

1 UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

2 REGION 5

3 IN THE MATTER OF: )  
 )  
4 ROBERT J. HESER, ANDREW ) DOCKET NO.  
HESER and HESER FARMS ) CWA-05-2006-0002  
5 Respondents. )  
 )  
6 Proceeding to Assess a Class II )  
Civil Penalty Under Section )  
7 309(g) of the Clean Water Act, )  
33 U.S.C. Section 1319(g). )  
8

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10 Hearing held pursuant to notice, on Monday,  
11 March 26, 2007 at the hour of 9:30 a.m. at Clinton  
12 County Courthouse, 850 Fairfax, Carlyle, Illinois,  
13 before HONORABLE WILLIAM B. MORAN, United States  
14 Administrative Law Judge.

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23 SULLIVAN REPORTING CO.,  
By H. Lori Bernardy, Reporter  
CSR# 084-004126

24

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9 (Appearing on behalf of Respondents.)

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16 (Appearing on behalf of the U. S.  
17 Environmental Protection Agency.)

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EXHIBITS                            MARKED                            ADMITTED  
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P R O C E E D I N G S

JUDGE MORAN: Good morning. My name is Judge William B. Moran. We are here this morning in Carlyle, Illinois, today, being March 26, 2007 for a case captioned as in the matter of Robert J. Hesel, Andrew Hesel, and Hesel Farms. The caption varies from filing to filing.

But those three Respondents are named in this action which is Docket Number CWA 0520060002.

Would the parties please, beginning with the Government, identify themselves, Counsel, please.

MR. MARTIN: Your Honor, my name is Thomas Martin. I am an Associate Regional Counsel for U.S. EPA in Chicago, and Defense Counsel for the Complainant.

JUDGE MORAN: Nice to meet you, Mr. Martin.

MS. PELLEGRIN: And, your Honor, Chrissy Pellegrin. I'm also Regional Counsel at U.S. EPA in Chicago.

JUDGE MORAN: Okay, I noticed your filing of an appearance.

Now for the Respondent, Mr. Northrup.

MR. NORTHRUP: I'm Charles Northrup from

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1 Sorling, Northrup, Hanna, Cochran and Cullen for the  
2 Respondents, and --

3 MR. SMALL: Brad Small from Mathis, Marifian,  
4 Richter and Grandy from Belleville, Illinois for the  
5 Respondents.

6 JUDGE MORAN: Did you file a notice of  
7 appearance, sir?

8 MR. SMALL: Yes.

9 JUDGE MORAN: Okay. Please be seated.

10 All right, this proceeding which is  
11 scheduled to last all week, I will hear Opening  
12 Statements; it's optional. But typically, the  
13 Parties do want to make some sort of Opening  
14 statement.

15 Before we do that, there were several  
16 last minute on the cusp motions to supplement the  
17 Prehearing exchange.

18 I'm hopeful that there's no objection  
19 from either side as to if there are issues of timing.  
20 The applicable section is 22.22 in 40 CFR, the Rules  
21 which govern these proceedings.

22 Any objection to these motions to  
23 supplement? Did Counsel read the Act?

24 MS. PELLEGRIN: Your Honor, I think we're going

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1 to object to those, the latest filing. They were  
2 filed within 15 days. Part 22(a), I don't believe  
3 Respondent demonstrated good cause for providing it  
4 on -- I believe it was on March 15.

5 JUDGE MORAN: Okay, let's go off the record.

6 (WHEREUPON, there was then had  
7 an off-the-record discussion.)

8 JUDGE MORAN: In an off-the-record discussion,  
9 I wanted to clarify which document we were talking  
10 about and the subject is whether there's -- there is  
11 an objection on the part of EPA to a late-filed  
12 motion to supplement the prehearing exchange.

13 This document was dated March 14th.  
14 It was received by my office on the 15th. And now I  
15 hear from Counsel for EPA as to their objection, and  
16 then I'll hear Mr. Northrup before I rule on that.

17 MS. PELLEGRIN: Well, your Honor, as I was  
18 saying this document was filed within 15 days and  
19 there was I don't believe good cause shown as to why  
20 it was not provided within 15 days to the U.S. EPA.

21 JUDGE MORAN: When did you receive it?

22 MS. PELLEGRIN: We received it I believe it was  
23 the 15th. It was filed on the 14th, I believe, and  
24 we received it on the 15th. I don't have a calendar

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1 in front of me, but I believe we received it on a  
2 Friday.

3 JUDGE MORAN: No, the 15th was a Thursday. And  
4 your position is that you should have received it by  
5 when, Ms. Pellegrin?

6 MS. PELLEGRIN: I believe the Friday before the  
7 15th day, which would have been --

8 JUDGE MORAN: The ninth?

9 MS. PELLEGRIN: The ninth, yes, your Honor.

10 JUDGE MORAN: Thank you.

11 Anything to add to that?

12 MS. PELLEGRIN: I'm not too sure that there was  
13 I don't believe any demonstrated good cause shown for  
14 that not being provided pursuant to Part 22(a).

15 JUDGE MORAN: Okay, now I'll hear from  
16 either -- is it Mr. Small that's your co-counsel,  
17 Mr. Northrup?

18 MR. NORTHRUP: Yes, sir, Mr. Small.

19 JUDGE MORAN: I understood from the floor that  
20 he's going to speak to this issue

21 MR. NORTHRUP: First of all, I want to point  
22 out on the proof of service, it was served on  
23 Mr. Martin by Federal Express on February 26th, and  
24 it would have been received the next day.

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1                   So I don't believe where they're  
2 coming up with this much later time.

3           MS. PELLEGRIN: I don't know if we're looking  
4 at the same document. I have a proof of service of  
5 March 14.

6           JUDGE MORAN: And when we're arguing motions,  
7 what I prefer is just not to have this colloquy  
8 between Counsel.

9                   Just make your position known, and  
10 then I'll hear from EPA.

11                   Your position right now is that this  
12 document, as I understand from Mr. Northrup, was  
13 received by the Hesers on February 26th; is this the  
14 same document?

15           MR. NORTHRUP: Yes, Judge.

16           JUDGE MORAN: And it's dated February 22nd?

17           MR. NORTHRUP: Correct.

18           JUDGE MORAN: And you say he received it on the  
19 26th?

20           MR. NORTHRUP: Well, no, it was attached -- it  
21 looks like the proof of service is accurate that --  
22 let me restate it.

23                   The February 22nd field visit report  
24 from Mr. Anderson was not filed upon Mr. Martin of

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1 U.S. EPA until the March 14th date. So that's the  
2 date that would appear to be applicable.

3 JUDGE MORAN: Okay, so what I have to adjust,  
4 Mr. Northrup, is to be fair here also, you know, the  
5 standard provides I shall not admit the document  
6 unless the non-exchanging party had good cause for  
7 failing to exchange their prior information,

8 And to provide the required  
9 information to all Parties as soon as he had control  
10 of the information or had good cause for not doing.

11 So is this a critical document to the  
12 defense?

13 MR. NORTHRUP: It is, your Honor. It is.

14 JUDGE MORAN: Can you explain any sort of good  
15 cause as to why there was a delay?

16 MR. NORTHRUP: Well, I did not receive it until  
17 March 9, 2007. So as soon as I received it, I did  
18 get it to Mr. Martin, in addition to this witness,  
19 Marc Anderson.

20 He had previously been identified as a  
21 witness. So there's not any surprise to the document  
22 on that score.

23 JUDGE MORAN: Well, had Mr. Anderson provided  
24 any other reports to the EPA?

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1 MR. NORTHRUP: Mr. Anderson --

2 JUDGE MORAN: I mean, were there other  
3 documents from Mr. Anderson prior to this one that  
4 you submitted to the EPA as part of the Prehearing  
5 exchange?

6 MR. NORTHRUP: Not as part of the Prehearing  
7 exchange. I do understand Mr. Anderson was  
8 corresponding via e-mail and provided documents to  
9 the U.S. EPA before this, before this February 22nd  
10 field investigation.

11 JUDGE MORAN: Okay, let me make sure I do  
12 understand completely what's involved here.

13 Is the -- and I want to hear from  
14 Miss Pellegrin as well.

15 Is the document that is in dispute  
16 here as to whether it should be considered by me, is  
17 it limited to the one-page report dated February 22nd  
18 from Mr. Marc, that's M-A-R-C, Anderson with an  
19 accompanying figure described as surface area  
20 illustration.

21 And it has two diagrams which at this  
22 point don't mean a whole lot, but they are called  
23 wedded(sp) perimeter for uniform channel, and then  
24 there's the other parameter for a multifaceted

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1 channel; is that the sum total of the documents that  
2 are initiated here, Mr. Northrup?

3 MR. NORTHRUP: Yes, your Honor.

4 JUDGE MORAN: And you agree with that,  
5 Miss Pellegrin?

6 MS. PELLEGRIN: Yes, your Honor.

7 JUDGE MORAN: Okay. And you also agree,  
8 Miss Pellegrin, that these are two pages accompanying  
9 that EPA had its hands as of March 15th; is that  
10 right?

11 MS. PELLEGRIN: Yes, your Honor.

12 JUDGE MORAN: And I assume you're not relying  
13 upon 22.22 - if I have the right number?

14 You promptly forwarded it to your  
15 experts for them to review that; did you not?

16 MS. PELLEGRIN: I believe -- our experts did  
17 review it within the day.

18 Your Honor, I would like to address  
19 Mr. Northrup's point that he believes that  
20 Mr. Anderson had provided information to the  
21 Respondents, and that's not in the prehearing  
22 exchange.

23 He did do that, but this is a totally  
24 different area of discussion, this particular report.

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1           JUDGE MORAN: Right. And I'm not considering  
2 that in making my Ruling.

3           MS. PELLEGRIN: Okay.

4           JUDGE MORAN: That seems to me to be beside the  
5 point.

6                         So anything further before I rule on  
7 this?

8           MR. NORTHRUP: No, your Honor.

9           JUDGE MORAN: I think that fairness has to be  
10 the overriding consideration here. If EPA were in  
11 this spot, I would rule the same way.

12                         This is a two-page document. If this  
13 were a document dump or 40 - 50 pages, something very  
14 intense, I'd look askance at it. But this is a  
15 two-page document, and I'm going to allow in.

16                         So that's my ruling on that.

17                         Are there any other preliminary  
18 matters I have to deal with before we begin?

19           MS. PELLEGRIN: I don't think so.

20           MR. NORTHRUP: No, your Honor. Thank you.

21           JUDGE MORAN: Okay.

22                         Then did Counsel want to avail  
23 themselves of opening statements in this matter?

24           MR. NORTHRUP: Yes, your Honor. We do.

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1 MR. MARTIN: Yes, Judge.

2 JUDGE MORAN: Okay, Proceed.

3 OPENING STATEMENT

4 BY MR. MARTIN:

5 May it please the Court, when  
6 Respondents, Robert and Andrew Hesper, purchased the  
7 five acres site at issue here in August of 1998, it  
8 was a forested area, intersected by 870 feet of a  
9 natural, meandering stream called Martin Branch.

10 Martin Branch flows into Lake  
11 Centralia, a navigable water of the United States.  
12 In its natural state, this wetlands area and  
13 meandering stream provided critical and environmental  
14 functions such as pollution filtering, trapping and  
15 run-off storage.

16 It also provides a natural habitat for  
17 wildlife, aquatic and marine life and served as a  
18 part of a riparian corridor, which provided area and  
19 coverage for movement and migration of wildlife

20 In the fall of 1999, Respondents razed  
21 and leveled the five acre wetland riparian area with  
22 bulldozers and other earth-moving equipment. In so  
23 doing, the Hesperes filled in approximately 2.1 acres  
24 of forested wetlands contained within the five acre

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1 wetland area, cut off and filled in an 870-foot  
2 portion of the natural meandering stream of Martin  
3 Branch, diverted stream flow into man made 569-foot  
4 L-shaped drainage channel on the southern and eastern  
5 edges of the site, and began cropping the five-acre  
6 site with road crops, a farming operation which  
7 continues today.

8                   At this hearing, the EPA will prove  
9 the following: One, that the five acre site  
10 contained 2.1 acres of wetlands as defined in section  
11 404 of the Clean Water Act.

12                   Two, the stream channel and wetlands  
13 at issue here and similarly situated wetlands in the  
14 Martin Branch water shed significantly effect in a  
15 positive way the chemical, physical, and biological  
16 integrity of Lake Centralia.

17                   And, three, taking into account the  
18 statutory penalty factors under Section 309(g) for  
19 water lands, the Hesper brothers should required to  
20 pay a penalty of \$120,000 for its violation of  
21 Section 404 of the Act.

22                   Briefly on these three points, Greg  
23 Carlson, an EPA enforcement officer, will be offered  
24 as an expert witness in this case on behalf of the

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1 EPA, will show that the impacted area formerly  
2 contained 2.1 acres of wetlands and associated stream  
3 channel under the 1987 Corps of Engineers Delineation  
4 Manual.

5                   Ward Lenz, who originally inspected  
6 the site for the Corps of Engineers, supports this  
7 determination.

8                   Respondents own expert all but  
9 concedes that the area contained 1.5 acres of  
10 wetlands, so the issue is not whether this site  
11 contained wetlands, but how much.

12                   Regarding the significant access  
13 passed under the Ohio Supreme Court Ruling, Lake  
14 Centralia is a 450 acre lake used extensively by  
15 recreational boaters from both in state and out.

16                   It's a navigable water in the United  
17 States. In fact, Lake Centralia which is located 2.1  
18 miles downstream of the impacted area is actually a  
19 man-made empowerment of waters from Martin Branch.

20                   In other words, it's a man-made lake  
21 created in 1910 by damming off a portion of Lake  
22 Centralia. Lake Centralia and Martin Branch are  
23 intimately connected in this way. The volume of flow  
24 of the Martin Branch watershed is regular and

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1 substantial.

2 In fact, the Martin Branch watershed  
3 is the largest and provides the most flow of the  
4 watersheds that feed the Lake. Martin Branch is  
5 mapped as an intermittent stream, but our  
6 investigation into the volume and regularity of flow  
7 indicates the water in Martin Branch flows frequently  
8 and continuously -- frequently flows continuously  
9 into Lake Centralia.

10 And that this flow is not relying on  
11 surface water alone, but that it is fed significant  
12 amounts of water from the surrounding high water  
13 table soils.

14 JUDGE MORAN: I'm sorry, surrounding high water  
15 table soils, did you say?

16 MR. MARTIN: High water table soils.

17 At this hearing, the EPA will provide  
18 testimony that Martin Branch contains permanent pools  
19 of water all year-around. In some, the stream flow  
20 in the watershed of the impacted area cannot be  
21 called migrant.

22 For this reason, the Martin Branch  
23 watershed affect on the water quality of Lake  
24 Centralia cannot be called speculative. In fact, in

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1 the Lake Centralia watershed, the negative effects of  
2 agricultural activities on the Lake have already been  
3 documented under the Clean Water Act TMDL programs,  
4 total maximum daily level program.

5 The statutory program is designed to  
6 sample water quality, to determine and remedy water  
7 quality impairment. In this case, Lake Centralia has  
8 been determined under this Program to be impaired for  
9 phosphorus and manganese, two pollutants that are  
10 caused by agriculture activity.

11 The Hesers' conversion of this site  
12 from forested wetlands and natural stream channel to  
13 now road cropped farmland, has caused this area to  
14 now be a pollutant source, rather than a pollutant  
15 filter and pollutant trap.

16 Increased sedimentation is found and  
17 the fertilizers presently used on the Hesper impacted  
18 area are contributing to the impairments that are  
19 already documented and taking place in the Lake.

20 The negative effect on water quality  
21 in Lake Centralia from this type of conversion cannot  
22 be called speculative.

23 Finally, the Hesers should be made to  
24 pay the proposed penalty in this case. Evidence

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1 proposed for the record reflects that each of the  
2 Hesper brothers had extensive dealings with or written  
3 notice of wetlands protection laws and the Section  
4 404 of the Permit Program.

5 Despite this, the Hesperes ignored the  
6 Section 404 of the Permit Program, proceeded to  
7 bulldoze the site, a site which they acknowledge was  
8 too wet.

9 The record will show the Hesperes have  
10 converted similar forested wetlands to farmland in  
11 the past and now are ineligible for Farm Bill  
12 Subsidies because of this.

13 The Hesperes cooperation with the  
14 Government in this matter has been spotty at best,  
15 and their response to statutory EPA information  
16 requests was incomplete and evasive.

17 The Hesperes have farmed the impacted  
18 area for the last seven years. They have benefited  
19 economically because of this, and it is fundamentally  
20 unfair to the farmers and other members of the  
21 regulated community to comply with the portent of the  
22 law.

23 The physical, chemical, and biological  
24 harm that the Hesperes' act can contribute to an

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1 already impaired Lake Centralia should not be  
2 minimized. There has been very significant drainage  
3 modification and level of conversion in Illinois.

4 It has been estimated that 85 percent  
5 of Illinois wetlands are filled primarily by  
6 agricultural activities. There was a time when these  
7 conversions were not regulated and even encouraged.

8 But now, there is a well-established  
9 permit process for this, and all we ask is that  
10 people engage the process.

11 And this case will exhibit the EPA  
12 program goal to send a message of deterrence for the  
13 Hesers' disregard for the 404 Program. The harm it  
14 contributes to navigable waters and the message of  
15 fundamental unfairness to other farmers that will  
16 result from allowing the Hesers to benefit  
17 economically.

18 For these reasons, we'll ask that you  
19 find the Respondents liable for filling wetlands and  
20 the stream channel from the Clean Water Act, and  
21 order the payment of \$120,000 under Section 309(g) of  
22 the Act.

23 Thank you, your Honor.

24 JUDGE MORAN: Before I hear from Mr. Northrup

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1 or Mr. Small, Mr. Martin, obviously there's no permit  
2 pending? There's been no permit issued by the Corps  
3 in this matter; is that correct?

4 MR. MARTIN: There was never a permit applied  
5 for.

6 JUDGE MORAN: Even as we speak?

7 MR. MARTIN: Even as we speak.

8 JUDGE MORAN: Okay.

9 The other question I have for you is:  
10 Typically, in these Clean Water cases, the Government  
11 will also seek to have the harm that's done -  
12 assuming a violation is established - remedied.

13 The Government isn't seeking that,  
14 they're seeking solely a monetary penalty; is that  
15 true?

16 MR. MARTIN: Well, your Honor, we did issue a  
17 301(a) Order for restoration of the site, and I know  
18 that's a different matter and we're not going to get  
19 into it too much in this hearing, although we will if  
20 allowed.

21 And if we prevail in this hearing, we  
22 will ask for a directed verdict under liability under  
23 Section 301(a) to enhance our abilities to seek  
24 restoration itself.

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1 JUDGE MORAN: Okay.

2 Mr. Northrup or Mr. Small?

3 MR. NORTHRUP: Thank you, your Honor. First of  
4 all, I do note we also recognize the Federal  
5 Government has not asked us to take any action in  
6 this Complaint other than pay a penalty.

7 OPENING STATEMENT

8 BY MR. NORTHRUP:

9 So we would certainly object now if  
10 they wanted to change the remedy or seek additional  
11 remedies.

12 I don't really have any formal opening  
13 statement, I've reserve my legal arguments for the  
14 finding of facts and the post-hearing briefs.

15 I do want to make clear that the  
16 Hesers do contest pretty much all the factual  
17 allegations in the Complaint and certainly the legal  
18 inferences that the Government is making.

19 We believe there is no significant  
20 access of our Clients in this case. So we'll be  
21 arguing that even though we did in our Motion for  
22 jurisdiction. We also believe there are Statute of  
23 Limitation issues.

24 JUDGE MORAN: I saw that. My reaction to that

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1 is I would first read briefs on that question. But  
2 it seems to me that it can be viewed as a continuing  
3 violation.

4 And while EPA cannot go more than five  
5 years back, if the violation occurred on X date and  
6 then it's continuing because it hasn't been remedied,  
7 there hasn't been any action to get it back to its  
8 original condition, it seems to me that one could  
9 view it as a continuing violation is when we look  
10 back five years from the date of filing the  
11 Complaint.

12 It's not a final ruling, but that was  
13 my reaction when I read that.

14 MR. NORTHRUP: I understand. We do have a  
15 couple cases that state the opposite, they'll be in  
16 the briefs.

17 If at the end of the day, you find  
18 that there has been a violation here, we'll put on  
19 lots of evidence about the substantial litigation,  
20 especially in this case. There is no way this case  
21 warrants \$120,000 penalty. If anything, that's out  
22 of bounds.

23 Essentially, what we will demonstrate  
24 is that the Hesers were faced with flooding from an

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1 upstream property owner. They took reasonable  
2 precautions. They created this new channel with  
3 gentle slopes, they vegetated it naturally. Rather  
4 than impairing water, it's actually serving a good  
5 function insuring preventing erosion, just the thing  
6 that the Government wants to be done there.

7 I note that Mr. Martin referred to  
8 Martin Branch as I believe as a flowing waters. It  
9 isn't flowing water, it is intermittent as we will  
10 get into the objections from the People.

11 You know, this is not a flowing  
12 stream. There may be a pond or two occasionally, but  
13 this is by no means a flowing river or stream.

14 In terms of sort of where our case is  
15 going to go, I believe at this point we will probably  
16 call five witnesses. Bob Hesper who is here and Andy  
17 Hesper, they're the Respondents, the two experts Terry  
18 Lundy and then Marc Anderson. And then also a third  
19 fact witness Mr. Bobby Kell(sp) who is from the area  
20 and has observed the property.

21 JUDGE MORAN: Before you sit down,  
22 Mr. Northrup, I understand that the Respondents'  
23 position is if liability were established and I were  
24 to agree with that, as you noted in your opening, you

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1 still have an issue about the appropriateness of the  
2 penalty.

3 Is ability to pay also one of the  
4 elements?

5 MR. NORTHRUP: Yes. Yes, it is.

6 JUDGE MORAN: And you've exchanged materials to  
7 present that to the EPA?

8 MR. NORTHRUP: We have provided tax returns for  
9 both the Mr. Hesers. I believe that's all the formal  
10 documentation.

11 They provided us with property records  
12 and things like that showing how much land the Hesers  
13 own and things like that. We are prepared to talk  
14 about that. They've gone through and sort of written  
15 out what they own and those things.

16 JUDGE MORAN: Okay.

17 Yes, Miss Pellegrin?

18 MS. PELLEGRIN: Your Honor, we've requested --  
19 it sounds like from Mr. Northrup that we requested  
20 some of the information we might be talking about on  
21 the stand, going through the debt and things that  
22 they own.

23 We've requested it a number of times,  
24 that information from Respondents so that we could

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1 get our financial analysis expert Mr. Mark  
2 (inaudible) to view that information.

3 We've requested it several times over  
4 the last month and have not received it. So I would  
5 object to Respondent putting all of that information  
6 on the stand.

7 JUDGE MORAN: Okay, we'll cross that bridge  
8 when we come to it.

9 MS. PELLEGRIN: And as we --

10 JUDGE MORAN: The board -- excuse me. When I'm  
11 speaking you can't.

12 The view on that is that the Appeals  
13 Board has been very clear about how one moves through  
14 the question of ability to pay. And I'll be applying  
15 those standards when that issue arises, okay?

16 MS. PELLEGRIN: Yes, your Honor.

17 JUDGE MORAN: Okay, ready to begin with first  
18 witness?

19 MR. MARTIN: Yes, your Honor. Complainant  
20 calls Ward Lenz with the Corps of Engineers.

21 JUDGE MORAN: Okay, we're off the record.

22 (WHEREUPON, there was then had  
23 an off-the-record discussion.)

24

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1 JUDGE MORAN: We're back on the record.

2 Good morning, Mr. Lenz, raise your  
3 right hand, please.

4 (Whereupon the Witness was sworn  
5 by the Administrative Law  
6 Judge.)

7 JUDGE MORAN: What I want you to do is state  
8 your name and then spell it for us, please.

9 THE WITNESS: My name is Gary Ward Lenz,  
10 G-A-R-Y, W-A-R-D, L-E-N-Z.

11 JUDGE MORAN: Whenever you're ready EPA.

12 WARD Lenz,  
13 having been first duly sworn by the Administrative  
14 Law Judge, witnesseth and saith as follows:

15 DIRECT EXAMINATION

16 BY MR. MARTIN:

17 Q. Good morning, Mr. Lenz. We're going to  
18 start out talking about your educational and training  
19 background?

20 A. Okay.

21 Q. Where did you go to undergraduate school?

22 A. I went to Southern Illinois University of  
23 Carbondale. I graduated with a Bachelor's degree in  
24 forestry in approximately 1982.

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1 Q. Describe generally the type of  
2 environmental course work that entailed.

3 A. It was a Bachelor's Degree in Forestry. My  
4 course work was predominately environmental sciences,  
5 biology, soil science, forestry courses, botany.

6 Q. Did you attend graduate school?

7 A. Yes, I did. I went to Michigan Tech  
8 University for a couple of years after graduating  
9 from Southern Illinois University. And I did not get  
10 my Master's Degree, but I attended and took about 45  
11 credit hours, I believe.

12 Q. And what course work did that entail?

13 A. Again, it was heavily in forestry and  
14 soils, biology.

15 Q. Are you currently seeking a degree?

16 A. Yes, I am. I'm seeking a Master's Degree  
17 in environmental science from Southern Illinois  
18 University Edwardsville.

19 Q. And what type of course work does this  
20 entail?

21 A. Environmental science courses, ecology  
22 related, soils.

23 Q. Okay, let's talk about your training at the  
24 Corps of Engineers. What type of formal training

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1 programs have you gone through at the Corps of  
2 Engineers?

3 A. With the Corps of Engineers, they have a  
4 whole set of regulatory course that everybody that  
5 comes into the regulatory branch has to take.

6 It's approximately seven courses.  
7 They're just entitled Regulatory One, Two, Three,  
8 Four and so forth. And they take you through the  
9 Permit Program, different aspects of the Permit  
10 Program. There's a course in wetlands delineation  
11 that was called Regulatory Four.

12 A course in enforcement. It's a whole  
13 barrage of courses. Then beyond that, the Corps  
14 offers courses for the cost approximation on items  
15 such as stream bank stabilization, ecological  
16 restoration, riparian management, things of that  
17 nature.

18 Q. Have you taught or lectured on topics  
19 related to your duties at the Corps of Engineers?

20 A. I give presentations regularly on the  
21 regulatory program to developers, school children  
22 even, consultants, farmers, the Soil and Water  
23 Conservation District.

24 Also, this past year I was put on the

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1 national training cadre for the Corps of Engineers  
2 Regulatory Program.

3 Q. What's the subject matter of those  
4 lectures?

5 A. It's basically an introduction to  
6 the Permit -- it's for people to make them aware of  
7 the Permit Program, the steps they have to go  
8 through, the types of permits that the Corps issues,  
9 the permit process.

10 It depends on the level that we're --  
11 when we go out with the school children like on Earth  
12 day, that's a whole different type of session there.  
13 We're just showing them critters.

14 And we give presentations to  
15 developers and farmers and then people of that  
16 nature. It's a whole different type where we  
17 actually talk about the nuts and bolts of the Permit  
18 Program.

19 Q. You just mentioned that you were appointed  
20 to the Board. Can you explain what the topic of that  
21 is?

22 A. One of our regulatory courses, Regulatory  
23 One which is the first course that somebody that  
24 enters the regulatory program at the Corps of

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1 Engineers would have to take.

2 They take that Regulatory One course.

3 And in that course they're exposed to scope of  
4 analysis, writing decision documents, public interest  
5 reviews. It's kind of an introduction to the permit  
6 process. And I was selected this past year as part  
7 of that national cadre.

8 Q. Are you currently employed?

9 A. Yes.

10 Q. Where do you work?

11 A. Corps of Engineers Regulatory Branch  
12 St. Louis District.

13 Q. And when did you begin working for the  
14 Corps of Engineers?

15 A. In 1994.

16 Q. What is your current position title or job  
17 title at the Corps of Engineers?

18 A. I'm a Project Manager in the Regulatory  
19 Branch. I'm also the team leader for the Missouri  
20 permit evaluation section.

21 Q. And what duties does that position entail?

22 A. The duties would involve -- well, as a team  
23 leader I'm responsible for approximately five people  
24 under me that process permits, enforcement actions,

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1 compliance, those types of things.

2 Then I personally do permit  
3 evaluations, enforcement and compliance inspections  
4 and compliance with issued permits.

5 Q. Have you had a different position at the  
6 Corps of Engineers before your current one?

7 A. When I entered the Corps of Engineers  
8 Regulatory Branch in 1994, and at that time the  
9 Regulatory Branch actually had an Enforcement  
10 Section.

11 So I started out in the Enforcement  
12 Section. And I was in the that section until 2000.  
13 And then in 2000, we did away with the Enforcement  
14 Section and switched over to every Project Manager  
15 does a little bit of everything just to round  
16 everybody out.

17 Q. And what were your duties as part of that  
18 Enforcement Section?

19 A. Enforcement Section, my duties with  
20 strictly enforcement and compliance. So if there was  
21 a violation of the Clean Water Act or the section on  
22 rivers and Harbors Act, that team including myself  
23 was responsible to follow-up on those Enforcement  
24 Actions. And we did after-the-fact permitting.

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1                   Then there was compliance with issued  
2 permits, to make sure that people that had issued  
3 permits were in compliance with any permit  
4 conditions.

5           Q.    In the course of these duties, do you  
6 conduct site inspections?

7           A.    Yes, commonly.

8           Q.    Approximately how many site inspections  
9 have you performed for the Corps of Engineers?

10          A.    I do -- I'm in the field about  
11 seventy-five days a year.  And when I'm in the field,  
12 I will do from one to five inspections.

13                   So, it could be in the course of a  
14 year, it could be several hundred.

15          Q.    Similarly, approximately how many wetland  
16 determinations or delineations have you made in the  
17 course of your duties at the Corps of Engineers?

18          A.    At the Corps of Engineers I probably -- on  
19 an ongoing basis between seventy-five and a hundred  
20 per year.

21          Q.    In your position with the Enforcement  
22 Section, how many notices of violation did you issue?

23          A.    I would estimate between 1994 and 2000 when  
24 I was in the Enforcement Section anywhere between

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1 maybe fifty to seventy.

2 Q. Okay, let's turn to the topic of your  
3 involvement in the Corps of Engineers enforcement  
4 proceedings.

5 Have you ever testified as a witness  
6 in such proceedings?

7 A. No, I have not.

8 Q. Have you been deposed in any such  
9 proceedings?

10 A. Yes, sir, I have been deposed. And I have  
11 provided two or three Affidavits.

12 Q. Do you recall generally what the outcome of  
13 those matters was?

14 A. Yes, I do. They all turned out favorable  
15 to the Corps. I guess you would say there were  
16 penalties involved.

17 Q. Okay, let's turn our attention to Section  
18 404 of the Clean Water Act.

19 First of all, what does Section 404  
20 require?

21 A. Section 404 is that part of the Clean Water  
22 Act that gives the Corps of Engineers the  
23 responsibility to run a Permit Program for the  
24 discharge of fill material into waters of the United

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1 States.

2 Q. Does your office -- first of all, where is  
3 your office located?

4 A. 1222 Spruce Street, St. Louis, Missouri.

5 Q. And does your office have authority to  
6 issue Section 404 permits?

7 A. Yes, sir, it does.

8 Q. What is the region that your office covers?

9 A. The St. Louis district covers approximately  
10 one-third of Illinois and one-third of Missouri.

11 Q. Let's talk generally about the Permit  
12 Program.

13 Generally, what types of projects do  
14 you receive permit applications for in the region?

15 A. What types of projects?

16 Q. Yes.

17 A. It's a wide range. It goes from road  
18 crossings, utility lines, casinos, barge facilities,  
19 commercial and residential development, agricultural  
20 activities.

21 Since it's for any type of activity  
22 that's going to impact either a stream, channel or  
23 wetland or a pond or lake or navigable waters, you're  
24 getting into a ton of activities.

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1 Q. Have you been involved in permit  
2 applications involving agricultural activities?

3 A. Yes, sir.

4 Q. Could you characterize how many or what  
5 percentage of your time is spent on permit  
6 applications for agricultural activities?

7 A. In agricultural areas, a percent of my  
8 time -- probably it evens out between all the rest.

9 If I were to say maybe 15 percent -  
10 20 percent. It's a common enough activity where the  
11 Corps has developed general permits for agricultural  
12 activities.

13 So it's kind of a common activity and  
14 common permits that we work with. A lot of them have  
15 to do with stream bank stabilization. There's a lot  
16 of folks in the agricultural community that have  
17 streams running through their property. They've got  
18 erosion problems and issues.

19 I was on a site just this past week  
20 looking at one where a farmer wants to do  
21 stabilization on a project. It's just a common  
22 activity.

23 Q. Generally, how would Section 404 permit  
24 requirements apply to stream channel alterations?

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1 A. Stream channel alterations.

2 Q. Yes.

3 A. Could you repeat that, please?

4 Q. You mentioned that you get permit  
5 applications for stream channel alterations. How  
6 would Section 404 requirements be applied to such  
7 projects?

8 A. How would they be applied to stream channel  
9 alterations?

10 Q. Yes.

11 A. We would look at the activity itself first  
12 of all, and see if the activity was covered by one of  
13 the general permits.

14 And these nationwide permits for  
15 example are a type of general permit. And these  
16 permits are developed for all these activities. So  
17 the alterations might be as simple as a utility line  
18 crossing, a road crossing which would maybe be a  
19 culvert. There might be bank stabilization that  
20 would be a modification.

21 And we get applications to put streams  
22 in pipes. That would be a common permit for  
23 residential commercial development.

24 Farmers, they will submit applications

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1 not just for stream bank stabilization projects, but  
2 say they have an erosion scholar coming into a field.

3 And maybe in addition to some bank  
4 stabilization they may want to straighten a section  
5 of the stream. So it runs a range.

6 Q. Upon issuance of a permit for such  
7 projects, what kind of conditions would be attached  
8 to the permit issued?

9 A. What kind of conditions?

10 JUDGE MORAN: If any?

11 THE WITNESS: Yes. If it's a general permit or  
12 nationwide permit, all of our permits automatically  
13 have a certain amount of conditions on them.

14 BY MR. MARTIN:

15 Q. Let's assume it's not a general permit, an  
16 individual permit is required.

17 Are environmental conditions attached  
18 to such permits?

19 A. Yes, they would always be attached.  
20 There's mitigations, conditions were probably  
21 mitigation would be a condition.

22 Conditions would be for they've got to  
23 obtain water quality certification would be a  
24 condition if they didn't have it.

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1                   Well, I take that back. In order to  
2                   have a valid permit, you'd have to have water quality  
3                   certification.

4                   But conditions would be best  
5                   management practices, maybe riparian corridor  
6                   installation. Erosion control would be a condition  
7                   of the permit.

8                   Most of the permit conditions would  
9                   have their reasoning based in it was an impact to the  
10                  stream channel, to reduce erosion impact, to minimize  
11                  those impacts, to maintain habitat.

12                  And then the other conditions for  
13                  mitigation would be to offset any adverse impacts.

14                  Q. And how is that done? Can you give us an  
15                  example a mitigation project?

16                  A. For mitigation? Mitigation would be the  
17                  last resort. If we're going to issue a permit and  
18                  we've gone through avoidance of impacts, minimization  
19                  of impacts, then what impacts that we are going to  
20                  authorize, those need to be compensated for.

21                  So let's say we're going to lose --  
22                  after going through that sequencing process, let's  
23                  say we're going to lose an acre of wetland, an acre  
24                  of wooded wetland, let's say.

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1                   How do you replace that acre of wooded  
2 wetland? The only way you can replace it is to plant  
3 another one in another location. And our first  
4 choice is do you have any land adjacent to the site;  
5 that would be the best preference.

6                   And that's what we would look at as  
7 part of the permit process, because there you have  
8 the soils that are the same types of soils.  
9 Location, you're providing water quality benefits and  
10 habit benefits in the same location as the project.  
11 So we would look there first.

12                   The other thing is if you lose a  
13 wooded wetland, you've lost trees that are probably  
14 12- to 18-inch in diameter, varying from saplings to  
15 older mature. And the habitat issues and things like  
16 that you cannot replace that.

17                   That won't be replaced for sixty to  
18 eighty years. So generally the mitigation  
19 requirements we would require. To replace those  
20 functions, you cannot do that with one acre and plant  
21 maybe seedlings. So we add additional acreage into  
22 it.

23                   So we may say well, to offset that  
24 impact, we're going to require three acres of tree

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1 plantings for that mitigation project.

2 That way you're spreading out those  
3 water quality benefits over a larger acreage. You're  
4 not getting all the habitat benefits, but you're making  
5 up for it in quantity really.

6 Q. Okay, thank you. Let's move on to wetlands  
7 identification.

8 Would you briefly explain the  
9 characteristics of a wetland?

10 A. Wetlands are characterized by three  
11 criteria.

12 You have to have hydrophytic  
13 vegetation or vegetation that is conducive to wet  
14 environments. Hydric soils, which would be soils  
15 that develop under wet and anaerobic conditions. And  
16 wetland hydrology in which you have water driving the  
17 system.

18 You have to have water for a long  
19 enough period of time during the growing season to  
20 have those conditions for the plants and to create  
21 those conditions in the soils.

22 So these three criteria: vegetation,  
23 soils and hydrology.

24 Q. What publication does the Corps of

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1 Engineers use in delineating wetlands under Section  
2 404 of the Clean Water Act?

3 A. We use the 1987 Corps of Engineers Wetland  
4 Delineation Manual.

5 Q. Do other Governmental agencies use this as  
6 well?

7 A. Yes, they do. We have a Memorandum of  
8 Agreement with several agencies in using the '87  
9 manual.

10 Q. Which agencies are part of that agreement?

11 A. We have a Memorandum of Agreement with the  
12 USDA, the Department of Interior, with EPA Fish and  
13 Wildlife Service.

14 The Memorandum of Agreement with the  
15 '87 Manual has more to do with using the manual for  
16 404 permit purposes. The memorandum with the USDA is  
17 a little bit -- that MOA is no longer applicable, but  
18 we did have MOAs with the U.S. EPA because they  
19 dovetail together the requirements of the Food  
20 Security Act and the Clean Water Act.

21 Q. I'm sorry, did you mention UPA -- U.S. EPA  
22 in your answer?

23 A. Yes.

24 Q. Does the manual provide guidance on how to

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1 identify wetland vegetation soil and hydrology?

2 A. Yes. The manual has a separate section for  
3 each one of those topics. There's a section on how  
4 do I identify vegetation, hydrophytic vegetation, a  
5 section on identification hydric soils, and a section  
6 on hydrology.

7 Q. Are there different types of delineation  
8 methods set out in the 1987 manual?

9 A. Yes. The manual has several methods and  
10 there's a section on each method. There's a routine  
11 method, there's a comprehensive method, there's a  
12 method for atypical situations.

13 There's a section for problem areas.  
14 So it is broken down into Sections.

15 Q. Have you applied each of these methods in  
16 the field?

17 A. Yes, I have.

18 Q. Okay, Mr. Lenz, I'd like for you to turn to  
19 Complainant's Exhibit Number 40 which would be in  
20 your second volume.

21 And this exhibit has several subparts  
22 as well. I ask you to just thumb through it and  
23 review the contents and describe what you see.

24 A. What you have here is you provided a copy

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1 of the 1997 Corps of Engineers Wetland Delineation  
2 Manual.

3 Q. And the subparts, I believe they're marked  
4 40 A through -- well, what do those entail?

5 A. I'm sorry, what was the question?

6 Q. Also associated with Exhibit 40 are  
7 subparts that are also in your binder. They are  
8 identified as 40 A through E, and I'd like for you to  
9 review that tell me if you can identify that?

10 A. Oh, these other tabs?

11 Q. Yes.

12 A. Okay. These are the subsequent guidance  
13 that has come up to supplement what is in the manual.

14 Q. Do those exhibits appear to be true and  
15 accurate copies of what you described?

16 A. Yes, they are.

17 MR. MARTIN: Your Honor, I move to include in  
18 the record Plaintiff's Exhibit 40A through 40E.

19 MR. NORTHRUP: No objection.

20 JUDGE MORAN: Okay, EPA Exhibits 40A through  
21 40E are admitted.

22 (WHEREUPON, Complainant's  
23 Exhibit Numbers 40A through 40E  
24 were admitted into the record.)

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1 BY MR. MARTIN:

2 Q. All right, Mr. Lenz, let's talk  
3 specifically about the case at issue here.

4 Are you familiar with the Hesper  
5 brothers property which is the subject of this  
6 enforcement action?

7 A. Yes, sir.

8 Q. How are you so familiar?

9 A. The Corps of Engineers received a complaint  
10 on that property back in 1999, and I was present for  
11 the site visit that was done shortly after that.

12 We received a complaint in 1999 and we  
13 issued a Notice of Violation for that, conducted a  
14 site visit I believe the following February. And I  
15 was present for the site visit.

16 Q. Okay, all told, how many other times did  
17 you visit the site?

18 A. I've been out on the site a total of three  
19 times.

20 JUDGE MORAN: Just to help me out, I'm curious,  
21 do you know about how far it is from where we are  
22 today, Carlyle to the this site?

23 THE WITNESS: The site? From here to Salem is  
24 probably 30 minutes.

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1 JUDGE MORAN: All right.

2 BY MR. MARTIN:

3 Q. Mr. Lenz, please direct your attention to  
4 Plaintiff's Exhibit Number 20.

5 A. (So complied with request.)

6 Q. Is it a soil survey?

7 A. Yes.

8 Q. A soil survey of Marion County, Illinois?

9 A. Yes.

10 Q. Do you recognize this document?

11 A. Yes, sir.

12 Q. What is it?

13 A. This is the front -- well, this is the soil  
14 survey of Marion County, Illinois. Marion County was  
15 -- all the soils in the county were mapped by the  
16 Soil Conservation Service. This was issued in 1996.

17 The survey work was conducted in the  
18 late '80s I believe. I was actually mapping, doing  
19 soil maps in Clinton County at the time that the  
20 Marion County soil survey was ongoing.

21 And I actually was even over in Marion  
22 County during the time of their mapping to meet with  
23 them, to look at some of their soils because our  
24 soils had to join their soils at the county line. So

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1 we had to coordinate the survey.

2 Q. What is the purpose of mapping soil?

3 A. The purpose of mapping the soils is because  
4 you have a map so you can do planning, environmental  
5 planning, development planning, agricultural  
6 planning.

7 This tells you what kind of material  
8 you have out there on the landscape, if you're going  
9 to have problems with run off, if you're going to  
10 have problems with drainage, are you going to have  
11 problems with construct ability, are you going to  
12 have problems with septic suitability.

13 So this is a good resource map for any  
14 county to have for any kind of land management  
15 decisions.

16 Q. Mr. Lenz, is the site located within Marion  
17 County?

18 A. Yes, sir.

19 JUDGE MORAN: And by the site meaning the site  
20 that's at issue in this proceeding?

21 MR. MARTIN: The site that's at issue in this  
22 proceeding.

23 THE WITNESS: Yes, sir.

24

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1 BY MR. MARTIN:

2 Q. Could you turn to page 260 which is --  
3 you're going to have to take it out of its sleeve.

4 A. The soil map?

5 Q. Yes.

6 MR. MARTIN: Your Honor, we have a blowup of  
7 this map that we'd like to use for demonstrative  
8 purposes.

9 JUDGE MORAN: Yes, go ahead. Let's go off the  
10 record for a second.

11 (WHEREUPON, there was then had  
12 an off-the-record discussion.)

13 (Whereupon a short recess was  
14 taken.)

15 JUDGE MORAN: Okay, let's resume.

16 BY MR. MARTIN:

17 Q. Mr. Lenz, you mentioned you were involved  
18 in the Clinton County soil survey. Can you describe  
19 your involvement?

20 A. Yes. I worked for the Soil Conservation  
21 Service. Before that -- now they're the Natural  
22 Resources Conservation Service.

23 When I worked for them, they were the  
24 Soil Conservation Service from approximately 1986 to

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1 1994. And I started working for them as a soil  
2 scientist. And I worked on the Clinton County soil  
3 survey manual, which is adjacent to Marion County.

4 And so we actually even worked with  
5 their field crews just a little bit because right  
6 over the line, we had to coordinate some of the  
7 soils.

8 But in order to make these soil maps,  
9 is that what you're wanting -- how these maps are  
10 made, is that --

11 JUDGE MORAN: You don't get to have a colloquy.  
12 Use your time to answer the question, and your  
13 Counsel will ask you additional questions, okay?

14 THE WITNESS: Okay.

15 JUDGE MORAN: It doesn't go back and forth.

16 THE WITNESS: All right.

17 BY MR. MARTIN:

18 Q. Just with regard to Clint County soil  
19 survey, can you just describe how you did your work  
20 to map Clinton County?

21 A. Okay. What we would do, we would take an  
22 aerial photograph, just the likes of what you have  
23 here except it would fit basically on a field  
24 clipboard. We take that out in the field and we

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1 would walk over the landscape and take soil samples  
2 on different landscape positions.

3 Because soils -- you find soils by  
4 landscape position. So you'll find side slope soils  
5 are different than ridge top or bottom land, and we  
6 would sample different landscapes.

7 And then we would identify on our  
8 aerial photograph, we would actually draw these lines  
9 as we walked. I would walk about 320 acres parcel a  
10 day that I would walk over and map, about 320 acres a  
11 day sampling and making these map units on the map.

12 And we would describe the soil to a  
13 depth of 5 feet getting surface -- well, horizon  
14 thickness, horizon colors, soil structure, soil  
15 internal drainage, classes, all the information that  
16 you see in these soil survey manuals is what would be  
17 the culmination of the survey in the county.

18 For instance, Clinton County took  
19 about three years to do. The last year was a lot of  
20 just office work compiling all the information that's  
21 in the soil survey manual.

22 Q. You mentioned that soils are -- types of  
23 soils are related to landscape position. Can you  
24 explain that?

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1           A.    Yes.  Well, the different landscape  
2 positions.  For instance, in a flood plane, you get  
3 constant flooding, sediment deposition.  And so those  
4 soils in a flood plane, you see a lot of organic  
5 matter stratification in the soil from flooding over  
6 times.

7                            You get different -- depending on the  
8 flood event, you might have coarse sands.  If it was  
9 a rapid flood then a rapid receding of the flood or  
10 if the water stayed up flooding for a long period of  
11 time, you get more silt deposits.

12                           So in the flood plane you have that  
13 kind of a situation, and those are different kinds of  
14 soils than you would have on say a ridge top where  
15 the soil is going to be well drained, it's going to  
16 be brown, it's going to have a real good structure  
17 within it, probably real good till for agriculture.

18           Q.    And you also mentioned color.  How does one  
19 check for color in the soils?

20           A.    Color in the soil is determined by use of  
21 soil color charts.  The most commonly used would be  
22 called a Munsell color chart, which is basically it's  
23 a book.

24                           It looks like a bunch of paint chips

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1 is what it looks like. And you compare the soil to  
2 the paint chips in this Munsell soil color book.

3 What you're looking at least in the  
4 Midwest here basically is iron, your evidence of  
5 iron. Iron is basically -- one famous soil scientist  
6 said iron is the paint of the soil.

7 So if you have well drained soils, the  
8 soils are brown because the iron is oxidized. If you  
9 have poorly drained soils, the soils are gray because  
10 the iron is reduced and bleached out.

11 So it's all pretty much related to  
12 iron.

13 Q. Explain the term poorly drained?

14 A. Poorly drained has to do with internal  
15 drainage within the soil.

16 So if you have a soil that's like  
17 heavy in clay, water is not going to percolate  
18 through that soil very quickly. That would be a  
19 sample of poor drainage.

20 If you have a courser, sandier soil,  
21 you're going to have quicker internal drainage, a  
22 well-drained soil.

23 Q. Just a couple questions about your job at  
24 Soil Conservation Service. What was your job title?

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1           A.    I was a soil scientist for the first three  
2           or four years then a soil conservationist after that  
3           prior to working for the Corps.

4           Q.    And were you certified in any way with  
5           regard to soils identification?

6           A.    Eventually -- well, to get hired on with  
7           the Soil Conservation Service as a soil scientist,  
8           you have to have a minimum of 15 credit hours of  
9           soils.

10                           And then after you've had enough on  
11           the job time, then you can get certified nationally  
12           and through the state of Illinois as a soil scientist  
13           and soil classifier.

14                           You have to go through an examination,  
15           you have to have so much time in field experience.  
16           But, yes, I was certified in 1989 through Illinois  
17           classifiers I believe, and then 1990 through the  
18           National Certification Board.

19           MR. MARTIN:  Your Honor, I ask your permission  
20           for the witness to approach what we're going to call  
21           Exhibit B and this is Bates Number 260 in  
22           Complainant's Exhibits.

23           JUDGE MORAN:  Yes, sure.

24

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1 BY MR. MARTIN,

2 Q. And, Mr. Lenz, if you could approach  
3 Exhibit B -- well, mark it Exhibit B first of all.

4 A. Just label it?

5 (So complied with request.)

6 Q. Yes. Actually, to allow everyone to see  
7 what you're doing. That's good.

8 Can you locate the area of the alleged  
9 violation on this map?

10 A. Sure do you want me to circle it?

11 Q. Yes, I do. One moment.

12 MR. MARTIN: Permission to approach, your  
13 Honor?

14 JUDGE MORAN: Yes.

15 THE WITNESS: I didn't know if you wanted me to  
16 mark on your map or not.

17 MR. MARTIN: That's okay.

18 BY MR. MARTIN:

19 Q. Mr. Lenz, could you draw a circle around  
20 the site with I think it's a pink highlighter.

21 What does this map tell you about the  
22 soils on-site of the alleged violation?

23 A. Okay, wait a minute, wait a minute. Wait a  
24 minute. I've circled the wrong spot. Hold on.

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1       Okay, here we go.  We're over here.

2               JUDGE MORAN:  Sometimes I interject so, I just  
3       want to make you aware of that.

4               So, Mr. Lenz, you have now marked a  
5       second circle on what is called Exhibit B and also  
6       for the rest of us it's Bates stamped 260, okay; is  
7       that right?

8               THE WITNESS:  Yes.

9               JUDGE MORAN:  And there are various numbers on  
10      there, right:

11              THE WITNESS:  Yes.

12              JUDGE MORAN:  And you drew your second  
13      circle -- if we were to divide this exhibit - the  
14      demonstrative exhibit you have in front of you - into  
15      four sections, if you divide it into fours; can you  
16      do that in your head?

17              THE WITNESS:  Yeah.

18              JUDGE MORAN:  It's in the lower right corner;  
19      is that right?

20              THE WITNESS:  That's correct.

21              JUDGE MORAN:  And is there a number in that  
22      lower right corner that one can associate or  
23      orientate oneself to, the area of that circle?

24              THE WITNESS:  You can see the section number,

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1 section Number 11 in that corner which is the largest  
2 number directly to the right of my circle.

3 JUDGE MORAN: That's unfortunate because on my  
4 11 is more just in the center. So can you give me  
5 some other numbers that are near there so I can --

6 THE WITNESS: Right in the center of the circle  
7 pretty much is the number 12.

8 JUDGE MORAN: Okay. I have seen that. Where  
9 is this 11 in reference to the 12?

10 THE WITNESS: It's further to the right.

11 JUDGE MORAN: It's not visible in mine. I  
12 don't know about Mr. Northrup.

13 Can you figure out the 11?

14 MR. NORTHRUP: No, but --

15 JUDGE MORAN: Go ahead. I need some help here.

16 MR. NORTHRUP: This doesn't appear to be the  
17 same map as that.

18 MR. MARTIN: I was just going to say that  
19 that's possible.

20 Can we go off the record, please?

21 JUDGE MORAN: Yes, we'll go off the record.

22 (Discussion off the record.)

23 JUDGE MORAN: Okay, go ahead.

24 MR. MARTIN: For the record, we've determined

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1 that the demonstrative exhibit is not the exact same  
2 copy as the one in our exhibit binder as marked by --  
3 as Bates Number 260.

4 So we will be using Bates 260 to mark  
5 the location of the site. And, Mr. Lenz, if you  
6 could, please.

7 JUDGE MORAN: Take your seat.

8 BY MR. MARTIN:

9 Q. And locate the site on CX page 260. And  
10 circle that for us, please?

11 JUDGE MORAN: And so for the record,  
12 demonstrative Exhibit B which -- may or may not have  
13 the same Bates stamp number.

14 That's not part of the record in this  
15 proceeding and I'm noting that explicitly.

16 MR. MARTIN: And per the Court's instructions,  
17 could -- your Honor -- permission to approach?

18 JUDGE MORAN: Yes.

19 BY MR. MARTIN:

20 Q. I'm going to ask you to do the same to  
21 Respondent's and the Court's copies of Bates 260.

22 JUDGE MORAN: And then in procedure with  
23 what's -- I don't know if there will be a lot of  
24 these, sometimes there are.

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1                   What I want you to do is to then take  
2 all three exhibits, including the one in front of  
3 this Witness, show it to Counsel for Respondent, and  
4 make sure he agrees that it is a replica of the area  
5 that was circled, so that we're all working literally  
6 from the same page.

7           MR. MARTIN: I understand.

8           JUDGE MORAN: And if you didn't do it, Counsel,  
9 just note for the record that the witness has marked  
10 on each of the exhibits -- on these with a --

11           MR. MARTIN: For the record, the witness has  
12 marked the site of the alleged violation on Bates 260  
13 on his own copy, the Court's copy, and Respondent's  
14 copy.

15 BY MR. MARTIN:

16           Q. And, Mr. Lenz, what does this map tell you  
17 about the soils on-site?

18           A. Okay, this identifies what soil types we  
19 have on the site. We've got three soils basically.  
20 We have Wynoose soil which is the 12, Newberry soil,  
21 and then there's a Hoyleton soil. The Hoyleton soil  
22 is on the stream channel.

23                   These are soils that are also listed  
24 on the hydric soils list.

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1                   So that's one of the criteria that we  
2                   were looking for to have a wetlands. The hydric soil  
3                   would be soil listed on the hydric soils list.

4                   The only thing about these soils and  
5                   even the surrounding soils in the general area is  
6                   they have something mentioned awhile ago, seasonal  
7                   high water table. That's prevalent throughout this  
8                   whole area.

9                   Q.    Let's talk about that for a second. What  
10                  is a high water table soil?

11                  A.    The seasonal high water table in these  
12                  soils. And this is a water table that's exhibited in  
13                  the soil during certain times of the year. Usually  
14                  it occurs between about -- and it differs by soil,  
15                  but basically between November and maybe May or June,  
16                  something like that.

17                  And what happens is for that period of  
18                  the year when you don't have active plant --  
19                  evaporation plant uptake and then respiration and  
20                  evaporation out of the soil, you've got rainfall  
21                  events, and you've got these soils that, as I  
22                  mentioned earlier, these have poor internal drainage.

23                  So you've got rainfall water coming  
24                  down them and it's percolating slowly through the

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1 soil. And the next rainfall I guess comes along  
2 before it can percolate through. So basically you've  
3 got water stacking up within the soil column itself.

4 So these soils basically have a water  
5 table within them where rainfall is occurring faster  
6 than percolation can occur. And that's what these  
7 soils exhibit.

8 Some of these, I think the Wynoose  
9 soil and Newberry -- not the Newberry, the Wynoose  
10 soil and the Hoyleton soil have what's called a  
11 perched water table. And the Newberry would have  
12 what's called a parent water table.

13 In the Newberry which is a very poorly  
14 drained soil, when you hit the table in this, the  
15 water goes throughout the soil profile, right past  
16 that 5-foot depth that we characterized for the soil  
17 survey.

18 The perched water table is one where  
19 when you hit it, you may punch through it and  
20 actually get into dryer soils below it.

21 Q. Mr. Lenz, please look at Complainant's  
22 Exhibit 20, and tell me if the characteristics of the  
23 soils that you found on the site of the alleged  
24 violation are described in the excerpts of the soil

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1 survey?

2 A. Yes, they are.

3 MR. MARTIN: Your Honor, at this time I'd like  
4 to move into evidence Plaintiff's Exhibit 20.

5 MR. NORTHRUP: I think I will object because  
6 there's been no foundation for what this document is,  
7 how it's been prepared, whether it's accurate.

8 I'm particularly concerned about  
9 what's Bates stamped 260 which is the photograph of  
10 the aerial photo. We don't know when this was taken.

11 So, on foundation, I object.

12 MR. SMALL: And, your Honor, we'd also object  
13 on the basis that the testimony has been Clinton  
14 County soil types that he dealt with. And there was  
15 even a statement by the witness that they would have  
16 to compare the Clinton and Marion County soils to  
17 somehow or other get them into sync with each other,  
18 meaning maybe there's something out there that's  
19 different.

20 So, for those reasons we would object.

21 JUDGE MORAN: Well, as to the second group of  
22 objects from Mr. Small.

23 MR. SMALL: Yes.

24 JUDGE MORAN: I reject that and that's subject

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1 to cross-examination in my view.

2 But the report itself, to me this  
3 document could be admitted just on the basis of a few  
4 questions as an official record produced by the  
5 United States Department of Agriculture, and could be  
6 admitted on that basis by itself.

7 But I'm going to ask Counsel please to  
8 ask a few more foundational questions related to this  
9 before I rule on the question of the admission of  
10 this document.

11 My understanding is also that this  
12 is -- this Exhibit 20, it's not the entire document,  
13 it's excerpts of this document.

14 And so I would like that clarified in  
15 those foundational questions.

16 And, also, somewhat adopting the issue  
17 raised -- I forget who said this, I think it was  
18 Mr. Small who said this, but the witness needs to  
19 speak a little bit to how this -- whether and how  
20 this Exhibit 260, Bates 260, that that is part of the  
21 survey and his understanding for the basis such as --  
22 have you reviewed the -- let's assume that this is  
23 not the entire survey.

24 So you would ask the witness: Have

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1 you reviewed the entire survey? Yes. I assume that  
2 that's what he would say.

3 And in the course of that review, do  
4 you recall seeing - you know, that's how it goes -  
5 the aerial photograph? Yes or no.

6 Do you understand what I'm driving at?

7 MR. MARTIN: Yes.

8 JUDGE MORAN: So ask some more foundational  
9 questions.

10 BY MR. MARTIN:

11 Q. Mr. Lenz, in your job with the Corps of  
12 Engineers in delineating wetlands, do you look at  
13 county soil maps?

14 A. Yes, all the time. Very, very commonly.

15 Q. So this is a relevant area to look at?

16 A. Yes. We relied very heavily on this  
17 document.

18 Q. Please take look at Plaintiff's Exhibit 20.  
19 Is this the current soil survey for Marion County?

20 A. Yes, it is. It was published in 1996.

21 Q. And are you familiar with this particular  
22 county soil survey?

23 A. Yes, sir.

24 Q. Are maps such as included in this exhibit

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1 also included in the soil survey?

2 A. Yes. Maps are an integral part of the  
3 book. The book itself is just about a inch thick,  
4 but that includes all the maps for the county.

5 Q. And I think I asked this earlier, but do  
6 the excerpts of the soil survey include the soils  
7 that are found in the area of the alleged violation?

8 A. Yes. These are tables taken right out of  
9 the soil survey manual itself. The manual itself is  
10 like I said probably about an inch thick. It  
11 includes a lot more tables than just this.

12 MR. MARTIN: Your Honor, I believe this witness  
13 has testified this is the latest soil survey. The  
14 soil survey are used by the Corps of Engineers in  
15 delineating manuals. And that the maps such as the  
16 ones included in the exhibit are included in soil  
17 surveys.

18 And I will again move to admit --

19 JUDGE MORAN: Yes, but did you ask -- does this  
20 represent -- he indicated it's about an inch thick.

21 This is apparently, it is only  
22 excerpts from the survey; is that true, Mr. Lenz?

23 THE WITNESS: Yes, these are just excerpts out  
24 of it.

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1           JUDGE MORAN:  And can you tell me -- you want  
2           to ask a question about how this exhibit come about.

3                        I mean, for instance, was this exhibit  
4           requested by Mr. Lenz from Marion County?

5                        And how did this exhibit come to be?

6           MR. MARTIN:  This exhibit, your Honor, was put  
7           together by the EPA in the interest of -- including a  
8           matter not related to the case.  It was an excerpt as  
9           part of this exhibit.

10          JUDGE MORAN:  By Counsel?

11          MR. MARTIN:  By Counsel and technical help on  
12          the case.

13          JUDGE MORAN:  And do you have the entire -- I  
14          assume with you, you have the entire --

15          MR. MARTIN:  (Nodded head up and down.)

16          JUDGE MORAN:  Okay, soil sample, all right.

17                        So what I'm going to do is I'm going  
18          to allow this exhibit.  But during lunch break and  
19          other times, I want Counsel for EPA to make available  
20          for Mr. Northrup and Mr. Small to look at the entire  
21          report for purposes of cross-examination.

22                        If they have questions -- maybe  
23          they'll be satisfied with the excerpts that are here.

24                        So noting the objection and this

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1 witness has testified to his familiarity with this  
2 particular survey.

3                                 And by the way, do you recognize,  
4 Mr. Lenz, the Exhibit that is marked CX 260? Do you  
5 recall that as being part of the soil survey of  
6 Marion County of 1996?

7                 THE WITNESS: Yes, sir.

8                 JUDGE MORAN: And what about I guess as part of  
9 it, Mr. Lenz, Complainant's Exhibit 259 which is  
10 another one of these maps.

11                                 It's called soil legends and then  
12 conventional symbols used on I guess on the map.

13                                 Have you seen that before, sir?

14                 THE WITNESS: Yes. This sheet is sort of like  
15 a divider in the middle of the manual. This comes  
16 right before the aerial photographs of the maps  
17 themselves.

18                 JUDGE MORAN: All right. And to understand,  
19 Mr. Lenz, Exhibit 260, is it helpful for reflections  
20 on doing that to have Exhibit 259 on hand as well?

21                 THE WITNESS: Yes, it's very helpful because  
22 there you have the numbers on the map, you can  
23 correlate as to the name of the soil itself.

24                                 And once you have the name of the

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1 soil, then you can go into the text and read about  
2 the soil and any characteristics of the soil.

3 JUDGE MORAN: And do you independently recall  
4 the soil legend and the conventional and special  
5 symbols legend as the being part of this particular  
6 survey?

7 THE WITNESS: Yes, sir.

8 JUDGE MORAN: Okay.

9 Then Exhibit 20 is admitted.

10 (Whereupon Complainant's Exhibit

11 Number 20 was admitted

12 into the record.)

13 MR. MARTIN: Thank you.

14 BY MR. MARTIN:

15 Q. Mr. Lenz, you were talking a bit about high  
16 water table soils. How do high water table soils  
17 have an effect on surrounding water bodies?

18 A. Okay. Well, the effect on the surrounding  
19 water bodies would be that -- certain types of  
20 streams, intermittent and perennial streams have a  
21 groundwater influence.

22 So when you don't have actual rainfall  
23 occurring in between rainfalls, where does the water  
24 come from? And that comes from groundwater.

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1                   So you have this high water table in  
2     the soils and these are -- bear with you, these are  
3     like I said the internal drainage is poor. So over  
4     time this water moves horizontally -- the water moves  
5     vertically and horizontally in both directions in the  
6     soil.

7                   Some of it will actually leach out --  
8     I shouldn't say leach, I guess, I should say seep out  
9     into a stream or it will go -- seep into a wetland.  
10    And this is where you get springs, too. This is  
11    where springs exhibit themselves from these water  
12    tables as well.

13                  But they provide a base flow for the  
14    streams. So in between rain events, you have flowing  
15    water and that's because it's constantly coming into  
16    the channel from the sides. The streams are  
17    basically incisions in the landscape because they're  
18    lower and they act as a drain.

19                  And so the water draws to these  
20    channels.

21           Q.     Mr. Lenz, is why news a high water table  
22    soil?

23           A.     Yes, sir, it is.

24           Q.     And Newberry is a high water table soil?

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1 A. Yes.

2 Q. And is Fulton a high water table soil?

3 A. Yes, sir.

4 Q. Are you familiar with the hydrology of  
5 Martin Branch?

6 A. Yes.

7 Q. Based on your observations and your  
8 knowledge of the soils in the area, how would you  
9 characterize flow from Martin Branch?

10 A. At Martin Branch, I would say that it flows  
11 a lot of the time. And the reason I say that is when  
12 I was out there the first time, I observed fish in  
13 the channel.

14 And to have, you know, certain types  
15 of aquatic life only need water part of the time.  
16 Fish have to have water all the time.

17 So if I were going to classify Martin  
18 Branch, I would call it -- thinking of the watershed  
19 and everything, I would call it intermittent with  
20 permanent pools is I think how I would classify it.

21 Q. And are you familiar with how Martin Branch  
22 is mapped on the USDS map?

23 A. Yes, sir.

24 Q. It's mapped as intermittent?

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1           JUDGE MORAN: Let me make sure I understand  
2 this, okay, Mr. Martin. The witness just said it's  
3 mapped as intermittent.

4                       Is that on this exhibit here as well?

5           MR. MARTIN: No, your Honor. This would be on  
6 a different exhibit.

7           JUDGE MORAN: All right, I just wanted to make  
8 sure that I understand it. So it doesn't relate to  
9 Exhibit 20?

10          MR. MARTIN: No.

11          JUDGE MORAN: By the way, I'm just curious,  
12 Mr. Lenz, when you circled on 260, you drew sort of a  
13 purplish circle on these copies?

14          THE WITNESS: Yes.

15          JUDGE MORAN: What size land am I looking at  
16 that you circled? Am I looking at an acre? You  
17 know, 40,000? I don't know what. Give me a sense of  
18 what size of land I'm looking at here on this map.

19          THE WITNESS: The circle itself probably  
20 encompasses probably 100 acres.

21          JUDGE MORAN: Okay, I just wanted to have as  
22 sense of proportion.

23          THE WITNESS: On most maps every square inch  
24 would be 40 acres.

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1           JUDGE MORAN: Every square inch is 40 acres.

2 All right, thank you.

3           MR. SMALL: Your Honor, so that I'm clear, I  
4 thought that the witness was to circle the land in  
5 question, not just a bigger area.

6           JUDGE MORAN: Right. That was his testimony.  
7 He circled -- the question was to circle the area in  
8 question. And he drew a rough circle just to sort  
9 of -- I don't believe it was in any sort of a  
10 technical sense.

11                         But since this is a rather large  
12 sheet, he was just directing our attention - and you  
13 can confirm this or not, Mr. Lenz - when you drew  
14 this circle were you precisely identifying on this  
15 map exactly the dimensions on area involved in this  
16 litigation?

17           THE WITNESS: No, I just wanted to encompass  
18 the area so that you knew it all fell within that  
19 circle.

20           JUDGE MORAN: I understand that this is just a  
21 rough orientation on this map of the vicinity of the  
22 area in question. I do not interpret the circle to  
23 mean that there are hundreds of acres involved.

24           MR. SMALL: And just to be clear, again, I

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1 thought his testimony was a hundred acres. And is he  
2 saying 100 acres was within the circle?

3 JUDGE MORAN: Correct. And this is how I want  
4 you to handle this cross-examination, okay, to refine  
5 the record.

6 BY MR. MARTIN:

7 Q. Mr. Lenz, could you please turn to  
8 Complainant's Exhibit Number 21?

9 A. (So complied with request.)

10 Q. Do you recognize this document?

11 A. Yes, sir.

12 Q. What is it?

13 A. Hydric soils list for Marion County.

14 Q. Is this an excerpted version?

15 A. Yes.

16 Q. And is it the current list for Marion  
17 County?

18 A. Yes, sir.

19 Q. Does this exhibit excerpt provide  
20 information about soils on the site of the alleged  
21 violation?

22 A. Here's why news. Why news is listed on  
23 here.

24 Q. How is it listed?

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1           A.    It's listed as a hydric soil.

2           JUDGE MORAN:  How about, Mr. Lenz, give us a  
3   clue as to what page you're looking at.

4           THE WITNESS:  262.  Why news is in the middle  
5   of the column on the left-hand side, number 12.

6                        If you move over to the third column,  
7   which is the hydric column, and it's got a yes in  
8   there where it identification why news as a hydric  
9   soil.

10   BY MR. MARTIN:

11           Q.    Could you explain a little bit more about  
12   the columns that appear to the right of the hydric  
13   soil column that you just described?

14           A.    Okay.  The first column you have actually  
15   is your mapped soil.  In this case why news silt  
16   loam.  The next column which says component on the  
17   heading, it tells you what part of that soil is  
18   hydric.

19                        And the reason for that is, these map  
20   units, these soil map units that you see on the soil  
21   maps encompass areas within which you may have more  
22   than just the why news soil.  You have inclusions of  
23   other soils within in where the scale of mapping, we  
24   did not map out smaller soils just because of the

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1 scale.

2                   So this is telling you that within the  
3 why news soil map unit, why news is the hydric  
4 component of that map unit.

5                   So the actual named soil in this  
6 case -- the predominant soil on the map is hydric.

7                   The third column identified whether  
8 the soil on the map unit hydric or not.

9                   Then it tells you what type of land  
10 form. In this case, it's a ground Marine which has  
11 to do with being on the Illinoisan till plane. It  
12 might say depressional flood plane or something of  
13 that nature.

14                   Then the next four columns have to do  
15 with hydric soils criteria. And that has to do with  
16 -- and I would have to look at the actual document to  
17 even explain this. But it has to do with where  
18 saturation occurs in the soil column.

19                   It has flooding criteria and ponding.  
20 It differentiates between the two. And then the last  
21 column is the extent of acres that you have of why  
22 news.

23           Q.    Mr. Lenz, which document did you just refer  
24 to when you said you'd have to -- which -- you'd have

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1 to refer to explain the saturation?

2 A. The actual hydric soils criteria, I believe  
3 it is listed in the 1987 Corps of Engineers Wetland  
4 Delineation Manual.

5 And it's also listed in the national  
6 hydric soils database in Ames, Iowa. So there's  
7 several documents that have this out there.

8 But the Newberry soil, you had asked  
9 if all of these soils were listed in here. The  
10 Newberry soil is listed in here as well. It's on the  
11 next page, page 263 towards the top.

12 In this one the hydric component is  
13 the named map unit again, Newberry.

14 On page 265 is the Hoyleton, 3225  
15 Hoyleton loam frequently flooded.

16 Q. Before we move on to the next soil, is  
17 Newberry listed as a hydric soil?

18 A. Yes, sir, it is.

19 Q. Okay, thank you.

20 JUDGE MORAN: Before you get into any more  
21 details of this, Counsel, you're going to have to  
22 back up and explain more about -- through this  
23 witness about where this document came from, where  
24 one could -- if I wanted to locate this document,

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1 would I go to Marion County?

2                   Would I go to the United States  
3 Department of Agriculture? You've indicated this was  
4 an excerpted document, and yet as I look at it, it's  
5 listed as continuous pages of one through six. Six  
6 of six.

7                   It looks to me like on its face a  
8 complete document, not an excerpted document, at  
9 least not excerpted by EPA.

10                   You have to lay more foundation about  
11 where this document came from. Does it have anything  
12 to do for example with Exhibit 20?

13                   How does this document, if at all,  
14 through this witness specifically relate to the land  
15 that's at issue in this proceeding?

16                   I can't fathom that. I mean, you  
17 mentioned for instance I think you said why news on  
18 262. Well, that's interesting. But I don't know  
19 that this -- this could be why news in Kansas.

20                   You have to lay more of a foundation  
21 about what this exhibit means, where it came from,  
22 how it was created, and how it relates to this case  
23 before you move for its introduction.

24                   MR. MARTIN: Yes, your Honor.

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1 BY MR. MARTIN:

2 Q. Mr. Lenz, who puts together the hydric  
3 soils list?

4 A. The hydric soils list is put together by  
5 the USDA Natural Resources Conservation Service.

6 What this is basically in the Marion  
7 County soil survey, that soil survey manual is old  
8 enough where you're not going to have this in the  
9 manual itself. But if you were to go on-line and get  
10 current version, NRCS has what they call an  
11 electronic field office technical guide.

12 Where you can go on line and get the  
13 most recent versions or editions in anything that has  
14 to do with their soil survey manuals. They keep  
15 these hydric soils lists updated.

16 So if you wanted to know the most  
17 current version of the hydric soils list for Marion  
18 County, Illinois, you would get on what's called the  
19 electronic field office tech guide, and pull up a  
20 list of hydric soils.

21 And, basically, what you're pulling up  
22 out of there is information out of the soil survey  
23 manual. So I guess how I would reference this, it  
24 would be a supplement to the soil survey manual.

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1                   But they keep it as an independent  
2 list because it is updated.

3           Q.    Have you gone on-line and obtained the  
4 these supplements themselves?

5           A.    Yes, I always go on-line to get the hydric  
6 soils list.

7           Q.    Okay.  What county does this exhibit  
8 pertain to?

9           A.    This is Marion County, Illinois.

10          Q.    Well, could you read the title of the  
11 document on page 261?

12          A.    Okay, yeah.  This is the hydric soils list  
13 for Marion County, Illinois.

14          Q.    And I believe you testified that this is  
15 you believe the most recent version of hydric soils  
16 list for Marion County?

17          A.    Pardon?

18          Q.    Is this the most recent list of hydric soil  
19 done for Marion County?

20          A.    Yes, it is.

21          Q.    When one goes on line, would this be the  
22 entire document one would receive?

23          A.    If you were to pull just the hydric soils  
24 list for Marion County, this is what you would get.

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1 This is all that you could get.

2 MR. MARTIN: Okay, your Honor. I apologize. I  
3 thought that this was an excerpt.

4 JUDGE MORAN: Okay, he's explained it's not.

5 But now, Mr. Lenz, is there anything  
6 within the four corners of these six pages of this  
7 hydric soils list - I accept this as an official  
8 document, a business record created by the U.S.  
9 Department of Agriculture, I take it.

10 THE WITNESS: (Nodded head up and down.)

11 JUDGE MORAN: You have to speak up.

12 THE WITNESS: Yes, sir.

13 JUDGE MORAN: For Marion County.

14 Was there anything within these four  
15 corners, so to speak, of the six pages that  
16 specifically ties these various identified hydric  
17 soils on this list to the particular land that's at  
18 issue in the case, just looking at this document by  
19 itself?

20 THE WITNESS: What --

21 JUDGE MORAN: It's a yes or a no.

22 THE WITNESS: Yes.

23 JUDGE MORAN: There is, okay. Now, tell me  
24 how. When I look at one of these six pages, and pick

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1 any one, tell me how the information in this hydric  
2 soils list specifically, clearly relates to the land  
3 that's at issue in this litigation?

4 THE WITNESS: Okay, if you want to know whether  
5 one of those soil types on your soil maps is hydric  
6 or not, on your soil map are a series of numbers.

7 You would go to one of those numbers  
8 on that soil map where I made that circle. And then  
9 the number 12 is within that circle on the site in  
10 question.

11 JUDGE MORAN: Okay.

12 THE WITNESS: So for you to determine whether  
13 or not that number 12 soil map unit is hydric or not,  
14 you would have to go to this list and see whether or  
15 not it was on the list and has a yes next to it.

16 JUDGE MORAN: Okay. And without trying to  
17 overtake the EPA's case, so you, in other words, can  
18 look at page two of six. And you see that the number  
19 12 is there next to why news, this is on page 262 of  
20 CX, 262, right?

21 THE WITNESS: Yes, sir.

22 JUDGE MORAN: And so that's how you know that  
23 if you see on the map in the area of that you circled  
24 as being the vicinity of the land that's at issue in

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1 this case, you associate number 12 on the map with  
2 the number 12 that's on this hydric soils list; is  
3 that correct?

4 THE WITNESS: Yes, that's correct.

5 JUDGE MORAN: Okay. And did you personally or  
6 do you know of anyone within EPA or the Corps of  
7 Engineers, did anyone actually go out apart from what  
8 this map tells you, and I'm just curious, just did  
9 anyone analyze the soil, like you analyze the soil,  
10 apart from this official record, this business  
11 record?

12 Has anyone personally gone out because  
13 apart from this sole record, we said we know this is  
14 why. This is why news silt loam because -- did  
15 anything like that happen in this case?

16 THE WITNESS: Yes, sir.

17 JUDGE MORAN: Are you going to talk about that  
18 later?

19 MR. MARTIN: Yes, your Honor. That will come  
20 with the site inspection.

21 BY MR. MARTIN:

22 Q. Mr. Lenz, is there another number which  
23 appears on the map marked page 260 that appears also  
24 in this hydric soils list for Marion County,

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1 Illinois?

2 A. Did you say is there another number?

3 Q. A number that appears on the site of the  
4 alleged violation that appears also on this hydric  
5 soils list?

6 A. Yes, there's the numbers on the soil map  
7 that we're interested in that's actually on the site  
8 are 12, 32, 25, and 218.

9 The 12 is Wynoose, the 218 is  
10 Newberry, and the 32 and 25 is Hoyleton.

11 Q. I direct your attention to page 263. Does  
12 the number 218 appear on this page?

13 A. Yes, sir.

14 Q. Could you give a brief description of what  
15 that column says?

16 A. The Newberry?

17 Q. (Nodded head up and down.)

18 A. The Newberry is listed as a hydric soil.  
19 Newberry itself it is the component of that soil map  
20 unit that is hydric and it's a depressional land  
21 form.

22 Q. And turning your attention to page 265, is  
23 there a column associated with the number 32/25?

24 A. Yes, sir, that's Hoyleton loam frequently

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1 flooded. 32/25, that was also on the site.

2 Well, it's not listed in here as the  
3 component being hydric, but it has inclusions within  
4 it that are hydric.

5 Q. Could you speak more to the issue of what  
6 inclusion is within a soil type?

7 A. Okay, inclusions would be when you're out  
8 there in a natural setting, in a natural landscape,  
9 nature is not going to be uniform.

10 And it's not going to be uniform for a  
11 couple reasons. One, you've got natural variability  
12 in the field, natural variability in nature. And you  
13 also have mapping scale problems to deal with as  
14 well.

15 So for the natural variability in the  
16 field, you have depressional areas, you've got  
17 gradients going on out there. With scale, you have  
18 the problem of like I said you have every square inch  
19 on there is 40 acres.

20 The smaller and smaller you make your  
21 map unit, the harder it is to put a number within it  
22 to call it a soil. So you can't just make a tiny,  
23 little soil map unit that's a quarter inch around and  
24 be able to put more than one number in there.

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1                   So, you've got scale problems. So you  
2                   have to make sure that your soil map unit is large  
3                   enough for the scale of the map you developed. In  
4                   Illinois I think the cutoff is three acres. If you  
5                   don't have a soil map unit that's at least three  
6                   acres in size, you'll just grow into another map unit  
7                   just for the sake of scale.

8                   So you have inclusions for several  
9                   reasons.

10                  Q. Looking specifically again on page 265,  
11                  under the column concerning unit 32/25 Hoyleton loam,  
12                  could you explain what the component column means?

13                  A. Okay. The component would be the part of  
14                  Hoyleton that are or not hydric. So in here you have  
15                  birds as a hydric component. Birds is a poorly  
16                  drained soil.

17                  And there are other soil map units if  
18                  you were to look at this map you would probably find  
19                  a birds soil map unit in another location on the soil  
20                  map itself.

21                  In this case it's a poorly drained  
22                  component of the Hoyleton soil map unit.

23                  JUDGE MORAN: Can you define for me what birds  
24                  refers to? What does birds have to do with it? Does

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1 that mean that birds use it, or is that just the name  
2 of a soil?

3 THE WITNESS: This whole column labeled  
4 component are names of soils.

5 JUDGE MORAN: So birds is a name of a soil?

6 THE WITNESS: Birds would be the name of a  
7 soil, yes, sir.

8 JUDGE MORAN: Okay. And my understanding is  
9 from your testimony is that birds is a sub-component  
10 of Hoyleton; is that right?

11 THE WITNESS: Yes, sir. It's occulusion within  
12 it and also within it these other components you  
13 have, it says other wet areas within Hoyleton. It  
14 just recognizes the fact that there's other wet areas  
15 that do not necessarily fit the birds description  
16 either, but they're there.

17 JUDGE MORAN: Well, then explain this to me,  
18 okay?

19 Again, I don't know how important it  
20 is, and I suspect it's going to be more important  
21 actually what people visually observe when they're at  
22 the site in terms of describing the soil.

23 But Hoyleton loam as a general  
24 proposition according to this map as I read it, it's

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1 not hydric soil; is that right?

2 THE WITNESS: That's correct.

3 JUDGE MORAN: Is that true whenever I would  
4 find Hoyleton loam? It's not considered hydric or  
5 just here?

6 THE WITNESS: Wherever you would find Hoyleton,  
7 it would not be hydric. And there's actually a  
8 description of Hoyleton in one of these other  
9 submittals that describes exactly what you should see  
10 when you see Hoyleton.

11 JUDGE MORAN: Then why, explain to me,  
12 Mr. Lenz, why if Hoyleton is not hydric, why do they  
13 have these subparts - and correct me if that's the  
14 wrong description - why do they have these subparts  
15 of Hoyleton -- they have the whole thing, Hoyleton,  
16 not hydric.

17 And then you've got subparts, birds  
18 long duration flooding, other wet areas. They're all  
19 the part of Hoyleton and they're hydric. How can the  
20 whole be not hydric and the parts within it -- why  
21 aren't they separately described as independent  
22 hydric soils?

23 THE WITNESS: Okay. What you have here, it's  
24 the difference between a soil map unit and a soil

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1 series.

2                   The soil map unit is made up of a  
3 whole group of soils. The predominant one within  
4 that is Hoyleton. And it just for the sake of  
5 mapping and mapping convention and being able to make  
6 maps, we grouped landscape positions by dominant soil  
7 type.

8           JUDGE MORAN: Okay.

9           THE WITNESS: So there's just a difference  
10 between the soil series itself Hoyleton and the soil  
11 map unit called Hoyleton.

12                   The soil map unit would contain birds  
13 and a lot of other inclusions, where the soil series  
14 itself is exclusive. The soil series has parameters  
15 on it that you just -- like Ph, really exacting  
16 things to Hoyleton itself.

17           JUDGE MORAN: Okay, thank you.

18                   Go ahead, EPA.

19 BY MR. MARTIN:

20           Q. When checking soils in the field, is it  
21 possible to distinguish between the preference of  
22 Hoyleton and birds?

23           A. Yes, sir, it is.

24           Q. And how is that done?

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1           A.   Predominately based on color really.  It  
2 would be the simplest and easiest way.

3                       Like I was saying a while ago, your  
4 better drained soils are going to be brown and your  
5 poorly drained soils are gray.  Hoyleton is a  
6 moderately well known substance, somewhat poorly  
7 drained soil, I believe.

8                       It's either somewhat poorly or  
9 moderately well drained, but if it's brown, it's got  
10 a brown matrix.

11                      Your birds soil is poorly drained.  
12 It's going to be a gray soil sub-color from reduced  
13 iron.  That's probably the easiest difference to make  
14 between the two.

15           MR. MARTIN:  Your Honor, at this time I'd like  
16 to move Complainant's Exhibit 21 into the record.

17           MR. NORTHRUP:  Subject to cross-examination,  
18 no, objection.

19           JUDGE MORAN:  Okay, all right.  Then EPA  
20 Exhibit 21 is admitted.

21                                       (WHEREUPON, Complainant's  
22                                       Exhibit Number 21 was admitted  
23                                       into the record.)

24           JUDGE MORAN:  You should be keeping your own

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1 tally, Mr. Martin. But right now at this point EPA  
2 Exhibits 40A through E, 20 and 21 are the only  
3 exhibits that are admitted in this record.

4 BY MR. MARTIN:

5 Q. Okay, Mr. Lenz, I'd like to draw your  
6 attention to Complainant's Exhibit Number 8 starting  
7 at Bates page 39.

8 JUDGE MORAN: I'm sorry, Counsel, what exhibit  
9 was that again?

10 MR. MARTIN: Eight.

11 BY MR. MARTIN:

12 Q. And this is a fairly long exhibit. If you  
13 could look at it carefully and then look up to me  
14 when you're done, please.

15 A. Yes, sir.

16 MR. MARTIN: Just for the record, this exhibit  
17 goes from Bates pages 39 to 153.

18 JUDGE MORAN: Through 153?

19 MR. MARTIN: Yes.

20 JUDGE MORAN: Please lay a detailed foundation  
21 at the introduction of this.

22 MR. MARTIN: Yes, sir.

23 Your Honor, while we're waiting for  
24 Mr. Lenz to look through the exhibit, this is another

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1 excerpted copy. And I'd just like to point out that  
2 we do have the entire file here for Respondents to  
3 view.

4 JUDGE MORAN: Okay. This is the part of the  
5 Prehearing exchange well before any cutoff date, you  
6 provided this as part of the Prehearing Exchange,  
7 Counsel?

8 MR. MARTIN: Yes.

9 JUDGE MORAN: Okay. And so, Mr. Northrup, if  
10 you haven't already looked at the entire document  
11 because I assume this witness is going to talk about  
12 how one can acquire that, anyone, except maybe the  
13 photographs, I don't know about that.

14 But you'll have the opportunity,  
15 should you desire to do that to look at the entire  
16 exhibit - not the entire exhibit - but the entire  
17 document. Do you have that here?

18 MR. MARTIN: Yes, sir.

19 JUDGE MORAN: And, of course, you can use that  
20 entire exhibit -- excuse me, that entire document for  
21 purposes of cross-examination if you decide to do  
22 that.

23 And let's go off the record while the  
24 witness is looking at this lengthy document.

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1 (Whereupon a short recess was  
2 taken.)

3 JUDGE MORAN: Go ahead, Counsel.

4 BY MR. MARTIN:

5 Q. Mr. Lenz, do you recognize this document?

6 A. Yes, sir, I do.

7 Q. What is it?

8 A. This is the referral that the Corps made to  
9 EPA referring this case to EPA, referring it to them  
10 basically as a violation of Section 404 of the Clean  
11 Water Act, the reason being we considered the Hesers  
12 to be flagrant violators.

13 Q. And under what procedure was this letter  
14 sent to the EPA?

15 A. In accordance with a Memorandum of  
16 Agreement that the Corps has with EPA for referrals.

17 Q. Were you --

18 A. -- (continuing) enforcement actions.

19 Q. Were you personally involved in putting  
20 this letter and documents together?

21 A. Yes, sir.

22 Q. Could you describe your involvement?

23 MR. SMALL: Your Honor, we're going to object  
24 at this time because it appears there's reference in

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1 this letter to a December 22, 1996 date, and I  
2 believe the case law is clear that any evidence of  
3 prior violations should be within five years, and  
4 this certainly is not.

5 And I would quote you a court case 3M  
6 Company versus Browner 17 Fed. 3rd 1453 D.C. circuit  
7 case 1994.

8 JUDGE MORAN: That's the basis of your  
9 objection?

10 MR. SMALL: Yes.

11 JUDGE MORAN: Okay. I'm going to defer ruling  
12 on that and I'll certainly consider that.

13 But provisionally when it's moved for  
14 introduction -- I'm rejecting that basis of the  
15 objection for now. And then when I have the luxury  
16 of reviewing the case law that you cited, this Fed.  
17 3rd case, I'll consider that at that time.

18 So, continue, Counsel.

19 BY MR. MARTIN:

20 Q. Mr. Lenz, were you personally involved in  
21 putting this document together?

22 A. Yes, sir, I was. This was at the time we  
23 still had an enforcement section in the Regulatory  
24 Branch. Karen Marzek(sp) was the team leader and

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1 you'll see correspondence from her in this section I  
2 believe.

3 I was working under her. I worked  
4 with Katherine Kelley. Katherine Kelley was the  
5 original Project Manager and I was basically  
6 overseeing her and supervising her work on this.

7 So all of the material here,  
8 basically, I okayed it to go out the door.

9 JUDGE MORAN: When you say all the material  
10 here, Mr. Lenz, are you referring to the entirety of  
11 EPA CX 8, which includes numerous photographs.

12 THE WITNESS: Yes, all of the material here was  
13 part of the referral we made to the EPA.

14 JUDGE MORAN: And did you personally review all  
15 these documents before this was sent out?

16 THE WITNESS: Yes.

17 JUDGE MORAN: Okay, go ahead.

18 BY MR. MARTIN:

19 Q. Mr. Lenz, were copies furnished to other  
20 parties?

21 A. Of the referral?

22 Q. If you could just note for the record the  
23 cc's of these filings.

24 A. We did send Hesers part of it. It says

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1 here copies furnished, but I don't think Hesers got  
2 all of the referral. They only got a portion of the  
3 referral.

4 Because when we were out on-site doing  
5 the site visit, it was requested that they get some  
6 of the information that the wetlands litigation had.

7 So they did not receive all of the  
8 information that EPA received.

9 JUDGE MORAN: At that time?

10 THE WITNESS: Yes, sir.

11 MR. MARTIN: We'll turn to your site visit in  
12 just a moment.

13 BY MR. MARTIN:

14 Q. If you could turn to Bates page 41, why was  
15 this included in the referral?

16 A. Okay, this is the Raccoon Township map, is  
17 that what you're referring to?

18 Q. Yes.

19 A. Okay, this is a page taken out a plat map  
20 for Marion County. And this is Raccoon Township,  
21 Marion County within which is the violation site.

22 If you look up towards the right hand,  
23 you can see section 11 there. You can see Martin  
24 Branch as labeled and running into section 11. And

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1 then right there is where the violation site is.

2 The reason for this being in here is  
3 a plat -- the plat map that you get out of the plat  
4 books are one of the best maps that we have to get  
5 locations, to get every little county road.

6 So that when we go into the field, we  
7 can easily find the site because all of the roads are  
8 labeled. And if I go -- like for instance on the  
9 left-hand column of the page and then you see all  
10 those numbers. It says 500 north, 400 north, 300  
11 north, and then along the bottom 800 east, 900 east,  
12 1000 east, all of the townships are divided up into  
13 sections.

14 And there's usually, not always, but  
15 usually a road on every section. And there's signs  
16 at every intersection that tell you basically on a  
17 grid fashion where you're at out in the field. So  
18 it's easy to orient yourself when you're out on the  
19 field to find the site.

20 Q. Okay, thank you.

21 Turning to Bates page 42 through 45,  
22 do you recognize this document?

23 A. Yes, sir. This is the initial Complaint  
24 form that we received for the -- from Bill Heser.

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1 Q. First of all directing your attention to  
2 the top right of this document, what number -- why  
3 are the numbers placed there?

4 A. Okay. 199906800, that's our regulatory  
5 file number that we attach to -- every action that  
6 comes in our door gets a number, whether it's a  
7 violation action or a permit action, we assign a  
8 number to it, and that's what this represents.

9 It also corresponds to a year as well.

10 Q. Okay, who is the complainant in this  
11 regulatory complaint report?

12 A. The complainant is Bill Hesel.

13 Q. And I noticed from the form Complainant  
14 informed of rights under Privacy Act.

15 Has Bill Hesel waived his Privacy  
16 right?

17 A. Yes, sir. There's a box in the form here  
18 and it says confidentially -- well, where it says  
19 confidentially requested, it says yes.

20 JUDGE MORAN: You'll have to help me out  
21 Counsel for EPA, you're referring to CX 43?

22 What you're talking about, a waiver?

23 MR. MARTIN: CX 42, your Honor.

24 JUDGE MORAN: And your question was whether the

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1 individual waived confidentiality and the witness  
2 disagreed with you and said that in fact  
3 confidentiality was requested.

4 MR. MARTIN: Your Honor, I think I'm going to  
5 strike that question and ask it of the EPA personnel.

6 JUDGE MORAN: Okay. I don't think you can undo  
7 what's done. This witness has said that  
8 confidentiality was requested.

9 MR. MARTIN: Well, under the form it's  
10 requested, and I'm clarifying whether in the context  
11 of this matter confidentiality has been waived.

12 JUDGE MORAN: Well, you asked him based on this  
13 report, and based on this report he said it has not  
14 been waived; isn't that what you said, sir?

15 THE WITNESS: Yes, sir.

16 JUDGE MORAN: If you're going to ask him if he  
17 knows something that contradicts that based on what,  
18 you can ask him that.

19 MR. MARTIN: Okay.

20 BY MR. MARTIN:

21 Q. Subsequent to filling out this form, has  
22 Mr. Hesar indicated that he waived his  
23 confidentiality request?

24 A. I would not know that. I don't know.

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1 MR. MARTIN: All right, we'll cover this with  
2 EPA personnel, your Honor.

3 JUDGE MORAN: Okay.

4 BY MR. MARTIN:

5 Q. Who are the alleged violators noticed in  
6 this complaint?

7 A. Robert and Andrew Heser.

8 Q. And is the location of the alleged  
9 violation correctly noticed in this report?

10 A. Yes, sir.

11 Q. I noticed a reference to the phrase point  
12 source at the bottom of the page?

13 JUDGE MORAN: Bottom of what page, Counsel?

14 MR. MARTIN: Page 42.

15 THE WITNESS: Oh, okay, about four lines up  
16 from the bottom, point source type of equipment.

17 BY MR. MARTIN:

18 Q. Yes. Can you explain the significance of  
19 the term point source?

20 A. Point source means that you can point to  
21 where the discharge was coming from as opposed to it  
22 being something subjective or like agricultural  
23 run-off where you can actually say oh, no, it's not  
24 just run-off. It's a ditch here.

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1                   You can actually point to a piece of  
2                   equipment saying okay, this is the discharge coming  
3                   from the bulldozer. But there's no question about it  
4                   coming from a multitude of sources. You can point to  
5                   one single source.

6                   Q.    Mr. Lenz, directing your attention to page  
7                   43, there's a reference to pictures and video?

8                   A.    Yes, sir.

9                   Q.    Did you receive pictures of video along  
10                  with this complaint?

11                  A.    Yes, sir, we did, pictures and a video.

12                  Q.    Directing your attention to Bates 63  
13                  through Bates 70, do you recognize these pictures?

14                  A.    These are the pictures that were sent in  
15                  with the complaint.

16                  Q.    Mr. Lenz, as a enforcement officer for the  
17                  Corps of Engineers, what do these pictures portray to  
18                  you?

19                  A.    Well, from these pictures, you can see  
20                  clearing has been done. You can see debris piles in  
21                  the picture. You can see a newly constructed channel  
22                  that has been apparently seeded and strawed.

23                  Q.    If you could specifically reference the  
24                  page and the picture when you're describing it.

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1           A.    Okay, on page 63 you can see from the top  
2 photo, you can see a debris pile in the background.

3           JUDGE MORAN:  See, Counsel, it's one thing to  
4 -- you haven't moved yet.

5                         it's one thing to have this particular  
6 exhibit moved for introduction as an official record;  
7 that's one thing.  And I don't have a problem with  
8 that as an official record.

9                         This witness has stated this is all  
10 part of Exhibit 8 which was part of the formal  
11 notification of the enforcement Complaint.

12                        But you can't have this witness just  
13 jump in without asking some foundational questions  
14 about how he knows what these photographs depict, who  
15 took the photographs, whether he was there, whether  
16 they accurately display --

17                        I mean, you can't just jump into a  
18 discussion of these exhibits talking about things  
19 like this appear to be re seeded you know, et cetera.  
20 You can't just fast forward to that without bringing  
21 in some foundation.

22           MR. MARTIN:  Yes, sir.

23 BY MR. MARTIN:

24           Q.    Mr. Lenz, have you been to the site of the

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1 alleged violation?

2 A. Yes, sir, I have.

3 Q. And how many times have you been out to the  
4 site?

5 A. I've been out on-site three times.

6 Q. Were you personally involved in taking  
7 these photographs starting at page 63 to 70?

8 A. Could you restate?

9 Q. Were you personally involved in the taking  
10 of these photographs on 63 to 70?

11 A. No, sir, these are Bill Hesers' pictures.

12 Q. So you are aware of who took these  
13 pictures?

14 A. Yes.

15 JUDGE MORAN: How are you aware?

16 THE WITNESS: They came with the complaint,  
17 part of the complaint.

18 JUDGE MORAN: You have -- you'll have to ask  
19 him some questions for it. You haven't yet  
20 identified whether he knows, how he knows, who took  
21 these pictures, when they were taken.

22 There's a host of things you have to  
23 ask before you can discuss these questions.

24 MR. MARTIN: Your Honor, I think the purpose

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1 here is just to confirm that the Corps of Engineers  
2 enforcement officer, Mr. Lenz, saw the possibility of  
3 a violation.

4 MR. SMALL: We object --

5 MR. MARTIN: We have witnesses --

6 JUDGE MORAN: Excuse me, we have an objection.

7 Go ahead, please.

8 MR. SMALL: I'm going to object to Mr. Martin's  
9 testimony.

10 JUDGE MORAN: Excuse me?

11 MR. SMALL: I don't think he should be  
12 testifying.

13 JUDGE MORAN: He's not. He's explaining a  
14 limited purpose behind it.

15 But you don't get there, Mr. Martin,  
16 without more of a foundation so that I can understand  
17 how this witness knows what he's talking about these  
18 photos.

19 How he came into possession of these.  
20 When he first saw them. How it relates to his  
21 personal visits to the site.

22 You can't talk about these photographs  
23 based on the questions you've asked so far.

24 So all I have is this report which I'm

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1 likely to admit without any application of it. I  
2 have a bunch of photos which are meaningless to me  
3 even as to what they depict or where based on the  
4 foundation you have not laid yet for this witness to  
5 talk about these photos. Maybe you'll do it through  
6 another witness.

7 MR. MARTIN: Yes, your Honor I'm merely trying  
8 to explain what -- whether the pictures came with the  
9 complaint.

10 JUDGE MORAN: That's one thing.

11 MR. MARTIN: And whether they were part of the  
12 public record.

13 JUDGE MORAN: Well, if that's you will you want  
14 to do, you can could that.

15 MR. MARTIN: That's all I want to do. And I  
16 also would direct the witness' attention to page 43.

17 THE WITNESS: Yes, sir.

18 BY MR. MARTIN:

19 Q. Did the Corps of Engineers receive video  
20 along with this complaint?

21 A. Yes, we did. We received a video with the  
22 complaint and the pictures with the complaint.

23 MR. MARTIN: Your Honor, I've laid the original  
24 videotape along with Mr. Lenz.

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1 THE WITNESS: This is it, right here.

2 JUDGE MORAN: That's a different thing.

3 But by the way, there has to be a  
4 logical connection. This is not an informal  
5 proceeding.

6 And when you direct my attention to  
7 page 43, CX Bates Number 43. It says I observed. My  
8 son took the pictures and videos.

9 Well, that's interesting. But I don't  
10 know based on any testimony in this record that these  
11 photographs on page 43 -- referenced on page 43 are  
12 the same photographs that begin on 63 through 70.

13 And nor would I know absent testimony  
14 that the video that Mr. Lenz has held up is the same  
15 video that was referenced on this page 43 that  
16 apparently William Hesel supplied.

17 You just can't -- what you have at  
18 this point is what I said earlier or what I agreed  
19 to.

20 You have that there's an official  
21 record launching this an arrangement dated May 1,  
22 2002 with a file number which is -- by the way, I  
23 know it's the same file number that's referenced on  
24 page 42, so there is that consistency.

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1                   So you have this official record, but  
2                   I can draw zero conclusions based on this witness'  
3                   testimony about anything to do with these photographs  
4                   at this point this time.

5                   Going back to Mr. Small's objection --  
6                   and I'm not saying by the way that I might not  
7                   ultimately agree with you on the issue of the Statute  
8                   of Limitations, but without having the benefit of  
9                   researching it and reading the Parties respective  
10                  positions on it, I told what my instinct is.

11                  There's the continuing violation. I  
12                  don't know whether the Court of Appeals for this  
13                  particular circuit has definitely ruled on that. I'd  
14                  have to look at that.

15                  That's why I'm holding in abeyance a  
16                  final ruling on that question. I can't do that from  
17                  here.

18                  Okay, continue, Counsel.

19                  MR. MARTIN: Just one more question about the  
20                  complaint.

21                  BY MR. MARTIN:

22                  Q. Mr. Lenz, are you personally aware of  
23                  whether the pictures and videotape accompanied  
24                  Mr. Hesers Regulatory Complaint?

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1           A.    Yes, they did.

2           Q.    And how are you so aware?

3           A.    We received it all in one package.  We  
4   received the complaint, the pictures and the video  
5   which we actually like to have it in that fashion  
6   just because if we have to make a determination on  
7   whether there's been a violation.

8           Q.    When you say we received the complaint,  
9   what procedures are involved in receiving and  
10   processing complaints at the Corps of Engineers?

11          A.    Okay, well, when they come in we assign a  
12   number to them.  And then we go over the documents  
13   and have to determine, you know, what's the activity  
14   that's occurred and we use all the information in the  
15   complaint report to make that determination, the  
16   videos, the photographs, witness statements, the  
17   statement of the complainant, what happened.

18                    And look at what's the activity that  
19   occurred, is it in a jurisdictional area, is there an  
20   existing permit that's been issued.

21                    A lot of times we get complaints at  
22   the Corps for projects that we've authorized.  So we  
23   look and make sure that we haven't issued a permit  
24   for this activity.

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1                   Then we determine okay, has there been  
2 a violation at that point. So that's kind of how it  
3 all goes about. And then after that once we've made  
4 that determination, then after that point we'll send  
5 out a Notice of Violation or schedule a site visit,  
6 one of those things.

7           Q.    Mr. Lenz, can you confirm for the Court  
8 that the pictures included in this exhibit as well as  
9 the video that is resting before you were a part of  
10 this Regulatory Complaint?

11          A.    Yes, they are an a part of it.

12          Q.    Thank you.

13          JUDGE MORAN: Well, and you were involved.

14                    Didn't you testify, Mr. Lenz, you were  
15 involved in essentially helping to oversee or you had  
16 personal involvement in the development of EPA  
17 Exhibit 8 before you sent it over to EPA in Chicago;  
18 is that right?

19          THE WITNESS: Yes, sir.

20          JUDGE MORAN: Okay, thank you.

21                    And when you developed this document  
22 to send over to EPA in Chicago, did you send over  
23 these photos as well?

24          THE WITNESS: Yes, sir.

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1           JUDGE MORAN:  Okay.  And there are two groups  
2 of photos, right?

3           THE WITNESS:  Yes.  There's that video and the  
4 photos.

5           JUDGE MORAN:  Yes.  Apparently, there are two  
6 groups of photos, one begins CX 63, do you see that?

7           THE WITNESS:  (Nodded head up and down.)

8           JUDGE MORAN:  And then it ends on CX 70; do you  
9 see that first group?

10          THE WITNESS:  Yes, sir.

11          JUDGE MORAN:  And then isn't there another  
12 group that starts on CX 146 and ends on CX 153?

13          THE WITNESS:  Yes, sir.

14          JUDGE MORAN:  And tell me whether or not, was  
15 that all of what you had personal involvement in in  
16 sending over all of this stuff to Chicago -- the  
17 wetlands protection section on May 1?

18          THE WITNESS:  Yes.  Yes, I did.  This was all  
19 part of the referral.

20          JUDGE MORAN:  Okay.

21          MR. MARTIN:  As I noted, your Honor, there are  
22 parts that were excerpted from this exhibit which is  
23 why we are providing the court file.

24          JUDGE MORAN:  You're telling me, Counsel, that

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1       you're representing on behalf of EPA that Exhibit 8  
2       is not the entire file that was sent from the  
3       department of the Army over to the EPA, these are  
4       selected parts of it?

5             MR. MARTIN: In one respect, yes.

6             JUDGE MORAN: What's your representation?

7             MR. MARTIN: My intent is to go through with  
8       the witness each part of this Regulatory Complaint  
9       which is complete and the part that has been  
10       excerpted by EPA just to give Respondent an idea of  
11       what is missing from this exhibit.

12            JUDGE MORAN: Well, I want you to make it a  
13       little bit easier during the break. Have your  
14       administrative person tab the pages that are not  
15       included within Exhibit 8.

16                        Apparently, you have the entire file  
17       that was sent from the Department of the Army over to  
18       the EPA, but some pages are not within this exhibit;  
19       is that correct?

20            MR. MARTIN: Yes, that's correct.

21            JUDGE MORAN: And then rather than make Counsel  
22       have to guess and respond now to this page, now I'll  
23       have to go look for it. It looks like it's here.

24                        Okay, that's ridiculous. So you're

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1 going to have to tab that for Counsel if he's  
2 interested in seeing that, the pages that are not in  
3 within EPA Exhibit 8.

4 Help him out.

5 MR. MARTIN: Yes, your Honor.

6 Well, at this time it might be a good  
7 time to take a break.

8 JUDGE MORAN: I agree. I have 12:33, and we  
9 will be stopping and we'll figure out tomorrow at the  
10 end of the day.

11 MR. NORTHRUP: I've got witnesses in  
12 Springfield. Do you have any thought as to how long  
13 your case might be?

14 I want to get these people down here  
15 if you're case is going to be over and if it looks  
16 like it won't be, so I can at least tell these guys  
17 to stand down for tomorrow.

18 JUDGE MORAN: And if we have to break a little  
19 early, it's best to have it seamless. But EPA -- all  
20 right, let's take that break.

21 (Whereupon a lunch recess was  
22 taken.)

23 JUDGE MORAN: Counsel from EPA, you wanted to  
24 say something.

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1 MR. MARTIN: Yes, your Honor.

2 The Court requested EPA to supply a  
3 complete copy of the soil survey to Respondent and  
4 Respondent's Counsel suggested that we include an  
5 entire copy of the survey in the record in case --  
6 which we will agree to do. We can use our copy here  
7 to include in the Court's record.

8 JUDGE MORAN: Right, but you're going to have  
9 to supply -- it will be after the fact. But you'll  
10 supply like two copies: one for me and one for the  
11 Regional Hearing Clerk who is the Magistrate and  
12 he'll probably hold onto the original.

13 And then if the case is appealed, it  
14 goes on to the EAB, and it's the Regional Hearing  
15 Clerk that supplies the original to that review body.  
16 And I kept my set.

17 And then Mr. Northrup needs a copy,  
18 okay?

19 And then what we'll do is your  
20 administrative person, who is not in the courtroom,  
21 she'll have to take out whatever the Exhibit Number  
22 was and substitute in there.

23 MS. PELLEGRIN: Your Honor, our administrative  
24 assistant said that there's not a Kinkos copying for

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1     like sixty miles or something.  So she requested I  
2     think you just said it can be done after the fact,  
3     so --

4             MR. MARTIN:  And it's my understanding that you  
5     don't need this copy at this time.

6             MR. NORTHRUP:  Yes, that's right.

7             MR. MARTIN:  The problem is these surveys are  
8     particularly hard to copy with the maps, map  
9     attachments.

10            JUDGE MORAN:  Can't you just order two more  
11     sets from -- what Exhibit Number is that?

12            MR. MARTIN:  Twenty.  Exhibit 20.  Yes, we can  
13     order an extra copy.

14            JUDGE MORAN:  And you know what would be a good  
15     thing in terms of not delaying the time clock.  
16     Specifically I think we get ten working days for the  
17     transcript?

18                     Fourteen, okay.  And if you could  
19     sometime during the day please place that order, and  
20     then we can have it to give it to Counsel for  
21     Respondent sooner.  And then they'll have that to  
22     reference when they're working on their briefs.

23                     Okay, let's continue.  Any other  
24     housekeeping matters?

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1 MR. MARTIN: No.

2 JUDGE MORAN: Okay, well then go ahead,  
3 Mr. Martin.

4 By the way, Exhibit A is not yet  
5 admitted, right?

6 MR. MARTIN: We're still working on the  
7 attachment.

8 Another housekeeping matter, Mr. Lenz  
9 and Mr. Carlson have consulted over their lunch  
10 period to determine the parts of the EPA exhibit --  
11 to determine which parts of the original court file  
12 were not included in the EPA's exhibit. So we are  
13 working on that.

14 JUDGE MORAN: Good, thank you.

15 BY MR. MARTIN:

16 Q. Good afternoon, Mr. Lenz.

17 Could you please turn to Bates Number  
18 112 through 153 of Complainant's Exhibit?

19 A. (So complied with request.)

20 Q. Do you recognize these documents?

21 A. Yes, sir. These are copies of my field  
22 notes, data forms, and photographs that were taken  
23 during the Corps' site inspection in February of  
24 2000?

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1 Q. When you say site inspection, are you  
2 referring to the alleged site of the violation in  
3 this case?

4 A. Yes, sir.

5 Q. Mr. Lenz, is this a complete, true and  
6 accurate copy of your inspection notes?

7 A. Yes, sir, it is.

8 Could I make a --

9 JUDGE MORAN: No.

10 BY MR. MARTIN:

11 Q. Would you like to amend your last answer,  
12 Mr. Lenz?

13 A. I was just saying I noticed on this first  
14 page of the field notes, I noticed an error on there,  
15 a typo error.

16 On item number 1, directly under the  
17 title where it says Field Notes, in that second line,  
18 it mentions water 3 feet deep. That should be  
19 3 inches deep.

20 Q. Well, what you're doing is correcting --  
21 this is a true and accurate copy of your field notes?

22 A. Yes, sir, it is.

23 Q. We'll get to that, Mr. Lenz.

24 Let me ask you, in Bates page 112,

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1 there are some handwritten notes.

2 Are these your handwritten notes?

3 A. Yes.

4 Q. Mr. Lenz, who accompanied you to the site  
5 on your February 15, 2000 site inspection to the  
6 alleged violation?

7 A. Katherine Kelley of our regulatory staff.

8 Q. And who is Katherine Kelley?

9 A. She's a Project Manager in the regulatory  
10 branch, St. Louis District, works with me.

11 Q. And what was her role in this site  
12 inspection?

13 A. She came along. She was the original  
14 Project Manager and this was her project originally  
15 and I was supervising her.

16 Q. Describe what occurred on your site  
17 inspection on February 15, 2000?

18 A. Okay, we -- Katherine Kelley and I, we met  
19 Hesers out adjacent to the site, on the downstream  
20 end of Martins Branch, down the stream end of the  
21 violation.

22 And from there -- well, we were asking  
23 a few questions, but Hesers were extremely quiet and  
24 basically wouldn't answer any questions.

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1                   And finally, I think they realized  
2                   after many questions, they realized the problem that  
3                   I was having, and they told me, well, our attorney  
4                   told us not to say anything.

5                   So, from then on I just basically went  
6                   out on the site with Katherine and we just tried to  
7                   determine where any of the clearing work took place,  
8                   and did our field investigation.

9                   JUDGE MORAN: Well, I don't want to have these  
10                  rambling answers that bring in all kinds of other  
11                  things. It is all right to do it by question and  
12                  answer. But the extensive narrative with these  
13                  digressions into what was allegedly said and the  
14                  Hesers' attorney said.

15                  I mean, you have to reign in your  
16                  witness in. And I'm going to stop him with these --  
17                  if I don't have an objection.

18                  And you can ask him questions to bring  
19                  out all this information. But you can't let him just  
20                  go on. And when you said amend a minute ago, amend  
21                  his answer, he didn't amend his answer. He just went  
22                  on to another topic about this, as you know.

23                  So, please, make your questions a  
24                  little more pointed. And if he starts to stray, say

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1 thank you, and ask your next question.

2 BY MR. MARTIN:

3 Q. Mr. Lenz, how would you characterize the  
4 behavior of the Hesper brothers at this inspection?

5 A. I would characterize it as quiet,  
6 uncooperative.

7 Q. Did they willing show you the location of  
8 the alleged violation site?

9 A. No, they did not.

10 Q. Now turning your attention to Bates 112,  
11 Bates Number 112, what do these measurements depict?

12 A. These are measurements of the field  
13 channel -- stream channel, excuse me.

14 Q. The stream channel at the site of the  
15 alleged violation?

16 A. Yes, sir.

17 Q. What is the significance of taking stream  
18 channel measurements?

19 A. The significance of the stream channel  
20 measurements are to determine what resource was  
21 impacted, was it jurisdictional or not.

22 Q. And what test is made to determine whether  
23 a stream channel is jurisdictional?

24 A. There has to be an ordinary high water

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1 mark. This would be outlined in our regulations in  
2 33 CFR 328.

3 Q. Describe what an ordinary high water mark  
4 is?

5 A. An ordinary high water mark - and this is  
6 how we determine jurisdiction - it's a line of  
7 demarcation within a stream channel that it's  
8 exhibited because when water flows for a long enough  
9 period of time in a stream channel, it creates a mark  
10 within the channel itself, just because of flow  
11 frequency and duration.

12 So you'll have -- it could be seen  
13 like a vegetation line. It could be a defined line  
14 within the bank, shelving, all these features that  
15 have been determined to be indicators of water flow.

16 Q. How is ordinary high water mark inspected  
17 in the field?

18 A. It's inspected by direct observation. You  
19 have to look within a stream channel, within the bank  
20 itself to observe these features.

21 Q. Mr. Lenz, do these field notes on page 112  
22 reflect your measurements concerning ordinary high  
23 water mark at the violation site?

24 A. Yes, they do.

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1           MR. MARTIN: Your Honor, for demonstrative  
2 purposes, I'm going to ask permission for the witness  
3 to approach the easel and draw out his measurements  
4 as he found in the field notes found on page 112.

5           JUDGE MORAN: In other words, he's going to  
6 recreate what appears on 112?

7           MR. MARTIN: I'm sorry?

8           JUDGE MORAN: In other words, he's going to  
9 recreate what appears on 112?

10          MR. MARTIN: Yes, your Honor.

11          JUDGE MORAN: Okay, sure.

12          MR. MARTIN: I think the easel's is behind --  
13 permission to approach?

14          JUDGE MORAN: Yes.

15 BY MR. MARTIN:

16           Q. Now, on these field notes, what I did --  
17 items Number 1 and 2 are field measurements on the  
18 downstream end of the channel -- excuse me, on the  
19 downstream end of the channel, downstream of the  
20 violation.

21                   Items Number 3 and 4 are upstream of  
22 the violation. And then new channel, I have those  
23 items 1 and 2 go into the channel measurements I took  
24 within the new channel.

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1                   So in item Number 1 which is on the  
2                   upstream end of the violation, 15 feet in -- 15 feet  
3                   outside of the field into the timber with the stream  
4                   channel. So this is an undisturbed section of the  
5                   stream channel.

6                   The top width of the channel is  
7                   13 feet, and there's the channel, the top width,  
8                   13 feet.

9                   The bottom width, 3 feet.

10                  JUDGE MORAN: Let me just help:

11                   Mr. Lenz, you've drawn on this easel,  
12                  I take it what you're drawing is a cross section of  
13                  the channel?

14                  THE WITNESS: Yes, sir

15                  JUDGE MORAN: And how did you make these  
16                  measurements? How did you come up with 13 feet? Did  
17                  you work with Miss Kelley or how did you do it?

18                  THE WITNESS: Yes. We had what's called a  
19                  stadia rod that they use for surveys.

20                  JUDGE MORAN: Stadia rod?

21                  THE WITNESS: Stadia rod. And it's a pole.  
22                  It's telescopic, you can extend it out to 20 feet or  
23                  so. And it has measurements in 10's of a foot on it.

24                   So to get top width, we just laid the

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1       stadia rod sideways across the channel to get to the  
2       top width. That's the easiest way of doing it.

3                       The rest of the measurements were done  
4       with a combination of either a tape measure or just  
5       estimates.

6           JUDGE MORAN: Did you get in the channel?

7           THE WITNESS: Yes, I was in the channel.

8           JUDGE MORAN: With waders on?

9           THE WITNESS: Yes, I have waterproof boots.

10          JUDGE MORAN: Do you just put it under the  
11       water and measure it or was it dry at the time?

12          THE WITNESS: The flow was a few inches deep  
13       and it was really not a concern.

14          JUDGE MORAN: Okay, let me make sure I  
15       understand:

16                       Where you're talking about right now -  
17       tell me if I'm understanding this correctly - the  
18       measurement that you have up there right now, this is  
19       below the activity that the Corps has challenged.

20                       In other words, this is an undisturbed  
21       area; isn't that right?

22          THE WITNESS: It's undisturbed area upstream.

23          JUDGE MORAN: What's this downstream end?

24          THE WITNESS: I'm sorry, you're right. This is

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1 on the downstream end. I'm sorry. This is on the  
2 downstream end 15 feet in from the edge of the  
3 stream.

4 JUDGE MORAN: And so am I correct then that  
5 where you took this measurement, pristine,  
6 undisturbed; is that right?

7 THE WITNESS: Yes, sir.

8 This is for references purposes to see  
9 what channel would have been like in the area where  
10 it was relocated.

11 JUDGE MORAN: Go ahead, Counsel.

12 BY MR. MARTIN:

13 Q. What other measurements did you take?

14 A. Okay, we've got top width, bottom width.  
15 I've got a note in here of water depth. It was  
16 3 inches deep flowing through this section right  
17 here.

18 Q. Does that refer to the previous correction  
19 you made to your testimony, Mr. Lenz?

20 A. Yes, sir.

21 Q. Number one of 112, was the water 3 feet  
22 deep?

23 A. No, the water was 3 inches deep. There was  
24 a shelf, just a natural shelf in the channel 3-foot

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1 out there -- excuse me, 4-foot.

2 So what you have there then, it says  
3 shelf out to 7 feet, and this is a common occurrence  
4 in channels, they're not uniform. A lot of times you  
5 will have shelving.

6 This is where your low flows are here.  
7 And then as you get rain events, water increase and  
8 it's going to spill over into this shelf area, and  
9 then fill up the rest of the channel.

10 Had an ordinary high water mark,  
11 that's the mark that we were talking about awhile  
12 ago, that was 8 to 10 inches.

13 Q. And what was the evidence of that ordinary  
14 high water mark?

15 A. Okay, we have the shelving was a indicator,  
16 plus we had a vegetation line, which on the bank in a  
17 cross section it looked like you have vegetation  
18 growing all the way down into the channel to the  
19 point where there's bare soil and no vegetation. And  
20 that line would be the ordinary high water mark.

21 Q. Did you take measurements in other  
22 locations upstream?

23 A. I took one other measurement on the  
24 downstream end, two measurements on the downstream

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1 end.

2                   This next measurement further west, I  
3 just wanted to get a better idea of what the channel  
4 looked like. So I went west, did the same thing  
5 again, another cross section.

6           JUDGE MORAN: Let me ask you this:

7                   When the second measurements were  
8 made, are you moving further away from what the EPA  
9 alleges to be the disturbed area or are you moving  
10 closer to it?

11           THE WITNESS: I'm moving further away,  
12 downstream.

13           JUDGE MORAN: Okay. Just very quickly, even  
14 though I understand it, just for the record, you've  
15 marked on here TW, does that stand for top width?

16           THE WITNESS: Top width.

17           JUDGE MORAN: And BW?

18           THE WITNESS: Bottom width.

19           JUDGE MORAN: And OHW?

20           THE WITNESS: Ordinary high water mark.

21           JUDGE MORAN: Okay. And when you talked about  
22 8 to 10 inches a moment ago, the 8 to 10 inches I  
23 take it - and you tell me if I'm misunderstanding this  
24 or whether I'm understanding this correctly - 8 to

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1 10 inches is if you're standing in the bottom of this  
2 channel, that from the bottom where you have that  
3 3 foot area mark, that if you were to go 8 to  
4 10 inches from the bottom up, that's where you would  
5 see the high water mark?

6 THE WITNESS: Yes, sir, from the bottom  
7 measure -- from the bottom up, vertical.

8 JUDGE MORAN: I understand, okay.

9 Go ahead, Mr. Martin.

10 BY MR. MARTIN:

11 Q. Could you describe your second measurement  
12 down stream of the first measurement?

13 A. Okay, the second measurement, that's the  
14 cross section. It had a 10 foot top width. The  
15 bottom width was 4.5 feet.

16 I didn't have the shelving that I had  
17 previously because the shelving comes and goes in the  
18 channel.

19 Ordinary high water mark was at  
20 12 inches. It had 5 inches of water flowing in the  
21 channel.

22 And this other measurement that I have  
23 both for 1 and 2, I refer to the channels in terms of  
24 right descending bank and left descending bank.

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1                   So if you're looking downstream,  
2     you've got your right descending bank on your right  
3     of course, and then your left descending bank on your  
4     left.

5                   And then since I was using a stadia  
6     rod for some of my measurements, what I have is the  
7     note at the bottom of the page here that you  
8     referenced earlier 5.7 feet is my eye level.

9                   So if I'm giving you a rod reading  
10    level that's in reference to I'm already looking at  
11    5.7 feet.

12                  So on the right descending bank here,  
13    it's eye level. okay, wait a minute, the right  
14    descending bank eye level 2.4 feet. The left  
15    descending bank eye level 3.1 feet.

16                  So, you have subtract that  
17    measurement -- my field notes here are off a stadia  
18    rod. So when I'm giving that you reading, that 3.7  
19    feet, you have subtract that from 5.7 feet. I hope  
20    that makes sense.

21                  Q. Did you take measurements on the upstream  
22    portion of Martin Branch, upstream of the violation  
23    site?

24                  A. Yes, sir, two readings upstream there.

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1 Item Number 3 on the upstream end and this is in a  
2 natural section of channel again, upstream of the  
3 violation.

4 This is 37 feet upstream of the  
5 violation. Again, here I have depth, I've got right  
6 descending bank, 2.2 feet.

7 Here, right descending bank got 2.2  
8 feet, so it's actually 3 foot 5 feet high because I'm  
9 looking at eye level on the stadia rod which is  
10 5.7 feet.

11 Top width, okay, this is the same as  
12 on the downstream. The top width here again is  
13 15 feet. The bottom width is 6 and a half feet. And  
14 the ordinary high water mark here was at 18 inches.

15 And there were seven -- on the  
16 upstream end there were 7 inches of water flowing in  
17 the channel.

18 I have a note of shelving and sands  
19 deposition, debris lines -- trash and debris lines.

20 And when I say trash and debris lines  
21 what I'm referring to is leaf litter, sticks and  
22 twigs and things, that was just referred to as trash  
23 lines or debris lines, that terminology.

24 Q. Did that material indicate to you the

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1 ordinary high water mark in the sample?

2 A. That the trash and debris lines can be  
3 used -- trash and debris lines are evidence of flow.

4 If you've got leaf litter, twigs and  
5 debris flow with the channel, and then they'll come  
6 to a turn in the channel or the roots or obstruction  
7 or something and they'll start piling up.

8 So it's all evidence of flow.

9 JUDGE MORAN: Let me interrupt again, okay.

10 I'm letting you know my thoughts. It  
11 seems to me that what's important here is - and  
12 that's to be determined - there's water in here.

13 How often the water is there and what  
14 that means I'm not getting to. But he takes some  
15 measurements and he finds some water. What I want to  
16 understand -- well, what does that mean to me?

17 But I still want to understand about  
18 the stadia rod. Make this a little bit clearer for  
19 me:

20 Are you standing in the channel  
21 holding the stadia rod up because when you tell me  
22 that eye level -- make that a little bit clearer.

23 THE WITNESS: Let me draw it.

24 JUDGE MORAN: Sure. Are you in the channel

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1 using it?

2 THE WITNESS: Yes.

3 JUDGE MORAN: Okay. You're down in the  
4 channel, wherever that is, and when you talk about --  
5 why do we care about what your eye level is?

6 Why do I care about what your eye  
7 level is?

8 Oh, you're not holding the stadia rod,  
9 someone else is holding it?

10 THE WITNESS: Yes.

11 JUDGE MORAN: You didn't tell us that until  
12 now. Let me see if I can -- Counsel should be  
13 bringing this out, but you're standing in the  
14 channel, right, Mr. Lenz?

15 THE WITNESS: Yes.

16 JUDGE MORAN: Okay. And your assistant,  
17 Miss Kelley, she's holding the stadia rod?

18 THE WITNESS: She's holding the stadia rod.

19 JUDGE MORAN: And she's not in the channel,  
20 she's on the bank.

21 THE WITNESS: That's correct.

22 JUDGE MORAN: Okay. So when you talk about eye  
23 level, she's up above you to whatever degree and if  
24 you look at eye level at the rod, your eyes hit at

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1 the 5.7 foot level in that rod, right?

2 THE WITNESS: My eye level is 5.7 feet, so --

3 JUDGE MORAN: And how did you know it was 5.7  
4 feet? I mean, did you guesstimate that that's what  
5 it was?

6 THE WITNESS: No. What I -- before we did any  
7 measurements, I would stand right next to the rod and  
8 say, okay, my eye level is 5.7 feet.

9 JUDGE MORAN: But now, you're in the channel?

10 THE WITNESS: Yes, that's correct.

11 So when I read the rod, I get a  
12 reading of 2 feet.

13 JUDGE MORAN: Okay.

14 THE WITNESS: So that means I have to add in --  
15 or subtract that 2 feet from my 5.7 feet.

16 JUDGE MORAN: Why didn't you just bring the rod  
17 to the bottom of the crossing there --

18 THE WITNESS: The other way of doing it --

19 JUDGE MORAN: -- (continuing) of the channel?

20 THE WITNESS: -- and you would have to,  
21 depending on the depth of the channel, you would  
22 to -- I would stand on top, somebody else would be in  
23 here with the stadia rod, and then the readings would  
24 be like 8 or 9 feet.

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1                   So, you can do it either way, but you  
2                   have to have something level.

3                   You can bring the rod and the channel  
4                   in and then I would have to estimate where the level  
5                   was.

6                   JUDGE MORAN: But isn't your main focus what  
7                   the high water mark is and measuring that, and also  
8                   how much water happened to be in the channel at the  
9                   time?

10                  THE WITNESS: That's correct.

11                  JUDGE MORAN: And when you were there, were the  
12                  Hesers with you or is it just the two of you?

13                  THE WITNESS: The Hesers were there. Some of  
14                  them left.

15                  JUDGE MORAN: Some of them; there's only two?

16                  THE WITNESS: There were -- no, I believe there  
17                  were three or --

18                  JUDGE MORAN: Were there other people connected  
19                  with the Hesers who were there?

20                  THE WITNESS: Yes.

21                  JUDGE MORAN: Did anybody object to the  
22                  measurements?

23                  THE WITNESS: No, nobody objected.

24                  JUDGE MORAN: Were you calling them out and

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1 somebody was writing them down at the time?

2 THE WITNESS: Katherine was there. Katherine  
3 was writing -- Katherine Kelley was writing them down

4 JUDGE MORAN: And you were calling out what the  
5 measurements were?

6 THE WITNESS: Yes, sir.

7 JUDGE MORAN: Okay.

8 Go ahead.

9 BY MR. MARTIN:

10 Q. Can you describe the next measurement which  
11 would be upstream of the measurement you just  
12 described?

13 A. Item Number 4?

14 Q. Yes.

15 A. Okay, up -- I went further upstream an  
16 additional 35 feet. I wanted just another  
17 measurement just like I did on the downstream end of  
18 the channel, where the second measurement -- just to  
19 validate the first one.

20 Got 16-foot top width. These are the  
21 same measurements, you know, top width, bottom width,  
22 same kind of thing.

23 So I got 16-foot top width, three and  
24 a half foot bottom width. The ordinary high water

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1 mark at 8 to 12 inches. And I had shelving and  
2 vegetation lines as indicators of the ordinary high  
3 water mark.

4 Q. What -- did you find any water in this  
5 measurement?

6 A. I didn't have a note here on the water in  
7 here. There was water in the channel everywhere I  
8 went that day. I just didn't put it in my notes.

9 Q. What do these measurements tell you about  
10 the stream channel in between the measurements?

11 A. Okay. The purpose of all these  
12 measurements and to get the ordinary high water mark  
13 measurement, both upstream and downstream of the  
14 project area, was basically to extrapolate that the  
15 area in between where the channel was jurisdictional.

16 I started -- through these procedures,  
17 I established jurisdiction on the upstream and the  
18 downstream end; therefore I extrapolated that is our  
19 jurisdictional channel.

20 Q. Do the measurements tell you anything about  
21 the shape and configuration of the stream in between  
22 the measurements?

23 A. Yes, it does. The measurements were fairly  
24 consistent top width, bottom width, those kinds of

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1 things. But the importance of the measurements  
2 themselves -- well, for one thing I got jurisdiction  
3 determined, could extrapolate that.

4 But the other part of this - and this  
5 is the importance for some of the other measurements  
6 - was if we're going to do a restoration project,  
7 then this tells us what we had there in between.

8 What kind of channel did we need to  
9 recreate? What was lost? What was impacted? If we  
10 need to restore it and put it back, here's how you  
11 can do it, is the measurements.

12 So it makes it easier to review our  
13 restoration plan and look at what we need to do out  
14 there.

15 Q. Did you take measurements of the new  
16 channel during your inspection?

17 A. Yes, I did.

18 Q. Are those reflected on these field notes on  
19 page 112?

20 A. Yes, sir, on the -- a new heading, new  
21 channel, I took two measurements.

22 Q. Could you give us the results of those  
23 measurements?

24 A. Sure. The first measurement, this

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1 measurement was taken 50 feet downstream of the  
2 beginning of the new channel. The upstream end of  
3 the channel about 50 feet from where the new channel  
4 started, had a top width of 28 feet.

5 So a substantial increase in channel  
6 design. Bottom width of 4 feet. And then my depth  
7 readings -- again, these are off a stadia rod, so  
8 you've got to do a conversion on those.

9 Then on the -- okay, this reading,  
10 this first, reading Number 1 here, as I said this is  
11 50 feet downstream from the beginning of the project.  
12 Upstream is 50 feet downstream of the upstream end of  
13 the project.

14 You go to item Number 2, now I've  
15 walked all the way to the downstream of the project  
16 and I'm 75 feet.

17 Q. First of all, Mr. Lenz, did you take an  
18 ordinary high water mark reading at the first  
19 location?

20 A. No, I did not.

21 Q. And why not?

22 A. Because the channel was new enough where an  
23 ordinary high water mark reading -- it takes time to  
24 establish an ordinary high water mark. The channel

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1 had been especially created.

2 So there hadn't been enough time to  
3 develop an ordinary high water mark. An ordinary  
4 high water mark is evidence of flow over a period of  
5 time. It just shows a history of flow.

6 The new channel hadn't been there long  
7 enough to exhibit those characteristics.

8 Q. So what did this finding reveal about the  
9 part of the channel you were measuring -- under  
10 Number 1 of your new channel note?

11 A. The fact that it didn't have an ordinary  
12 high water mark?

13 Q. Yes.

14 A. That's an indicator of a freshly  
15 constructed channel.

16 Q. Okay, please proceed to your second  
17 measurement of the channel.

18 A. Okay. With the second measurement -- and  
19 this is at the downstream end of the project, 75 feet  
20 upstream of the end of the project.

21 And on this end, it's a very uniform  
22 channel, again, 28-foot top width and a 4-foot bottom  
23 width. And then my stadia rod readings or depth.  
24 And again, no ordinary high water mark.

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1           Q.    Could you please compare your measurements  
2           that were taken in the natural part of the channel  
3           with the two last measurements you described in the  
4           new channel?

5           A.    Okay, the newly constructed channel was a  
6           much larger design than the natural channel.  We're  
7           going from a -- from 12 to 15-foot top width, 3  
8           bottom width to a 28-foot top width, 4-foot bottom  
9           width.

10                                So it was a larger channel overall.

11           MR. MARTIN:  Okay, thank you, Mr. Lenz.

12           JUDGE MORAN:  Okay, I'm going to ask a few  
13           questions before -- and, of course, you can go over  
14           these things in cross-examination.

15                                But, Mr. Lenz, just assuming -- let me  
16           understand some basics here.  I don't see it in notes  
17           here but you can tell me:

18                                Did you ever measure in total length  
19           in terms of feet or yards of this new channel?

20           THE WITNESS:  No, I did not.

21           JUDGE MORAN:  As you stand here today, since  
22           you never measured it at the Corps, did anybody else  
23           ever measure the total length of the new channel?

24           THE WITNESS:  I measured it basically off of

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1 maps. I did not in the field.

2 JUDGE MORAN: Well, do you have any idea of the  
3 total length of the new channel?

4 THE WITNESS: No.

5 JUDGE MORAN: You talk about 50 feet downstream  
6 and 75 feet upstream, so I assume it had to be at  
7 least 75 feet.

8 THE WITNESS: I have the measurements off of  
9 photographs.

10 JUDGE MORAN: Didn't you consider it important  
11 to know the entire length of the new channel? It's  
12 not important?

13 THE WITNESS: It wasn't important to me at the  
14 time because it's easily gotten off of an aerial  
15 photograph, because it's a corner. It's a corner of  
16 the field so it would be easy to find that corner on  
17 a map.

18 JUDGE MORAN: Let me ask you this:

19 The new channel, was it an S-type  
20 thing or was it a straight line?

21 THE WITNESS: It was an L-shape.

22 JUDGE MORAN: The new channel was an L-shape?

23 THE WITNESS: Yes, starting at a field corner.

24 So my 50 feet downstream of the

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1 upstream end was basically 50 feet from that top of  
2 the L. And then I went to the other end of the L,  
3 and came back 75 feet.

4 JUDGE MORAN: And let me see if -- again, I'm  
5 not sure what the significance of these questions are  
6 at this time, but I still want to ask them so that I  
7 don't say gee, I wish I would have asked that.

8 Is this a fair characterization of  
9 your testimony that you just gave? That we have this  
10 stream, this channel, you take measurements above  
11 where the area is disturbed, then you take  
12 measurements in the disturbed area along this L,  
13 correct?

14 THE WITNESS: That's correct.

15 JUDGE MORAN: And then you took measurements at  
16 the end of the disturbed area where you're back to  
17 the natural channel?

18 THE WITNESS: Yes, sir.

19 JUDGE MORAN: Okay. And it's my understanding  
20 and tell me yes, you've got it right or no, Judge,  
21 you don't understand.

22 my understanding is that excepting  
23 your measurements in the disturbed area that  
24 essentially once that disturbed area is past, the

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1 channel below is much like -- it's not almost  
2 identical to what it was above.

3                   You've got the channel in its natural  
4 condition above. Then you have the disturbed area.  
5 Then the channel is back to its natural condition.  
6 And if you look at the area above and the area below,  
7 they're the same?

8           THE WITNESS: Yes, sir. The measurements were  
9 real close.

10           JUDGE MORAN: So it would be fair to  
11 conclude that -- what I'm asking you as an expert in  
12 this area is:

13                   The area that was disturbed had no  
14 real impact on the area below the area of the stream  
15 that's been disturbed because it's in the same  
16 condition as above?

17           THE WITNESS: I wasn't looking at impact. My  
18 measurements --

19           JUDGE MORAN: But isn't that true that the size  
20 of the crossing or -- it isn't like oh, well, below  
21 the crossing is much different than above. No, it's  
22 about the same.

23                   The only area where it's markedly  
24 different is where the activity occurred?

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1           THE WITNESS: That's correct. The channel  
2 dimensions where the activity occurred were  
3 remarkably different.

4           JUDGE MORAN: But once you get past the area of  
5 the stream disturbance, it's back to it's normal  
6 condition?

7           THE WITNESS: That's correct.

8                         My reasoning for taking the  
9 measurements was strictly to determine jurisdiction.  
10 Because oftentimes when I go out in the field to make  
11 a call like that on jurisdiction, this is the case  
12 probably commonly on ponds and lakes where they're  
13 constructed in the upper reaches of water sheds.

14                        If you build below a pond or a lake  
15 and you have a natural channel and it's 5-foot  
16 wide or 6-foot wide, you got the lake, and then you  
17 go on the upstream end of the lake and you have no  
18 channel.

19                        Then you have to decide okay, was this  
20 lake constructed in a jurisdictional channel or not.

21                        That call becomes much easier if I'm  
22 below a lake with a 5 foot wide channel and I go  
23 above the lake and there's a 5 foot wide channel, I  
24 could say this lake was constructed in a

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1 jurisdictional channel.

2                   It's just to help me make that  
3 jurisdictional call.

4           JUDGE MORAN: And the reason I bring this up is  
5 that maybe Counsel for EPA will educate me about  
6 this.

7                   But one of the remarks made in the  
8 opening statement was that - and I'm not suggesting  
9 that I'll find one way or the other on it - but it  
10 was alleged in the opening that well, this did great  
11 harm to whatever named lake that was.

12                   And I'm wondering, gee, I hope you  
13 have an expert who can tell me how this disruption  
14 for some area of length that we don't know what that  
15 is because it was never measured. And the channel is  
16 in this pristine condition above it and then it's  
17 back with pristine conditions below it, so I'm  
18 thinking to myself well, how is it that -- since  
19 below it was not impacted apparently, you know, how  
20 did this cause this great havoc in the lake or stream  
21 or whatever body of water the People --

22           MR. MARTIN: Well --

23           JUDGE MORAN: I'm just saying something that I  
24 think needs to be addressed if I ever get to that

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1 point of understanding.

2 MR. MARTIN: Thank you. We'll keep that in  
3 mind. We've got other witnesses that will testify on  
4 impact.

5 JUDGE MORAN: I'm not a scientist. I'm not  
6 pretending to be. But it seems to me that I would  
7 have been more impressed for example without the  
8 benefit of some scientist or some expert would  
9 explain to me how if the conditions of the channel is  
10 just about the same above the channel before, I don't  
11 see how that's -- how one can then conclude that  
12 there's this horrendous impact of the body of water  
13 that is -- I think you described it as navigable.

14 Okay, go ahead.

15 BY MR. MARTIN:

16 Q. Mr. Lenz, were you checking for evidence of  
17 sedimentation in the downstream portion of the  
18 natural channel on the downstream portion of the  
19 alleged violation site?

20 A. At the time of the measurements, I was  
21 looking in terms of jurisdiction.

22 Q. So you were looking at the physical  
23 dimensions?

24 A. That's correct.

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1 Q. How long were you at the site after the  
2 alleged drilling activities took place?

3 A. Approximately five months I was in there.  
4 In February, and I think the violation was in  
5 September. So approximately five months.

6 Q. What effect do you believe would  
7 channelization of Martin Branch have on the  
8 hydraulics of the site?

9 MR. NORTHRUP: I'm going to object. He hasn't  
10 been shown to be an expert in hydrology.

11 JUDGE MORAN: And you're asking him to  
12 speculate anyway, what effect it might have. We  
13 don't know.

14 MR. MARTIN: We have other witnesses.

15 I think we're finished with page 112,  
16 Mr. Lenz. So, you can take your seat again.

17 BY MR. MARTIN:

18 Q. Moving to Bates page 113, do you recognize  
19 this document?

20 A. Yes, sir. This is the vegetation or plant  
21 species list that I developed the day that we were in  
22 the field in February, the same day I did the stream  
23 channel measurements.

24 Did kind of a walk through of the

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1 vegetation on the adjacent site. This would be on  
2 the -- that riparian, that wooded area on the left  
3 descending bank of the channel.

4 Q. Are these observations at the alleged  
5 violation site?

6 A. Yes, sir.

7 Q. And what location were these observations  
8 taken?

9 A. These are starting from the upstream end of  
10 the violation, starting at where the work started on  
11 that upstream end at the top of the L.

12 Q. Mr. Lenz, you call the channelization an L.  
13 When you're discussing the upstream portion of the L,  
14 what direction is that channel facing?

15 Which way is that channel oriented?

16 A. The L has a north-south leg to it, and an  
17 east-west leg do it. So I'm standing on the upstream  
18 end of the project which would be the upstream end of  
19 the north-south lake.

20 Q. Okay, from there, can you describe your  
21 findings on plants?

22 A. Okay. What I found was to -- and these are  
23 tree species predominately.

24 The dominant tree species were Pin Oak

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1 and American Elm. Other trees, black cherry, white  
2 ash.

3 And then I had a note that there was a  
4 lot of poison ivy in there as well. And I had put  
5 the wetland indicator status on the species on the  
6 list as well.

7 In the 1987 Corps of Engineers Wetland  
8 Delineation Manual, it outlines the hydrophytic  
9 vegetation indicator status. All vascular plant  
10 species have a wetland indicator status, and this is  
11 published by the Fish and Wildlife Service Department  
12 of the Department of the Interior.

13 These codes, like this top one, F --  
14 capitol F-A-C-W and then it has a minus behind it and  
15 sometimes it has a plus. That's a wetland indicator  
16 status. In this case it means facultative wet,  
17 meaning this American Elm is found predominately on  
18 wet sites.

19 The indicator status goes UPL meaning  
20 upland to facultative which has a designated F-A-C to  
21 facultative wet, FACW, and then wet. And then  
22 they'll put minuses or pluses on them. Pluses would  
23 indicate it's in the category on the wetter side. A  
24 minus in that same category would mean on the drier

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1 side.

2 But from this point, I started walking  
3 down the channel and I made a list of the species  
4 just walking from that upstream then top of the L  
5 down to the bottom of the L.

6 Q. And does this list of plants reflect what  
7 you observed outside?

8 A. Yes, sir.

9 Q. A been again these plants were not located  
10 in the impacted area, correct?

11 A. No, sir.

12 Q. Did you mean to conduct a formal dominance  
13 analysis with this listing of plants under the 1987  
14 manual?

15 A. No, I did not.

16 Q. And what was the purpose of your  
17 observations of plants outside?

18 A. The purpose was two-fold. First of all, I  
19 wanted to be able to support my sampling to make a  
20 wetland determination to see what kind of vegetation  
21 was on the adjacent site.

22 Secondly, we had stream and riparian  
23 community as well as the wetland appeared. So I had  
24 in mind, okay, we have a site restoration out here.

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1       What are we going to plant?

2                       Because that question comes up a lot.  
3       When somebody restores a site they want to know what  
4       the plan is.

5                       So the best thing to do is well, what  
6       kind of species did we have out there on the adjacent  
7       site because that's the best indicator of what's  
8       going to perform well and grow in the restoration  
9       site in the same area.

10       Q.    When you say adjacent site, are you aware  
11       of owns the adjacent site?

12       A.    My understanding is that Bill Hesper owns  
13       it.

14       Q.    Mr. Lenz, let's move to Bates page 146.

15       JUDGE MORAN:  Yes, but before he does that, I  
16       have to ask a question:

17                       Mr. Lenz, looking still at 113, you  
18       didn't explain what FACU stands for.  You've  
19       described FAC for us but what does FACU mean?

20       THE WITNESS:  FACU means facultative upland.

21       JUDGE MORAN:  Okay.  Let me ask you a different  
22       question because that doesn't mean a whole lot to me,  
23       other than it's upland.

24                       But are all of these plants that you

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1 have listed here: American Elm, Pin Oak, White Ash,  
2 Black Cherry, Shellbark, Persimmon, Box-Elder,  
3 Sugar-Berry/Hackberry, Slippery Elm, are all of those  
4 plants which are found in wetlands, predominately in  
5 wetlands or are they not exclusively wetland plants?

6 THE WITNESS: All of the plants here are  
7 wetland plants except the ones that have the FACU on  
8 them.

9 JUDGE MORAN: Those are not wetland plants?

10 THE WITNESS: That's correct. If they have  
11 FACU, they would not be.

12 JUDGE MORAN: They're not wetlands?

13 THE WITNESS: That's correct.

14 JUDGE MORAN: Okay. And by the way, before you  
15 move on to other questions from Counsel from the EPA,  
16 you did talk about -- I'm looking at the previous  
17 page, page 112 when you talked about on the right  
18 side and the left side, you have the symbol Rdb and  
19 Ldb and that stands for -- like Ldb stands for what?  
20 Left?

21 Do you see on page 112, I know you  
22 were talking about this. Ldb, if you look at  
23 Number 1 downstream end channel, this is page 112.

24 Are you on page 112?

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1 THE WITNESS: Yes.

2 JUDGE MORAN: See where it says 1 downstream  
3 end channel under 1?

4 Do you see where it says 1 downstream  
5 end channel?

6 THE WITNESS: Yes, sir.

7 JUDGE MORAN: Okay. And then at the end of the  
8 -- the fourth line under 1, it says Rdb equals 2.9  
9 feet, Ldb equals 2.9 feet. The R in Rdb stands for?

10 THE WITNESS: Right descending bank and left  
11 descending bank.

12 JUDGE MORAN: That's what I wanted to have on  
13 the record. Thank you.

14 MR. MARTIN: Your Honor, the EPA that witness  
15 that subsequently inspected the site did the formal  
16 review of what hydrophytic vegetation was on the  
17 site. That's why I didn't follow through.

18 JUDGE MORAN: That's fine. You don't have to  
19 offer an explanation. I just asked this witness some  
20 questions about that. I'll be doing that later with  
21 other witnesses.

22 BY MR. MARTIN:

23 Q. Turning to Bates page 146 through 151, do  
24 you recognize these photographs?

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1 A. Yes, sir. This is the upstream.

2 Q. Can you describe what the subject matter of  
3 these photographs is?

4 A. This is the upstream end of the project  
5 area. This is the --

6 Q. Mr. Lens, did you take these photographs?

7 A. No, I did not. Katherine Kelley took these  
8 pictures.

9 Q. Were you with Katherine Kelley at the time?

10 A. Yes, I was.

11 Q. Do they accurately depict your observations  
12 on-site during your February 2000 inspection?

13 A. Yes, sir, they do.

14 Q. Going one by one, could you describe what  
15 you see in the photographs, starting with Bates page  
16 146?

17 A. Okay. One thing I should I mention is mine  
18 don't have the numbers on them.

19 Q. Actually, that's correct.

20 MR. MARTIN: We have provided better copies  
21 than the copies that were provided in the Prehearing  
22 exchange to Mr. Lenz and apparently they're not Bates  
23 stamped.

24 JUDGE MORAN: So why don't you give him a set

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1 so he can talk about them intelligently and we'll all  
2 be on the same page. Can you do that? Is that  
3 doable?

4 (WHEREUPON documents were  
5 tendered to the witness.)

6 JUDGE MORAN: Okay, Miss Pellegrin brought up  
7 copies that have these Bates stamped numbers on them.

8 Do you have that now in front of you?

9 THE WITNESS: Yes, sir.

10 JUDGE MORAN: Okay, now EPA continue.

11 BY MR. MARTIN:

12 Q. Could you describe what is portrayed in the  
13 picture at 146?

14 A. This picture portrays the stream channel in  
15 question, immediately upstream of the project. So  
16 this is prior to any disturbances.

17 So what you see in the picture here,  
18 you can see vegetation on the sides of the channel.  
19 You can see actually some tree roots coming down into  
20 the channel.

21 You can see debris in there, you know,  
22 we were talking about trash and debris earlier. You  
23 can see a lot of end stream wildlife habitat here.

24 You see a lot of organic matter in

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1 there. Again, this is upstream of the project.

2 Q. What is the significance of observing tree  
3 roots in the channel?

4 A. Well, the tree roots in the channel, you  
5 have for one thing, they provide habitat. And  
6 another thing, they are taking up nutrients in the  
7 filtering of the channel. They are affecting flow in  
8 the channel, they're moderating flow in the channel.

9 They're collecting organic matter. As  
10 water flows down the channel collecting organic  
11 matter. So it really all plays in the nutrient  
12 cycling. As soon as you get debris piled up and  
13 habitat and then it will grow micro habitat here.

14 Q. Just as a general matter, is this  
15 photograph in the area of where you took your  
16 upstream measurements as reflected on page 112?

17 A. Yes. It would be very close if not the  
18 exact same point.

19 Q. And those measurements are reflected in  
20 numbers three and four?

21 A. Yes.

22 Q. Moving on to page 147.

23 MR. NORTHRUP: Your Honor, can I interrupt for  
24 just a second?

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1 JUDGE MORAN: Sure.

2 MR. NORTHRUP: Do you have another set a  
3 cleaner copies?

4 JUDGE MORAN: Let's go off the record for a  
5 second.

6 (WHEREUPON, there was then had  
7 an off-the-record discussion.)

8 JUDGE MORAN: Are you ready to go back on the  
9 record?

10 MR. MARTIN: Yes, your Honor.

11 BY MR. MARTIN:

12 Q. I believe we were moving on to the picture  
13 found at Bates 147. What did you observe when this  
14 picture was taken?

15 A. Okay, this -- 147 is the top of the L.  
16 This is that north end of the north-south leg of the  
17 L. This is the upstream end of the project where  
18 it's coming out of the timber entering the cleared  
19 area, and immediately the channel takes a hard turn  
20 south.

21 And what you're looking at is where  
22 the L begins and the channel basically looking at it  
23 in the picture, it takes a hard left.

24 So you're looking at an area, kind of

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1 a pooled area. You've got a lot of scour, a lot of  
2 energy in this area. So they've got concrete slabs  
3 here. You can see a bunch of erosion here.

4 I think this is just a heavy scour and  
5 erosion area, because water is just coming out and  
6 hitting the site and immediately it has to take a  
7 hard turn, so this is just a typical spot for scour  
8 erosion and that's why you see bare soil there along  
9 with the concrete.

10 Q. And what did you observe about the flow of  
11 the stream?

12 A. Well, as I said earlier, it was flowing at  
13 the time of the site visit. Here it's flowing and  
14 you have actually have kind of a pool right here  
15 where the scour is.

16 Q. Moving back to Bates 146 for a moment, did  
17 you observe flow in this stretch?

18 A. Yes, sir, it is flowing.

19 Q. Moving to Bates page 148. Describe what  
20 you find is significant about this picture?

21 A. Okay, on page 148, I'm standing at the top  
22 of the L on this north-south leg of the L.

23 I'm probably 15 - 20 feet away from --  
24 west of where I was standing previously looking

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1 downstream.

2                   And you can see the water flowing away  
3 from me down to the next part of the L.

4                   What you see at the far end is the  
5 start of the east-west shape of that L-shaped  
6 channel. So you've got the water flowing  
7 continuously through the channel there.

8                   And you can kind of see it's kind of a  
9 bermed levee area there off to the right. You can  
10 see all the riparian has been cleared on the right  
11 descending bank.

12                   You can see on the left descending  
13 bank on the neighborhood's property there you can see  
14 the riparian area or what have been on the right  
15 descending bank. And you can see some shelving there  
16 on the left-hand side right there at the top.

17           Q. Can you confirm for us that the property on  
18 the right side of the photograph is the property of  
19 Robert and Andrew Hesel?

20           A. It is. That's the area that was cleared.

21           Q. And is this the violation site?

22           A. Yes, sir, it is.

23           Q. And on the left side of the photograph, is  
24 this the property that you took your vegetation

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1 readings that we just discussed?

2 A. Yes, sir.

3 Q. And this is the property owned by Mr. Bill  
4 Heser?

5 A. Yes, sir.

6 Q. And what would you say about the flow, the  
7 flow of the Martin Branch channel at this location?

8 A. You can see the flow continuously as far as  
9 you can see the channel in this picture.

10 Q. Just perhaps to explain a little bit  
11 better, can you point out what you call the right  
12 descending bank on this photograph?

13 A. Okay. The right descending bank is in the  
14 crop field on the right-hand side. That would be the  
15 right descending bank. It's your right-hand side  
16 looking downstream. The channel is descending. So  
17 on your right is the right descending bank. And on  
18 your left is --

19 Q. And then the left I take it is on the other  
20 side of the channel?

21 A. Yes, sir.

22 JUDGE MORAN: Where there are trees?

23 THE WITNESS: Yes, sir, where there are trees.

24 BY MR. MARTIN:

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1           Q.    Is there anything else significant about  
2 this photo that you can see?

3           A.    The significant thing about this photo here  
4 is the difference between this and the natural  
5 channel. Here, you have a channel that is  
6 functioning basically as a drainage ditch from this  
7 point through the project area.

8                         The channel is a straight line. It's  
9 a straight line to the other end, to the bottom of  
10 the L here. And then it heads west in a straight  
11 line as well.

12                        Whereas a natural channel flowing  
13 through the woods would meander and have tenuosity  
14 to it. Here, it's just basically performing as a  
15 ditch. Whereas before you had canopy cover, tree  
16 cover over the channel providing shade in this  
17 habitat, here, you have some.

18                        And once you get past top of bank on  
19 the left descending bank side on the neighborhood's  
20 property, you've got the trees growing up. But  
21 because these trees have been cut right up, there's  
22 no overhanging limbs of timber.

23                        So you've got -- in the summer, you're  
24 going to have a channel that's subjected to

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1 temperature extremes in the summer and temperature  
2 extremes in the winter, basically.

3 Q. Thank you. Moving to Bates 149.

4 JUDGE MORAN: But not quite yet. I want to ask  
5 a couple of questions to make sure I understand it.

6 Mr. Lenz, when I look at 147 and then  
7 148, the two you just talked about -- all right, do  
8 you have those in front of you, 147 and 148?

9 THE WITNESS: Yes, sir.

10 JUDGE MORAN: Okay. My understanding is that  
11 147 from your testimony is 15 or 20 feet further  
12 upstream from where 148's picture was taken? Is that  
13 what you told me?

14 THE WITNESS: Yes, sir.

15 JUDGE MORAN: I'm trying to get the whole scene  
16 of this.

17 THE WITNESS: Yes, in 147 I'm standing  
18 basically in the timber looking at the project.

19 And in 148, I've stepped out into the  
20 field and I'm on the top of that L. You can see  
21 the -- well, you can see the concrete slabs. These  
22 are the same concrete slabs in 147 as you see in 148.

23 JUDGE MORAN: Right. But I'm just trying to  
24 get a relational --

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1 THE WITNESS: Okay.

2 JUDGE MORAN: -- (continuing) understanding.

3 147, if I'm looking at this disturbed  
4 area at 147, how many feet is 147 upstream from 148?  
5 Are they contiguous in other words?

6 THE WITNESS: Yes. You're taking a matter of  
7 maybe 20 feet from 147, if you look right on the  
8 right-hand edge of the photo on page 147, that  
9 picture?

10 JUDGE MORAN: Yes.

11 THE WITNESS: You can see right where I'm  
12 standing. I'm standing right at the edge of the  
13 photo when I'm taking 148.

14 JUDGE MORAN: Okay. These concrete slabs, did  
15 you ask the Respondents about where these came from?

16 I assume they weren't natural.

17 Did you ask anyone where these  
18 concrete slabs came from?

19 THE WITNESS: No, I did not. They were  
20 instructed not to.

21 JUDGE MORAN: They were instructed not to?  
22 Hold it, did you ask?

23 THE WITNESS: No, I did not.

24 JUDGE MORAN: Now when you talked about how

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1 looking at photograph 148, in the foreground we see a  
2 pool of water; is that right?

3 THE WITNESS: Yes, sir.

4 JUDGE MORAN: And then following that water  
5 down, you indicated that where you reach the  
6 vanishing point of that water from a project  
7 standpoint -- or you described that as a vanishing  
8 point, you said then it makes a right turn; is that  
9 true? But you said -- as I'm looking at photograph  
10 148, does the channel make a right turn or a left  
11 turn?

12 THE WITNESS: It makes hard right turn.

13 JUDGE MORAN: A hard right turn, okay.

14 And these concrete slabs, were they  
15 only on one side of the channel or both?

16 THE WITNESS: They were just on the one side.

17 JUDGE MORAN: And will you define riparian,  
18 please. What's your understanding of the term?

19 THE WITNESS: Riparian would be a vegetative  
20 zone immediately adjacent to a channel.

21 And it's called riparian because that  
22 vegetation has an influence on the channel. It  
23 provides habitat benefits. It provides organic  
24 matter for the channel itself. Vegetation is close

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1 enough to the channel to impact the channel.

2 JUDGE MORAN: Okay.

3 Go ahead now.

4 BY MR. MARTIN:

5 Q. Mr. Lenz, on page 148, what direction are  
6 you looking at in this photograph?

7 A. In 148, I'm looking south. I'm on the  
8 north end of the L looking south.

9 Q. And I believe you testified that the  
10 channel makes a hard right at the end of the flow,  
11 and what direction would that be?

12 A. As you're looking in this picture, the  
13 channel and the flow takes a hard right turn. The  
14 flow then is heading west. So it's heading south in  
15 this picture and it's going to head west.

16 Q. Mr. Lenz, what is your understanding and  
17 purpose of the boulders placed on the site?

18 JUDGE MORAN: Of course -- first, do you have  
19 an understanding?

20 THE WITNESS: Yes. They were placed there for  
21 erosion protection. That would be my understanding.  
22 It's a common practice for bank stabilization.  
23 Material such as that is commonly used and we issue  
24 permits for that type of activity often.

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1 BY MR. MARTIN:

2 Q. Would rocks such as these be considered  
3 fill material under Section 404?

4 A. Yes, they would.

5 Q. Moving to page 149. From where is this  
6 photo taken?

7 A. 149 is basically from the previous picture,  
8 you're backing up, walking, backing up straight  
9 backwards probably 15 feet - 20 feet.

10 In essence, you're looking at the same  
11 picture just a little bit further back. But what you  
12 can see in this picture that stands out a little bit  
13 better would be this berm on the right-hand side.

14 It's just like a, kind of like a levee  
15 adjacent to the channel here at the beginning of the  
16 construction project. And the interesting thing  
17 about the site is the channel because of the way it  
18 was constructed, it was moved in such a manner that  
19 it was moved into an upland location.

20 So the channel basically dies in  
21 elevation. So the berm disappears about halfway  
22 through this north-south leg because it eventually  
23 runs into ground level.

24 Q. Who are the people in this photograph?

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1           A.    That's myself in the red coat.  And then  
2           the others are Hesers.  And then I don't remember who  
3           all was present.  There was one of the Hesper brothers  
4           at least, and I'm thinking it was maybe the mother  
5           and father.

6           Q.    And you testified as to the existence of a  
7           berm in this photograph.  Would the people in this  
8           photograph be standing on that berm?

9           A.    Yes, everybody is standing on that berm in  
10          the picture.

11          Q.    What effect would that berm have on run-off  
12          from the impacted area?

13          A.    Well, run-off from the impacted area could  
14          not enter the channel.  That berm is going to serve  
15          as a barrier both to water coming out of the channel  
16          in the field and it's going to serve as a barrier for  
17          water coming into the channel.

18                         But the water in the field is going to  
19          have to find another route to get back into the  
20          Martin Branch.  It's going to have to go a different  
21          direction.  It would have to go uphill to do it.

22          Q.    Mr. Lenz, when was the last time you  
23          visited the site of the alleged violation?

24          A.    I believe it was approximately a month and

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1 a half ago.

2 Q. Did you observe whether this berm is still  
3 on-site?

4 A. Yes, it's still present.

5 Q. Thank you. Moving to 150. Now from where  
6 was this photo taken?

7 A. Okay, this photo here, in relation to the  
8 last photo, 149, have moved around the channel to the  
9 right closer to where the people are standing but  
10 looking straight back into the natural channel.

11 So it's still at the top of the L,  
12 still at the top of the project area, and you're  
13 looking right in here at the channel and you can see  
14 the concrete pads.

15 You can see them within the channel  
16 right there. So we're still right on top of the  
17 project area. It's just that now we're looking  
18 upstream into the undisturbed channel, probably the  
19 berm in the disturbed area.

20 JUDGE MORAN: Please describe where you see the  
21 concrete slabs for the record, on that photo, 150.

22 THE WITNESS: Okay.

23 JUDGE MORAN: The top, bottom, left, right?

24 THE WITNESS: The slabs are on the bottom of

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1 the photo --

2 JUDGE MORAN: Left side, right side?

3 THE WITNESS: They show up best in the bottom  
4 left-hand corner. They show up as a bright white.

5 JUDGE MORAN: Thank you.

6 BY MR. MARTIN:

7 Q. What else does this photo depict?

8 A. Well, in this photo, again, you're looking  
9 back into the natural, undisturbed channel, right  
10 away you notice where we have a pool right here in  
11 front of us. Some flowing water in the channel and  
12 the pool in front of you.

13 You've got a debris rack right in the  
14 center of the photo. As you're entering the project  
15 area is where that debris rack is, which again is  
16 evidence of flow, debris piling up and catches the  
17 result of flow.

18 You also have a view of a wooded  
19 wetland and a riparian area there in the background.  
20 So it gives you a good idea of what the conditions  
21 were of the violation site prior to clearing.

22 You can look in that photo and kind of  
23 see an idea of that. You can also see above the  
24 debris rack, looking inside the channel again, you

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1 can see the stream bank conditions upstream. You can  
2 see roots in the channel, you can see a lot of things  
3 like that, habitat.

4                   You can also see that as the  
5 channel -- as the natural channel enters this new  
6 channel, a lot of the debris piling up. It looks  
7 like a lot of scour in this whole area where it could  
8 be that water is backing up into that area, too,  
9 since it cannot jump that berm.

10           Q.    Which berm are you referring to?

11           A.    The berm that I identified in the previous  
12 photo which is on the right descending bank of the  
13 channel. The berm starts on the upstream end of the  
14 project around those concrete slabs and proceeds  
15 south along the new channel until the grade  
16 intercepts the natural grade.

17                   And it acts as a levee. So,  
18 basically, as the water comes out of the woods, the  
19 water can no longer jump bank and go into the field,  
20 so it's going to scour back up on the adjacent  
21 property.

22           Q.    Is the berm located at the approximate  
23 location of where this photo was taken?

24           A.    Yes, sir.

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1 Q. Moving to page 151, a smaller photo on this  
2 page. From where was this photo taken?

3 A. In this photo, I'm in -- I'm inside the  
4 channel basically on the east-west leg of the L.

5 So this is on the downstream end of  
6 the project area approximately, I'd say maybe  
7 100 feet from the end of the project, looking at that  
8 point where the new channel takes a hard left and  
9 goes off site into the woods of the neighborhood's  
10 property.

11 Q. When the channel takes a hard left, what  
12 direction is it facing?

13 A. When the channel takes a hard left, it's  
14 heading south.

15 Q. So the perspective of this photo is one  
16 facing west?

17 A. That is correct.

18 Q. What does this photo tell you about the  
19 flow of the stream?

20 A. Well, again, you can see continuous flow  
21 all the way to the end of the project area and  
22 exiting the site.

23 Q. And is the impacted area on the right side  
24 of this photo?

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1           A.    Yes, it is, off the right descending bank  
2 out in the field area.

3           Q.    And, again, who owns the property on the  
4 left side of the wooded side in this photo?

5           A.    That would be Bill Hesper.  And, again, you  
6 see concrete slabs downstream.

7           Q.    What would be purpose be for these concrete  
8 slabs?

9           A.    The same as before because you've got a  
10 hard L here.  You've got a hard turn, so that water  
11 is making a straight shot, a straight linear shot at  
12 this point so that you have an extremely sensitive  
13 spot there subject to scour and erosion.

14                         So you have to have those concrete  
15 slabs there to help stabilize it.  You can see in  
16 this picture that they know that they've got active  
17 scouring going on.

18           Q.    What is scour?

19           A.    Scouring is water acting -- it's the energy  
20 of the water acting with erosive forces against the  
21 bank of the channel taking soil with it, actually  
22 taking soil out of the channel, eroding it out.

23           JUDGE MORAN:  Let's just go off the record for  
24 a second.

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1 (WHEREUPON, there was then had  
2 an off-the-record discussion.)

3 JUDGE MORAN: Okay, let's go.

4 MR. MARTIN: Just another matter concerning the  
5 excerpted file complaint Exhibit 8, we have  
6 determined the exhibits that were missing from  
7 Exhibit 81?

8 JUDGE MORAN: Eight?

9 MR. MARTIN: We have --

10 JUDGE MORAN: Eight? Eight, you're saying?

11 MR. MARTIN: Eight, yes.

12 JUDGE MORAN: Okay.

13 MR. MARTIN: So we will provide those to the  
14 Respondent.

15 JUDGE MORAN: Okay, but what is the Exhibit  
16 Number, Mr. Martin, that we're going to be  
17 substituting?

18 You're not intending to introduce that  
19 whole thing on that one, are you?

20 There was another exhibit we were  
21 going to substitute, I forget which number it was.

22 MR. MARTIN: It was the soil surveys which we  
23 have a complete copy of.

24 JUDGE MORAN: Okay. So for 20, that whole

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1 exhibit is going to come in, right?

2 MR. MARTIN: Yes.

3 JUDGE MORAN: No excerpts?

4 MR. MARTIN: Right.

5 JUDGE MORAN: Whereas this Exhibit 8, your  
6 intention is to have the excerpts be the exhibit and  
7 then give Counsel an opportunity to look it over and  
8 maybe ask some comments, correct?

9 MR. MARTIN: Yes.

10 JUDGE MORAN: Okay, let's go. We've got a  
11 half-hour to work here.

12 BY MR. MARTIN:

13 Q. Okay, Mr. Lenz, turning your attention to  
14 Bates 114 to Bates 145?

15 JUDGE MORAN: Well, now, did you intentionally,  
16 Counsel, you stopped at 151 and then you had 152  
17 which shows the old channel and new channel.

18 Did you intend to mention anything  
19 about that?

20 MR. MARTIN: I'm sorry? Oh, in terms of the  
21 aerial photos?

22 JUDGE MORAN: Yes. Do you intend to have the  
23 witness talk about these at all?

24 MR. MARTIN: He will. Actually, they go along

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1 with the data forms that we're about to talk about.

2 JUDGE MORAN: Okay, all right.

3 BY MR. MARTIN:

4 Q. Starting at 114 through 145, please take a  
5 look and describe for the Court what is this?

6 A. Pages 114 through 145, these are wetland  
7 data forms that are found in the appendix of the 1987  
8 Corps Wetland Delineation Manual. These are the data  
9 forms that you fill out when you're making wetland  
10 determinations.

11 So these sheets here between 114 and  
12 145 are the data sheets from my site visit on the  
13 Hesper -- the site of concern here in February of  
14 2000.

15 Q. How many data forms are there as part of  
16 your field notes?

17 JUDGE MORAN: Well, don't have him count them  
18 up. How about asking whether --

19 THE WITNESS: Sixteen.

20 JUDGE MORAN: 114 through what -- to me, it  
21 looks to me like it goes through 145.

22 MR. MARTIN: Yes, it does.

23 BY MR. MARTIN:

24 Q. What are these data forms meant to measure

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1 on the site?

2 A. These data forms, I was verifying the  
3 previous existence of wetlands out there on the site  
4 looking basically look are for hydric soils.

5 And hydric soils were there disturbed  
6 along the channel and seeing indicators -- any  
7 indicators of hydrology that I could get. Whatever  
8 information I could get from the site that --  
9 under -- in the '87 manual we have the atypical  
10 procedures.

11 So basically, with these data forms, I  
12 was getting the information that I could from the  
13 site.

14 Q. Do these data forms set out a tree  
15 parameter from --

16 JUDGE MORAN: A what parameter, sir?

17 MR. MARTIN: A tree parameter approach under  
18 the Corps manual?

19 THE WITNESS: Yes, they do. These data forms  
20 are set up so that you look at vegetation, hydrology,  
21 and soil.

22 So you get all three criteria, can be  
23 put on each data sheet per sample point to make a  
24 wetland determination.

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1 Q. Did you fill out these data forms?

2 A. Yes, sir.

3 Q. Did someone else accompany you as you  
4 filled out these data forms?

5 A. Yes, sir. Actually I did the soil borings  
6 and Katherine Kelley who was with me recorded the  
7 information for me as I gave her the information.

8 So she actually filled out the data  
9 forms and I gave her the information.

10 Q. I take it there's one data form per soil  
11 boring?

12 A. Yes, sir.

13 Q. And, in general, how did you set out to  
14 locate your locations of the soil borings on-site?

15 A. Okay. What I did was I used the L-shape  
16 new channel as my baseline. So I knew that the  
17 cleared area was on the left descending bank of that  
18 out in that field area.

19 So, on that north-south L, I decided,  
20 well, I'm going to divide that up into three  
21 transects. I wanted to transect using the channel as  
22 a baseline, three transects.

23 My first transect, Transect  
24 Number one, I came off the top of the L heading west

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1 into the field or into the cleared area.

2 My third transect was on the bottom of  
3 that north-south L downstream of the first transect.

4 Q. Now, please, turn to Bates 152.

5 A. (So complied with request.)

6 JUDGE MORAN: Before do you that, a couple of  
7 things:

8 Mr. Lenz, just to make the record  
9 clear, your data forms -- do your data forms from  
10 this site visit on February 15, 2000 run from CX 114  
11 through CX 145?

12 THE WITNESS: Yes, they do.

13 JUDGE MORAN: And define a transect.

14 THE WITNESS: A transect is a line on which --  
15 an imaginary line that I lay out on a map. And then  
16 in the field or on-site, I walk along that line and  
17 sample along it. It's a straight line along which I  
18 sample.

19 JUDGE MORAN: Okay. And is transect, is that  
20 an abbreviation of a longer word?

21 THE WITNESS: No, it's T-R-A-N-S-E-C-T.

22 JUDGE MORAN: Okay, thank you.

23 Now, go ahead.

24

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1 BY MR. MARTIN:

2 Q. And is the transect identified in this data  
3 form? Starting at 114, where are the transect  
4 locations identified?

5 A. On page 114?

6 Q. Yes:

7 JUDGE MORAN: Look at the top, the top right.

8 THE WITNESS: Oh, okay, okay. There's a box at  
9 the top of the data form which identifies which  
10 transect and plot number or ID number that it is.

11 BY MR. MARTIN:

12 Q. Drawing your attention to the aerial  
13 photograph at 152. Do you recognize this photograph?

14 A. Yes, sir. This is the aerial photograph  
15 upon which I put my transects.

16 Q. Have you marked on this photograph the  
17 location of the site?

18 A. Yes, sir.

19 Q. And how is that designated?

20 A. I have transect one labeled on the top of  
21 the page, it says T-1, and it has plots listed behind  
22 it. And then T-2, you can see directly below that  
23 where I have the plots listed below that on the  
24 sheet.

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1                   And then I marked on the channel  
2           itself -- it's kind of hard to see, but I drew red  
3           lines on where each of the transects were taken off  
4           of that north-south leg of the L.

5           Q.    So you used this photograph to plot the  
6           locations of your sample points?

7           A.    Yes, sir.

8           Q.    That's reflected in the sample forms in  
9           this section?

10          A.    Yes, sir.

11          Q.    How did you start to measure and plot the  
12          location of your transect?

13                   What was your beginning point in that?

14          A.    My beginning point, Transect Number 1, plot  
15          1, I used that north-south leg of the L, I used the  
16          new channel as my baseline.

17                   I needed a reference point that I  
18          could use and was easily recognizable and could be  
19          returned to if needed. So I used the channel as my  
20          reference line.

21          Q.    And where did you locate the transect to as  
22          reflected on page 114?

23          A.    Okay, Transect 2, if you take the  
24          north-south leg of the L of the new channel and go

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1 right to the middle of it, right in the middle of the  
2 channel heading out west into the field.

3 I divided the channel in half  
4 basically, and went off of the midpoint -- went off  
5 of the midpoint of the channel is a better way of  
6 saying it.

7 Q. Starting with the data form at 114, where  
8 is plot ID 1?

9 A. Where is it located on the channel? Or in  
10 the between --

11 Q. Transect 2, where is plot ID 1 located?

12 A. Okay, Transect ID 2, plot ID 1 --

13 JUDGE MORAN: Mr. Martin, are you asking this  
14 witness to identify where plot ID 1 and Transect ID 2  
15 as reflected on EPA Exhibit 114, page 114, are you  
16 asking him to locate that on CX 152 or not?

17 MR. MARTIN: I'm asking him to describe how far  
18 away from the channel that Transect -- that plot ID  
19 on Transect 2 would be.

20 THE WITNESS: Okay. I marked it on the map,  
21 but I believe it's 25 feet out from the top of the  
22 bank to the channel on Transect 2.

23 I think plot ID -- yes, I believe it's  
24 25 feet out, but I've marked it on the map.

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1 JUDGE MORAN: On what map?

2 THE WITNESS: The map that's on 152.

3 JUDGE MORAN: Okay.

4 BY MR. MARTIN:

5 Q. Could you go through your analysis on  
6 vegetation, hydrology, and soil for Transect 2, plot  
7 ID 1?

8 A. Okay, Transect 2, plot ID 1 the vegetation  
9 parameter was absent. There was nothing there; it  
10 had been cleared.

11 For hydrology, I found one secondary  
12 indicator while I was sampling the soil and that was  
13 oxidized root channels in the upper 12 inches of the  
14 soil.

15 Q. And what are you referring to by oxidized  
16 root channels?

17 A. Oxidized root channels are -- that's a  
18 feature in the soil that develops when you have  
19 saturated conditions where the soil goes anaerobic,  
20 there's no oxygen in the soil.

21 So, plants uptake oxygen out of the  
22 air and it transfuses down through the roots. And  
23 oxygen as it transfuses through the roots, some of it  
24 actually even diffuses outside of the root walls.

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1                   And when that happens, you've got --  
2   iron oxidizes. And as I said awhile ago, iron is the  
3   paint of the soil. And when it oxidizes, it turns  
4   orange or red.

5                   So you actually have these root  
6   channels with live roots in them that are -- have  
7   these -- they're called redox amorphic features.  
8   It's bright red mottling right around the channel and  
9   soil. And those are determined to be secondary  
10  indicators of hydrology in the '87 Wetlands  
11  Delineation Manual.

12           Q.    What is the significance of anaerobic  
13  conditions?

14           A.    For anaerobic conditions, the significance  
15  of that is that there's no oxygen in the soil, you've  
16  got saturated conditions, therefore, you're going to  
17  end up with a vegetation community that is wetland  
18  plants.

19                   You're going to develop your hydric  
20  soils. So this hydrology indicator tells you what  
21  water is doing on the site; it's creating these other  
22  conditions in the soils and vegetation and meeting  
23  one of the criteria of the '87 Manual or part of that  
24  criteria.

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1 Q. Could you turn to your soils analysis on  
2 page 115?

3 A. Yes.

4 Q. How did you conduct this analysis?

5 A. I had a soil probe with me out in the field  
6 that day. So I sampled the soil 25 inches deep at  
7 this plot.

8 Q. And does the 1987 Corps of Engineers  
9 Delineation Manual set forth color requirements to  
10 find positive indicators of hydric soil?

11 A. Yes, it does. This soil here 0 to 2 inches  
12 in this next column where it says matrix -- two  
13 columns over I should say, it says matrix color,  
14 Munsell moist, those are color designations where it  
15 says 10 Y-R, that stands for yellow red.

16 Three over two, that's a three with a  
17 soil color value number. The two, the bottom part of  
18 that fraction, is a color chroma, marks the strength  
19 of the color.

20 So the 0 to 2 inches, that's basically  
21 a dark surface soil. 2 to 8 inches - and this is  
22 what meets the hydric soil criteria right here - the  
23 soil color there, 10 YR 4 over 1, that's a hydric  
24 soil color, 10 YR 4/1 with -- and even in the next

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1 column over, that's the mottle, that's the bright  
2 orange oxidized iron colors here.

3 M-M stands for mini medium, 10 YR 4/4  
4 which is another bright brown color. But your hydric  
5 soil criteria is met in that data.

6 Q. What does mottle colors refer to?

7 A. Mottle colors refer to -- color in the  
8 soils is identified by a matrix color and mottle  
9 color.

10 The matrix color of the soil is the  
11 dominant color of the soil. So when you talk about  
12 the soil matrix, you're talking about the dominant  
13 color in the soil.

14 The mottles would be other colors,  
15 subdominant colors in the soil. So in this case, you  
16 have a gray soil with patches of orange. And those  
17 patches or spots of orange would be what's referred  
18 to as the mottles.

19 Q. In the next category of the soils box at  
20 the top of the page, what does mottle abundance  
21 contrast refer to?

22 A. Abundance and contrast, that tells you --  
23 the abundance would be the quantity. see  
24 abundance is -- generally to get abundance, you would

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1 put it into a criteria of few, common, or many.

2 And there's an actual percentage  
3 designation for few, common and many. I believe it's  
4 few would be 0 to 2, common would be 2 to 20 and many  
5 would be over 20 percent.

6 Q. And what does texture, concretions, and  
7 structure, what does that refer to?

8 A. Texture refers to the amount of sand, silt  
9 and clay in the soil.

10 So if you have a silt loam, it would  
11 have a certain amount of sand, silt and clay. Loam  
12 would have certain amounts of sand, silt and clay --  
13 different amounts of sand, silt and clay for each  
14 soil textural class.

15 Each soil texture has got different  
16 quantities of those three soil particle sizes.  
17 Concretions has to do with generally iron and  
18 manganese (key lating)sp together and forming nodules  
19 or concretions when they oxidize.

20 Structure refers to within the soil,  
21 you've got what's called different types and styles  
22 of soil structure. You've got blocking structure,  
23 granular.

24 If you have a surface soil like in a

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1 field, like a lot of tilth, that's granular, garden  
2 soil is a granular structure.

3 As you a dig deeper, structure gets  
4 bigger. You get a blocking structure and so on until  
5 there's no structure.

6 Q. Now, are all these profile descriptions in  
7 this box -- what is required to find a positive  
8 indicator of hydric soil set forth in the 1987 Corps  
9 of Engineers Manual?

10 A. In order to meet the hydric soils criteria  
11 in the 1987 Corps of Engineers Wetland Delineation  
12 Manual, you need to have either below the A horizon,  
13 which is 0 to 2 inches in this case or 10 inches,  
14 whichever is shallower.

15 You need to have a chroma and that  
16 would be the lower fraction of the soil of 2 or less.  
17 If you have a chroma of 2, you need to have mottles  
18 in the soil. If you have a chroma of 1, you don't  
19 need to have mottles in the soil.

20 Q. You mentioned the A horizon, is it  
21 important where you sample within the soil, what  
22 depth?

23 A. To meet the hydric soils?

24 Q. Yes.

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1           A.    Could you repeat the question?

2           Q.    Is it important -- is the depth of your  
3 soil sample important?

4           A.    It's important, first of all, that you go  
5 at least to the depth that you need to make those  
6 determinations.  Beyond that, it's important to go  
7 deeper.  The Manual -- according to Manual, you need  
8 to go 18 inches deep.

9                         It's not a bad idea to go deeper in  
10 places just to understand what's going on, especially  
11 if you have -- if you've got a situation where you  
12 might have film material or site disturbance or if  
13 you're in a complex area.

14          Q.    And what was your finding based on your --  
15 what was your finding regarding positive indicator  
16 for hydric soils as reflected on page 115?

17          A.    My findings on this site were that we did  
18 in fact have hydric soils.

19          Q.    Turning to page 116, Transect ID 2, plot  
20 ID 2, would you start by describing the location of  
21 this plot ID?

22          A.    Okay.  Page 116, Transect ID 2, plot ID 2,  
23 this would be depicted on that map again on I believe  
24 page 152.

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1 Q. At page 152?

2 A. Yes, the map at page 152. Basically this  
3 sample was 50 feet further west on that transect  
4 line, on Transect ID 2.

5 Q. And could you summarize your findings  
6 regarding vegetation, hydrology and soil on this plot  
7 ID location?

8 A. Vegetation, again, I left that blank.  
9 Hydrology, no hydrology indicators were marked for  
10 this site or for this plot. On the next page,  
11 page --

12 Q. Yes, page 117?

13 A. Page 117 for the soil criteria. 0 to  
14 9 inches of dark surface. You can see between the  
15 first and second sample of the transect a difference  
16 in depth of the surface arising because we're on a  
17 disturbed site here.

18 So we have surface soil variability.  
19 At 9 to 15 inches, it's 10 YR 4/1, so based on that  
20 color, we do meet the hydric soil criteria for that  
21 plot.

22 Q. This hydric soil criteria as set out in  
23 1987?

24 A. Yes, sir.

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1           Q.    Is there any reason why all these boxes  
2 aren't filled out?

3           A.    I neglected to fill them out.

4           Q.    Moving to page 118, starting with the  
5 location, can you describe your findings for this  
6 plot ID?

7           A.    Okay.  Transect ID 2, plot 3, and again,  
8 the points are depicted on that map.  And this would  
9 be I believe 50 feet further west being on that same  
10 line.  So we're moving out into the field away from  
11 the channel.

12                         Vegetation was left blank because  
13 again, it was clear.  Under hydrology, there were  
14 oxidized root channels in the upper 12 inches again.

15                         And then the soils criteria on the  
16 next page, page 119, here the surface horizon was  
17 6 inches thick, same color, just different thickness  
18 again.

19                         Six to 14 inches, this is -- we meet  
20 the hydric soil criteria in this layer in accordance  
21 with the '87 Manual.  It's a 10 YR 4/2 color with  
22 bright mottles.

23           Q.    And under your remarks for the soils box,  
24 what does that finding refer to?

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1           A.    That's a note for the oxidized root  
2 channels.  The oxidized root channels are a soil  
3 feature.  So when you're doing your soil description,  
4 it's an easy place to put it in the remarks there  
5 when you find it, because you're doing the soil  
6 parameters at that point.

7                     If you do the hydrology separate, you  
8 may miss it.  So then therefore, it's good to right  
9 it down there because it's a feature you're seeing  
10 while you're doing the actual soil description.

11                    That's why it's written on that box.

12           JUDGE MORAN:  Okay, with that question it's  
13 over 3:55 so we're going to have to call it a day.

14                    We'll see you tomorrow morning at  
15 9 A.M.

16                    We'll start promptly so be here, okay?

17                    You're still under oath.  You  
18 shouldn't be talking with other witnesses about the  
19 testimony until after you're all done with this  
20 hearing, okay?

21           THE WITNESS:  Okay.

22           JUDGE MORAN:  All right, folks, see you  
23 tomorrow morning at 9:00.

24                    We'll call it a day today.

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(WHEREUPON the hearing in this  
matter was continued to  
Tuesday, March 27, 2007 in  
Carlyle, Illinois.)

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