

1 UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

2 REGION 5

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

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10 Hearing held pursuant to notice, on Tuesday,  
 11 March 27, 2007 at the hour of 9:30 a.m. at Clinton  
 12 County Courthouse, 850 Fairfax, Carlyle, Illinois,  
 13 before HONORABLE WILLIAM B. MORAN, United States  
 14 Administrative Law Judge.

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

24

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1 P R O C E E D I N G S

2 JUDGE MORAN: Good morning. We're ready for  
3 our second day here.

4 Go ahead.

5 MR. MARTIN: Complainant calls Ward Lenz from  
6 the Army Corps of Engineers.

7 JUDGE MORAN: Mr. Lenz, you're still under  
8 oath.

9 THE WITNESS: Yes, sir.

10 WARD LENZ,  
11 having been first duly sworn by the Administrative  
12 Law Judge, witnesseth and saith as follows:

13 DIRECT EXAMINATION CONT'D.

14 BY MR. MARTIN:

15 Q. Good morning.

16 A. Good morning.

17 Q. Yesterday we talked a little bit about  
18 your February 10th, 2000 inspection of the alleged

19 violation site and went over some of the photos that  
20 you witnessed.

21                   Could you please describe the conditions  
22 of the site as you observed them on that day?

23                   A. Okay. Well, the site -- it was disturbed  
24 site. So going out there first of all I had to

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1 determine from the aerial photograph where the  
2 activity had occurred at.

3                   I had aerial photographs that had the  
4 timber area on it and from there I had to determine  
5 where was the disturbed site was. And I had to apply  
6 what's called atypical procedures in accordance with  
7 the 1987 Manual when I did my sampling, had to  
8 determine, like I said yesterday, jurisdiction is the  
9 first thing.

10                  Q. Mr. Lenz, there is a reference to a slide  
11 review in your field notes. What did that entail?

12                  A. Prior to going to the site, I went to the  
13 NRCS field office in Salem just to look at some of  
14 their resource maps. I spoke to the district  
15 conservationist there and the resource  
16 conservationist.

17                   The district conservationist, Tony  
18 Antonacci, and Brett Davies who is a resource  
19 conservationist with the Soil and Water Conservation  
20 District, and had them show me some slides and aerial  
21 photographs of the site.

22                   And they showed me where it was, what  
23 they had seen out at the site and get an idea of what  
24 had happened and where the activity occurred on the

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1 site.

2                   And so I had an idea prior to going there  
3 as to what I was walking into to, what kind of  
4 situation, what to look for, where the cleared areas  
5 where.

6                   Q. Was anyone else from the Corps of  
7 Engineers with you?

8                   A. Yes, Katherine Kelly.

9                   Q. What are the source of the aerial  
10 photographs that you looked at?

11                  A. What are the source of the aerial  
12 photographs?

13                  Q. Which agency compiled the aerial  
14 photographs that you looked at?

15                   A. These are from the USDA Natural Resources  
16 Conservation Service. They supplied the aerial  
17 photographs.

18                   Q. And describe what happened during this  
19 slide review?

20                   A. During the slide review, I was looking at  
21 the just the area in general to see what it looked  
22 like. Was it wooded, cropped or what?

23                   And what I saw in the aerial photographs  
24 the site was in fact wooded, a timber area on the

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1 aerial photographs. And you can see the stream  
2 channel, where it was on the aerial photographs, so I  
3 knew where I needed to go to and look out on the  
4 site.

5                   Q. How many different years of aerial  
6 photographs did you review?

7                   A. I don't recall. It was several historic  
8 photographs. I don't really recall how many it was.

9                   Q. Did you obtain any aerial photographs?

10                   A. Pardon?

11                   Q. Mr. Lenz, did you obtain any aerial  
12 photographs from this visit?

13           A. Yes. I got aerial photographs to take  
14 out to the field with me.

15           Q. What years were those from?

16           A. I believe they were -- they were in the  
17 '90s. I would say '98, '93, they were in the '90s.

18           Q. Going back to your observations at the  
19 site, how could you tell that the site had been  
20 altered?

21           A. Well, first of all when I arrived out on  
22 the site, the timber that I saw in the aerial  
23 photographs was not there. And then walking right  
24 out to the actual location on the ground, I could

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1 still see remnants -- well, when you clear an area  
2 you still got roots popping up through the soil and  
3 things like that.

4           It takes quite a few years for that to  
5 really disappear. You can see depression areas here  
6 and there where you've taken out stumps and pushed  
7 things around. So it had I believe visible  
8 characteristics where you could see that things had  
9 been manipulated and cleared.

10           Q. Was any natural vegetation remaining at



11 the site of the alleged violation during your  
12 inspection?

13 A. No, there was not.

14 Q. Based on your observations of the site  
15 was the hydrology of the site altered?

16 A. The hydrology of the site was altered,  
17 yes.

18 Q. Describe how it was altered?

19 A. It was altered because first of all the  
20 vegetation had been removed, that's going to alter  
21 hydrology. Filling in the stream channel alters  
22 hydrology.

23 Just moving the earth around and grading  
24 the area, the low spots are brought up higher and the

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1 high spots are brought lower, that alters the  
2 hydrology.

3 Putting the levee up against the stream  
4 channel, that alters the hydrology. So there were  
5 pretty significant alterations throughout that whole  
6 cleared area.

7 Q. What ability would this alteration have  
8 on your ability to observe positive indicators for

9 hydrology of the site?

10 A. It makes it much more difficult.

11 Q. Is there a section in the Corps of  
12 Engineers Delineation Manual that applies to  
13 violation sites like this in this case?

14 A. Yes, there is. One of the -- yes, there  
15 is.

16 Q. What is that site?

17 A. It's the atypical situations.

18 Q. And does that atypical situation -- is  
19 that a atypical situation method set out specifically  
20 in the Manual?

21 A. Yes, it is.

22 Q. Do you know what section that it's set  
23 out?

24 A. No, sir, I don't recall which section.

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1 Q. Let's turn to Exhibit 40, Complainant's  
2 Exhibit 40.

3 And if I could Mr. Lenz, please point out  
4 the section that sets out the atypical method?

5 A. The atypical situations are in Section F  
6 on page 83.

7 Q. And which Bates Number would that be?

8 A. Page 83.

9 Q. The Bates Number?

10 A. Oh, I'm sorry, 1-1-6-0.

11 Q. Thank you. Have you applied this method  
12 in the field before?

13 A. Yes, sir.

14 Q. How many times have you applied this  
15 method?

16 A. A number of times. Commonly when we had  
17 the Enforcement Section in our branch, this was what  
18 we used all the time.

19 And now on enforcement actions, this is  
20 the procedure we would use. Anytime there's a  
21 cleared area you have to use it because you're  
22 missing one or two parameters.

23 Generally, you're missing vegetation and  
24 hydrology could be masked as well. So you're only

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1 left with maybe one or two of the criteria that are  
2 left between soils, vegetation and hydrology.

3 Q. In general, how is this method applied in  
4 the field, the atypical situation?

5           A. Applying this method in the field, you're  
6 still using the same methodology that's laid out  
7 under routine or comprehensive methods.

8           The difference between this is it  
9 realizes the fact that you are missing vegetation or  
10 soils or hydrology. So you gather as much  
11 information as you can on the missing parameters.

12           For instance, vegetation is gone on the  
13 site. You could go to an adjacent site to look at  
14 the vegetation to get an idea of what had been  
15 present before.

16           And what you can get on the site if you  
17 can get one of the criteria on the site, then you go  
18 ahead and get it.

19           For instance, soil is generally all that  
20 you're left with on the site. So you gather the  
21 information from the soil and record that data on  
22 your data sheets.

23           Q. Did you conduct soil sampling at the  
24 site?

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1           A. Yes, sir.

2           Q. Is there a procedure in the Manual set

3 out for how to take soil samples?

4 A. Yes, sir.

5 Q. Can you locate that section for us,  
6 please, in the Manual?

7 A. Yes, sir. It's actually in two Sections.  
8 The hydric soil criteria, it starts on Bates Number  
9 1103. That spells out your hydric soil criteria.

10 And then also if you go to Appendix D of  
11 the Manual, which would be Bates Number 1208, that  
12 spells out field procedures for actually doing  
13 sampling.

14 Q. You mentioned hydric soil criteria is set  
15 out starting at 1103?

16 A. Yes, sir.

17 Q. And when does that section end?

18 A. Bates Number 1111.

19 Q. We talked a little bit about the color of  
20 the soils yesterday. Where are the criteria for  
21 colors for the soil set out in the 1987 Manual?

22 A. They're set out in both of those places  
23 that I mentioned. The first place where the criteria  
24 is provided in Bates Number 1108.

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1 JUDGE MORAN: 08?

2 THE WITNESS: 1108.

3 JUDGE MORAN: Okay.

4 THE WITNESS: And then it goes on over into  
5 Bates Number 1109. This is where it specifically  
6 talks about soil color.

7 And then also, if you go to the appendix,  
8 it goes into it a little bit more thoroughly on Bates  
9 Number 1210.

10 BY MR. MARTIN:

11 Q. Okay, returning back to Bates 1108, can  
12 you briefly summarize the analysis that's described  
13 for soil color?

14 A. Okay. When you're sampling the soil and  
15 you get to -- the criteria is, if you're looking at  
16 these colors at a depth of either 10 inches or at the  
17 base of A horizon, which would be your surface layer.

18 You're looking for soil color with a  
19 matrix chroma of two or less in the mottled soils and  
20 that's when we were talking about when you have gray  
21 soil, you've got bright spots or splotches in there  
22 or a matrix chroma of one, again, which would be  
23 gray. One or less in un-mottled soil.

24 So if you have a two chroma which would

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1 be like a gray brown kind of a color, you need to  
2 have mottles present. If you basically have a very  
3 deep gray soil, you don't have to have those bright  
4 colored mottles.

5 JUDGE MORAN: And if you determine, you said  
6 grade soil --

7 THE WITNESS: Gray soils is usually you don't  
8 have to have the mottles. Not grade, gray.

9 JUDGE MORAN: Gray?

10 THE WITNESS: Yes, gray.

11 JUDGE MORAN: And that tells you what, that  
12 it's hydric soil?

13 THE WITNESS: Yes, sir.

14 BY MR. MARTIN:

15 Q. Let's return to the data forms that we  
16 started discussing yesterday. I think we left off at  
17 page 118.

18 JUDGE MORAN: And this of course is from  
19 Complainant's Exhibit 8.

20 MR. MARTIN: Yes, your Honor.

21 THE WITNESS: I'm sorry, which page number?

22 MR. MARTIN: Bates 118.

23 THE WITNESS: Okay.

24 BY MR. MARTIN:

1           Q. Did you fill out this data form,  
2 Mr. Lenz?

3           A. Yes, sir.

4           Q. And where does that data form come from?

5           A. This is Transect Number 2.

6           Q. I mean the data form itself. Where does  
7 the form come from?

8           A. The form itself? This is a routine data  
9 form that comes out of the '87 Manual. These data  
10 forms are provided within the Manual.

11          Q. Why did you use the routine form?

12          A. I used the routine form because I didn't  
13 see a need to use any of the other forms. This has  
14 all the information that I needed in here to fill  
15 out.

16          Q. And what was the primary parameter you  
17 were looking at during your site inspection?

18          A. The primary parameter would be soils just  
19 because being an atypical situation, the vegetation  
20 had been cleared and was gone, so I could not look at  
21 that parameter.

22                   And hydrology had been altered, so I was  
23 left with soils.



24

Q. Okay, we're going to go through the

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1 locations of these sample points later, but for now  
2 I'd like for you to go through this data form and  
3 explain your findings.

4 A. Okay, first of all, this is transect  
5 ID 2. I took three transects out on the site as I  
6 explained yesterday.

7 This is transect ID 2, plot ID 3, which I  
8 believe was on these transect lines, this would have  
9 been I believe 50 feet further west.

10 I was on a straight line heading west  
11 away from the north-south leg of the channel. So  
12 this is further west than the previous plots.

13 The first criteria, vegetation, I left  
14 that blank. The site, as I said, had been disturbed,  
15 it had been cleared. So I just put a note in there  
16 the site was cleared.

17 Hydrology, I did mark in there oxidized  
18 root channels because during soil sampling that was  
19 one of the things noticed in the soil under the  
20 hydrology section.

21 If you turn the page to Bates Number 119,

22 there's the soil information that I took. 0 to  
23 6 inches, that's the A horizon, the top layer.

24 It had a color of 10 YR 3/2 which

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1 basically it tells you it's a black surface color or  
2 a dark colored surface. It's just your surface  
3 layer, silt loam and texture.

4 The next layer -- and that surface layer  
5 you need to get below that to get any hydric  
6 criteria.

7 6 to 14 inches was the next horizon. And  
8 that 6 to 14 inch layer, that is where I met hydric  
9 soil criteria on the sample.

10 It had a 10 YR 4/2 color, and as I said a  
11 minute ago in the '87 Manual, you need that chroma of  
12 two or less. And this is it right here. That lower  
13 number is a two. That's the chroma number.

14 At that chroma, that requires that you  
15 have those mottles. So if you go on in the next  
16 column, that describes the mottles.

17 The CF means common find, and then the  
18 color 10 YR 4/3. So it had the four as the color  
19 value is the same. That three chroma, that's a

20 brighter chroma. So there's your bright colored  
21 mottles.

22 And then if you go to the next column,  
23 FF, that would be few find, and that's an abundance  
24 and size designation. Color 10 YR 5/4, so it's just

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1 a different color of mottle, a brighter model, a bit  
2 more texture.

3 And then I went ahead and sampled 14 to  
4 20 inches, but I had already met my criteria at that  
5 point.

6 Q. Why do you sample to 20 inches?

7 A. Pardon?

8 Q. Why did you sample to 20 inches?

9 A. It's not required in the '87 Manual. I  
10 believe the Manual only requires 16 inches. But in  
11 an atypical situation, it's always a good idea to  
12 sample deeper because you're already in a situation  
13 that's difficult.

14 And you really want to get information on  
15 the site about what's going on. And there's a  
16 possibility when you've had bulldozers out on the  
17 site, too, you could truncate the soil, meaning you

18 could have things flip-flopped out there.

19 You've got material being pushed around,  
20 so it's a good idea to go deeper to get an idea of  
21 what's going on.

22 Q. In general, what did your soil boring  
23 results tell you about how the site was altered?

24 A. In general, the soil boring results told

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1 me it had been graded. There had been -- in some of  
2 my samples I had notes where I actually saw mixing of  
3 horizons in here, in some of these.

