

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 7

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 In the Matter of: :
 :
 LOWELL VOS :Docket No. CWA 07-2007-0078
 d/b/a LOWELL VOS FEEDLOT :
 WOODBURY COUNTY, IOWA : VOLUME V
 -----X

Fourth Floor Courtroom
 United States Courthouse
 123 East Walnut Street
 Des Moines, Iowa
 Friday, September 19, 2008

The above-entitled matter came on for hearing
 at 9:30 a.m.

BEFORE: WILLIAM B. MORAN, Administrative Law Judge

ORIGINAL

KELLI M. MULCAHY - CERTIFIED SHORTHAND REPORTER

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I N D E X

<u>WITNESS</u>	<u>DIRECT</u>	<u>CROSS</u>	<u>REDIRECT</u>	<u>RECROSS</u>	<u>VOIR DIRE</u>
<u>For the Respondent:</u>					
Mike Vos	992	1009 (Ryan)	1032 1035	1034 (Ryan)	
Brad Woerner	1037	1079 (Ryan)	1121		1041 (Ryan)
Gerald Hentges	1124	1195 (Ryan)			

E X H I B I T SCOMPLAINANT'S EXHIBITSRECEIVED

56 - Gassman article

1213

RESPONDENT'S EXHIBITSRECEIVED

18 - Map

1032

P R O C E E D I N G S

1
2 THE ADMINISTRATIVE LAW JUDGE: Okay. Good
3 morning. This is September 19th. We are here for
4 day five of this proceeding.

5 Mr. McAfee, are you ready with your next
6 witness?

7 MR. MCAFEE: Yes, I am, Your Honor. The
8 respondents will call Mike Vos. He's in the hall. I
9 will get him.

10 THE ADMINISTRATIVE LAW JUDGE: Good morning.
11 Did I hear your last name is Vos?

12 MR. MIKE VOS: Yes, it is.

13 THE ADMINISTRATIVE LAW JUDGE: Okay. Please
14 raise your right hand.

15 MIKE VOS,
16 called as a witness by counsel for the Respondent,
17 being first duly sworn by the Administrative Law
18 Judge, was examined and testified as follows:

19 THE ADMINISTRATIVE LAW JUDGE: Okay. Have a
20 seat, Mr. Vos, and give us your first and last name
21 and spell your name, please.

22 THE WITNESS: Mike Vos. It's M-i-k-e and
23 V-o-s.

24 THE ADMINISTRATIVE LAW JUDGE: Okay.
25 Mr. McAfee.

1 MR. McAFEE: Thank you, Your Honor.

2 DIRECT EXAMINATION

3 BY MR. McAFEE:

4 Q. Mike, can we assume you're related to a
5 Lowell Vos?

6 A. Yeah. That's my dad.

7 Q. Okay. And could you tell us your address,
8 please?

9 A. It is 1012 Knox Avenue, Kingsley, Iowa,
10 51028.

11 Q. How old are you, Mike?

12 A. Thirty-three.

13 Q. What's your current occupation?

14 A. I farm with my dad and I work for him at the
15 feedlot.

16 Q. What's your educational background?

17 A. I have two years of college.

18 Q. Where at?

19 A. Iowa Lakes Community College in Emmetsburg.

20 Q. And what was your major or your course of
21 study?

22 A. Farm management.

23 Q. Following college, what did you do?

24 A. I went right to working for my dad at
25 the--farming and trying to rent some ground of my own

1 and working at the feedlot.

2 Q. And how long ago has that been?

3 A. '95 is when I got out of college.

4 Q. So you've been employed at the feedlot and
5 engaged as a farmer since then?

6 A. Yep. Yes.

7 Q. And in this same area?

8 A. Yes.

9 Q. And at this feedlot that's the subject of
10 this hearing?

11 A. Yes.

12 Q. Could you tell us a little bit about what
13 you do at the feedlot?

14 A. I'm actually kind of a--I don't know if you
15 call it a jack-of-all-trades. I do a little of
16 everything. I'll do chores some days. I--I plant
17 all the corn and beans and run the combine and, oh,
18 feed cattle, vaccinate cattle. I'll scrape yards.
19 I'm a payloader operator usually for hauling manure
20 and a little bit of-- Fix vents. Anything that
21 needs done, I've usually did it before, so...

22 Q. Okay. And you said payloader. Is that a
23 type-- And I believe you said this. Is that a type
24 of manure loader?

25 A. Yeah. It's bigger than a tractor. An end

1 loader is just a heavier duty so you can--it lasts
2 longer. It's just a big loader, I guess, for loading
3 manure. And we use it to load feed and everything.

4 Q. Kind of like maybe we would see at
5 construction sites?

6 A. Right. Same thing.

7 Q. Mike, I want to talk to you about some of
8 your duties or jobs at the feedlot, and I believe you
9 mentioned one, and that is scraping the lots.

10 A. Yes.

11 Q. Are you kind of the person in charge of
12 that?

13 A. Oh, we have a various-- We have another
14 full-time employee that he does it more than I do
15 because it's a--I call it a monotonous job. It's
16 just a continuous job that we do all the time. And
17 we've also had other people hired to do it also. But
18 I have--I do do it, yes, I do.

19 Q. Okay. I want to start with could you
20 explain to the Court exactly what kind of machine you
21 use to do this?

22 A. Well, we call it a box scraper, but it's
23 pretty much like a blade on a--you'll see behind a
24 tractor, but it has sides on it, like two- or three-
25 foot sides, so it can hold some capacity. And you

1 would pull it behind a four-wheel drive tractor, a
2 pretty good size tractor.

3 And pretty much you just pull it, and it's
4 hydraulically driven, so you can raise and lower it,
5 and you scrape up any material you want to. And you
6 pull a lever and it raises up and you can stockpile
7 with it or transport it to a different place. I
8 guess that's all I can explain it.

9 Q. No. That's fine. And then once it's full
10 you go back and--

11 A. Do it again, yeah.

12 Q. And you cover the entire yard when you--

13 A. Yeah. It's usually-- We've got two of
14 them. There's a--I believe one's a 12- or 14-footer
15 and the other one's a 10-foot wide, so they're fairly
16 good size.

17 Q. With your tractor, can you put any down
18 pressure on the blade or the box scraper?

19 A. Yeah. They're built out of--I think it's
20 half-inch wall metal, so there's quite a bit of
21 weight in all the-- And you put it down, the whole
22 weight of the machine is pressing down on the ground,
23 so it's got quite a bit of down ground pressure.

24 Q. What does the yard look like after you
25 scrape it?

1 A. It looks just like a--a dirt road, I guess
2 I'd call it. It's pretty much bare ground.

3 Q. Could you tell the Court kind of what
4 your--at the Lowell Vos Feedlot what the time table
5 is for scraping lots?

6 A. It depends a lot on the weather. Like in
7 the wintertime it's a for sure each yard gets scraped
8 two to three times a day--well, a day, a continuous
9 process. And then in the summertime, it's more
10 weekly event, I suppose, every week.

11 And we just try to keep everything as clean
12 as we can, and other people have even commented on
13 how clean our feedlot is compared to neighboring
14 feedlots.

15 Q. What's the purpose for scraping the lots?

16 A. Mainly just to keep the manure scraped up so
17 the cattle have a nice place to lay down, and it just
18 keeps them nice. It doesn't get muddy. If it rains,
19 it's nice and clean in there and just keeps them
20 clean, I guess.

21 Q. Now, when you used this box scraper, I think
22 you talked about you'd come to a place and you'd dump
23 it. Tell the Court what you do then.

24 A. We--we usually-- Well, in the wintertime
25 we'll scrape it up and it will be-- In the

1 wintertime we bed also with cornstalk bales. We have
2 a shredder that shreds the bales, and then we'll
3 scrape it all up, and we have two big manure
4 spreaders and we'll haul it out, because we always
5 have a place to go with it because the harvest is
6 over with.

7 In the summertime, it's a little more
8 difficult if there's nowhere to go, like if we don't
9 have--the corn and beans are still growing in the
10 field or-- Like we usually have an oats field or
11 something.

12 We will stockpile it on a--probably in the
13 high spots of the yards, and as soon as we start
14 chopping oats or something, have a place to haul it
15 back out, we will go in, then, in a later time and
16 load it back up and spread it in our oats field.

17 Q. I want to talk about what you've called
18 stockpile a little bit. When you say you put it
19 in--when you do that, is it removed from the pen
20 where you scraped it up from?

21 A. I don't quite understand what you mean.

22 Q. When you use the box scraper, and you said
23 you use the payloader to pile it; is that right?

24 A. Right.

25 Q. Is that done within the pen where you

1 scraped it up?

2 A. Normally, yes.

3 Q. Do the cattle have access to it, then?

4 A. Yes, they would.

5 Q. What do they do?

6 A. Actually, they will-- It's normally dry,
7 and it's just a big mound, and they'll--actually,
8 they lay on it and they like it because they get up a
9 little higher and the breeze hits it. But we try to
10 get them out of there as soon as we have a place to
11 go with it.

12 Q. When they lay on it, does it do anything to
13 it, the pile?

14 A. No. Not really.

15 Q. Does it pack it down?

16 A. I'd say it would a little. Yes, it would a
17 little.

18 Q. Do you do anything differently as far as
19 scraping the lots if there's rain forecast?

20 A. If they-- I mean it's--you know, the
21 weather is hard to judge, but if we know it's
22 supposed to rain for a week straight or--yeah, we
23 definitely try to get them scraped up and cleaned up,
24 so yeah.

25 Q. What about snow?

1 A. Snow, we always--it's a time-consuming job,
2 but we try to always stock--same thing, we'll go in
3 and scrape the whole yards down into a stockpile, and
4 we use a payloader and a box scraper then so we
5 can--you can put the big mound--make it in a smaller
6 area, just taller.

7 And usually can't get it all done in the
8 same day, but then the following day we will get our
9 manure spreaders and load it up and haul it out to--
10 We got terraces all around, and we've got adjoining
11 fields around there we also farm. To the north of
12 the feedlot, there's a quarter that we dump the snow
13 on.

14 MR. McAFEE: Your Honor, may I approach?

15 THE ADMINISTRATIVE LAW JUDGE: Yes.

16 Thank you.

17 MR. RYAN: Which exhibit number are we
18 looking at, counsel?

19 MR. McAFEE: I just wanted to get it
20 centered here and I'll state it in the record. It's
21 Complainant's Exhibit No. 4.

22 BY MR. McAFEE:

23 Q. Okay. Mike, can you-- This has been-- I
24 have placed Complainant's Exhibit 4 on the LitePro,
25 and it is a little light there, but can you maybe

1 come around and show us, just by pointing, where you
2 typically haul the--the-- Well, I'll let you testify
3 what you do with the snow--

4 A. The snow?

5 Q. --once you remove it from the lot.

6 A. Normally, just because it's easy access from
7 the road--there's terraces up in this corner and it's
8 right off the road--we'll usually go up into those
9 terraces up in this area here and dump the snow. Or
10 if we have to, we'll go out in these terraces back
11 behind just to the south.

12 Q. Okay. Just for purposes of the record,
13 you've pointed to an area in the--what I would call
14 the northwest corner of the section where the feedlot
15 is located, and it's directly west of the feedlot on
16 the west side of the unnamed tributary; is that
17 right?

18 A. That would be right.

19 Q. And you say there are terraces there?

20 A. Yes, there are.

21 Q. And then you also pointed to an area of
22 the--on Exhibit 4 that is south of the feedlot out in
23 the--would you call it a large cornfield?

24 A. Yes. It's 296 acres, I believe.

25 Q. And those dark lines on that exhibit, are

1 those terraces also?

2 A. Yes, they are.

3 THE ADMINISTRATIVE LAW JUDGE: Mr. McAfee,
4 you don't want to have this witness mark on--it would
5 be a new exhibit number, but as the other witnesses
6 have done?

7 It's your call, but, I mean, all the sudden
8 we're going with just a verbal description, and the
9 practice has been to have people, throughout the
10 hearing, mark.

11 Because I was listening closely to your
12 verbal description. Someone who is looking at the
13 record wouldn't really be able to hone in on where
14 Mr. Vos says that the snow is moved to, I don't
15 think.

16 MR. McAFEE: I--I appreciate the-- Once you
17 heard my description, if we want to make sure it's
18 clearer in the record, why, I'm all for that, Your
19 Honor.

20 THE ADMINISTRATIVE LAW JUDGE: Right. Well,
21 it would seem to be important to you in terms of your
22 position about this matter.

23 MR. McAFEE: May we go off the record for a
24 minute?

25 THE ADMINISTRATIVE LAW JUDGE: Yes, we'll go

1 off the record.

2 (Discussion off the record.)

3 MR. McAFEE: I would like to substitute for
4 the witness to mark on Complainant's Exhibit 3. It's
5 just--it's the same map. It's the one I can find in
6 my list of exhibits right now. If that's okay with
7 Complainant's counsel--

8 MR. RYAN: No problem.

9 THE ADMINISTRATIVE LAW JUDGE: And you're
10 going to denominate this for purposes of
11 identification, I guess, at this point the
12 Respondent's Exhibit-- What number will it have?

13 MR. McAFEE: I believe I'm at 20, if I
14 remember right, Your Honor.

15 Excuse me, Your Honor. The last one I see
16 on my list of Respondent's Exhibits is R-17.

17 THE ADMINISTRATIVE LAW JUDGE: That's the
18 one I--that's the last one I have listed,
19 Respondent's Exhibit 17.

20 MR. McAFEE: Okay. So this would be
21 Respondent's Exhibit 18.

22 THE ADMINISTRATIVE LAW JUDGE: Okay.

23 BY MR. McAFEE:

24 Q. Mike, could you just identify for the record
25 where you haul the snow, I believe, as you've

1 testified? Now, what we'd like to have you do is
2 take this Sharpee pen and on this exhibit just draw a
3 circle around the areas where you take the snow out
4 as you've testified.

5 A. Where we dump--haul it to?

6 Q. Correct.

7 A. In this area or--

8 THE ADMINISTRATIVE LAW JUDGE: Okay. Why
9 don't you put an S in the middle of that, okay, and
10 then we will know that that refers to the first area
11 that you've marked, is that right, Mr. Vos, of where
12 you put snow?

13 THE WITNESS: Yeah. Yes.

14 THE ADMINISTRATIVE LAW JUDGE: Okay.

15 THE WITNESS: I mean, it's a pretty big--
16 I'm not exact every time. It's in this general area
17 in these terraces in this field.

18 THE ADMINISTRATIVE LAW JUDGE: How about
19 putting an S--

20 THE WITNESS: I'm not the best artist.

21 BY MR. McAFEE:

22 Q. Thank you. Are there any other places you
23 take the snow after you've removed it from the
24 feedlot?

25 A. No. It generally always goes to these

1 areas.

2 Q. Thank you. You can have a seat.

3 Mike, what happens when you pile it there?

4 Do the piles get pretty big?

5 A. Oh, depends on the year, I guess, how much
6 snow we get.

7 Q. Well--

8 A. But not huge, no.

9 Q. Could you tell the Court how you pile it
10 there?

11 A. In the field?

12 Q. Yes.

13 A. We just unload it. Either we'll-- It
14 depends. Sometimes we actually spread it, our manure
15 spreaders will spread the snow, so it gets a little
16 more area. Otherwise we'll just--they just unload it
17 there, kind of like a dump truck, but it's a manure
18 spreader. It has an apron chain in it so it just
19 pushes it off.

20 Q. Is there a reason why you choose these two
21 areas?

22 A. It's mainly the closest two areas to the
23 feedlot that have terraces, I guess, so it's
24 convenience.

25 Q. Is there any importance to the terraces?

1 A. Well, it will hold the-- If it melts--
2 When it does melt in the spring, it can't go
3 anywhere. It soaks away or follows the terrace, I
4 guess.

5 Q. On the first circle you placed on Exhibit
6 18, the one to the west of the feedlot, do you ever
7 see--do you ever see any--the snow leave the terrace
8 areas when it melts?

9 A. No.

10 Q. Would the same go for out in the field to
11 the south?

12 A. Yes.

13 Q. Okay. You mentioned bedding; is that right?

14 A. Correct.

15 Q. Could you describe that process?

16 A. Well, in the fall of the year, after
17 harvest, we round-bale cornstalk bales, so it will be
18 mainly just shredded up cornstalk bales in a big
19 round bale.

20 And then we have a machine that it picks it
21 up, puts it in there. It's a big shredder is what I
22 would call it, and it will blow it out probably 50
23 feet. And we go in each yard and spread it out in
24 the yard so the cattle have a nice warm spot to lay
25 down and just keeps them warm and comfortable.

1 And if there happens to be any ice on the
2 ground, cattle will soak into the ice and it gets
3 them wet, and then they get cold that way. And this
4 just gives them a place to lay down, nice and warm.

5 Q. So is it your testimony the bedding prevents
6 the cattle laying on the ice?

7 A. Correct.

8 Q. Okay. And are there any certain areas you
9 place the bedding?

10 A. We--we usually, in the winter, do it three
11 times a week, Monday, Wednesdays and Friday. We'll
12 put approximately two bales--two to four bales in
13 each yard, and each yard gets it, and then one to
14 two-- Depends on how many cattle are in the yard and
15 how much manure gets in the bedding. It is hauled
16 out weekly, I would say, or maybe twice a week.
17 We'll put it on top a couple times, and then when it
18 gets dirty, we'll spread that in the field or a
19 different field and bed them again. It's kind of a
20 continuous process.

21 Q. You mentioned manure in the bedding.
22 Evidently manure gets in it?

23 A. Yeah. That's-- Well, yeah. Cattle mainly
24 do their duty, I guess, in the bedding. They're not
25 as smart as an other animal. So it does get dirty as

1 the weeks go on.

2 Q. You've been around cattle all your life,
3 right?

4 A. Correct.

5 Q. Is there anything that a feedlot steer or
6 heifer usually does when they stand up after laying
7 down in the bedding?

8 A. That's the first thing they do is stretch
9 out and do their--do their business, I guess.

10 Q. Okay. Are there any particular areas of the
11 feedlot of each pen that you place the bedding?

12 A. Oh, we always place it on the highest part
13 of the--or the driest part of the yard or kind of out
14 of the wind too a lot of times to keep-- It is in
15 the wintertime. We're trying to keep them warm and
16 protected. But always up on the higher end where
17 it's easy to scoop back up.

18 Q. Where would that be in relation to any
19 points of the feedlot where there would be, maybe,
20 any runoff?

21 A. Oh, it would always be-- Actually, it would
22 be the opposite of any--the highest point. And the
23 runoff's always gonna go to the lowest point, so I
24 guess the opposite end.

25 Q. Back to the scraping for a minute, you have

1 feed bunks you feed the cattle in?

2 A. Correct.

3 Q. What's around these feed bunks?

4 A. We call it a concrete apron where the feed
5 wagon actually drives so it's a nice smooth area.
6 It's probably 8 foot on each side of the bunk.

7 Q. And otherwise is the yard dirt?

8 A. Otherwise the yard's dirt, yes.

9 Q. Do you scrape those aprons?

10 A. We do not scrape the aprons due to the
11 tractors we use on the scrapers have--are set up for
12 fieldwork, which usually requires duals, and they
13 have big--oh, a shaft that sticks out where you can
14 put a second set of rear tires on it, and that sticks
15 out too far and it hooks on the field bunks and it
16 breaks them, so we cannot go on the concrete.

17 Q. What usually ends up being on the concrete
18 apron after the cattle are fed?

19 A. They will waste some feed because,
20 especially Holstein cattle, I don't know why, they
21 root it up with-- They like it. And it spills feed
22 over the edge, so there will be silage and corn and
23 hay all on there.

24 Q. And you mentioned silage. You feed corn
25 silage?

1 A. Yes.

2 MR. McAFEE: I don't have any further
3 questions, Your Honor.

4 THE ADMINISTRATIVE LAW JUDGE: Okay. Do you
5 need a minute or are you ready?

6 MR. RYAN: One second, Your Honor. Thank
7 you.

8 THE ADMINISTRATIVE LAW JUDGE: Sure.

9 CROSS-EXAMINATION

10 BY MR. RYAN:

11 Q. Good morning, Mr. Vos.

12 MR. RYAN: For purposes of the record, since
13 your father is here and will be testifying to, would
14 it be appropriate for me to call him Mike, so we're
15 clear, if it's all right with you, Mr. Vos?

16 THE WITNESS: That's fine with me, yeah.

17 THE ADMINISTRATIVE LAW JUDGE: Sure.

18 MR. RYAN: Just so we don't have two
19 Mr. Voses being cross-examined.

20 BY MR. RYAN:

21 Q. I'm Mr. Ryan. I'm Mark Ryan from the EPA.

22 A. All right.

23 Q. Pleased to meet you.

24 Now, you testified a minute ago that you
25 scrape the yards, I believe, in the summertime

1 approximately once a week?

2 A. Approximately, yeah.

3 Q. Yeah. Is there sometimes it's longer
4 between scrapings?

5 A. Oh, I would say both ways. Sometimes it
6 possibly could go every other week, and sometimes it
7 could be three times a week. It depends on the
8 cattle.

9 Q. Okay. And you would agree, would you not,
10 that the summertime is the rainy season in your part
11 of the world?

12 A. Correct.

13 Q. And that's when you get most of your rain?

14 A. Right.

15 Q. Yeah.

16 THE ADMINISTRATIVE LAW JUDGE: You have to--
17 You have to keep your voice up and not just
18 say--mumble. Just yeses or nos, all right?

19 THE WITNESS: All right.

20 THE ADMINISTRATIVE LAW JUDGE: So your
21 answer to the last question was yes?

22 THE WITNESS: Yes.

23 BY MR. RYAN:

24 Q. And you would agree that as soon as you
25 scrape-- Let me ask this first: Are the cows in the

1 pens when you're scraping?

2 A. Generally, yes. Not always.

3 Q. So the scraper goes by. The cows will just
4 walk in right behind it, possibly?

5 A. Yes.

6 Q. And so the cows will start doing their thing
7 again?

8 A. Yes. You will have that.

9 Q. So we'll have manure deposited possibly
10 right behind the scraper as it goes by?

11 A. Yes.

12 Q. Okay. So it's safe to say, isn't it, that
13 the feedlot is never completely free of manure, is
14 it?

15 A. No.

16 Q. Okay. So when you scrape up the manure and
17 haul it away, as we've discussed, and we'll get to
18 that in a little bit, you're never getting it all;
19 there's always manure there, right?

20 A. Correct.

21 Q. So if it's raining, the rain's gonna wash
22 that manure off, won't it?

23 A. I would say some of it would wash. I don't
24 know where you're talking, but, yes, it will move,
25 yes.

1 Q. Okay. So, now, you testified that
2 approximately once a week, and then you said
3 sometimes if you saw a big rainstorm coming, I think
4 you said like a week-long series of rain coming, you
5 might do it more often?

6 A. Well, we'll do it before the rain hits, yes.

7 Q. Do you scrape during the rain?

8 A. No, we do not.

9 Q. Okay. So if you have a big week-long gully
10 washer, you won't be out there scraping?

11 A. Probably not.

12 Q. Okay. And the cows are out there the whole
13 time?

14 A. Yep.

15 Q. And they're dropping manure?

16 A. Yes.

17 Q. I keep looking for a polite term to
18 reference that--

19 A. Yeah.

20 Q. --act.

21 And then, in the summertime you said you
22 primarily stockpile it on site?

23 A. I don't know about primarily. If we don't
24 have a place to go, like if-- Early on, we'll have
25 oats growing, but normally we have an oats field, so

1 we have a place to go with it after the oats are
2 harvested, and that's later on in the summer. So
3 half of the summer, maybe. The other half we'll haul
4 it out.

5 Q. And where do you haul it to in the summer?

6 A. To the oats field.

7 Q. And are those visible on this Respondent's
8 Exhibit 18?

9 A. No. Every year it's-- We have farms all
10 over the place, and we have--we put the oats in
11 different areas every year so we get the fertilizer
12 up in the manure.

13 Q. Now, the stockpiles that we talked about,
14 can they get fairly large at times in the summer?

15 A. I don't know what you call fairly--

16 Q. More than--

17 A. Yeah.

18 Q. --five feet high?

19 A. Well, probably, yes.

20 Q. And approximately how big around?

21 A. Well, normally it's the same width as a
22 scraper. We just keep going higher. So it's 10 to
23 12 foot--well, 12 to 14 foot wide.

24 Q. And 5 feet high and how long?

25 A. Every yard is different. We have-- The

1 small yards would be smaller, and--

2 Q. So you stockpile in each individual yard?

3 A. Yes.

4 Q. Okay. So when you scrape up, you move the
5 manure to a stockpile in the yard, and it stays in
6 that particular yard or pen until, at some point, you
7 can move it off?

8 A. Generally, yes.

9 Q. And when rain falls out of the sky, it hits
10 that stockpile. You don't cover it with any kind of
11 plastic or anything?

12 A. No.

13 Q. Yeah. Okay. So the practical effect of
14 scraping is to simply move--not remove immediately
15 the manure from the pen, it's just to push it into a
16 corner, so to speak?

17 A. Well, you've got a huge area you're talking
18 that the rain's gonna hit, and the manure pile is
19 going to a--maybe a twentieth of the yard size. So
20 you have way less rain hitting the pile than you
21 would if it was just scattered out.

22 Q. Okay. Please answer my question. My
23 question was when it rains, the manure that you
24 removed is still in the pen?

25 A. Sometimes. If we don't have a place to haul

1 it out.

2 Q. Okay. And you also testified that as soon
3 as the scraper goes by, the cows are continuing to
4 drop manure all the time?

5 A. Correct.

6 Q. Okay. Is the ground pretty hard in the
7 feedlot?

8 A. Yeah. Well, yeah. Dirt, so yes.

9 Q. Right. I mean, is it compacted dirt or is
10 it loose soil?

11 A. Probably compacted a little bit.

12 Q. Is that from the hooves of the animals?

13 A. Uh-huh.

14 Q. And I would suspect your scraper, when it
15 was out scraping, doesn't dig down into the dirt;
16 otherwise--

17 A. You have to regulate that in the tractor,
18 yeah. You don't want it to take dirt.

19 Q. Because otherwise your pen would disappear?

20 A. Correct.

21 Q. So you're just scraping off the surface; is
22 that correct?

23 A. Yep.

24 Q. Okay.

25 A. Yes.

1 Q. And this soil is fairly compacted from all
2 the machinery running over it?

3 A. Yeah.

4 Q. And the hooves of the cattle?

5 A. I would say.

6 Q. How much do these cattle weigh, per average,
7 fully grown?

8 A. Well, they're not always fully grown in the
9 yard. I mean, they're anywhere from 400 pounds to
10 1,300 pounds.

11 Q. So you have these heavy animals tramping
12 around all the time and heavy machinery driving
13 through the pens?

14 A. Yep. Yes.

15 Q. In your experience, does water run off
16 compacted soils more than loose soils?

17 A. I assume so, yes.

18 Q. You testified in the winter that you--if
19 I've got this correct, and I was taking notes
20 quickly, so please correct me if I'm getting this
21 wrong, that you scrape it several times a day in the
22 winter, did I get that correct, and when it's
23 snowing?

24 A. If it's snowing, we--we scrape--yes, we'll
25 scrape the snow all out of the yard that day it

1 snowed.

2 Q. Okay. And how often does it snow in your
3 part of the world in the wintertime?

4 A. Every year is completely different.

5 Q. Okay. Would you typically see, in the
6 months of January and February, snow on a regular
7 basis in an average area?

8 A. Oh, maybe three to four times a month,
9 maybe.

10 Q. Okay. So is it safe to say most of the time
11 you don't have snow coming down into your yard?

12 A. Depends on the year, I guess. It's hard to
13 answer that.

14 Q. And you talked about the bedding that you
15 put down. When you scrape-- If there's bedding on
16 the ground and you scrape for snow, does the bedding
17 get scraped up?

18 A. We have separate piles. We always go one
19 area with the bedding, so when we scrape the snow,
20 we'll go around where we had the bedding. It goes to
21 one spot, and then we'll scrape the bedding up
22 separately and spread that.

23 Q. And that's when it snows?

24 A. Well, no. We scrape the bedding either way.
25 We clean the yard--the bedding out. If it gets a lot

1 of manure in it, we'll do that. Two to three times a
2 week we'll clean it out and put fresh bedding in.

3 Q. Okay.

4 A. Because the yards actually don't get that
5 dirty. Most of the manure is in the bedding because
6 the cattle, they tend to just love that area because
7 it's warm.

8 Q. And when it rains or snows on the bedding,
9 the bedding gets wet, right?

10 A. Correct.

11 Q. Okay. And does any of the bedding ever run
12 off with the rain?

13 A. Well, no. It's in the wintertime, so it's--

14 Q. Well, how about-- Does it ever rain in the
15 wintertime?

16 A. Not too often, no.

17 Q. Okay. Now, you said after you picked
18 this--the material up you would take it to these two
19 areas on Respondent's 18, which you've marked with an
20 S.

21 A. Well, this is the snow I picked up.

22 Q. Okay. The snow. And you would admit that
23 the snow probably has--does have manure mixed in with
24 it?

25 A. Very, very little.

1 Q. Okay. So you use a scraper to pick up the
2 snow?

3 A. Scraper and a loader, payloader, end loader.

4 Q. Are the cows in the pens at the time?

5 A. Yes.

6 Q. Okay. And the cows are defecating?

7 A. Yes. Yes.

8 Q. So does the scraper--is it raised up to not
9 pick up the manure?

10 A. You're gonna have some in the snow, I guess,
11 yes.

12 Q. Do you remove right down to the ground with
13 the scraper when you're removing snow?

14 A. There's usually a layer of ice or something
15 because of the--the ground's usually a little warmer
16 when it snows, so it gets a little layer of frozen--
17 It doesn't ever get into the ground because it's
18 frozen, but, yes, you're scraping it off as clean as
19 we can get it.

20 Q. So you're scraping it off as clean as you
21 can get it. You're getting-- Any manure that is
22 scrapable is going to go with the snow, correct?

23 A. Yes.

24 Q. And then you haul it off to the area in the
25 northwest corner of the property we see as the--

1 A. Well, I should have probably made a bigger
2 circle. It's a pretty big field. It's in that
3 field, though.

4 Q. And you would agree that that field is right
5 above the unnamed tributary?

6 A. Yes. But we're in the--there's terraces.

7 Q. Please answer my question. You would agree
8 that field we're looking at in the northwest corner
9 of your property is adjacent to the unnamed
10 tributary? Yes or no?

11 A. I don't know what you mean by the "unnamed
12 tributary."

13 Q. Well, let's be clear.

14 MR. RYAN: May I approach, Your Honor?

15 THE ADMINISTRATIVE LAW JUDGE: Yes.

16 BY MR. RYAN:

17 Q. Okay. What we're looking at here on
18 Respondent's 18, which I have right up on the
19 projector right now, you would agree this is an
20 aerial photograph of your feedlot and farm, correct?

21 A. Correct.

22 Q. And you wrote in the upper left-hand corner
23 an S--

24 A. Correct.

25 Q. --for an area where you deposit snow which

1 you've cleared off of the feedlots, correct?

2 A. Correct.

3 Q. Now, looking here, starting at Franklin
4 Avenue and proceeding northeast up towards-- Is this
5 340th Street that runs on the north boundary of your
6 feedlot?

7 A. Yeah. It's the county line so it's got two
8 names, but that's one of them.

9 Q. And what's the name on the north boundary of
10 your feedlot? What's this street right here?

11 A. That's 340th.

12 Q. Okay. So that is 340th?

13 A. Or 100th. It's got two signs on it. It's a
14 crazy deal. One's Woodbury, one's Plymouth.

15 Q. Okay. So the line that we're looking at
16 right here-- And do you see the line I'm pointing
17 at?

18 A. Right.

19 Q. Would you agree that's a small creek that
20 runs through your property?

21 A. Correct.

22 Q. Okay. Now, could I have you please come
23 around and use the Sharpee, and just so--just for
24 purposes of this exhibit, we've been referring to
25 that--

1 MR. RYAN: And correct me if I'm wrong,
2 Eldon.

3 BY MR. RYAN:

4 Q. --as the unnamed tributary throughout this
5 proceeding.

6 A. Okay. I wasn't here, so--

7 Q. That's fine. And can we agree that that
8 line I just pointed out is the unnamed tributary that
9 runs through your property?

10 A. I guess so, yes.

11 Q. Could you put a little arrow next to it and
12 write "UNT" for unnamed tributary?

13 A. UNT?

14 Q. Yes, please.

15 A. (Witness complied.)

16 Q. And you agree that's the little creek that
17 runs below the area with the S on it?

18 A. Correct.

19 Q. Okay. Thank you. That's all I have for
20 that right now.

21 Okay. So you would agree, would you not,
22 that the area in the northwest corner of your
23 property is adjacent to the unnamed tributary?

24 A. Yes.

25 Q. And that's--in that area is where you

1 deposit your snow that you remove from the feedlot?

2 A. Yes.

3 Q. And you would agree that that's--that area
4 slopes down towards the unnamed tributary?

5 A. Yes. But there is terraces in there.

6 Q. Okay. Again, but you would agree that this
7 area is uphill of the unnamed tributary?

8 A. Yes.

9 Q. Now, do you have tile drains in that field?

10 A. I--I'm not 100 percent on that.

11 Q. You don't know whether you have tile drains
12 there or not?

13 A. There possibly could be one down--way down
14 by those buildings that are in there.

15 Q. And what do tile drains do, in general?

16 A. They--I think they absorb springs, so if
17 there's a spring in the field, it helps dry out the
18 field.

19 Q. So if water falls out of the sky and soaks
20 into the ground, does it get into the tile drain?

21 A. I assume so, yes.

22 Q. And where do the tile drains lead to?

23 A. Probably that UNT.

24 Q. So if you have snow deposited in this
25 part--in that field and there's a tile drain--

1 A. The tile drain is a long, long ways from
2 there.

3 Q. Please let me finish my question and then
4 you can answer your question. If there's a tile
5 drain in that field and the snow soaks into the
6 ground, it might get into that tile drain and flow
7 into the unnamed tributary?

8 A. I'd say no.

9 Q. But you don't know whether there's tile
10 drains there or not?

11 A. I'm not-- Well, I think there's one way
12 down by the creek, but there's not way up--I know
13 there's not one where we're putting the snow, no.

14 Q. Okay. So there are no tile drains in that
15 area. So you said that you put them on terraced
16 areas because that's where they won't run off; is
17 that correct?

18 A. Correct.

19 Q. Now, do you ever monitor to make sure
20 they're not running off?

21 A. I do not, no.

22 Q. Okay. So if it, in fact, was running off,
23 you wouldn't know?

24 A. Well, I drive that road daily, so I would
25 probably see it.

1 Q. But you just said that you don't monitor it?

2 A. I don't keep a record of it, no.

3 Q. And you don't go out and check after a rain
4 event to make sure the manure is not coming off of
5 these areas that you've placed it?

6 A. I've never--

7 MR. McAFEE: Objection, Your Honor. He's
8 referring to manure and the testimony has been
9 regarding snow.

10 THE ADMINISTRATIVE LAW JUDGE: Okay. Why
11 don't you rephrase the question.

12 BY MR. RYAN:

13 Q. You agree there's snow in the manure that
14 you deposit in this area, don't you?

15 A. No.

16 MR. McAFEE: Objection. I believe he stated
17 that backwards.

18 THE WITNESS: Right.

19 BY MR. RYAN:

20 Q. Sorry. You agree that there's manure picked
21 up with the snow when you remove it from your
22 feedlot, correct?

23 A. I-- Possibly, yes. There probably is.

24 Q. And you would agree that that manure that's
25 entrained in the snow is deposited in the northwest

1 field, correct?

2 A. Correct.

3 Q. Okay. And so you don't actually check to
4 see whether any of that manure is ever flowing off
5 into the unnamed tributary, do you?

6 A. Well, it can't go anywhere. It's in a
7 terrace.

8 Q. That wasn't my question.

9 A. Oh.

10 Q. My question is you don't ever check to make
11 sure whether it's flowing off or not, do you?

12 A. I don't drive out there and write it in a
13 book or-- No. I don't get what you want me to say.

14 Q. Do you go out on a daily basis and look to
15 make sure it's not running off?

16 A. I drive by that every day.

17 Q. No. That's not my question. You don't go
18 out there on a daily basis to look?

19 A. I do not go in the field on a daily basis.

20 Q. And do you ever--other than casually driving
21 by, you don't ever go out and check it, do you, to
22 see whether it's running off into the unnamed
23 tributary?

24 A. I guess not, no.

25 Q. And my same questions will apply to the S in

1 the southeast corner that you made on Respondent's
2 18.

3 A. Well, that's impossible for that to get
4 there.

5 Q. Okay. Again--

6 THE ADMINISTRATIVE LAW JUDGE: But you have
7 to just answer his question, okay?

8 BY MR. RYAN:

9 Q. Okay. My question is you don't monitor that
10 area for runoff, do you?

11 A. No.

12 Q. Okay. Now, you would agree, would you not,
13 that when it rains-- It rains hard at times in your
14 part of the world in the summer, doesn't it?

15 A. Sometimes, yes.

16 Q. Yeah. And in the spring it can rain hard
17 too?

18 A. Yes.

19 Q. And you would agree, would you not, that if
20 you took manure from your feedlot and moved it to one
21 of your fields that could potentially wash off in a
22 hard rain, couldn't it?

23 A. You mean spread it in a field? What do you
24 mean put it in the field?

25 Q. Well, referring to the placing your--the

1 snow, which we've--you've already stated could
2 possibly have manure in it.

3 A. Correct.

4 Q. In that northeast field if it rained hard on
5 top of that, it could potentially run off if it
6 rained hard enough, couldn't it?

7 A. I would say no. Possibly, if there's
8 terraces, so it's going to be very hard.

9 Q. But it's possible, right?

10 A. I can't-- I don't know. I guess it's
11 possible.

12 Q. Now, do you know what constitutes a
13 pollutant under the Clean Water Act?

14 A. No.

15 Q. Would you consider manure a pollutant?

16 A. I'm assuming so.

17 Q. Okay. Would you consider silage a pollutant
18 if it got into the creeks?

19 A. No.

20 MR. McAFEE: I'm going to object, Your
21 Honor. He's asking the witness for a legal
22 conclusion.

23 THE ADMINISTRATIVE LAW JUDGE: Yeah. That--

24 MR. RYAN: I'll rephrase, Your Honor.

25 THE ADMINISTRATIVE LAW JUDGE: Okay.

1 Rephrase.

2 BY MR. RYAN:

3 Q. When you're doing your routine maintenance
4 on the yards, keeping them clean, as you spoke
5 before, do you try and prevent things from running
6 off your yard during a rain event?

7 A. Yes.

8 Q. Okay. But you don't have--there's no
9 berming around your yard, is there?

10 A. Yeah, there is.

11 Q. I mean around all of your yard.

12 A. There's-- Yeah, there's somewhat of a berm
13 on-- On the west end, everything goes into a lagoon
14 or basin.

15 Q. But on the south end, there's no berming on
16 the south end, is there?

17 A. There's a slight berm on-- There's an
18 opening where there's no berm, but there's a berm
19 around majority of it.

20 Q. But you would agree there are low points on
21 the south end--

22 A. Correct.

23 Q. --where there's no berming and stuff can run
24 off?

25 A. Correct.

1 Q. And you agree you have no retention ponds?

2 A. Not on the south end.

3 Q. Okay. So you would agree, then, that when
4 it rains things can run off over your yard to the
5 south, for example?

6 A. Water runs off, yes.

7 Q. Okay. And you would agree that water--that
8 water would contain, at times, manure?

9 A. Not that you can see, no.

10 Q. But that wasn't my question.

11 A. I don't know the answer to that. I mean, I
12 don't know. I've never tested the water.

13 Q. And is it possible that silage runs off to
14 the south?

15 A. Very minimum, if it is. Maybe along the
16 bunk there a little bit.

17 Q. How about bedding?

18 A. Probably not, because it's usually in the
19 winter only, and that's very rare that it would rain
20 in the winter. If it does, it's freezing rain, and
21 nothing runs.

22 Q. So you wouldn't expect to see silage and
23 bedding flowing off of the south side of the lot into
24 those farm fields to the south?

25 A. Maybe silage from the-- I guess it could

1 from the cement aprons along the bunks, there might
2 be spillage of hay and silage mixed, but not a huge
3 quantity.

4 MR. RYAN: May I have 30 seconds?

5 THE ADMINISTRATIVE LAW JUDGE: You can have
6 more than 30 seconds.

7 MR. RYAN: Thank you, Your Honor.

8 THE ADMINISTRATIVE LAW JUDGE: We'll go off
9 the record for a minute.

10 (Discussion off the record.)

11 THE ADMINISTRATIVE LAW JUDGE: We're back on
12 the record, and, Mr. Ryan, you say you've concluded
13 your cross?

14 MR. RYAN: Yes, I have, Your Honor. Thank
15 you very much.

16 THE ADMINISTRATIVE LAW JUDGE: Before you
17 begin your redirect, Mr. McAfee, if--that's not
18 saying you have to have it, but assuming for a moment
19 that you are, you didn't move for the admission of
20 Respondent's Exhibit 18. Do you want to do that?

21 MR. McAFEE: Yes. Thank you, Your Honor.

22 THE ADMINISTRATIVE LAW JUDGE: Okay. And so
23 any objection, Mr. Ryan?

24 MR. RYAN: I apologize, Your Honor.

25 THE ADMINISTRATIVE LAW JUDGE: That's all

1 right. Mr. McAfee just moved for the admission of
2 Respondent's Exhibit 18.

3 MR. RYAN: I have no objection, Your Honor.

4 THE ADMINISTRATIVE LAW JUDGE: Okay.

5 Respondent's Exhibit 18 is admitted.

6 (Respondent's Exhibit No. 18
7 was received in evidence.)

8 THE ADMINISTRATIVE LAW JUDGE: All right,
9 Mr. McAfee.

10 REDIRECT EXAMINATION

11 BY MR. McAFEE:

12 Q. Mike, one at a time. Related to the
13 scraping and how often you do it, did you have more
14 cattle in the past than you have now?

15 A. Yes.

16 Q. Did you scrape more often when you had more
17 cattle?

18 A. Yes. We actually have sometimes a retired
19 person that would scrape nonstop. He'd just--that's
20 all his job was is to do one yard, and when it's done
21 he'd go to another yard and just try to keep them
22 clean.

23 Q. When you scrape in the summer, is there any
24 dirt in with the manure when you scrape?

25 A. Yes, there would be.

1 Q. Do you have any idea how much of each or--

2 A. I just know that in the fall we haul a lot
3 of dirt in to fix all our holes or water tanks. It
4 seems like, yeah, there's--was substantial amount. I
5 don't know how much, though.

6 Q. Mr. Ryan asked you about the pens being hard
7 or compacted, I believe. Along those lines, do you
8 usually need boots to walk out in your yards?

9 A. Actually, it's amazing that very rare-- I
10 mean, if it's raining you have to wear, like, just a
11 small overshoe, not a knee boot like a lot of places
12 do. Pretty-- It's just sticky and slimy. It's not
13 deep.

14 Q. And what do you attribute that to?

15 A. Just that we--it's just dirt. It's not--
16 We try to keep them as clean as we can.

17 Q. You also talked about the bedded areas. Are
18 they as hard as the areas that don't have bedding?

19 A. Yeah. They'd be the same.

20 Q. Okay. After the bedding is placed on them,
21 is it hard, then, on top of the bedding?

22 A. Oh, no. No. Not on top of the bedding.
23 It's always soft and just like cornstalks.

24 Q. Mr. Ryan asked you quite a few questions
25 about the snow and the manure in the snow, et cetera.

1 You may have testified to this, but how much--how
2 much manure do you see in the snow?

3 A. You actually-- It looks like nice white
4 snow when you unload it. I mean, I wouldn't
5 recommend eating it, but it's pretty clean snow.

6 Q. But there is some manure in it?

7 A. There would be a little. I don't know how
8 much, but there would definitely be some in it.

9 MR. McAFEE: No further questions, Your
10 Honor.

11 MR. RYAN: Just one question, Mr. Vos.

12 RE-CROSS-EXAMINATION

13 BY MR. RYAN:

14 Q. If it's not in the snow, it's still in the
15 pen, isn't it, after you scrape up the snow? If it
16 doesn't get in the snow, it's still in the pen, isn't
17 it?

18 A. There was none under it, yeah. It's either
19 in the-- I don't know. It's either in the animal
20 yet or in the snow or in the pile, one of the places.

21 MR. RYAN: Okay. Thank you very much.

22 THE WITNESS: All right. Thanks.

23 THE ADMINISTRATIVE LAW JUDGE: You're sure?
24 You can-- When there's another question, then you
25 have the opportunity to follow up with additional

1 direct. And even if-- And I'm somewhat open on
2 this. If you have something that you forgot to ask
3 and you feel it's important, for both sides, I would
4 allow a question to be asked, even though it's not
5 strictly part of redirect.

6 FURTHER REDIRECT EXAMINATION

7 BY MR. McAFEE:

8 Q. Mike, you were just asked a question about
9 if the manure's not in the snow, where is it, but you
10 also scrape, don't you, when it's not snowing?

11 A. Right. So it could be scraped up already.

12 Q. And I think you also testified to the effect
13 that-- What effect does the bedding have on where
14 the cattle dung in the wintertime?

15 A. It's almost--I would say almost 95 percent
16 of it is right on the bedding.

17 MR. McAFEE: No further questions.

18 THE ADMINISTRATIVE LAW JUDGE: And then but
19 I did notice-- We'll go off the record.

20 (Discussion off the record.)

21 THE ADMINISTRATIVE LAW JUDGE: We're back on
22 the record.

23 MR. RYAN: No, Your Honor, I have no more
24 questions.

25 THE ADMINISTRATIVE LAW JUDGE: Okay. That's

1 it, Mr. Vos. Thank you for your testimony.

2 THE WITNESS: Thank you.

3 (Witness excused.)

4 THE ADMINISTRATIVE LAW JUDGE: Okay. So--

5 MR. McAFEE: Pardon me, Your Honor?

6 THE ADMINISTRATIVE LAW JUDGE: Are you ready
7 for your next witness?

8 MR. McAFEE: Yes.

9 THE ADMINISTRATIVE LAW JUDGE: So we'll take
10 five minutes.

11 (Short recess.)

12 THE ADMINISTRATIVE LAW JUDGE: All right.
13 I'm Judge Moran. Please raise your right hand.

14 BRAD WOERNER,
15 called as a witness by counsel for the Respondent,
16 being first duly sworn by the Certified Shorthand
17 Reporter, was examined and testified as follows:

18 THE ADMINISTRATIVE LAW JUDGE: Okay. Have a
19 seat, sir. And then, first of all, state your name
20 nice and clearly for us, and then spell your name for
21 us.

22 THE WITNESS: Brad Woerner, B-r-a-d
23 W-o-e-r-n-e-r.

24 THE ADMINISTRATIVE LAW JUDGE: Okay.
25 Mr. McAfee.

DIRECT EXAMINATION

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BY MR. McAFEE:

Q. Good morning, Brad. Could you please state your address for the record.

A. 1407 St. Benedict Drive, Yankton, South Dakota, 57078.

Q. Could you give us a little background on yourself, starting with where you went to college?

A. I went to Iowa State University. Began in the fall of 1991, graduated with a bachelor's degree in ag engineering with an emphasis in structural and environmental in May of 1996 and--when I got my bachelor's degree.

And then went right into graduate school at Iowa State and received my graduate degree--finished my course work, excuse me, in August of 1998 and ultimately received the degree in December of 1998.

THE ADMINISTRATIVE LAW JUDGE: And what was the grad degree in?

THE WITNESS: The graduate degree was in ag engineering.

THE ADMINISTRATIVE LAW JUDGE: Okay.

BY MR. McAFEE:

Q. First of all, Mr. Woerner, where are you from?

1 A. Pardon me?

2 Q. Where did you grow up?

3 A. I grew up in Valmy, Nebraska.

4 Q. Did you grow up on a farm?

5 A. I did not grow up on a farm. I grew up in a
6 small community of about 1,700. Excuse me. It was a
7 rural community and a farming community.

8 Q. So were you ever able to be on a farm?

9 A. Yes, sir.

10 Q. Okay. Back to your educational background,
11 and now we'll get into your work experience. What
12 did you do upon graduation with a master's degree in
13 engineering?

14 A. In August of 1998, I started working for
15 Iowa State University Extension in the southeast area
16 of the state. I was initially housed in Mahaska
17 County and then was transferred over to Marion
18 County.

19 I was an ag engineering field specialist was
20 the title, which allowed me the opportunity to serve
21 the ag community, livestock producers, farmers, in
22 the southeast portion of the state.

23 Q. Give us--and maybe you have, but give us, if
24 you could, a little more detail on what you did with
25 farmers.

1 A. We, as field specialists, were there to
2 provide free assistance to the community, to the ag
3 community. We worked with several producers,
4 producer groups, commodity groups.

5 In particular with livestock producers, we
6 provided assistance in designing settling basins and
7 other structures for their facilities. We wrote
8 numerous nutrient management plans for those
9 producers that were submitted to the Iowa DNR.

10 We also worked with grain producers on grain
11 handling, drying, grain storage facilities, as well
12 as homeowners with drainage issues, wet basements,
13 how to improve drainage, some air quality issues
14 within the house as well as within livestock
15 facilities.

16 Q. You're no longer with--or in that position,
17 of course, so when did you make a change?

18 A. In March of 2002, I started working for
19 Eisenbraun & Associates in Yankton, which is a civil
20 engineering, surveying, environmental engineering
21 firm. And in that capacity, I was initially hired as
22 a project engineer and worked exclusively within our
23 agricultural engineering group.

24 Since that time, I have--I have become a
25 partner in the firm and have moved up to head

1 of--heading up, excuse me, the ag engineering program
2 at our company. I have approximately two full-time
3 engineers that work underneath me, as well as various
4 field crews and AutoCAD technicians.

5 Q. Do you do much work with feedlots?

6 A. Yes. In fact, that's all I've done since
7 moving to Yankton is working with Eisenbraun &
8 Associates. The company itself started doing
9 agricultural engineering for the livestock producers
10 in South Dakota in the approximately '93, '94 time
11 frame, and since that time our market share has grown
12 tremendously, and we've assisted several hundred
13 producers with permitting in a four-state region.
14 Iowa, South Dakota, Nebraska, and Minnesota would be
15 the four states that we focus on.

16 Q. As part of your duties and job
17 responsibilities, do you--what do you do for
18 feedlots?

19 A. For--for all of our livestock producers, we
20 meet with them, get an understanding of what problems
21 or issues they may have, what--I guess ultimately
22 what do they want to accomplish, whether it's a new
23 facility, an expansion of a facility, permitting of a
24 facility based on a complaint or just as a desire to
25 permit the facility.

1 Our company provides all of the engineering
2 and surveying for those producers for both design and
3 construction.

4 Q. As part of your work with Eisenbraun, do you
5 do any computer modeling?

6 A. We could some computer modeling. When it
7 comes to modeling runoff for feedlots, it's required
8 to show that the structures are sized properly to
9 handle the runoff from the storm events.

10 Q. And do you do that personally?

11 A. Yes.

12 MR. McAFEE: Your Honor, I would move that
13 this witness be designated as an expert witness.

14 MR. RYAN: In what field?

15 MR. McAFEE: In the field of engineering,
16 and in specifically regarding this case, dealing with
17 computer modeling.

18 MR. RYAN: May I have a minute, Your Honor?

19 THE ADMINISTRATIVE LAW JUDGE: Yes.

20 MR. RYAN: May I voir dire on the modeling
21 issue, Your Honor?

22 THE ADMINISTRATIVE LAW JUDGE: Yes.

23 VOIR DIRE EXAMINATION

24 BY MR. RYAN:

25 Q. Mr. Woerner, you've testified just a moment

1 ago that you do computer modeling and you said for
2 feedlots and you said it's required. Do you recall
3 that testimony?

4 A. Yes.

5 Q. How long have you been modeling?

6 A. With Eisenbraun & Associates, since--

7 Q. No. In general.

8 A. In general?

9 Q. That would be computer modeling, hydrologic
10 computer modeling.

11 A. Since August of 1998, January of 1999 for
12 sure.

13 Q. And how many different models do you use?

14 A. We have used the SITES model, the TR-55
15 model, a couple of spreadsheet models that have been
16 developed by the Iowa NRCS.

17 Q. And are these models all related to modeling
18 runoff from feedlots?

19 A. Yes, sir.

20 Q. And what was the first one?

21 THE ADMINISTRATIVE LAW JUDGE: No. You
22 know, I allowed you a little bit of leeway, but
23 really you're straying into subjects not as to
24 whether this witness is qualified as an expert but
25 into how you might deal with the extent of his

1 expertise, the extent, and that will be subject to
2 cross-examination.

3 MR. RYAN: Your Honor, you're correct. I'm
4 sorry. I can't help myself sometimes. I apologize.

5 Just a couple more questions--

6 THE ADMINISTRATIVE LAW JUDGE: Maybe.

7 MR. RYAN: --if I may.

8 THE ADMINISTRATIVE LAW JUDGE: Yes.

9 BY MR. RYAN:

10 Q. And is modeling part of your daily work at
11 Eisenbraun & Associates?

12 A. Yes. For our livestock producers.

13 MR. RYAN: And just so I'm clear, counsel,
14 how were you seeking to have him qualified again?

15 MR. McAFEE: As a--as an engineer, as an
16 agricultural engineer, and as regarding computer
17 modeling as the issues have been presented in this
18 case.

19 MR. RYAN: I have no objections, Your Honor.

20 THE ADMINISTRATIVE LAW JUDGE: Right. But,
21 you know, and I so designate this person, but I'm not
22 going to limit his area of expertise simply to
23 modeling because he has expertise by virtue of his
24 agricultural engineering degree and his master's
25 degree in agricultural engineering, and to the extent

1 that EPA has been advised that--through the
2 prehearing exchange that that would be part of the
3 subject of his testimony, unless you can show it's
4 outside of that, this person is clearly an expert and
5 able to testify and not just limited to the subject
6 of modeling.

7 In other words, I don't want to--just
8 because Mr. McAfee has sort of spoken with a broad
9 brush about his expertise, that that doesn't mean
10 that he's--may only testify about that, again, as
11 long as the prehearing exchange so advised as to the
12 scope of his testimony.

13 MR. RYAN: Your Honor, he was--

14 THE ADMINISTRATIVE LAW JUDGE: So you can
15 have specific objections as testimony may arise, and
16 then I will deal with those questions at that time.

17 MR. RYAN: Fair enough, Your Honor. Just
18 for the record, it was my understanding that he was
19 moved in as an expert in engineering and modeling. I
20 had no objection to that.

21 THE ADMINISTRATIVE LAW JUDGE: Okay. Thank
22 you.

23 All right. So he has been designated, and
24 you may now proceed, Mr. McAfee.

25 MR. McAFEE: Thank you, Your Honor.

1 DIRECT EXAMINATION (Resumed)

2 BY MR. McAFEE:

3 Q. Mr. Woerner, just kind of cutting to the
4 chase here, could you tell us how you first became
5 involved with working with Lowell Vos on his feedlot?

6 A. We were contracted with-- Back up. The
7 Iowa NRCS had put out a solicitation for qualified
8 firms to provide engineering services for some of
9 their clients. There has been money designated at
10 the federal level to outsource, if you will, those
11 services due to backlog on projects, lack of
12 timeliness getting to some of their clients.

13 So we--we put in an application for that.
14 We went through the interview process, and based on
15 the qualified--qualification-based selection process
16 that they used, our firm was awarded a five-year
17 contract with the Iowa NRCS.

18 Mr. Vos' feedlot was one of the projects
19 that they provided to us in, I believe, July of 2004,
20 and at that time we initiated work with Mr. Vos.

21 Q. What did you first do for Mr. Vos?

22 A. Approximately a week after we were awarded
23 the contract, and in this particular what they call
24 work order for the Vos feedlot, we met with Mr. Vos
25 and a gentleman by the name of Jerry Sindt, who is

1 the district conservationist for Woodbury County for
2 the NRCS.

3 We met on site at Mr. Vos' feedlot, walked
4 around, discussed what his thoughts were, what we can
5 provide to him in the way of services, how our
6 contract was arranged with the NRCS.

7 THE ADMINISTRATIVE LAW JUDGE: And just help
8 me out. I know you said it, but when did this
9 on-site first visit with Mr. Vos' feedlot occur, what
10 year and month?

11 THE WITNESS: I believe it was late July
12 2004, Your Honor.

13 THE ADMINISTRATIVE LAW JUDGE: Okay. Thank
14 you.

15 BY MR. McAFEE:

16 Q. Could you tell us, what were the
17 circumstances as to why you got involved or what was
18 NRCS's request?

19 A. The NRCS had, I believe, earlier in 2004,
20 performed a site survey at Mr. Vos' feedlot,
21 topographic survey, to begin engineering. They were
22 unable to give it the proper attention and wanted to
23 make sure that it moved forward.

24 So we were informed of this, and, like I
25 stated, we met with him on site, as well as the local

1 NRCS individual in charge of that county, to discuss
2 our involvement further.

3 Q. Do you know or were you aware at the time if
4 Mr. Vos was participating in what's been called the
5 Iowa Plan?

6 A. We were provided information by the Iowa
7 NRCS that identified that a plan of action was put
8 together for his facility. We were not informed as
9 to whether or not it had actually been filed until
10 later on.

11 Q. Were you aware of what the Iowa Plan was?

12 A. Yes.

13 Q. And could you tell us briefly--the Court's
14 had some testimony regarding that, but your
15 understanding of what it was at the time?

16 A. My understanding of the Iowa Plan at that
17 time was that it was established as somewhat of an
18 amnesty program for livestock producers to volunteer
19 information on their facility so that the DNR could
20 prioritize, rank their facilities in high, medium, or
21 low category, I believe is how they had it, so that
22 the producers would have an understanding of,
23 perhaps, the urgency.

24 The higher priority feedlots would be the
25 ones that would be preferred to get taken care of

1 sooner or early on in the stage and then working
2 their way down to the medium and low risk, I believe
3 is how they identified it.

4 Q. Did you know at the time if Mr. Vos had been
5 ranked?

6 A. No.

7 Q. Okay. Do you know now if he had been
8 ranked?

9 A. It is my understanding that he had been
10 ranked. I-- Yes.

11 Q. Do you recall that ranking?

12 A. No, sir.

13 Q. Okay. So what did you do after meeting on
14 site with Mr. Vos?

15 A. After our visit in July with Mr. Vos and
16 Mr. Sindt, we were to come back--per our contract
17 with the Iowa NRCS, we were to come back with a
18 feasibility report for what Mr.--what the producer
19 was looking to do.

20 In this case, Mr. Vos was looking at an
21 alternative technology system, and we felt it would
22 be prudent, prior to giving him this feasibility
23 report, which would identify possible construction
24 cost, time lines, issues that may come about with
25 whatever system he chose, it would have been--it

1 would be prudent for us to understand the alternative
2 technology rules or, rather, have them in place at
3 the DNR level, make sure we understood them so that
4 we can provide him an accurate snapshot of what that
5 type of system would be for his facility.

6 Q. When you became involved with Mr. Vos, was
7 NRCS still involved in working with Mr. Vos?

8 A. Directly, yes, because they were funding our
9 services for Mr. Vos. He also had, it's my
10 understanding, EQIP monies available for his project
11 on the construction side as well.

12 Q. Do you recall what you did next as far as
13 preparing any plans or anything for Mr. Vos?

14 A. In, I believe, February of 2005, we had a
15 little better understanding of the alternative
16 technology systems that were floating around the
17 state as far as the rules and the general idea of how
18 they were gonna be critiqued. I do not believe at
19 that time, however, that the rules were finalized.

20 But in February of 2005, we did present
21 Mr. Vos, as well as our contract representative at
22 the Iowa NRCS office, with a copy of a report
23 outlining a conventional system, a holding pond-type
24 system, and its costs, and then we also clarified
25 that in our opinion it would be prudent to make sure

1 that the rules regarding alternative technologies
2 were finalized before we--before we finalized
3 anything with respect to construction costs and/or
4 feasibility on that side.

5 Q. Did you have any understanding as to what
6 Mr. Vos' status was under the Iowa Plan at the time
7 you started? Did you know, was he on time or--

8 A. No.

9 Q. You didn't have any-- Did NRCS relate
10 anything to you about their status in performing work
11 for Mr. Vos?

12 A. The only thing we were provided was what was
13 identified as a preliminary plan of action outlining
14 some dates; however, we were--it was never confirmed
15 to us that anything had been set in stone. It was
16 our assumption; however, we weren't provided any
17 official paperwork from the Iowa DNR at that time
18 regarding Mr. Vos and the Iowa Plan.

19 Q. I'd like to have you turn, if you would,
20 please--

21 MR. McAFEE: And, Your Honor, may I
22 approach?

23 THE ADMINISTRATIVE LAW JUDGE: You may.

24 BY MR. McAFEE:

25 Q. I'll help you find--

1 THE ADMINISTRATIVE LAW JUDGE: Let's go off
2 the record.

3 (Discussion off the record.)

4 BY MR. McAFEE:

5 Q. Mr. Woerner, would you please, in the
6 exhibit book that's in front of you, turn to Tab 23.

7 THE ADMINISTRATIVE LAW JUDGE: This is from
8 EPA exhibits?

9 MR. McAFEE: Yes. The Complainant's Exhibit
10 23, please.

11 BY MR. McAFEE:

12 Q. Okay. And that's a fairly lengthy exhibit,
13 but it starts out with eight pages. Would you flip
14 past those. And then there's 27 pages with
15 handwritten numbers at the bottom. Would you please
16 go to page 4 of 27?

17 Do you recognize what this document is?

18 A. Yes.

19 Q. Could you tell us what it is?

20 A. It appears to me the public notice as well
21 as proof of publication for an NPDES permit for
22 a--for Lowell Vos Feedlot.

23 Q. And is there a date on this?

24 A. Yes.

25 Q. And what is that date?

1 A. The proof of publication date is October
2 6th, 2004.

3 Q. And tell us, what's involved with a--what
4 does a proof of publication mean in the process of an
5 NPDES permit?

6 A. The proof of publication?

7 Q. Yes.

8 A. It is a statement stating that public notice
9 was public noticed and where it was public noticed
10 and when it was public noticed.

11 Q. And by the fact that there's a proof of
12 publication, does that mean that an NPDES permit is
13 in the works or has been prepared, or what does that
14 mean?

15 A. I believe that's--that it means that an
16 NPDES permit application had been received and--

17 Q. Received by whom?

18 A. By the Iowa DNR--

19 Q. Okay.

20 A. --in this case.

21 Q. Did you prepare--did you work on the NPDES
22 permit application that this public notice appears to
23 represent?

24 A. No.

25 Q. Do you know who did?

1 A. I believe it was the Iowa NRCS.

2 Q. So as of October 6th of 2004, then, it
3 appears that an NPDES permit application had been
4 prepared and submitted to DNR and proof of
5 publication had been--it is proof that notice had
6 been published for regarding that permit application;
7 is that right?

8 A. Yes.

9 Q. Okay. Were you aware of this at this time?

10 A. Was I aware--

11 Q. Were you--

12 A. I was not aware that this had been public
13 noticed at this--at the time of the public notice.

14 Q. So then apparently NRCS was still doing some
15 work on the file?

16 THE ADMINISTRATIVE LAW JUDGE: You could say
17 you can't answer that question, for example, but what
18 I don't want you to do is what some witnesses have
19 done is they throw back a question to counsel.

20 If you don't feel you can answer it because
21 you don't know, just say either, "I don't understand
22 your question," or, "I'm unable to answer that
23 question," and then your attorney will have a chance
24 to either move on to something else or either
25 rephrase the question.

1 A. Could you please rephrase the question?

2 BY MR. McAFEE:

3 Q. Sure. I think, you know, you testified that
4 for this proof of publication to be there there would
5 have had to have been an NPDES permit application
6 submitted to DNR; is that correct?

7 A. Yes.

8 Q. Someone has done that, evidently, but it
9 wasn't you?

10 A. Yes.

11 Q. Who was doing the work for Mr. Vos prior to
12 you?

13 A. The Iowa NRCS.

14 Q. And, as far as you know, would it have been
15 the Iowa NRCS that might have submitted this NPDES
16 permit application?

17 MR. RYAN: Objection; calls for speculation.
18 He's already testified he has no knowledge of where
19 this thing came from.

20 THE ADMINISTRATIVE LAW JUDGE: Sustained.

21 BY MR. McAFEE:

22 Q. Would someone have prepared an NPDES permit
23 application for this notice to have been published?

24 A. Yes.

25 Q. Okay. Now, I want to proceed with you were

1 testifying as to what was--what work you were doing
2 that, I guess, fall of '04 and winter of '05; is that
3 right?

4 A. Yes.

5 Q. Okay. And I think-- Well, go ahead with
6 your testimony about what you were doing to prepare
7 some type of design plans for Mr. Vos.

8 A. Following our February 2005 report to
9 Mr. Vos, we were in contact again with him in May of
10 2005 regarding our report from February, as well as
11 which direction we were to move forward--or which
12 direction we were to move with respect to his permit
13 application or the design that we had been hired to
14 finish for the NRCS.

15 Q. In your work with Mr. Vos up to this point
16 and, in fact, going forward, did you find him
17 cooperative?

18 A. Yes.

19 Q. Did he seem interested in getting work done?

20 A. Yes.

21 Q. Are you aware of a letter that he may have
22 received from the Iowa DNR regarding his status in
23 the Iowa Plan?

24 A. Yes.

25 Q. How did you become aware of that letter?

1 A. If I-- I believe we--we did not receive a
2 copy of the letter directly. I believe that the NRCS
3 office in Woodbury County received a copy and faxed a
4 copy of that letter to our office.

5 Q. If you would, would you please turn to
6 Complainant's Exhibit 22. And please take a look at
7 that. Is that the letter that you were referring to?

8 A. Yes.

9 Q. What's the date on that letter?

10 A. April 28, 2005.

11 Q. And did Mr. Vos contact you, then, shortly
12 after that date?

13 A. Yes.

14 Q. And you may have testified to this, but what
15 date was it he contacted you?

16 A. It was early May 2005, I believe May 4th or
17 5th.

18 Q. And did he mention receiving this letter?

19 A. Yes.

20 Q. And what did you and he talk about?

21 A. We talked about the options, what was in
22 front of us, what we needed to accomplish. We
23 discussed whether or not alternative technology and
24 conventional system would benefit his facility, which
25 one was he interested in pursuing at that time.

1 May 4th, 2005, two engineers from our
2 office, not including myself, visited with Mr. Vos at
3 his facility.

4 Q. Before we get to that, Mr. Woerner, I wanted
5 to ask you, in your discussions with Mr. Vos, he did
6 mention this letter; is that right?

7 A. Yes.

8 Q. Was there any--was there any sense of
9 urgency in his discussions with you?

10 A. Yes.

11 Q. And that urgency was regarding what?

12 A. Wanting to bring this to a closure, wanting
13 to do the right thing, making sure that what he was
14 going to decide to do in the long term--long-range
15 plans, rather, was going to fit his facility. He
16 didn't want to make a decision short term and regret
17 it long term.

18 Q. I'd now like to have you-- There's a
19 smaller notebook there labeled "Respondent's Hearing
20 Exhibits" with a green cover.

21 THE ADMINISTRATIVE LAW JUDGE: Yep. You've
22 got it.

23 BY MR. McAFEE:

24 Q. Would you please turn to Tab 9, please.

25 Do you recognize that photo?

1 A. Yes.

2 Q. I believe you just testified that several
3 people from your office went to Mr. Vos' site on what
4 date was it?

5 A. I believe May 4th, 2005.

6 Q. And were you present that day?

7 A. No.

8 Q. Do you know if what's been marked as
9 Respondent's Exhibit 9, which is a photograph, do you
10 know if that photograph was taken that day?

11 A. Yes.

12 Q. And how do you know that?

13 A. Upon after our engineers returned to the
14 office, they dictated a contact report and put photos
15 in that report, and these photos were with that
16 report.

17 Q. Did you have a cause or an opportunity
18 review those photos?

19 A. Yes.

20 Q. Taking a look at Respondent's Exhibit 9,
21 could you tell us what that photo depicts and where
22 it was taken from?

23 A. The photo is from Mr. Vos' feedlot toward
24 the west end of the facility looking west. In the
25 photo there is a catch basin there.

1 Q. Does the photo show his feedlot itself, the
2 surface?

3 A. It shows a portion.

4 Q. And tell us what you surmised from viewing
5 this photo regarding the feedlot surface.

6 A. The feedlot appears to have--be clean. It
7 doesn't appear to be large piles of manure sitting
8 within the yard.

9 Q. Would that indicate that maybe the feedlot
10 has been scraped recently?

11 A. Yes.

12 Q. You visit quite a few feedlots, I take it?

13 A. Yes.

14 Q. How would you rank Mr. Vos' feedlot, based
15 on this photo, for cleanliness of the lots?

16 A. Based on this photo, it would appear that
17 this feedlot is--is, obviously, clean, but would be
18 one of the cleaner ones that I have seen.

19 Q. Okay. Let's please turn to the next tab,
20 Respondent's Exhibit 10. Could you identify this
21 exhibit for us, please?

22 A. It is a photo of Mr. Vos' feedlot on the--be
23 on the south side of the feedlot looking to the
24 north.

25 Q. And tell us what this photo--tell us your

1 interpretation, I'll say, of this photo.

2 A. It is of a different pen than the previous
3 photo. It shows, like the other photo, a clean yard
4 that appears to be well maintained, does not appear
5 to be large quantities of manure sitting in the yard.
6 South side of the yard where the fence is shown in
7 the photo, there is a grass strip there.

8 Q. And tell us what that grass--the importance,
9 if any, to you of that grass strip.

10 A. Healthy standing grass would indicate
11 there--there would not be severe erosion problems.
12 Based on this photo, it would appear that the stand
13 of grass does not have any dead spots within it,
14 which could possibly be caused from erosion washing
15 out the grass, or pollutants or too many nutrients
16 over the grass would cause it to have a poor stand.

17 Q. For what purpose, if you know, would these
18 photos have been taken by your associates?

19 A. When we visit a site, we like to get photos
20 of the site so that we can identify several things
21 from it. One, to properly design a facility, you
22 have to design it so that you can match the
23 producer's management style so that it would be easy
24 for the producer to continue working in the yards the
25 same way as he or she has been in the past. You

1 don't want to cause any increase in workload for
2 them.

3 So we take a picture to get an understanding
4 of what the yards look like during our visit. That
5 may lead into what type of management style the
6 producer has without directly asking him.

7 We also would typically take photos from a
8 marketing standpoint to get before and after photos
9 of facilities, as well as to include photos within a
10 report.

11 Q. You mentioned management style. Would
12 management style include cleanliness of the lots?

13 A. Yes.

14 Q. Would you please turn to Exhibit 11. And
15 what is this exhibit?

16 A. It is a photo of Mr. Vos' feedlot in close
17 proximity to the previous photo. This photo, I
18 believe, is facing more northeast than the previous
19 photo. It shows similar yard conditions as the other
20 photos that we've looked at. Stand of grass in this
21 photo is comparable to the one in the previous photo
22 as well.

23 Q. Do you see anything in the lower right-hand
24 corner of the photo?

25 A. Yes.

1 Q. And what is that?

2 A. It appears to be the edge of the field that
3 is out at his site.

4 Q. So does that give us some perspective as to
5 the grass strip there that you've identified?

6 A. Yes.

7 Q. So we can get some idea of the width because
8 of the presence of the crop field there?

9 A. Yes.

10 Q. Looking at the grass, does the ground level
11 appear to be any different there looking next to the
12 fence as opposed to near the crop field?

13 A. Yes.

14 Q. And tell me what you see.

15 A. It looks as if the south side of the fence,
16 there appears to be a berm--

17 Q. Okay.

18 A. --that is higher than the bottom of the
19 photo where the south edge of the grass is.

20 Q. Could you please turn to Exhibit 12. And
21 could you describe this exhibit for me, please?

22 A. This is a photo of Mr. Vos' feedlot. It
23 would be one of the west pens looking toward the
24 west.

25 Q. Would you-- Go ahead, please.

1 A. Similar conditions within the pens as the
2 other photos with respect to cleanliness. Appears to
3 be very clean tack on the animals, which typically is
4 an indicator that we don't have muddy conditions or
5 piles of manure for them to lie down in. In the
6 background there is a catch basin.

7 Q. You've just referred to the condition of the
8 animals. What term did you use?

9 A. The tack.

10 Q. Explain what you mean by that.

11 A. Tack with the animal would be the condition
12 of the hide; is it clean tack or dirty.

13 Q. Would that also be present in Exhibit 9?

14 A. Yes.

15 Q. And do those--do you have the same
16 observation there regarding the tack?

17 A. Yes.

18 Q. Now, again, these photos were taken on, I
19 believe you testified, May 4th, 2005?

20 A. Yes.

21 Q. Okay. Is that when you were-- Well, tell
22 us what-- Your associates were there that day. What
23 was their purpose? You've testified to some of this,
24 but--

25 A. The purpose of their visit was to talk with

1 Mr. Vos regarding the future direction that we were
2 to go with respect to the design.

3 I believe at that time we had a few
4 preliminary layouts that we had put together for this
5 facility. I believe they discussed those preliminary
6 layouts with Mr. Vos to see what he may have liked or
7 not liked, agreed or not agreed with with our
8 proposed structures.

9 Q. At this time, what was Mr. Vos' intention as
10 to what type of runoff control system to build?

11 A. At this time Mr. Vos--it's my understanding,
12 based on the report that I read from our site visit
13 that day, that there was still some decision
14 between--that needed to be finalized between the
15 alternative technology and the conventional system;
16 however, he was leaning more toward the conventional
17 system.

18 Q. And why was that?

19 A. Because of the delays with the finalization
20 of the alternative technology rules.

21 Q. What did he tell you about that?

22 A. I did not speak with him that day regarding
23 that, but I spoke with Mr. Vos the next day, and he
24 still had concerns regarding both approaches, both
25 types of systems, and was--told me that he would--he

1 needed to make a decision soon and that he would get
2 back to us with respect to the alternative versus
3 conventional approach.

4 Q. What did you do then?

5 A. At that time we contacted the Iowa NRCS to
6 inform them that Mr. Vos did want--was going to move
7 forward; however, we weren't sure which type of
8 system he was wanting. I felt that it would be wise
9 for us to put together a proposal with--to the Iowa
10 NRCS so that we could continue to move forward.

11 Q. Did you-- I'm sorry. Go ahead.

12 A. I spoke with our contracting representative
13 at the Iowa NRCS. At that time we were told that
14 funding was available for this project to fund the
15 engineering portion of it and that when we had a few
16 more details we could put together a work order for
17 their review and acceptance.

18 Q. Then what happened?

19 A. Then about a week to two weeks later I
20 received a call from--from the contracting
21 representative at the Iowa NRCS stating that they
22 were hesitant to fund this particular project because
23 they felt the costs would be prohibitive, and then
24 they went on further to state that they also did not
25 believe that the engineering money that was there a

1 week or two weeks prior was there anymore, so we were
2 in limbo as to whether or not they would be able to
3 fund the engineering for this facility.

4 THE ADMINISTRATIVE LAW JUDGE: Please put a
5 month and year with reference to what you just
6 testified to, approximately.

7 THE WITNESS: It was June 2005 with respect
8 to the conversations with the Iowa NRCS and the
9 funding issues around the project.

10 THE ADMINISTRATIVE LAW JUDGE: Thank you.

11 BY MR. McAFEE:

12 Q. Did you talk to Mr. Vos about this?

13 A. Yes. We talked to Mr. Vos again in--in June
14 of 2005 following our May visit and conversation, and
15 at that point in time he stated that he wanted--we
16 needed to move forward with the conventional system
17 for his facility.

18 We then talked to the NRCS to confirm that
19 everything was a go on their end from a funding
20 standpoint and put together a work order, and they
21 approved it in mid-July to mid--the second half of
22 July 2005.

23 Q. So what did that mean to--

24 THE ADMINISTRATIVE LAW JUDGE: May I just
25 ask one question so I can understand this,

1 Mr. McAfee?

2 MR. McAFEE: Sure.

3 THE ADMINISTRATIVE LAW JUDGE: The funding
4 issue with the NRCS was--am I correct that it had to
5 do with they had hesitations and questions of funding
6 for the alternative system, that's what gave them
7 angst or gave them some worry?

8 THE WITNESS: Initially, yes, Your Honor.

9 THE ADMINISTRATIVE LAW JUDGE: But then
10 after that they gave the green light for the
11 conventional system to go ahead, there would be
12 funding for that?

13 THE WITNESS: Mr.--

14 THE ADMINISTRATIVE LAW JUDGE: If I don't
15 have it correct, tell me.

16 THE WITNESS: Mr. Vos had funding for a
17 conventional system at that time--or prior to that
18 time already.

19 THE ADMINISTRATIVE LAW JUDGE: Oh.

20 THE WITNESS: The issue with funding, Your
21 Honor, was whether, one, funding the alternative
22 technology from a construction standpoint may be
23 cost-prohibitive. They did not have a standard in
24 place at that time at the NRCS level.

25 And then the funding issue was also--

1 irregardless of whether it was conventional or
2 alternative system, the funding for the engineering
3 side of the project was also in question by the NRCS.
4 They did not know if they had the money available.

5 THE ADMINISTRATIVE LAW JUDGE: And then, as
6 I understand your testimony--I'll let you get back,
7 Mr. McAfee--but it was after that, am I correct,
8 Mr. Vos then made a determination to go with the
9 conventional system?

10 THE WITNESS: It was-- Those--the issues of
11 the funding and Mr. Vos deciding to go with the
12 conventional system was all within a seven- to
13 ten-day period. I do not recall if--if Mr. Vos said
14 go conventional and then they said money's there the
15 next day--

16 THE ADMINISTRATIVE LAW JUDGE: Okay.

17 THE WITNESS: --or not.

18 THE ADMINISTRATIVE LAW JUDGE: Thank you.

19 Go ahead, Mr. McAfee.

20 MR. McAFEE: Thank you, Your Honor.

21 BY MR. McAFEE:

22 Q. So then everything's a go, then, in July of
23 2005, finally, and you move forward?

24 A. Yes.

25 Q. What happens then in the work you did or

1 your firm?

2 A. We began in July of 2005-- We had been
3 provided prior to that a partial topographic survey
4 for Mr. Vos' facility. That was conducted by the
5 Iowa NRCS prior to May of 2004. However, in July of
6 2005 we moved forward, did some verification of the
7 survey with our own survey to make sure that the data
8 was accurate, proceeded with putting together a
9 permit application for Mr. Vos to be submitted to the
10 Iowa DNR, and in December of 2005 we provided that
11 application to the Iowa DNR for their review.

12 Q. During this period of time from, say, July
13 through December, when you're working on this
14 project, did you get any notification from Iowa DNR
15 about Mr. Vos' status under the Iowa Plan?

16 A. No.

17 Q. Did Mr. Vos say anything to you about his
18 status under the Iowa Plan?

19 A. Not that I recall.

20 Q. And you've seen Exhibit 22, which was the
21 letter from DNR stating that if his final engineering
22 plan was not submitted within 30 days he'd no longer
23 be in the Iowa Plan? You've seen that letter and you
24 were aware of it, right?

25 A. Dated April of 2005?

1 Q. Correct.

2 A. Yes.

3 Q. I just want to make sure I'm clear and that
4 we're all clear that, to your knowledge, did Mr. Vos
5 ever receive a follow-up to that letter that he was,
6 in fact, not in the Iowa Plan anymore?

7 A. To my knowledge, no.

8 Q. And in your conversations and dealings with
9 DNR in preparing this permit application, did they
10 ever say anything to you about that?

11 A. No.

12 Q. Okay. So in December of 2005, a permit
13 application is submitted. What did you do next?

14 A. In February of 2006 I sent an e-mail to Doug
15 Opheim. Doug is--was an engineer for the Iowa DNR in
16 their Spencer field office. Mr. Opheim was the
17 engineer that was reviewing our application for
18 Mr. Vos as well as, at that time, five other feedlots
19 in Iowa.

20 Q. What was your purpose in sending that e-mail
21 to Mr. Opheim?

22 A. I sent the e-mail to Mr. Opheim in February
23 of '06 to check on the status of Mr. Vos', as well as
24 the other five feedlots that we had permit
25 applications in front of Doug. Some of those

1 applications dated back to May of 2005, and we were
2 approaching nine months' review on those.

3 I wanted to for a couple of reasons, and for
4 Mr. Vos' facility, I wanted to, one, let them know
5 that 60 days was quickly approaching, which would
6 have been a week to ten days after my e-mail, the
7 60-day review period that the DNR had to review the
8 plans; and, two, we were also aware that the Iowa
9 Feedlot Plan was coming to an end and we wanted to
10 make sure that we, if you will, poked the DNR to make
11 sure we got these permits out--or, rather, approved
12 and back to us so we could begin construction as soon
13 as possible in the spring of '06.

14 Q. What was Mr. Opheim's response to you?

15 A. Mr. Opheim stated in his e-mail that
16 Mr. Vos' project, as well as the other five that I
17 had e-mailed him questioning whether or not the other
18 five were ready, he stated that all six of those were
19 on his list for--to be approved by the end of the
20 month, the end of February 2006.

21 Q. And we'll kind of jump ahead here and come
22 back, but regarding Mr. Vos' feedlot, when did he
23 actually receive his construction permit?

24 A. I believe the approval was in August of
25 2006. I do not know the exact date.

1 Q. So I'll ask you to state the obvious. Did
2 DNR get it out by the end of the month?

3 A. No.

4 Q. Were there any problems with his permit
5 application that you were notified of by DNR?

6 A. No.

7 Q. You do a lot of permit applications, I think
8 it's clear from your testimony. Was this--was
9 Mr. Vos' time period here to receive a permit
10 unusual?

11 A. At that time, we were having issues, and
12 I'll speculate that others were as well--

13 MR. RYAN: Objection. He's speculating,
14 Your Honor. I'll object to that, move that it be
15 stricken.

16 THE ADMINISTRATIVE LAW JUDGE: Well,
17 unfortunately, I was making a notation so I wasn't
18 closely listening to it. Could you rephrase the
19 question, counsel?

20 MR. McAFEE: Sure.

21 BY MR. McAFEE:

22 Q. Mr. Woerner, could you just--

23 MR. McAFEE: I'm sorry, Your Honor.

24 THE ADMINISTRATIVE LAW JUDGE: Do you want
25 the question--

1 MR. McAFEE: That's okay. I'll ask the
2 court reporter to please read back the question.

3 THE ADMINISTRATIVE LAW JUDGE: Yes. Can you
4 do that for us. Thank you.

5 (Question read by the reporter.)

6 THE ADMINISTRATIVE LAW JUDGE: Yeah.
7 There's a problem with that question?

8 MR. RYAN: No. His statement, he said I
9 have to speculate.

10 THE ADMINISTRATIVE LAW JUDGE: I'm sorry.
11 Just try and answer his question.

12 A. At that point in time, our permit
13 applications with the Iowa DNR were taking a lot
14 longer than what we felt they should. I did not feel
15 that nine months to review a project and then have no
16 questions or problems with that application--we felt
17 that was--was too long of a time period. Mr. Vos'
18 review process at the DNR was, I would say, average
19 for what we were experiencing at that time.

20 BY MR. McAFEE:

21 Q. Mr. Woerner, you, as a project engineer, I
22 assume you-- Well, do you have any experience with
23 the construction process itself once the permit is
24 issued?

25 A. Yes.

1 Q. And I'm talking in general here. So part of
2 your duties as an engineer require you to be involved
3 with the actual construction?

4 A. Duties as an engineer on this type of
5 facility, we would--we would be involved with
6 construction staking, monitoring, and observation of
7 the facility.

8 Q. Of the construction?

9 A. Of the construction activities. We would
10 not physically partake in the actual construction
11 activities, but we would be there to make sure that
12 what was constructed or what is being constructed is
13 in accordance with the plans and specifications that
14 have been approved by, in this case, the Iowa DNR and
15 also the Iowa NRCS because of the funding on the
16 project.

17 Q. So as part of your duties, you have some
18 idea of the time it takes for a project like this to
19 be built?

20 A. Yes.

21 Q. In your opinion, if Mr. Vos had received his
22 permit on time, would he have been able to construct
23 the necessary structures before the end of the
24 five-year period on the Iowa Plan?

25 A. Yes.

1 Q. Mr. Woerner, when Mr. Vos received his
2 permit, construction permit, I think you testified in
3 August of 2006-- Is that correct?

4 A. Yes.

5 Q. And in the construction business is that
6 considered getting into the fall?

7 A. Yes.

8 Q. And what are your thoughts about starting
9 construction in the fall of the year on a project
10 like Mr. Vos'?

11 A. On feedlot like Mr. Vos' or any feedlot, I
12 would be hesitant to move forward with constructing
13 holding ponds and waste storage structures that are
14 constructed with clay. If there's a lot of dirt work
15 to be done, you get a little nervous starting a
16 project that late in the season because if we have a
17 wet fall or we have an early frost, then we have
18 partially constructed holes in the ground that are--
19 potentially would fill up with snow in the winter and
20 would even further delay construction in the spring.

21 Q. I just briefly want to go back, if I could,
22 Mr. Woerner, to this question of the Iowa Plan and
23 Mr. Vos' status under it. You testified that up to
24 the point of submitting the permit application, I
25 believe, you were not aware-- Well, what was your

1 understanding of his status under the Iowa Plan prior
2 to submitting the permit application?

3 A. The-- Based on the April letter that we
4 referenced earlier, we had not heard anything
5 regarding his status in the Iowa Feedlot Plan up to
6 the time of our submittal of his plans or even to the
7 date of August '06 when his permit application was
8 eventually approved.

9 Q. When you had your e-mail exchange with
10 Mr. Opheim in February of '06, did he mention
11 anything about Mr. Vos' status under the Iowa Plan?

12 A. No.

13 Q. He didn't say anything like, "He's not in
14 the Iowa Plan anymore. It's not a problem," or no
15 mention?

16 A. No.

17 MR. McAFEE: Your Honor, could I just have a
18 minute to look at a few of my notes?

19 THE ADMINISTRATIVE LAW JUDGE: Certainly.
20 We'll go off the record.

21 MR. McAFEE: Thank you.

22 (Discussion off the record.)

23 BY MR. McAFEE:

24 Q. Okay. Mr. Woerner, I now want to turn to
25 some of the computer modeling issues in this case,

1 and I understand from some of the questions I asked
2 you previously that you do have some experience with
3 computer modeling in the agricultural engineering
4 context; is that right?

5 A. Yes.

6 Q. You mentioned a TR-55, I believe?

7 A. Yes.

8 Q. For what purposes do you use computer
9 modeling in your business?

10 A. With respect to livestock facilities, we use
11 the models to flood route the 25-year, 24-hour, or
12 the 10-year as well storm event, depending on what we
13 were designing. The model is used to model the
14 rainfall storm event to determine how ditches, pipes,
15 pumps, other waste handling structures would convey
16 the water to make sure that they are sized properly.

17 Q. So I take it from what you've testified to
18 is it fair to say you use modeling for planning
19 purposes?

20 A. Yes.

21 Q. Are you aware of how modeling was used in
22 this case?

23 A. The only knowledge I have of modeling in
24 this case was that initially TR-55 was used. I'm not
25 aware of any other modeling.

1 Q. Okay. In general, and I'm speaking in
2 general, from your experience with computer modeling,
3 do you believe, in your opinion, that it should be
4 used to prove an actual discharge of a pollutant
5 under the Clean Water Act from the feedlot such as
6 Mr. Vos'?

7 A. Not stand-alone.

8 Q. What do you mean by that?

9 A. Computer models-- By not stand-alone, I
10 mean there would have to be, in my opinion, other
11 physical evidence, such as a water quality sample,
12 taken to determine whether or not pollutants had
13 reached somewhere where they weren't supposed to, a
14 stream or a creek.

15 I believe using a model saying, "It rained
16 and the model says you polluted, therefore you're
17 guilty," I believe is flawed.

18 MR. McAFEE: I have no further questions,
19 Your Honor.

20 THE ADMINISTRATIVE LAW JUDGE: Okay. Do you
21 need a minute or do you want to launch right into
22 cross?

23 MR. RYAN: I'm ready to launch, Your Honor.

24 THE ADMINISTRATIVE LAW JUDGE: Okay. Then
25 we have a go.

1 MR. RYAN: Thank you, Your Honor.

2 CROSS-EXAMINATION

3 BY MR. RYAN:

4 Q. Good morning, Mr. Woerner. I'm Mr. Ryan
5 from the EPA. We met briefly out in the hallway.

6 Why don't we start with the most recent
7 testimony and move back. I'm going to have some
8 questions about what you testified about this
9 morning. I'm sure your attorney told you that.

10 The modeling. Let's talk about the
11 modeling. You testified you didn't--you did not
12 believe it was--it was flawed to use the modeling as
13 proof of violation of the Clean Water Act; is that
14 correct?

15 A. Without any other--without a water quality
16 sample, I believe, that approach.

17 Q. Okay. So you must understand, then, what
18 the level of proof is for proving a violation of the
19 Clean Water Act?

20 A. In this particular case, I-- No.

21 Q. Okay. So you've said use of the model is
22 flawed, but you don't know what the level of proof
23 is; is that correct?

24 A. Yes.

25 Q. Okay. So, now, you testified earlier that

1 modeling--you used TR-55, and I believe earlier I had
2 the opportunity to ask you a few questions and you
3 mentioned a couple other models. Are these
4 something--are these models something you rely on in
5 your day-to-day work at Eisenbraun & Associates?

6 A. That particular model as well as other
7 models.

8 Q. Yeah.

9 A. We--we do use those on a daily basis.

10 Q. Okay. And you rely on them?

11 A. We rely on them, yes.

12 Q. Yes. And do you find them trustworthy?

13 A. For the purpose that we need them, yes.

14 Q. Okay. So and then you mentioned that you
15 used them for modeling, I believe--and correct me if
16 I get this wrong--the flow route of a 25-year,
17 24-hour storm event, for example; is that correct?

18 A. Flood routing, yes.

19 Q. Flood routing. I'm sorry. And tell me
20 about that real briefly. What is that exactly?

21 A. Flood routing is-- When we use the model
22 for flood routing, we simulate--the model, rather,
23 simulates a particular storm event. In this case I
24 was referring to a 25-year, 24-hour storm event.

25 For instance, in South Dakota, where we also

1 practice engineering, any pumps or any pipes that
2 receive rainwater for a feedlot need to be sized to
3 properly handle the runoff from the 25-year, 24-hour
4 storm.

5 We also use that same approach in Iowa and
6 other states to make sure--if we have a culvert
7 that's handling runoff, we want to make sure that it
8 is sized properly so that it doesn't wash out or
9 fail. We would also not want to oversize it and
10 waste money.

11 Q. So you used--you used the results of your
12 modeling to size pumps, for example?

13 A. Yes.

14 Q. Okay. So you're using these models for your
15 engineering?

16 A. Yes.

17 Q. So the results of these models are telling
18 you what size pumps to engineer into a facility, for
19 example?

20 A. Yes.

21 Q. Yeah. So they're not simply used for
22 planning purposes; they're actually used in your
23 engineering?

24 A. Yes.

25 Q. Okay. Now, are you familiar with what

1 computer model was used by EPA in this enforcement
2 action?

3 A. I am aware of the TR-55 program that was
4 used initially.

5 Q. But are you--

6 A. I am not aware of any other model that has
7 been used.

8 Q. Okay. So you can't, as you sit here today,
9 offer an opinion as to whether the model EPA used in
10 this case was appropriate because you don't know what
11 model was used, do you?

12 A. I know what model was used initially. I do
13 not know if any other model has been used.

14 Q. Okay. So when you offered your opinion as
15 to whether use of models was flawed, you offered that
16 opinion not knowing what model is at issue in this
17 case today right as we sit here today?

18 A. Yes.

19 Q. Okay. Let's turn to--

20 MR. RYAN: May I have just a moment, Your
21 Honor, to grab some--

22 THE ADMINISTRATIVE LAW JUDGE: Yes.

23 BY MR. RYAN:

24 Q. Mr. Woerner, could you please turn to the
25 series of photographs we discussed--you discussed on

1 direct testimony that would be in that small green--
2 Yes. That would be starting with Respondent's
3 Exhibit 9.

4 Do you have that in front of you?

5 A. Yes. Yes, I do.

6 Q. And you weren't there--I believe you
7 testified you weren't there the day these were taken;
8 these were taken by someone in your office?

9 A. Correct. Yes.

10 Q. And there are--there's Exhibits 9, 10, 11.
11 There are four--I count four photos here. Do you
12 also have four photos there?

13 A. Yes, I do.

14 Q. Are those the only four photos that were in
15 your file when you reviewed the report from that
16 date?

17 A. Yes.

18 Q. Now, I take it you've been to Mr. Vos' site,
19 you've seen it yourself?

20 A. Yes, I have.

21 Q. Okay. Would you--you would agree, would you
22 not, that these four photos do not show the entire
23 site?

24 A. Yes. They do not show the entire site.

25 Q. And they do not show any low point,

1 necessarily, any breaks that might be in the berms?

2 A. Nos. 10 and 11 do not appear to have any
3 breaks in the berm, Photos 10 and 11.

4 Q. Now, is it your position--is it your-- It's
5 not your position, is it, that no water can come off
6 this site, is it, and--during a rainstorm or a snow
7 melt?

8 A. Could you define "site," please?

9 Q. Yeah. Off the feedlot. It's not your
10 position, is it, that no water can flow off of this
11 feedlot during a rainstorm, is it?

12 A. No.

13 Q. Okay. So the picture--the photographs that
14 we looked at, Respondent's 9, 10, 11 and 12, do not
15 tell you that this site is, essentially, buttoned up
16 and no discharges from it can occur, correct?

17 A. I could not conclude from these photos that
18 it is buttoned up, as you said.

19 Q. Okay. But you have concluded independently
20 of these photographs that discharges can occur from
21 this site, haven't you?

22 A. Would you please define "discharge"?

23 Q. Yeah. If it rains on Mr. Vos' feedlot,
24 separately from these photos, you have concluded that
25 water will exit the site, the feedlot?

1 A. There is a potential--

2 Q. Okay.

3 A. --for water to leave this site.

4 Q. Now, you would agree water runs downhill,
5 would you not?

6 A. Yes, sir.

7 Q. Basic hydrologic principle. And you would
8 agree that Mr. Vos' feedlot is on a hill, correct?

9 A. Yes.

10 Q. It's on the high point. And you would
11 agree, would you not, that there is an unnamed
12 tributary a short distance away downgradient from his
13 feedlot?

14 A. I assume that there is no name to the
15 tributary that you are talking about.

16 Q. Okay. Well, you would agree that there is a
17 tributary--a creek to the west--approximately to the
18 west of his facility?

19 A. Yes.

20 Q. That's downgradient-- And that creek is
21 downgradient of his facility?

22 A. Yes.

23 Q. And isn't it true that you have stated
24 that--I'm reading to you from a letter you wrote on
25 December 2nd, 2005--"Currently manure and process