

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) Honorable William
Civil Penalty Under Section) Moran
7 309(g) of the Clean Water Act,)
33 U.S.C. Section 1319(g).)
8

9
10 Hearing held pursuant to notice, on Monday,
11 May 1, 2007 at the hour of 9:00 a.m. at Clinton
12 County Courthouse, 850 Fairfax, Carlyle, Illinois,
13 before the HONORABLE WILLIAM B. MORAN, United States
14 Administrative Law Judge.

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

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I N D E X

WITNESSES	DIRECT	CROSS	REDIRECT	RECROSS
GREG CARLSON				
By Mr. Martin	4			
By Mr. Small		71		
By Mr. Northrup		157		
By Mr. Martin			191	
By Mr. Small				199

I N D E X

EXHIBITS	MARKED	ADMITTED
Complainant's Exhibit 27		12

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P R O C E E D I N G S

JUDGE MORAN: Let's begin here this morning.
Good morning, all.

And we're going to continue with
Mr. Carlson's testimony?

MR. MARTIN: Yes, your Honor.

JUDGE MORAN: He was going through some
photographs as I recall.

MR. MARTIN: That's correct.

JUDGE MORAN: Mr. Carlson, you're still under
oath.

GREGORY CARLSON,
having previously been duly sworn by the
Administrative Law Judge, witnesseth and saith as
follows:

DIRECT EXAMINATION (CONT'D)

BY MR. MARTIN:

Q. Good morning, Mr. Carlson.

Please turn to page 461 of your
exhibit book.

A. All right.

Q. Do you recognize this photograph?

A. I do.

Q. Where was this taken?

1 A. It was taken on the north end of the
2 north-south leg of the altered channel looking south.

3 Q. And could you describe what's portrayed in
4 the photo?

5 A. On the left-hand side of -- well, starting
6 in the center of the photograph, there's a band
7 approximately about 5 feet in width that goes down
8 the center of the photograph. That's essentially the
9 top of the bank, the right bank of the altered
10 channel where it's bermed up at.

11 To the left of that band is the
12 altered channel. It's not actually viewable but it's
13 immediately adjacent to the left side of that band.

14 And on the right side is the soybean
15 field. In the background running from left to right
16 you can see the east/west edge of the site.

17 Q. Okay, looking at your description, you
18 described the grass in the center of the photograph
19 as a uniform grass ban?

20 A. That's a typo. That should be B-A-N-D for
21 band.

22 Q. So you're saying that the taller shrubs or
23 foliage to the left of this grass band is the
24 reconstructed channel?

1 A. Yeah, those shrubs that you see are growing
2 on the slope of the new channel.

3 Q. All right. Is there a grass strip on the
4 opposite side of the channel at this location?

5 A. No.

6 Q. What is the significance of the grass band
7 being located on the bank of the reconstructed
8 channel?

9 A. Well, I don't understand that question.
10 It's not on the bank. It's on the top of the bank.

11 Q. And is the topography on which the grass
12 band is located, is that significant?

13 A. It's not significant in my view for any
14 sort of water quality purposes.

15 Q. And what do you think the effectiveness, of
16 this grass band is in preventing any sedimentation?

17 A. Well, given its location relative to the
18 rest of the site, it's not acting as a -- it's not
19 acting to eliminate sediment from the channel.

20 Q. Could you describe the significance of its
21 location?

22 A. Well, the significance of the location,
23 it's higher ground relative to the rest of the site.

24 So it's unlikely that either runoff

1 water or flood waters are going to enter the altered
2 channel at this location.

3 Q. So this is a bermed area where the grass
4 band is in this photograph?

5 A. The top of the bank at this location has a
6 slight hump to it. We've often referred to it as a
7 berm.

8 Q. Is that true for the grass strip in other
9 locations at the site of the alleged violation?

10 A. Where it's humped and there's a berm left,
11 that will prevent water from exiting for the most
12 part. Where the berm peters out or doesn't exist,
13 that's where water can leave the site and enter
14 Martin Branch.

15 Q. Is there a grass strip on the east-west leg
16 of the reconstructed channel?

17 A. No, there's not.

18 Q. So there's no grass strip similar to the
19 grass strip portrayed in this photograph?

20 A. That's correct.

21 Q. How would you compare this grass strip
22 portrayed in this photograph with the grass filter
23 strip on William Hesper's property that we discussed
24 yesterday?

1 A. Well, there really is no comparison. It's
2 not acting as a filter strip in this location.

3 Q. Could you compare the two, generally?

4 A. Well, the major comparison is that this is
5 not acting as a filter strip because of its location
6 on the site.

7 On the Bill Hesper property, the
8 location of the filter strip is correct in that it
9 intercepts runoff from higher ground going towards
10 Martin Branch.

11 Q. Okay, thank you. Moving to the photo at
12 462?

13 A. All right.

14 Q. Where is this photo taken?

15 A. This photograph, as well as the previous
16 one and the next four, are all part of a panoramic.

17 You can tape them together and they
18 overlap so you get one continuous view of the site
19 from looking south to looking west, sort of a
20 '90-degree pivot and you'll see the whole site.

21 So this is a bit south -- excuse me,
22 west of this photograph. I'm turning to the west.

23 Q. Is there anything significant that you'd
24 like to point out in these photographs?

1 A. In the last two photographers, 464 and 465,
2 again, they overlap somewhat, essentially in the
3 center of the photograph, on the right-hand side, the
4 center right of 464 and pretty much the center of
5 465, there's a slight depressional area where you see
6 a different plant growing.

7 And if you look at the very far
8 right -- excuse me, bottom right corner of 465,
9 you'll see a -- it's called foxtail grass.

10 And it's called foxtail grass because
11 the end of the grass looks like a fox's tail.
12 There's an example of that on the very bottom right
13 of 465.

14 That's a typical agricultural weed.
15 And what it's signifying is that this is one of those
16 small depressional areas that still exist in the
17 violation site; it's ponding water. That's the only
18 thing of significance in this photograph other than
19 showing you that it's in crops.

20 Q. Okay, thank you. And this is the last in
21 the group of photographs, so I ask you to approach
22 Exhibit D, and mark the general location --

23 MR. MARTIN: With your permission?

24 JUDGE MORAN: Sure.

1 MR. MARTIN: -- and mark it ten, group ten.

2 THE WITNESS: Okay. On Exhibit D in silver
3 marker I have labeled an area GC photo group ten with
4 an arrow pointing to a spot on the map from which
5 emanates four distinct arrows.

6 And the arrows indicate the direction
7 of the photographs taken in this group.

8 BY MR. MARTIN:

9 Q. Well, there are five photos. So four
10 arrows are for panoramic shots?

11 A. That's correct.

12 Q. The one additional photo at 461 is of the
13 north-south leg of the "L"-shaped channel; is that
14 correct?

15 A. That's correct.

16 Q. During your second inspection of the site,
17 what, if any, wildlife or aquatic life did you
18 observe at or around the site of the alleged
19 violation?

20 A. We captured a small, what I considered a
21 northern water snake in the sub channel at the
22 east/west lake. I mentioned that yesterday. It was
23 a young of that year; it was about nine inches long,
24 very thin.

1 Other than that, you still observed in
2 the Bill Hesel woods the tracks of deer and small
3 mammals like you'd likely see: mink, raccoon, skunk
4 possum. That's about it with regard to wildlife in
5 that section.

6 Q. Okay, referring back to Complainant's
7 Exhibit 22 as a whole, is this exhibit a true,
8 accurate and complete copy of the inspection report
9 for your August 30, 2006 inspection of the site of
10 the alleged violation?

11 A. What was the number?

12 Q. Yes? Oh, I'm sorry, it's Complainant's 27,
13 not 22.

14 A. Yes, it is Complainant's Exhibit Number 27.

15 Q. And is this inspection report part of
16 U.S. EPA's official record in this case?

17 A. It is.

18 MR. MARTIN: Your Honor, at this time I move to
19 include Complainant's Exhibit 27 into the record.

20 MR. NORTHRUP: No objection.

21 JUDGE MORAN: Okay, EPA Exhibit 27 is admitted.

22

23

24

1 (WHEREUPON, Complainant's
2 Exhibit Number 27 was
3 admitted into the
4 record.)

5 BY MR. MARTIN:

6 Q. All right, Mr. Carlson, let's talk about
7 your third inspection of the site. When did this
8 take place?

9 A. By site, what do you mean? Which site?

10 Q. The site of the alleged violation.

11 A. While I was there on March 8th and 9th, we
12 weren't actually on the site.

13 Q. When was the third time you visited the
14 area around the site?

15 A. March 8th and 9th of 2007.

16 Q. Okay, and you say you weren't on the site
17 of the alleged violation, why is that?

18 A. We were denied access by the Hesper
19 brothers.

20 Q. On March 8th and 9th who else attended on
21 behalf of the government?

22 A. Wendy Melgin, Simon Manoyan, Chrissy
23 Pellegrin, Tom Martin, Ward Lenz was there later
24 although not with myself, but he was there later.

1 And that's it for the Government.

2 Q. Okay. Before you visited the area of the
3 site, did you check the prior weather conditions to
4 form your observations?

5 A. Yeah.

6 Q. What were those prior weather conditions?

7 A. There was significant rain that Daniel
8 Hesper testified about on the 24th of February. I
9 believe there was one other small rain event, about 3
10 tenths of a inch.

11 Otherwise, no wet weather after the
12 24th other than the 3 tenths.

13 Q. Okay. Mr. Carlson, did you write an
14 inspection report for this inspection?

15 A. No.

16 Q. Why not?

17 A. It was too late to get into the record was
18 my understanding.

19 Q. Okay. In general describe the purpose of
20 this inspection?

21 A. Well, again, it was to look at the flow in
22 Martin Branch, characterize the flow to a greater
23 extent.

24 And it was also an opportunity for

1 other EPA witnesses to take a look at the site.

2 Q. Okay, you testified that you investigated
3 the flow of Martin Branch.

4 How would you define flow?

5 A. Water moving within the channel.

6 Q. And what is it indicative of, the water
7 moving through the channel? What do you look for to
8 determine whether water flow is occurring?

9 A. Well, you can either see things moving in
10 the water, you can put things in the water and watch
11 them move.

12 You can see indications of ripples on
13 the water as it moves over an area indicating that
14 it's flowing.

15 You can see areas where there's a
16 little drop in the stream where water is cascading
17 over some feature to indicate flow.

18 Q. In general, what actions did you take to
19 investigate the flow in Martin Branch?

20 A. We walked large segments of it.

21 Q. Did you walk the entire length of Martin
22 Branch?

23 A. Not the entire length no.

24 Q. Why not?

1 A. Well, we didn't have access to all reaches
2 of the stream.

3 Q. In general, in your investigation of the
4 flow of Martin Branch, what did you discover?

5 A. At the time we looked at it, it was flowing
6 from -- well, actually from Highway 37 on the very
7 east -- way on the east end.

8 It was flowing at the location of Bill
9 Hesper's critical area planting project.

10 It was flowing all the way from that
11 upstream end all the way to the old Salem Road
12 crossing, and that puts the flow through and past the
13 alleged site of the violation.

14 And we also saw it flowing on the
15 other side of Highway 37 and then a couple other
16 points downstream, including the mouth of Martin
17 Branch where it enters Lake Centralia.

18 Q. Okay, Mr. Carlson, just to make the record
19 clear, I'm going to ask you to approach what's marked
20 as Exhibit A.

21 And I'm going to ask you to mark the
22 points at which you stopped and observed Martin
23 Branch, designate those areas with an X.

24 And at the points where you walked

1 along Martin Branch, I'm going to ask you to identify
2 those areas with a continuous line. If you could use
3 a blue highlighter for that.

4 MR. MARTIN: With permission, your Honor, I'd
5 like for the witness to approach.

6 JUDGE MORAN: Sure, that's fine.

7 MR. MARTIN: And if you could identify the
8 names of those areas GC one and two and so on.

9 JUDGE MORAN: With his initials, is that what
10 you said?

11 MR. MARTIN: Yes, GC one and two.

12 Mr. Carlson, with regard to the X's
13 and the lines using the highlighter, it will show up
14 better if you use a pen to identify --

15 THE WITNESS: The X's may be so numerous as to
16 obscure. I mean, we stopped many, many times as we
17 walked.

18 JUDGE MORAN: Why don't we go off the record,
19 work this out between the two of you. Then on the
20 record, we'll put what happens.

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

23 JUDGE MORAN: Back on the record. In an
24 off-the-record discussion we worked out how

1 Mr. Carlson would be marking this exhibit, did you,
2 Counsel?

3 MR. MARTIN: Yes, we have.

4 JUDGE MORAN: Okay, why don't you relate that
5 in the form of a question to him?

6 BY MR. MARTIN:

7 Q. Mr. Carlson, you observed stretches of
8 Martin Branch and I'm going to ask you to identify
9 those areas in which you observed Martin Branch, and
10 divide them into groups so we can talk about specific
11 stretches of Martin Branch individually.

12 A. (So complied with request.) All right.

13 Q. Please describe generally.

14 A. Okay, beginning on the far right-hand side
15 of Exhibit A at U.S. Highway 37, which is running
16 north and south and is labeled with a circle and 37
17 in the middle of it, that is the location of the
18 culverts under U.S. 37 that bring flow into the upper
19 ends of Martin Branch. That is designated as GC
20 eight.

21 Heading on downstream on Martin
22 Branch, we go to the area of Bill Hesper's critical
23 area planting project. There is a stretch of the
24 stream there that is highlighted and is labeled

1 GC-one.

2 There is a vertical line on either end
3 of that segment to denote where it begins and ends.

4 Then immediately downstream of that
5 segment is another segment that goes to the upstream
6 end of the alleged violation site.

7 That segment is highlighted and has
8 the vertical lines denoting the beginning and ending
9 of the segment. It's labeled as GC-2.

10 Immediately downstream of that segment
11 and following the path of the altered Martin Branch
12 channel is the "L"-shaped channel, the site of the
13 alleged violation. That is highlighted and marked
14 GC-3.

15 Immediately downstream of that and
16 continuing downstream to Old Salem Road, and actually
17 just past Old Salem Road in a western direction is a
18 segment called GC-4.

19 That's highlighted and denoted by a
20 vertical slash at the beginning and end.

21 Then I made a mistake and I crossed
22 the areas out that I highlighted downstream of that.

23 So that scribbled out area is not an
24 area that we walked. This is an area east of

1 Interstate 57 which is marked on the map and goes
2 north and south.

3 Continuing on to where we did walk
4 downstream at Mt. Mariah Road Crossing, and it's
5 marked on the map. Just to the north of that
6 crossing is Mt. Mariah Church and the cemetery.

7 That's the downstream end. We began
8 there and walked upstream to Interstate 57. That
9 segment is highlighted and it is marked GC-5.

10 Then going down to the mouth of Martin
11 Branch where it enters Lake Centralia on its
12 southernmost extremity is an area marked GC-6.

13 Then there is one other area in
14 between GC-6 and GC-5, that's a short segment of
15 stream marked GC-7.

16 It's marked a little bit differently
17 in that we did not walk that segment. We were able
18 to view that segment from higher ground.

19 GC-7 should be differentiated in that
20 we did not walk the segment that was highlighted, but
21 we saw the segment that was highlighted.

22 Q. So you've identified a total of eight
23 segments in Martin Branch in which you observed flow
24 in Martin Branch?

1 JUDGE MORAN: Is that correct?

2 BY MR. MARTIN:

3 Q. Is that correct?

4 A. Yes.

5 Q. Okay, well, let's start with your first
6 observation point that is marked GC-1?

7 A. Okay.

8 Q. And if you could describe this area in
9 general.

10 A. We saw pictures of this yesterday during my
11 testimony. This is the area of Bill Hesper's critical
12 area of planting. It's essentially devoid of woody
13 shrubs and trees. It's essentially a grass swell
14 area that was altered -- subject to the PCP project
15 in 1997.

16 It's a heavily vegetated channel. The
17 channel bottom is not even viewable. The side slopes
18 are very gentle, flat.

19 I did not observe -- I observed water
20 in the channel at the upper end of it, but I actually
21 did not see water moving in that channel or where I
22 actually could discern movement until about
23 three-quarters of the way down, about 100 feet
24 upstream where it enters the woods.

1 There's a little drop in the stream
2 about 6 inches, and water was cascading over that
3 drop.

4 Now I didn't wait around and do any
5 sort of tests in the upper end to detect flow there.
6 But it wasn't observable with the eye in the 30
7 seconds I was standing in one particular spot.

8 Q. Did you observe anything else of
9 significance?

10 A. No.

11 Q. Okay, moving on to the second location or
12 next location marked GC-2. Please describe what you
13 observed.

14 A. Well, I stayed pretty much in the channel
15 for more of the walk through the area of GC-2. This
16 is where it enters the woods.

17 The first section, as you'll recall
18 from yesterday was it was channelized.

19 We saw a continuous flow through
20 there, essentially going from pooled areas. And then
21 the water would exit the pooled areas sort of from
22 one side of the channel or the other around a higher
23 shelf at the bottom of the channel.

24 And it was from where it went as a

1 pool in this relatively narrow channel in terms of
2 water flowing 6, 7, 8-foot in width until it got to
3 another pool.

4 I walked the bottom of that channel,
5 and certainly around the pooled areas I would sink up
6 into real loose, silty soil are. You know, I'd sink
7 down walking in my boots around nine -- ten inches.

8 That's around the pooled area where
9 most of the stuff would accumulate.

10 In between the pools, walking was a
11 little firmer but still soft material. Very few
12 rocks, mostly granular material, still soft.

13 Essentially, had that pool, a pool and
14 a run of water all the way through that section.

15 In this upstream end and one of the
16 bigger pools where we saw some sizable fish, much
17 bigger than minnow size, about 6 inches of length in
18 the bigger pools and more than one.

19 That's where I saw the bigger fish.
20 In other areas in that section we saw minnows,
21 smaller-sized fish.

22 Otherwise, the riparian corridor is
23 still intact, particularly on the William Hesper side.

24 This section, there's a straight

1 section to it or a relatively straight section to it
2 that is at the downstream end of that.

3 And this is the area I believe
4 Mr. Small was referring to in some of his questions.

5 But that likely had been channelized
6 in the distant past, and now it was naturalizing
7 itself. Within the stream it started to re-meander
8 itself.

9 The banks weren't nearly as high as
10 the channelized section.

11 And downstream of that initial section
12 you're going from 2 to 4 feet high. The banks are
13 not as scoured although there are certainly spots
14 within this section that are scoured out, and I have
15 pictures of that that we discussed yesterday.

16 The comment I want to make on the
17 riparian corridor is that the stream in that section
18 is very near the property line.

19 There's some old fence posts and some
20 fencing in there.

21 Essentially, on the north side of the
22 stream is the Hesper brothers' property. And there,
23 there is just a very thin strip of riparian corridor
24 left, about a tree or two trees' size on the Hesper

1 Brothers' side.

2 In other words, they farm pretty much
3 within ten-foot of the top of the channel.

4 There's also water standing on the
5 Hesper brothers' crop field along that side of the
6 stream, along that more channelized section that is
7 naturalizing itself.

8 And I guess that's about it.

9 Q. You mentioned the location of the Hesper
10 brothers' farming operation next to the stream at
11 this location.

12 What effect does that proximity of the
13 farming operation have on Martin Branch?

14 A. Well, it increases the vulnerability of
15 Martin Branch receiving runoff from that agricultural
16 area just by -- due to the proximity of its strength,
17 and the fact that there's little intervening cover to
18 knock runoff down or knock sediment out or any other
19 associated contaminants that might be in that runoff.

20 Q. Okay, let's move to the next downstream
21 section marked GC-3. Could you describe your
22 observations there, please?

23 A. This is a section of the altered channel.

24 And there was a continuous band of

1 water through the channel and largely in that sub
2 channel that we talked about yesterday.

3 That's almost the entire length of the
4 north-south, east-west leg now.

5 And the down -- at the downstream end
6 of the GC-3 segment is where I observed the actual
7 water flowing where I could see ripples in the water
8 and things moving in the water.

9 There is still the band of tree canopy
10 on the Bill Hesper's side of the "L".

11 In other words, the east/west lake,
12 there's the canopy of trees that remains on the Bill
13 Hesper side and also on the north-south leg.

14 On the east side there's still a band
15 of trees left.

16 The channel itself is pretty well
17 vegetated except for the sub channel.

18 That's about it for that section.

19 Q. Okay, moving to the next downstream section
20 which is GC-4. Can you describe your observation at
21 that location?

22 A. Well, this is -- the first really natural
23 segment. It doesn't appear to have been channelized
24 in any contemporary or distant past.

1 The stream meanders back and forth. I
2 measured this previously at 1600 feet from the
3 downstream end of the alleged violation site of Old
4 Salem Road.

5 And that's approximately double the
6 distance if you straight-lined it.

7 So it has a lot of curves; it meanders
8 through it.

9 Flow is continuous through it.

10 As you go downstream there's more
11 water in the channel. We captured a frog in this
12 section, continued to see aquatic life in the form of
13 minnows.

14 It's within a tree corridor for its
15 entirety except from where a power transmission line
16 cuts across it. They keep those power lines away and
17 clear from trees for the most part.

18 And that segment at the end way down
19 to Salem Road and we walked 150 Feet downstream of
20 that Salem Road crossing.

21 And similar results. It's still
22 meandering, water flowing in the channel, aquatic
23 life.

24 The right bank on this west of Old

1 Salem Road is a bit altered because some of the
2 homeowners have cleared out some of the riparian
3 corridor on the right bank.

4 The left bank is still natural woods.

5 Q. Moving to the next downstream area that you
6 observed, GC-5.

7 Can you describe what you observed at
8 this section?

9 A. Well, we began this walk at the downstream
10 end and walked up the channel to Interstate 37.

11 The channel becomes -- is bigger in
12 terms of top width and bottom width.

13 I noticed a distinct difference in the
14 bottom sediments. There seems to be much more sand
15 and a much firmer bottom in this segment than
16 upstream, particularly in segment GC-2 which was the
17 muckiest and softest.

18 Aquatic life, we saw mink run along
19 the banks; you still had your minnows.

20 There was one shallow road crossing on
21 it, towards the upper end. The box culverts at
22 Interstate 37, there were two of them, 7 feet high by
23 7 feet wide, and water was cascading off of that
24 ledge forming a pool right on the downstream end.

1 There was a lot of rocks, trees
2 falling in the stream.

3 Q. And you observed water flowing in this area
4 as well?

5 A. Yeah, a continuous flow of water, more
6 water than upstream.

7 Q. Moving to your next downstream segment or
8 GC-6, can you describe your observations of that
9 site?

10 A. We drove down to that end, and ran into a
11 property owner and got his permission to cross his
12 land and get to the mouth.

13 And we walked westward through a
14 wooded area and then down a large slope, a fairly
15 steep slope through flooded plane area at the mouth.

16 There was more than one channel there.
17 There were two. One contained the main flow the
18 other was probably a channel in the past

19 In other words, the water had switched
20 channels from one to the other.

21 And the bottom sediments in this area
22 off the channel in flood plane area was very mucky,
23 very soft. I could stick my fist down in the depth
24 of the soil about 12 inches just with my hand picking

1 up silt, muck, organic debris from previous
2 vegetation.

3 Off to one side there is an abayment
4 area to Lake Centralia that is almost completely
5 covered with phagmites australis, a reed grass
6 essentially forming an emergent area in that area,
7 and that's probably from fines settling out that is
8 due to reed growth, phagmites australis, in the area.

9 It's a typical reed that covers the
10 ground and allows only that particular species to
11 grow.

12 It was a wider channel there. It was
13 a flowing, but slow moving.

14 Q. You mentioned the word abayment; is that
15 correct?

16 A. Yes.

17 Q. Could you define that term, please?

18 A. Well, it's a bay, it's a three-sided
19 feature of water that -- like a thumb pushing into
20 the land, that thumb is an abayment.

21 That's the shape of it. I consider
22 bay -- the two terms synonymous.

23 Q. Moving on to the next segment, segment
24 GC-7. Can you describe your observations at this

1 location?

2 A. Well, on this location we were looking at a
3 mitigation site discussed with the Hesel Counsel.

4 That's why we got to this particular
5 segment.

6 There's a well out in the middle of
7 the crop field there, gas or oil well, I'm not sure
8 which.

9 And from that location we walked
10 across a crop field and walked to higher ground that
11 is above Martin Branch.

12 Generally --

13 MR. SMALL: I'm going to move to object, about
14 that statement about a mitigation site.

15 I don't think that adds anything to
16 this or it is part of what we were talking about
17 yesterday that we wanted to avoid.

18 JUDGE MORAN: Okay. The reference to the
19 mitigation site when the witness, Mr. Carlson,
20 referenced -- about Counsel witnessing the mitigation
21 site, Counsel; is that your objection?

22 MR. SMALL: Correct.

23 JUDGE MORAN: You should just relate what you
24 observe. You should just relate what you observed.

1 Don't relate other things, please,
2 Mr. Carlson. You have a penchant for talking about
3 other witnesses' testimony within your answer to
4 questions from Mr. Martin.

5 Just stick to what you observed.

6 THE WITNESS: All right.

7 Continuing, at this location we walked
8 across that farm ground. And generally west of I-37
9 the stream becomes much more ravine.

10 In other words, it's much deeper,
11 embedded and there's a lot higher ground around it.

12 And for that reason, it probably
13 maintains a wide corridor that you see on this
14 Exhibit A.

15 And from that higher ground, we were
16 able to view roughly about a 700 segment of the
17 stream with binoculars.

18 And it had a continuous band of water
19 from the upstream segment as far as I could see to
20 the downstream segment as far as I could see.

21 It had a meandering feature to it.

22 It's width was not much different from
23 where it was at GC-5. It was a forested, bottom
24 area, forested up to the higher ground where we were

1 at.

2 BY MR. MARTIN:

3 Q. Did you estimate the width of the channel
4 at this location?

5 A. Not accurately.

6 Q. Just in general you compared it to the
7 channel in GC-5. Did you estimate the width for the
8 channel at that location?

9 A. Well, I think it was similar to what it was
10 up in GC-5. At GC-5 the top width of the channel was
11 probably about 30 - 35 feet.

12 Q. Thank you. Anything else of significance
13 in GC-7?

14 A. No.

15 Q. Moving on to GC-8, can you describe your
16 observations at that location?

17 A. Okay. We moved up to this location to look
18 at the stream as it -- as it was affected by Highway
19 37.

20 And what we saw was there is a large
21 concrete box culvert here. And there are roadside
22 ditches on either side of Highway 37, going north up
23 a hill and going south up a hill.

24 In other words, the culvert is located

1 about at the bottom, the low point about at the
2 valley of this location, this upper part of Martin
3 Branch watershed.

4 There are also a dual set of roadside
5 ditches on either side of the road that is meeting
6 Highway 37 coming from the east.

7 It's an east-west road. It meets
8 right there in a T shape. That also has dual
9 roadside ditches on it. And that takes --

10 In other words, if you sat and looked
11 -- sat right at Highway 37 and looked north, you
12 would see a fairly significant hilltop.

13 If you looked south, you'd see a
14 hilltop, and if you looked east you'd see a hilltop.

15 And there are roadside ditches on all
16 three of those roads.

17 And water was flowing out of that box
18 culvert not at a very high rate, but flowing at a --
19 to a channel west of that point.

20 Q. And just describe the general land use in
21 this area marked GC-8.

22 A. Well, it's almost entirely agricultural.

23 Q. Okay, moving on to other observations. On
24 your third inspection, Mr. Carlson, did you observe

1 the site of the alleged violation on your third visit
2 to the site?

3 A. Yes, from Bill Heser's property on the east
4 and from the south.

5 Q. What, if any, observations did you have of
6 evidence of hydrology at the site of the alleged
7 violation?

8 A. Well, the one -- and, actually, I forgot to
9 mention this in this segment:

10 On the downstream end of the east-west
11 leg of the "L", we observed two distinct channels
12 relatively narrow, I'd say about a foot wide by no
13 more than a foot 6 inches to a foot deep that were
14 coming from the alleged violation.

15 The eastern most one was coming from
16 the alleged violation site and exiting the site just
17 west of where the east-west leg bends to the south.

18 And then further, about 100 feet west
19 of that, there was another channel where the channel
20 entered Martin Branch.

21 And as you looked out north into the
22 Heser farm field, there was another similar channel
23 cut that "Y"ed itself.

24 In other words, it was a single

1 segment initially and then it diverted into a "Y"
2 shape heading back north and east towards the alleged
3 violation site.

4 So those were the two new water
5 features we saw on-site.

6 Q. And those water features that you just
7 described, are you saying that they were located on
8 the farm field north of the east-west leg of the
9 "L"-shaped channel at the site of the violation?

10 A. The eastern most one was definitely within
11 the site. I could not tell on the western one, as it
12 moved north and east, whether or not it made it all
13 the way to the alleged violation site.

14 Q. And when you just referred to the site, you
15 referred to the site of the alleged violation?

16 A. That's correct.

17 Q. What do you think caused these channels to
18 occur at the site?

19 A. Well, I think it's likely that the Hesper
20 brothers dug these channels --

21 MR. SMALL: I'm going to object --

22 JUDGE MORAN: Sustained. Sustained.

23 BY MR. MARTIN:

24 Q. What do you think the effect is of the

1 trenches at this site?

2 A. They would allow water to leave the site.

3 Q. And what do you base that on?

4 A. Well, because they're essentially small
5 ditches that were dug and they lead to the Martin
6 Branch channel.

7 Q. And what effect do you think the drainage
8 of water would have on water quality in Martin
9 Branch?

10 A. Well, it makes it --

11 MR. SMALL: I'm going to object. There's been
12 no foundation. There's been no showing whatsoever
13 that there's been any testing or anything else.

14 It's just pure speculation.

15 JUDGE MORAN: I understand that.

16 But I'm going to leave that for part
17 of your cross-examination. That's the way you can
18 expose that.

19 I mean, he's an expert on this and he
20 can offer his opinion, and you can go about dealing
21 with that.

22 So that's overruled.

23 MR. MARTIN: Your Honor, I'll withdraw the
24 question.

1 JUDGE MORAN: There goes your
2 cross-examination.

3 Go ahead.

4 MR. MARTIN: Five minutes, your Honor?

5 JUDGE MORAN: Five-minute break, sure. We'll
6 go off the record.

7 (WHEREUPON, a short recess was
8 taken.)

9 JUDGE MORAN: Okay, back on. Go ahead,
10 Mr. Martin.

11 BY MR. MARTIN:

12 Q. Mr. Carlson, you just testified as to
13 existence of two channels in the area north of the
14 east-west leg of the "L" shaped channel.

15 I'm going to ask you to approach
16 Exhibit D, Mr. Carlson, with permission, and using a
17 gold Sharpie, trace the locations of these two
18 channels that you've just talked about.

19 A. All right, I marked on Exhibit D with gold
20 marker two linear features just west of the
21 downstream outlet for the altered channel.

22 The channel immediately west of the
23 downstream outlet is labeled channel one, and there
24 is an arrow that points at it and it's a linear

1 feature generally running north and south.

2 And then at approximately
3 three-quarters of an inch to the west of that channel
4 is an another channel that's labeled channel two with
5 an arrow pointing at it. And it is shaped more like
6 a "Y". And it is generally going from south to
7 north -- northeast.

8 Q. Okay, thank you.

9 Mr. Carlson, let's talk about EPA's
10 penalty calculations in this case.

11 You mentioned that as part of your
12 responsibilities at EPA as an enforcement officer
13 involved calculating some penalties; is that correct?

14 A. That's correct.

15 Q. Can you tell us approximately how many
16 civil penalties you have calculated under
17 Section 309(G) of the Clean Water Act?

18 A. Approximately forty-five.

19 Q. Did you work on the calculation and
20 recommend EPA management penalty with U.S. EPA's
21 Complaint in this matter?

22 A. Yes, I did.

23 Q. What penalty amount did EPA propose to
24 assess in this case?

1 A. \$120,000.

2 Q. And what factors did EPA apply in
3 calculating the penalty for Respondents in this case?

4 A. We looked at the statutory factors listed
5 in 309(G) of the Clean Water Act.

6 Q. Can you enumerate?

7 A. Yes. Generally, regarding the violation
8 itself -- or the alleged violation, we look at the
9 nature, the circumstances, the extent and gravity of
10 the alleged violation.

11 Regarding the violators, you look at
12 their ability to pay penalty, economic benefits if
13 they were getting any from the alleged violation, the
14 degree of culpability of the violators, and the prior
15 history of any such violations.

16 And there's sort of a catch-all
17 category and that's other matters as justice may
18 require.

19 Q. Okay, thank you. Let's discuss each of
20 these briefly.

21 What is your view of the nature of the
22 violation penalty factor in this case?

23 A. That two brothers, adult males in the
24 business of farming, directed the mechanical

1 clearing, leveling, essentially converting a five and
2 a half acre of forest area to crop land.

3 And in so doing discharged pollutants
4 in the form of dredge spoil, concrete, farm
5 fertilizer, lime, pot ash through the waters of the
6 United States on the site which includes 2.1 acres of
7 forested wetlands and about 1800 feet of Martin
8 Branch and its tributaries and channel scars within
9 that five and a half acre area.

10 They did all this without a permit
11 from Section 404 of the Clean Water Act.

12 In addition, the actual discharge of
13 pollutants resulted from the use of point sources
14 including a scraper, a couple of bulldozers, a paddle
15 wheel, and an offset disc.

16 That was the equipment used to clear,
17 level, and fill the site.

18 Q. Okay, thank you. And what in your view
19 were the circumstances of the violation in this case?

20 A. I break the circumstances into two bigger
21 pictures:

22 One, dealing with the score of the
23 violation with regard to the alleged violators.

24 And the second circumstance, the

1 Government's reaction to it.

2 And the circumstances are that the two
3 Hesper brothers beginning in the early 1990s began a
4 pattern and practice of converting forested wetland
5 wetlands --

6 MR. SMALL: Your Honor, I'm going to object at
7 this time because Number one, I think they're
8 confined to adjudication by law, and I don't hear
9 anything about that.

10 JUDGE MORAN: I sustain the objection.

11 THE WITNESS: Well, to continue, the
12 circumstances --

13 MR. SMALL: I'm going to object again. You've
14 got to have questions.

15 MR. MARTIN: I asked what in Mr. Carlson's view
16 were the circumstances regarding the violation
17 penalty, and he hasn't answered the question.

18 JUDGE MORAN: And you object if he strays off.

19 I'll let him continue the question on
20 the table now which he can answer is:

21 What circumstances did you consider in
22 determining that aspect of the penalty?

23 What were the circumstances of the
24 statutory criteria?

1 THE WITNESS: Is that the Hesel brothers
2 engaged in a farming business, began inquiring
3 regarding swamp buster provisions of the farm bill in
4 the early 1990s.

5 And ultimately in 1996, received a
6 Notice of Violation from the U.S. Army Corps of
7 Engineers regarding alleged violations at two sites
8 that were also the subject of the swamp buster.

9 MR. SMALL: I object again. We're getting into
10 adjudication --

11 JUDGE MORAN: Didn't we have testimony,
12 Mr. Small, that was related in this proceeding?

13 MR. SMALL: They had a letter that was almost
14 seventeen years old that they put into evidence; I
15 recall that on swamp buster.

16 But he's talking about unrelated,
17 other tracks, and he's talking about potential
18 violations.

19 I don't think they can do that. I
20 think they have to confine to adjudication.

21 JUDGE MORAN: Yes, and I'll let you deal with
22 that on cross-examination.

23 But the way I'm interpreting his
24 testimony is -- well, first of all, these terms

1 nature, circumstances, they're sort of more physical.

2 It's not like one can tell exactly how
3 nature is different in circumstances.

4 I don't think the statutes goes into
5 explaining the nuances between the different terms.

6 But apart from that, what this witness
7 is attempting to do is to show that these people had
8 some knowledge of the Clean Water Act provisions.

9 And apart from the adjudication,
10 whether there was a jurisdiction or not, the fact
11 that they had some contact with other Governmental
12 entities related to this is of some relevance.

13 It says something about the
14 circumstances. As opposed to someone, let's say me
15 for example, who's never done any farming other than
16 the backyard, if you call that farming, one little
17 tomato plant.

18 You know, I didn't know from Adam
19 about -- and so I think there's some relevance to
20 this.

21 All right. So that's my ruling.

22 MR. MARTIN: Thank you, your Honor.

23 JUDGE MORAN: Proceed with your answer,
24 Mr. Carlson.

1 THE WITNESS: Well, to continue, the Corps of
2 Engineers had notified them in 1966 and that they had
3 received notification earlier by the farm people in
4 1991, when Robert Hesper in a letter where he was
5 specifically notified that his farm bill labor work
6 was not necessarily exempt.

7 BY MR. MARTIN:

8 Q. You mentioned 1966, did you mean 1996?

9 A. I meant 1996, the day that the Corps of
10 Engineers sent the notice, the violation letter to
11 Andrew and Robert Hesper.

12 JUDGE MORAN: Let me just stop this.

13 To me -- isn't the history of
14 violations one of separate criteria?

15 Again, what I was trying to express to
16 you was it shows some awareness of environmental
17 regulations. That's all.

18 Go ahead, Mr. Martin. Try and ask
19 more specific questions related to the circumstances.

20 That way -- then Mr. Carlson won't go
21 off on a wrong narrative.

22 MR. MARTIN: Sure.

23 BY MR. MARTIN:

24 Q. Mr. Carlson, do you view this penalty

1 factors circumstances in the violation in the context
2 of historical loses of wetlands?

3 A. I wouldn't consider that. I would consider
4 that somewhere else in the penalty factors.

5 Q. What other circumstances did you consider
6 in this case?

7 JUDGE MORAN: If any?

8 MR. MARTIN: If any.

9 THE WITNESS: That the Hesper brothers, again,
10 in the early '90s were astute enough to seek out
11 assistance and assistance of the Farm Bill subsidies.

12 They went to a seminar with the Corps
13 of Engineers and the Fish and Wildlife Service and
14 the U.S.D.A. specifically on streams and ditches and
15 how they're regulated in the state.

16 Then the circumstances more direct or
17 to the side are that the Hesper brothers contended
18 that three factors led them to do what they did at
19 the site.

20 Those were that at Highway 37 was
21 contributing excessive amounts of water and that was
22 flooding out the site and eroding it.

23 Their uncle, Bill Hesper, through a
24 U.S.D.A. Soil and Water Conservation District

1 Project, the critical area of planting project.

2 That that had straightened the channel
3 and that had caused excessive sediment and water to
4 cause flooding and erosion on their site.

5 And then a logging operation prior to
6 their ownership had essentially clear-cut the site
7 and left logging debris in the channel.

8 JUDGE MORAN: So you consider defenses raised
9 by the Hesers to the EPA and the Corps of Engineers
10 as part of the circumstances?

11 THE WITNESS: I do, and our reaction to that.

12 JUDGE MORAN: All right.

13 THE WITNESS: Okay, and our investigation of
14 these three factors, we found that Highway 37 and
15 that culvert had been there for a long, long time.

16 And that is essentially the normal
17 circumstance for Martin Branch now. It gets runoff
18 from a highway at a accelerated pace than it would if
19 Highway 37 was not there.

20 Similarly, on the Uncle Bill Hesper's
21 critical area planting project, what the Government
22 found was completely contrary to what the Hesper
23 brothers believe has happened.

24 Rather than contributing water and

1 sediment to this site, this is the exact opposite.

2 Practices on his farm operation are
3 stopping sediment, slowing water from the site, and
4 essentially assisting his nephews in their farming
5 operation.

6 It's 180 degrees different
7 circumstance than what we heard from the Hesper
8 brothers.

9 The third factor about the site being
10 clear cut, our review of our witness and more
11 objectively aerial photography led us to believe that
12 that site was not clear-cut prior to the Hesper
13 brother owning that site.

14 And if there were tree tops in the
15 channel that were causing them problems, a simple
16 solution is to remove the tree tops from the channel.

17 That's what I generally considered
18 under circumstances.

19 BY MR. MARTIN:

20 Q. Okay. Thank you. Moving to the extent
21 penalty factor.

22 What is your view of the extent of the
23 violation in this case?

24 A. The extent of the violation refers to the

1 amount of on-site impact to the waters of the United
2 States.

3 And as the record reflects, we believe
4 there were 2.1 acres of forested wetlands on that
5 site.

6 In addition to the main stem of Martin
7 Branch that's approximately 875 feet in length as a
8 natural meandering stream, and that there were
9 associated tributaries, channel scars, linear
10 depressions in the surrounding the flood plane of
11 Martin Branch that added another thousand feet of
12 impact to the waters of the United States.

13 These areas were completely
14 eliminated.

15 And the main stem of Martin Branch was
16 moved up against the east and south property lines of
17 the site.

18 And the end result was the expanded
19 farming operation over this entire area for the Hesper
20 brother's benefit.

21 The extent of the violation is also
22 characterized by the length of time that this
23 violation has continued.

24 And the work began in 1999. And the

1 impact to the site continues to this day.

2 I think that's the extent of my
3 extent.

4 Q. Thank you.

5 The next factor is gravity.

6 What are some of the relevant
7 considerations regarding the gravity factor in this
8 case?

9 A. Well, gravity goes to the actual impact of
10 the violation on the resource that we're seeking to
11 protect, generally waters of the U.S.

12 In this case, it's actually Martin
13 Branch and adjacent wetlands.

14 Under gravity, I put that in context,
15 in a big picture context, and then I narrowed it to
16 the site.

17 And the big picture is that Illinois
18 has already lost 85 percent --

19 MR. SMALL: Objection; this is the very thing
20 we started talking about trying to make this case
21 into a very big broad case rather than narrow it--

22 JUDGE MORAN: Sustained.

23 THE WITNESS: The impact at the site eliminated
24 2.1 acres of wetlands.

1 And these wetlands provide generally
2 three main functional values that society values that
3 have now been either completely eliminated or
4 thoroughly denigrated.

5 The Wildlife service says water
6 generally filters through ceding water.

7 That filtering capacity has been very
8 much denigrated by the elimination and destruction of
9 the environment and the filling and leveling of the
10 site and the movement of the stream to a two-part
11 channel, straightened channel.

12 Essentially, we've taken what we
13 consider a pollutant sink, and now the site has
14 become a pollutant source.

15 One other main quality --

16 BY MR. MARTIN:

17 Q. Before you proceed, how do you define the
18 term pollutant sink?

19 A. Pollutant sink is where the wetland acts as
20 a filter and sediment and nutrients are traveling
21 down and transformed.

22 So the pollutant can be sunk there,
23 left there and transformed into vegetation growth.

24 The plants would use them to transform

1 those nutrients from pollutant source to fertilizer.

2 The other major function -- and I
3 usually go over the big three.

4 The second one is flood storage.

5 We're in very broad valley here in the
6 upper parts of the Martin Branch Watershed. It's
7 largely an agricultural valley.

8 So there's a lot of potential
9 pollutant sources in it that can reach Martin Branch.

10 And Martin Branch is a stream that
11 floods in that area.

12 And stream side wetlands would capture
13 that flood water.

14 It would also capture ground runoff
15 from higher areas above it, in other words, water
16 from the stream and from surface runoff, and capture
17 that water in these low-lying depressions that are
18 our forested wetlands.

19 And there they assist in trapping and
20 transforming pollutants, but also storing flood
21 waters.

22 So that does not immediately or at a
23 much greater rate get to the Martin Branch.

24 And in this particular case, flood

1 storage, again, in comparison to the circumstances
2 that we heard from the Hesper brothers, what the Hesper
3 brothers have essentially done is taken the water
4 that would aggregate or accumulate on their site,
5 they have funneled it around their site through this
6 channel and are essentially dumping this water on to
7 everyone downstream.

8 They're doing to downstream landowners
9 exactly what they're accused the upstream landowners
10 of doing.

11 The third major function of wetland
12 areas is for habitat. Martin Branch has a fairly
13 continuous riparian corridor all the way to its
14 mouth, except for obvious road crossings, a well
15 defined riparian corridor that is essentially
16 undeveloped.

17 What the Hesper brothers have done here
18 is eliminated that corridor and replaced it with
19 income producing crop.

20 So for the gravity of the violation,
21 that's what was considered.

22 Q. Let's move on to history of violation and
23 penalty factor. What, in your view is the
24 Respondents' prior history of violation?

1 JUDGE MORAN: And before he answers that
2 question, I just want to point out for the benefit of
3 Counsel for the Respondent that when you object, if
4 you going to object, for instance, on the last one,
5 this witness was saying he was considering the whole
6 state of Illinois and so forth.

7 One approach could be to point that
8 out that that was how this average person arrived at
9 the recommended penalty, and from there argue that
10 was an improper consideration.

11 By the same token, if he's testifying
12 about history things that are -- if he's saying this
13 is how I did it, then that's how he did it.

14 And then from there, one could say
15 yes, but that was incorrect. And therefore, that
16 should not have been -- I'm speaking hypothetically,
17 but I think you get my point.

18 MR. SMALL: I do, your Honor. Thank you.

19 JUDGE MORAN: Okay, you were asking about what
20 this witness, Mr. Carlson, what he factored into in
21 terms of history in arriving at the penalty he
22 recommended to the EPA, right?

23 MR. MARTIN: Right. And my specific question
24 in looking at the context of the violation:

1 Do you look at the historical losses
2 of wetlands in Illinois?

3 And I believe his answer was yes, and
4 that did play a part in his penalty.

5 JUDGE MORAN: Well, wasn't the question now
6 you're going back and asking -- you were asking about
7 what he considered for the history of the violations.

8 MR. MARTIN: I thought you were asking me about
9 the history?

10 JUDGE MORAN: No, I was just making an
11 observation about the nature of his testimony and
12 when you're in areas of what a person considered in
13 terms of recommending a penalty, then that's what
14 they considered. Good, bad or wrong or right.

15 Okay, so proceed with your question
16 about what this Witness, Mr. Carlson, considered when
17 he evaluated the Hesper's history as he sees it of
18 violations.

19 THE WITNESS: While there were no adjudicated
20 violations, we considered that in the past the Hesper
21 had received a Notice of Violation from the U.S. Army
22 Corps of Engineers in 1996.

23 MR. MARTIN: Thank you.

24 BY MR. MARTIN:

1 Q. The next factor is culpability.

2 What considerations, if any, in your
3 view bear on the Heser brothers' culpability in this
4 matter?

5 A. Well, culpability overlaps quite a bit as I
6 represent the penalty.

7 And the culpability factors are that
8 the Heser brothers were astute enough to seek out
9 advice on regulations be they typical regulations
10 from a regulatory agency like the Corps of Engineers
11 or the U.S. EPA, and also for subsidy-driven agencies
12 like the U.S. Department of Agriculture and the Soil
13 and Water Conservation District.

14 They did that early on in the life of
15 this case, preceding this case back in 1990 - 91 that
16 began.

17 And that they were informed by a
18 different Governmental agency, but, again, an agency
19 we interact with quite a bit, since we both cover
20 waters of the United States and particularly
21 wetlands, that they were directly informed that their
22 work in converting wetlands to crop land was not
23 exempt from the Clean Water Act and that they should
24 contact the Corps of Engineers.

1 Subsequent to that, they continued
2 with that practice.

3 And in 1996 the Corps of Engineers put
4 them on official notice that that converting of
5 wetlands to crop land needed a permit. And that was
6 a specific notice in 1996.

7 Q. Mr. Carlson, what is the significance of
8 the Respondents' familiarity with the law's
9 requirements?

10 A. Well, the significance is that that makes
11 them more culpable.

12 That they should have known or should
13 have at least known before they began doing their
14 most recent work in converting wetlands to crop land.

15 Q. And how, if at all, does your concept of
16 deterrence play into your analysis and culpability?

17 A. Well, a major component of an enforcement
18 program is to deter this alleged illegal conduct both
19 specifically to the alleged violators who have a high
20 degree of culpability in our view.

21 And generally -- more generally in the
22 community which in this case is the agricultural
23 community.

24 It has a tremendous impact on water in

1 this country largely because they own a lot of the
2 land.

3 So the more general regulated
4 community needs to know that there are consequences
5 to illegal conduct, and that they need to take that
6 into consideration when they're contemplating work
7 that might affect waters of the United States.

8 Q. In your view, what message will be sent to
9 the regulated communities if the alleged unauthorized
10 activity in this case is not penalized?

11 MR. SMALL: Your Honor, here we go again: This
12 is deterrence for everybody else out there. We're
13 not talking about the people that are involved in
14 this penalty case.

15 JUDGE MORAN: Unfortunately though, the case
16 law is that one of the factors EPA can consider in a
17 hope that the violators (inaudible) in hopes of
18 formulating a penalty deterrence is broader than just
19 the particular individuals. The reason it is to
20 consider deterrence in the community because word is
21 exchanged, word of mouth travels.

22 So deterrence generally is broader
23 than the individual Respondents in the case.

24 So I am going to allow that question

1 to be answered.

2 MR. MARTIN: Thank you, your Honor.

3 Would you like for me to ask again?

4 THE WITNESS: Please do.

5 BY MR. MARTIN:

6 Q. In your view what message will be sent to
7 the regulated communities if the alleged unauthorized
8 activities in this case are not penalized?

9 A. Well, the message would be there's no
10 consequences. It's still illegal under the Clean
11 Water Act.

12 Q. And what effect would this message have?

13 A. Well, that may encourage people violating
14 the law.

15 Q. Okay. Thank you. Moving on to ability to
16 pay.

17 Has EPA considered the Respondents'
18 ability to pay in this case?

19 A. Yes, they have.

20 Q. And who has addressed the issue?

21 A. Mark Ewen of Industrial Economics.

22 Q. Okay, and is Mr. Ewen listed as a witness
23 for this purpose in this proceeding?

24 A. He is.

1 Q. Okay, let's move on to economic benefits
2 stemming from the violation.

3 First of all, what is the rationale
4 behind recouping alleged economic benefit from the
5 alleged violation?

6 A. Well, the general concept of a level
7 playing field is that people in a regulated
8 community, people, individuals and businesses are
9 treated similarly.

10 Part of that means no one get an
11 unfair advantage by avoiding costs, in this case a
12 regulatory cost for obtaining a permit.

13 And so they should not benefit from
14 their illegal activities if caught in some illegal
15 activity whereas a similarly-situated person who goes
16 through the permit process entails costs before they
17 can pursue similar.

18 Q. In general, what costs or income are
19 considered in analysis of economic benefit stemming
20 from the violation?

21 A. Well, on the income end of things, you
22 know, the effect of this project was to expand
23 cropping into an additional five and a half acres of
24 a 60-acre parcel.

1 And the alleged violation work allowed
2 them to plant crops in not only in the acres of
3 wetlands and Martin Branch and its channel scars and
4 tributaries were, but it also allowed them to reach
5 the upper areas that otherwise they would not be able
6 to reach.

7 So you could look at the two acres of
8 wetlands and another three tenths of an acre if you
9 look at the area of Martin Branch, the 2.4 acres in
10 terms of total area.

11 In addition to that, you could look at
12 the additional acres of upland that would be
13 acceptable by clearing out the wetlands and filling
14 the stream in.

15 And the result of that is they're
16 growing crops of -- they're growing wheat I've seen
17 and they grow soybeans.

18 And they appear to have cropped this
19 immediately after the work was done through the
20 winter of 1999 to 2000 they had wheat.

21 And then in the aerial crop sites I
22 have seen and visits that I've been at.

23 And I've seen it cropped in soybeans
24 in my two summer visits.

1 And this past March of '07, it was in
2 winter wheat.

3 So there's a business reason to do
4 that, and the farmers make money from growing crops
5 and selling them.

6 Q. So you're saying the site of the alleged
7 violation was cropped both in summer and winter?

8 A. Well, it has been. I don't know about
9 every winter.

10 Q. And you also testified that with regard to
11 the site of the alleged unauthorized activity in
12 terms of economic benefit, do you feel that a
13 five-acre site is more appropriate to look at?

14 A. About a five and a half acre block of woods
15 was cleared. So my point is that you could look
16 further than just the acres of wetlands that were
17 converted because that conversion made the upland
18 accessible.

19 So but for that clearing, it's
20 unlikely that those acres would have been cropped.

21 Q. Okay, thank you.

22 Did you determine an economic benefit
23 figure in this case?

24 A. I did.

1 Q. And what was that figure?

2 A. I think it was a little over \$3,000.

3 Q. And what was this figure based on?

4 A. This was based on the speed memo from the
5 Corps of Engineers' file which gave a net return on
6 an acre of cropland in Illinois at I believe \$130 an
7 acre.

8 And that figure was used to apply to
9 across, in this instance conservatively over the
10 acres of wetlands and stream.

11 And you simply multiply the number of
12 years of cropping by the number of acres cropped with
13 that \$130 return per acre and that came to I believe
14 a little over \$3,000.

15 Q. So in other words, in that calculation you
16 just referred to, you used the two acre figure
17 instead of the just over five-acre figure?

18 A. That's correct.

19 Q. Moving on to the final factor Matters as
20 Justice may Require.

21 In determining the proposed penalty,
22 how did you consider this factor?

23 A. Well, under that factor I think there's
24 maybe three points:

1 On the small end compared to the other
2 two I'll mention is they refused us site access, most
3 recently in March.

4 Earlier, the record reflected my
5 testimony that I thought the answers regarding the
6 initial circumstances we heard from the Hesper
7 brothers regarding the clearing of the site were at
8 best misleading in the 308 response.

9 And the third factor would be that the
10 violations still continue today.

11 So that impacts the gravity of the
12 violation every day that continues.

13 Q. Okay, thank you, Mr. Carlson.

14 Did EPA take into account all the
15 factors of Section 309 of the Clean Water Act in
16 imposing a penalty against the Hesper Brother in this
17 case?

18 A. Yes, it did.

19 Q. And in your opinion, based on your
20 experience as an Wetlands Regulatory Officer is the
21 proposed penalty in this case a fair and reasonable
22 amount given the application of these factors?

23 A. I believe, it is.

24 Q. Okay, thank you, Mr. Carlson.

1 At this time I ask you to turn to
2 Complainant's Exhibit Number 5 in your binder?

3 A. All right (so complied with request.)

4 Q. Do you recognize this document?

5 A. I do.

6 Q. What is it?

7 A. This is a letter, a letter of notice to the
8 state of Illinois the Environmental Protection Agency
9 regarding the penalty, proposed penalty in this
10 matter.

11 This is a statutory requirement of
12 309(G).

13 Q. And did you help prepare this document?

14 A. I did.

15 Q. And why was this document issued?

16 A. It's a statutory requirement of the Clean
17 Water Act to notify the State of Illinois of proposed
18 penalty action.

19 MR. MARTIN: Your Honor, I believe the Parties
20 have stipulated.

21 JUDGE MORAN: Your voice trails off again.
22 This is one of the exhibits that I have noted is
23 stipulated.

24 MR. NORTHRUP: That's correct.

1 JUDGE MORAN: So Exhibit 5 has already been
2 admitted.

3 BY MR. MARTIN:

4 Q. Was this document issued?

5 A. Yes.

6 Q. Turn to Complainant's Exhibit Number 6?

7 A. Okay.

8 Q. Do you recognize this document?

9 A. I do.

10 Q. What is it?

11 A. This is a public notice notifying the
12 public that the EPA intends to or has issued -- is
13 seeking penalties under 309(G) for the alleged
14 violation.

15 Q. And were you personally involved in
16 preparing this document?

17 A. I was.

18 Q. And was it issued?

19 A. It was.

20 Q. And why was it issued?

21 A. Another statutory requirement of the Clean
22 Water Act for issuing administrative penalties.

23 Q. Then I'll ask you to turn to Complainant's
24 Exhibit Number 24.

1 JUDGE MORAN: And 24 was also one of the
2 Exhibits that was stipulated for admission?

3 MR. MARTIN: As was Exhibit Number 6.

4 THE WITNESS: All right, I'm there.

5 BY MR. MARTIN:

6 Q. Do you recognize this document?

7 A. By this document are you referring to --
8 there's another document here, are you referring to
9 just the top one?

10 Q. Yes, Mr. Carlson.

11 A. Yes, I recognize this letter.

12 Q. And what is it?

13 A. This is what we call our -- this is a
14 notice to the alleged violators that EPA intends to
15 file suit against them.

16 It gives them an opportunity to get
17 back to them with reasons why we should not and in
18 particular emphasizes the ability to pay factor, and
19 asks for signed tax returns for at least three years
20 with relevant schedules, forms, and balance sheets.

21 Q. And who has sent these letters?

22 A. Andrew and Robert Hesser were sent the
23 letters.

24 Q. Were you personally involved in preparing

1 this document for issuance?

2 A. I was.

3 Q. And did the EPA receive a response to this
4 letter?

5 A. No, they didn't.

6 Q. Turn your attention to Complainant's
7 Exhibit Number 25.

8 A. Okay.

9 MR. MARTIN: Again, this is another document
10 that the Parties have stipulated to.

11 BY MR. MARTIN:

12 Q. Do you recognize this exhibit?

13 A. Yes, I do.

14 Q. What is it?

15 A. This is a tolling agreement between the
16 Hesper brothers, Hesper Farms and the U.S. EPA.

17 Q. And were you personally involved in
18 preparing this document?

19 A. I provided the generic file for it. But
20 the rest was filled out by others.

21 Q. And was this document signed by the
22 Respondent?

23 A. Yes, it was.

24 Q. And was it signed by the U.S. EPA?

1 A. It was, yes.

2 Q. What is your understanding of why this
3 document was executed?

4 A. This was executed, it told the Statute of
5 Limitations and allowed possibly us and the Hesper
6 brothers attempt to resolve the 309(A) Order.

7 Q. I direct your attention to paragraph
8 three on this tolling agreement on page 415?

9 A. I see that.

10 Q. Do you see the start and end date for this
11 tolling agreement?

12 A. I do.

13 Q. Can you tell the Court what dates these
14 are?

15 A. The start date commences on January 10,
16 2005 and ends on November 1, 2005 inclusive.

17 Q. Okay, moving to Complainant's Exhibit
18 Number 26.

19 Do you recognize the document in this
20 Exhibit?

21 A. I do.

22 Q. And what is it?

23 A. It's another tolling agreement between
24 Hesper brothers, Hesper Farms and U.S. EPA.

1 Q. And were you involved in the preparation of
2 this document?

3 A. I don't believe so.

4 Q. Reviewing the document, is it signed by
5 Respondents or by a representatives of the
6 Respondents?

7 A. Signed by a representative of the
8 Respondents.

9 Q. And was it signed by the U.S. EPA?

10 A. It is.

11 Q. Now I direct your attention to paragraph
12 three of this document, on page 419?

13 A. Okay.

14 Q. What is the start and end date of this
15 tolling agreement?

16 A. It commences on November 1, 2005 and ends
17 on May 1, 2006.

18 Q. Mr. Carlson, did the U.S. EPA issue an
19 administrative penalty Order in this case?

20 A. Yes, they did.

21 Q. Do you recall the date the administrative
22 penalty order was issued?

23 A. I do.

24 Q. What is that date?

1 A. May 1, 2006.

2 Q. Thank you.

3 MR. MARTIN: Your Honor, can we take a
4 ten-minute break a this time?

5 JUDGE MORAN: I'd rather you wrap this up.

6 MR. MARTIN: I'm taking a break to make sure
7 that I can end testimony at this time. How about
8 five minutes?

9 JUDGE MORAN: All right, let's take five
10 minutes.

11 We'll go off the record at this time.

12 (WHEREUPON, a short recess was
13 taken.)

14 JUDGE MORAN: Back on the record.

15 Okay, Mr. Martin, does that conclude
16 your direct examination of Mr. Carlson?

17 MR. MARTIN: Yes, it does.

18 JUDGE MORAN: Okay.

19 Counsel for Respondent, are you ready
20 to proceed with your cross-examination?

21 MR. SMALL: Yes, your Honor.

22 JUDGE MORAN: Go ahead, Mr. Small.

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CROSS-EXAMINATION

BY MR. SMALL:

Q. Mr. Carlson, if I ask you a question you don't understand, please let me know, and I'll try and clarify it. That's what I'd like to do here with a variety of issues I'd like to ask you about.

First, referring to Exhibit Number 25, and all of these exhibits that I'm referring to are the Plaintiff's Exhibits.

A. Okay, I'm in.

Q. I believe your testimony was that this was a tolling agreement, and it was tolling a Statute of Limitations from January 10 of '05 to November 1 of '05; is that correct?

A. That's correct.

Q. And if you know, can you tell me why you would need a tolling agreement if it was a continuing violation case?

MR. MARTIN: Your Honor, that calls for a legal conclusion. We're going to argue these in briefs.

JUDGE MORAN: Yes, but I'm overruling your objection.

If you noticed, he said if you know.

And I'm going to allow him to say yes,

1 I know or no, I don't know.

2 THE WITNESS: Yes, it protects the Agency's
3 option to seek either a judicial or an Administrative
4 Order while the 309(A) is being dealt with.

5 BY MR. SMALL:

6 Q. So you're indicating that a Statute of
7 Limitations period is running at that time; is that
8 correct?

9 A. It could be running.

10 Q. In this case, do you know if it was
11 running?

12 MR. MARTIN: Asked and answered, your Honor.

13 JUDGE MORAN: Overruled.

14 This is cross-examination.

15 (WHEREUPON, the requested
16 portion of the record was read
17 back by the Reporter.)

18 THE WITNESS: Could you ask me again?

19 MR. SMALL: Would you please read that back.

20 (WHEREUPON, the requested
21 portion of the record was read
22 back by the Reporter.)

23 THE WITNESS: It could be.

24 MR. NORTHRUP: Okay.

1 BY MR. SMALL:

2 Q. And do you know in this particular case if
3 a Statute of Limitations was running at the time they
4 executed Exhibit Number 25?

5 A. No, I don't with definite.

6 Q. But it wouldn't make any sense to execute a
7 tolling agreement if the Statute of Limitations was
8 not applicable?

9 A. That depends on the factors of the
10 situation and the law of the land and the circuit
11 you're in.

12 Q. Okay, I'm going to ask you to refer to
13 Exhibit Number 26?

14 A. All right.

15 Q. And what is that document?

16 A. That is also the second tolling agreement
17 for this case.

18 Q. And I think your testimony was that that
19 told the Statute of Limitations from November 1st of
20 '05 to May 1st of '06; is that correct?

21 A. Well, I would add the word inclusive, but
22 other than that, yes, that's correct.

23 Q. Okay. And this is the second time that you
24 required the Respondents to execute a tolling

1 agreement; is that correct?

2 A. No, that's not correct.

3 Q. Is this the second time that the
4 Respondents signed a tolling agreement in this case?

5 A. It is.

6 Q. And again, can you tell me any reason why
7 you would sign a tolling agreement unless the Statute
8 of Limitations was running?

9 A. Well, I earlier testified that the Agency
10 is protecting it's options.

11 Q. Mr. Carlson, your first visit to the site
12 was September 19, 2003; is that correct?

13 A. That's correct.

14 Q. And when you came on that site, the
15 property had been previously logged, correct?

16 A. I was told it was logged and I did not find
17 support for that.

18 Q. Did you see woods present there on
19 September 19, 2003?

20 A. Not on the site of the alleged violation,
21 no.

22 Q. Okay. So, if your prior testimony was
23 you're looking at what had been done to these woods,
24 the only thing that you know is that on September 19,

1 2003, there weren't any woods there; is that correct?

2 A. No, that's not correct.

3 Q. Tell me what's not correct about the fact
4 that -- I thought you just testified there weren't
5 any woods there?

6 A. I know a lot more about the site than when
7 I was there on September 19th.

8 Q. I'm asking about your personal knowledge:
9 Did you or did you not see any woods
10 on the site on September 19, 2003?

11 A. No, I did not.

12 Q. Would you consider that site disturbed?

13 A. I would.

14 Q. Did you hear the testimony of Danny Hesper
15 in the first portion of this trial?

16 A. I believe I heard most of his testimony.

17 Q. And did you here Danny Hesper testify that
18 the woods were removed prior to Bobby and Andy Hesper
19 purchasing that property?

20 A. No, I did not.

21 Q. Did you here testimony of Bill Hesper?

22 A. I believe I heard most of Bill Hesper's
23 testimony.

24 Q. Did you hear Bill Hesper's testimony that

1 the woods had been removed prior to the purchase by
2 Bobby and Andy Hesper?

3 A. No, I do not recall that.

4 Q. Did you ever ask any of these -- Mr. Bill
5 Hesper or Danny Hesper, did you ask either one when
6 they had seen the woods removed?

7 MR. MARTIN: Your Honor, I'm going to object.
8 I think he's mischaracterizing the previous testimony
9 of both.

10 JUDGE MORAN: Based on the question I have in
11 front of me right now, I'm overruling the objection
12 to this question.

13 THE WITNESS: Could you repeat that question,
14 please?

15 MR. SMALL: Can you read it back?

16 (WHEREUPON, the requested
17 portion of the record was read
18 back by the Reporter.)

19 THE WITNESS: Yes.

20 BY MR. SMALL:

21 Q. You did ask them?

22 A. Yes.

23 Q. And was their answer to you that the woods
24 had been removed prior to the purchase by Bobby and

1 Andy Hesel?

2 A. No.

3 Q. Now, I understand you indicate that one of
4 your specialities is being a air photo interpretation
5 person?

6 A. I would characterize that as an experienced
7 practitioner of that, that line of work.

8 Q. Okay. And that experience came from
9 attending two courses that totaled one week in
10 length; is that correct?

11 A. That's not correct.

12 Q. One of your previous statements several
13 weeks was:

14 One of the first things that you did
15 when you went to the site was to look for
16 jurisdiction; is that correct?

17 A. Jurisdiction is an elemental part of a
18 enforcement investigation, so I would have been
19 searching for jurisdictional elements.

20 Q. And as part of looking for that
21 jurisdictional requirement, were you making
22 assumption that Martin Branch was a navigable stream?

23 A. No, I was not.

24 Q. Were you taking into account the Rapanos

1 Supreme Court opinion at that time?

2 A. What time are you referring to?

3 Q. I'm referring -- excuse me, let me --

4 MR. SMALL: I'm going to strike that, your

5 Honor.

6 JUDGE MORAN: Okay.

7 BY MR. SMALL:

8 Q. Are you familiar with the Rapanos Supreme

9 Court opinion?

10 A. I pronounce Rapanos and yes, I am.

11 Q. And based upon that opinion, has that

12 changed the way you look for jurisdiction?

13 MR. MARTIN: Your Honor, I think this calls for

14 a legal conclusion. He's referring to case law.

15 JUDGE MORAN: I think that that is an improper

16 question as posed.

17 So I'm sustaining that objection.

18 BY MR. SMALL:

19 Q. Now, Mr. Carlson, could you once again tell

20 me what is a seasonal wetland?

21 A. That is a wetland that is seasonally wet.

22 So, generally speaking, a seasonal wet

23 time is spring, later parts of the winter season, and

24 earlier parts of spring.

1 Q. And how is that distinguished from an
2 isolated seasonal wetland?

3 A. Seasonality wouldn't change. That term
4 would modify isolated or other than isolated
5 wetlands.

6 Q. And the reason I'm asking that is you
7 mentioned in your previous testimony that you believe
8 the wetlands that were on the Heser property were
9 isolated seasonal wetlands.

10 Does that mean that they come and go?

11 A. That's not my previous testimony, so I
12 don't agree with the premise of your question.

13 Q. Well, Mr. Carlson, unless I have my notes
14 wrong, it seems to me that that was your testimony.
15 Are you changing your testimony?

16 A. I don't know what testimony you're
17 referring to specifically, sir.

18 JUDGE MORAN: Why don't you ask him, Mr. Small,
19 for instance, be more specific: Did you describe
20 this area as a seasonal isolated wetland, and then he
21 can answer yes or no.

22 MR. SMALL: Okay.

23 BY MR. SMALL:

24 Q. Mr. Carlson, did you describe the wetlands

1 on the Hesper property as being seasonal wetlands?

2 A. I did, yes.

3 Q. Okay. Describe for me what a seasonal
4 wetland is?

5 A. I answered that question three or four
6 sentences ago.

7 JUDGE MORAN: Don't argue with Mr. Small. Just
8 answer the question. You're not the Counsel for EPA,
9 Mr. Carlson, please.

10 If Counsel feels there's a need for an
11 objection, he'll ask for it.

12 You just answer the questions.

13 THE WITNESS: The seasonal nature of the
14 wetlands is that it's wet seasonally. And in this
15 part of the world seasonally wet would be late winter
16 into spring for the most part.

17 BY MR. SMALL:

18 Q. So for most of the year these wetlands are
19 not wet; is that correct?

20 A. That, I don't know.

21 Q. When you say isolated seasonal wetlands,
22 what does that mean to you?

23 A. An isolated seasonal wetland -- well, an
24 isolated wetland is a wetland that does not have a

1 distinct surface connection to a receding body of
2 water that would continue on through to whole change
3 of waters downstream from a service connection or an
4 isolated wetland would be -- it could be connected
5 through groundwater.

6 Where the law is on isolated wetlands,
7 I'm not entirely clear past that.

8 Q. Now, you heard Ward Lenz's testimony, did
9 you not?

10 A. I believe I heard most of Ward's testimony,
11 that's correct.

12 Q. And as a matter of fact, you used his
13 probes on the Hesper property when you charted all
14 these holes that had been -- probes that had been
15 made on the Hesper property, correct?

16 A. I used Mr. Ward's soil probe data, that's
17 right.

18 Q. And Mr. Ward had taken these probes over
19 three years before you even appeared on the real
20 estate; is that correct?

21 A. That's correct.

22 Q. And did you re-check Mr. Lenz's probes,
23 those locations, did you re-probe those?

24 A. No, I did not.

1 Q. Why didn't you re-probe them?

2 A. Because I have confidence in Mr. Lenz as a
3 formal soil scientist and experienced professional,
4 enough to rely on his work.

5 Q. As a matter of fact, if they're isolated
6 seasonal wetlands, you could tell that things changed
7 from the time of the initial probe by Mr. Lenz to the
8 time that you had began your first site visit,
9 correct?

10 A. You're putting in the term I -- that I said
11 isolated wetlands --

12 JUDGE MORAN: Excuse me --

13 THE WITNESS: -- (continuing) and I don't know
14 the premise of that.

15 JUDGE MORAN: Excuse me. The question was not
16 that. The question was if they are isolated seasonal
17 wetlands. That doesn't mean you have to agree they
18 are.

19 The question was simply if they are
20 isolated seasonal wetlands.

21 THE WITNESS: I'm sorry.

22 JUDGE MORAN: This question is not implying
23 that you are adopting that term.

24 There's a question being asked.

1 Please repeat the question, Miss Court
2 Reporter, that Mr. Small last asked.

3 (WHEREUPON, the requested
4 portion of the record was read
5 back by the Reporter.)

6 THE WITNESS: I'm sorry, read that to me again.

7 (WHEREUPON, the requested
8 portion of the record was read
9 back by the Reporter.)

10 THE WITNESS: No, I don't believe -- if they
11 were seasonal isolated wetlands what effect that
12 would have when Ward was there and when I was there.

13 BY MR. SMALL:

14 Q. So your testimony is that time makes no
15 difference, correct?

16 A. No, that's not correct.

17 Q. So is your testimony that three years and
18 two months makes no difference, the time from when
19 Mr. Lenz had taken his probes to the time that you
20 first appeared on-site, that that period of time
21 would not make any difference in an isolated seasonal
22 wetland designation; is that correct?

23 A. No, time can make a difference.

24 Q. Okay. Now, you indicated I believe also in

1 your testimony that the site was atypical; is that
2 right?

3 A. That's correct.

4 Q. And when you say atypical, you mean that it
5 was disturbed, right?

6 A. Correct.

7 Q. And the fact that woods had been removed
8 from the property would be a disturbance, correct?

9 A. That's correct.

10 Q. And through such a disturbance, land would
11 be mixed?

12 A. It certainly could be, yes.

13 Q. And if somebody had burned any tree tops or
14 anything like that and had buried it and the charcoal
15 went down into the ground, you'd consider that to be
16 disturbance also, wouldn't you?

17 A. Yes, it's evidence of disturbance, yes.

18 Q. And that's what you call that debris?

19 A. I'd call it charcoal organic debris,
20 correct.

21 Q. Now, when you were talking about
22 vegetation, the one site that you key off of is
23 really not on the Bobby and Andrew property, correct?

24 A. Correct.

1 Q. It's on the Bill Hesper property?

2 A. That's correct.

3 Q. And in relationship to where the "L" is
4 located, it would be north and a little bit west of
5 the top of the "L", correct?

6 A. Not correct.

7 Q. Will you describe where you think it is.

8 A. It is east of the top of the "L" and I
9 think a little north of the mouth where the top of
10 the "L" is.

11 Q. Okay, east and north.

12 Now there were probes that were done
13 by Mr. Lenz that were roughly in line with that site
14 where you checked for the vegetation and also did a
15 probe on the Bill Hesper property; is that correct?

16 A. I don't know what you mean by roughly in
17 line with.

18 Q. If that is considered on the northern
19 portion of the "L", there where I believe three
20 probes that were conducted by Ward Lenz the property
21 owned by Bobby and Andy Hesper?

22 A. I believe there were four at the north end.

23 Q. But the one closest to your site, to the
24 Bill Hesper site, showed a non-hydric conclusion; is

1 that correct?

2 A. I don't know if it was the closest to. But
3 there was one of those four that was non-hydric.

4 Q. And then the next site also was not
5 non-hydric; is that correct?

6 A. I don't believe so.

7 Q. When you were looking at the plant life, I
8 believe you indicated that looking at the Bill Hesper
9 site you considered that to be hydric, where you had
10 done your probe, where you had looked for vegetation;
11 is that correct?

12 A. It's generally correct. It was not a
13 probe. It was a bore hole, and I concluded there
14 were hydric soils there.

15 Q. And when you are looking at that site you
16 concluded the reason why you would consider it when
17 looking at the vegetation was that there were the
18 American Elms that were the species there, correct?

19 A. They were dominant I believe in the tree
20 layer.

21 Q. Excuse the layman's language, but American
22 Elm is kind of on the bubble: it could be wet, it
23 could be dry, is that correct?

24 Is that kind of a loose interpretation

1 of that?

2 A. There is a smaller possibility that on the
3 probability scale since it's rated in fact wet that
4 there are instances where it can be found in uplands.

5 Q. So do I take that to mean yes, it could be
6 either way?

7 A. The probability is that it's in a wetland,
8 less probability that it would be in an upland.

9 Q. Now the fact that a probe directly in line
10 Bill Hesper's, the next one over that Mr. Lenz had
11 done that showed non-hydric, would that tend to leave
12 you to believe that soil types and weather, a soil
13 was hydric or non-hydric could change in a relatively
14 short space?

15 A. What I don't understand about your
16 question, you're referring to non-hydric data holes
17 by Ward Lenz, and I'm not exactly sure which holes
18 you're referring to.

19 Q. Okay, let me rephrase the question as well
20 see if this will help:

21 I think it was Ward Lenz's testimony
22 that in Southern Illinois that you can go from one
23 location, let's say right here, there's a probe and
24 you find that it's hydric: You have a hydric

1 conclusion.

2 But then if I go right over here, this
3 could be non-hydric because that's the character of
4 the land in Southern Illinois, it changes.

5 There's a possibility of change in
6 that short of a distance; is that correct?

7 A. Yes, you can have changes of non-hydric
8 soils within a short distance.

9 Q. So all you can say is at that given point,
10 that probe, you have certain conclusions based upon
11 that probe at that point, correct?

12 A. No, you can infer a broader area from that
13 probe based on the landscape.

14 Q. But you do agree that the hydric versus
15 non-hydric conclusions can change within a short
16 space?

17 A. Yes, they can.

18 Q. Now isn't it a fact that it's much more
19 difficult to come to conclusions when you're working
20 with a disturbed soil?

21 A. It's a little more difficult determination,
22 that's correct.

23 Q. Referring to Exhibit 8, pages 114 through
24 145. Start at 114.

1 THE WITNESS: You said Exhibit 8; is that
2 right?

3 MR. SMALL: Yes.

4 THE WITNESS: And pages 114 through what?

5 MR. SMALL: 114 through 145.

6 THE WITNESS: All right.

7 BY MR. SMALL:

8 Q. Now, I realize that these were performed by
9 -- first of all, I want you to look at all of those
10 pages if you could, just generally look at them.

11 And in particular, I want you to look
12 on what I think would be the back page of each one of
13 these probes.

14 JUDGE MORAN: So the back page of the data
15 form, Mr. Small?

16 MR. SMALL: So that would be for instance,
17 starting out with page 115, 117, and so forth.

18 THE WITNESS: All right.

19 BY MR. SMALL:

20 Q. And I realize you didn't do these probes,
21 Mr. Lenz had, but do you have any explanation why
22 under hydric soil indicators that it is left blank?

23 A. No, I do not.

24 Q. Okay. Now, your testimony was I believe

1 that you measured from the corner of the Hesper
2 property - and I'm talking about Bobby and Andy Hesper
3 here - from the "L" exits, where the channel exits
4 their property.

5 And I believe you indicated to me that
6 you used a 1970s map and a string to trace Martin's
7 Branch to see how far it was from the Hesper corner of
8 the property to the edge of Lake Centralia; is that
9 correct?

10 A. Yes.

11 Q. And I believe your testimony was that it
12 was 2.8 miles from the edge of the Hesper property to
13 Lake Centralia?

14 A. I don't know if that's my testimony. I
15 know that's in my declaration.

16 Q. And my question is simply I guess
17 mechanics:

18 Is there not a better method of
19 measuring a stream that meanders in length other than
20 using a string on a 1970s map?

21 A. There are other methods that would be more
22 accurate.

23 Q. Such as?

24 A. You could walk the entire length if that

1 was possible and keep track as you walked. That
2 would be the most accurate method.

3 Q. Is there any kind of satellite system or
4 something like that that you could utilize?

5 A. I'm not aware of any satellite system
6 system.

7 Q. Are you aware in a Martin's Branch dries up
8 each year at the intersection of Lake Centralia
9 totally?

10 A. No, I'm not.

11 Q. Are you aware that over the last few years
12 people have used bulldozers to go into the lake to
13 dig out soil so that they can get their boats up
14 closer to the ramps because it's so dry?

15 A. No, I'm not.

16 Q. Now there -- I think your testimony was
17 that there were five other streams or tributaries
18 that go into Lake Centralia other than Martin Branch;
19 is that correct?

20 A. I don't recall that in my testimony. I
21 recall something about that in other people's
22 testimony.

23 MR. SMALL: May I approach?

24 JUDGE MORAN: Sure.

1 So remember, Mr. Small, he doesn't
2 know about the number of streams that may enter into
3 that other than Martin's Branch.

4 Let's go off the record.

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

7 JUDGE MORAN: Now we'll go back on the record.

8 MR. SMALL: First off, thank you for the
9 assistance in getting Exhibit A which is entitled
10 Lake Centralia and intermittent streams.

11 Mr. Carlson, will you look at that
12 Exhibit, first off?

13 THE WITNESS: All right.

14 BY MR. MARTIN:

15 Q. And after looking at that map, does that
16 refresh your memory as to other streams or
17 tributaries that go into Lake Centralia?

18 A. Yes.

19 Q. Okay. And how many other streams or
20 tributaries go into Lake Centralia other than
21 Martin's Branch?

22 A. There are four intermittent streams other
23 than Martin Branch noted.

24 Q. And, as a matter of fact, Martin's Branch

1 also is declared to be an intermittent stream; is
2 that correct?

3 A. It's mapped on this map as an intermittent
4 stream, that's right.

5 Q. Now, I'm going to ask you just a general
6 question and we'll see where we go from there:

7 As to all these other tributaries and
8 streams other than Martin's Branch that flow into
9 Lake Centralia, did you do any testing on any of
10 those tributaries?

11 A. No.

12 Q. None whatsoever?

13 A. None.

14 Q. Okay. And so based upon that, you could
15 not offer an opinion whether or not those streams are
16 polluted or impaired that are going into Lake
17 Centralia, correct?

18 A. That's correct.

19 Q. Now you indicated that when you got up to
20 Lake Centralia that there were lots of houses, I
21 think that's the way you described it; do you
22 remember that?

23 A. I do.

24 Q. Are you aware that there's no public sewer

1 system for those houses on Lake Centralia?

2 A. On the contrary, I believe that I have
3 information that there are sewer systems.

4 Q. Did you have the opportunity to see certain
5 septic tank pipes discharges fluid into Lake
6 Centralia when you were there at the site?

7 A. No.

8 Q. Did you see anybody washing their boats, or
9 washing their cars on any of your trips down to visit
10 the site at the Lake Centralia housing, houses
11 throughout that area?

12 A. No, I did not.

13 Q. Would you look at Exhibit 2, please?

14 A. All right.

15 Q. I believe your testimony was that this was
16 a 1980s map; is that correct?

17 A. No, I don't recall that.

18 Q. Okay. Do you know if that map shows that
19 there's any indication that the Hesper site is a
20 wetland?

21 A. It's not denoted as a wetland on this map.

22 Q. Okay.

23 A. It is however --

24 Q. Excuse me --

1 A. -- (continuing) denoted as an intermittent
2 stream --

3 Q. Excuse me?

4 JUDGE MORAN: Absolutely, you've got to stop
5 that, Mr. Carlson.

6 THE WITNESS: I was just completing my answer.

7 MR. SMALL: Excuse me?

8 JUDGE MORAN: No, you can't do that.

9 THE WITNESS: I was just completing my answer.

10 JUDGE MORAN: No, you can't do that.

11 BY MR. SMALL:

12 Q. Would you look at Exhibit 23, please?

13 A. Twenty-three?

14 Q. Yes. Page 299, please.

15 A. Okay, I'm at 299.

16 Q. And this is a 2001 real estate tax bill for
17 Marion County; is that correct?

18 A. It appears to be.

19 Q. And looking at the left-hand side of that
20 document, there's a designation that says farmland,
21 2,472.

22 Do you see that?

23 A. I do.

24 Q. And do you see directly below that it says

1 a review of equalized values 2,472?

2 A. I see that.

3 Q. Okay. And based upon looking at that,
4 would it appear to you that all of the land is being
5 assessed as farmland?

6 A. Ummm, I believe that's correct.

7 JUDGE MORAN: His last answer was he believes
8 that's correct. That was his last answer.

9 MR. SMALL: Yes, thank you, your Honor. Can we
10 go off the record for just a second.

11 JUDGE MORAN: Sure, we'll go off the record.

12 (WHEREUPON, a short recess was
13 taken.)

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

15 MR. SMALL: Thank you, your Honor.

16 BY MR. SMALL:

17 Q. Mr. Carlson, have you found Hesel Exhibit
18 Number 84, or Hesel Exhibit Number 10?

19 A. Yeah, I found Hesel Exhibit Number 10. I'm
20 not sure what you're referring to 84.

21 Q. Just to the left of where our sticker says
22 Exhibit Hesel 10 is, it says Hesel Exhibit 84?

23 A. Oh, I see that.

24 Q. Now, up on the top right portion of this

1 document, there's something called record of
2 ownership. Do you see that?

3 A. I do.

4 Q. And on the first line it says Max and
5 Dorothy Mercer; is that correct?

6 A. That's correct.

7 Q. And then, when you go down four lines, it's
8 got WD 98-6696 Hesel Robert, then it looks like a
9 Jeffrey and Andrew J.

10 Do you see that?

11 A. Yes.

12 Q. And it says August of '98; do you see that?

13 A. I do.

14 Q. And looking at the left-hand side of the
15 document, there is a category that says number of
16 acres.

17 Do you see that?

18 Where it says tillable, number of
19 acres?

20 A. Oh, oh, yeah. I see that.

21 Q. And what does it say? Number of acres of
22 what?

23 A. On the line that appears to be tillable, it
24 says 50 under acres.

1 Q. Okay. And then going down from that a
2 couple spaces, do you see a line that says permanent
3 pasture?

4 A. I do.

5 Q. And what does that say?

6 A. It says number of acres ten.

7 Q. And to the best of your knowledge, is the
8 total number of acres that Robert and Andy Hesel own
9 on the site that's the subject of this Complaint 60
10 acres?

11 A. That's my understanding.

12 Q. And so the 50 tillable acres and the ten
13 permanent pasture acres total to a total of 60 acres,
14 correct?

15 A. That appears to be correct.

16 Q. And this appears to be assessor's notations
17 as to this particular piece of property, correct?

18 A. I don't know who the author --

19 MR. MARTIN: They don't know the notations.
20 There's been no explanation whatsoever of what this
21 document is.

22 JUDGE MORAN: Do you have objection?

23 MR. MARTIN: Lack of foundation. There's been
24 no description of what this document is.

1 JUDGE MORAN: The foundation question would be
2 for admission purposes.

3 He's asking him, just based on this
4 exhibit which is not yet admitted, whether he can
5 draw a certain conclusion.

6 And he can say yes, it appears to be
7 this or I can't tell or whatever.

8 So that's my ruling.

9 Do you want to repeat the question?

10 MR. SMALL: Would you mind reading that back,
11 please?

12 (WHEREUPON, the requested
13 portion of the record was read
14 back by the Reporter.)

15 THE WITNESS: I don't know if it's the
16 assessor's record.

17 MR. SMALL: Okay.

18 BY MR. SMALL:

19 Q. Also referring to the same document, in the
20 bottom right-hand portion of that document, it says
21 building permit record.

22 Do you see that?

23 A. I do.

24 Q. And directly below that it says 84, 86, a

1 little further over, it says 93. Does that appear to
2 be notations for years?

3 A. That, I don't know because there's a date
4 column to the left for that section.

5 Q. Could that be years, designation of years?

6 MR. MARTIN: Calling for speculation.

7 JUDGE MORAN: He could point that out. It
8 could also be lucky numbers that someone was planning
9 to play in the lottery.

10 So you can point that out on Redirect.

11 THE WITNESS: It could be, yes.

12 MR. SMALL: Okay.

13 BY MR. SMALL:

14 Q. I'd like to direct you to Exhibit 23.

15 JUDGE MORAN: Are we talking about back to EPA?

16 MR. SMALL: Yes, back to all EPA again. I'm
17 sorry, Judge.

18 JUDGE MORAN: That's okay. Twenty-three.

19 MR. SMALL: And page 305.

20 JUDGE MORAN: What was that page, Counsel?

21 MR. SMALL: 305.

22 JUDGE MORAN: Okay, thank you.

23 THE WITNESS: All right, I'm there.

24 I have two 305s in my folder.

1 MR. MARTIN: Just to clarify, there's 23 and
2 23a. Exhibit 23a has been admitted by stipulation.

3 JUDGE MORAN: Let's just get straight about
4 which pages we're talking about here.

5 Do you mean Exhibit 23, Mr. Small, or
6 do you mean Exhibit 23a?

7 MR. SMALL: I have it as Exhibit 23, but we're
8 going to go to 23A and see if 23a is part of the full
9 record provided by the EPA.

10 MR. MARTIN: For clarification, there is a 305.
11 There's a 305 in 23a.

12 MR. SMALL: Okay, let's refer to Exhibit 23a,
13 305.

14 JUDGE MORAN: Is that what you intended to
15 refer to?

16 MR. SMALL: Yes, it's the same photograph, your
17 Honor.

18 JUDGE MORAN: Okay, 23a at 305?

19 MR. SMALL: Correct.

20 JUDGE MORAN: Thank you.

21 THE WITNESS: All right.

22 BY MR. SMALL:

23 Q. Now, you're familiar with the Hesper site;
24 is that correct?

1 A. Yes.

2 Q. And I don't know if your copy contains this
3 but on my copy, that area is circled with a red pen;
4 is yours?

5 A. It's circled, but it's a photo copy. It's
6 black in mine.

7 Q. Okay, all right. At any rate you are
8 familiar with where the Bobby and Andy Hesper site is
9 located, correct?

10 A. Correct.

11 Q. Looking at the stream corner where the "L"
12 meets, where the north-south leg and the east leg
13 meets, do you see a "W"?

14 A. I do.

15 Q. And who put that mark on this map, if you
16 know?

17 A. I believe it to be the USDA folks.

18 Q. And is that Anthony Antonacci?

19 A. He's in that office. I don't know if he
20 put the mark on it.

21 Q. Okay. Do you know Mr. Antonacci?

22 A. Yes.

23 Q. How do you know in Antonacci?

24 A. Through this case.

1 Q. When was the first time you met him?

2 A. August of '06.

3 Q. Okay. And was this one of the times when
4 you were obtaining maps from that Agency?

5 A. No.

6 Q. I noted that on several of your site visits
7 to the Heser that Mr. Antonacci was with you; is that
8 correct?

9 A. Yes, he was there in August of '06. I'm
10 not -- I can't recall if he was there in March, I
11 don't believe so.

12 Q. Why would Mr. Antonacci be there, if you
13 know?

14 A. Well, I asked him to be there.

15 Q. Why would you ask him to be there?

16 A. Well, because I thought he had some
17 connection with the Conservation Practice's program
18 that work was being disputed.

19 Q. Did you invite anyone else out of that
20 office, the Marion County soil office?

21 A. Yes.

22 Q. And did they go to the site?

23 A. Yes.

24 Q. And who were they?

1 A. That would be Burke Davies.

2 Q. Okay. And is Mr. Antonacci Burke Davies'
3 boss?

4 A. No.

5 Q. If you know, what is Tony Antonacci's
6 proper designation?

7 A. District conservationist for the U.S.
8 Department of Agriculture, U. S. Conservation
9 Services.

10 Q. Are you aware of any past disagreements
11 between Mr. Antonacci and the Hesers?

12 A. No, I'm not.

13 Q. Are you aware that Mr. Antonacci as this
14 trial took place yesterday decided that was time to
15 get Mr. Robert Hesel involved in another case about
16 real estate --

17 A. No.

18 Q. -- a(continuing) questioning their use?

19 A. No, I'm not.

20 Q. So you're not aware of the fact that while
21 we're in the middle of this trial. Mr. Antonacci who
22 provided some of this information to you just all of
23 a sudden decided he wants to start inspecting the
24 parent of Robert and Andy Hesel for his property now;

1 is that correct?

2 A. I have no knowledge of that.

3 Q. Okay. Now I'd like to refer you to Exhibit
4 Number 23, page 308?

5 JUDGE MORAN: Before you do that, let me ask
6 Mr. Carlson:

7 Mr. Carlson, has there been any
8 communication that you're aware of on the part of EPA
9 to look into potential other Clean Water Act
10 violations related to Hesers other than Robert and
11 Andrew Hesper?

12 THE WITNESS: No, I'm not.

13 JUDGE MORAN: Now what page, Mr. Small?

14 MR. SMALL: Exhibit 23, page 308 -- excuse me,
15 Exhibit 23a, 308.

16 THE WITNESS: Okay.

17 JUDGE MORAN: I'm not there yet. 308? You've
18 got a lot of points; you mean strictly 308?

19 MR. SMALL: Yes.

20 JUDGE MORAN: Just for clarification of the
21 record, would this be the Effingham Clay exhibit?

22 MR. SMALL: That's correct.

23 BY MR. SMALL:

24 Q. Now referring to that document, have you

1 had a chance to review that?

2 A. Yes.

3 Q. And does that bill indicate that certain
4 products were sold to Andy Hesel by Effingham Clay
5 Service Company?

6 A. It appears they were, yes.

7 Q. And does that include ammonia and potash?

8 A. It includes di-ammonia phosphate and
9 potash.

10 Q. And these are commonly used fertilizers by
11 farmers throughout Southern Illinois; is that
12 correct?

13 A. I don't know about the geographical extent
14 of the use, but I understand them to be common
15 fertilizers.

16 Q. Okay. Now, I'd like to refer you to
17 Exhibit 9a, page 168.1.

18 A. All right.

19 Q. Actually, I'd like you to refer to 168.3.
20 I'm sorry about that.

21 A. All right.

22 Q. Do you remember your testimony was about
23 Bill Hesel and about his what I'll call stream
24 straightening upstream from the Hesel property.

1 You said it was a Conservation cost
2 sharing practice.

3 But the looking at page 168.3, does
4 that indicate that what he used in that project was
5 520 pounds of phosphorus?

6 A. I believe so.

7 Q. And did he use 320 pounds of nitrogen in
8 that project?

9 A. It appears so.

10 Q. And did he use 320 pounds of urea?

11 A. I believe that's the nitrogen.

12 Q. Okay. And did he use 400 pounds of potash?

13 A. It appears so.

14 Q. Now, didn't you testify that Lake Centralia
15 is impaired with manganese and total phosphorus?

16 A. I actually don't recall if I testified to
17 that.

18 Q. Do you know if that's a fact?

19 A. I do.

20 Q. Do you think that Bill Hesser's 520 pounds
21 of phosphorus ended up in Lake Centralia?

22 A. Unlikely.

23 Q. And why is it unlikely?

24 A. Because the fertilizers are used by the

1 plants.

2 It would depend on where it was
3 applied and how it was applied.

4 Q. So you don't believe that it would have
5 impacted Lake Centralia, correct?

6 A. It could.

7 Q. Oh, it could?

8 A. Sure.

9 Q. Okay, I want to be clear on this now.

10 Are you saying that some of his
11 phosphorous could be in Lake Centralia?

12 A. Well it depends on the timing of the
13 project.

14 Q. So your answer is it's a possibility?

15 A. A possibility.

16 Q. Okay. And now when you look at nitrogen or
17 what's called urea, you have 320 pounds of that.

18 Do you think that could have reached
19 Lake Centralia?

20 MR. MARTIN: Your Honor, Mr. Carlson, did not
21 testify on this topic.

22 JUDGE MORAN: But he is an expert in this area
23 and I consider this appropriate.

24 I'm not going to express why, but it

1 should be obvious why.

2 These questions are fair game for
3 cross-examination. It's clear to me.

4 BY MR. SMALL:

5 Q. Could that have ended up in Lake Centralia?

6 A. It's within the realm of possible.

7 Q. Now nitrogen will deplete water of oxygen;
8 is that right?

9 A. In and of itself, I don't believe so.

10 Q. Can it?

11 A. Indirectly, I believe it can.

12 Q. And to the best of your knowledge, is
13 manganese a naturally occurring element?

14 A. Yes.

15 Q. So that could be gotten anywhere, correct?

16 A. That I don't know.

17 Q. It's naturally occurring. Wherever it
18 occurs, it occurs, right?

19 A. Right.

20 Q. Could be right in Lake Centralia itself?
21 It's a possibility, right?

22 MR. MARTIN: He's calling for speculation I
23 think.

24 Calling for speculation and beyond the

1 scope of direct. It's calling for speculation on the
2 appearance of something being anywhere. I don't
3 understand.

4 JUDGE MORAN: I'm overruling that.

5 Is it possible that manganese could be
6 because of what you said, it's a naturally occurring
7 element that it could be in Lake Centralia?

8 THE WITNESS: It's within the realm of the
9 possible.

10 MR. SMALL: Okay.

11 BY MR. SMALL:

12 Q. I'll refer you next to Exhibit Number 28
13 entitled EPA Crooked Creek report is?

14 A. Okay, I'm at that exhibit.

15 Q. Okay, are you familiar with that document?

16 A. Not in its entirety, no.

17 Q. This was an EPA document that's been
18 entered into evidence.

19 And what is the date on the front of
20 that report?

21 A. May of 2006.

22 Q. Okay. Can you tell me anywhere within that
23 report that shows that Martin's Branch is impaired in
24 any manner?

1 A. Well, under Lake Centralia.

2 Q. No, I said Martin's Branch; that's the
3 question.

4 A. Martin's Branch -- Lake Centralia is simply
5 a part of Martin's Branch.

6 Q. I --

7 MR. SMALL: Your Honor, would you --

8 JUDGE MORAN: Absolutely. This witness has had
9 a continuing problem with going on with answers not
10 asked and formulating ing his own answers to the
11 questions.

12 The question is pretty clear. It's
13 not a complex question from Mr. Small.

14 Please answer that.

15 And you'll have to have faith that
16 your Counsel, on Redirect, will do what they call
17 rehabilitate.

18 Would you like the question read back?

19 MR. SMALL: Yes, please.

20 (WHEREUPON, the requested
21 portion of the record was read
22 back by the Reporter.)

23 THE WITNESS: No, I don't believe that the
24 channel of Martin Branch was tested in any manner for

1 this report.

2 BY MR. MARTIN:

3 Q. My question was:

4 Can you point out anywhere in this
5 report that says Martins Branch is impaired?

6 JUDGE MORAN: That's a "yes" or "no".

7 THE WITNESS: I don't know.

8 BY MR. SMALL:

9 Q. You can tell me that Crooked Creek, under
10 this report, is impaired by manganese and total
11 phosphorus; is that correct?

12 A. That, I don't know.

13 Q. I thought you just testified that Lake
14 Centralia had these two elements and that it was an
15 impairment of Lake Centralia?

16 Am I not hearing you correctly?

17 MR. MARTIN: He's being argumentative. He said
18 Crooked Creek. He didn't say Lake Centralia.

19 JUDGE MORAN: Your question was Crooked Creek
20 Mr. Small.

21 MR. SMALL: Okay.

22 BY MR. SMALL:

23 Q. If Lake Centralia -- if that report done by
24 your own Agency, EPA, says that Lake Centralia is

1 impaired by manganese which you've testified to is
2 naturally occurring and by phosphorus, can you tell
3 me for a fact that any of that phosphorus came from
4 Martin's Branch watershed?

5 MR. MARTIN: Your Honor, again, this is beyond
6 the scope of direct testimony of Mr. Carlson.

7 JUDGE MORAN: No. No, you're wrong when you
8 say it's beyond the scope.

9 You're actually confusing some
10 concepts that have to do when it's your turn for
11 Redirect.

12 And this is within the gambit of
13 cross-examination.

14 MR. SMALL: And I would ask the Court to direct
15 him to answer that question.

16 THE WITNESS: Can you read back the question.

17 (WHEREUPON, the requested
18 portion of the record was read
19 back by the Reporter.)

20 BY MR. SMALL:

21 Q. Yes or no?

22 A. I would say probably yes.

23 Q. Did you do any testing for phosphorus?

24 A. I did not do any of the testing.

1 Q. Did anybody do any testing for phosphorus
2 to the best of your knowledge?

3 A. Yes.

4 Q. On Martin's Branch?

5 A. No.

6 Q. Well, that's what we're talking about here.

7 And you did no testing on any of the
8 other streams or any other tributaries that came into
9 Lake Centralia.

10 You've already tested to that, right?

11 A. I did not do any testing.

12 Q. Okay, so nobody had done any testing
13 whatsoever --

14 MR. MARTIN: That's not --

15 MR. SMALL: -- (continuing) as it relates to
16 Lake Centralia --

17 MR. MARTIN: That's not his testimony.

18 JUDGE MORAN: Well, he --

19 MR. MARTIN: His testimony was that he didn't
20 conduct any testing.

21 JUDGE MORAN: -- (continuing) actually, let me
22 stop you.

23 He was narrow in his answer. Your
24 question was he aware of anyone doing any testing.

1 And he did not answer that question. You did not
2 pick up on that.

3 MR. MARTIN: No, he --

4 JUDGE MORAN: Let me finish.

5 He said I did not do any testing.

6 So there was a little bit of a switch
7 between your question and his answer.

8 So maybe you need to ask your question
9 again.

10 MR. SMALL: I am. I'm going to ask that again
11 to you, and I would ask:

12 BY MR. SMALL:

13 Q. Are you aware of anyone that did any
14 testing for phosphorus on Martin's Branch watershed
15 as a part of this case?

16 A. No, I'm not.

17 Q. You're not aware of any and your testimony
18 is on the other tributaries, there was no testing,
19 correct?

20 A. I'm not aware of any testing on the other
21 tributaries.

22 Judge, if you'd like, this would be a
23 nice break point.

24 JUDGE MORAN: Good point. We're all going to

1 take a break. It's 12:37 and we'll pick up at 1:40
2 just to make it easier to remember: 1:40.

3 (WHEREUPON, a luncheon recess
4 was taken.)

5 JUDGE MORAN okay. Go ahead, Mr. Small.

6 BY MR. SMALL:

7 A few follow-up questions on
8 phosphorus which you indicated is one of the elements
9 that's in Lake Centralia.

10 Q. To the best of your knowledge detergents
11 release phosphorus in the water?

12 A. I am aware that some detergents have
13 phosphorus in them. How they would end up in the
14 water, I can't say.

15 Q. Livestock manure if it was raining and
16 there was runoff from that?

17 A. That, I don't know.

18 Q. Septic tanks certainly could; is that
19 correct?

20 A. I don't know the specifics of phosphorus
21 and septic systems.

22 Q. Excuse me?

23 A. I don't know whether it's there or not.

24 Q. I'd like you to refer to Exhibit Number 7?

1 JUDGE MORAN and just before you do that, I just
2 want to know I made a comment about how long this
3 proceeding could go.

4 And I made the observation that midway
5 through day seven the Respondents haven't had a
6 chance to put on their case.

7 And I just want to remind the Parties
8 that way back February 23, 2007 of this year when
9 Respondents had motions for additional discovery
10 which I denied. I said at the end of my order,
11 quote, "The Respondents are entitled to and will have
12 a full and robust opportunity to cross-examine
13 witnesses."

14 And so I mention that only because I
15 don't want Mr. Small or Mr. Northrup to feel in any
16 sense that they have to hasten things along.

17 You take as much time, and even though
18 we haven't even launched that part of the case that
19 your cross-examination has to be curtailed because of
20 watching the clock.

21 So with that additional comment, let's
22 continue.

23 MR. SMALL: Excuse me, I'm sorry. I've got the
24 wrong exhibit and it's page 152.

1 JUDGE MORAN: This a photograph.

2 MR. SMALL: Correct, your Honor.

3 BY MR. SMALL:

4 Q. My question, Mr. Carlson, is this:

5 I think your testimony was that
6 although it says 1998 in the upper left portion of
7 that document but in fact it's a photo from 1993; is
8 that correct?

9 A. That's correct.

10 Q. Is there any plausible explanation that you
11 know of to tell us why that document has 1998 on it
12 in error --

13 A. I --

14 Q. -- (continuing) that you know of
15 personally?

16 A. Yes.

17 Q. There is a plausible explanation; is that
18 what you're saying?

19 A. Yes.

20 Q. Why would somebody label that photograph
21 with an incorrect date?

22 A. Well, when I spoke to Mr. Hargrave of the
23 Soil and Water Conservation District office he
24 mentioned that what they do the photograph is a

1 baseline photograph for them in tracking farm program
2 material and that when they use these baseline maps
3 in any particular year they label it by the year
4 they're doing the task.

5 Q. So that a particular date on a know of
6 doesn't necessarily mean that that's when that
7 photograph was taken correct?

8 A. That depends on the photography you're
9 looking at and where you got it from.

10 Q. And so how am I to distinguish whether or
11 not a date is correct or incorrect on a photograph if
12 you know?

13 A. Check with the source of the photograph.

14 Q. So we could have a variety of photographs
15 here that have been admitted to evidence that may say
16 particular date but that doesn't necessarily mean
17 that that's the way the conditions portrayed in that
18 photograph are as of that year; is that correct?

19 A. I'm not aware of any particular example in
20 this hearing.

21 Q. But you didn't put the dates on those
22 photographs?

23 A. I did not.

24 Q. So the fact that one photograph is

1 inaccurate there could be other photographs that
2 could be inaccurate as to that particular date?

3 A. I'm not aware of any.

4 Q. I'd like to refer to Exhibit Number 35.

5 A. (So complied with request.) I'm there.

6 MR. SMALL: Can we go off the record, please?

7 JUDGE MORAN: Yes, off the record.

8 (WHEREUPON, a short recess was
9 taken.)

10 JUDGE MORAN: Back on the record.

11 Go ahead, Mr. Small.

12 BY MR. SMALL:

13 Q. Referring to Complainant's Exhibit Number 7
14 and referring to page 35.

15 A. Okay.

16 Q. Is it your testimony that this is a
17 photograph at the Old Salem Road?

18 A. It was.

19 Q. And it's downstream from the Hesper "L"; is
20 that correct?

21 A. That's correct.

22 Q. And at that location you did see minnows
23 and frogs at that particular spot; is that correct?

24 JUDGE MORAN: Did you say did or didn't?

1 MR. SMALL: Did.

2 BY MR. SMALL:

3 Q. Is that your testimony?

4 A. I believe it was a frog and minnows.

5 Q. Okay. Referring to page 36 right behind
6 it.

7 A. All right.

8 Q. Again, that's at the Old Salem Road cross
9 been and that's downstream from the Hesper "L" again;
10 is that correct?

11 A. That's correct.

12 Q. And the state or township or somebody has
13 put rip he raft in there; is that correct?

14 A. That's my understanding.

15 Q. And would that be to slow down water and
16 stabilize the conditions there?

17 A. My understanding was the riff raff was
18 placed in the roadside ditches to stabilize those
19 ditches so they would not wash out.

20 Q. And that's fairly normal on road crossings,
21 isn't it, if you're familiar?

22 A. I'm not familiar with enough road crossings
23 to say that that's common.

24 Q. If you look at pages 37 and 38, and this

1 may just be the quality of the quality of photograph
2 that I've got here but referring first to page 37
3 that is a probe; is that correct?

4 A. Yeah, the center part of the photograph.

5 Q. Hang on. Look at that probe on my picture
6 at least it looks likes little black dots?

7 A. Where on the photograph are you looking.

8 Q. Inside the probe it's in the dirt?

9 A. I guess I do on this, yeah.

10 Q. And I want you to look at page 38 and
11 there's a man standing there, I don't know who it was
12 but that's on the Bill Hesel property correct?

13 A. That's correct.

14 Q. And it looks to me like there's a bunch of
15 dots all over that too; is that correct?

16 JUDGE MORAN where are you referring to,
17 Counsel?

18 MR. SMALL: I'm referring directly to the right
19 of the photograph to the right of the person, there
20 appear to be at least on my photograph a bunch of
21 black dots.

22 THE WITNESS: Yeah, I see that, just to the
23 right of that.

24 BY MR. SMALL:

1 Q. I'm asking about the black dots?

2 A. But I'm telling you where I see the black
3 dots.

4 Q. Okay.

5 A. To the right of the man in that green area.

6 Q. Now, there was some discussion about
7 charcoal in probes. And looking back, again, on page
8 37, is that just the quality of the photograph that
9 we're looking at here?

10 A. Yeah.

11 Q. Now, looking again at page 38, I think you
12 testified as to habitats of animals; is that correct?

13 A. That's correct.

14 Q. And I believe that you testified that you
15 saw over a period of time you saw a snake and you saw
16 minnows?

17 A. (No audible response.)

18 Q. I'd like you to respond to this:

19 You saw a snake; is that right?

20 A. Not on what's depicted on page 38.

21 Q. I'm not saying -- let me rephrase my
22 question:

23 From upstream of the Hesper "L" through
24 the Hesper "L" down to Old Salem Road; let's confine

1 it to that area, did you see a snake or snakes?

2 A. Yes.

3 Q. Did you see minnows?

4 A. Yes.

5 Q. Did you see fish?

6 A. Yes.

7 Q. Did you see evidence of deer tracks?

8 A. Yes.

9 Q. Did you see raccoon tracks?

10 A. I'm not an expert on animal tracks. My
11 answer was I thought the tracks were either a
12 combination or individual a coon's, possum's or
13 skunks.

14 Q. Did you see any turkeys, wild turkeys?

15 A. No.

16 Q. Did you see any other animals in that area?

17 A. We saw a deer crossing Old Salem Road.

18 Q. Did you see places where the deer had
19 bedded down in the field, pushed down the crops so
20 that they could bed down into that area?

21 A. No, I did not.

22 Q. Did you see locations where deer had been
23 bedded down?

24 A. No, I did not.

1 Q. And these animals were both upstream from
2 the Hesper "L", in the Hesper "L" and downstream from
3 the Hesper "L"; is that correct?

4 A. Some of the examples were in each of those
5 three locations.

6 Q. Now, are you familiar with each one of
7 these animals?

8 A. Yes.

9 Q. Do deer like to eat soybeans in farmer's
10 fields?

11 A. That I don't know.

12 Q. Do you know if coons like corn?

13 A. I would think that they would.

14 Q. So is it a possibility that these animals
15 that are wildlife would like to come out to the
16 Hesper and have lunch, so to speak?

17 A. I'm not aware of any particular animal that
18 dines on soybeans exclusively or in part, so.

19 Q. It seems like a lot of animals in a fairly
20 short distance, doesn't it?

21 A. Nope, it doesn't.

22 JUDGE MORAN: Help me out, didn't you say you
23 saw mink as well.

24 THE WITNESS: Yeah, but that was further

1 downstream.

2 MR. SMALL: I'd like to refer to Exhibit G
3 which I believe is over here.

4 JUDGE MORAN: Are we going to hand it up?

5 MR. SMALL: Yes.

6 JUDGE MORAN let's go off the record.

7 (WHEREUPON, a short recess was
8 taken.)

9 JUDGE MORAN: Back on the record. Up on the
10 easel is EPA Exhibit G.

11 MR. SMALL: Thank you, your Honor. May I
12 approach that exhibit?

13 JUDGE MORAN yes.

14 BY MR. SMALL:

15 Q. Now I'd like to go into a little bit:

16 Regarding an area of that land is it
17 certain, you know whether they're wetlands or not
18 wetlands.

19 Now, my recollection was - and correct
20 me if I'm wrong - you said that using black and white
21 photography makes it a little more difficult to do
22 that; is that correct?

23 A. No, I don't recall that testimony.

24 Q. Okay. Do you recall saying that it wasn't

1 an exact science?

2 A. Yes.

3 Q. And as a matter of fact you make certain
4 assumptions when you're doing these aerial
5 photographs when you're looking at them.

6 For instance, when you talk about
7 tone, you mentioned tone in that darker would mean
8 wetter basically?

9 Generally; is that correct.

10 A. Sure.

11 Q. I want you to look at Exhibit G. Have you
12 had a chance to look at it?

13 A. I have.

14 Q. Now, I'm going to point to a track which is
15 in the extreme right-hand side of Exhibit G and down
16 about halfway and there is a rectangle that appears
17 to be approximately 80 acres in total; would you
18 agree with is that?

19 A. (No audible response.)

20 Q. Do you see which one I'm pointing to?

21 A. I do.

22 Q. Would you take out a marker and then circle
23 that for me, please?

24 JUDGE MORAN: Let's see now, there are no other

1 marks on this exhibit; is that right?

2 MR. SMALL: They're all in pen with an overlay.

3 JUDGE MORAN: Just to have some way to
4 distinguish it when reviewing it, but if there's
5 multiple marks then that's fine.

6 MR. SMALL: Just pick one color is fine. And
7 I'd like you to put a circle around that area I was
8 just talking about.

9 Put in your initials and make that
10 whatever number you want to pick.

11 JUDGE MORAN: There's no other number one on
12 there? That's fine.

13 MR. SMALL: Okay. Now, have you looked at the
14 photograph well?

15 THE WITNESS: No, not well.

16 BY MR. SMALL:

17 Q. Well, will you look at it now until you
18 feel comfortable with it?

19 A. (So complied with request.) Okay.

20 Q. Looking at that map does it appear to be a
21 dark black color?

22 A. Yes, I agree.

23 Q. So based upon your aerial interpretation
24 using this tone, this would be a wetland, correct?

1 A. No.

2 Q. Why wouldn't it be?

3 A. Because you just don't look at one factor.

4 Interpretation includes everything.

5 Q. But if you're just looking at tone, you'd

6 say that looks like one heck of a wetland. And it

7 just happens to be in a rectangle and it's 80 acres

8 square, correct?

9 A. No.

10 Q. If you're looking at color, period, on

11 anything on this map, if you saw something that was

12 dark, would that lead you to believe that it would be

13 a wetland?

14 A. That it might be a wetland, it's possible.

15 Q. But it's not always a wetland, is it?

16 A. No, it might not be a wetland.

17 Q. Okay. Because it's not an exact science,

18 is it?

19 A. Interpretation is not an exact science.

20 Q. Right. So errors can be made?

21 A. Errors can be made.

22 Q. Now, let me ask you, I'm going to switch

23 gears on you a little bit.

24 Do you wear glasses?

1 A. No.

2 Q. Contacts?

3 A. No.

4 Q. Have you had Lasix?

5 A. No.

6 Q. Do you wear any types of glasses, ever?

7 A. I wear sunglasses sometimes.

8 Q. When you're doing these stereoscopes, would

9 you wear glasses?

10 A. No.

11 Q. I'd like to talk to you a little bit about

12 polygons. On Exhibit H -- which I may have just

13 covered up -- would you look at Exhibit H, please?

14 A. Okay.

15 Q. Now, is it correct -- is it a correct

16 statement to say this is where you draw out certain

17 polygons?

18 A. That's correct.

19 Q. And you labeled them by particular numbers.

20 And I want to start with number W Number two?

21 A. Okay.

22 Q. Now, that had no borings on that particular

23 polygon?

24 A. It had a hydric boring fairly close.

1 Q. My question was: Was there any borings on
2 W2?
3 A. No.
4 Q. But you found hydric, correct?
5 A. I found it a wetland.
6 Q. Now, I direct your attention to W4.
7 A. Okay.
8 Q. There was no hydric point anywhere in that
9 area, correct?
10 A. By area, do you mean -- what do you mean by
11 area?
12 Q. Within W4.
13 A. No.
14 Q. But you found that hydric?
15 A. I found it to be a wetland.
16 Q. I want you to refer to W6?
17 A. Okay.
18 Q. And that was upland, was it not?
19 A. No.
20 Q. You found that to be hydric?
21 A. I found it to be a wetland.
22 Q. And was there an upland point?
23 A. There's an upland point right on it's right
24 hand edge.

1 Q. But no borings within W6?

2 A. I would consider that boring essentially on
3 the line.

4 Q. Now, if there's a depression -- just a
5 general question -- depression in a farmer's field, a
6 swale or whatever you want to call it, that naturally
7 would hold water, correct?

8 That's where the water would go to?

9 A. Generally, yes, depending on the
10 surrounding landscape.

11 Q. And if that water would sit there long
12 enough, it could form algal mats, correct?

13 A. It could.

14 Q. But that wouldn't necessarily mean it's a
15 wetland, would it?

16 A. Not by that alone, no.

17 Q. Okay. Did you ever see the Hesers fill any
18 ditch on their property where the "L" is located,
19 personally?

20 A. I didn't personally see any filling. I was
21 not there when it happened.

22 Q. Now, you had testimony that you thought the
23 upstream of Martin Branch before it gets to the "L"
24 on the Hesper property had certain dimensions.

1 And I forget what they are, so many
2 feet, so many feet. And you also had testimony as to
3 what was downstream from the Hesper "L" and what those
4 dimensions were, correct?

5 A. Correct.

6 Q. And you made an assumption, did you not,
7 that therefore it had to be X amount of feet deep
8 across the Hesper property to connect the two dots,
9 right?

10 A. I made an assumption regarding the Martin
11 Branch that we can no longer find on-site we have
12 essentially assumed that the dimensions -- I think I
13 used the downstream dimension as the dimension for
14 the stream though the site is no longer there.

15 Q. Is there any scientific method why you
16 would have chosen that?

17 A. Well, yes. It's comparable -- either up or
18 downstream would have worked, or an average of the
19 two would have worked two.

20 Q. But that's your assumption?

21 A. Because it's right.

22 Q. It's --

23 A. It's my assumption that the stream
24 dimensions would have been similar to those up and

1 downstream.

2 Q. Is the Heser land flat?

3 A. It has flatter parts to it. It also has
4 slopes to it.

5 JUDGE MORAN: By the way when we talk about
6 Heser land, you mean the Respondent Heser?

7 MR. SMALL: I'll try to refer to it as the
8 Heser "L" property.

9 BY MR. SMALL:

10 Q. It is basically a flat piece of property,
11 is it not?

12 A. No, I wouldn't say -- from my work it was a
13 series of concave, convex land forms within that
14 flood plane.

15 Q. And that's because of the logging of the
16 trees?

17 A. No, not necessarily.

18 Q. At any rate, you didn't see the Hesers fill
19 any part of Hesers Martin Branch, period?

20 A. I was not at the site.

21 Q. Yes or no?

22 A. No.

23 Q. Now, you said on several occasions
24 yesterday that Martin Branch both upstream and

1 downstream from the Heser "L" property is not a
2 pristine stream, I think is your exact words on
3 multiple occasions; is that correct?

4 A. I think that's correct for the upstream end
5 of it more so than the downstream.

6 MR. SMALL: I'd like to go to Exhibit Number
7 27.

8 Your Honor, I'd like to ask for a
9 two-minute break.

10 JUDGE MORAN: Sure, a two-minute break.

11 (WHEREUPON, a short recess was
12 taken.)

13 JUDGE MORAN: Back on the record.

14 MR. SMALL: Thank you, your Honor.

15 Referring to Exhibit Number 27, I
16 first want to direct your attention to page 425.

17 THE WITNESS: Okay.

18 BY MR. SMALL:

19 Q. And I believe your testimony is that this
20 is part of the Bill Heser land; is that correct?

21 A. Correct.

22 Q. Now isn't it a fact that there are multiple
23 channels that are running through what look like
24 weeds to me on that location?

1 A. No.

2 Q. I'll refer you to page 427.

3 A. All right.

4 Q. Now, again this is on Bill Hesers'

5 property?

6 A. That's correct.

7 Q. There's no water in that ditch, is there?

8 A. Ummm, I would not consider it a ditch.

9 Q. Just for the same of humoring me, let's

10 just call it a ditch for now, okay?

11 MR. MARTIN: I object, it's not a ditch. It's

12 just something different from the stream.

13 JUDGE MORAN: Why don't you -- since no one

14 will be humored, why don't you just rephrase your

15 question, Mr. Small.

16 MR. SMALL: Okay, we'll call that --

17 JUDGE MORAN: Because ultimately, he's going to

18 have to say there's no water in there, but I may be

19 surprised.

20 MR. SMALL: Okay, this is, again, page 427 and

21 we're looking at something more -- we'll call it

22 Martin Branch, okay?

23 BY MR. SMALL:

24 Q. Is it dry?

1 A. It has a dry bottom to it in this picture.

2 Q. And there are a lot of roots that are
3 coming out from the banks; is that correct?

4 A. There are roots from the banks.

5 Q. And looking as far as back in that picture
6 as you can, there's kind of a light area?

7 A. I see that.

8 Q. Okay. And is that the beginning of the
9 Bill Hesser project where you can call it a stream
10 straightening or you can call it Illinois shared cost
11 funding, but that's where that's located, right?

12 A. That's the downstream end of it.

13 Q. Right. And there's no trees there?

14 A. I don't recall any trees in the open area.

15 Q. Okay. Now I want to refer you to page 429.

16 A. All right.

17 Q. And, again, that is on Bill Hesters'
18 property?

19 A. That's correct.

20 Q. And the notation says it's a remnant water
21 pool; is that correct?

22 A. That's correct.

23 Q. Which means that the rest of Martin Branch
24 around that dried up other than that little pool; is

1 that right?

2 A. That's correct for that location.

3 JUDGE MORAN: And it's described as -- Martin's
4 Branch is described there as a what?

5 THE WITNESS: I don't know that it's described
6 there as anything other than Martin Branch.

7 JUDGE MORAN: Doesn't it say: Note remnant
8 water pool in channel.

9 THE WITNESS: Channel center, yes.

10 BY MR. SMALL:

11 Q. So the channel center is dry?

12 A. The channel center is where that remnant
13 pool is located.

14 Q. Looking at the bottom of that photograph,
15 right in the middle of that channel does that look
16 wet to you?

17 A. It's only wet where that pool is.

18 Q. Okay. Looking at photograph 431?

19 A. Okay.

20 Q. And, again, this is the Bill Hesper property
21 upstream from the Hesper "L", correct?

22 A. Correct.

23 Q. And you see a tree and I think your words
24 were the tree roots were in competition with the

1 water flow; is that correct?

2 A. I think I said they're in competition with
3 the receding bank to grab ahold.

4 Q. Okay, and there's some debris that's washed
5 up against that root system; is that right?

6 A. That's correct.

7 Q. And so this would be the stream's natural
8 condition upstream from the Hesers; is that correct?

9 A. Seasonally, it may be correct when it's in
10 the dry part of the year.

11 Q. And most of the time it is dry; isn't that
12 correct?

13 A. That, I don't know.

14 Q. Referring to page 435.

15 A. Okay.

16 Q. Now this is Old Salem Road. And this would
17 be downstream from the Hesper "L", correct?

18 A. Correct.

19 Q. And it would be according to your
20 calculations 1800 feet away from the corner of the
21 Hesper "L"?

22 A. I think my calculation was 1600 feet.

23 Q. Okay. Do you see any water that's flowing
24 on that picture?

1 A. No.

2 Q. Again, all you've got is a remnant pool
3 depend; is that right?

4 A. There's a remnant water pool in that
5 channel.

6 Q. Referring to page 436.

7 A. Okay.

8 Q. And that's downstream from the Hesper "L";
9 is that right?

10 A. Yes.

11 Q. And a tree has fallen into Martin's Branch;
12 correct?

13 A. That's correct.

14 Q. And that happens in a natural stream,
15 doesn't it?

16 A. It does.

17 Q. I'm going to refer you next to 442.

18 A. All right.

19 Q. Now, this is a picture upstream from the
20 Hesper "L", and this is on Bill Hesper's property; is
21 that correct?

22 A. That's correct.

23 Q. And there's lots of sediment deposits,
24 correct?

1 A. There are sediment deposits on the channel
2 side slop vegetation and the channel bottom, yes.

3 Q. As a matter of fact, you've got in your
4 photograph that there's 20 inches of sediment; is
5 that correct?

6 A. No.

7 Q. Okay. Let me strike that. I misread that.
8 There is substantial sediment deposits shown on this
9 photograph, correct?

10 A. On the vegetation, yes.

11 Q. Now, so that we're all clear, when water
12 comes from Route 37 down through Bill Hesper's
13 property and down to the Hesper "L" property, that's
14 going from upstream to downstream; correct?

15 A. Correct.

16 Q. And the water flows from upstream to
17 downstream, correct?

18 A. Correct.

19 Q. So, if there's sediment deposits shown in
20 photograph 442 on the Bill Hesper property, then it
21 came from either Bill Hesper's own property or from
22 other property upstream from Bill Hesper, correct?

23 A. That's correct.

24 Q. The water doesn't flow from the Hesper "L"

1 upstream?

2 A. No. I'm not aware that it does.

3 Q. Referring to page 444.

4 A. Okay.

5 Q. We're in on Bill Hesel's property, correct?

6 A. That's correct.

7 Q. And the water has cut into some roots of a
8 tree; is that correct?

9 A. That's correct.

10 Q. And this is one of the places you said, you
11 know, it's not -- Martin's Branch is not very
12 pristine there, is it?

13 A. I don't recall that testimony for this
14 photograph.

15 Q. Okay, referring to photograph 445.

16 A. All right.

17 Q. This photograph once again shows a lot of
18 sediment in the stream bed; is that correct?

19 A. No.

20 Q. Looking at the bottom right-hand corner of
21 that photograph?

22 A. Yes.

23 Q. Do you see what appears to be dirt and
24 gravel and some type of loam type material?

1 A. I see that.

2 Q. Okay. What would you characterize that as?

3 A. The channel bed.

4 Q. You did in fact measure some of the

5 sediment, did you not?

6 A. Yes, I did.

7 Q. And there's substantial amount of sediment

8 in the Bill Hesper stream bed; correct?

9 A. I guess when you say measure sediment, can

10 you tell me what measurement you're referring to that

11 I made about sediment.

12 Q. Didn't you measure the sediment on Martins

13 Branch upstream from the Hesper "L"?

14 A. No.

15 Q. You never did?

16 A. No.

17 Q. Because I recollect that your testimony --

18 well, let's turn to page 446 and look at that

19 photograph.

20 A. All right.

21 Q. It says close up view of sediment deposits,

22 correct?

23 A. That's correct.

24 Q. And I believe your testimony was that

1 there's 20 inches of sediment or sediment had come up
2 20 inches in this stream bed, correct?

3 A. My testimony was that the water was up high
4 enough to leave these sediment deposits on
5 vegetation.

6 JUDGE MORAN: Right. But your question was how
7 high, was it not?

8 MR. SMALL: Yes. Yes.

9 BY MR. SMALL:

10 Q. So there are sediment deposits in that
11 creek bed itself, correct?

12 A. I would expect so, yes.

13 Q. And that sediment deposit hadn't come from
14 upstream, correct?

15 A. Not necessarily.

16 Q. I thought you just indicated that sediments
17 have to go from upstream to downstream, correct?

18 A. Sediments that are moving would move from
19 up to downstream.

20 Q. Or otherwise they're stationary, and
21 they're in the bed, correct?

22 A. That is correct.

23 Q. I'd like you to refer to page 449.

24 A. Okay.

1 Q. This again is on Bill Hesper's property,
2 correct?

3 A. Some of the photo on the left may be the
4 Hesper brothers' property, but I'm not certain.

5 Q. Well, the photograph it's says on W. Hesper
6 property.

7 So looking at that notation, would
8 that refresh your memory?

9 A. Yeah, that I was on the property. The
10 photograph itself may depict areas off the property.

11 Q. Well, you wouldn't label a photograph if
12 you were standing on somebody else's property -- if
13 you're standing on my property, you wouldn't say it's
14 the Brad Small property just because you're taking a
15 photograph from there, would you?

16 A. I would note where I was taking the
17 photograph from, wherever that property was.

18 Q. Where is the notation on number 449.

19 A. It's the last clause there where it says:
20 on W. Hesper property.

21 Q. So all that means is you took the
22 photograph from the Bill Hesper property?

23 A. That's correct. I'm on Bill Hesper's
24 property.

1 Q. And can you tell me if this portion of
2 Martin's Branch is on Bill Hesper's property?

3 A. I believe it is.

4 Q. And the banks are eroding, would you say
5 that? They're kind of sloped down and all filling
6 in?

7 A. There's some erosion evident on the channel
8 banks.

9 Q. These photographs that we've been going
10 through, occasionally there is what you've labeled
11 remnant pool.

12 Did you find minnows or fish in those
13 pools?

14 A. I would need to refresh my memory on that.

15 Q. Okay. Is there a certain document you'd
16 have to have to refer to refresh your memory?

17 A. Yes.

18 Q. And what is that?

19 A. That would be the special report, the
20 narrative portion that is attached to this exhibit.

21 Q. Okay. Would you look at that report, just
22 for the one matter that relates to whether or not
23 there is any fish or minnows in these remnant pools.

24 A. Okay I've refreshed my memory.

1 Q. Have you reviewed that document?

2 A. I have.

3 Q. Has it refreshed your recollection?

4 A. It has.

5 Q. Okay, now I'm going to ask you a question:

6 After reviewing that document, can you

7 answer whether or not there were any minnows or fish

8 in these remnant pools located north of the Heser "L"

9 and/or south of the Heser "L" property?

10 A. Yes, I believe I can answer that.

11 Q. Okay, would you please answer?

12 A. I recorded seeing no fish species in that

13 area.

14 Q. Okay. Now referring to the Heser "L"

15 itself, isn't it a fact that this "L" was seeded on

16 both sides with grass?

17 A. Oh, ummm, I have no personal knowledge of

18 that. I understand that the Hesers in their 308

19 response said that they had seeded it.

20 Q. Well, you were out on the site, how many

21 times? Four times?

22 A. I was on the site twice, and two other

23 times I observed it from the property edges.

24 Q. And did you see the Heser "L"?

1 A. I did.

2 Q. And when you saw it, you saw grass on both
3 sides of the channel, did you not?

4 A. I saw grass on both sides of the channel.

5 Q. And grass would slow down if there was any
6 water or any sediment that was coming off the fields,
7 that would slow down the flow of that water, would
8 it?

9 A. No, it depends on the level of full.

10 Q. Under most circumstances would the grass
11 have the effect of slowing down the water?

12 A. That, I don't know.

13 Q. And you don't know because you don't know
14 what effect that vegetation would have on slowing
15 down water?

16 A. No.

17 Q. Or you just don't know because you didn't
18 look at the "L" close enough to know that?

19 A. No.

20 Q. No what?

21 A. No that I don't know for certain what most
22 of the time the flow is.

23 Q. Okay. Did you look at the Hesper "L"
24 closely?

1 A. Yes, I walked in it.

2 Q. Okay, so you're familiar with the grass
3 areas on both sides of that stream?

4 A. I am.

5 Q. And isn't it a fact that since, if there
6 was water that was making its way to that ditch, if
7 it hits anything whether it's grass or anything else
8 it's going to slow it down, correct?

9 A. I agree with that.

10 Q. It's the law of physics. And so if it
11 slows it down, it would also have the effect of
12 dropping some of that sediment, correct?

13 A. It may have that effect, yes.

14 Q. When you went on your second visit to the
15 site, to the Heser "L", this was after the point in
16 time that a Complaint had been filed against the
17 Hesers; is that correct?

18 A. That's correct.

19 Q. What?

20 A. That's correct.

21 Q. And so that report was filed after the
22 point in time that this matter was being contested,
23 correct?

24 A. Correct.

1 Q. And when you went on I believe you said
2 March 8th and 9th --

3 A. Correct.

4 Q. -- (continuing) to the Hesper site, this was
5 your third observation of the area?

6 A. Correct.

7 Q. And is that the time when you attempted to
8 walk most of the Martin's Branch Creek, upstream and
9 downstream from the Hesper "L"?

10 A. Yes.

11 Q. And I believe your indication was that you
12 spent no more than 30 seconds in any one spot; is
13 that correct?

14 A. No, I don't believe so.

15 Q. What?

16 JUDGE MORAN: He disagrees with your
17 characterization of what his testimony was.

18 MR. SMALL: That's what I think you said, but
19 let's just back up and ask it differently:

20 BY MR. SMALL:

21 Q. You didn't spend a whole lot of time at any
22 location that you stopped at, did you?

23 THE WITNESS: What do you mean by a whole lot
24 of time?

1 JUDGE MORAN: Back it up and ask him again.

2 MR. SMALL: Well, seconds, thirty seconds.
3 Let's try thirty seconds.

4 JUDGE MORAN: Why don't you ask him how much
5 time he spent at each location.

6 BY MR. SMALL:

7 Q. How much time did you spend at each
8 location?

9 A. Well, that varied.

10 Q. From what to what?

11 A. Seconds to probably up to twenty minutes.

12 Q. Well, let's go into that a little bit.

13 Under Exhibit A --

14 JUDGE MORAN: Miss Kilgore will help you out.
15 We'll go off the record while you get that set up.

16 (WHEREUPON, there was then had
17 an off-the-record discussion.)

18 JUDGE MORAN: Thank you, Miss Kilgore. Back on
19 the record, and we now have Exhibit A on visual.

20 BY MR. SMALL:

21 Q. I believe you characterized some of these
22 areas that you had walked by certain designations.
23 And I'd like to start with GC-2. Do you see that?

24 A. I do.

1 Q. And GC-2 is in the woods on the Bill Hesper
2 property directly upstream from the Hesper "L",
3 correct?

4 A. Correct.

5 Q. Now, I believe you also mentioned that in
6 these areas you had silty soil and some pool areas;
7 is that correct?

8 A. Yes, I mentioned silt deposits primarily in
9 the pool area.

10 Q. And it was very soft, granular material,
11 correct?

12 A. It's very soft. I did not texture it to
13 see if it was granular.

14 Q. So this would have flowed downstream down
15 to that location?

16 A. I believe the silt deposits probably did,
17 yes.

18 Q. Also on GC-2 I believe that's where you
19 said you found a six-inch fish and minnows; is that
20 correct?

21 A. More than one 6-inch, approximately 6-inch
22 fish and minnows, yes.

23 Q. Okay. And there were a strip of trees that
24 you could see that you believed to be owned by Andy

1 and Bobby Hesper; is that correct, at that location?

2 A. Yes.

3 Q. And I believe you also indicated that in
4 your terms this was the muckiest area, you know, the
5 soil, lots of sediment; is that correct?

6 A. In the upper reaches of GC-2 that's where
7 it was the muckiest, silty, yes.

8 Q. Now, GC-3, referring to that, that was the
9 area of the Hesper "L", correct?

10 A. That's correct.

11 Q. And I just want to make certain, your
12 language was that there was lush vegetation -- there
13 was vegetation there?

14 A. Where's there?

15 Q. Along the stream channel through the "L"?

16 A. Yes, there was vegetation along the sides
17 and on the sub channel on the bottom.

18 Q. Okay. And GC-4, that was 1600 feet from
19 the Hesper edge of their "L" where it exits the
20 property; is that correct?

21 A. That's correct.

22 Q. And that's downstream 1600 feet and there
23 you found frogs and minnows, correct?

24 A. Yes, and just a single frog.

1 Q. Okay. And any waters that you'd have down
2 there, other than a rain fall event that would fall
3 on it directly would have to come through the Hesper
4 "L", correct?

5 A. Would you repeat that?

6 Q. Any water that you would see in GC-4,
7 unless it came directly from rainfall from the sky
8 directly down or so other precipitation, the only
9 other source of water there would be that it flowed
10 from upstream to downstream, correct?

11 A. No.

12 Q. And why are you saying no?

13 A. Because there could be surface runoff
14 within that whole segment of GC-4, there could be
15 groundwater contributions to the flow of Martin
16 Branch.

17 Q. So you think that the majority of the water
18 in Martin's Branch is a result of it flowing through
19 Martin's Branch or do you think that it's just select
20 locations where there's runoffs that forms pools?

21 A. The majority of the water -- I don't know
22 the split between the surface water contribution and
23 the groundwater contribution on that.

24 Q. So you have no opinion on that, correct?

1 A. Not with any definitiveness, no.

2 Q. Okay. And I believe your testimony was
3 that when you visited the site those two days, this
4 was after a substantial rain?

5 A. I testified there was a rain event
6 somewhere around an inch on February 24th.

7 Q. And then I think there was another, I think
8 you characterized it as three tenths of a inch --

9 A. That's correct.

10 Q. -- (continuing) another day?

11 A. That's correct.

12 Q. So what you were seeing then which were
13 just remnants was after a substantial rain?

14 A. Well, the substance rain was on
15 February 24th if you consider a little less than an
16 inch a substantial rain. It was flowing on when we
17 were there.

18 Q. Okay. I just want to go, a little bit into
19 your some of your penalty calculations. You
20 indicated that the penalty that you were considering
21 was based upon 5.5 acres; is that correct?

22 A. I said it was potential -- you had the
23 potential to make an economic benefit argument on
24 five and a half acres rather than 2.1 wetlands.

1 Q. And are you making the assumption when
2 you're looking at that, are you assuming that this
3 area was wooded before the Hesers purchased the
4 property?

5 A. Yes, I am.

6 Q. Okay. And you understand that EPA's prior
7 witnesses have indicated a whole that's not the case?

8 A. That's not my understanding.

9 Q. That's not your understanding or you didn't
10 hear it?

11 A. It's not my understanding of their
12 testimony.

13 Q. Now isn't it a fact that there are large
14 amounts of pollutant sources within Martin's Branch
15 watershed other than the Hesel "L"?

16 A. I don't know with certainty the number of
17 sources, but to the extent that there's agricultural
18 land that butts up against channels, I would agree
19 that that's a similar situation.

20 Q. And you've indicated that you didn't do any
21 research on any other tributaries that go into Lake
22 Centralia, correct?

23 A. Other than defining their watershed
24 boundaries, no.

1 Q. Okay. Now when we talk about deterrence,
2 you're really talking about a penalty, aren't you?

3 A. Yeah, the use of a penalty as deterrence,
4 that's correct.

5 Q. And you don't want anybody to get an undue
6 advantage or disadvantage, do you?

7 In other words, you want to be even
8 handed with everybody?

9 A. I want to be fair.

10 MR. SMALL: Your Honor, I'd like to turn the
11 baton over to my partner.

12 JUDGE MORAN: Certainly.

13 CROSS-EXAMINATION (CONT'D.)

14 BY MR. NORTHRUP:

15 Q. Well, let's see, Mr. Carlson, you've been
16 to other properties that the Hesers own in addition
17 to the subject property; is that correct?

18 A. I have been, yes.

19 Q. And you've talked to Bill and Danny Hesper
20 before?

21 A. I have.

22 Q. Did you talk to Trent Hesper?

23 A. Yes.

24 Q. Who's Trent Hesper?

1 A. That's the brother of Daniel, son of Bill.

2 Q. Did he say he was present when the video
3 was taken, the video that we all watched a few weeks?

4 A. Yes.

5 Q. Did he indicate he took that video?

6 A. That's my understanding.

7 Q. Of course, that's not what Danny testified
8 to, correct? Do you remember that?

9 A. That's not my understanding.

10 Q. Other than Bill and Danny and Trent Hesel,
11 have you talked to any other neighbors of Andy and
12 Bobby Hesel?

13 A. Yes.

14 Q. Who were those neighbors?

15 A. A neighbor that lives off Old Salem Road.
16 I didn't catch the name. I thought that Daniel Hesel
17 referred to that as the Mercer residence, but I don't
18 know the name of the person.

19 Q. They didn't identify themselves?

20 A. No.

21 Q. Was that a man or a woman?

22 A. It was woman.

23 Q. So you don't know if you've talked to
24 either Dorothy or Max Mercer?

1 A. No, I don't.

2 Q. Now, do you recall Dorothy and Max Mercer
3 were identified in the Heser's Information Request to
4 Response?

5 A. I do?

6 Q. But still, you did not go out and talk to
7 them?

8 A. I don't know the name of the person we
9 talked to, other than that, that person lived in that
10 home on Old Salem Road, across the street.

11 Q. Did you talk to that person about logging
12 activities on the Heser property?

13 A. No.

14 Q. Other than -- well, strike that.

15 Have you talked to anyone else who
16 owns property adjacent to Martin Branch downstream to
17 the Heser "L"?

18 A. I believe the gentleman that we met at the
19 mouth of Martin's Branch owns property adjacent to --
20 adjacent -- well, actually, it's adjacent to Lake
21 Centralia.

22 Q. Did he identify himself?

23 A. No, other than as a property owner.

24 Q. Do you know what political entity, if there

1 is one, has jurisdiction over Lake Centralia?

2 A. Well, I believe like the Illinois
3 Department of Natural Resources would have the
4 ability to check fishing licenses and boat licenses.

5 Q. Okay.

6 A. But other than that -- well, it's part of
7 the water supply. It's now the number three water
8 supply. It used to be number two water supply. I
9 used to talk to the person dealing with water supply.

10 Q. Water supply for?

11 A. For Centralia and surrounding communities.

12 Q. And I'm sorry, did you say you did talk to
13 that person?

14 A. I did.

15 Q. Okay, and what was that person's name?

16 A. His name was I believe Sharp.

17 Q. Did you ask him whether he had observed any
18 changes in Lake Centralia over the years?

19 A. Yes.

20 Q. Did you ask him if he had observed any
21 changes since 1999?

22 A. Yes.

23 Q. And what was his response to that?

24 A. Well, the change was that the water supply

1 was changed so that instead of Lake Centralia being a
2 secondary water supply, it was now tertiary in that
3 they had put a new water line into Lake Carlyle here
4 for a while.

5 Q. So Lake Centralia is not the sole source of
6 water for the City of Centralia?

7 A. No, it's not. Now, it's third.

8 Q. Did you raise any issues with respect to
9 water quality issues with Mr. Sharp?

10 A. No, only with sedimentation about the lake.

11 Q. And what did he say about sedimentation?

12 A. Well, they kept an eye on it in case they
13 -- they used to have to keep an eye on it in the
14 sense that if it become too much, they would possibly
15 have to dredge it.

16 But now that it's a tertiary system,
17 now it's not a big concern of theirs.

18 Q. What does that mean, tertiary system?

19 A. Just a third, just a third option.

20 Q. In that discussion, was there any comment
21 about the sources of the sediment, sedimentation?

22 A. No, I don't believe we got that specific.

23 Q. Did you talk to Mr. Sharp about the
24 presence of septic systems around the lake?

1 A. Ahhh, no.

2 Q. In your -- take look at Exhibit A that's up
3 on the easel.

4 Looking at Lake Centralia, do you see
5 where there are two different shades of blue?

6 A. I do.

7 Q. Do you have any understanding as to why
8 there are two different shades of blue?

9 A. I think that's an artifact of joining two
10 different maps together at that border.

11 Q. So as far as you know, there's no barrier
12 or anything like that where the color has changed?

13 A. No, there is not.

14 Q. As a life scientist, that is your title
15 correct, life scientist --

16 A. And Enforcement Officer.

17 Q. Okay -- (continuing) of the EPA, have you
18 ever heard the term watershed assessment?

19 A. Yes.

20 Q. What is a watershed assessment?

21 A. Where you attempt to identify pollutant
22 sources, generally.

23 Q. How do you go about assessing a watershed?

24 A. Well, I don't know the details of it.

1 Q. Okay, in general terms.

2 A. In general terms, you would have to analyze
3 the land. Probably go out and do field trooping and
4 look at aerial photography and then go out and field
5 troop that area.

6 Q. What do you mean by field trooping?

7 A. Well, if it's a big enough area, it makes
8 sense to look at field photography first, that covers
9 a broader area.

10 You look at your scales. You can see
11 a lot in a relatively small piece of photo print.

12 Or if it's digital on the computer
13 screen.

14 And then field trooping is just going
15 out and saying what you -- what you thought say it
16 was a farm field that had a pipe into a ditch is in
17 fact is that.

18 Q. Do you perform any kind of sampling and
19 analysis in a watershed assessment?

20 A. I don't know the details, that much
21 details. I think you would but I don't know.

22 Q. Do you know if a watershed assessment has
23 been performed on the Martin Branch?

24 A. Well, only to the extent that it's

1 incorporated within the Crooked Creek TMDL plan.

2 Q. And that TMDL report, that was Exhibit 28;
3 is that correct?

4 A. That's correct.

5 Q. And that was the exhibit that made no
6 mention, no specific mention of Martin Branch,
7 correct?

8 A. I have not read the entire document. So I
9 don't know if there's a mention in there somewhere of
10 Martin Branch.

11 Q. To the extent that you've reviewed it, have
12 you seen any reference to the Martin Branch watershed
13 in that document?

14 MR. MARTIN: Your Honor, this has been asked
15 and answered.

16 JUDGE MORAN: Overruled. References.
17 Overruled.

18 THE WITNESS: Would you repeat that question
19 for me, please?

20 BY MR. NORTHRUP:

21 Q. To the extent that you have reviewed that
22 document, do you recall seeing any mention of the
23 Martin Branch Watershed?

24 A. Yes.

1 Q. Do you recall in what context that was?

2 A. The context of Lake Centralia.

3 Q. And do you recall the specific reference
4 under the Martin Branch Watershed?

5 A. Only to the extent that it's part of Lake
6 Centralia.

7 JUDGE MORAN: And I want to comment, not that I
8 need, but to -- further explaining my past ruling.

9 It's because this witness, in my view,
10 backtracked a little bit from his earlier answer, and
11 so that's why I allowed that question as to
12 references.

13 BY MR. NORTHRUP:

14 Q. In your review, do you recall whether the
15 Martin Branch Watershed was listed as being impaired?

16 A. No.

17 Q. You don't recall or you don't recall it was
18 listed as impaired?

19 A. I don't recall it listed as impaired.

20 Q. Thank you. Have you heard the term
21 watershed assessment plan?

22 A. I don't believe so.

23 Q. Now, in the field, you can take all kinds
24 of samples and perform all kinds of analyses

1 monitoring for all various media whether it's soil,
2 sediment water or grass, correct?

3 A. With time and resources, one could do lots
4 of sampling.

5 Q. You can measure water flow?

6 A. You can.

7 Q. Did you measure water flow above the Heser
8 "L"?

9 A. No.

10 Q. Did you measure water flow in the Heser
11 "L"?

12 A. No.

13 Q. Did you measure water flow downstream of
14 the Heser "L"?

15 A. No.

16 Q. You can measure such things as water
17 velocity, correct?

18 A. Correct.

19 Q. At any time in this case whether it be
20 above or below the Heser "L", have you taken such a
21 measurement?

22 A. No.

23 Q. And you can even measure the temperature if
24 you want?

1 A. Correct.

2 Q. Have you taken any temperature measurements
3 in Martin Branch?

4 A. No.

5 Q. Whether that's above, below or in the Hesper
6 "L"?

7 A. No to both locations.

8 Q. Have you taken any -- have you taken any
9 water samples from the Martin Branch?

10 A. No.

11 Q. Again, that's above the "L", below the "L",
12 or in the "L"?

13 A. None of those locations.

14 Q. And, of course, you can with a water
15 sample, you can analyze it for the presence of
16 chemicals, correct?

17 A. Correct.

18 Q. Pollutants?

19 A. Correct.

20 Q. Organic material, you can do all those
21 things?

22 A. I believe you can, yes.

23 Q. The same is true with soil. You can sample
24 soil for chemicals or organisms or pollutants,

1 correct?

2 A. Yes.

3 Q. Have you taken any soil samples on the
4 Heser property?

5 A. Yes.

6 Q. Okay, now when you say that are you
7 referring to those probes that you took?

8 A. Mine were bore holes, not probes.

9 Q. When you took those bore holes, did you
10 ever collect those samples and send them off to a lab
11 for analysis?

12 A. No.

13 Q. What did you do with that soil that you
14 took in your borings?

15 A. I measured horizon depth, did texture by
16 feel, recorded the colors and recorded doxamorphic
17 features, and recorded any observations of fill
18 material.

19 Q. And then just emptied the material back on
20 the ground?

21 A. That's correct.

22 Q. All right, did you take any soil samples
23 anywhere within the Martin Branch Watershed?

24 A. Well, the Heser --

1 Q. Other than on the Hesper site?

2 A. On Bill Hesper's property.

3 Q. And, again, those were the bore holes?

4 A. That's correct.

5 Q. You did not have those analyzed for the
6 presence of chemicals or pollutants or anything like
7 that; is that correct?

8 A. That's correct.

9 Q. Did you take any sediment samples along
10 Martin Branch?

11 A. No.

12 Q. And, again, sediment samples, you can
13 analyze those for the preference of chemical or
14 organic material, a whole host of things, correct?

15 A. If you could get enough of a sample, I
16 believe you could, yes.

17 Q. And you did not do that anywhere along
18 Martin Branch?

19 A. No.

20 Q. You can also perform surveys of insects,
21 correct?

22 A. Yes.

23 Q. Did you do any of those surveys at that
24 site?

1 A. We did no insect survey.

2 Q. Did you do any other kind of survey at the
3 site?

4 A. We reconnoitered the site for its
5 vegetative structure and any animals that we saw we
6 reported.

7 Q. And you've talked about what you've seen,
8 you know, what kind of animals you've seen, things
9 like that?

10 A. Yes, I mentioned that earlier.

11 Q. Is it the proper terminology
12 macroinvertebrate or is it microinvertebrate?

13 A. In what context?

14 Q. I'm just asking, is that the word? Is that
15 an English word?

16 A. Macroinvertebrate is a term.

17 Q. Okay. Did do you any surveys looking for
18 macroinvertebrates at the site?

19 A. No

20 Q. How about amphibians, were they surveyed?

21 A. Not anything focused on amphibians.
22 Again, just what we recorded when we
23 walked and reconnoitered the area.

24 Q. And you have performed no such surveys

1 either above or below the Hesper "L"; is that correct?

2 A. Again, other than the reconnoitering and
3 other than making your observations document, no.

4 Q. Now does reconnoitering, is that equivalent
5 of a survey?

6 A. Yes.

7 Q. Do surveys come in all sizes and shapes?

8 A. It certainly can.

9 Q. Was what you performed, was that a minimal
10 survey?

11 A. I would say that it was enough to do the
12 job that we were required to do.

13 Q. And what was the job you were required to
14 do?

15 A. Well, to determine whether or not waters of
16 the United States existed on-site, and to
17 characterize their current status.

18 Q. You indicated I believe in your testimony
19 that Lake Centralia was impoundment of the Martin
20 Branch. Do you recall that?

21 A. I do.

22 Q. And just to be clear: There are a lot of
23 other sources of water to Lake Centralia besides the
24 Martin Branch, correct?

1 A. There were four specific intermittent
2 streams that drain to Lake Centralia that we
3 mentioned.

4 Q. And there's also rainfall?

5 A. Correct.

6 MR. NORTHRUP: If I can just take a minute,
7 your Honor.

8 JUDGE MORAN: Certainly.

9 MR. NORTHRUP: Actually, it didn't take me that
10 long.

11 BY MR. NORTHRUP:

12 Q. Mr. Carlson, can you look at page 458 which
13 is part of Complainant's Exhibit 27. Page 458.

14 A. Okay, I'm there.

15 Q. Okay. You indicated these were algal
16 something. Algal mats something?

17 A. Well, floating algae.

18 Q. Floating algae.

19 JUDGE MORAN: This is, again, CX 458?

20 MR. NORTHRUP: Correct.

21 JUDGE MORAN: Okay.

22 BY MR. MARTIN:

23 Q. And this is in Lake Centralia, correct?

24 A. That's correct.

1 Q. And at what end of Lake Centralia -- where
2 in Lake Centralia is this located?

3 A. This is on the very downstream end of it,
4 just upstream of the emergency spillway.

5 Q. Just for my benefit, can you point out
6 where this is on Exhibit A?

7 A. Right over here (so complied with request.)

8 JUDGE MORAN: I need to see, too.

9 THE WITNESS: There's a little spillway --
10 there's a little indentation for the spillway.

11 MR. NORTHRUP: So at the top of the lighter
12 blue area?

13 THE WITNESS: That's true.

14 BY MR. MARTIN:

15 Q. Did you observe algae anywhere else on Lake
16 Centralia, on that day that you took that picture?

17 A. Not that I recall.

18 Q. Do you know why the algae would be forming
19 at this particular location and nowhere else on the
20 Lake?

21 A. Well, I don't know that nowhere else on the
22 lake it forms.

23 It could be here in particular because
24 if there's any flow towards the spillway, you could

1 get algae grouping here.

2 Q. Does the depth of the water have anything
3 to do with the formation of the algae?

4 A. That, I don't know.

5 Q. How about the temperature of the water,
6 does that have anything to do with the formation of
7 algae?

8 A. I don't know specifically.

9 Q. And the movement of water?

10 A. I don't know regarding that either.

11 Q. What about the presence of silt or
12 sedimentation?

13 A. To the extent that silt and sedimentation
14 are associated with excess nutrients, that could be a
15 factor.

16 Q. So when there's excess nutrients that can
17 potentially cause the production of algae?

18 A. It's usually associated where you have
19 overproduction where you have extensive algal blooms
20 that interfere with the flow of traffic or swimming.

21 Q. Now, I believe you also testified that on
22 the left-hand side of this photograph, again, on page
23 458, is that reed grass?

24 A. It's called -- it's a giant reed grass.

1 Q. And does a whole have any significance to
2 you in this location?

3 A. The significance to me is that it's a --
4 weeds generally grow where there's some element of
5 disturbance.

6 Q. Does reed grass -- is it more prolific
7 where there's sedimentation or sediment?

8 A. I believe that it tolerates that.

9 I don't know that it has a particular
10 preference for it, but it can grow in those areas.

11 Q. Also, if could you approach Exhibit A and
12 show me where Martin Branch enters Lake Centralia.

13 A. Just to the north of where my finger where
14 the end of the CG-6 highlighted area is.

15 Q. Can you calculate for me how far away the
16 point is between where Martin Branch enters Lake
17 Centralia and where the algal appearing on page 458
18 is located?

19 A. I could give you a rough estimate if you
20 could give me a little bit.

21 Q. That's fine.

22 A. I'd say somewhere around like a mile and a
23 half.

24 Q. All right. , thank you.

1 At the beginning of your testimony,
2 you talked about various assessments, I believe
3 wetland assessments that you performed.

4 There was atypical, there was
5 comprehensive and I think there were two others. Do
6 you recall that?

7 A. Yes.

8 Q. What is a comprehensive assessment?

9 A. It refers to the methodology within the '87
10 Corps Wetlands Manual.

11 A comprehensive assessment is just a
12 method where do you a lot more quantification of the
13 different parameters. It's more time intensive.

14 Q. The assessment that you did on the Hesper
15 property, that is not a comprehensive assessment,
16 correct?

17 A. No, that would not be applicable in this
18 situation.

19 Q. On any of the visits when you were at the
20 site, do you recall any personal observations that
21 you had that animal feeding had been disrupted at the
22 site?

23 A. No, no direct evidence of that.

24 Q. Well, how about any personal observations

1 that nesting had been disrupted at the site?

2 A. Well, to the extent that the forest is
3 gone, that structure of the forest, that would tell
4 me there's a lot less possibility of like migratory
5 birds nesting.

6 Q. But any personal observations?

7 A. No, because the habitat's no longer there.

8 Q. You also mentioned in your testimony that
9 there was an adverse impact on migration at the site.

10 What personal observations, if any, do
11 you have of any adverse impact on animal migration at
12 the site?

13 A. That the former wood riparian corridor is
14 now much reduced in width and its shape, so there's
15 less room for migration to occur under cover.

16 Q. Did you observe any migration -- well, you
17 didn't observe any migration before your first visit
18 there, correct?

19 A. Correct.

20 Q. And by the time of your first visit -- I'll
21 strike that.

22 With respect to your civil penalty
23 calculation, we were discussing one of the factors
24 you referred to or your Counsel referred to as

1 matters as justice may require.

2 Do you recall that in your testimony?

3 A. I do.

4 Q. And you indicated that there were three
5 points that you discussed.

6 And on the small end was the fact that
7 the Hesers essentially refused site access for you in
8 March of this year; is that correct?

9 A. That's correct.

10 Q. But your penalty calculation goes back to
11 May of 2006, correct?

12 A. The penalty of calculation would include
13 factors that could go further back in history than
14 that.

15 Q. Okay. So the fact that you claim the
16 Hesers refused access to you in March really had
17 nothing to do with the penalty calculation, correct,
18 that you made in May of '06

19 A. Well, it's a factor we can still consider
20 before the hearing.

21 Q. But it had nothing to do with your original
22 calculation of \$120,000 penalty, correct?

23 A. That's correct.

24 Q. Do you recall in the Hesers' information

1 request response they indicated they had attended a
2 seminar on wetlands or drainage, do you remember
3 that?

4 A. I do.

5 Q. Did you perform any investigation or
6 follow-up on that claim that they had made?

7 A. Nothing other than reviewing the 308
8 response itself.

9 MR. NORTHRUP: That may be all I have if you'll
10 give me a couple minutes.

11 JUDGE MORAN: You want a couple minutes, sure.

12 And I take it there will be some
13 Redirect from EPA?

14 MR. MARTIN: Yes, your Honor.

15 JUDGE MORAN: When Respondents are done, we'll
16 take a break.

17 But before we do that I'm going to ask
18 some questions, and I want that on the record.

19 I don't mean questions of this
20 witness, although I will have some.

21 MR. NORTHRUP: I'm ready to go back on, your
22 Honor.

23 JUDGE MORAN: Okay. Go ahead, Counsel.

24 MR. NORTHRUP: Thank you.

1 BY MR. NORTHRUP:

2 Q. Were you present when Mr. Bill Hesper
3 testified as to some natural channels that went from
4 his property into the -- onto the Respondents'
5 property in the area of the "L"?

6 A. Yes.

7 Q. Did those channels appear to you when you
8 were performing your aerial survey?

9 A. I can't say I saw them on that aerial
10 survey.

11 Q. You also talked about crawfish burrows?

12 A. Yes.

13 Q. I believe you said the bottoms of those
14 have to be wet?

15 A. Yeah, they live in an aquatic environment
16 because they have gills so generally they're in areas
17 where there's water.

18 Q. And did you observe those -- were they in
19 the Hesper field?

20 A. There was one area that had them in it, in
21 the Hesper field, yes.

22 Q. Where would that water come from, if you
23 know?

24 A. Well, it could come from overland flooding

1 and or it could come from a high water table or it
2 could come from surface runoff.

3 Q. And a high water table meaning groundwater?

4 A. That's right.

5 Q. You also talked about an area that you
6 observed on the Hesper property you called it a
7 concentrated flow area.

8 Do you remember that.

9 A. Yes, I do.

10 Q. Can you go to Exhibit A and mark on there
11 where you saw that?

12 A. Sure.

13 JUDGE MORAN: Okay, and let's identify what
14 color pen you're using and how you're going to mark
15 it when you're doing that.

16 That can be up to Counsel for what you
17 use.

18 MR. NORTHRUP: Whatever you have before you.

19 JUDGE MORAN: And then if you would,
20 Mr. Carlson, just as you did when you were testifying
21 on direct, just describe what you just marked?

22 THE WITNESS: On Exhibit A, I have marked in
23 orange pen, I placed a dot, an orange dot at the
24 location of the concentrated flow area that I

1 observed on-site.

2 And it's labeled as such. And the
3 label is connected with a dot with an arrow that
4 points at it.

5 MR. NORTHRUP: Okay, on that -- why don't you
6 stay there for a minute.

7 BY MR. NORTHRUP:

8 Q. On Exhibit A -- were you in the room when
9 Miss Rogers testified?

10 A. For some of it, yes.

11 Q. Do you recall that she drew a line on
12 Exhibit A that sort of goes through the B and the R
13 of the Martin Branch Watershed?

14 A. I do.

15 Q. And that essentially was I believe she
16 testified 446-acre sub watershed of Martin Branch, do
17 you recall that?

18 A. I do.

19 Q. On which side of that line have you drawn
20 the concentrated flow area?

21 A. I'm upstream of that area.

22 Q. Where does that flow come from?

23 A. I believe it comes from the Hesper
24 property -- Hesper brothers' property.

1 JUDGE MORAN: Which brother are we talking
2 about?

3 THE WITNESS: I'm talking about them as joint
4 partners, the Hesper brothers, Robert and Andrew, the
5 Respondents.

6 JUDGE MORAN: Okay.

7 BY MR. NORTHRUP:

8 Q. Do you mean the Respondents?

9 A. Correct.

10 Q. And it was a little unclear, did you
11 testify that it was a channel or it's not a channel?

12 A. No, it was not a channel in the sense that
13 it had a bed and banks. It was a scour area, much
14 shallower than that.

15 Q. How shallow was it?

16 A. Oh, probably less than an inch.

17 Q. When you were making your penalty
18 recommendation, did you assume that the Respondents
19 had cleared the site of woods or forest?

20 A. Yes, or they directed it.

21 Q. Did you ever make any contact with anyone
22 from Culling(sp) Wood Products?

23 A. No.

24 MR. NORTHRUP: That's all I have.

1 JUDGE MORAN: Okay. We're going to take a
2 five-minute break here, but before we do and we're
3 still on the record.

4 Now we have left three more witnesses
5 for EPA?

6 MR. NORTHRUP: Yes, your Honor.

7 JUDGE MORAN: Please tell me those names they
8 are first.

9 MR. MARTIN: First, Simon Manoyan.

10 JUDGE MORAN: And your best estimate as to how
11 long -- he's going to be testifying about what?

12 MS. PELLEGRIN: This witness will be
13 testifying -- he's a surface water modeler. He will
14 be much less --

15 JUDGE MORAN: Just give me the time.

16 MS. PELLEGRIN: A couple of hours. Let's say a
17 couple of hours.

18 JUDGE MORAN: Okay, we'll say two hours.

19 A couple? Two?

20 MS. PELLEGRIN: Two.

21 JUDGE MORAN: Could be three?

22 MS. PELLEGRIN: Could be three.

23 JUDGE MORAN: Then the next witness for EPA?

24 MS. PELLEGRIN: That's Wendy Melgin.

1 JUDGE MORAN: That's the lady right there.
2 She's going to testify about what?
3 MS. PELLEGRIN: She's our expert hydrologist.
4 JUDGE MORAN: And your best estimate,
5 Miss Pellegrin is she'll be about how long?
6 MS. PELLEGRIN: I'm going to go with may be
7 four, four hours.
8 JUDGE MORAN: And your third and last witness
9 is?
10 MS. PELLEGRIN: Mr. Mark Ewen.
11 JUDGE MORAN: And, Mr. Ewen, he's the person
12 that's been patiently waiting here for a long time.
13 It's the gentleman with the beard; is
14 that right?
15 Oh, I'm sorry the other person with a
16 beard.
17 Where is he? Where's Mr. Ewen?
18 MS. PELLEGRIN: Mr. Ewen is not in the
19 courtroom now.
20 JUDGE MORAN: Okay, what's he going to testify
21 about?
22 MS. PELLEGRIN: He's our financial analysis
23 expert.
24 JUDGE MORAN: And he will take approximately

1 how long?

2 MS. PELLEGRIN: I would say approximately two
3 hours.

4 JUDGE MORAN: Okay, all right. Then that means
5 that all of tomorrow, and that's not even counting
6 cross-examination --

7 MS. PELLEGRIN: Correct.

8 JUDGE MORAN: -- (continuing) all of Wednesday
9 EPA will be continuing with it's case and it's
10 unlikely that that will be completed when we consider
11 cross-examination tomorrow.

12 That means that EPA to present its
13 case will have taken eight out of five scheduled
14 days.

15 How can that be? Because the original
16 schedule was five, if you remember.

17 So, mathematically it's impossible but
18 we're talking about eight days for EPA's case for
19 what was originally scheduled to be five days, total,
20 both sides.

21 So that leaves, at most, two days for
22 the Respondents.

23 And so the upshot of this is -- I'm
24 going to reiterate what I said before:

1 The Redirect is about to begin; is
2 that right?

3 Okay, but before that I have just a
4 couple of questions.

5 First of all, just in case it isn't in
6 the record, Mr. Carlson, define the terms watershed.

7 I know what it is but you put it in
8 the record for me, please.

9 THE WITNESS: A watershed refers to some water
10 body that you're referring to.

11 And for that body that you're
12 referring to the watershed is a geographical area
13 that essentially encircles it to degree that all
14 either the precipitation on the surface will end up
15 in that water body or move towards that water body.

16 JUDGE MORAN: Okay.

17 Now early on in your testimony under
18 cross-examination, you were talking about
19 interpreting aerial photography and I believe you
20 agreed that it's not an exact science.

21 THE WITNESS: That's correct.

22 JUDGE MORAN: And for the aerial photography
23 that you reviewed, you looked in black and white
24 photographs albeit they were in stereo, you reviewed

1 them in stereo, correct?

2 THE WITNESS: Correct.

3 JUDGE MORAN: Okay. My question to you is, if
4 you know:

5 Is it easier to conduct an aerial
6 analysis of color photographs that are stereo or
7 black and white photographs that are done in stereo?

8 THE WITNESS: That would depend on what you're
9 looking at.

10 JUDGE MORAN: Well, let's talk about what we're
11 looking at here.

12 THE WITNESS: All right.

13 JUDGE MORAN: Would your job have been easier
14 if these same photographs which have been displayed
15 in various exhibits -- would your job in analysis
16 have been easier and/or more accurate had they been
17 in color?

18 THE WITNESS: No.

19 JUDGE MORAN: No. And so there's no greater
20 accuracy from a color photograph versus black and
21 white, is there?

22 THE WITNESS: In a different situation, there
23 might be. But in this situation I don't think there
24 is.

1 JUDGE MORAN: Were there color photographs,
2 aerial photographs available to you?

3 THE WITNESS: I can't recall. I have a slip in
4 my file that lists the aerial photography that
5 generally covers this area. I'd have to refresh my
6 memory for that.

7 JUDGE MORAN: When you're seeking aerial
8 photography, do you put in a request or oh, send me
9 whatever you got or I prefer black and white or
10 actually, I like color better.

11 Do you not care whether it's black and
12 white or color?

13 THE WITNESS: No, I believe black and white
14 works best on this site.

15 JUDGE MORAN: But on a different site, color
16 might be --

17 THE WITNESS: It might, depending on the
18 situation you're looking at.

19 JUDGE MORAN: But you didn't ask or at least
20 you don't recall whether there was color available?

21 THE WITNESS: I would have looked through the
22 records to determine what photography was available.
23 I don't recall whether there was color available.

24 JUDGE MORAN: Okay.

1 Redirect?

2 MR. NORTHRUP: Your Honor, for the first few
3 questions I'm going to need Exhibit H.

4 REDIRECT EXAMINATION

5 BY MR. MARTIN:

6 Q. Mr. Carlson, looking at Exhibit H, which is
7 on the easel before you, and directing your attention
8 to polygon W2, will you locate the nearest hydric
9 soil boring to polygon W2?

10 A. It says S2.

11 Q. S2 is the soil boring location.

12 That soil boring location S2 was
13 tested to be hydric; is that correct?

14 A. That's correct.

15 Q. In the area in which S2 is located on
16 Exhibit H, was that area determined to being upland
17 or wetland?

18 A. The point right at where S2 is, is upland.

19 Q. So you determined the area in which S2 is
20 located to be upland?

21 A. That's correct.

22 Q. Now why did you do that?

23 A. Because under stereoscopic review, that
24 area is a convex surface.

1 There is also no indication of moist
2 soil or inundated soil beneath the canopy of the
3 forest at that location.

4 Q. And W2 under stereoscopic analysis tested
5 out to be a concave area; is that correct?

6 A. Concave, that's correct.

7 Q. Directing your attention to polygon W4?

8 A. Okay.

9 Q. Now what is the nearest soil boring
10 location to polygon W4 that tested hydric?

11 A. It looks to be the bore hole that's listed
12 T24 to the southwest of that.

13 Q. So T24, the area in which soil boring T24,
14 was that determined by you to be wetland or upland?

15 A. Upland.

16 Q. And why is that?

17 A. For the same reason as the previous one, it
18 looks convex and a little indication of water beneath
19 the canopy, the soil part on top of the surface.

20 Q. Looking at the location of transect T24, is
21 that sample location located near a channel scar that
22 you determined to be present on the site?

23 A. It's relatively close to a couple of
24 features, features I have called linear depressions

1 one and two as well as in the vicinity anyway of the
2 southwest part of W4.

3 Q. And does that linear depression - I'm not
4 sure if it's one or two - tell us that?

5 Do either of those linear depressions
6 feed into polygon W4?

7 A. Linear Number two feeds into polygon W4.

8 Q. And looking at polygon W4, did you
9 determine that to be a concave area or convex area?

10 A. Concave.

11 Q. And, again, what is the significance of
12 determining an area to be concave?

13 A. Well, concave is a depressional area so
14 it's going to collect water from the surrounding area
15 and from over the bank flooding.

16 Q. Okay, thank you.

17 Was the former wetland on the site of
18 the alleged violation next to a stream?

19 A. I believe all the polygons are either
20 abutting the main stem or abutting a tributary to it.

21 Q. And when you refer to the main stem, which
22 stream are you referring to?

23 A. Martin Branch.

24 Q. In your opinion, is the site of the alleged

1 violation an isolated wetland?

2 A. No, it is not.

3 Q. And why is that?

4 A. Because they are connected to Martin Branch
5 or a tributary to Martin Branch.

6 Q. You talked a little bit about the American
7 Elm.

8 I believe this was a tree that you
9 found on the reference site; is that correct?

10 A. That's correct.

11 Q. Where does the American Elm fall on the
12 wetland vegetation dominance scale that we discussed
13 earlier in your testimony?

14 A. I don't understand that question. That
15 just sounded like -- vegetative dominance?

16 Q. I'm asking if it's facultative or
17 facultative wet or -- which category does the
18 American Elm fall into?

19 A. It's a facultative wetland.

20 Q. And what does that mean?

21 A. That means between 67 to 99 percent of the
22 time that you see an American Elm the probability is
23 that you're in a wetland.

24 Q. Mr. Carlson, what if any work do you

1 conduct for the TMDL program for water division of
2 the U.S. EPA?

3 A. None.

4 Q. Are you aware specifically of how the TMDL
5 program works?

6 A. Only in general.

7 Q. Are you aware specifically of how the State
8 of Illinois implements the TMDL program?

9 A. I know a little piece of it.

10 Q. Describe which piece.

11 A. Just what I've read in the report. It was
12 a phased process for them to develop their TMDL.
13 Crooked Creek was in the first phase.

14 Q. Okay, you're familiar with the TMDL that
15 was located at Complainant's Exhibit 28?

16 A. I'm familiar with parts of it.

17 Q. Okay, which Agency produced that document?

18 A. The Illinois Environmental Protection
19 Agency.

20 Q. So U.S. EPA did not write that document?

21 A. No.

22 Q. Have you read that document in its
23 entirety?

24 A. No.

1 Q. Mr. Carlson, are you a watershed assessor
2 for EPA?

3 A. No.

4 Q. Have you ever conducted a watershed
5 assessment?

6 A. No.

7 Q. Mr. Carlson, do you know what a fate and
8 transport analysis is?

9 A. Just on a general level.

10 Q. What is it?

11 A. It deals with the fate of a particular
12 pollutant generally, what happens to it as it moves
13 through the environment.

14 Q. In this case, did you conduct any type of a
15 fate and transport analysis on Martin Branch or with
16 regard to Lake Centralia?

17 A. No, I did.

18 Q. Now let's talk a little bit about the
19 critical planting project for Bill Hesel's property:

20 Was the project that was conducted
21 that was referred to as a critical planting project,
22 was that conducted with the oversight of any
23 Governmental Agency?

24 A. Yes.

1 Q. And which Governmental Agency was that?

2 A. Marion Counsel Soil and Water Conservation
3 District.

4 Q. And what can that oversight entail?

5 A. I understood it to entail that they would
6 be involved in pretty much all aspects of the design
7 of it. And there would be some on-site work in
8 overseeing the construction.

9 Q. Can you give us some details on the work
10 that would be required pursuant to this over site?

11 A. There were seating specifications. There
12 were fertilizer specifications involved, design
13 specifications of the channel and the work around the
14 channel.

15 And I believe on-site supervision of
16 at least some of the construction.

17 Q. When you say there are specifications, what
18 does that refer to?

19 A. That refers to information about a
20 particular aspect of the project that the Government
21 would have used from its experience in doing those
22 types of projects.

23 And that would have been given to the
24 applicant as guidance for the project.

1 Q. So in other words, these specifications
2 would be something along the lines of requirements of
3 how much fertilizer to use on a project area?

4 A. I believe so.

5 JUDGE MORAN: Okay, you've got to wrap it up
6 for the day, Mr. Martin. You can have a couple more
7 questions if you're almost done.

8 MR. NORTHRUP: I'm fairly close.

9 JUDGE MORAN: Hopefully, very close.

10 BY MR. MARTIN:

11 Q. What was the purpose of this oversight
12 activity of the project at the William Heser's site?

13 A. To ensure the project was implemented
14 according to specifications that were approved when
15 they were granted.

16 Q. And was the project conducted by the
17 Respondent at the site of the alleged violation, was
18 that overseen by any Governmental Agency?

19 A. Yes.

20 Q. The project at the site of the alleged
21 violation conducted by the Respondents?

22 A. Oh, I'm sorry.

23 Q. Was it over seen by any Governmental
24 Agency?

1 A. Not that I'm aware of.

2 JUDGE MORAN: Okay.

3 MR. MARTIN: That's all I have, your Honor.

4 JUDGE MORAN: We'll pick this up tomorrow with
5 Recross.

6 And if you think of any other
7 questions in the interim, there are people that have
8 to get out and tend to their fields, so we'll just
9 call it a day.

10 So we'll see you all tomorrow morning.

11 MR. SMALL: Your Honor?

12 Are you resting on this?

13 MR. MARTIN: Yes.

14 MR. SMALL: You're done with your Redirect?

15 MR. MARTIN: Yes.

16 MR. SMALL: I've got one question.

17 JUDGE MORAN: Okay, go ahead.

18 RE CROSS EXAMINATION

19 BY MR. SMALL:

20 Q. Referring to Exhibit H, the darkened area
21 where you've drawn your polygons, is this the area --
22 this is the 1993 map; is that correct?

23 A. It's a 1993 photograph.

24 Q. And that is where the woods used to be

1 correct, before -- long before you came on-site,
2 those woods were removed, correct?

3 A. Those wood were what?

4 Q. Removed by someone.

5 A. That's correct.

6 MR. SMALL: That's it.

7 JUDGE MORAN: Okay, no need to call back this
8 witness, right? You're done with him?

9 Okay, that concludes Mr. Carlson's
10 testimony.

11 Now tomorrow morning we're starting at
12 9:00.

13 Thank you.

14 (WHEREUPON, the hearing in this
15 matter is continued to
16 Wednesday, May 2, 2007 at 9:00
17 A.M. in Carlyle, Illinois.)

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