4 Q. Can you explain mixing of horizons?

5 A. Out on the site originally, the  
6 topography is going to be uneven. You're in a wooded  
7 wetland situation.

8 So you have a history on the site of for  
9 instance, trees will pop over, and where the tree was  
10 the roots popped out so you've got depression.

11 So you've got a series of low and high  
12 spots throughout the entire area, you have in any  
13 kind of wooded wetland situation like that.

14 So when you grade it level, you've got  
15 low spots that have been filled in and high spots

16 that have been graded. So what happens is in the  
17 soil you see evidence of that.

18 Because you're going to sample down  
19 through disturbed layers and you may hit the original  
20 surface 10 inches down lower.

21 Or you may find that you think you're  
22 sampling in an undisturbed area and then all of a  
23 sudden you find another surface or something where  
24 you actual have a large section of soil intact pushed

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1 over on to another.

2 So you've just got different things going  
3 on. That's what mixing is, is where you have soil  
4 horizons mixing with others surface mixed with  
5 subsurface horizons and vice versa.

6 Q. Okay, thank you. Moving on to Bates 120.

7 JUDGE MORAN: Just before you do that, I'm  
8 going to ask a couple questions:

9 I'm looking at CX 119, Mr. Lenz.

10 THE WITNESS: Yes, sir.

11 JUDGE MORAN: I just want the record to be  
12 explicit about this. You see on page 119, you have  
13 14 through 20 inches.

14                   And then under that, you have the caret  
15                   symbol, does that mean, for example, that all the  
16                   results at 14 to 20 inches were the same as any of  
17                   the above 6 to 14 inches?

18                   THE WITNESS: Yes, sir.

19                   JUDGE MORAN: And would that be true for each  
20                   of these data forms where you employed that  
21                   procedure?

22                   If one sees a caret sign or half a  
23                   quotation mark or whatever you want to call it, that  
24                   means it's the same as that which is immediately

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1                   above it.

2                   THE WITNESS: Yes, sir.

3                   JUDGE MORAN: And when you did these soil  
4                   analyses, did you do the soil analyses at the spot  
5                   right then and there? Or do you take this to a lab  
6                   and do it? How is this done?

7                   THE WITNESS: This is all done on-site,  
8                   nothing is taken to a lab.

9                   JUDGE MORAN: And is it done strictly  
10                  visually?

11                  THE WITNESS: Yes, sir.

12 JUDGE MORAN: Go ahead.

13 BY MR. MARTIN:

14 Q. And you discussed a little yesterday the  
15 Munsell soil chart. Could you explain how that is  
16 employed in the field?

17 A. The Munsell color chart, it's a series of  
18 paint chips, page by page, which basically those  
19 chips have been determined by Hughes values and  
20 chroma to represent soils across the United States.

21 So in this area, we only employ probably  
22 three or four of the pages out of there.

23 And below each of those color chips is a  
24 little hole, also. It allows you -- when you take a

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1 sample, I would put the sample under the paint chip,  
2 look through the hole, and basically match that to  
3 the color, just like you would matching paint in a  
4 store for a wall or something.

5 Q. And you used the Munsell data chart for  
6 each data point in this case?

7 A. Yes, sir.

8 Q. Moving to Bates 120, would you describe  
9 your observation for vegetation soils and hydrology

10 at the site?

11 A. Transect 2, plot ID 4, again on the  
12 vegetation I left that blank because the site had  
13 been cleared.

14 I have a note on there, location 130 feet  
15 west of plot 3, Transect 2. I made no notes under  
16 hydrology again because the parameters had been  
17 altered.

18 So if you turn the page to Bates Number  
19 121, I have the soil section filled out. There I got  
20 0 to 6 inches, 10 YR 3/2 which is a surface horizon  
21 again.

22 From 6 to 14 inches, this is the horizon  
23 that meets the hydric soil criteria. So the color  
24 was 10 YR 4/1, so I had a matrix color of one which

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1 meets the hydric soil criteria. And then I also  
2 noted that there were mottles present.

3 I did go down to 36 inches on this boring  
4 even though I had met the criteria at 6 to 14 inches.

5 From 21 to 28 inches, I do have a note on  
6 there common silt coats. And I put that note in  
7 there just because silt coats are indicators of water



8 movement.

9 So I believe I have several samples here  
10 where I did report in here silt coats.

11 So you have beyond just saturation of the  
12 soil, you actually have evidence of water movement.

13 Q. So that's a positive indicator of  
14 hydrology?

15 A. I met the positive indicator of hydrology  
16 behind the soil criteria at 6 to 14 inches.

17 Q. Turning to your explanation of silt  
18 coats, is that an indicator of hydrology?

19 A. Yes, it is. It's a indicator of  
20 hydrology in terms of flow. It shows you flow. What  
21 that is, silt coats, water has moved through the soil  
22 enough that it has stripped all of the clay off of  
23 the soil particle itself.

24 So all you're left with is the actual

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1 soil particle which you wouldn't be able to see  
2 normally except it's over a wide enough area where  
3 you can see under a ten power lens it would look like  
4 a whole bunch of sand grains.

5 The soil particles that have been

6 stripped from water movement. All of the clay has  
7 been leached off them. And when that happens it's  
8 only under conditions where you've got water movement  
9 through there.

10 Q. In this case, where would the matter be  
11 moving?

12 A. Well, in this case here you know there's  
13 water movement. And so the locations of water  
14 movement -- water is going to move both vertically  
15 and laterally.

16 So in this site here the lateral movement  
17 probably went into the stream channel to provide some  
18 of the base flow of the stream.

19 Q. Moving on to Bates 122. This is a new  
20 transect. Can you briefly describe where this  
21 transect was located?

22 A. Transect 3, on that L shaped channel that  
23 north-south leg again, transects where Transect 1 is  
24 at the top of the leg, 2 in the middle, 3 is at the

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1 bottom of the north-south leg.

2 So this transect again starts at the  
3 channel, and then I run a straight line to the west.

4 So I'm again, just like on Transect Number 2, I'm  
5 heading out in the cleared area there. There was  
6 woods, but now at this time, it was a crop field.

7 So I'm heading west into the crop field  
8 away from the newly constructed channel.

9 Q. Could you go through the results of this?

10 A. Yes, sir.

11 The vegetation again is left blank  
12 because the site is disturbed. So this is an  
13 atypical situation. And I have a note here that my  
14 first sample point was 25 feet west of top of bank of  
15 the new channel. So I went out 25 feet from the  
16 channel to even start sampling.

17 My reason for getting away from the  
18 channel is just because there had been berm and earth  
19 work and stuff taking place right next to the channel  
20 and I wanted to get away from that influence.

21 I really did not want the sample  
22 disturbed soil so much as we wanted to get an idea as  
23 much as I could of undisturbed conditions out there.

24 Q. So do I understand that your intent was

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1 to avoid areas that had been filled in your sampling?

2           A. Yes, sir. That's why I wanted to get  
3 away from the channel. In order to make a wetland  
4 determination -- you're never going to get away from  
5 the fact that you're going to find disturbance out  
6 there.

7           But I wanted to minimize that as much as  
8 possible and I knew if I sampled in certain areas out  
9 there like this, I would get nothing but fill  
10 material. So in my mind, there was no reason to  
11 sample there.

12           The next section under hydrology, I left  
13 that blank. If you turn the page --

14           Q. When you say you left it blank, does that  
15 mean you did not observe any evidence of hydrology?

16           A. I left it blank just because the site had  
17 been altered, the hydrology had been altered.

18           Q. You looked for evidence of positive  
19 indication of hydrology, but did not find it?

20           A. That's correct.

21           On the next page under the soils  
22 criteria, the surface layer was 0 to 7 inches thick.  
23 It was a dark surface layer.

24           In this case, it did have bright mottles

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1 right in the surface of the dark surface layer which  
2 actually probably shows up under the field indicators  
3 of hydric soils.

4 That may have met the requirement right  
5 there. I would have to check on that. I'm not sure.  
6 At 7 to 14 inches that did without a doubt meet the  
7 hydric soil criteria.

8 It's a 10 YR 4/1 with that one chroma  
9 matrix, that makes it right there. And there were  
10 also mottles in that soil, bright color mottles. And  
11 that's a common find. 10 YR 5/6, that's that orange  
12 color.

13 Q. The reference in your remark 0 to  
14 7 inches some mixing, is that evidence of alteration  
15 at the site?

16 A. Yes, sir. There was mixing. There would  
17 have been subsoil mixed in with the surface layer  
18 soils. So that note is there just to show that the  
19 site had been disturbed.

20 We had subsoil within that surface layer.  
21 So basically a more clay material mixed in with that,  
22 brown clay material mixed in with that dark surface.

23 Q. Okay, Mr. Lenz, moving on to Bates 124,  
24 Transect 3 B-1?

1           A. Yes, sir Transect 3, plot 1B.

2           Q. Could you describe your findings on this  
3 data form?

4           A. Okay, on this data form, again, I left  
5 the vegetation block blanked. I have a note site  
6 disturbed. I do have a note location-wise 110 feet  
7 from the fence line.

8           The hydrology blocks, I did check  
9 secondary hydrology indicator, oxidized root  
10 channels. Now I checked that after doing the soil  
11 boring though, because that's an indicator that you  
12 don't see unless you're doing your soil analysis.

13           So a lot of times what I'll do is I'll  
14 make a note under the soil section for that criteria  
15 and then I'll go back and mark it over here. Because  
16 it's not evidence unless you're doing sampling.

17           Q. So the notation of the presence of  
18 oxidized root channels could be located in the  
19 hydrology section or the soil section?

20           A. Yes, sir. Yes, sir.

21           Then if you turn the page to Bates 125,  
22 that's the soils parameter. 0 to 8 inches, again  
23 dark surface soil 10 YR 3/2.

24           Now in this sample, in this soil boring,

1 I also made a remark down here that in that 0 to  
2 8 inches, it actually had charcoal within it, which  
3 would be evidence that the woody debris had been  
4 burnt on the site and mixed in. After it had been  
5 burnt it mixed in and incorporated into the soil.

6 From 8 to 21 inches, that's what meets  
7 the hydric soil criteria right there, that 10 YR 4/1,  
8 one chroma matrix, it's that gray color from the  
9 hydric soils right there. And also had a common find  
10 10 YR 5/6 mottles which would be orange modeling.

11 Again here, I had a note here on silt  
12 coats which would be a indicator of water movement.

13 Q. Mr. Lenz, at the top of the box on page  
14 125, you have a notation regarding the map unit name?

15 Why did you do this?

16 A. This boring here I thought at the time  
17 that I was in that Hoyleton unit with a birds  
18 inclusion.

19 Birds would be that -- typically that  
20 darker surface with that 10 YR 4/1 gray sub horizon.

21 So, if you remember, the Hoyleton is  
22 hydric because of birds inclusion. This would be a

23 birds inclusion.

24 Q. So, in this area, you were looking to

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1 confirm the presence of the birds inclusion?

2 A. Yes, sir, this would be a birds  
3 inclusion. There are other inclusions in the  
4 Hoyleton as well, wetter areas.

5 But, yes, this would be the birds  
6 inclusion which would be verified.

7 Q. Is that what you concluded on the basis  
8 of the soil sample?

9 A. Yes, sir.

10 Q. Moving to Bates 126. This would be  
11 Transect 3-3?

12 A. Yes, sir.

13 Q. Can you describe the results?

14 A. Transect 3, plot ID 3. Again, vegetation  
15 that parameter I left blank again. I did put a note  
16 that it was left blank because it was disturbed.

17 This one had a note on the location,  
18 again, 100 feet from the top of bank. Under  
19 hydrology, again, that was left blank because  
20 hydrology had been altered.



21                   If you turn the page to Bates Number 127,  
22                   there for the soil criteria 0 to 8 inches, it's that  
23                   dark surface color again, 10 YR 3/2, with bright  
24                   mottles within it.

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1                   From 8 to 14 inches had a matrix color of  
2                   10 YR 4/3 which is little browner than the other  
3                   samples with no mottles within it.

4                   And from 14 to 25 inches, again, 10 YR  
5                   4/4. The sample here would not meet the hydric  
6                   criteria unless the field indicators from 0 to  
7                   8 inches brought that in.

8                   Q. What was your determination of whether  
9                   this sample point showed hydric soil?

10                  A. I didn't put a determination on this  
11                  sheet. But I would say looking at it, it doesn't  
12                  meet the criteria, not unless the field indicators,  
13                  and I don't have a copy with me looking at the field  
14                  indicators.

15                  Q. But based on your analysis of the color,  
16                  what was your conclusion?

17                  A. That it would not.

18                  Q. Okay. Moving to page 128?

19 A. Yes, sir.

20 Q. Transect 3-4. Can you describe your  
21 results?

22 A. Transect 3, plot 4, I have a not here on  
23 the distance 245 feet from the top of bank from the  
24 new channel, again. So I'm still on that line

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1 heading west from the channel.

2 I did not fill out the vegetation block  
3 just because it's disturbed. The hydrology block,  
4 did not fill that out as well.

5 If you turn the page to Bates Number 129,  
6 I have an asterisk there that just says that I did  
7 not -- this is similar to the last plot, so I did not  
8 fill it out.

9 Q. When you say last plot, which plot are  
10 you referring to?

11 A. I'm referring to plot 3.

12 Q. That would be Transect 3 ID 3?

13 A. Yes, sir.

14 Q. And you resulted similar results?

15 A. Yes, but I -- well, I have a note here  
16 that it's birds inclusions, so that 0 to 8 inches

17 with the dark surface and the mottles, that's the  
18 only thing that could make it a birds inclusion.

19 By calling it that I automatically called  
20 it a hydric soil. So that's the only thing that  
21 would put that in there.

22 Q. So what was your determination of --

23 A. I've listed it as a hydric conclusion.

24 Q. Moving back to Bates Number 126, this is

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1 a similar point that you found similar to the sample  
2 point just discussed.

3 Can you describe the analysis at the 0 to  
4 8 profile depth?

5 A. On which page?

6 Q. This would be 127.

7 A. 127? 0 to 8 inches had a dark surface  
8 and had bright colored mottles within it. So, what  
9 you have there is -- and this is an atypical  
10 situation remember as well.

11 So this would be called a problem soil.  
12 And there's an another section in the '87 Manual for  
13 dealing with problem soils.

14 And actually we are to go to what's call

15 Field Indicators of Hydric Soils which is a  
16 publication of the USDA. And then spell out what to  
17 do in these situations where you have a dark surface  
18 colored soil, because you can't see -- gray is masked  
19 by these black surface or dark surface soils.

20 So what you rely on is bright colored  
21 mottles within the surface layer itself.

22 And the only reason I can think for  
23 calling that a birds inclusions is because it meets  
24 the field indicators for hydric soils.

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1 Q. So just to clarify your prior testimony,  
2 you did find this data point 3-3 as being a hydric  
3 soil?

4 A. Yes, sir, that's how I have it listed and  
5 that's why I'm thinking I did that.

6 Q. And that was based on your confirmation  
7 that this was a birds inclusion?

8 A. Yes, sir.

9 Q. And your testimony is that Transect ID  
10 3-4 showed similar results?

11 A. Yes, sir. That's why I didn't bother to  
12 write it down.

13 Q. Is your finding the same, that this  
14 transect reflects the presence of a hydric soil?

15 A. Yes, sir.

16 Q. Based on it being a birds inclusion?

17 A. Yes, sir.

18 Q. Moving on to page 130, that's a new  
19 transect. Can you describe the general lotion of  
20 this transect?

21 A. Transect ID 1, plot 1, this transect is  
22 on the top of that north-south L, heading west away  
23 from the new channel. So it would be on the north  
24 end of that channel, heading west straight line west

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1 just like the other transects.

2 Under the vegetation, I left that blank.  
3 Again, the site was disturbed. The hydrology  
4 criteria also left blank.

5 Under the soils criteria, 0 to 5 inches,  
6 it's that dark surface color. 5 to 14 inches, the  
7 color I have is 10 YR 4/3.

8 And then below that 14 to 19 inches  
9 that's where the soil becomes gray, 10 YR 4/1h,  
10 that's your gray matrix colors with bright mottles.

11                   And then I sampled the 25 inches of  
12                   depth. I have a remark down here birds inclusions.

13                   Notes 124, I'm not sure -- I'm not sure  
14                   why I have that there.

15                   Q. Could this refer to a note on your aerial  
16                   photograph?

17                   A. I don't recall.

18                   Q. What is your interpretation of the color  
19                   results from this data point?

20                   A. The color results do not show this as a  
21                   hydric soil.

22                   Therefore, I'm not sure why I have it  
23                   listed as a birds inclusion.

24                   Q. Moving on to page 132, transects ID 1,

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1                   plot ID 2?

2                   JUDGE MORAN: What was that page number,  
3                   Counsel?

4                   MR. MARTIN: 132.

5                   JUDGE MORAN: Thank you.

6                   BY MR. MARTIN:

7                   Q. Can you describe the results of your  
8                   findings?



7 to 14 inches.

8 Below that 14 to 16 inches, I saw the  
9 same colors as above that. And then I sampled the 26  
10 inches and found similar results.

11 Q. How did you interpret these results?

12 A. The soil was not hydric, but there was  
13 evidence of disturbance in the soil profile through  
14 mixing and charcoal.

15 Q. Again, to you what is the presence of  
16 charcoal indicate?

17 A. The charcoal at those depths show me two  
18 things. The charcoal itself is evidence of the  
19 debris being burned. The woody debris when the area  
20 was cleared was piled up and burned.

21 Some of those were seen in the  
22 photographs that Bill Hesel provided his Attorney  
23 with the complaint form.

24 So this is evidence of the burning debris

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1 on the site.

2 And then the fact that I found it at that  
3 depth shows mixing to 14 inches.

4 Q. Moving on to page 134, this is marked as



5 plot ID 1. Can you describe the results on this data  
6 form?

7 A. Yes, sir. Plot ID 1, this sample was  
8 taken further to the west off of Transect 3. And  
9 it's depicted on the map that I made with the  
10 transects on it.

11 But this is further to the west of the  
12 very last data point on Transect 3. So we're further  
13 out in the field. And my reason for doing these  
14 plots 1 and 2 here, both of these plots is I wasn't  
15 sure where the cleared area ended.

16 So I had finished my transects but I  
17 wasn't comfortable with how far I had gone. So I  
18 went and basically resampled a little to the west off  
19 of -- basically off of Transect 3, further out to see  
20 how far the clearing or disturbance really was.

21 So plot ID 1, again, under vegetation, I  
22 left that blank because it had been cleared.

23 Under hydrology, I did have some notes  
24 under hydrology that were still evident when I was

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1 out there on the site. I noted sediment deposits  
2 which are a primary indicator of hydrology.

3                   Oxidized root channels which I would have  
4 saw those during the soil analysis part.

5                   And then other, I believe that just --  
6 I'm not sure what that references unless it is just  
7 referencing the sediment deposits. Because I have  
8 nothing in the remarks other than what the plant  
9 color was, wheat.

10                   So, if you turn the page to Bates Number  
11 135, where I do the soil sampling. 0 to 5 inches,  
12 again, that dark surface horizon. From 5 to 15  
13 inches, that's where it meets the hydric soil  
14 criteria. 10 YR 4/1, that one chroma matrix. And it  
15 also listed mottles within that layer, the 10 YR 5/6  
16 and the 10 YR 4/4 which are bright colored mottles.

17                   15 to 23 inches, I just put those  
18 notations that I found the same material to 23  
19 inches.

20                   And then I put a note in the last column  
21 on silt coats which is again an indication of water  
22 moving, leaching through the profile.

23                   Under remarks oxidized root channels from  
24 7 inches and that's why I marked it on the first

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1 page.

2 Debris and wheat cover, well, that's my  
3 note on the first page under hydrology where I said  
4 other.

5 So there was actually trash and debris  
6 which water had actually flowed out in the field and  
7 left debris in the field.

8 So that's other one I marked under other  
9 on the first page under hydrology.

10 Q. What was your determination based on this  
11 analysis?

12 A. This was a hydric soil.

13 Q. You mentioned that the sample location  
14 here was located on your map. Can you turn to Bates  
15 152 and 153?

16 A. Yes, sir.

17 Q. In general, is this the map that you  
18 referred to?

19 A. Yes, sir. It shows up better on 153.

20 Q. How are these maps, aerial photographs  
21 different?

22 JUDGE MORAN: How are they what?

23 MR. MARTIN: Well, we've got two photos,  
24 aerial photographs and --

1                   JUDGE MORAN: I didn't hear the last word  
2 that you said. Said it again, the last word, how are  
3 they what?

4                   MR. MARTIN: How are they different?

5                   THE WITNESS: There's different from the  
6 information that I put on them.

7                   On 152, I got a few more notes on there  
8 on the location of the transect in terms of  
9 distances. You see on 152, written in red at the  
10 top, I have a note that Transect 1 -- I have levee  
11 that -- one, which would be levee to sample point  
12 Number one which would be 5 feet.

13 BY MR. MARTIN:

14                   Q. We can return to the locations after we  
15 looked at them. I just wanted to know generally what  
16 map you were referring to from your last answer.

17                   And you were referring to the aerial  
18 photographs; is that correct?

19                   A. Yes, sir.

20                   Q. Returning to Bates 136. This would be  
21 plot ID 2?

22                   A. Yes, sir.

23                   Q. Please go through your analysis.

24                   A. Plot ID 2, vegetation parameter left

1 blank again, because there was no vegetation, the  
2 site had been cleared.

3 Under hydrology criteria, I did mark a  
4 second hydrologic indicator, oxidized root channels,  
5 which I would have seen under soil analysis.

6 So if you turn the page to Bates 137,  
7 that's the results of my soil sampling. 0 to  
8 6 inches, 10 YR 3/2, that dark surface color again.

9 And here we had gray and bright colored  
10 mottles noted in the surface layers 10 YR 5/6,  
11 meaning both gray and bright mottle colors.

12 6 to 14 inches, 10 YR 4/1, that one on  
13 the bottom of that fraction is what refers to the  
14 chroma. That's what makes the hydric soil criteria.

15 And then I have a note on the mottles,  
16 common find, 10 YR 5/6 mottles, which are bright  
17 colored orange mottles.

18 That 6 to 14 inches is what made the  
19 hydric soil criteria.

20 And then I went ahead and I did sample  
21 down to 23 inches. And then within the 20 to 23 inch  
22 layer I do have a note that I found silt coats down  
23 there which is a indicator of water moving through

24 the soil profile.

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1 Q. So your determination here was that the  
2 soil was hydric?

3 A. Yes, sir.

4 Q. I'll just move over to page 138, this  
5 would be plot ID 3?

6 A. Yes, sir.

7 Q. Will you go through your results?

8 A. Plot ID 3, again, the vegetation  
9 parameter was left blank. I had a note that  
10 vegetation was missing.

11 Hydrology also left blank because the  
12 site had been altered.

13 So if you turn the page to 139 where I  
14 have the soils information filled out, 0 to 7 inches,  
15 here we actually have a gray surface horizon with  
16 bright colored mottles within it.

17 7 to 11 inches, this is what meets the  
18 hydric soil criteria for 10 YR 4/1, that gray color,  
19 that one.

20 Also had mottles, brighter colored  
21 mottles that, 10 YR 4/3, that would be a brighter

22 colored mottle in there.

23 And I went ahead and I sampled to 20  
24 inches, but I met the criteria at 7 to 11 inches.

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1 And I have this listed as a birds  
2 inclusion.

3 Q. I'm sorry, can you repeat that, please?

4 A. I have this listed as a birds inclusion.

5 Q. So the sample results confirm the finding  
6 of a birds inclusion?

7 A. Yes, sir.

8 Q. In the upper box of the soils criteria on  
9 page 139, what's noted in the taxonomy section?

10 A. I'm sorry, would you repeat that?

11 Q. You have a notation in the taxonomy  
12 section of the soils box, top of the soils box.  
13 Could you explain what that notation is?

14 A. Okay. Hoyleton has a taxonomic  
15 classification. This is part of soil taxonomy that  
16 in addition to the soil name Hoyleton, the name  
17 itself really doesn't tell you anything about the  
18 soil.

19 So every soil including Hoyleton has a

20 taxonomic classification. And in Hoyleton's place  
21 it's fluvaquent. It's actually an aeric fluvaquent.

22 Q. Would you repeat that?

23 A. Aeric, fluvaquent and that's F --  
24 taxonomy is read backward. So the formative element

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1 of fluvaquent, it's an inter soil meaning it's a  
2 recently developed soil, in this case it's a flood  
3 plane soil, so fluvaquent, flood.

4 So it's a young soil that's the hint.  
5 The aquent multiplier means it has an aquent moisture  
6 in it, so it's wet. So you have a wet young soil.

7 And then flu which would be another  
8 modifier to get fluvaquent, fluvial just means that  
9 you have depositions from flooding events.

10 So you have organic matter that is real  
11 sporadic throughout it, because every time there's a  
12 flooding, you have organic matter deposits.

13 So if you were to profile on a graph  
14 organic matter contents in the soil with depth, it  
15 would just spike back and forth with flood events.

16 So that's how you get the term  
17 fluvaquent.



18                   And then the aeric, which isn't written  
19                   down here, but that just means it's on the more  
20                   aerated side. That's why this is not a hydric soil  
21                   in and of itself.

22                   It's a little bit better drained and it's  
23                   not hydric in of itself. You have an inclusion in  
24                   hydric.

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1                   JUDGE MORAN: Why don't you just step back  
2                   for us and define the term taxonomy? Is it just  
3                   T-A-X-O-N-O-M-Y?

4                   THE WITNESS: Yes, sir.

5                   JUDGE MORAN: Go ahead.

6                   THE WITNESS: All soils in the United States  
7                   are classified in accordance with soil taxonomy. I  
8                   can't recall what approximation we are, I think it's  
9                   the seventh approximation.

10                   They've gone through many iterations of  
11                   it to get to what we have right now. But soils are  
12                   broken down in different levels and categories just  
13                   like botanical classifications.

14                   So you have like eleven soil orders. You  
15                   have Mollisols, you have Entisols, which here this is

16 an Entisol; that's why you have that ent.

17 And you can have alfisols which is a  
18 timber soil which would be like this Wynoose soil we  
19 have is a timber soil.

20 And then Alfisol that's why the Wynoose  
21 soil on the site, it's an albaqualf, an Alfisol.

22 And all soils in the United States are  
23 classified according to the classification system.

24 And the soils on the site, all the Wynoose, the

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1 Newberry and the Hoyleton, they all -- in that soil  
2 survey Manual, they actually have the classification  
3 name of these soils.

4 JUDGE MORAN: So taxonomy, it's just a  
5 classification system?

6 THE WITNESS: Yes, sir.

7 JUDGE MORAN: And in this case it's a  
8 classification of soil?

9 THE WITNESS: Yes, sir.

10 JUDGE MORAN: All right.

11 BY MR. MARTIN:

12 Q. Okay, moving on to page 140, plot ID 4.

13 A. Yes, sir.

14 Q. Can you describe your results from your  
15 data form here?

16 A. Okay, plot ID 4, again, it's depicted on  
17 the map. This is on the upstream -- upstream end of  
18 the site. This is in the field adjacent to the  
19 beginning of the channel work, as was plot ID 3.

20 1 and 2 were on the downstream end. 3  
21 and 4 are on the upstream end.

22 The vegetation blocks left blank because  
23 the site's disturbed, vegetation is missing.

24 Hydrology again is left blank for the

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1 same reason, hydrology has been altered.

2 If you turn the page to 141, Bates Number  
3 141, 0 to 6 inches, 10 YR 3/2, that's that dark  
4 surface horizon again.

5 6 to 14 inches, 10 YR 4/3, was the color  
6 there. There was no mottles.

7 I do have a note that there's mixing of  
8 material in the soil. I'm not sure the extent of the  
9 mixing. I just have a note that there's mixing in  
10 that soil.

11 And I don't have an indication of it

12 being a hydric soil. I have it listed as a birds  
13 inclusion, but I'm not sure why.

14 Q. Is that a reference to, in your remarks,  
15 to sheet one?

16 A. Yes, sir. The note there, there's an  
17 asterisk by birds referencing sheet one.

18 MR. MARTIN: Your Honor, could we recess for  
19 a short time for a bathroom break.

20 JUDGE MORAN: Absolutely. Let's all take a  
21 ten-minute break.

22 (Whereupon a short recess was  
23 taken.)

24 JUDGE MORAN: Okay, let's go.

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1 BY MR. MARTIN:

2 Q. Looking at Bates 139, first of all, who  
3 filled out these data forms under this section?

4 A. I did the actual sampling, and I gave the  
5 information to Katherine Kelly there on the site,  
6 right next to me. And she filled it out right as I  
7 sampled.

8 Q. This is Katherine Kelly's writing?

9 A. That's her actual handwriting.

10 Q. Turning to Bates 139, in the soils box at  
11 the bottom, in the remarks?

12 A. Yes, sir.

13 Q. Do you recall what this is referring to?

14 A. This note on the birds inclusions where  
15 it says notes one, two, four, see sheet one, this is  
16 on several of these data sheets.

17 And if you go back -- if you go back,  
18 let's see, to Bates 135 in the remarks section, under  
19 soil criteria.

20 Q. That's Bates 135?

21 A. Bates 135.

22 Q. And that would be for Transect 1,  
23 correct?

24 A. Yes, sir, it's plot ID 1.

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1 Q. Go ahead.

2 A. You'll see under the remarks where it has  
3 another asterisk, it mentions birds inclusions, one,  
4 two, four. And underneath it, it actually has one,  
5 two and four listed.

6 Item number 1, it says hydric due to  
7 water table at or near the surface. Number 2, these

8 soils support woody vegetation under natural  
9 conditions.

10 And number 4, these soils are seasonally  
11 flooded or ponded. That's what this is referencing  
12 to, where you see these notes.

13 Q. So this is sheet one as referenced on the  
14 other data forms?

15 A. Yes.

16 Q. Why are these listed one, two, four  
17 instead of one, two, three?

18 A. These are referencing -- what we're  
19 getting at with these notes is in the '87 Manual  
20 under hydric soil criteria, it actually spells out  
21 some criteria with reference to water tables and  
22 seasonal ponding.

23 And they're listed in that section and  
24 that's what these are referencing to.

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1 Q. Why don't we go into the 1987 Manual.  
2 This would be Complainant's Exhibit 40. Would you  
3 turn to that?

4 Are you there?

5 A. Yes.

6 Q. You just explained that these  
7 designations, one, two, four, come from the 1987  
8 Manual. Can you point out where.

9 A. Yes, sir. In the Manual, it's on Bates  
10 Number 1103, under hydric soils, item number 37,  
11 there on that page.

12 And that's where it gives the definition  
13 of a hydric soil for each of the -- according to the  
14 National Technical Committee of Hydric Soils, and it  
15 goes through the criteria.

16 And in there, under B, you actually see a  
17 reference to the water table, different depths,  
18 depending on whether the soil is somewhat drained or  
19 poorly drained.

20 And then on the next page, Bates Number  
21 1104, it has reference for item C, soils that are  
22 ponded for long and very long duration during the  
23 growing season.

24 These are -- they're frequently flooded

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1 for long duration or very long duration during the  
2 growing season.

3 But out in the field, we couldn't

4 remember the item number to say it's 37 (a) (b) 1, 2.  
5 We tried to go from memory that it's items  
6 Number one, two, and four.

7 JUDGE MORAN: But there is no item Number  
8 four on this - not that it matters particularly.

9 THE WITNESS: No, sir, there's not.

10 JUDGE MORAN: And that's why Counsel was  
11 asking you why there was a -- can you just explain  
12 simply if you know, why there was a --

13 Why does it go one, two and then not  
14 three but then four. Just explain. Do you  
15 understand why Miss Kelly would --

16 What did her one and two and four refer  
17 to as far as you understand it, if you know.

18 That's what Counsel is asking you. He  
19 was asking why the missing three?

20 THE WITNESS: We knew that the ponded part  
21 was on there. Soils that are seasonally flooded or  
22 ponded.

23 We didn't know what item it was. And we  
24 knew it was at the end. We wasn't sure, it was a

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1 guess. Just a guess in the field as to which one



2 covered it.

3 JUDGE MORAN: So what you're saying is, it's  
4 not the important the numbers, the one, two, or four,  
5 it's the text that accompanies the numbers  
6 themselves?

7 THE WITNESS: That's true. We put the text  
8 here.

9 JUDGE MORAN: Okay.

10 BY MR. MARTIN:

11 Q. In the Manual, you're referring to  
12 paragraph 37 (a) through (d)?

13 A. Yes, sir.

14 Q. Instead of numbers, does Manual use the  
15 letters?

16 A. Yes.

17 Q. Is that what you're saying?

18 A. Yes.

19 Q. So if you had used letters in the data  
20 form, you would have referred to A, B, and D; is that  
21 the intent?

22 JUDGE MORAN: Well, it doesn't matter  
23 doesn't, does it. It's the text that we should focus  
24 on, the words that we use, not the particular number?

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1                   Isn't that what's important, Counsel?

2                   MR. MARTIN: That's what I'm just trying to  
3 get to, an explanation from him.

4                   JUDGE MORAN: Okay.

5                   THE WITNESS: Yes, sir. I should have  
6 referenced B2 for one of those under B2 for item  
7 Number one.

8                   And for item Number four, it's close to C  
9 or D, but it's not word for word. We were just  
10 getting out the fact that it was seasonally flooded  
11 or ponded. We just figured it would have fit one of  
12 those. We weren't sure which because we couldn't  
13 remember the text of it.

14                   And item Number two, that doesn't fall  
15 within here anywhere.

16 BY MR. MARTIN:

17                   Q. But the purpose of the analysis is to  
18 determine whether the soil meets the birds inclusion?

19                   A. Yes, sir.

20                   Q. And for the data forms that reference  
21 sheet one, was did your conclusion that those data  
22 points did meet the birds inclusion?

23                   A. I would have to go back to those sheets,  
24 because some of those, for instance on Transect 3,

1 the soils colors do not support the hydric soil  
2 criteria even though I did mark it as a birds  
3 inclusion.

4 MR. MARTIN: Well, I think because the record  
5 is unclear on this, your Honor, I'd like to just  
6 return to the data forms that contain a reference to  
7 sheet one.

8 JUDGE MORAN: Sure.

9 MR. MARTIN: Just to summarize what the  
10 findings are.

11 JUDGE MORAN: I was just trying to make life  
12 easier for you. But it's your case.

13 BY MR. MARTIN:

14 Q. Return to page 130, Transect 1, plot  
15 ID 1, I believe this is the first reference to sheet  
16 one. What was your analysis of this soil sample?

17 A. Bates Number 131?

18 Q. Yes.

19 A. On this sample here the soils information  
20 I have do not support this as being a hydric soil.

21 Q. Returning to Bates page 139 --

22 A. Yes, sir.

23 Q. -- (continuing) what was your  
24 determination for this soil sample?

1 A. This sample would be a hydric soil.

2 Q. Turning to Bates 141?

3 A. (So complied with request.)

4 Q. What was your determination there?

5 A. On page 141, this sample would not.

6 Q. I'm sorry, could you repeat that?

7 A. Bates Number 141?

8 Q. Yes.

9 A. The soil information in this book would  
10 not meet the soil criteria.

11 Q. And this is for plot ID 4, correct?

12 A. Yes, sir.

13 Q. Moving to page 142, the next plot ID is  
14 labeled one star. Could you explain what that refers  
15 to?

16 JUDGE MORAN: Which one are we on right now?

17 MR. MARTIN: On Bates 142 --

18 JUDGE MORAN: Okay.

19 MR. MARTIN: -- (continuing) the plot ID is  
20 referred to as a one with a star or asterisk next to  
21 it.

22 THE WITNESS: That star just references that

23 I'm in the crop field. The sample point was -- this  
24 is north of the newly constructed channel.

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1 BY MR. MARTIN:

2 Q. When you say you're in the crop field,  
3 what does that refer to?

4 A. This is the crop field north of the site.  
5 I'm out in an area -- this isn't that block of wooded  
6 timber area in this case. I'm going north instead of  
7 west.

8 West would have taken me in that block of  
9 wooded timber. At this sample point, I'm going  
10 north, another cleared area but it's all crop field  
11 at this time.

12 Q. Just referring to this field, does that  
13 mean this area was crop?

14 A. Yes.

15 Q. Can you give me your results or analysis  
16 of this plot ID?

17 A. Yes, sir, the vegetation parameter was  
18 left blank because the vegetation had been removed.  
19 Hydrology had been altered. I did mark one of the  
20 secondary indicators because during the soil analysis

21 I did find oxidized root channels.

22 And if you turn to Bates 143, my soil  
23 analysis, 0 to 9 inches at 10 YR 4/1 matrix which is  
24 a gray matrix with bright mottles, 10 YR 5/6.

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1 9 to 15 inches, again, a gray matrix with  
2 bright mottles. And I met the hydric criteria at  
3 that point although I did sample to 23 inches.

4 Q. Your determination for this data point,  
5 that was hydric?

6 A. Yes, sir.

7 Q. Moving to page 144, this would be plot  
8 ID 2 with an asterisk?

9 A. Yes, sir. This, again, was out in that  
10 field area. This is going north again, straight  
11 north of the channel, further north than sample point  
12 Number one in the field.

13 Q. How far west from the north-south leg of  
14 the L are you at that point in this transect?

15 A. I'm not west. I'm just about due north  
16 of the newly constructed channel.

17 So I'm probably -- well, here in my  
18 notes, 300 feet from the fence line is the note. So

19 I'm approximately 300 feet north of the beginning of  
20 the channel work.

21 That north end of that north-south L at  
22 the beginning of the project where we had the  
23 concrete slabs laying in the channel there 300 feet  
24 north of that point.

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1 Q. We can return to locations after we  
2 finish this final data sheet.

3 What were your results for this data  
4 form?

5 A. Okay, for plot ID 2, the results were  
6 that the soil was hydric. And it met the hydric soil  
7 criteria at 5 to 10 inches, it had a matrix color of  
8 10 YR 4/1 which would be hydric with bright mottles.

9 Q. Would you turn to --

10 JUDGE MORAN: At this point, are you done  
11 talking for now about these data forms?

12 MR. MARTIN: Yes.

13 JUDGE MORAN: Mr. Lenz, would you do me a  
14 favor and look at these data sheets and I'm going to  
15 ask you to go through a couple of them, all right?

16 THE WITNESS: Yes.

17 JUDGE MORAN: First look at page 141. Tell  
18 me when you have it.

19 THE WITNESS: Yes, sir, I'm there.

20 JUDGE MORAN: And you see under he remark it  
21 says birds and then it has parentheses one,  
22 parentheses two, and parentheses four, see sheet one.  
23 Do you see that?

24 THE WITNESS: Yes, sir.

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1 JUDGE MORAN: Keep that in mind. Now look at  
2 page 139, same thing, remarks; are you there?

3 THE WITNESS: Yes.

4 JUDGE MORAN: See same business: notes one,  
5 two, four, see sheet one. She sells sea shells by  
6 the seashore. Do you see that?

7 THE WITNESS: Yes, sir.

8 JUDGE MORAN: Okay. And then I want you to  
9 look -- look at 131. And do you see the same thing  
10 there?

11 THE WITNESS: Yes, sir.

12 JUDGE MORAN: Under remarks: one, two, four  
13 see sheet one?

14 THE WITNESS: Yes. Yes, sir.



15 JUDGE MORAN: Did we do 137? We didn't do  
16 that one, did we? I think I missed that one.

17 137, do you see the same thing birds,  
18 one, two, four, see sheet one?

19 THE WITNESS: Yes, sir.

20 JUDGE MORAN: Okay, you saw all four of those  
21 examples under remarks?

22 THE WITNESS: Yes.

23 JUDGE MORAN: And they're all essentially the  
24 same thing? One, two, four, see sheet one; right?

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1 THE WITNESS: Right.

2 JUDGE MORAN: Where is sheet one? Which page  
3 is sheet one? Give me the page number?

4 THE WITNESS: Sheet one would be --

5 JUDGE MORAN: I mean, you referenced this,  
6 did you not, so you wouldn't have to keep writing in  
7 the same thing. It's just a shorthand way just  
8 referring back to something else; right?

9 THE WITNESS: Yes, sir. And I believe it's  
10 one, three, four -- or one, two, four.

11 JUDGE MORAN: Bates what?

12 THE WITNESS: 134.

13 JUDGE MORAN: Are you sure you don't mean  
14 135?

15 THE WITNESS: Oh, I'm sorry, 135

16 JUDGE MORAN: Okay. And when you talk about  
17 one, two, and four, it's my understanding that you  
18 were with your assistant or partner, Miss Kelly, the  
19 one, two, and four were intended to refer to  
20 categories within the hydric soil definition which  
21 are part of Exhibit 40, at page 1103?

22 THE WITNESS: Yes, sir, that was the intent.

23 JUDGE MORAN: And so while you were used one,  
24 two, and four, you were really referring to letters

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1 as opposed to numbers?

2 THE WITNESS: Yes, sir.

3 JUDGE MORAN: And I have a bunch other  
4 questions to ask about this, but I'll going to wait  
5 until you're done with your direct with this  
6 individual and then we'll have the cross-examination.

7 BY MR. MARTIN:

8 Q. Mr. Lenz, you reviewed aerial photographs  
9 of the site?

10 A. Yes, sir.

11 Q. And did you do that routinely -- do you  
12 do that routinely in your work for the Corps of  
13 Engineers?

14 A. Yes, sir.

15 Q. Do you ever use the USDA aerial  
16 photographs?

17 A. Yes, sir.

18 Q. Turn to Complainant's Exhibit 14, which  
19 is located at Bates 191.

20 JUDGE MORAN: Give me that number again,  
21 please.

22 MR. MARTIN: Bates 191.

23 THE WITNESS: Yes, sir.

24 BY MR. MARTIN:

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1 Q. Could you review this letter? Do you  
2 recognize what this letter is?

3 A. Would you repeat the question?

4 Q. Do you recognize what this letter is?

5 A. Yes, sir.

6 Q. What is it?

7 A. It's a certification from USDA regarding  
8 this attached photograph.

9 Q. Have you had occasion to order  
10 photographs from the USDA?

11 A. No, I have not.

12 Q. Are you aware of whether it was done in  
13 the course of delineation work under the Manual?

14 A. Yes, sir, it is done. Consultants will  
15 order this information. I have not.

16 Q. But you have worked with people who have  
17 ordered USDA aerial photographs for wetland purposes?

18 A. Yes, sir.

19 Q. How often have you done that?

20 A. Occasionally, not real often.

21 Q. What's the purpose of obtaining aerial  
22 photographs?

23 A. The purpose is to get generally a  
24 historic picture of the site. Most of the time when

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1 I see it, it's a slide review, that they haven't  
2 actually ordered the photographs. And they've got  
3 this slide reviews showing different years of a site  
4 to determine hydrology.

5 So you get a photograph of a picture.  
6 You may see wetness signatures for example, from

7 photos only.

8 So, basically, you're interpreting aerial  
9 photographs and photo tone on the photograph to  
10 determine the hydrology indicator.

11 Q. Let's return to the slide review that you  
12 conducted prior to the site visit. How many slides  
13 did you view at the time?

14 A. I don't recall. We looked at several  
15 slides, but I don't recall how many we looked at.

16 Q. And were those slides from the site of  
17 the alleged violation?

18 A. Yes, sir.

19 Q. Can you recognize aerial photographs that  
20 contain the site of the alleged violation?

21 A. Yes, sir.

22 Q. Can you turn to page 192?

23 A. Yes, sir.

24 Q. What does it appear to be?

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1 A. This is an aerial photograph that shows  
2 the site in question in the bottom half of the aerial  
3 photo here.

4 Q. You're referring to the site of the

5 alleged violation?

6 A. Yes, sir.

7 MR. MARTIN: Your Honor, what I'd like to do  
8 to clarify the record as to the location of the  
9 sampling results. It would be useful to have a  
10 blowup of this map. I would like for the witness to  
11 refer to this blowup for generally for demonstrative  
12 purposes to point out where these sample results are  
13 as reflected in the data forms.

14 JUDGE MORAN: Okay. I'd like you to ask him  
15 whether how when he first saw this document, this  
16 192, if, when he saw it, the certification was  
17 attached to it? If this photograph was -- this  
18 enlargement was taken pre-disturbance of the alleged  
19 disturbance or post-disturbance.

20 But you can still do this through your  
21 demonstrative exhibit, but I just have some other  
22 questions about certification.

23 MR. MARTIN: Sure.

24

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1 BY MR. MARTIN:

2 Q. Mr. Lenz, when was the first time you saw

3 this exhibit?

4 A. This exhibit, the certification with the  
5 photograph?

6 Q. Yes.

7 A. This is the first time I have seen it.

8 Q. EPA obtained this blowup --

9 JUDGE MORAN: And this is the first time this  
10 witness has seen this?

11 MR. MARTIN: Yes.

12 JUDGE MORAN: You're going to have to ask him  
13 how is it he's able to recognize that Bates 192 is  
14 the site.

15 I mean, this could be a million different  
16 sites within the continental United States, the lower  
17 forty-eight states.

18 BY MR. MARTIN:

19 Q. Mr. Lenz --

20 JUDGE MORAN: I know there are fifty, but I'm  
21 talking about continental, not Alaska or Hawaii.

22 BY MR. MARTIN:

23 Q. Mr. Lenz, you testified you could see the  
24 site on the aerial photograph on page 192, what

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1 evidence do you see on this aerial photograph that  
2 indicates that this depicts the site of the alleged  
3 violation?

4 A. The evidence that I see is the  
5 configuration of -- the first and for most thing that  
6 stands out in my mind when I look at it is the  
7 configuration of the separate areas, that they match  
8 the photos that I have seen of the site.

9 And there's also the drainage pattern on  
10 the photo that stands out so I can match this.

11 JUDGE MORAN: So you have seen before you  
12 laid eyes on this 192, you have seen a number of  
13 other aerial photos of the site, correct?

14 THE WITNESS: Yes, sir.

15 JUDGE MORAN: And based on the other photos  
16 that you had seen you're able to recognize this  
17 enlarged version of the site; is that correct?

18 THE WITNESS: Yes, sir.

19 JUDGE MORAN: Go ahead.

20 BY MR. MARTIN:

21 Q. Turning to the photograph that you  
22 attached to your field notes located at Bates 152?

23 A. What page is it on?

24 Q. Page 152.



1 A. Yes, sir.

2 Q. What year is this photograph from?

3 A. This is 1998. It has the year referenced  
4 in the upper left-hand corner of the sheet.

5 Q. And how would you compare the features of  
6 this photograph with the feature of the photograph  
7 that we just talked about, which is Complainant's 14?

8 A. From the previous photo we just looked  
9 at?

10 Q. Yes.

11 A. They're similar or identical. There  
12 might be some minor variations due to -- I don't  
13 know. I don't know the year. What was the year of  
14 the -- if it was 1998 or not, but I'm seeing the same  
15 signatures on the photo, the same topographic  
16 features or signatures.

17 Q. So it's your opinion that both photos  
18 contain the site of the alleged violation?

19 A. Yes, sir.

20 MR. MARTIN: Your Honor, again, I would like  
21 to request some blowup of Exhibit 14 for  
22 demonstrative purposes.

23 JUDGE MORAN: Yes, that's fine. And I have  
24 to tell you that, first of all, I don't know -- it

1 hasn't been explained why this matters, this aerial  
2 photograph.

3                   Mr. Lenz was there at the site. He took  
4 soil samples. He did it with Miss Kelly, but from an  
5 evidentiary standpoint as I looked through  
6 yesterday -- you know, the only real difference  
7 between the administrative proceeding and if this  
8 were a Federal District Court essentially deals with  
9 hearsay, in that hearsay is more liberally admitted.  
10 Although there are some 22 exceptions of hearsay  
11 admission if this were a court, a Federal District  
12 Court proceeding, which is it is not.

13                   But the problem is there's nothing self  
14 authenticating about this particular document. The  
15 proper way to introduce this document would have been  
16 to have some individual come up and say I work for  
17 U.S. EPA.

18                   I requested from USDA a blowup of aerial  
19 photography, et cetera, et cetera, this is what I  
20 received. Unless the other side stipulates.

21                   There's nothing self authenticating. And  
22 I'll also point out to you - and this is just for  
23 future reference in trial - that there's nothing

24 about page 191 that references 192.

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1 For example, the Linda MacDonald who is  
2 Chief of the Sales Section identifies this as an  
3 enlargement NAPP and then gives it some numbers  
4 ending with the letter X, but there's nothing that I  
5 see on the following page which has that identifying  
6 number on it.

7 So while Counsel has not objected, and as  
8 far as I know there's been no stipulation to the  
9 admission of this, the problem I'm trying to get at  
10 here is - and I'm not saying that EPA did this - but  
11 there are rules for introducing evidence in a  
12 proceeding.

13 And there would be nothing in theory for  
14 a person who has substituted Bates page 192 to 191.  
15 I'm not even suggesting that happened here.

16 But there's a way to do it and it's what  
17 I outlined to you a moment ago. And it would have  
18 been a very simple thing. First, you try and get a  
19 stipulation. If the stipulation doesn't happen then  
20 you have to haul in the witness and say:

21 I requested this. This is what I got.

22 Yes, I recognize it. And then you can have the  
23 witness talk about it and how it looks the same to  
24 him as earlier photographs, et cetera. That's how to

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1 have done it.

2 MR. MARTIN: Your Honor, Greg Carlson is  
3 here. He can testify to that. We can go out of  
4 order and put him on the witness stand.

5 JUDGE MORAN: I think it would be nice to tie  
6 that up not later on, not right now.

7 I'm just expressing -- you know, you  
8 can't come in and say -- as Counsel, you can't say  
9 well, we requested this. That doesn't become your  
10 duty. You're not up here testifying.

11 All right, that's just an aside. Let's  
12 continue.

13 MR. MARTIN: Is there a ruling on the use of  
14 an aerial photograph for demonstrative purposes?

15 JUDGE MORAN: Yes, you may use it. But  
16 you're fortunate that Mr. Northrup isn't making this  
17 more difficult for you, because I still would allow  
18 you to use it for demonstrative purposes subject to  
19 your tying it up later with Mr. Carlson.



18       stink about it. Then you know what you have to do.  
19       Then you'll have to haul in a witness and go through  
20       the paces. And then you return the favor by  
21       requiring the same - hold their feet to the fire.  
22       That's how it operates.

23                       Go ahead.

24       BY MR. MARTIN:

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1                       Q. Mr. Lenz, you have various notes in your  
2       field notes that we've been looking at regarding  
3       location of the twelve samples that you took.

4                       Where do those notes appear?

5                       A. Okay, I labeled my transects, where I've  
6       sampled.

7                       JUDGE MORAN: Which Bates page are you  
8       referring to?

9                       THE WITNESS: On Bates 152 and 153.

10                      JUDGE MORAN: Thank you.

11       BY MR. MARTIN:

12                      Q. Take us through the procedure here. You  
13       took soil sample in the field, and did you fill out  
14       these aerial photographs after your field visit?

15                      A. Yes, sir.

16 Q. And what did you -- is this your --  
17 looking at Bates 152, is this your handwriting?

18 A. Yes, sir, it is. Part of it is. The  
19 actual locations and the notations on the transects  
20 and the sample points are mine.

21 Just the line and the reference to new  
22 channel, that's Katherine Kelly's writing, that  
23 label.

24 Q. Turning to the aerial photograph at 153,

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1 are these additional notes regarding field locations  
2 of the soil samples?

3 A. Yes, sir.

4 Q. And how were these plot out on aerial  
5 153?

6 A. On Bates 153, on that aerial?

7 Along the north-south leg of the new  
8 channel is where I laid out my transects. I have it  
9 labeled on here T one, T two, and T three. T one  
10 being further north on that channel, T three being  
11 the bottom of that north-south leg, and T two in the  
12 middle of my three transects.

13 Q. Did you rely on the notes that you took

14 in the field in your data forms to draw out your  
15 handwritten notes on these aerial photographs?

16 A. Actually, what I did was I marked in the  
17 field on aerial photos and came back into the office  
18 and redid everything in red. Then I used my field  
19 notes as reference while doing that, but I actually  
20 had some notations on the maps.

21 Q. You had this aerial photograph with you  
22 during sampling?

23 A. Either this one or a copy of it. I think  
24 the actual field copy may have gotten mud all over it

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1 or something, but this would have been a duplication.

2 Q. So, as you filled out -- as you conducted  
3 your soil sampling, you made notations  
4 contemporaneously on the aerial photographs at the  
5 site?

6 A. Yes, sir.

7 Q. For demonstrative purposes, could you  
8 give us the locations of each transect on the blowup  
9 map?

10 A. Yes, sir.

11 JUDGE MORAN: And then just help me out,



12 define again transect. A transect is?

13 THE WITNESS: Transect is a line that I'm  
14 sampling along.

15 JUDGE MORAN: Okay.

16 BY MR. MARTIN:

17 Q. Turning to data form 114, I believe you  
18 testified you started out by defining Transect 2?

19 A. Yes, sir.

20 Q. Could you mark on the blowup map where  
21 the location of Transect 2 is, and describe where  
22 you're marking?

23 A. Here's the north-south leg of the  
24 channel. Transect 2 would be here. It doesn't show

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1 up too well, does it?

2 JUDGE MORAN: Let me ask you this? Is  
3 Transect 2, sir, in what you believe to be the  
4 disturbed part of the channel or where the work was a  
5 allegedly done or is it in an undisturbed area?

6 THE WITNESS: It's over here.

7 JUDGE MORAN: Adjacent to the disturbed area?

8 THE WITNESS: Transect 2 is through the  
9 disturbed area.

10 JUDGE MORAN: It's through the disturbed  
11 area.

12 THE WITNESS: I just made my note on the map  
13 here because I knew that nobody could see my writing  
14 in the timber.

15 JUDGE MORAN: Okay. All of data forms that  
16 you filled out - there were 16 of them, right?

17 THE WITNESS: I believe so.

18 JUDGE MORAN: Something like that. Were they  
19 all in the vicinity of the disturbed area along  
20 various transects?

21 THE WITNESS: Yes, sir, they were all in the  
22 disturbed area.

23 JUDGE MORAN: Okay. And my understanding is  
24 you took no soil samples in the area that was

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1 undisturbed either above or below the work; is that  
2 true?

3 THE WITNESS: That's correct.

4 JUDGE MORAN: Go ahead.

5 BY MR. MARTIN:

6 Q. Can you generally describe the plot ID  
7 for Transect 1 -- for plot ID 1 in Transect 2? If

8 you could just go through the locations of the plot  
9 IDs for Transect 2?

10 A. Okay, for Transect 2, again, I wrote 22  
11 off in this crop field over here just so it could be  
12 seen.

13 Here's my line. I started next to the  
14 channel here. My first point was 25 feet west of the  
15 newly constructed channel. That's where my line  
16 started, in essence.

17 From there, I went out 50 feet to the  
18 next -- and my reason for starting 25 feet out was to  
19 get rid of the disturbed area -- to get away from the  
20 disturbed area right near the channel.

21 So my first point was 25 feet from the  
22 channel. I went along on my transect line another  
23 50 feet to Transect 2. That would be --

24 Q. That would be plot ID 2?

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1 A. Yes, sir.

2 Then another 50 feet to plot ID 3.

3 Q. That would be Transect plot ID 3. Can  
4 you move on to transect -- there's one more plot ID  
5 Transect 2?

6           A. Yes, there's another one I believe the  
7 distance is different. The last one, it's 150 feet  
8 from three to four so I increased the distance to get  
9 my last sample point on Transect 2, plot 4.

10           Q. In general, what considerations are you  
11 taking into account when you're locating the exact  
12 locations of those plot IDs?

13           A. Would you repeat the question?

14           Q. What considerations on the ground are you  
15 taking into account when you're locating the exact  
16 locations of your soil samples?

17           A. Okay. Number one, I want to have a  
18 reference point that I can go back to in terms of  
19 being able to plot this on a map later.

20                   That's why I used the new channel as a  
21 reference point. We can always go back to the new  
22 channel and find the sample points. The new channel  
23 is there. You can go back to a point like that, a  
24 line. It's a straight line, too, which makes the

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1 baseline very good. Having that straight-line  
2 channel works wells as a baseline.

3           The other consideration -- when you're on

4 the transect line the other considerations are what  
5 kind of anomalies do you see to an area?

6 In this case, I was going through a  
7 disturbed area. So I could go equal distance  
8 50 feet. But when I saw -- after the third data  
9 point I did not wanting to on 50-foot intervals  
10 because the cleared area was too far out.

11 So I just skipped and went further. And  
12 the '87 Manual it really doesn't address that. It  
13 allows flexibility when you're locating transects,  
14 judgment calls in the field.

15 Q. Could you move on to Transect 3 and tell  
16 us where that was located?

17 A. Okay, Transect 3 is down here. I'll see  
18 if this will show up better.

19 This is Transect 3 on the south end of  
20 that north-south belt.

21 Q. What is your notation on where this is  
22 located in relation to the east-west section?

23 A. It's -- Transect 3 is north of the newly  
24 constructed channel. The newly constructed channel

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1 is down here.

2 I'm north of it, going through the  
3 cleared timber area. And then on my sheet though, my  
4 notation is out in the crop field, just so that I can  
5 read it.

6 Q. Could you go through the plot ID's for  
7 Transect 3, where they're located?

8 A. Okay. I don't have the distances written  
9 on the map for Transect 3.

10 Q. If you can refresh your recollection from  
11 referring to the data forms which are found at page  
12 122 --

13 A. Okay, Transect 3 -- and I began all the  
14 transects the same. I started again, 25 feet out  
15 from the edge of the channel going through the timber  
16 area.

17 So the first sample is 25 feet from the  
18 woods, which in this case was crop at that time.

19 The next sample point was 110 feet out  
20 from the fence line.

21 And I don't know why I used the fence  
22 line as my measuring point at that time because I was  
23 using top of bank for the other samples. For some  
24 reason I came off the fence line and I went out

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1 110 feet.

2 Then plot ID 3, I went back 100 feet from  
3 top of bank which would be really close actually with  
4 the other samples, within about 15 to 20 feet from  
5 the other samples.

6 So there's probably some anomaly there.  
7 I'm on my transect and I'm sampling closer together  
8 for some reason.

9 Q. Mr. Lenz, you referred to a fence line,  
10 where would that fence line be?

11 A. The fence line over in this area,  
12 property line?

13 Q. And it would extend north?

14 A. North south.

15 Q. I'm just wondering from where you made  
16 your measurements?

17 A. From over here.

18 Q. Does that fence line extend to the  
19 disturbed area?

20 A. No, it does not. The fence line is off  
21 site.

22 Q. Is the fence line east of the new stream  
23 channel?

24 A. It's -- of the north-south leg, it's east

1 of the stream channel.

2 Q. East, okay. Thank you.

3 A. Then Transect 3, plot ID 4, I'm 225 feet  
4 out from top of bank. And I'm going out a little  
5 further because this timber here juts out a little  
6 further as well.

7 And that was the last plot or transect of  
8 the day.

9 Q. Okay. Will you move on to Transect 1?

10 A. Yes, sir. Transect 1 is up on the north  
11 part of the project area, again heading west into the  
12 timber.

13 Again, I started 25 feet out from top of  
14 bank for my first sampling point. Then I went  
15 another -- I went 50 feet to plot ID 2 on transect.

16 Q. The next sample location -- does that  
17 conclude your plots for Transect 1?

18 A. Yes, sir.

19 Q. The next sampling point is ID 1. Where  
20 is the location of that?

21 A. Okay, 1 is not -- it doesn't represent a  
22 transect. It's just a stand-alone sample point.

23 Plot ID 1 would be beyond Transect 3.  
24 So, basically what happened was after I was done with



1 my transects, I felt I needed to go further out in  
2 this bottom area because the timber goes out further  
3 just to be more comfortable with my sampling.

4 Q. When you're saying beyond Transect 3 for  
5 plot ID 4?

6 A. Yes, sir, which would be the western most  
7 sample of Transect 3.

8 Q. Okay, thank you. And the next plot ID 2?

9 A. Plot ID 2 is down in the same vicinity as  
10 plot ID 1, further to the west. So in essence what I  
11 was doing with 1 and 2 was in essence extending  
12 Transect 3 further to the west.

13 Q. Can you mark those locations with 1 and  
14 2, please?

15 A. (So complied with request.)

16 Q. Plot ID 3?

17 A. Okay, plot ID 3, leaving the downstream  
18 end of the project area, coming up on top here to the  
19 top of the upstream end of the project area, plot  
20 ID 3 is in this area here upstream of the project  
21 area.

22 And I don't have a reference to distance

23       how far.  But it was close to the beginning of the  
24       newly constructed channel in this area over here.

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1               Q.  Okay, plot ID 4?

2               A.  Plot ID 4, same general vicinity as plot  
3       ID 3, same vicinity, approximately 50 feet or so  
4       further to the east in this case.

5               Q.  And the finally 2 plot ID 1 star 2 star,  
6       where are those located?

7               A.  Okay, these -- sample point Number 1 was  
8       100 feet out from the beginning of the newly  
9       constructed channel, north of the newly constructed  
10      channel or I should say north of the north edge of  
11      the newly constructed channel.

12              Plot ID 2, that was 300 feet out from the  
13      beginning of the project, of the channel.

14              Q.  Thank you.

15              MR. MARTIN:  Can we refer to this  
16      demonstrative exhibit as Demonstrative Exhibit B?

17              JUDGE MORAN:  B?

18              Are you intending to introduce it as  
19      something that will be used in review of the record?  
20      You're intending it not just for purposes of the

21 proceeding like right now, but that it would be part  
22 of the record.

23 MR. MARTIN: Yes, your Honor.

24 JUDGE MORAN: There already was a B.

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1 Let's go off the record.

2 (WHEREUPON, there was then had  
3 an off-the-record discussion.)

4 JUDGE MORAN: Counsel for EPA, you wanted to  
5 have this introduced as a demonstrative exhibit and  
6 you want it designated as EPA Exhibit C?

7 MR. MARTIN: Yes.

8 JUDGE MORAN: I understand there is an  
9 objection.

10 MR. NORTHRUP: Not so much as a depiction of  
11 what Mr. Lenz has done but, again, this aerial, we  
12 don't know when it was taken. It certainly was taken  
13 sometime before 1993?

14 I want to make sure that the Court  
15 doesn't rely on it for anything other than the  
16 locations of where he took the samples.

17 I don't want the Court to look at that  
18 and say oh, here's all these woods and that. We just

19 don't know --

20 JUDGE MORAN: But you don't have an issue,  
21 Mr. Northrup, about this -- apparently, you're not  
22 challenging -- this is an aerial photograph taken at  
23 a point in time after which the area that was the  
24 subject of the proceeding was disturbed?

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1 MR. NORTHRUP: That's correct.

2 JUDGE MORAN: All right, well, with that  
3 qualification, do you have an objection to Counsel  
4 for Respondent's qualification?

5 He is allowing it, but he has objections  
6 as to scope.

7 MR. MARTIN: Well, again, Mr. Greg Carlson  
8 can testify as to the source of this aerial  
9 photograph and its reliability and its authenticity.

10 This is subject of his testimony and we  
11 will proceed with that.

12 JUDGE MORAN: So then you may want to renew  
13 your objection after Mr. Carlson.

14 Do you have other questions to ask this  
15 witness about this.

16 MR. MARTIN: No, I don't, your Honor.

17 JUDGE MORAN: Do you have other questions of  
18 this witness?

19 MR. MARTIN: Yes, I do.

20 BY MR. MARTIN:

21 Q. Mr. Lenz, could you please turn to Bates  
22 pages 57 through 60?

23 JUDGE MORAN: Would you repeat those again  
24 for me, please?

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1 MR. MARTIN: Turn to pages 57 through 60.

2 THE WITNESS: Yes, sir.

3 BY MR. MARTIN:

4 Q. Do you recognize these three pages --  
5 four pages rather?

6 A. Yes, sir.

7 Q. What is it?

8 A. Karen Marzac of the Enforcement Section  
9 of our regulatory bank at that time had requested  
10 from Tony Antonacci some information from  
11 Conservation on information on crop prices in the  
12 area.

13 And this is what Tony Antonacci provided  
14 her with just to get an idea of what kind of costs

15 are involved in farming an area and what kind of  
16 return you get, economic return.

17 Q. When did Miss Marzac request this  
18 information?

19 A. I'm not sure of the exact date when she  
20 requested it. This would have been sometime after we  
21 had received the complaint and done an initial  
22 investigation.

23 This would have been part of the  
24 investigation that we were doing.

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1 Q. Were you working with Miss Marzac at the  
2 time?

3 A. Yes, sir.

4 Q. And were you working with her concerning  
5 the alleged violation site?

6 A. Yes, sir.

7 Q. Does this memo concern the alleged  
8 violation site?

9 A. Yes, sir.

10 Q. Who is Tony Antonacci?

11 A. Tony Antonacci is the District  
12 Conservationist in Marion County, Illinois, the USDA

13 Natural Resources Conservation Service.

14 Q. Do you know his job title?

15 A. Conservationist.

16 Q. Conservationist?

17 A. That is his job title. He's in charge of  
18 the NRCS office in Marion County.

19 Q. Is it your -- the Corps' practice to work  
20 with the NRCS on wetland delineations?

21 A. Yes, sir.

22 Q. Could you describe this, please?

23 A. Would you repeat that?

24 Q. Could you describe the nature of your

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1 working with the NRCS for wetlands purposes?

2 A. Yes, sir. When NRCS -- when they make a  
3 wetland determination on crop land and non-crop land  
4 areas for USDA purposes, they will commonly info copy  
5 us with that information.

6 In the past, we've had Memorandum of  
7 Agreement on how to conduct wetland delineations,  
8 just to dovetail our requirement for Section 404 of  
9 the Clean Water Act and the Food Security Act.

10 So we work with them commonly and have

11 agreements with them.

12 Q. You mentioned having a memorandum of  
13 agreement with NRCS. Could you describe that?

14 A. We have -- I should say we had a  
15 Memorandum of Agreement with USDA Natural Resources  
16 Conservation Service whereby they would copy us with  
17 all that information.

18 And that Agreement entitled when we would  
19 and would not be responsible for wetland  
20 delineations. And we would accept their  
21 determinations on crop land, and they would accept  
22 our determination on crop land, and who did what  
23 really in terms of wetland delineations in terms of  
24 the agricultural areas.

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1 Q. Why did Karen Marzac ask the NRCS office  
2 for crop budget information?

3 A. The importance of this information is  
4 that -- and this is part of the investigation of a  
5 violation, mind you. One of the things that we have  
6 to consider is the economic benefit of a violation to  
7 somebody. The thought being that you should not make  
8 an economic benefit through a violation, that it's



9 not fair to people who go through --

10 MR. SMALL: I'm going to object. Number one,  
11 there's no foundation that's been laid. There's  
12 nothing to show any of these figures are correct or  
13 accurate or how they got to them.

14 Also, it references 1999 and that's part  
15 of our continuing objection on the basis of the  
16 Statute of Limitation issues.

17 We just don't think it's been presented.

18 JUDGE MORAN: Well, I agree with you. It's  
19 what I alluded to before. There are -- I don't agree  
20 with you in total about the -- I'm not ruling on this  
21 question of -- your question of 1999.

22 I understand your objection to that in  
23 terms of the Statute of Limitations.

24 But what I'm addressing is there are

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1 significant foundation problems here which could have  
2 been cured by a stipulation as to the authenticity of  
3 the document.

4 But agreeing with Mr. Small that -- you  
5 have the fundamental problem to start of that this  
6 was not a letter an addressed to Mr. Lenz.

7                   You haven't laid any foundation to say  
8                   oh, I was with Miss Marzac when she requested crop  
9                   budget information. And when it came in, she said  
10                  come on over -- what's your first name?

11                  THE WITNESS: Ward.

12                  JUDGE MORAN: -- Ward, look at this. This  
13                  just came in. And then I looked out it with her -  
14                  this is extremely hypothetical how this could play  
15                  out - and she showed me this information.

16                  And there were three pages I remember in  
17                  addition to the cover letter from Mr. Tony -- how do  
18                  you pronounce his last name?

19                  THE WITNESS: Antonacci.

20                  JUDGE MORAN: Antonacci, because you can't  
21                  associate other than -- this isn't the way that these  
22                  proceedings work. It isn't a matter of good will.

23                  I don't suspect that you did anything  
24                  underhanded here at all. But there's a way to do it,

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1                  and it wasn't followed here.

2                  And so there's no way -- attached to  
3                  sample budgets, there's nothing that ties Page 57 to  
4                  the three pages that follows it.

5                   The other problem is this is not from the  
6                   Department of Agriculture, but it's further removed.  
7                   It's from the University of Illinois Extension who  
8                   apparently does planning budgets.

9                   And you haven't laid a foundation for the  
10                  way to determine to interpret this, price for corn or  
11                  soybeans and break even price per bushel and soy bean  
12                  crop budget, et cetera.

13                  The host of problems which I just touched  
14                  on a little bit here with this exhibit are at this  
15                  point insurmountable in terms of content. I  
16                  understand the basic principle, but this wasn't how  
17                  to achieve it.

18                  What you're trying to show is people who  
19                  don't comply - and this is something that's not  
20                  challengeable - people who do not abide by the law  
21                  should not have an edge by virtue of that  
22                  noncompliance which everyone else has to bear, the  
23                  expense of compliance.

24                  And so they shouldn't -- their profits

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1                  from crops however you interpret it, but you don't  
2                  look like an expert in interpreting this data. I'm

3 certainly not.

4 The objection is sustained.

5 MR. MARTIN: Your Honor, you're correct when  
6 you say this goes to the Corps of Engineers' analysis  
7 of how to address alleged violations.

8 JUDGE MORAN: And I'm telling you, as it  
9 stands now you can't use this to prove that part your  
10 case. You can't use this document, CX 57, 59, 60 or  
11 61 for -- pick one of the many reasons that I've  
12 mentioned.

13 MR. MARTIN: Yes, your Honor.

14 BY MR. MARTIN:

15 Q. Mr. Lenz, could you turn to Bates 71  
16 through 111?

17 A. Yes, sir.

18 Q. Please take a look through the letters  
19 that are included within those page numbers.

20 A. 71 through what?

21 Q. One eleven.

22 A. (So complied with request.)

23 Q. Do you recognize these letters?

24 A. Yes, sir.

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1 Q. Can you tell us generally what they are?

2 JUDGE MORAN: Well, first, tell us -- give me  
3 some more foundation as to how he recognizes these  
4 letters before he gets into what they are.

5 When he first saw them, how it was that  
6 he first saw them, did he see them all at once.

7 You know, lay more of a foundation so I  
8 can understand before he gets into telling me what  
9 the letters mean because we may have the same  
10 foundational problems. I don't know.

11 BY MR. MARTIN:

12 Q. When did you first see these letters?

13 A. Okay, these are letters -- these are  
14 letters -- well, I first saw these letters back in  
15 1996.

16 JUDGE MORAN: How was it that you first saw  
17 these letters back in 1996, Mr. Lenz?

18 Do you recall?

19 THE WITNESS: Yes, sir, these are letters  
20 they were forwarded, a copy furnished to the Corps by  
21 the Natural Resources Conservation Service.

22 JUDGE MORAN: And were they put in a file  
23 with the Hesper name in your office?

24 THE WITNESS: Yes, they were.

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1           JUDGE MORAN: And is that how you first saw  
2 them, in this file, or did you see them when they  
3 first came in?

4           THE WITNESS: I saw them when they first came  
5 in.

6           JUDGE MORAN: Were they directed to you or  
7 someone else?

8           THE WITNESS: They were not addressed to me,  
9 sir, they were an addressed to Sue Janota-Summers in  
10 our office who provided them to me.

11          MR. SMALL: Your Honor, I'm going to object  
12 on the basis of --

13          JUDGE MORAN: On what basis?

14          MR. SMALL: Number one on foundation.

15          JUDGE MORAN: Well, he's working on the  
16 foundation right now.

17          MR. SMALL: Number two, relevancy and number  
18 three, case 3M Company versus Browner where it talks  
19 about prior violations in excess of five years  
20 whether they are administrative or judicial are not  
21 to be admissible.

22          JUDGE MORAN: Let's take these one at a time.  
23 First of all, foundation, I'm trying to assist EPA  
24 with the intent of trying to have a full and fair

1 hearing in terms of trying to understand the  
2 foundational basis for this document.

3 As to your point about whether I can  
4 consider it, in any event I'm going to reserve  
5 judgment until I have the luxury of considering your  
6 argument that it's outside the Statute of Limitations  
7 and shouldn't be considered in any event.

8 I'm not sure what their purpose is behind  
9 the exhibit at this point in time. We haven't gotten  
10 to that yet.

11 And what was your third point?

12 MR. SMALL: Relevancy.

13 JUDGE MORAN: Isn't relevancy tried to the  
14 Statute of Limitations and prior violations whether  
15 they can be considered.

16 MR. SMALL: And actually I want to make clear  
17 that that's actually two separate issues when I bring  
18 up the Statute of Limitations issue and the prior  
19 violations issue, time limitations on it.

20 JUDGE MORAN: Okay. And I'll really be in a  
21 better position assuming we get through the  
22 foundational part of it -- I'll be in a better  
23 position when I'm not going because I think it would

24 be unwise for me to make rulings to your other

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1 objections until I'm able to consider the legal  
2 arguments concerning that and that will be in  
3 post-hearing briefs.

4 It's just the best way for me to handle  
5 that.

6 So that addresses all the objections,  
7 assuming we get some more information from him in  
8 this business about foundation.

9 So, Mr. Lenz, you said that this other  
10 person in your office to whom these documents were  
11 addressed brought these over to you?

12 THE WITNESS: Yes, sir.

13 JUDGE MORAN: And do you recall the year and  
14 month when these documents were first brought to your  
15 attention?

16 THE WITNESS: This was in 1996. I don't  
17 recall the month.

18 JUDGE MORAN: It was in 1996 that you first  
19 saw these?

20 THE WITNESS: Yes, sir.

21 JUDGE MORAN: Okay, and then as you sit here



22 today under oath, do you recognize that these are the  
23 same documents that were presented to you at that  
24 time and identified by this person who was your

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1 supervisor or colleague?

2 THE WITNESS: Yes, sir.

3 JUDGE MORAN: You recognize these documents  
4 as the same ones that you looked back at in 1996?

5 THE WITNESS: Yes, sir.

6 JUDGE MORAN: Okay, subject to the other  
7 objections it seems to me that there's been  
8 sufficient foundation laid for him to talk about  
9 this.

10 Whether I can consider it in terms of the  
11 case, I don't know yet. I'm not sure about what  
12 Counsel intends to do -- what Counsel's intent of the  
13 exhibits are.

14 About how much longer do you -- and I'm  
15 not in any way trying to truncate your direct  
16 examination of this witness, but can you just give me  
17 a sense of it, if you know.

18 MR. MARTIN: Another hour.

19 JUDGE MORAN: We're still going to break

20           though for lunch at noon.

21                         Look, I want to express a couple thoughts  
22           about the case at this juncture.  And this may be a  
23           reflection of my being obtuse.  Sometimes I can be  
24           obtuse and I feel scrupulous about it, not in my

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1           decision when I actually issue it but in terms of the  
2           questions during the actual course of the hearing.

3                         Frankly, let's put aside questions of  
4           economic benefit, computation of penalty.  To get  
5           back to more basic questions about this case, and I'm  
6           going to ask the witness if you don't ask him later  
7           on after the lunch break.

8                         I don't really even need an aerial  
9           photograph in this case.  I mean, he hasn't explained  
10          why that was critical, maybe it is.

11                        But as far as I understand, there's no  
12          testimony that or allegations that he was confused  
13          about where he was.  He's physically there.  He does  
14          all these tests.  He comes to certain conclusions  
15          about the nature of the soil, and one of the main  
16          arguments that the Respondents are contesting here  
17          they're saying among other things, these are not

18 wetlands or they're not the kind of wetlands that are  
19 recognized under the Clean Water Act, right?

20 Is that fair?

21 MR. NORTHRUP: That's reasonably fair.

22 JUDGE MORAN: Okay. That's one of your  
23 arguments. So I don't know, it escapes me, again, it  
24 might be because I can be obtuse, what's all this

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1 business about --

2 Why is it critical to go through all this  
3 business about aerial satellite pictures of the moon  
4 of the site?

5 He's there. It isn't like I guess -- I  
6 guess you could have a case where a person totally  
7 through satellite imagery was able to determine the  
8 nature of the wetlands only by sky views.

9 And it seems to me that's a lot more  
10 probative and, again, there's no confusion about  
11 where he was.

12 So I don't know why all this swirling  
13 about -- about this given that Mr. Lenz was actually  
14 there and did sixteen data forms.

15 By the way, when you did these sixteen

16 soil samples, right, soil determinations?

17 THE WITNESS: Yes, sir.

18 JUDGE MORAN: Why did you pick sixteen? Does  
19 the Corps tell you do more than five and less than  
20 eighteen? Or how did you happen to pick sixteen?

21 THE WITNESS: No, sir, it was strictly  
22 subjective.

23 JUDGE MORAN: Okay. And some of them showed  
24 - but not all of them - a lot of them showed -- you

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1 concluded they were hydric soils?

2 THE WITNESS: Yes, sir.

3 JUDGE MORAN: And a few were not?

4 THE WITNESS: Yes, sir.

5 JUDGE MORAN: But you didn't go above or  
6 below the disturbed the area to determine if there  
7 were hydric soils above or below, right?

8 THE WITNESS: That's correct.

9 JUDGE MORAN: And you didn't go to  
10 undisturbed areas and test that you? Just looked in  
11 the area where it was disturbed or near that area?

12 THE WITNESS: That's correct.

13 JUDGE MORAN: Okay. And if you had just done

14 one of these soil samples, Mr. Lenz, in the disturbed  
15 area or near to it would that have been based on your  
16 experience sufficient to make a determination as to  
17 whether you were dealing with hydric soils or do you  
18 have to do more?

19 THE WITNESS: You could have done one, but  
20 the more you do, the more comfortable you are the  
21 results basically.

22 JUDGE MORAN: Okay. And were aerial photos  
23 critical for you to be able to do your job in  
24 analyzing whether in fact wetlands were disturbed by

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1 the activizes here?

2 Were aerial photos -- you couldn't have  
3 done it? Are you going to tell me that, gee, we  
4 couldn't have proceeded -- I couldn't have -- the  
5 case would have fallen out?

6 Tell me, were aerial photographs critical  
7 to your getting your job done here?

8 THE WITNESS: No, sir. If I had shown up on  
9 the site and had forgotten them, I could have gotten  
10 by and sampled. But at some point in time I would  
11 have had to put them on an aerial or a map.

12 JUDGE MORAN: Why?

13 THE WITNESS: Just to look at the extent of  
14 the area we're dealing with.

15 JUDGE MORAN: But you would do that from  
16 being on the ground, didn't you?

17 THE WITNESS: Yes, sir, I did. But at some  
18 point in time you have to make a map or you have to  
19 show the area, look at the area that you're in.

20 JUDGE MORAN: Is that like the photographs  
21 that were taken?

22 THE WITNESS: I prefer aerial photographs.

23 JUDGE MORAN: Okay. But you did take  
24 photographs from the ground or someone with you,

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1 correct?

2 THE WITNESS: Yes, sir.

3 JUDGE MORAN: And you were there when those  
4 photographs were taken?

5 THE WITNESS: Yes, sir.

6 JUDGE MORAN: Did anyone -- anyone who was  
7 there during your visit say to you, you know, this  
8 isn't our land?

9 Did any one of the Hesers or anyone

10 suggest you were in some other person's property?

11 THE WITNESS: No, sir.

12 JUDGE MORAN: Did they acknowledge that you  
13 were on their property?

14 THE WITNESS: No, sir.

15 JUDGE MORAN: Now did you have these aerial  
16 photographs before you went out for your first visit?  
17 I think you told me that you had three visits to the  
18 site, correct?

19 THE WITNESS: Yes, sir.

20 JUDGE MORAN: And did you have these aerial  
21 photographs with you on your first visit?

22 THE WITNESS: Yes, I had aerial photographs  
23 with me at that time.

24 JUDGE MORAN: And just backing up for the

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1 bigger view, it's my understanding from your  
2 testimony yesterday and today that -- that -- I see  
3 someone shaking their head.

4 MR. MARTIN: I'm trying to turn my phone off.

5 JUDGE MORAN: Well, it's a nice little tune.

6 It's my understanding and you tell me if  
7 I'm correct about this, that in determining whether





6       timbering. Our fear is that U.S. EPA is going to get  
7       in all these aerial photographs that we don't know  
8       when they were taken, that show all of these woods  
9       and try to impute that oh, these must have been there  
10       when the Hesers purchased the property.

11               JUDGE MORAN: Okay, so you think that --

12               MR. NORTHRUP: And we think that's the only  
13       evidence of that, these aerial photographs. That's  
14       why we're concerned about it.

15               JUDGE MORAN: Again, to make sure I have it  
16       straight:

17                        You're saying that when the Hesers first  
18       purchased the property, whenever that was, these  
19       woods were not there, correct?

20               MR. NORTHRUP: Correct.

21               JUDGE MORAN: Okay. Well, is that so  
22       critical, I mean, in terms of my figuring out whether  
23       they were wetlands and whether there was disturbance  
24       and un permitted alteration of an existing channel?

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1                        Doesn't that go -- isn't that similar to  
2       if I arrive that there was a violation and then  
3       there's the penalty?



2 record that in an off-the-record discussion just  
3 minutes before, I did ask Counsel, Mr. Small for the  
4 Respondent, for the citation for two cases. And he  
5 gave me those, so I'm going to perhaps have a chance  
6 to look at them, I don't think I'll get to them  
7 tonight, but by tomorrow I'll be looking at them.

8 The other thing I want to say is we have  
9 all these EPA people here, sometimes I'm viewed as  
10 being hard on EPA. But when you go back to Chicago  
11 however this case turns out, don't go back with that  
12 unsophisticated view of what I do here.

13 My rulings have to do with the integrity  
14 of the administrative process. And if you don't know  
15 now then I'm telling you now that the administrative  
16 proceeding is indistinguishable from any civil  
17 proceeding other than what I alluded to about the  
18 difference in terms of the acceptance of hearsay.

19 And so when I insist on proper protocol  
20 for the presentation of evidence, it has nothing do  
21 with my being hard to one side or the other. It has  
22 to do with the integrity of the process.

23 All right, are we ready to proceed,  
24 Mr. Martin?

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1 MR. MARTIN: Yes, sir.

2 BY MR. MARTIN:

3 Q. Mr. Lenz, we were discussing, starting at  
4 pages 71 through page 111, a series of correspondence  
5 from U.S. EPA to Andrew Hesel?

6 A. Yes, sir.

7 Q. And did you say your office was copied on  
8 those letters?

9 A. Yes, sir, we were copy furnished.

10 Q. Would that be Sue Janota-Summers?

11 A. Yes.

12 Q. And what was her position in your office?

13 A. She's a Project Manager in the Regulatory  
14 Branch.

15 Q. After she received these letters, what  
16 would she do with them?

17 A. With these letters, she provided these  
18 letters to Karen Marzac, who is Chief of the  
19 Enforcement Section.

20 The reason for doing that is she saw that  
21 there were violations in the group of letters here,  
22 so she automatically turned them over to Karen Marzac  
23 in the Enforcement Section.

24 Karen Marzac then turned them over to me

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1 just because I'm more familiar with the USDA process.

2 Q. And why did she turn them over to you?

3 A. She turned them over to me just because  
4 I'm more familiar. I used to work for the USDA  
5 Natural Resources Conservation Service.

6 So I'm familiar with these letters. I've  
7 sent them out, I developed them. So I'm familiar  
8 with them so it's easy for me to go through them and  
9 understand what's going on basically.

10 Q. First of all, in 1996 you worked for the  
11 Enforcement Division of your office?

12 A. Yes, sir.

13 Q. And with Karen Marzac?

14 A. Yes, sir.

15 Q. Can you describe your experience with  
16 USDA in terms of farm bill benefits?

17 A. Okay, my experience with the USDA and the  
18 farm bill stems back when I worked for the USDA. As  
19 a soil scientist, I did a lot of the soil mapping  
20 that was required to be in compliance with the sod  
21 buster provisions and swamp buster provisions, the  
22 USDA and the RCS had to develop -- they had to  
23 determine highly erodible lands and wetlands on  
24 individual farm tracks.

1                   So I was part of the team that did that.  
2                   And at the Soil Conservation Service, I did  
3                   conservation planning and actually sent out these  
4                   types of letters.

5                   BY MR. MARTIN:

6                   Q.    You mentioned the term sod buster, can  
7                   you explain that?

8                   A.    Sod busters refers to provisions in the  
9                   Food Security Act where if you're not allowed to  
10                  clear highly erodible land without having any  
11                  conservation plan developed on that to stem erosion.

12                  Q.    Did you also mention the term swamp  
13                  buster?

14                  A.    Yes, sir, swamp buster was another  
15                  component of the farm bill.

16                  Q.    Can you describe that component?

17                  A.    The swamp buster provisions of the Food  
18                  Security Act, and this is for people that are in the  
19                  USDA program, you lose your USDA program eligibility  
20                  if you clear a wetlands in such a way as to bring it  
21                  possible to put it into crop production.

22                  Q.    And how does the USDA enforce the swamp

23 buster provisions on the farm bill?

24 A. It's enforced basically through the

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1 carrot of the USDA benefits. You're not eligible for  
2 benefits if you clear this wetland.

3 So that's how the enforcement works. And  
4 you'll have to pay back subsidies if you received  
5 subsidies and it was found out that you did clear  
6 wetlands. So if you're in a USDA program, you have  
7 to pay back.

8 Q. Can you describe the general process that  
9 is implemented in the swamp busting provisions of the  
10 farm bill?

11 A. Excuse me? Could you rephrase?

12 Q. Can you explain the process by which the  
13 USDA determines whether farmland has been converted  
14 under the swamp buster provisions of the farm bill?

15 A. Yes, sir. What happens if you're a USDA  
16 participant any land that you farm, you have to have  
17 highly erodible land and a wetlands determination on  
18 all farm fields on your land.

19 So if you intend to bring any new land  
20 into production, if there's an area over here and I

21 want to clear that area and bring it into crop  
22 production. You would have to go into a USDA office  
23 and say hey, I want to clear this land.

24 And they will look at it and say well, we

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1 have not done a wetlands determination on that piece  
2 of land. We need to do that to ensure you maintain  
3 your USDA eligibility.

4 Then they will go out and they will do a  
5 wetlands determination on that tract of land and they  
6 may say either yes, it's a wetland. You can't bring  
7 it into production or if it's not a wetland, you can  
8 clear it and bring it into production and maintain  
9 your eligibility.

10 So they will send these letters out as  
11 part of that effort for people to be in compliance  
12 with the farm bill.

13 Q. When you refer to these letters, which  
14 letters are you referring to?

15 A. This letter -- this first one here, 71,  
16 Bates Number 71, this is a typical letter that they  
17 would send out.

18 Q. Describe what this letter is about?



19 A. This --

20 Q. Uh-huh.

21 A. It's dated October 18, 1996 to Mr. Andrew  
22 Hesper. This is a preliminary technical  
23 determination, so they're making a preliminary  
24 determination here that wetlands were on this

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1 specific tract of land. It's listed as farm number  
2 6487, tract 5027.

3 And they're saying some unnumbered fields  
4 or unnumbered areas have wetlands on them. Because  
5 you've have a tract of land and they'll have a field  
6 or field numbers, they don't bother numbering areas  
7 that they aren't crop production.

8 They just make a generic reference to  
9 unnumbered areas. So they explain on page one -- I  
10 guess it's page 71, the first page of the letter,  
11 what the eligibility programs are. And then if you  
12 turn to page two, they continue with the eligibility.

13 They also on page two give you the  
14 opportunity to appeal their decision. And that's in  
15 that second paragraph. And they give you your appeal  
16 rights. And then at the bottom, second paragraph on

17 the bottom there on page 72, they tell that you this  
18 preliminary determination will become final in  
19 30 days then if appeal isn't registered.

20 Q. Are you familiar with how preliminary  
21 technical determinations on wetlands are made after  
22 the farm bill?

23 How many preliminary technical  
24 determinations that wetlands exist are made on the

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1 farm bill?

2 A. These are made continuously.

3 Q. I'm sorry.

4 A. These are made continuously. There is a  
5 seasonal aspect to it in terms of spring and fall.

6 But these are everyday kind of  
7 determinations that they would do.

8 Q. Are you familiar with how the preliminary  
9 technical determinations that wetlands exist are made  
10 by USDA on the farm bill?

11 A. Yes, sir. These are off-site  
12 determinations. Nobody goes out to the field on  
13 preliminary determinations.

14 JUDGE MORAN: Well, how do they do it?

15 THE WITNESS: Off of maps.

16 JUDGE MORAN: Off maps.

17 THE WITNESS: We actually have I think what's  
18 called wetlands conventions where they through and  
19 look at maps and aerial photographs, slide reviews,  
20 and they'll determine using those off-site  
21 procedures.

22 They have wetland inventory maps.

23 BY MR. MARTIN:

24 Q. Are additional procedures applied in

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1 order to make a decision final?

2 A. At the time this was done, they were  
3 finalized just by virtue of the time period. They no  
4 longer do that.

5 Now to finalize and certify a wetland  
6 determination, now they require a site visit.

7 Q. Okay, so, in 1996 you're saying that they  
8 didn't require site visits?

9 A. It was my understanding that they did  
10 not. That they had that 30-day period.

11 Q. Could you turn to Bates 84 -- page 84?

12 A. Yes, sir.

13 Q. Can you describe what this document is?

14 A. This is a field data sheet out of the '87  
15 Manual that was filled out by NRCS.

16 Q. Is there an applicant name on the form?

17 A. Yes, sir. It says Bobby and Andy Heser.

18 Q. And is there a plot number referenced?

19 A. They reference tract number 5027-A, which  
20 I believe they're referencing to a site map -- a  
21 marked on map.

22 They would have -- with these  
23 determinations, they would attach a map. It would be  
24 on the previous, Bates Number 83.

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1 There you have tract number 5027. If you  
2 turn the sheet sideways, the numbers are oriented  
3 upright. It's kind of in the upper right-hand  
4 quadrant of the page, 5027, which is what this letter  
5 references.

6 Q. You testified that the data form is under  
7 the Corps of Engineers 1987 Manual?

8 A. Yes, sir.

9 Q. Does that data form indicate to you that  
10 a site visit was made?

11           A. Yes, sir, a site visit was made on this  
12 tract.

13           Q. So despite what you said earlier, the  
14 general practice was not to visit sites, but in this  
15 case, it appears from the data form number one that a  
16 site visit was made?

17           A. Yes, sir, it was.

18           Q. Could you please turn to pages 46 through  
19 56?

20           JUDGE MORAN: What is it, Counsel?

21           MR. MARTIN: Pages 46 to 56.

22           JUDGE MORAN: Just before we go to those, I  
23 have to ask: When you were just referring, Mr. Lenz,  
24 to Complainant's Exhibit Bates stamped 84 and the

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1 page, the map that accompanied that.

2           Do you remember talking about that a  
3 minute ago?

4           THE WITNESS: Pardon?

5           JUDGE MORAN: Page 84, CX 84, Bates stamped  
6 84. You just talked about it when you talked about  
7 the map that accompanies it.

8           THE WITNESS: Yes, sir.

9 JUDGE MORAN: Okay. My question for you is:  
10 Does that wetland determination reflected  
11 on that data form, on CX 84, and the map which  
12 accompanies that --

13 THE WITNESS: Yes, sir.

14 JUDGE MORAN: -- (continuing) does that  
15 relate to the same land which is at issue in this  
16 proceeding or not?

17 THE WITNESS: No, it is not.

18 MR. SMALL: Your Honor, then we're going to  
19 make a continuing objection, again, that it's outside  
20 the five-year time frame and relevancy.

21 JUDGE MORAN: Right. Well, I've already  
22 spoken to the five-year argument and I told you how  
23 I'm handling that.

24 But as to relevancy, I'm not sure what

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1 the relevancy is.

2 Do you want to speak to that, Counsel?  
3 What is the relevancy of this plot which is not  
4 related to the plot that's at issuance here?

5 MR. MARTIN: Well, your Honor, it shows in  
6 our minds, a pattern and practice of converting

7 wetlands and farmland. It's not adjudicated  
8 violation, we realize that.

9 But it shows both having practice and  
10 also shows knowledge of wetlands protection programs,  
11 knowledge of all the agencies involved.

12 JUDGE MORAN: Okay, that's enough. I accept  
13 that as being relevant for the reason that you just  
14 articulated.

15 And notice that that's different from --  
16 that's a legal argument that you made. I don't need  
17 to have a witness tell me that. That's something  
18 that you do.

19 So subject to the other objection which  
20 I'm not ruling on at this time.

21 Mr. Small, I overrule your objection on  
22 relevancy for the reasons that I just accepted that  
23 Mr. Martin just articulated.

24 Okay, now you can go to the next page.

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1 BY MR. MARTIN:

2 Q. I just wanted to confirm that the data  
3 forms that we just discussed do relate to the  
4 October 18th letter that was found on page 71; is

5 that correct, Mr. Lenz?

6 A. Yes, sir.

7 JUDGE MORAN: And also, not to break your  
8 stride again, but just to remind you - just trying to  
9 be helpful here - that the last exhibit that was at  
10 admitted was CX 21.

11 I have CX 40, 20, and 21. And it's not  
12 up to me to be keeping track of those things that are  
13 moved for admission into the record. But that's what  
14 my notes show, that CX 8 and 14, the Government has  
15 not moved for those to be admitted.

16 MR. MARTIN: That's correct.

17 JUDGE MORAN: Okay.

18 MR. MARTIN: We were intending on moving  
19 Exhibit 8 testimony subject to the speed memo  
20 objection.

21 JUDGE MORAN: Okay. So later, right.

22 MR. MARTIN: Your Honor, I point out that  
23 Exhibit C had been admitted

24 JUDGE MORAN: With the limitations that

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1 Mr. Northrup referred to, Exhibit C, that's

2 Demonstrative Exhibit C, so I stand corrected on



3 that.

4 BY MR. MARTIN:

5 Q. Mr. Lenz, could you move to page 46?

6 A. Yes, sir.

7 Q. That would be 46 through 57. Would you  
8 review these letters and tell me -- describe what you  
9 see?

10 A. Pardon me?

11 Q. Could you review these letters and  
12 describe what they are?

13 A. These are letters similar to the one we  
14 just went through. Actually, these are different  
15 just because these are not preliminary  
16 determinations.

17 At this point, this letter here is  
18 actually a final technical determination on wetlands.

19 Q. And were these letters part of your  
20 official case file at the Corps of Engineers?

21 A. Yes, sir, they are.

22 Q. Did you attach these letters as well as  
23 the preliminary letter we just discussed to the  
24 referral that was sent to the U.S. EPA?

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1 A. Yes, sir.

2 Q. And why did you do that?

3 A. The reason I did was twofold. First of  
4 all, these letters show that the Hesers had cleared  
5 wetlands in the past.

6 It was determined by the NRCS and they  
7 were referring these letters to us if we wanted to  
8 pursue a violation under Section 404 of the Clean  
9 Water Act.

10 Q. Mr. Lenz, are you aware of whether the  
11 Hesper brothers appealed any final determinations that  
12 were made of the farm bill?

13 A. Would you repeat the question?

14 Q. Are you aware of whether the Hesper  
15 brothers appealed any of the final determinations  
16 made under the farm bill?

17 A. To my knowledge, they did not.

18 MR. NORTHRUP: Just for the record, we'd like  
19 to show a continuing objection as well for 46 to 56.

20 JUDGE MORAN: Which are?

21 MR. NORTHRUP: Relevance and the Statute of  
22 Limitations.

23 MR. SMALL: And, your Honor, also the  
24 adjudication. The issue of adjudication that's more

1 than five years removed, which is another grounds,  
2 also.

3 JUDGE MORAN: Okay. And I'm not making any  
4 final ruling on that. But I think it's -- the  
5 five-year business, to use that phrase, capture that.

6 To my mind five-year does not impact  
7 history of violation. For instance, one has 20 years  
8 of history of violation. You don't stop and look at  
9 history any less so than if you had a criminal case  
10 and you had someone that was a recidivist, and you  
11 were looking at that person's priors.

12 It isn't like the slate gets wiped clean  
13 after a certain period of time.

14 MR. SMALL: Your Honor --

15 JUDGE MORAN: It's a distinct aspect on the  
16 history of violations.

17 MR. SMALL: We would again cite the case of  
18 3M Company versus Browner that speaks to that issue  
19 which you're getting.

20 JUDGE MORAN: Okay.

21 BY MR. MARTIN:

22 Q. Mr. Lenz, speaking of the Corps' file in  
23 this matter specifically with regard to the farm bill  
24 provisions of it relating to the Hesers, did you

1 compare the case file that you brought over for  
2 hearing with the contents of EPA Exhibit 8?

3 A. Yes, sir.

4 Q. And were you able to find the documents  
5 that were not included in EPA's Exhibit 8?

6 A. Yes, sir.

7 MR. MARTIN: Your Honor, just to explain, we  
8 have provided a tabbed copy of missing documents that  
9 were not included in EPA's Exhibit 8. We gave them  
10 that last night.

11 MR. NORTHRUP: That's correct, your Honor.

12 JUDGE MORAN: Okay. But there's no intention  
13 on the part of EPA to include those within Exhibit 8,  
14 it's just for completeness of that record, of that  
15 investigatory file or whatever you want to call it.

16 That's what you're referring to?

17 MR. MARTIN: That's correct, your Honor.

18 JUDGE MORAN: Okay. And Respondent's Counsel  
19 has acknowledged that?

20 BY MR. MARTIN:

21 Q. Mr. Lenz, I'd like to call your attention  
22 to pages 61 and 62.

23 A. Yes, sir.

24

Q. Do you recognize this letter?

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1

A. Yes, sir.

2

Q. What is it?

3

A. This is a letter that I wrote to Robert

4

and Andrew Hesper on December 22, 1996. This is a --

5

as a result of the information that we got from

6

USDA - NRCS, that documentation said that they had

7

cleared wetlands in the St. Louis district on two

8

tracts of land and identified those in this letter

9

just informing the Hesperes that the clearing was a

10

violation of the Section 404 of the Clean Water Act.

11

In the first paragraph, I outlined -- or

12

identified one of the tracts as farm Number 2661,

13

tract 4268 where they cleared .7 acres of wetlands.

14

In the second paragraph, I identify

15

another farm number 6488, tract number 10366, where

16

they cleared 1.3 acres of wetlands. And then

17

informed them that further on in the letter that what

18

they did was a violation of Section 404 of the Clean

19

Water Act.

20

Also explained to them that we were not

21

going to pursue this as an enforcement action, but

22 told them that we did consider them at this point --  
23 excuse me. Let me back up a second.

24 Yes, we told them we were not going to

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1 pursue anything at this time. But we did tell them  
2 that we did consider them knowledgeable of the  
3 provisions of Section 404 of the Clean Water Act.

4 And I said that any future land clearing,  
5 excavation, or discharges or fill of wetlands or work  
6 in stream channels or other waters of the United  
7 States will be considered to be done with the  
8 knowledge of the need for permits under Section 404  
9 of the Clean Water Act?

10 Q. First of all, did you send this letter?

11 A. Yes, sir, I did.

12 Q. The stamp of your name does that indicate  
13 the letter was sent?

14 A. Yes, sir.

15 Q. Were the two tracts involved in this  
16 letter, two tracts that were subject to final  
17 determinations under the farm bill?

18 A. Yes, sir.

19 Q. You said that three other tracts that

20 were subject to the final determinations under the  
21 farm bill were in a different Corps of Engineers'  
22 District?

23 A. Yes, sir. The other violations were in  
24 the Louisville District.

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1 Q. So your office had no jurisdiction over  
2 those sites?

3 A. That's correct.

4 Q. