINATION

17 BY MR. TACK:

18 Q. Mr. Levetzow, first can you clarify, is it
19 one horse or two horses per acre they're allowed
20 under the rules? We've had some confusion on that.

21 A. Yeah. My one--it's two.

22 Q. Let's continue briefly our statutory review
23 that we're doing. Could you look at the--well, now
24 I'm having trouble--here it is. It would be Exhibit
25 11, the definition of solid waste, 301(23). Would

1 you take a moment to read through that?

2 A. In Exhibit 11?

3 Q. Yes.

4 A. "Solid waste means garbage, refuse"--did you
5 want me to read it or look through it?

6 Q. You can go ahead and read it out loud. That
7 would be just fine.

8 A. "Solid waste means garbage, refuse, rubbish,
9 and other similar discarded solid or semisolid
10 materials, including, but not limited to such
11 materials resulting from industrial, commercial,
12 agriculture"--"agricultural, and domestic activities."

13 Q. And are you aware--what program area is
14 Chapter 100, Administrative Code Chapter 100? Does
15 that come from drinking water? Air?

16 A. Solid waste.

17 Q. Okay. And does the definition of farm
18 animals in 100.4 include horses?

19 A. Yes.

20 Q. To the best of your knowledge is Pet
21 Memories operated as a commercial for-profit
22 business?

23 A. Yes.

24 Q. And does--I think your testimony, I just
25 want you to confirm, I think your testimony is is

1 that the Department would allow composting,
2 rendering, incineration, or landfill disposal for
3 horses; is that correct?

4 A. Correct.

5 Q. And in regard to composting, rendering, or
6 incineration, does the Department receive any tonnage
7 fee?

8 A. No.

9 Q. So any of those acceptable options would
10 also reduce the tonnage fee received by the
11 Department; correct?

12 A. Correct.

13 Q. You have experience in the air program
14 within the Department; is that correct?

15 A. Yes.

16 Q. Could you tell us, what's the difference
17 between a boiler or an incinerator, if you know?

18 A. One is to produce steam, or electrical
19 power, generation; and an incinerator is to destroy
20 and dispose of something.

21 Q. And which type of permit does Pet Memories,
22 Incorporated, have?

23 A. They have an incinerator.

24 Q. And that would be for disposal; correct?

25 A. Disposal.

1 Q. Do they dispose of a gas or a liquid
2 material?

3 A. No.

4 Q. What form of material do they dispose of?

5 A. It would be a solid waste.

6 Q. And would that be the dead horses you're
7 referring to?

8 A. Yes.

9 Q. Could you explain qualitatively from your
10 experience the difference between burying a horse or
11 a goldfish in regard to environmental (inaudible).

12 A. Just the sheer mass and amount of waste is
13 much different. You're talking ounces to a couple of
14 pounds versus half a ton.

15 Q. Do you perceive that to be a greater threat
16 of groundwater contamination?

17 A. Which?

18 Q. The--good question. The burial of horses?

19 A. I would assume so, yes.

20 Q. And is it your testimony that composting
21 requirements include some form of groundwater
22 controls and/or protection?

23 A. Yes. There's separation distances, there's
24 requirements on what types of, you know, media you're
25 placing this on. There's all kinds of different

1 requirements in Chapter 105 designed to protect
2 surface and groundwater.

3 MR. TACK: That's all the questions I have,
4 Your Honor.

5 THE ADMINISTRATIVE LAW JUDGE: Recross?

6 MR. BITTNER: Very briefly.

7 RECROSS EXAMINATION

8 BY MR. BITTNER:

9 Q. Are you aware, one way or the other, whether
10 horses are defined as farm animals by the Iowa
11 Department of Revenue?

12 A. I'm not aware.

13 Q. Okay. Would it be a greater risk to the
14 environment to bury a horse or to bury a human that
15 has been embalmed in formaldehyde, in your view, if
16 we didn't have a casket, for instance?

17 A. I don't know.

18 Q. Would it be a greater risk, in your view, to
19 bury one horse or to bury 7 cattle, 44 swine, 73
20 sheep or lambs, 400 poultry carcasses, and two other
21 members of every other species?

22 A. I would say the less burial the better.

23 Q. So the one horse would be better than all
24 that that I just--

25 A. I agree.

1 MR. BITTNER: All right. Nothing further.

2 THE ADMINISTRATIVE LAW JUDGE: Any
3 additional direct examination?

4 MR. TACK: No, Your Honor, and the
5 Department has no further evidence to present at this
6 time.

7 THE ADMINISTRATIVE LAW JUDGE: All right.
8 We'll take a brief recess, ten minutes.

9 (Short recess.)

10 THE ADMINISTRATIVE LAW JUDGE: We're back on
11 the record in Case No. 12DNR015. This is the matter
12 of Pet Memories from Cedar County, Iowa.

13 We have taken a brief recess. We're back on
14 the record. The DNR has rested.

15 I did have a discussion with the parties off
16 the record, and the administrative rules that will
17 apply and statutory authority to this case are the
18 rules and statutes that were in effect as of the date
19 of the administrative order dated September 13th,
20 2012.

21 Correct, Mr. Bittner?

22 MR. BITTNER: We agree that that is exactly
23 the correct legal analysis, yes.

24 THE ADMINISTRATIVE LAW JUDGE: And Mr. Tack?

25 MR. TACK: Yes, Your Honor.

1 THE ADMINISTRATIVE LAW JUDGE: You may call
2 your first witness, Mr. Bittner.

3 MR. BITTNER: All right. I would like to
4 make my motion first.

5 THE ADMINISTRATIVE LAW JUDGE: All right.

6 MR. BITTNER: And we are making a motion to
7 dismiss. It's for the reasons set forth. We're
8 going to submit it in written form. I will renew it
9 at the close of our case, and we anticipate that the
10 Court probably will reserve ruling on it.

11 THE ADMINISTRATIVE LAW JUDGE: Did you wish
12 to make some oral record?

13 MR. BITTNER: Sure. The oral argument is
14 essentially the opening statement. We are arguing
15 that the Department of Agriculture and Land
16 Stewardship has exclusive jurisdiction over the
17 subject matter of the disposal of dead animals, and
18 that is point No. 1.

19 Point No. 2 is that the dead horses that
20 Petitioner, Pet Memories, Inc., is accused of
21 illegally disposing of are not solid waste under Iowa
22 law. Consequently, the DNR has no subject matter
23 jurisdiction. That's an additional reason.

24 Finally, that the DNR's rules and
25 regulations as applied to the facts of this case are

1 arbitrary and capricious and lack a rational basis.
2 As a consequence, the Respondent, Pet Memories, has
3 been denied equal protection under the law. And the
4 lead cite of that is Racing Association of Central
5 Iowa versus Fitzgerald.

6 THE ADMINISTRATIVE LAW JUDGE: Mr. Tack?

7 MR. TACK: Thank you, Your Honor. The
8 Department has presented evidence that Pet Memories,
9 Incorporated, has buried dead horses, a solid
10 material that is discarded by the persons who owned
11 those horses when alive. We think that's a
12 sufficient factual basis to survive a motion to
13 dismiss at this point.

14 The other matters raised are legal and
15 conclusory, and I don't think they're appropriate
16 for, at this stage of the evidence, to be the basis
17 for a dismissal.

18 THE ADMINISTRATIVE LAW JUDGE: I'm going to
19 overrule the motion, and it can be renewed at the
20 close of Pet Memories' case. I will note again that
21 I do not have jurisdiction over the equal protection
22 claim. That will be reserved for the District Court.
23 I don't have any authority to rule on that.

24 MR. BITTNER: Just for the record, I don't
25 know if we were on the record when the Court pointed

1 that out to us before, but the Court did in fact
2 point that out.

3 THE ADMINISTRATIVE LAW JUDGE: Right. I was
4 just clarifying again, since it was raised again.

5 All right. You may call your first witness,
6 Mr. Bittner.

7 MR. BITTNER: Call Stephen Johnson to the
8 stand, please. Yes, that's where--

9 THE ADMINISTRATIVE LAW JUDGE: You can have
10 a seat right there.

11 MR. BITTNER: That's the hot seat, so...

12 THE WITNESS: That's the hot seat?

13 MR. BITTNER: Don't trip over any wires when
14 you're walking back there.

15 THE WITNESS: No. No. No. No.

16 THE ADMINISTRATIVE LAW JUDGE: And, in fact,
17 the next witnesses, if you'll just come around the
18 table. I don't want anyone to trip. It could be a
19 hazard. Really, you could get hurt, so...

20 MR. BITTNER: We just have one more, so...
21 All right. Let's wait until everybody's ready.

22 THE ADMINISTRATIVE LAW JUDGE: All right,
23 Mr. Johnson, if you would please raise your right
24 hand.

25

1 STEPHEN ROBERT JOHNSON,
2 called as a witness by the Appellant, being first
3 duly sworn by the Administrative Law Judge, was
4 examined and testified as follows:

5 THE ADMINISTRATIVE LAW JUDGE: You may
6 proceed.

7 DIRECT EXAMINATION

8 BY MR. BITTNER:

9 Q. Would you please state your name and
10 address, sir.

11 A. I'm Stephen Robert Johnson, address is
12 613-618 235th Street, Tipton, Iowa.

13 Q. Where did you grow up?

14 A. Lisbon and Mechanicsville area.

15 Q. Where did you go to school?

16 A. Lisbon.

17 Q. What do you currently do for a living?

18 A. I run a pet cemetery and crematory service.

19 Q. Briefly tell us about your work history and
20 what you've done.

21 A. I've worked for farmers, I've worked in
22 factories, I've worked construction, I've done
23 welding, fabrication of the metal, did about
24 everything on the farm you could do, you know, worked
25 for dirt farmers, and owned a farm.

1 Q. Okay. And you are the owner of Pet
2 Memories, Incorporated, which is the--legally the
3 respondent in this case; correct?

4 A. Yes. Yes.

5 Q. Tell us how Pet Memories came about.

6 A. Many years ago I was farming, had sheep
7 dogs, and I had a sheep dog that actually went into a
8 seizure and a coma and died. At that time I wasn't
9 doing this, of course. The veterinary told me he had
10 two options, the landfill or National By-Products.
11 And I refused to take her to either one. She was a
12 great dog. So I said, "You got a small cemetery"--I
13 went and did, you know, what I had to do to get into
14 it, and that's where we are today. Got to respect
15 the dog.

16 Q. You had affection for your pet and that--

17 A. Fantastic dog.

18 Q. --that led you to start this business?

19 A. Yup.

20 Q. What's a pet cemetery, just in your own
21 words?

22 A. It's for burying pets.

23 Q. Why don't you take a look at Exhibits 14 and
24 15, okay?

25 A. Yes.

1 Q. Those are exhibits that you provided me;
2 correct?

3 A. Yes, they are.

4 Q. And do those accurately describe what a pet
5 cemetery is?

6 A. Yes, it does.

7 Q. Tell us what goods and services Pet Memories
8 offers to its customers.

9 A. I offer a place for people--for their pets.
10 A lot of people don't own any land. Sometimes they
11 don't want them at their place. If they do decide to
12 bury them, if they do have land, some people have to
13 sell their property.

14 I do cremations, I sell urns, caskets, I
15 have a store for that. Pretty much anything to help
16 them out with their loss.

17 Q. When a customer agrees with you to dispose of a
18 dead animal carcass through a general disposal--I guess
19 through any disposal, whose animal does it become?

20 A. They become my responsibility. They're
21 mine.

22 Q. Okay. It becomes your animal?

23 A. Yes.

24 Q. Pet Memories becomes the owner?

25 A. Yes.

1 Q. And when it becomes the owner, then it
2 becomes legally responsible for the disposal of that
3 animal--

4 A. Yes.

5 Q. --correct?

6 And as the owner, you could--you can cremate
7 the animal for a general disposal; correct?

8 A. Yes.

9 Q. You can bury it?

10 A. Yup.

11 Q. And I guess, at least in theory, you could
12 turn it around and send it--sell it to a rendering
13 plant, in theory? In theory only?

14 A. You could only in theory, not as an
15 honorable (inaudible).

16 Q. And you sort of answered my next question.
17 You wouldn't do that, I take it. Why not?

18 A. Never. It's an honorable (inaudible), they
19 trusted me with their pet. They could have done it
20 themselves if that's what they wanted to do.

21 Q. Do people have a sentimental value attached
22 to their pets that they give to you?

23 A. Very much, or they wouldn't be paying me the
24 price they're paying me.

25 Q. Okay. Do they expect the disposal in a

1 dignified manner?

2 A. Yes.

3 Q. Do you dispose of all types of animals or
4 only pets?

5 A. Only pets.

6 Q. All right. Now, you understand that the
7 reason that we're here today is because prior to
8 September 13th, 2012, you were burying horses in your
9 pet cemetery?

10 A. Yes.

11 Q. Okay. And you're not here to deny that you
12 did bury horses in your pet cemetery?

13 A. I will not deny it.

14 Q. Okay. But it's your claim that you were
15 allowed to bury these horses that were pets in your
16 pet cemetery because they are dead animals under Iowa
17 Chapter 167; right?

18 A. Yes.

19 Q. All right. And you have challenged and are
20 challenging the DNR's claim that the horses you
21 buried on your property, that are the subject of this
22 claim, were solid waste under Iowa Chapter 455B;
23 right?

24 A. I'm challenging it, yes.

25 Q. All right. Do you believe that the dead

1 horses that you buried are solid waste?

2 A. No.

3 Q. Mr. Johnson, has the Iowa Department of
4 Agriculture and Land Stewardship ever claimed that it
5 had jurisdiction over your company, Pet Memories?

6 A. Yes, they did.

7 Q. Okay. And has IDALS, the Iowa Department of
8 Agriculture and Land Stewardship, ever cited Pet
9 Memories for alleged violations of Chapter 167? Have
10 they cited it?

11 A. Yes.

12 Q. Okay. Tell us about that.

13 A. They come out and did their investigation.
14 That was the year it was wet all fall, all winter.
15 Yes, I did have horses around there for--I couldn't
16 get out in the fields. The backhoe would just sit
17 there and bury itself. You couldn't move them.

18 Q. Okay. Take a look at Exhibit 8 which is in
19 front of you. I think they're now in order.

20 A. Yes.

21 Q. Were those the charges that were made
22 against you by the Iowa Department of Agriculture and
23 Land Stewardship?

24 A. Yes, it was.

25 Q. Okay. How did those proceedings turn out?

1 A. They dropped them.

2 Q. Okay. Did they drop them--why? Because
3 they--well--

4 A. (Inaudible) really had a case.

5 Q. Did they come to the conclusion that you
6 didn't need a license to do what you were doing
7 because you weren't a rendering plant?

8 A. That's right.

9 Q. All right. So you never paid them any fine
10 or penalty; right?

11 A. No.

12 Q. And just to clarify, even though I think
13 it's clear for the record, it was the Department of
14 Agriculture and Land Stewardship, not the DNR, that
15 in that instance claimed the right to regulate the
16 disposal of the dead horses in question?

17 A. Right.

18 Q. All right. And IDALS claimed that it had
19 jurisdiction over your operation for the reason that
20 you were disposing of dead animals; right?

21 A. Yes.

22 Q. Before we came here today, you looked at the
23 definitional section of the Iowa Code; right?

24 A. That's right.

25 Q. Take a look--take a look at Exhibit 11. And

1 I want you to go to the definition of solid waste.

2 A. Yes.

3 Q. Are the dead horses you disposed of solid
4 waste under the Iowa Code?

5 A. I don't see it.

6 Q. Okay. Take a look at the DNR's definitions
7 which are set forth in Exhibit 10. You've reviewed
8 that exhibit prior to coming here, right?

9 A. Yes.

10 Q. And do you believe that they are solid--the
11 animals you disposed of are solid waste?

12 A. They're not solid waste.

13 Q. Are they garbage?

14 A. Nope.

15 Q. Do you use the horses you bury as food? Do
16 you use the--are the horses you bury used as food in
17 any part?

18 A. No. No. No.

19 Q. Okay. Are they refuse?

20 A. Nope.

21 Q. Okay. Are the horses you bury ashes,
22 incinerator ash, incinerator residues, street
23 cleanings, market waste, industrial solid waste, or
24 sewage treatment waste?

25 A. No.

1 Q. Are they anything like--the horses you bury,
2 that is--anything like ashes, incinerator ash,
3 incinerator residues, street cleanings, market waste,
4 industrial solid waste?

5 A. No.

6 Q. Are they rubbish?

7 A. Nope.

8 Q. Anything like ashes, cardboard, tin cans,
9 yard clippings, wood, glass, bedding, crockery, or
10 litter?

11 A. No.

12 Q. Are they rubble?

13 A. Nope.

14 Q. If you were to describe the dead horses that
15 you bury, that your clients hand over to you to bury,
16 in their presence as garbage, refuse, rubbish, or
17 rubble, how would they respond?

18 A. They wouldn't be using me.

19 Q. Do any of your clients that you know
20 consider their dead pets as garbage, refuse, rubbish,
21 or rubble, to your knowledge?

22 A. No, they do not. They wouldn't even pay the
23 price.

24 Q. How do your clients feel about their dead
25 pets?

1 A. Very much. They're family.

2 Q. All right. Do you dispose of any horses
3 that are used for agricultural purposes?

4 A. No.

5 Q. How can you prove that?

6 A. I charge a pretty good fee for what I do.

7 Q. Okay. Do you charge sales tax?

8 A. Yes, I do.

9 Q. Would you be required to charge sales tax if
10 those were ag animals?

11 A. No.

12 Q. And yet it's your testimony, just to be
13 clear for the record, that all of the animals that
14 you dispose of are pets?

15 A. Yes.

16 Q. All right. What's the name of your
17 business?

18 A. Pet Memories.

19 Q. All right. Does any part of your business'
20 name imply that it disposes of farm animals?

21 A. No.

22 Q. In your experience would farmers pay the
23 same rate to dispose of farm animals as pet owners
24 pay to dispose of their dead animals?

25 A. Farmers are penny-pinchers. They'd find a

1 cheaper way to go.

2 Q. All right. I'll try to condense this since
3 we took so long with the other witness. I want to
4 get into--again with you whether or not there's a
5 rational basis for their attempt to regulate the
6 burial of dead horses in this instance.

7 How long have you been in the pet cemetery
8 business? I didn't ask you that.

9 A. Fifteen years.

10 Q. All right. And in the course of that
11 business, have you become aware that human bodies are
12 sometimes involved?

13 A. Yes.

14 Q. In the course of discussing this case, did
15 you bring to my attention an article that discusses
16 the problems that arsenic and mercury are now causing
17 in human cemeteries?

18 A. Yes, I did.

19 Q. Would you take a look at Exhibit 25.

20 A. Yes.

21 Q. Is that the article you brought to my
22 attention?

23 A. Yes, it is.

24 Q. Would you summarize that article for the
25 Judge?

1 A. For about 100 years, before the Civil War
2 and after the Civil War, they were embalming a lot of
3 soldiers, and it got to be more people and more
4 people they embalmed with arsenic, lead, and mercury.
5 They buried them in graves all over the United
6 States. Some used caskets, wood caskets, and some
7 just wrapped them in blankets. It happened in all
8 the cemeteries.

9 Q. Okay. You heard the State's
10 witnesses--sorry, I can't remember the correct
11 pronunciation of your name. But he testified,
12 essentially, that--as I recall his testimony, that
13 horse carcasses are solid waste, then human beings
14 are also solid waste. Do you recall that testimony
15 on his part?

16 A. Yes, I do.

17 Q. Okay. To the best of your knowledge, in
18 your experience, in the pet cemetery business, have
19 you ever heard of the DNR charging the owner of human
20 cemeteries with violating the DNR solid waste
21 regulations?

22 A. Never.

23 Q. Do you know for a fact that human cemeteries
24 in the state are now allowing the burial of animals?

25 A. Pets, yes.

1 Q. Human cemeteries are letting people bury
2 their pets?

3 A. Yes.

4 Q. You know that for a fact?

5 A. Yes, I do.

6 Q. Okay. In fact, that's fairly common, isn't
7 it?

8 A. Very much.

9 Q. In the course of the business have you ever
10 heard of the DNR citing a human cemetery for burying
11 pets in the human cemetery?

12 A. Never.

13 Q. Okay. Have you ever embalmed a horse?

14 A. I don't embalm anything.

15 Q. Okay. Never--no animal?

16 A. No.

17 Q. Is there a term used for the type of burial
18 that you perform?

19 A. It's called natural burial and green burial.

20 Q. Okay. Sort of synonymous terms?

21 A. It's--the green burial I use a casket
22 sometimes, and caskets can be wicker basket caskets,
23 they can be plastic, metal, steel, wood, whatever.

24 Q. Okay. Would you explain to the Judge what a
25 green burial or natural burial is?

1 A. Well, a natural burial is where you just put
2 the pet in the ground, you don't need blankets, you
3 don't need anything. Usually you're not (inaudible).

4 Q. It's basically a process, isn't it, where
5 you allow a body to naturally decompose in the
6 ground?

7 A. Yes, it is.

8 Q. So it's--

9 A. At a slower rate.

10 Q. All right. Take a look at Exhibit 18,
11 please.

12 A. Yes.

13 Q. Are those articles that you brought to my
14 attention?

15 A. They sure are.

16 Q. Would you briefly summarize what they have
17 to say for the Judge?

18 A. It's green burial, they're all over the
19 United States. It's kind of like clothes that come
20 back in style. It's been gone in the past, but
21 people are more aware of the environmental problems
22 with embalming. So with pets, we are--most people
23 don't want them embalmed, just natural elements.

24 Q. Are natural or green burials being promoted
25 now as an environmentally friendly way to dispose of

1 pets and animals?

2 A. Big time.

3 Q. Okay. Why is your industry promoting
4 natural burials or green burials?

5 A. It's more environmentally friendly, you
6 don't use chemicals. We're all thinking about
7 drinking water. It's not hurting the environment at
8 all.

9 Q. Okay. When you perform a natural burial or
10 green burial, what happens chemically?

11 A. It breaks down just like it would
12 composting, it's just a lot slower.

13 Q. Okay. Are the molecules--elements,
14 molecules, and chemicals that were in the body
15 basically returned to the ground, is that--

16 A. Yes, they are.

17 Q. And you're aware, and I think the DNR's
18 witnesses admit that the DNR promotes composting; is
19 that right?

20 A. Yes, they do.

21 Q. And take a look at Exhibit 1, and basically
22 if you look at the bottom of the first page that's
23 what they're saying, right?

24 A. Yes, it is.

25 Q. And on the second page he mentions--I really

1 didn't want to get into it, but I did with him, that
2 they don't require a dead box, right?

3 A. No.

4 Q. What is a dead box?

5 A. A lot of farmers had, like, an old wagon,
6 stuff like that, wood box, and they just threw the
7 carcasses on there and sometimes they would haul that
8 out there and fill that, they'd just let it lay.
9 It's an old wagon, it's falling apart anyway.

10 Q. Okay. What we're doing when we're
11 composting animals, we're allowing it to decompose
12 above the ground partially before we put it back into
13 the ground; right?

14 A. Yes.

15 Q. All right. When we're comparing composting
16 to what you do, composting to burial, are the
17 elements that are eventually returned to the ground
18 the same under both processes?

19 A. They're very much the same.

20 Q. Okay. But, again, as we mentioned, the DNR
21 promotes composting, but they tell you that you have
22 to send your dead horses to a landfill?

23 A. That's what they want.

24 Q. All right. Does that make any sense to you?

25 A. They don't get no fees from me.

1 Q. All right. From an environmental view does
2 it make any sense?

3 A. No.

4 Q. I got into this a little bit, but take a
5 look at Exhibits 1 and 10. You see on both of
6 those--or prior to coming here did you see on both of
7 those where the DNR allows the operator of a
8 livestock operation to dispose of 7 cattle, 44 swine,
9 73 sheep or lambs, 400 poultry carcasses, and 2 dead
10 animals of every other species on every acre they
11 own, right?

12 A. Yes.

13 Q. And you've taken a look at Exhibits 2 and 3
14 before coming here today; right?

15 A. Yes.

16 Q. And that confirms that the DNR allows mass
17 farm burials; correct?

18 A. Right.

19 Q. And the DNR tells you how many--you're
20 limited to how many horses per acre?

21 A. One.

22 Q. So how does their treatment of your disposal
23 of dead animals compare to their treatment of
24 farmers' disposal of dead animals?

25 A. It's definitely not right.

1 Q. How much--how much does one horse weigh?

2 A. They average around a thousand.

3 Q. Okay. A thousand pounds?

4 A. Yes.

5 Q. All the animals that they're allowing to be
6 buried per acre there, how much poundage or tonnage
7 would you estimate that to be?

8 A. I'm guessing it's quite a few more tons.

9 Q. Twenty tons, 30 tons per acre?

10 A. Depending on the size of the animal, it's
11 probably over ten tons.

12 Q. Okay. Does the DNR allow you to let the
13 carcasses you own just rot on the top of the ground?

14 A. No, they do not.

15 Q. When an animal is killed on one of Iowa's
16 roadways, does the DNR make any county or city
17 dispose of that dead animal?

18 A. No, they do not.

19 Q. Okay. Take a look at Exhibit 4.

20 A. Yes.

21 Q. What's the article say that the DNR does
22 with dead animals alongside of Iowa's roadways?

23 A. They don't do anything.

24 Q. So it's not their responsibility to cleanup
25 roadkill?

- 1 A. That's what they're claiming.
- 2 Q. Okay. In your job, how often do you observe
3 roadkill?
- 4 A. Every day.
- 5 Q. All right. How often do you see roadkill
6 that's been laying there for at least 24 hours?
- 7 A. They're laying there until the coyotes carry
8 the bones off.
- 9 Q. Every day?
- 10 A. Pretty much.
- 11 Q. All right. Take a look at Exhibit 1 again.
12 What's the DNR require people to do if they have a
13 number of animals that die within 24 hours?
- 14 A. You got to get rid of them.
- 15 Q. They got to cover them up with dirt?
- 16 A. They've got to cover them up--if they're a
17 farmer, they just need six inches of soil on top.
- 18 Q. Okay. And that's farmers?
- 19 A. That's farmers.
- 20 Q. They won't let you even cover them up with--
- 21 A. No.
- 22 Q. Okay. Is the DNR treating private owners of
23 dead animals and roadkill along county roads in a
24 similar manner?
- 25 A. They're all different.

1 Q. Okay. And you agree with the State's
2 witnesses that if dead horses are solid waste, then
3 dead cats, dogs, birds, and fish are solid waste,
4 too; right?

5 A. They're not.

6 Q. All right. During the time you've been
7 running the pet cemetery business, you have knowledge
8 that people bury their birds, cats, dogs, and fish in
9 their yard?

10 A. That's right.

11 Q. How common an occurrence is it?

12 A. There's more pet cemeteries than there are
13 human ones.

14 Q. All right. Have you ever heard of the DNR
15 citing anybody for violation of the solid waste rules
16 by burying a dead cat, dog, bird, or fish?

17 A. Never.

18 Q. All right. And you're aware that the DNR
19 receives a fee when people use a landfill to dispose
20 of their dead horse?

21 A. Yeah.

22 Q. And when you bury a horse for a client, the
23 DNR doesn't get that fee, right?

24 A. Right.

25 Q. So in essence your competition for them?

1 A. That's what they're thinking.

2 MR. BITTNER: That's all I have.

3 THE ADMINISTRATIVE LAW JUDGE: Cross?

4 MR. TACK: Yes, Your Honor.

5 CROSS-EXAMINATION

6 BY MR. TACK:

7 Q. Mr. Johnson, at first I'd like to get a
8 little more explanation about how your business
9 works, your business. So you have the incinerator;
10 correct?

11 A. Yes, I do.

12 Q. And what do you incinerate, what types of
13 animals in that?

14 A. Pets.

15 Q. Of any species?

16 A. Any species.

17 Q. Are they particular--does the pet owner
18 choose the disposal option?

19 A. Most of the time. If they want ashes back,
20 that's definitely. If it's general disposal, a lot
21 of times they don't say.

22 Q. Do you provide an area with markers or grave
23 stones, or something?

24 A. I have all kinds of places, some with
25 markers, some without.

1 Q. And is that their choice?

2 A. That is their choice.

3 Q. For your--and you accept--you're paid for
4 this service; correct?

5 A. Yes, I am.

6 Q. And how much are you paid for horses?

7 A. Generally, like, 40 cents a pound for
8 general disposals. I don't have to return nothing
9 back, I don't have to furnish a container, I don't
10 have to give ashes back, it's 40 cents a pound, and
11 it's all plus tax.

12 Q. So does that usually work out to somewhere
13 around \$400 per horse?

14 A. Yes, or 500.

15 Q. Okay.

16 A. You get bigger horses, or you got to go a
17 little further distance, time is an element there,
18 too.

19 Q. Okay. Are there different rates for
20 incineration as opposed to burial?

21 A. Yes--well, to a point. If I don't have to
22 make a second trip, then it's cheaper.

23 Q. I'm sorry. I don't understand.

24 A. If I don't have to return ashes.

25 Q. Oh, okay. Okay.

1 A. I don't have to send them through the post
2 office, that sort of thing, because we do.

3 Q. And what is--approximately how many horses
4 do you provide disposal services for per year?

5 A. It depends on the year. Last year it was
6 probably--I maybe done 30, 35 horses, maybe. I don't
7 keep track in my head. This year it's a different
8 year. It's a lot harder. The temperature has been
9 up and down, it's a big variance for horses.

10 Q. Uh-huh.

11 A. Generally from January to the end of April
12 is when your horse season is, and after that it's
13 just lightening strikes, or, you know, little
14 things--you know, we don't get very many.

15 Q. Would it be fair to say you have revenues of
16 several thousand dollars a year for horse disposal?

17 A. Yes.

18 Q. Would it be more than 10,000?

19 A. Oh, I'm sure.

20 Q. More than a hundred thousand?

21 A. No. Not a hundred.

22 Q. You are, in fact, a commercial business, and
23 you receive funds to dispose of the horses?

24 A. I'm for-profit, yes.

25 Q. And the materials that you're burying, you

1 consider you're the owner of, your for-profit
2 business owns?

3 A. Yes.

4 Q. One thing I guess I want to clarify,
5 Mr. Johnson, is I'm using "you" and many times
6 referring both to Pet Memories, Incorporated, and
7 yourself.

8 A. I'm it. I'm it.

9 Q. Okay. I just want to make sure that's fair,
10 that they're the same.

11 A. Yeah. One of a kind.

12 MR. BITTNER: For purposes of the record,
13 that's our understanding. We've understood your
14 questions.

15 MR. TACK: Okay.

16 BY MR. TACK:

17 Q. Now, the DNR's exhibits, if I could have you
18 take a look at the DNR Exhibit F, which is
19 related--in here, the last exhibit.

20 A. Yup.

21 Q. There's some photographs there.

22 A. Uh-huh.

23 Q. It would appear to be locations of burial.

24 A. Yup.

25 Q. These were November of 2011.

1 A. Uh-huh.

2 Q. Is it correct that those in fact were
3 locations of animal burial?

4 A. Oh, I'm sure they are. (Inaudible)

5 Q. And would that be a typical type of burial
6 that you do?

7 A. That is.

8 Q. Would that be considered your green burial
9 you were discussing?

10 A. Yes, it is, natural burial.

11 Q. Natural burial, which means no marker,
12 typically?

13 A. No marker, no caskets.

14 Q. It's your understanding, is it not, that a
15 livestock producer is allowed to bury up to two
16 horses per year per acre?

17 A. A livestock--

18 Q. A farm, a farmer?

19 A. They can bury cattle and all farm animals.

20 Q. All right. And the farm animals rule
21 includes up to two other--two carcasses of other
22 species, correct?

23 A. Yes. Yes.

24 Q. So someone who is disposing of their own
25 horses can bury two per acre; is that your

1 understanding?

2 A. I don't know if it's their horses, but, yes,
3 they can.

4 Q. And you bury more than two horses per year,
5 right?

6 A. Per year?

7 Q. Yes.

8 A. Oh, definitely.

9 Q. Many more than two horses; correct?

10 A. Yes.

11 Q. You--I believe you stated that IDALS had
12 dropped their case against you; is that your
13 understanding?

14 A. Yes, they did.

15 MR. TACK: I need to make copies, Your
16 Honor. Could we take a moment?

17 THE ADMINISTRATIVE LAW JUDGE: You may.
18 I'll turn off the recorder.

19 (Short recess.)

20 THE ADMINISTRATIVE LAW JUDGE: We're back on
21 the record in Case No. 12DNR015. This is the matter
22 of Pet Memories.

23 BY MR. TACK:

24 Q. Mr. Johnson, I'd asked you a question in
25 regard to your earlier statement that IDALS had dropped

1 their case against you as well as the complaints?

2 A. Yes, they did.

3 Q. Didn't you, in fact, go to hearing on that
4 case?

5 A. There was a hearing.

6 Q. And at that hearing it was determined that
7 in fact you did qualify as a renderer under Chapter 167?

8 A. Never been a renderer. That's what they
9 tried to push me into.

10 Q. And that's what the judge determined at that
11 time; correct?

12 A. I don't remember exactly how it went, but I
13 was never a renderer.

14 Q. I'm going to show you what's been marked as
15 DNR Exhibit G.

16 A. Uh-huh.

17 Q. Please take a moment and look through that.

18 THE ADMINISTRATIVE LAW JUDGE: Did you want
19 me to have the official, or--

20 MR. TACK: Probably, yeah.

21 THE ADMINISTRATIVE LAW JUDGE: --for the
22 record? I'll give you that one.

23 THE WITNESS: Okay. I'll take this one.

24 BY MR. TACK:

25 Q. Would you take a look at--it would be page

1 4, the bottom of page 4, where it says "Order."

2 A. Where we at here?

3 Q. It would be the next page further.

4 A. Okay. At the bottom.

5 Q. At that point the Court upheld the IDALS'
6 cease and desist order; correct?

7 A. That's what it says.

8 MR. BITTNER: I guess I'm going to object to
9 the form of the question, and just because you've
10 used the word "court," okay? All right?

11 MR. TACK: Understood.

12 MR. BITTNER: Do you understand what my
13 objection is?

14 MR. TACK: Yes.

15 MR. BITTNER: Okay.

16 THE ADMINISTRATIVE LAW JUDGE: It's an
17 administrative proceeding.

18 MR. BITTNER: Right.

19 THE ADMINISTRATIVE LAW JUDGE: It's where I
20 work.

21 MR. BITTNER: There's a reason why I made
22 the objection, so...

23 BY MR. TACK:

24 Q. And the cease and desist order would be your
25 Exhibit 8 which we referred to earlier; correct?

1 A. Uh-huh.

2 Q. Now, you sought and successfully had the law
3 changed in response to this; correct?

4 A. I had nothing to do with it.

5 Q. You did not have anything to do with it?
6 All right. But your understanding is you're not--
7 you're no longer subject to Chapter 167; correct?

8 A. That's right.

9 Q. And do you--did your business of Pet
10 Memories engage in obtaining the hide, skin, or
11 grease of the animals that you receive?

12 A. I don't render.

13 Q. And that's always been the case; correct?

14 A. Right.

15 Q. You've never engaged in rendering at any
16 point in your business?

17 A. I don't sell by-products.

18 Q. And the horses that have been buried on your
19 property, you don't remove any of the parts of those
20 horses, either, do you?

21 A. No.

22 Q. And even once they're buried, you don't dig
23 them up and obtain anything; correct?

24 A. No. No.

25 Q. When they're buried, they're buried for

1 good; is that true?

2 A. Yes. I do have some I bury for storage
3 until I can get them in the crematory. That's the
4 only place you can put them. You can't get them in
5 the freezer.

6 Q. Okay. And then once you--

7 A. They're not buried very deep.

8 Q. Okay. I just want to clarify that, then.
9 So if you dig a horse back up, it is only for the
10 purpose of cremation?

11 A. Yes.

12 Q. Otherwise, once they're in the ground,
13 they're in the ground?

14 A. They're in the ground. I don't want them
15 again.

16 Q. It is your position today that you are not
17 required to have a rendering license under 167,
18 right?

19 MR. BITTNER: Objection; relevance. I'm not
20 sure why we're talking about rendering. There's no
21 charges here involving rendering.

22 MR. TACK: Your Honor, I'm referring to
23 Chapter 167, which I believe on cross-examination of
24 my witness we spoke at length in regard to Chapter
25 167.

1 THE ADMINISTRATIVE LAW JUDGE: I'm going to
2 overrule the objection.

3 MR. TACK: I believe--I don't know if I got
4 an answer to that or not. If I could re-ask it?

5 BY MR. TACK:

6 Q. Is it your understanding that you're
7 required to have a rendering license?

8 A. I'm not.

9 Q. And you also do not consider yourself a
10 slaughterhouse; correct?

11 A. No.

12 Q. One question, I guess, for clarification.
13 You had indicated one of the reasons people choose to
14 use your business is that some day they're going to
15 have to sell their own property. Would you explain
16 what you meant by that?

17 A. Many people are moving--getting older,
18 moving, downsizing, or moving to a different city
19 because of their jobs, they don't want to bury them
20 in their backyard.

21 Q. But--so then, therefore, you bury it for
22 them; correct? Is that what you just said?

23 A. Cemetery is a cemetery. It will stay there
24 forever.

25 THE ADMINISTRATIVE LAW JUDGE: Are you

1 offering this as an exhibit?

2 MR. TACK: Yes, Your Honor, I would offer
3 DNR Exhibit G.

4 THE ADMINISTRATIVE LAW JUDGE: Any
5 objection?

6 MR. BITTNER: The objection is as to
7 relevance, but--that's the objection.

8 THE ADMINISTRATIVE LAW JUDGE: Well, I
9 believe you actually raised this issue yourself. Am
10 I mistaken? It was raised in your--

11 MR. BITTNER: I mentioned 167.18, and this
12 deals with different provisions of 167, but I can
13 clear that up on redirect.

14 MR. TACK: Could I respond, Your Honor?

15 THE ADMINISTRATIVE LAW JUDGE: You may.

16 MR. TACK: Respondent specifically put into
17 evidence the cease and desist order, Exhibit A--

18 THE ADMINISTRATIVE LAW JUDGE: Uh-huh.

19 MR. TACK: --and in response to questioning
20 his client indicated that that matter had been
21 dropped.

22 MR. BITTNER: Okay.

23 MR. TACK: And, therefore, I thought it was
24 important to actually get into the record the final
25 resolution.

1 MR. BITTNER: If it states--well, you say
2 final resolution--anyhow, that's fine. I'll clear it
3 up on--

4 MR. TACK: Sure.

5 THE ADMINISTRATIVE LAW JUDGE: The objection
6 is sustained. Exhibit G is admitted.

7 (DNR Exhibit G was offered
8 and received in evidence.)

9 MR. BITTNER: You mean objection's
10 overruled?

11 THE ADMINISTRATIVE LAW JUDGE: I mean the
12 objection--

13 MR. TACK: Yeah.

14 THE ADMINISTRATIVE LAW JUDGE: Yeah, it's
15 overruled. It's overruled. Sorry.

16 You don't need to laugh at me. I mean, it's
17 not--

18 MR. BITTNER: No, I'm not. No, I'm not at
19 all. I would never do that. I say things that I
20 don't mean all the time.

21 THE ADMINISTRATIVE LAW JUDGE: All right.

22 MR. TACK: All right.

23 MR. BITTNER: That happens often in hearings
24 where I say something that I--where I say one thing
25 and thinking another.

1 THE ADMINISTRATIVE LAW JUDGE: Well, I'd
2 just like you to refrain from doing that.

3 MR. BITTNER: Okay. I'm sorry. I
4 apologize.

5 BY MR. TACK:

6 Q. Just a couple more questions, Mr. Johnson.
7 Does Pet Memories engage in animal composting?

8 A. Burial, that's what composting is. I don't
9 do above-ground.

10 Q. Do you have any training or education in
11 regard to groundwater protection?

12 A. No training in it. I drink water off that
13 property. I live there.

14 MR. TACK: All right. I have no further
15 questions at this time. Thank you.

16 THE ADMINISTRATIVE LAW JUDGE: Any redirect?

17 MR. BITTNER: Yeah, Your Honor. I'll
18 clarify. I have meant no disrespect to the Court. I
19 always have respect for the Court, and I was just
20 trying to clarify the record. I believed that the
21 Court had said that it was sustained, the objection,
22 and I knew it was--

23 THE ADMINISTRATIVE LAW JUDGE: It was just a
24 mistake.

25 MR. BITTNER: And I know that, and I figured

1 that. I just wanted a clean record because I believe
2 that we are going up on appeal. I absolutely
3 sincerely mean I did not intend any disrespect at
4 all.

5 THE ADMINISTRATIVE LAW JUDGE: All right.
6 Actually, before we proceed with your redirect, I did
7 have a question.

8 MR. BITTNER: Uh-huh.

9 THE ADMINISTRATIVE LAW JUDGE: What is the
10 size of Pet Memories?

11 THE WITNESS: It's 120 acres.

12 THE ADMINISTRATIVE LAW JUDGE: And burials
13 are done on the whole 120 acres?

14 THE WITNESS: Yes.

15 THE ADMINISTRATIVE LAW JUDGE: How many
16 animals are buried there?

17 THE WITNESS: Over the years? I have no
18 idea.

19 THE ADMINISTRATIVE LAW JUDGE: Thousands?

20 THE WITNESS: No, not that many.

21 THE ADMINISTRATIVE LAW JUDGE: Hundreds?

22 THE WITNESS: Yeah. Yup.

23 THE ADMINISTRATIVE LAW JUDGE: All right.

24 Redirect.

25 MR. BITTNER: All right. Again, I

1 apologize.

2

REDIRECT EXAMINATION

3 BY MR. BITTNER:

4 Q. You were handed Exhibit G; correct?

5 A. Uh-huh. Yes.

6 Q. Was that appealed to District Court after
7 this, to your knowledge?

8 A. I don't know exactly how it went.

9 Q. Well, you do know that this wasn't the final
10 say-so? At the end of the day, the charges against
11 you were dismissed; correct?

12 A. They were dismissed.

13 Q. All right. And the only way that you know
14 of that that could have happened is if this got
15 appealed; right?

16 A. Yes.

17 Q. All right. Exhibit 12, take a look at
18 Exhibit 12, the third page. I want you to go to
19 Chapter 167.

20 A. Okay.

21 Q. All right. Mr. Tack was discussing some
22 sections that are included in the order, including
23 167.2, 167.3, and the essence of your answers was
24 those don't apply to you because you're not a
25 rendering plant; right?

1 A. That's right.

2 Q. Okay. But is there a provision--take a look
3 at 167.18. That does apply to you?

4 A. Yes.

5 Q. Okay. And that applies to you because that
6 once you take possession--those carcasses into your
7 possession, you become the owner; correct?

8 A. That's right.

9 Q. And you become--it becomes your obligation
10 under the law--

11 A. Yup.

12 Q. --to dispose of those carcasses?

13 A. Yup. They're in my cemetery.

14 Q. All right. And the sections Mr. Tack was
15 citing apply to rendering plants?

16 A. That's rendering companies, yes.

17 Q. And you're not one, you've never been?

18 A. No, never been.

19 MR. BITTNER: That's all.

20 THE ADMINISTRATIVE LAW JUDGE: Recross?

21 MR. TACK: No, Your Honor. Thank you.

22 THE ADMINISTRATIVE LAW JUDGE: The witness
23 is excused.

24 (Witness excused.)

25 THE ADMINISTRATIVE LAW JUDGE: Call your

1 next witness.

2 MR. BITTNER: Dr. Joe Seng, please.

3 THE ADMINISTRATIVE LAW JUDGE: Are you going
4 to make an offer of proof regarding the earlier
5 ruling, or are you going to just proceed with
6 questioning of the witness?

7 MR. BITTNER: What was the earlier ruling,
8 Your Honor?

9 THE ADMINISTRATIVE LAW JUDGE: I made a
10 ruling before the case proceeded.

11 MR. BITTNER: Oh, yeah.

12 THE ADMINISTRATIVE LAW JUDGE: The motion
13 was unresisted. Are you going to make an offer of
14 proof first, or what is your plan?

15 MR. BITTNER: I believe, Your Honor, for the
16 record, that the substance of Dr. Seng's testimony
17 does not include any questions regarding legislative
18 intent.

19 THE ADMINISTRATIVE LAW JUDGE: Okay.

20 MR. BITTNER: Okay?

21 THE ADMINISTRATIVE LAW JUDGE: So you do not
22 wish to make an offer of proof on that issue?

23 MR. BITTNER: If I--well, it's sort of yes
24 and no.

25 THE ADMINISTRATIVE LAW JUDGE: Well, I'm

1 going to allow you to make an offer of proof, if you
2 want to, because I've already ruled on that issue,
3 and then we'll proceed with any additional testimony
4 you have from the witness.

5 MR. BITTNER: All right.

6 THE ADMINISTRATIVE LAW JUDGE: But, you
7 know, I made a ruling, you can make an offer of
8 proof, and I can reexamine that ruling that I made at
9 that time. So...

10 MR. BITTNER: And I appreciate that. What
11 I'm telling the Court is I think I'm going in a
12 different direction with this witness. If Mr. Tack
13 or the Court feels that I have not--

14 THE ADMINISTRATIVE LAW JUDGE: Well--

15 MR. BITTNER: Okay.

16 THE ADMINISTRATIVE LAW JUDGE: --I'm asking
17 you right now if you want to make an offer of proof.
18 If you do, I will allow you to make an offer of
19 proof.

20 MR. BITTNER: Okay.

21 THE ADMINISTRATIVE LAW JUDGE: If you do
22 not, then we'll proceed with the questions you have
23 for the witness.

24 MR. BITTNER: Okay.

25 THE ADMINISTRATIVE LAW JUDGE: Do you wish

1 to make an offer of proof?

2 MR. BITTNER: Not at this time, Your Honor.
3 Thank you.

4 THE ADMINISTRATIVE LAW JUDGE: Okay.
5 Dr. Seng, if you would please raise your right hand.

6 DR. JOSEPH MATTHEW SENG,
7 called as a witness by the Appellant, being first
8 duly sworn by the Administrative Law Judge, was
9 examined and testified as follows:

10 THE ADMINISTRATIVE LAW JUDGE: You may
11 proceed.

12 MR. BITTNER: Thank you, Your Honor.

13 DIRECT EXAMINATION

14 BY MR. BITTNER:

15 Q. Would you please state your name and address.

16 A. Joseph Matthew Seng, 4804 Northwest
17 Boulevard, Davenport, Iowa 52806 area code.

18 Q. Where did you grow up, Dr. Seng?

19 A. Lost Nation, Iowa.

20 Q. Where did you go to school?

21 A. Lost Nation Community School K through 12,
22 and then Iowa State University from--well, to get my
23 degree, veterinary degree.

24 Q. Okay.

25 A. That was six years.

1 Q. Six years for veterinary medicine? Is that
2 undergraduate and graduate school, is that how that
3 works?

4 A. Yeah; two years of premed at Iowa State, and
5 then four years of veterinary college.

6 Q. Okay. Have you ever held elective office?

7 A. Yes, many times.

8 Q. Would you tell the Judge about your career
9 as an elected official?

10 A. As an elected public official, or--

11 Q. Yes, sir.

12 A. Okay. I was five years on the Davenport
13 City Council. All those years I was alderman at
14 large, but the mayor has the discretion to appoint
15 you as mayor pro tem, any of the ten council members
16 for the City of Davenport. Two of those years I was
17 mayor pro tem and alderman at large. The other three
18 years I was alderman at large.

19 After that I was a state legislator. I'm
20 not--it was for the Davenport district. They changed
21 the district numbers every ten years. I was in the
22 state legislature, in the House of Representatives,
23 for two years. That was up til 2002. From 2002
24 until present I've been state senator for my district
25 in Davenport.

1 Q. Okay. Are you on any committees?

2 A. Yes. I'm the chairman of the agriculture
3 committee, the standing agriculture committee; I'm
4 vice chairman of ways and means--this is Senate; I'm
5 on the ethics--I'm on the economic development budget
6 subcommittee; and then I do have ethics committee,
7 labor and business committee, commerce committee, and
8 natural resources.

9 Q. Do you know Mr. Johnson?

10 A. Yes.

11 Q. Stephen Johnson?

12 A. Yes.

13 Q. How do you know him?

14 A. Actually I've done business with him. He's
15 done a lot of my cremations over the last probably
16 five or six years. I've known him through the court
17 case, the previous case we mentioned. I was
18 subpoenaed as a witness by, I think, Jennifer Cartee.
19 She was the lawyer for (inaudible).

20 MR. BITTNER: Could I clarify that? There's
21 Cathy Cartee and there's Jennie Clausen.

22 THE WITNESS: Oh, it's Cathy?

23 MR. BITTNER: Cathy is the brunette and
24 Jennie Clausen would be the, I think--was it Jennie
25 Clausen? Was she blonde?

1 THE ADMINISTRATIVE LAW JUDGE: You know, I
2 think the record indicates Jennie Clausen was the
3 attorney of record. I don't think there's any
4 dispute about that.

5 MR. BITTNER: Jennie works for--I'm sorry.
6 Ms. Clausen worked for Ms. Cartee at one point in
7 time. So that's maybe how we got confused.

8 THE WITNESS: Okay. I'm sorry.

9 MR. BITTNER: At that time she did.

10 THE WITNESS: I've known him through that
11 proceeding (inaudible).

12 BY MR. BITTNER:

13 Q. Did Mr. Johnson ever approach you wanting a
14 change in the legislation, certain legislation?

15 A. He did not approach me.

16 Q. Okay.

17 A. I made the suggestion under--when I was
18 involved in the court case, that it needed to be
19 changed to the administrative law judge. So that
20 was on my own volition that I wanted to change that
21 law.

22 Q. And are we talking about 167.18, that
23 you wanted to change that from a 24-hour disposal
24 requirement to a reasonable time time requirement?

25 A. Yes. I wasn't sure exactly when the code

1 was definitive as far as the 24-hour rule, but with
2 the invention of freezers, and things like that--the
3 Code goes clear back to 1846, I think, when we were a
4 state.

5 So, I mean, with the freezers and
6 preservation methods, 24 hours seems rather egregious
7 as far as a definitive time to dispose of an animal
8 when there's mechanical devices to preserve the
9 animal until a reasonable time could be given. So...

10 And we have weekends, and stuff, where
11 people drop off animals. We don't go out on Sunday.
12 It's--I mean, if you're religious, you're not
13 supposed to work on Sunday. So, I mean, I don't mean
14 to get, you know, too inclusive on my definition, but
15 "reasonable time" seemed a much better prerogative to
16 go with, so that's why the initiation of the code
17 change came.

18 Q. And Mr. Johnson testified that, you know,
19 his burials--or (inaudible) in his case he could have
20 four or six horses--

21 A. I think--

22 Q. --die over the course of a weekend?

23 A. Yeah. You can get swamped. I think--
24 nothing was mentioned about this, but the law has
25 been changed nationally about the slaughter of

1 horses. This completely impacted the disposal of
2 horses business. If you can't slaughter a horse,
3 what do you do with it? A lot of these horses, the
4 common term is they go to the glue factory. I think
5 "glue factory" means to slaughter. With the fact
6 that you cannot eat horse meat, I think, in the
7 United States, that goes to France--it depends on the
8 country that allows it, but I'm not sure--that's
9 federal, but I'm not sure whether they've opened up
10 the slaughter of horses, but there's a movement to do
11 that just because of the problem it created on how do
12 you dispose of these horses. So...

13 Q. Very difficult-- The disposal of horses is
14 a very difficult political issue in the United
15 States, is it not?

16 A. Could you repeat that?

17 Q. Disposal of horses is very difficult, as
18 your testimony reflected?

19 A. It is. Even the cremation process. The
20 most expensive crematory that I know for animals is
21 maybe 40, 50 thousand dollars, and it takes about a
22 day-and-a-half to do one horse, continuous operation.
23 I'm not a crematory expert on it, but I've looked
24 into it on my own veterinary operation, whether it
25 would be feasible to do it, and it's just not

1 anything I'd like to go into.

2 It was mentioned previously about the smell.
3 There's no agent that I know of on crematories to
4 stop the smell. I mean, this particulate matter, and
5 stuff like that, you know, but you just can't stop
6 the smell on these things, so...

7 Q. Okay. Exhibit 17, take a look at it. Does
8 that reflect the change in the law that you made in
9 that instance that you're talking about? It would be
10 Senate File 405?

11 A. Yes. This was my bill--well, it might have
12 been a committee bill.

13 Q. Okay.

14 A. It was generated by myself, and a lot of
15 times it goes into the committee process, and it goes
16 in as a committee bill, and--it came through the
17 agriculture committee.

18 Q. Ultimately adopted into law; correct?

19 A. Yes.

20 Q. And that's what changed the 24-hour disposal
21 requirement to "within a reasonable time"?

22 A. Yes.

23 Q. I think you said that you were chair of the
24 senate agricultural committee; is that correct?

25 A. Yes. I have been previous chair of the ag

1 and natural resources budget sub, too. I didn't
2 mention that.

3 Q. Do you have Exhibit 12 in front of you?

4 A. Yes.

5 Q. Have you looked at that before today, before
6 you came in here? Take a--

7 A. Oh, I didn't look at the rest of this.

8 Q. My first question--

9 A. Which--

10 Q. --is pretty simple. What administrative
11 body is in charge of dead animals?

12 A. The agriculture; IDALS, Iowa Department of
13 Ag and Land Stewardship.

14 Q. Okay. Is there any suggestion in Exhibit
15 12, the statute set forth in Exhibit 12, that the DNR
16 has been given authority to regulate the disposal of
17 dead animals?

18 MR. TACK: I object, Your Honor. This, I
19 think--and possibly I should have done more
20 objections with Mr. Levetzow's testimony, but, again,
21 I think this is especially important that we don't
22 ask Dr. Seng, Senator Seng, to start giving his
23 opinions on the legal--the legal interpretation of
24 the statutes because there could be some bias
25 implied, and I think we've addressed that with--not

1 bias, that's the wrong word. But the objection that
2 I had made about the testimony, we're getting into
3 his interpretation of the statutes as a legislator.

4 MR. BITTNER: I think the witness is
5 entitled to comment on the combination of law and
6 facts, and this person certainly knows what
7 administrative body is in charge of--and what the
8 statutes enacted by the State of Iowa say as it
9 relates to a particular factual situation.

10 THE ADMINISTRATIVE LAW JUDGE: You can ask
11 the witness questions about facts, but the legal
12 interpretation is something that I am to decide.
13 I've already issued a ruling on your earlier subpoena
14 related to Dr. Seng's testimony. You've declined to
15 make an offer of proof on that issue. We'll proceed
16 if you have some specific fact questions for him. I
17 can read the Iowa Code. I can read that dead animals
18 is in the IDALS statute.

19 MR. BITTNER: Can I make that question as an
20 offer of proof, or would you prefer that I do so at
21 the end?

22 THE ADMINISTRATIVE LAW JUDGE: You can do so
23 at the end. I gave you that option at the beginning
24 and you declined to make an offer of proof. I'll let
25 you do it at the end. I don't want it to be confused

1 as testimony.

2 MR. BITTNER: Okay.

3 BY MR. BITTNER:

4 Q. To your knowledge, to your personal
5 knowledge, is there any statute anywhere that says
6 that the DNR is in charge of disposing of dead
7 animals?

8 A. Up until today I would have said no. The
9 only thing I have found since that was today on--it
10 was in Code 100 under the DNR.

11 THE ADMINISTRATIVE LAW JUDGE: What is that?
12 Exhibit 10?

13 MR. BITTNER: Yes.

14 THE WITNESS: I'm sorry.

15 THE ADMINISTRATIVE LAW JUDGE: You're fine,
16 Dr. Seng.

17 THE WITNESS: We go through this, you
18 mentioned this, probably--

19 BY MR. BITTNER:

20 Q. Yes.

21 A. We do this (Inaudible).

22 Q. (Inaudible) I'll give you my copy.

23 A. No. It's--

24 THE ADMINISTRATIVE LAW JUDGE: I wonder if
25 it's over in this stack over here?

1 THE WITNESS: It's in this stack. I'm
2 sorry.

3 A. Here, it is. No, these are it.

4 THE ADMINISTRATIVE LAW JUDGE: Yup, I think
5 that's it. I think I just saw it there in this
6 stack. Okay.

7 MR. BITTNER: There's one of them.

8 A. This is the only thing where I would think
9 the DNR might have--your question again? Was there
10 any reason the DNR might have--

11 BY MR. BITTNER:

12 Q. Is there any statute anywhere, to your
13 knowledge, that says the DNR is in charge of
14 disposing of dead animals?

15 A. Okay. If it would be under the solid waste
16 provision, whatever this said, Code 455B and 455D, it
17 mentions contaminated animal carcasses. It means
18 "Waste including carcasses, body parts and bedding of
19 animals that were exposed to infectious agents during
20 research, production of biologicals, or testing of
21 pharmaceuticals."

22 Now, I'm not sure which would outweigh
23 whether--I mean, if this would be a special medical
24 waste, I would say, yes, they might have super power,
25 but that would be the only case whatsoever, if it

1 would be an infected animal carcass.

2 Q. Okay.

3 A. Otherwise, any other animal would not be
4 under there.

5 Q. Okay. So just for purposes of trying to
6 clarify your answer, first of all, that's not under
7 the statute, that's under the administrative
8 regulations that you just read; right?

9 A. These rules?

10 Q. That's part of Exhibit 10, right?

11 A. Yeah. This isn't code--well, this is under
12 definitions. That might be in code.

13 Q. Is that Exhibit 10 or 11?

14 A. This is--no. No, that's Exhibit 10. This
15 is Exhibit 10.

16 Q. Okay.

17 A. Is this code or is this rules?

18 Q. That's administrative rules. Exhibit 10 is
19 administrative rules.

20 A. Okay. It's not in code, then. It's in
21 definitions, though.

22 Q. Okay. But that's the definitions in the
23 administrative rules?

24 A. In the administrative rules.

25 Q. Okay. In the administrative rules; correct?

1 A. Okay. Okay.

2 Q. Okay. And second of all, as long as you've
3 answered that question the way that you have, there's
4 no evidence that you have that that situation that
5 was described in the rule that you read applies to
6 the horses that Mr. Johnson was burying in this case;
7 right?

8 A. It would be speculation, but I'm almost sure
9 Steve is not taking--unless from University of Iowa
10 Research Facility, or something. You'd have to ask
11 him. I'd have to say I don't know on that.

12 Q. That deals with a special situation of
13 contaminated carcasses; correct?

14 A. Yes. I don't know whether he did that or
15 not. If he did, I have--

16 Q. You have no knowledge one way or the other?

17 A. I have no knowledge of that, but I
18 didn't--no.

19 Q. Okay. Do you recall coming to my office
20 about a month ago, sir?

21 A. Yes.

22 Q. And at the time I advised you that the DNR
23 claimed that Mr. Johnson was disposing of,
24 quote/unquote, solid waste, right? That that was
25 their charge in this case?

1 A. Yes.

2 Q. Do you recall what your reaction was at that
3 point in time?

4 A. I was rather baffled by the statement that
5 you made because it is supposed to be under the
6 control of IDALS. I didn't think that animals ended
7 up under the definition of solid waste.

8 Q. Do you recall making the statement that pet
9 owners in this state would be shocked if they knew
10 that their pet cats and dogs were solid waste?

11 A. Oh, definitely. I mean, there is no--even
12 on the definition of solid waste it doesn't become
13 animal specific as to which animal is solid waste.
14 So if it doesn't say specifically what animals are
15 solid waste, I would say it's all-inclusive, that any
16 animal would be solid waste. Therefore, the reason
17 that I was befuddled--or just astounded, that every
18 person that has an animal and it dies, it's under
19 that specific classification.

20 Q. In your experience, as a veterinarian and an
21 Iowa legislator, are dead animals solid waste, to
22 your knowledge and belief, with the one exception
23 that you read?

24 A. They are not solid waste.

25 Q. When you were in my office, just to expedite

1 things, did you go through the DNR definition for
2 solid waste?

3 A. Yes. It's rubbish, garbage, and refuse, I
4 think.

5 Q. Right. And did you see anything in those
6 sub- categories that led you to believe that a dead
7 animal was solid waste, as they were defining things?

8 A. If I remember right, reading that animals
9 are not even mentioned in those categories, the word
10 "animal"--or "dead animal." It's like we have
11 stated, metal, things of that nature.

12 Q. So you saw nothing that defined a dead
13 animal as solid waste when you were going through
14 those--

15 A. Yes, except for that one exception.

16 Q. All right.

17 A. That would be more medical waste, but they
18 would involve animal parts.

19 Q. But you did see, and we've discussed the
20 regulations where despite the fact that there wasn't
21 any definition of a dead animal as solid waste, that
22 they were trying to regulate farm animals as solid
23 waste; correct?

24 A. Yes.

25 Q. And those were some of the provisions that I

1 discussed with the State's witness; correct?

2 A. Yes.

3 Q. All right. You recall that we discussed
4 human cemeteries some?

5 A. Yes.

6 Q. And you heard Mr. Johnson testify earlier
7 today that he was aware that dead animals are now
8 being disposed of in human cemeteries. Is that your
9 understanding as well?

10 A. It wasn't specifically characterized on
11 that. To me there's two definitions of animals being
12 interred, whatever you say, in a cemetery, a human
13 cemetery.

14 In Davenport there is Oakdale Cemetery,
15 which has a pet section of their cemetery, and then
16 they have the human section of their cemetery. And
17 it's not regarded as a multi-species cemetery, it's
18 called Oakdale Cemetery.

19 So in that respect, yeah, there's many
20 animals that are interred in cemeteries, if the word
21 interred is the right word.

22 However, the other part of that, if you're
23 implying that animals are buried in the casket with
24 the owner, yes, that's being done, too, and I have to
25 say I don't know whether it's legal or not to do

1 that. I haven't ever gotten into that part of it.

2 But I, as a veterinarian, have had when an
3 owner dies, the same day they'll bring the animal in
4 and have it put to sleep. And then what happens to
5 that animal, I don't know. So, I mean, they may
6 actually be buried with the person, I'm not sure
7 whether it's done, but I've heard that it has been
8 done. That's sort of, whatever you call it, second
9 nature, whatever the term is for it. So...

10 Q. But Oakdale, for instance--

11 A. Yes.

12 Q. --it buries pets in a stand-alone sort of
13 part--

14 A. Yeah, pet section of the cemetery.

15 Q. And other cemeteries do that in this state,
16 right?

17 A. I had--I had White Haven Pet Cemetery for
18 about 25, 30 years. I've been a veterinarian for 43
19 years. I had my own pet cemetery. So, yes, we
20 buried animals all the time. So...

21 Q. And we discussed the embalming process a
22 little bit; correct?

23 A. Yes.

24 Q. All right. And you're the one that told me
25 that human embalming involves formaldehyde, right?

1 Unless they've changed their practices very recently,
2 I think is what you said, right?

3 A. Yes. Yes. Yes.

4 Q. And formaldehyde is a harmful chemical,
5 right?

6 A. We just had a conference--maybe I should--
7 on GMO corn and non-GMO corn. It's a federal
8 regulation, I think, formaldehyde--they tested corn.
9 It's GMO corn, and it has formaldehyde in it. Just
10 for the fact it's genetically modified seed, and it
11 grows into a genetically modified plant, it does have
12 formaldehyde in it. And there's federal guidelines
13 on how much percentage because we eat that corn. 90
14 percent of the corn on the grocery store shelves is
15 genetically modified corn, and there is definitely
16 formaldehyde in some of that. So it's a very hot
17 topic right now, especially in California. They
18 spent 40--they corrected me. I think it's 54 million
19 dollars on the referendum, and it lost by 53--3
20 percent in California.

21 Q. Formaldehyde--

22 A. The other side spent, I think, 54 million
23 dollars.

24 Q. Formaldehyde--

25 A. Very dangerous.

1 Q. It's bad stuff?

2 A. It is bad. I had it in--we used
3 formaldehyde to send tissues to Iowa State for
4 diagnostic purposes. And the old skull and
5 crossbones is rarely used any more. I mean, that's
6 one bottle that still, I think--some of them have the
7 skull and crossbones on then.

8 Q. It's that bad?

9 A. It's bad. You should avoid skin--we have
10 MDS sheets, which is required by OSHA, and even skin
11 contact and the breathing of fumes, and stuff--it's
12 definitely explained in there about the fumes, not to
13 breathe them, not to have skin contact. If you do,
14 how fast to wash it off. It's bad.

15 Q. And you don't want it contaminating your
16 groundwater?

17 A. No.

18 Q. Okay. I'll ask you the same questions that
19 I asked the other witnesses--

20 A. I think it's MSDS sheets. I'm not an
21 acronym person.

22 Q. Me either. I can't even remember my own
23 name half the time.

24 A. Yes.

25 Q. Have you ever heard the DNR trying to

1 regulate the disposal of human bodies under its solid
2 waste rules?

3 A. No. No.

4 Q. Okay. In the process of this case, or maybe
5 even before that, you're aware of the term "natural
6 burial" or "green burial," right?

7 A. Yes. I should back up on that. The DNR may
8 regulate human disposal if it involves medical waste
9 because it's in the solid waste part.

10 Q. Okay. That one exception--

11 A. That one section. They would be involved
12 code wise--well, rule wise, I guess. I shouldn't say
13 code--well, a rule is an extrapolation of a code.
14 It's more definitive.

15 Q. But that's limited to one for instance?

16 A. Yes, that's the only instance. I don't want
17 to--you asked about green?

18 Q. Yes.

19 A. What was the question?

20 Q. Basically you agree with the other
21 witnesses' testimony that whether--when a body is
22 being put into the ground, all that's happening is
23 it's breaking down to the same chemical animal--or
24 same chemical elements that were extracted from the
25 ground when the animal was alive, right?

1 A. Yeah.

2 Q. All right.

3 A. I would maybe refer to it as organic matter.
4 It's decomposable matter. The bones take longer than
5 flesh. Each one has its own degratory (sic)
6 timetable. But, yes, it's--yes.

7 Q. If we're having a natural burial, or a green
8 burial, a naturally-decaying body isn't causing any
9 harm to the environment, is it, unless it is one of
10 those--

11 MR. TACK: I'd object, Your Honor. I'm not
12 sure that we've established that Dr. Seng has
13 groundwater protection knowledge, or what effects it
14 may have.

15 THE ADMINISTRATIVE LAW JUDGE: Do you want
16 to voir dire the witness?

17 MR. TACK: I really don't, Your Honor.

18 THE ADMINISTRATIVE LAW JUDGE: Any response?

19 MR. BITTNER: I think we've established his
20 expertise as a veterinarian. And obviously as a
21 veterinarian, Your Honor, I think you have to take
22 your basic science, your chemistry and things of that
23 nature. We have listed him as a witness, an expert
24 witness, for purposes of this. I think he's
25 competent to testify (inaudible).

1 THE ADMINISTRATIVE LAW JUDGE: I think we
2 have no choice but to voir dire the witness. I'm
3 certain he doesn't have that background, but we can
4 see.

5 MR. TACK: All right. Shall I precede?

6 THE ADMINISTRATIVE LAW JUDGE: You may.

7 VOIR DIRE EXAMINATION

8 BY MR. TACK:

9 Q. Dr. Seng, you have training as a
10 veterinarian; correct?

11 A. Yes.

12 Q. Do you have any specialized training in
13 regard to hydrology?

14 A. The training I get is usually through the
15 Senate. We have people come in and tell us about
16 water quantity, water quality, the aquifers. It's
17 not--you do not get continuing education for that,
18 but we are briefed on that all the time.

19 I think if you're--I am a member of the
20 natural resource committee, and I was the budget
21 chairman for ag and natural resources. Some of the
22 appropriations definitely involved water quality and
23 quantity, and hydrology. But I have no certificate
24 or degree in that. But I am definitely--the part of
25 the Senate that I am appointed to by the majority leader

1 mainly is agriculture and natural resources issues.
2 So I'm not saying I'm certified as an expert witness.

3 Q. Does your veterinarian training require you
4 to have knowledge of decomposition, or--decomposition
5 of animals?

6 A. It's broad and encompassing, my education,
7 but it's--as far as regulatory, no.

8 Q. And--

9 A. I mean, I could attend--when I get my CE
10 requirements, we have a broad spectrum of things we
11 go to, but there's no mandate on which classes we
12 have to have, as long as they're certifiable
13 requirements.

14 MR. TACK: The question, I guess, at issue,
15 Your Honor, is whether the briefings that the Senator
16 receives on natural resource matters are sufficient
17 to qualify him as an expert witness, and I think it
18 would require more formalized educational training
19 than that to be able to testify in regard to the
20 groundwater impacts of green burial.

21 MR. BITTNER: May I respond?

22 THE ADMINISTRATIVE LAW JUDGE: You may.

23 MR. BITTNER: I think they're both in rules
24 of evidence, even though they don't apply in this
25 case--or to administrative proceedings, and the cases

1 under the rules of evidence, and I think 207 and Rule
2 703, says an expertise can be acquired in a number of
3 ways. Education is one way, experience is another
4 way, just every day occurrences, what you're exposed
5 to.

6 And the question was, and I think it has
7 to be in the context of the question asked, the
8 question asked was, "To your knowledge, as somebody
9 that has some expertise, is a naturally-decaying body
10 in the ground going to cause any harm to the
11 environment?" And I think he said he has received--
12 he has received training in that area through the
13 legislature, and I think that is sufficient to
14 qualify him as an expert. And I'm sorry if my voice
15 trailed off there.

16 THE ADMINISTRATIVE LAW JUDGE: I'm going to
17 let the witness testify regarding his general
18 knowledge of that, and I'll give it the weight that
19 it's due. I do not conclude that he's an expert that
20 would meet the Daubert requirements to testify as an
21 expert on that issue. So I'll give it the weight
22 that it's due.

23 MR. BITTNER: I appreciate that ruling, Your
24 Honor.

25

1 DIRECT EXAMINATION (Resumed)

2 BY MR. BITTNER:

3 Q. So back to the question. Does a body that--
4 to your knowledge, that is naturally decaying in the
5 ground, cause any harm to the environment?

6 THE WITNESS: Thank you, Your Honor.

7 A. This is sort of an opinion, but we do make
8 laws regarding our opinions, which the judges and the
9 lawyers have to interpret. So it is sort of a
10 weighty thing to put on people when they're maybe,
11 like, as Jon has said, not a specialist, but we are
12 making laws regarding this.

13 I think the point in question here is the
14 quantity of the animals in a certain spot. I think
15 it's exemplified by the fact that the actual farm
16 animals it's definitive on how many actually you can
17 put in an acre of ground that possibly would
18 contaminate it.

19 However, there's a wanton disregard about
20 how many humans can be put in an acre of ground. No
21 reference has ever been made, that I know of, in the
22 code towards that, not that a farm animal has more
23 decom--stuff that would contaminate the ground more
24 than a person. And we've already gone through the
25 Trappist Monks that make these wooden caskets up in

1 Dubuque, and stuff like that. Still applicable that
2 wooden caskets--a vault is not required by the State,
3 even embalming I don't think is required by the
4 State, and I hate to go on record about that, but I
5 don't think it is.

6 In answer to your question, if I would just
7 give my honest opinion, I don't think there's any
8 problem with putting an animal in the ground and
9 letting it go back to its natural decomposition. The
10 only mitigating thing that would be maybe a problem
11 would be the quantity of animals in that parcel. But
12 there's animals that die on the ground daily that run
13 into our streams, that decompose into the ground,
14 whether it be by compression or anything like that.
15 But they just--like the coyotes you mentioned and
16 stuff like that, parts of them end up in animals'
17 stomachs, parts of them end up going into the ground.
18 So it's more a quantity issue, but I would say that
19 decomposition normally is not a problem whatsoever.

20 Q. Under normal circumstances?

21 A. Under normal circumstances.

22 Q. In fact--

23 A. If you go to Sobibor or Auschwitz, would
24 there be contamination of those prisons? I'm not
25 sure what the Germans did to that--you know, as far

1 as disposition of that land, and the groundwater
2 protection, I have no clue, but I would say there's a
3 problem possibly in quantity.

4 Q. As far as burial of horses on the one hand,
5 or by the same token roadkill, it's the DNR is just--

6 A. The fact that the Federal Government, State
7 Government, County Governments are not saying
8 anything about human cemeteries, I would say there's
9 no problem. They would be--they would be coming
10 after human cemeteries if there was a problem.

11 Q. Ashes to ashes, dust to dust is what is
12 going on?

13 A. Yes.

14 Q. All right. From your point of view, is
15 there any different impact on the environment between
16 when a farmer buries his livestock than when
17 Mr. Johnson is burying a horse?

18 A. None. You talked about--

19 Q. You've been here when we talked about the
20 regulation. Just for the record it's 567 Iowa
21 Administrative Code 100.4(2)(b)(2). That allows the
22 owner of a livestock operation to bury the 7 cattle,
23 44 swine, 73 sheep and lambs, 400 poultry carcasses,
24 and two dead animals of every other species on every
25 acre they own. Okay. And yet the DNR says that

1 Mr. Johnson can only bury one or two horses. Are
2 they treating similarly-situated people in a similar
3 manner by giving the livestock operator this many
4 animals and Mr. Johnson only two?

5 A. There's a disparity there. I don't think he
6 should be precluded from having one or two when a
7 farmer can do that many. So...

8 Q. And I think you advised me of this on a
9 break. There's no law that says that people cannot
10 bury animals that are not used for agricultural
11 purposes; correct?

12 A. Yes. If I could explain that a little bit?

13 Q. Please.

14 A. And you might want to check code, I don't
15 have a code reference to this, but horses were taken
16 out of the classification of farm animals by a
17 different part of the Iowa Code. It's the Department
18 of Revenue for the State of Iowa, which mainly on an
19 income tax--you don't have to pay income tax if
20 you--if the animals are used in production of
21 farming. That's mainly directed toward the Amish and
22 the Mennonites. If they're turning ground with those
23 animals, or using draft animals to actually farm
24 with, or to pull loads of hay in, whether it be a
25 religious issue or just they're against gas and

1 contaminating the environment, they want to use
2 horses, they are considered farm animals. If a
3 farmer has ten thoroughbred horses, they're
4 not--they're companion animals, they're not used in
5 the farming.

6 So they have actually split horses into two
7 categories, not the Iowa Department of Natural
8 Resources, or not the IDALS at all. It's the tax
9 implication. Now horse are classified as companion,
10 which would be like a dog or a cat.

11 They do relegate towards farm dogs, too. If
12 that dog is used in herding sheep, or anything like
13 that, yes, you can deduct that. But if you have a
14 dog that's a pet, although farmers have been known
15 to--it's quasi, "Well, he's a farm pet."

16 The same with all-terrain vehicles. Your
17 ATVs, they run around, they check cattle. What about
18 snowmobiles? They run around and they check the cattle
19 with the snowmobiles because the tracker may get
20 stuck out in the field with the snow, and stuff like
21 that. There's a lot of gray areas in the code, as
22 far as what you can--and we tried to clarify that
23 code.

24 But the fact that the IRS--not the IRS--the
25 Iowa Department of Revenue has separated companion

1 animals as not being farm animals just throws them
2 into a category of all other animals that are not
3 farm animals. And all other animals that are not
4 farm animals are not designated as far as how you can
5 bury them, only by the DNR, which regulates the
6 disposal of dead animals. They're thrown into that
7 category of disposal of dead animals that are not
8 farm animals.

9 So that there's--you're penalizing him because
10 they're--they are not farm animals. Theoretically,
11 he doesn't have to put two animals per acre.

12 Q. So what you're saying, I think, I'm just
13 trying to properly sum up your testimony--

14 A. There's no code that actually specifies how
15 many animals, other than the farm animals, you can
16 bury in an acre.

17 THE ADMINISTRATIVE LAW JUDGE: Well, I think
18 the question called for a "yes" or "no" answer.

19 MR. BITTNER: Yes.

20 THE ADMINISTRATIVE LAW JUDGE: And the question
21 is no, you're not aware of any code section; correct?

22 THE WITNESS: Yes. Thank you.

23 BY MR. BITTNER:

24 Q. And to summarize, when we're talking about
25 companion animals, okay--

1 A. Yes.

2 Q. --there is no code section that prohibits
3 the burial of companion--of what you've called
4 companion animals; correct?

5 A. There is no code section that I know of.

6 Q. All right.

7 A. We're talking about any new regulation, but
8 it would have gone through my--

9 Q. Okay. You would have known about it?

10 A. It has to go through either the House, the
11 Senate, or the Governor, so it would have gone
12 through my committee, and I have not missed a meeting
13 yet, so...

14 MR. BITTNER: Okay. Thank you.

15 Your witness, please.

16 THE ADMINISTRATIVE LAW JUDGE: Any cross?

17 MR. TACK: Yes, Your Honor.

18 CROSS-EXAMINATION

19 BY MR. TACK:

20 Q. Dr. Seng, I have a few questions for you.
21 From your veterinary experience, so what would be a
22 circumstance where you need to use Pet Memories'
23 services, what leads up to that?

24 A. I have a very small clinic, it's actually
25 the size of a two-garage clinic. It's one of the

1 smaller ones in the Quad Cities. When an owner
2 brings an animal to me, it gets down to who owns this
3 animal. Again, if I'm just a conduit of that animal
4 to take it to a different place for disposal, I have
5 legal responsibility until somebody would pick up
6 that animal. I do have a freezer outside my clinic
7 to put animals in, although you can't put horses in a
8 freezer. I think that's why he had horses out on
9 frozen ground there.

10 But I don't--this Saturday we put two
11 animals asleep, a big one and a small one, they're
12 both dogs. We can have anywhere from eight or ten or
13 none come in. And then I--I'm in the Senate, and I
14 usually at the end of the week--Monday I had to take
15 them out--yesterday, and take them out to Oakdale,
16 so... They're legally mine until I drop them off at
17 Oakdale, so--or to Steve.

18 Q. The pet owners have entrusted them to you
19 for disposal; correct?

20 A. Yes.

21 Q. And once you give them over to Pet Memories,
22 the intent is that they're going to be permanently
23 disposed of; is that right?

24 A. That's correct.

25 Q. And you don't dispute that these are

1 physically solid things, right? That the pet is a
2 solid object, or semisolid, at least?

3 A. No, I don't dispute that they're a solid
4 object.

5 Q. Okay. So it's a solid material that is
6 being permanently disposed of, right?

7 A. Yes. It's not liquid. It's solid.

8 Q. And your testimony--

9 A. I'm not saying it goes under the IDNR part
10 of solid waste as far as disposal, I definitely
11 disagree with that. It is maybe solid waste, or
12 could be classified--there's nothing that says an
13 animal could not be classified as solid waste. But
14 if it's addressed--I can put an animal in a landfill,
15 I definitely can.

16 The Scott County Waste--the Scott County
17 Landfill, it's legal for me to put an animal into the
18 landfill. There are certain counties, I'm pretty
19 sure, in Iowa that do not allow--accept animals into
20 their solid waste part, they don't. I may be wrong
21 on that, but I'm pretty sure there are certain kinds
22 that don't. In Davenport we can.

23 We do have disposal of animals, where people
24 come and I say, "Do you want to dispose of it, or do
25 you want to cremate it?" And they say, "Dispose of

1 it." I don't tell them where it's going, but if they
2 ask me a further question, like, "What is disposal?"
3 I say, "We have a service that picks them up." And
4 if they ask me that next question, "What's that
5 service?" I say, "It's the dumpster people," and I
6 will tell them that. Yeah, we do more cremations
7 that way.

8 But then I say they do end up in the
9 landfill, they do end up in the ground, they're dead.
10 It's your perception where you want your animal to go.

11 But if you want to say are they solid waste?
12 Yes, because they're going in a landfill that accepts
13 solid waste. So, yes, you're right on that aspect.
14 But, yes, you can bury animals, too. It's defined in
15 code under IDALS that you can--they're responsible
16 for the burial of animals.

17 So this thing is it a solid waste or should
18 it be buried, there's nothing that says there can't
19 be either or. But to include every animal as solid
20 waste, yes. But to say they have to be disposed of
21 as solid waste, no.

22 Q. I think you mentioned earlier, if I heard
23 you right, that cremation can be a little pricier
24 than other disposal options?

25 A. Yes.

1 Q. That's actually--that really does cost Pet
2 Memories, or whoever, more to cremate; correct?

3 A. Yes. To run a crematory, there's I don't
4 know how many jets in that burner, and they just
5 don't burn up like paper, it takes awhile. There's
6 liquid, and then that fat catches on fire, it burns,
7 it will burn--sometime an animal (inaudible), but
8 it's expensive. I don't know what it costs. I would
9 say maybe 10 to 20 dollars worth of natural gas to
10 burn it, or you can use fuel oil, too, it depends.
11 So, you know, it's not cheap.

12 Q. And a green burial, as you described, would
13 be a cheaper disposal method; correct?

14 A. Possibly. I mean, if the ground is frozen,
15 you have to have a heater to thaw out the ground.
16 It's not all that simple. I mean, you try to go
17 through six inches of frost, it's not cheap,
18 especially on a horse or something like that. You
19 can't keep them, apparently, under tarps until it's
20 springtime because it's aesthetically not right, and
21 freezers don't hold ten horses. So I don't know the
22 answer to that, either. But it could be possibly as
23 expensive to bury a horse. Not maybe a Chihuahua,
24 but a horse. So I'd say no, it's not cheaper. It
25 could be, but it's not necessarily.

1 Q. Pet Memories charges you for--you pay them
2 for the services of disposal, correct?

3 A. Yes. They do a pick up and then they bring
4 the animal back, the cremains. He mentioned the
5 second trip, so...

6 MR. TACK: That's all the questions I have
7 at this point.

8 THE ADMINISTRATIVE LAW JUDGE: I just had a
9 question about Oakdale Cemetery. Is the pet area, is
10 it a vault where the pets are put into, or do you
11 know what it is.

12 THE WITNESS: It's called Petland, is the
13 name of it, and it's a little section. They
14 make--I've got their price sheet. We used to do
15 vaults. We actually poured the cement, put the
16 casket on top of the cement, and then we'd pour--it
17 was almost a continuous pour. You'd pour right over
18 the top. I'm pretty sure they may do vaults.

19 There are some pre-made, either plastic or
20 metal or cardboard, but those wouldn't be considered
21 a vault. Most of them are impervious, and stuff like
22 that.

23 People use beer coolers, and stuff, snap
24 them down, and stuff. We've actually had these
25 things float up to the top when the water table--when

1 the ground gets soft, and actually if you go down to
2 the cemetery and you'll see a cooler--I shouldn't say
3 beer cooler--you'll see a cooler. So I'm sure they
4 don't use that, but there is a market for vaults on
5 pets, there are, but not every pet has to be in a
6 vault.

7 THE ADMINISTRATIVE LAW JUDGE: At Oakdale,
8 they don't require a vault for every pet?

9 THE WITNESS: I'm sure they don't.

10 THE ADMINISTRATIVE LAW JUDGE: You don't
11 know for sure?

12 THE WITNESS: I don't know for sure, but
13 I've seen a price list. It's an option. So I have
14 seen a price list. I'm not even sure if they have
15 vaults on it. They have all these different things,
16 but I've been in the business and I can't--I would
17 say I don't know, I guess, to that. But it's not
18 required, I don't think. I'm almost sure it isn't.

19 THE ADMINISTRATIVE LAW JUDGE: Any redirect?

20 MR. BITTNER: One question.

21 REDIRECT EXAMINATION

22 BY MR. BITTNER:

23 Q. You don't know, one way or the other,
24 whether or not Mr. Johnson basically passes on the
25 increased cost of cremation to his customer, do you?

1 A. An increased--

2 Q. In other words, do you know one way or the
3 other whether or not he charges more for cremations
4 than general disposals?

5 A. I don't know, no.

6 MR. BITTNER: That's it.

7 THE WITNESS: Well, he's done work for me.
8 Everything I've done with Steve has been with
9 cremation, so...

10 MR. BITTNER: Okay.

11 THE ADMINISTRATIVE LAW JUDGE: Any recross?

12 MR. TACK: No, Your Honor.

13 THE ADMINISTRATIVE LAW JUDGE: All right.

14 The witness is excused.

15 (Witness excused.)

16 THE ADMINISTRATIVE LAW JUDGE: Any
17 additional evidence?

18 MR. BITTNER: No. I would like to make a
19 motion. I renew my motion for purposes of the record.

20 THE ADMINISTRATIVE LAW JUDGE: All right.

21 MR. BITTNER: And I'll just say I renew my
22 motion for purposes of the record.

23 THE ADMINISTRATIVE LAW JUDGE: All right.

24 Overruled.

25 MR. BITTNER: All right.

1 THE ADMINISTRATIVE LAW JUDGE: I'm assuming
2 you don't have any additional argument, Mr. Tack?

3 MR. TACK: No, Your Honor.

4 THE ADMINISTRATIVE LAW JUDGE: All right.
5 Do the parties have any additional evidence, any
6 rebuttal?

7 MR. TACK: No.

8 THE ADMINISTRATIVE LAW JUDGE: Would the
9 parties prefer to submit simultaneous briefs for
10 their closing arguments, or do you want to do a
11 closing argument on the record?

12 MR. BITTNER: I would assume that if you
13 wanted summation--I mean, I really think that our
14 pretrial briefs are pretty consistent with our
15 arguments here, but I think it would be easier to do
16 written, if you want to do writing. I would prefer
17 to do writing, but--you know.

18 MR. TACK: Right. I mean, I feel as if
19 there's not much to add to my pretrial, except that I
20 was so rushed that I'm not real happy with the
21 typographical errors, and other results, but I'm
22 happy to do a written close, basically.

23 THE ADMINISTRATIVE LAW JUDGE: All right.
24 Should we do those simultaneous, too?

25 MR. TACK: Yes. Sure.

1 THE ADMINISTRATIVE LAW JUDGE: How many days
2 do you want? 30? 45? 15?

3 MR. TACK: Normally I would say 15. I have
4 two commission meetings and another hearing in the
5 next 15 days, so, I don't know, is 30--

6 MR. BITTNER: Let me tell you, if it's all
7 right with Her Honor, deadlines with other attorneys,
8 I understand if you need more time than that--

9 THE ADMINISTRATIVE LAW JUDGE: I personally
10 don't care. So whatever works for the parties. If
11 you want 60 days, if you want 45--

12 MR. TACK: 30 would be fine for me, Your
13 Honor.

14 THE ADMINISTRATIVE LAW JUDGE: 30? All
15 right. 30 days, simultaneous briefs, no rebuttal.

16 MR. BITTNER: And before we close, I just--I
17 think there's a misunderstanding. I've been doing
18 this for almost 30 years. I have never made fun of
19 anybody in charge of any hearing, nor would I. It's
20 not in my character, Your Honor. So...

21 THE ADMINISTRATIVE LAW JUDGE: All right.
22 With that I'm going to close the record, the
23 evidentiary record. I'll take the matter under
24 advisement after I receive the briefs 30 days from
25 now.

1 Does anyone have a calendar? I don't have
2 one with me, to see--

3 MR. BITTNER: I have a cell phone, if I may
4 turn it on. I have a calendar in my cell phone.

5 MR. TACK: Just for clarification, these
6 copies, are these--

7 THE ADMINISTRATIVE LAW JUDGE: Those will be
8 returned. I have my own.

9 MR. BITTNER: You don't want the ones with
10 the original exhibit stickers on them?

11 THE ADMINISTRATIVE LAW JUDGE: Well, I
12 have--you sent me what I thought was the originals.

13 MR. BITTNER: Yeah, I did. And they're the
14 same, they just don't have stickers on them.

15 THE ADMINISTRATIVE LAW JUDGE: They are all
16 marked.

17 MR. BITTNER: He has a better one, a better
18 calendar than I do.

19 THE ADMINISTRATIVE LAW JUDGE: All right.

20 DR. SENG: Here, I better turn my cell phone
21 on.

22 THE ADMINISTRATIVE LAW JUDGE: How do we get
23 it to--

24 MR. BITTNER: Here, I got one. I'm not very
25 literate--

1 THE ADMINISTRATIVE LAW JUDGE: All right.
2 Why don't we just do May 8th.

3 MR. TACK: May 6th is a Monday.

4 THE ADMINISTRATIVE LAW JUDGE: Why don't we
5 just do May 8th. It's a Wednesday.

6 With that I'm going to close the record and
7 I'll turn off the recorder. Thank you.

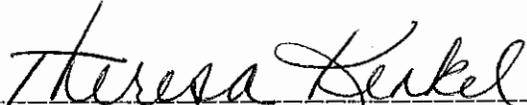
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C E R T I F I C A T E

1
2 I hereby certify that the foregoing pages
3 represent a true and complete transcript, to the best
4 of my ability to understand the recording, of the
5 captioned hearing which was electronically recorded
6 and later reduced to typewriting by me.

7 I further certify that I am neither attorney
8 or counsel for, nor related to or employed by any of
9 the parties to this action, and further that I am not
10 a relative or an employee of any attorney or counsel
11 employed by the parties hereto, or financially
12 interested in the action.

13 Dated at Des Moines, Iowa, this 13th day of
14 September, 2013.

15
16
17
18 
19 _____
CERTIFIED SHORTHAND REPORTER

**Iowa Department of Natural Resources
Environmental Protection Commission**

ITEM

9

DECISION

TOPIC

EPC Annual Report

Commissioners will develop an Annual Report in accordance to Iowa Code section **455B.105 Powers and duties of the commission.**

The commission shall:

...

5. Make a concise annual report to the governor and the general assembly, which report shall contain information relating to the accomplishments and status of the programs administered by the department and include recommendations for legislative action which may be required to protect or enhance the environment or to modernize the operation of the department or any of the programs or services assigned to the department and recommendations for the transfer of powers and duties of the department as deemed advisable by the commission. The annual report shall conform to the provisions of section 7A.3.

Mary Boote
Chair, EPC

To: Honorable Governor Terry E. Branstad
From: The Environmental Protection Commission
Date: January 21, 2014
Subject: 2013 Annual Report and Recommendations

The Iowa Environmental Protection Commission respectfully submits its Annual Report and Recommendations to the Governor and General Assembly of Iowa pursuant to Iowa Code Section 455B.105(5). The report highlights what we consider the major activities and accomplishments of the Commission in 2013. As part of this report, the Commission submits our recommendations for policy consideration for 2014. These recommendations reflect the issues that the Commission has worked on in 2013, comments from Iowa citizens that have been shared with the Commission and issues that we believe may warrant attention in the coming months.

We thank you for your consideration of this report and its recommendations.

Sincerely,

Mary Boote, Chair, Des Moines
Environmental Protection Commission

Nancy Couser, Secretary, Nevada
Cindy Greiman, Garner
Chad Ingels, Randalia
Brent Rastetter, Ames
Bob Sinclair, Sigourney
Max Smith, Vice-Chair, Knoxville
Gene VerSteeg, Inwood

Iowa Environmental Protection Commission 2013 Annual Report and Recommendations

Pursuant to Code of Iowa Section 455B.105(5) the Iowa Environmental Protection Commission (Commission) submits the following report to Governor Branstad and the Iowa General Assembly. As specified in the status, this report discusses the accomplishments and status of the programs administered by the Environmental Services Division of the Department of Natural Resources (DNR). The report also makes legislative recommendations for consideration of the Governor and General Assembly based on Commission observations regarding the state of the environment in the past year. The report also takes into account comments and concerns the Commission hears from Iowa citizens.

As 2013 saw the beginning implementation of the statewide collaborative effort called the Nutrient Reduction Strategy, the Commission witnessed the scope and breadth of such an undertaking. The DNR will be responsible for the point-source restrictions and working towards that goal will require considerable staff time and effort.

The Commission received a Petition for Rulemaking from the Iowa Environmental Council and the Environmental Law and Policy Center to adopt numeric water quality standards on a specific set of Iowa Lakes. We agreed unanimously with DNR leadership that there were compelling reasons to deny this second attempt at numeric standards and to allow the Nutrient Reduction Strategy a chance to work.

DNR, U of I Partnership Agreement

The Commission was in unanimous agreement with DNR leadership that a cooperative agreement between the DNR and the University of Iowa could result in significant cost savings and increased research capacity for the state's water and geological resources by transferring a number of groundwater and geological activities by contract to the University's College of Engineering, IIHR – Hydrosience & Engineering.

This agreement allows the university to leverage existing state resources and obtain more grants for research. The goal is more efficient and effective services for Iowa's citizens. The DNR will retain the state Geologist position.

Summary of Air Quality Rule Changes in 2013

- Chapter 33, Plantwide Applicability Limits for Greenhouse Gases
- New Air Quality Standards - addresses changes EPA made to National Ambient Air Quality Standards for fine particulate matter (PM_{2.5}), lead and sulfur dioxide. This included much consultation with stakeholders to maintain air quality and protect public health while minimizing the regulatory impact of implementation.
- Chapter 23, Adopting the RICE NESHAP- involves standards for stationary internal combustion engines, again with much stakeholder and EPA input to come to

satisfactory regulation that will not overburden the small utilities who rarely use such equipment.

- Chapters 20,22,31, and 33 Rule amendments regarding National Ambient Air Quality Standards. The construction of new major sources of air pollution (or major modifications of existing sources of air pollution) in areas that are not in attainment with the NAAQS is governed by federal Nonattainment New Source Review regulations. In Iowa, a portion of Council Bluffs is in nonattainment for lead and in Muscatine for sulfur dioxide. By adopting these regulations, the DNR will be able to issue permits in the nonattainment areas.

Working Towards Better Relations with Stakeholders

In Chapter 17 a revision was made to compliance and enforcement procedures, allowing for informal meetings, letters of inquiry, and letters of non-compliance to be used where no environmental harm or threat to human health or safety had occurred. This allows staff to address issues of noncompliance such as late paperwork in a less punitive manner.

Enforcement of Existing Regulations

In 2013 DNR issued 116 orders, consisting of 82 Consent Orders and 34 Unilateral Orders. The total penalties were \$363,224. They breakdown as follows: Animal Feeding Operations were penalized \$45,800, Air Quality \$103,235, Solid Waste \$64,581, Underground Storage Tanks \$16,618, Wastewater \$63,550, Water Supply \$58,440, and Flood Plain \$11,000. The Commission also referred four cases to the Attorney General for further action.

Agreement with EPA

DNR entered into an agreement with EPA to expand inspections of CAFO's by the department. The department has hired and is currently training the additional staff for implementing this program after the legislature provided funding for the personnel this summer. We would highly encourage continued funding for the 7 new inspectors.

Summary and Recommendations

Public comments for the year have focused on the number of impaired waters in the state. Confinement facilities continue to garner considerable public attention as well.

Legislative agenda:

The Commission supports DNR's request to update the Code of Iowa to reflect the current air permitting program and remove conditional air quality permits from the Iowa Code. The conditional permit was created in the 1970s when the Iowa Utilities Board (IUB) required utilities to have their regulatory permits issued prior to setting electricity rates. IUB updated its administrative rules to no longer require the permit prior to rate setting. The DNR Air Quality Bureau has never used this permit type and the conditional permit requirement causes confusion for the regulated community.

Financial sustainability:

The Commission recognizes that DNR has made great strides in recent years in process improvement which has allowed DNR to improve performance in spite of declining budgets. More permits are being issued today with less staff and in less time than has happened historically. However, it must be recognized that these efficiencies have limits and that adequate financial resources are necessary to maintain responsible and reliable environmental programs for communities, industry, and agriculture.

The Commission recognizes that a number of programs have been tied to fees associated with pollutant loading and that with improved air quality and reduced generation of solid and hazardous wastes, financial support for these necessary programs is diminishing. The Commission supports the continuation of the robust programs that the DNR has developed for the protection of Iowa's land, air, and water. Specifically, the Commission further supports the collaborative development of long-term solutions in order to meet industry's need for rapidly issued permits in the air quality program. This funding challenge will provide stakeholders and the department the opportunity to work together to find the appropriate tools to assure that permitting services at the department meet the needs of a growing Iowa economy.

The Commission thanks the Governor and the General Assembly for the opportunity to submit this report and invites further inquiry and conversation about these issues.

Mary Boote, Chair, Des Moines

Max Smith, Vice-Chair, Knoxville

Nancy Couser, Secretary, Nevada

Cindy Greiman, Garner

Chad Ingels, Randalia

Brent Rastetter, Ames

Bob Sinclair, Sigourney

Gene VerSteeg, Inwood

**Iowa Department of Natural Resources
Environmental Protection Commission**

ITEM

10

DECISION

TOPIC

PROPOSED CONTESTED CASE DECISION –JOSEPH AND CAROL
JAHNKE

On May 13, 2013, the Department issued to the City of Waverly (City) a modified operation plan to Flood Plain Development Permit 2010-184. Joseph and Carol Jahnke appealed this permit alleging the approved modified operation plan, which authorized a summer pool of 905.4 feet, adversely affects their property.

A Proposed Decision was issued on January 8, 2014. The Proposed Decision affirmed the modified operation plan and opined that the evidence presented at hearing did not support the Jahnkes' contention that the modified operation plan adversely affects their property and therefore the City needed to obtain easements. This decision affirmed the Department's finding that the historic normal summer upstream pool elevation was 905.4 feet and because of that the Department correctly approved a modified operation plan which authorized a summer pool of 905.4 feet. Thus, there was no change between the modified operation plan and the historic upstream summer pool level. Because there was no change, there was no adverse impact to property owners and the City did not need to obtain easements from the property owners.

There has been no appeal of this Proposed Decision. However, the 30 day appeal period has not expired. Nevertheless, the Department has brought this Proposed Decision to the Commission pursuant to 567 Iowa Administrative Code (IAC) Chapter 7 (incorporating 561 IAC Chapter 7) which requires that a proposed decision be brought to the Commission within 30 days of its issuance. In the absence of an appeal the Commission may decide on its own motion to review the Proposed Decision. If there is no review of this Proposed Decision, it automatically becomes the final decision of the agency. Should the Proposed Decision be appealed it will be brought to the Commission again for a hearing of that appeal.

Edmund J. Tormey, Chief
Legal Services Bureau

January 15, 2014

Iowa Department of Inspections and Appeals
Division of Administrative Hearings
Wallace State Office Building – Third Floor
Des Moines, Iowa 50319

JOSEPH AND CAROL JAHNKE,)	
)	PROPOSED DECISION
Appellants,)	Docket No. 13DNR010
)	
v.)	
)	
IOWA DEPARTMENT OF)	
NATURAL RESOURCES,)	
)	
Respondent.)	

A contested case hearing was held on January 6, 2014. Appellants Joseph and Carol Jahnke appeared and Mrs. Jahnke testified. Attorney Carrie Schoenebaum represented Respondent Iowa Department of Natural Resources. Senior Dam Safety Engineer Jonathan Garton appeared and testified on behalf of the Department. Lori McDaniel and Casey Welty appeared on behalf of the Department, but did not testify. Attorney William Werger represented Intervenor City of Waverly. City Director of Public Works Mike Cherry appeared and testified on behalf of the City. Exhibits 1 through 19, W1 through W8, and Exhibits A through L were admitted into the record.

FINDINGS OF FACT

A dam has been present on the Cedar River near the City since 1914. In 1948 the City reconstructed the dam, creating a low head dam in the channel of the Cedar River from bank to bank, which was made of concrete with wooden flashboards that could be inserted into the top to increase the height by 12 to 14 inches. A low head dam is designed to have water flowing over the crest. The dam created a pool upstream. For many years the USGS has recorded the level of the pool at the gage location upstream from the dam. The level of the summer pool when the flashboards were installed typically ranged from 905 to 906 feet, depending on the summer flows. The first permit for the dam was issued in 1951, by the Iowa Natural Resources Council, the predecessor to the Department.

The Jahnkes' property is located upstream from the dam and the USGS gage location. The majority of the Jahnkes' property is located in the 100 year floodplain. The Jahnkes' property has flooded many times.

Cherry is a licensed engineer who was hired by the City in 1996. The flood of 1998 caused extensive damage to the City. The City learned that the existing concrete dam caused the flooding.

In 1999, the City began working on flood mitigation. The City Council and members of the community were interested in maintaining the historic recreational opportunities created by the dam with the pool, while mitigating against future flood events.

The City hired a consultant with expertise in floodplain modeling to provide recommendations on a new dam. The consultant suggested the City install a low head dam where the gates could be flattened in the event of flooding through inflatable bladders operated by a computer. The old concrete structure was static and could not be lowered with flooding. The City tried to obtain federal funding for the project, but was unsuccessful.

In 2008 the City was devastated by flooding. State and federal assistance was available for mitigation efforts. The City was able to secure funding to install a new dam with gates that could be lowered during flooding. The City submitted an application for a flood plain permit to the Department to modify the existing low head dam.

Garton is the lead engineer for the dam safety program in Iowa. As part of his job duties, Garton reviewed the City's application. The Department did not send the adjacent property owners notice of the application or provide an opportunity to comment because the construction did not alter the height of the upstream pool. The Department approved Flood Plain Development Permit Number FP 2010-184 in 2010. The construction was completed in November 2011. The new dam operates through an automated computer system, where the City can set the water level and the computer will adjust the air pressure in the bladders to raise or lower the gates to keep the water level constant. The level of the water for the summer pool was set at 905 feet, but the dam had the capacity of 906 feet. With the new dam the City is able to deflate the bladders to lower the gates to the release of water downstream during flooding.

The City later learned the level of the water of the summer pool was below historic levels. The City conducted a survey to determine whether there would be any impact on upstream property owners if the City raised the summer pool level to 906 feet. The City raised the height of the dam to increase the pool to 906 feet. Two property owners identified docks that were adversely affected at 906 feet. Cherry testified the two owners were comfortable with a level of 905.8 feet, with no adverse impact.

After surveying the property owners, the City submitted a modification request to the Department, requesting a modification of the permit to 905.8 feet for the normal summer upstream pool elevation. The Department determined this was a significant change and sent out notification letters to upstream property owners, including the Jahnkes, allowing the property owners to comment on the proposed modification. The Department received comments from 10 of the property owners, including the Jahnkes. Two were in favor of the change and eight raised concerns about drainage on the land, bank erosion, and lack of easements.

In their comments the Jahnkes reported their property is approximately 1.5 miles upriver from the dam. The Jahnkes requested the Department deny the modification and argued: (1) their property was awarded \$500 in 1914 when the dam was heightened

during construction; (2) the property owners were not notified of the second heightening of the dam in the 1960s and there was no record of any easements or payments to the property owners; (3) the property owners were not notified of the “increased height of the dam” in 2010 and there were no record of easements or payments to the property owners. The Jahnkes contend the cumulative additions to the height of the dam have resulted in increases to the pool, which floods their land and prevents them from being able to use their land.

The Department reviewed the City’s request and the public comments in connection with the low head dam criteria found in 567 IAC chapter 72. Garton examined the daily average flow data from the USGS gage location records from 1999 through 2012, and determined the average summer flows were 2,000 to 3,000 cubic feet per second. For June 10th, the average daily flow was 5,000 cubic feet per second. Based upon the information he was able to estimate the summer pool height using a mathematical equation. Garton found the average flows in the summer pool ranged from 905.5 to 905.6 feet. Garton noted the flow of 5,000 cubic feet per second exceeded 905.6 feet. The Department found that the historic normal summer upstream pool elevation was 905.4 feet, and granted the modification to that level. The Jahnkes appealed. The Jahnkes contend the increase in the upstream pool elevation caused flooding to their property in 2013 and that the modification is improper because the City has not obtained easements for their property.

Garton testified the City was not required to obtain easements with the most recent modification because there was no change in the pool height, and thus, no adverse impact on the Jahnkes’ property upstream.

2013 was an extremely wet year. 2013 was the first year the Jahnkes could not plant a crop on their property. Garton testified the average rainfall for Iowa through June 29th is 16 inches. On June 29, 2013, the Cedar River watershed had received 15 extra inches of rain. On May 20, 2013, following a four inch rain, the flow on the Cedar River was 33,000, approaching a 50-year flood event. Garton reported 2013 was an unusual year of flooding because the heavy rains continued unlike a typical, singular flood event. During 2013, the Cedar River watershed continued to receive heavy rain over a period of time, causing flooding.

In response to the flooding, on April 1, 2013, the City lowered the gates of the dam to lower the pool to 900.97 feet. Garton testified the lowering of the gates had the result of lowering the pool, releasing the flow downstream. Garton reported the area closest to the dam would have experienced the most impact. The Jahnkes’ property was located several miles away from the dam. Garton opined the Jahnkes would have experienced no change with the lowering of the dam.

Cherry testified the Jahnkes’ property is 3.4 miles from the dam, and nearly two miles from the USGS gage location. Cherry reported the Jahnkes’ property is behind the inflection point, or the point where the pool stops being the pool and becomes the river. Cherry opined because the Jahnkes’ property is located behind the inflection point, the dam has no effect on the flooding of their property.

CONCLUSIONS OF LAW

The Department has jurisdiction over the public and private waters of the state of Iowa¹. The Department approves all applications for construction and maintenance of structures, obstructions, dams, obstructions, deposits, or excavations erected, used or maintained in or on the floodplains of any river or stream.² The administrative rules define the term “dam” as “a barrier which impounds or stores water.”³ This case concerns a low head dam. A low head dam is “any dam essentially contained within the channel of a river or stream which is overtopped by normal stream flows.”⁴

The administrative rules set forth criteria that applies to low head dams.⁵ The Jahnkes contend the modification does not meet the second criterion, which provides, “the pool created by a low head dam shall not adversely affect drainage on lands not owned or under easements by the applicant.”⁶ Garton testified he followed this criterion when reviewing the City’s modification application.

The Jahnkes are upset because they were unable to plant a crop on their property for the first time in 2013. At hearing the Jahnkes argued the modification should be denied because the City has increased the pool of water by 19 inches since 1914, resulting in flooding to their land without obtaining easements and holding public hearings.

The Department’s rules do not require the Department to hold a public hearing. The Department sent notice of the proposed modification to the upstream property owners and allowed the property owners to comment. The Jahnkes submitted comments to the Department.

Garton testified he reviewed all the comments in connection with the low head dam criteria found in 567 IAC chapter 72. Garton examined the daily average flow data from the USGS gage location records from 1999 through 2012, and determined the average daily summer flows were 2,000 to 3,000 cubic feet per second. On June 10th, the average daily flow was 5,000 cubic feet per second. Based upon the information he was able to estimate the summer pool height using a mathematical equation. Garton found the average flows in the summer pool ranged from 905.5 through 905.6. He also determined the flow of 5,000 cubic feet per second exceeded 905.6. Garton found that the historic normal summer upstream pool elevation was 905.4 feet, and the Department granted the modification to that level. Garton testified that because there was no change in the historic upstream summer pool level, there was no adverse impact to the upstream property owners, and the City did not need to obtain easements from the property owners.

¹ Iowa Code § 455B.264 (2013).

² *Id.* § 455B.264(3).

³ 567 IAC 70.2

⁴ *Id.*

⁵ *Id.* 72.3(3).

⁶ *Id.* 72.3(3)b.

It is unfortunate the Jahnkes were unable to plant a crop on their property in 2013. However, the evidence at hearing did not support the Jahnkes' contention that the modification has had an adverse impact on their property. While the Jahnkes believe the modification has caused increased flooding, they did not submit expert testimony or other evidence to rebut Garton's opinions, or the opinion of Cherry that their property lies behind the inflection point. The Department's decision should be affirmed.

ORDER

The Department's decision is AFFIRMED. The Department shall take any steps necessary to implement this decision.

Dated this 8th day of January, 2014.



Heather L. Palmer
Administrative Law Judge
515-281-7183

cc: Joseph and Carol Jahnke
Carrie Schoenebaum
William Werger

Any party may appeal a proposed decision to the Director of the Department of Natural Resources within 30 days after receipt of the proposed decision and order. The agency may also decide on its own to review a proposed decision, notwithstanding the absence of a timely appeal by a party.⁷

⁷ 561 IAC 7.17(5).

**DEPARTMENT OF NATURAL RESOURCES
ENVIRONMENTAL PROTECTION COMMISSION
ATTORNEY GENERAL REFERRALS
January, 2014**

Name, Location and Region Number	Program	Alleged Violation	DNR Action	New or Updated Status	Date				
Alchemist USA, LLC Early (3) UPDATED	Underground Tank	UST System Deficiencies; UST Closure; Financial Responsibility	Referred to Attorney General	Referred	4/17/12				
				Petition Filed	10/31/12				
				Answer	1/14/13				
				Trial Setting Conference	1/28/13				
				Trial Date	10/30/13				
				Amended Petition	4/22/13				
				Consent Decree with Alchemist USA, (\$13,000 Admin./Injunction)	10/16/13				
				Consent Decree with Advanced Realty Investment (joined as party in Amended and Subst Petition) (\$5,780 Civil/Injunction)	12/02/13				
				<hr/>					
				Grain Processing Corporation Muscatine (6)	Air Quality Wastewater	Operation Without (PSD) Permit; Emission Standards – Particulate; Failure to Comply - MON; Construction Without WW Permit	Referred to Attorney General	Referred	4/19/11
Petition Filed	12/01/11								
Answer	1/10/12								
CLAM Motion to Intervene	1/24/12								
Hearing on Intervention	4/03/12								
Ruling Granting CLAM Intervention	6/25/12								
Trial Date	5/19/14								
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Iowa Farm Bureau Federation et. al. Polk Co. (5)	Wastewater	Judicial Review of Antidegradation Rules	Attorney General	Petition Filed	10/04/10				
				State's Answer	10/27/10				
				Motion to Intervene by Sierra Club	11/03/10				
				Motion to Intervene by Iowa Environmental Council and Environmental Law & Policy Center	12/15/10				
				Hearing on Intervention	1/20/11				
				Ruling Granting Intervention	2/03/11				
				State's Motion for Summary Judgment; Undisputed Facts; Affidavits; Appendix and Memorandum	4/29/11				
				Hearing on Petitioners' Motions	9/30/11				
				Ruling Denying Petitioners' Motions	10/14/11				
				Petitioner's Application for Interlocutory Appeal	10/31/11				
				Petitioner's Motion for Stay	11/08/11				
				State's Resistance to Application	11/14/11				
				State's Resistance to Motion for Stay	11/16/11				
				Hearing on Motion for Stay	11/30/11				
				Supreme Court Denial of Interlocutory Appeal	11/23/11				
				Petitioners' Motion for Stay Hearing Withdrawn	11/30/11				
				Petitioners' Motion for Summary Judgment and Cross-Motion for Summary Judgment	12/21/11				
				Hearing on Motions for Summary Judgment	1/18/12				
				Ruling Granting State's Motion for Summary Judgment	3/29/12				
				Notice of Appeal	4/26/12				
				Petitioner's Proof Brief	9/28/12				
				State's Proof Brief	11/28/12				
				State's Designation of Appendix	11/28/12				
Appendix Filed	1/23/13								

**DEPARTMENT OF NATURAL RESOURCES
ENVIRONMENTAL PROTECTION COMMISSION
ATTORNEY GENERAL REFERRALS
January, 2014**

Name, Location and Region Number	Program	Alleged Violation	DNR Action	New or Updated Status	Date
				Respondent-Intervenors' Proof Brief	12/03/12
				Petitioners' Proof Reply Brief	2/05/13
				Petitioner's Final Brief	2/06/13
				Petitioner's Final Reply Brief	2/06/13
				State's Final Brief	2/06/13
				Respondent-Intervenor's Final Brief	2/08/13
				Oral Argument before Iowa Supreme Court	10/09/13
McMains, Phil Appanoose Co. (5)	Air Quality Solid Waste	Open Burning Illegal Disposal	Referred to Attorney General	Referred Petition Filed Answer	6/19/12 8/08/13 9/03/13
North Central Iowa Regional SWA Fort Dodge (2)	Solid Waste	Operating Permit Violations	Referred to Attorney General	Referred	9/17/13
North Iowa Area Solid Waste Agency Sheldon (3) UPDATED	Solid Waste	Unapproved Leachate Collection System	Referred to Attorney General	Referred Petition Filed Answer Third Party Petition Against Elliot Waddell and Five States Engineering, PLC State's Resistance to Demand for Jury Trial Hearing Regarding Jury Trial Demand	1/15/13 9/26/13 10/11/13 10/11/13 10/23/13 11/25/13
Passehl, Jerry Latimer (2)	Solid Waste; Wastewater; Hazardous Condition	Illegal Disposal; Operation Without Permit; Pollution Prevention Plan Violations; Failure to Notify	Order/Penalty	Referred Petition Filed State's Motion for Summary Judgment Trial Date Hearing on State's Motion for Partial Summary Judgment Ruling granting State's Motion for Partial Summary Judgment State's Motion for Sanctions Hearing on Motion for Sanctions Order Regarding Sanctions Trial Ruling (\$36,110/Civil; \$4,150.17/Admin. & Injunction) Defendant's Motion to Enlarge and Amend State's Resistance Hearing on Defendant's Motion to Enlarge and Amend Order Denying Motion to Enlarge and Amend Notice of Appeal Defendant's Proof Brief Defendant's Amended Proof Brief Oral Argument Date Before Court Of Appeals	3/16/10 12/27/10 8/25/11 9/13/12 6/01/12 6/06/12 6/09/12 7/17/12 7/20/12 9/14/12 10/09/12 10/24/12 11/01/12 12/17/12 12/21/12 1/18/13 5/13/13 5/24/13 11/07/13

**DEPARTMENT OF NATURAL RESOURCES
ENVIRONMENTAL PROTECTION COMMISSION
ATTORNEY GENERAL REFERRALS
January, 2014**

Name, Location and Region Number	Program	Alleged Violation	DNR Action	New or Updated Status	Date
Sioux-Preme Packaging Co. Sioux Center (3)	Wastewater	Prohibited Discharge; Operation Violations; WQ Violations – General Criteria	Referred to Attorney General	Referred	9/17/13
Van Beek, Vern Inwood (3)	Animal Feeding Operation	Prohibited Discharge	Referred to Attorney General	Referred	10/16/12

**DEPARTMENT OF NATURAL RESOURCES
ENVIRONMENTAL PROTECTION COMMISSION
CONTESTED CASES**

January, 2014

DATE RECEIVED	NAME OF CASE	F.O.	ACTION APPEALED	PROGRAM	ASSIGNED TO	STATUS
11/27/01	Dallas County Care Facility	5	Order/Penalty	WW	Hansen	10/03 – Letter to County attorney regarding appeal resolution. 1/04 – Letter to attorney regarding appeal. 4/04 – Dept. letter to attorney regarding appeal. 9/04 – Dept. letter to attorney regarding appeal. 6/26/07 – Appeal resolved. Facility connected to City WWTF. Consent order to be issued. 1/29/13 – Order amendment drafted.
4/08/04	Silver Creek Feeders	4	Permit Conditions	AFO	Clark	12/9/11 – Meeting with Silver Creek officials, DNR staff and attorneys.
1/05/09	River Highlands Homeowner's Association	6	Order/Penalty	WS	Hansen	10/09- WS in partial compliance with order after repair to well in 9/09. 5/11 – Now in compliance with order. Settlement offer to River Highlands. 6/2011- Response received from River Highlands. 7/13 – To be set for hearing. 8/27/13 – Conference call to discuss settlement. 9/13 – Settled – Consent amendment to be sent to River Highlands for signature.
8/17/09	Phoenix C & D Recycling, Inc.	5	Permit Revocation	SW	Tack	Proposed Decision issued 5/21/2010. DNR permit revocation upheld. EPC appeal to be presented on 1/21/14.
10/29/09	Harlan Rudd; Karen Rudd; dba Rudd Brothers Tires	6	Order/Penalty	UT	Brees	Informal negotiation. CADR was submitted, partially rejected with options. Settlement letter sent 2/24/10.
12/16/09	Guy Thomas	4	Order/Penalty	UT	Brees	Oral agreement for tank removal prior to April 1, 2010. Continued negotiation on final settlement.
2/25/10	Higman Sand & Gravel Inc.	3	Order/Penalty	FP	Clark	Negotiating before filing.
3/11/10	Bondurant, City of	5	Order/Penalty	WW	Hansen	7/2013-On hold pending further investigation.
11/3/2010	Wendall Abkes	2	Order/Penalty	SW	Schoenebaum	Settlement phone call held. Mr. Abkes indicated he would enter into a settlement. 6/12/13 -- Offer to settle sent via certified mail. Letter was returned as unclaimed.
12/29/10	Griffin Pipe Products Co., Inc.	4	Permit Conditions	AQ	Preziosi	Last communication to appellant on 10/22/13.
1/31/11	Griffin Pipe products Co., Inc.	4	Tax Certification Request	AQ	Preziosi	Last communication from appellant on 11/19/13.
2/28/11	Manson, City of	3	Order/Penalty	WS	Hansen	4/1/11 – Settlement conference held with City. 6/22/11- Settlement offer received from City attorney. 6/28/11- More information requested from City attorney

**DEPARTMENT OF NATURAL RESOURCES
ENVIRONMENTAL PROTECTION COMMISSION
CONTESTED CASES**

January, 2014

DATE RECEIVED	NAME OF CASE	F.O.	ACTION APPEALED	PROGRAM	ASSIGNED TO	STATUS
						concerning the settlement proposal. 11/29/11- Settlement meeting with City regarding new well project. 12/2011 – City proceeding with project. 6/2012- Contractor worked on new well to remove debris in well. Test pump to be installed to do test of well capacity. 07/2012- City to abandon new well and select new site for well to increase PWS capacity. 10/2012- Water plant work to be done week of 12/10/12. 5/2013- New well project & appeal on hold, pending USDA funding decision. 6/2/13 – USDA funding decision received. 6/26/13 – New bid date for well project. . 7/2013- Tentative schedule for new well received from City’s engineer. 8/13 – Drilling on test well begun by contractor. 9/13 – Test well not productive, new well site approved by Dept. New test well to be drilled. 10/13- Test well drilled but not successful. Test well abandoned. City Council to decide on next step.
6-15-12	Vermeer Manufacturing Co.	5	Permit Conditions	AQ	Preziosi	Internal meeting held 10/22/13.
8-27-12	Ag Processing, Inc.; Sergeant Bluff	4	Permit Conditions	AQ	Preziosi	Last communication with appellant 10/17/13.
8-29-12	Alcoa	6	Permit Conditions	AQ	Preziosi	Last communication with appellant 10/21/13.
10-01-12	Pet Memories	3	Order/Penalty	SW	Tack	Proposed Decision appealed to EPC. Will be presented to EPC on 1/21/14.
11-21-12	Ag Processing Inc.	6	Permit Conditions	AQ	Preziosi	Last communication from appellant 10/17/13.
3-04-13	Anderson Excavating Co., Inc.	4	Order/Penalty	SW	Tack	Negotiating before filing.
6-20-13	Joseph and Carol Jahnke	1	Dam Application	FP	Schoenebaum	Hearing set for 1/06/14..
9-09-13	David Hansen; Debra D. Imhoff	6	Order/Penalty	FP	Schoenebaum	Appeal filed 9/9/13.
10-28-13	Regional Environmental Improvement Commission/Iowa Co. SLF	6	Permit Amendment	WW	Tack	Negotiating before filing.
11-07-13	Linn County Conservation Board Pinicon Ridge Park	6	Permit Conditions	WS	Hansen	Negotiating before filing.

DATE: January, 2014

TO: EPC

FROM: Ed Tormey

RE: Enforcement Report Update

The following new enforcement actions were taken during this reporting period:

Name, Location and Field Office Number	Program	Alleged Violation	Action	Date
Denison Municipal Utilities; Farmland Foods, Inc. Crawford Co. (4)	Wastewater	Compliance Schedule	Consent Order \$10,000	12/05/13
Northern Filter Media, Inc. Muscatine Co. (6)	Air Quality	Other Violations - MSEI	Consent Order \$1,000	12/20/13
McLanahan Corporation Linn Co. (1)	Air Quality	Other Violations - MSEI	Consent Order \$1,000	12/31/13

IOWA DEPARTMENT OF NATURAL RESOURCES
 ENVIRONMENTAL PROTECTION COMMISSION
 RULE MAKING STATUS REPORT
 January, 2014

Proposal	Stakeholder Engagement	Sent for Governor's Pre-Approval (Job Impact) Statement	Notice to EPC	Notice Published	ARRC No.	ARRC Mtg.	Hearing	Comment Period	Final Summary To EPC	Rules Adopted	Rules Published	ARRC No.	ARRC Mtg.	Rule Effective
1. Ch. 20, 21, 22, 31 and 33 – Air Quality Program Rules – Nonattainment New Source Review		7/24/13 8/02/13	8/20/13	9/18/13	1016C	10/08/13	10/21/13	10/21/13	11/19/13	11/19/13	12/11/13	1227C	1/10/14	*1/15/14
2. Ch. 22, 23 –AQ – Grain Vacuuming		11/22/13												
3. Ch. 64 – Storm Water Permits		8/27/13 9/18/13	10/14/13	11/13/13	1176C	12/10/13	12/12/13	12/12/13	1/21/14	*1/21/14	*2/19/14		*3/03/14	*3/26/14
4. Ch. 93 – Wastewater Assistance Program		8/27/13 9/18/13	10/14/13	11/13/13	1177C	12/10/13	12/04/13	12/04/13	1/21/14	*1/21/14	*2/19/14		*3/03/14	*3/26/14

IOWA DEPARTMENT OF NATURAL RESOURCES
COMPLIANCE AND ENFORCEMENT BUREAU

DATE: January 1, 2014
TO: Environmental Protection Commission
FROM: Ed Tormey
SUBJECT: Summary of Administrative Penalties

The following administrative penalties are due:

NAME/LOCATION	PROGRAM	AMOUNT	DUE DATE
Robert and Sally Shelley (Guthrie Center)	SW	1,000	3-04-91
Daryl & Karen Hollingsworth d/b/a Medora Store(Indianola)	UT	4,126	3-15-96
Greg Morton; Brenda Hornyak (Decatur Co.)	SW/AQ/WW	3,000	11-04-98
James Harter (Fairfield)	WW	1,336	8-01-01
Wisconsin North dba National Petroleum, Inc. (Clinton)	UT	5,000	8-04-01
# Practical Pig Corporation (Clinton Co.)	AFO	2,000	5-26-02
Midway Oil Co.; David Requet (Davenport)	UT	5,355	9-20-02
Midway Oil Co.; David Requet; John Bliss	UT	44,900	2-28-03
Green Valley Mobile Home Park (Mt. Pleasant)	WW	5,000	4-23-03
Midway Oil Company (West Branch)	UT	7,300	5-03-03
Midway Oil Company (Davenport)	UT	5,790	5-03-03
Albert Miller (Kalona)	AQ/SW	9,810	9-26-03
Mike Messerschmidt (Martinsburg)	AQ/SW	500	4-13-04
Interchange Service Co., Inc., et.al. (Onawa)	WW	6,000	5-07-04
# Dunphy Poultry (Union Co.)	AFO	1,500	6-27-04
# Cash Brewer (Cherokee Co.)	AFO/SW	10,000	8-25-04
# Doorenbos Poultry; Scott Doorenbos (Sioux Co.)	AFO	1,500	10-09-04
Rock N Row Adventures (Eldora)	WS	3,000	10-23-04
# Doug Sweeney (O'Brien Co.)	AFO	375	12-21-04
Harold Linnaberry (Clinton Co.)	SW	1,000	5-18-05
# Joel McNeill (Kossuth Co.)	AFO	2,460	1 21-06
Affordable Asbestos Removal, Inc. (Monticello)	AQ	7,000	4-28-06
# Troy VanBeek (Lyon Co.)	AFO	3,500	10-16-06
Larry Bergen (Worth Co.)	AQ/SW	257	11-01-06
# Joshua Van Der Weide (Lyon Co.)	AFO	3,500	2-25-08
Karl Molyneux (What Cheer)	AQ/SW	960	7-19-08
George Kramer (Clinton Co.)	AQ/SW	1,500	11-09-08
Jon Knabel (Clinton Co.)	AQ/SW	2,000	12-16-08
Stuart Yoder (Johnson Co.)	AQ/SW	224	2-11-09
# Robert Fangmann (Dubuque Co.)	AFO	396	6-01-09
# Rick Renken (LeMars)	AFO	996	7-03-09
# Brian Lill (Sioux Co.)	AFO	3,342	7-18-09
# Lane Bachman (Calhoun Co.)	AFO	3,885	10-08-09
Denny Geer (New Market)	SW	9,476	10-31-09
Shrey Petroleum; Palean Oil; Profuel Three (Keokuk)	UT	10,000	3-19-10
Melvin Wellik; Wellik-DeWitt Implement (Britt)	AQ/SW	2,900	4-08-10
Alchemist USA, LLC; Ravinder Singh (Malcom)	UT	8,260	5-03-10
# LJ Unlimited, LLC (Franklin Co.)	AFO/AQ/SW	3,500	5-27-10
Bret Cassens; J & J Pit Stop (Columbus Junction)	UT	8,700	6-20-10

#Animal Feeding Operation

BOLD Entries Have Been Referred to DRF

# Christopher P. Hardt (Kossuth Co.)	AFO	2,000	7-07-10
AKD Investments, LLC; H.M. Mart, Inc. (Blue Grass)	UT	6,900	8-06-10
Eastern Hills Baptist Church (Council Bluffs)	WS	1,250	11-29-10
James Bailey; James Bailey Construction (Douds)	AQ/SW	634	12-01-10
Jeff Grooms; Floris One Stop (Floris)	UT	7	12-09-10
# Joe McNeill (Kossuth Co.)	AFO	2,500	12-23-10
Gonzalez & Sons Express, Inc. (DeSoto)	WW	8,000	4-20-11
David C. Kuhlemeier (Cerro Gordo Co.)	AQ/SW	2,000	6-30-11
Steve Friesth (Webster Co.)	AQ/SW	8,400	11-26-11
Josh Oetken (Worth Co.)	AQ/SW	8,495	3-11-12
Jeffrey G. Gerritson (O'Brien Co.)	SW	2,000	4-16-12
Bhupinder Gangahar/Saroj Gangahar/International Business	UT	7,935	4-20-12
Finney Industrial Painting, Inc. (Fairfield)	AQ/WW	5,250	4-23-12
Terry Philips; TK Enterprises (Washington Co.)	AQ/WW	7,000	5-30-12
# Boerderij De Vedhoek, LLC (Butler Co.)	AFO	8,500	11-16-12
James L. Heal; A-1 Imports (Homestead)	WW/SW	1,800	1-08-13
Sun-Jon, Inc.; Iowa Poultry (Johnson Co.)	WW	3,000	1-08-13
Noah Coppess (Cedar Co.)	AQ/SW	7,500	2-23-13
Shane Rechkemmer (Fayette Co.)	SW	1,000	3-01-13
Jeff Grooms; Floris One Stop (Floris)	UT	3,500	3-01-13
Michael Lee Liphardt aka Melvin Liphardt (Clinton Co.)	AQ/SW	2,000	3-05-13
B Petro Corporation (Cedar Rapids)	UT	7,728	5-13-13
Bernard Michelson (Hancock Co.)	AQ/SW	2,500	4-26-13
Ken Odom (Iowa Co.)	AQ/SW	3,000	4-26-13
Jacob Reed (Mahaska Co.)	AQ/SW	1,500	6-10-13
River Trading Company, Ltd. (Muscatine)	WW	3,000	9-15-13
Robert Downing (Mahaska Co.)	AQ/SW	10,000	11-15-13
# Steve and Paul Groth; Groth Farms (Mitchell Co.)	AFO	3,000	11-17-13
Shriners Hospital for Children, Inc. (Des Moines)	UT	8,890	12-03-13
Golden Grain Energy, LLC (Mason City)	WW	10,000	12-14-13
Joseph E. Skelley; Ssippi Valley Saloon, LLC (Burlington)	AQ	3,300	12-29-13
# J & J Pork, LLC (Iowa Co.)	AFO	5,000	1-01-14
Northern Filter Media, Inc. (Muscatine Co.)	AQ	1,000	1-20-13
Larry Eisenhauer (Woodbury Co.)	AQ/SW	4,675	-----
	TOTAL	344,512	

The following penalties have been placed on payment plans:

* Reginald Parcel (Henry Co.)	AQ/SW	110	4-23-05
* Country Stores of Carroll, Ltd. (Carroll)	UT	1,408	6-06-05
* Douglas Bloomquist (Webster Co.)	AQ/SW	3,500	12-01-07
* Jack Knudson (Irwin)	UT	10,000	1-15-08
* Craig Burns (Postville)	WW	950	7-15-08
# Jerry Passehl (Latimer)	SW/WW/HC	2,695	7-01-09
Jerry Wernimont (Carroll)	AQ/SW	1,500	4-19-10
# Ernest Greiner (Keokuk Co.)	AFO	500	10-10-10
Quad City Drum Recycling Co., Inc. (Davenport)	AQ	125	9-01-12
John Kletsch (Superior)	AQ	1,150	11-01-12
# Lee Kovar (Iowa Co.)	AFO	104	1-15-14
Ernest Poyzer; Alan Poyzer; Dean Poyzer (Emmet Co.)	AQ/SW	290	1-15-14
Jim Scallon (Butler Co.)	SW	700	4-15-13
R.H. Hummer Jr., Inc.; 2161 Highway 6 Trail (Iowa Co.)	AQ/SW	3,643	9-15-13
Patrick Baker; Stockton Auto (Davenport)	AQ/SW	1,162	1-15-14

#Animal Feeding Operation

BOLD Entries Have Been Referred to DRF

Anthony Sheeder (Guthrie Co.)	AFO	625	2-15-14
Air Advantage, Inc. (Mt. Pleasant)	WW	4,500	4-01-14
Ellsworth Excavating Co. (Muscatine Co.)	AQ/SW	1,425	1-01-14
# Steve Grettenberg; Dragster LLC	AFO	5,750	1-20-14
Mid River Marine Service and Storage (North Liberty)	WS	5,720	9-30-13
Lonnie Bryant; Sierra Bryant; Bryant's MHP (Keokuk)	WW	600	2-01-14
Stephan A. Palen (Wapello Co.)	AQ	2,392	1-01-13
	TOTAL	48,849	

The following administrative penalties have been appealed:

NAME/LOCATION	PROGRAM	AMOUNT
Dallas County Care Facility (Adel)	WW	5,000
River Highlands Homeowner's Association	WS	10,000
Guy Thomas (Council Bluffs)	UT	10,000
Harlan Rudd; Karen Rudd; Rudd Bros. Tires (Drakesville)	UT	10,000
Bondurant, City of	WW	10,000
Higman Sand and Gravel, Inc. (Plymouth Co.)	FP	10,000
Helen and Virgil Homer; Grandmas Snack Shop; Preston White (Aredale)	WS	8,461
Manson, City of	WS	10,000
Wendall Abkes (Parkersburg)	SW	7,000
Keith Durand; Durand Construction (Lee Co.)	WW	500
Pet Memories, Inc. (Cedar Co.)	SW	10,000
Anderson Excavating Company, Inc. (Pottawattamie Co.)	SW	10,000
Massey Properties, LLC; The Wharf (Dubuque)	WS	10,000
David Hansen; Debra Imhoff (Wilton)	FP	6,000
	TOTAL	116,961

The following administrative penalties have been collected:

NAME/LOCATION	PROGRAM	AMOUNT
# Kenneth W. Kline (Harrison Co.)	AFO	3,000
Albert Miller (Kalona)	AQ/SW	5
Ellsworth Excavating Co. (Muscatine Co.)	AQ/SW	75
Lonnie Bryant; Sierra Bryant; Bryant's MHP (Keokuk)	WW	100
Harold Irwin Sr.; Harold Irwin Jr.; Irwin Inc. (DeWitt)	AQ/SW	2,500
Anthony Sheeder (Guthrie Co.)	AFO	625
Ernest Poyzer; Alan Poyzer; Dean Poyzer (Emmet Co.)	AQ/SW	145
Stephan A. Palen (Wapello Co.)	AQ	108
Jim Scallon (Butler Co.)	SW	1,175
Ernest Poyzer; Alan Poyzer; Dean Poyzer (Emmet Co.)	AQ/SW	145
# Dan Muller (Kossuth Co.)	AFO	3,938
# Kevin DeWeerd (Lyon Co.)	AFO	208
Patrick Baker; Stockton Auto (Davenport)	AQ/SW	83
Lonnie Bryant; Sierra Bryant; Bryant's MHP (Keokuk)	WW	100
# Steve Grettenberg; Dragster LLC	AFO	500
# Anthony Fehr; ACL Fehr LLC (Kossuth Co.)	AFO	249
Denison Municipal Utilities; Farmland Foods, Inc.	WW	10,000
McLanahan Corporation (Linn Co.)	AQ	1,000
	TOTAL	23,956

#Animal Feeding Operation

BOLD Entries Have Been Referred to DRF

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Monthly Variance Report
November 2013

Item No.	Facility/City	Program	DNR Reviewer	Subject	Decision	Date
1	GPC	Air Quality	Reid Bermel	variance to install 80 foot stack for corn cleaner baghouse prior to construction permit being issued	approved	11/7/2013
2	GPC	Air Quality	Reid Bermel	variance to increase existing stacks by 40 feet to modeled height of 110 feet for two boilers prior to construction permit being issued	approved	11/7/2013
3	Koch Nitrogen	Air Quality	Diane Brockshus	variance to operate John Zink portable emission control system at a facility prior to construction permit being issued	approved	11/8/2013
4	Gable Construction	Air Quality	Dennis Thielen	variance to install 32 emergency generators	approved	11/18/2013
5	US 63 Over Soap Creek	Flood Plain	Andy Jensen	Variance for backwater increase of 1.2 feet and 1.4 feet for Q50 and Q100 flood events.	approved	11/20/2013
6	Bridge Replacement	Flood Plain	Jim Hallmark	variance to freeboard criterion that low chord of bridge must be set 3 feet above 50-year flood elevation	approved	11/20/2013
7	Green Plain Superior LLC	Air Quality	Dennis Thielen	variance to store undenatured ethanol in addition to denatured ethanol in final product storage tanks.	approved	11/21/2013
8	Valero Hartley	Air Quality	Brian Hutchins	variance to adjust operating limits found in facility's construction permits	approved	11/27/2013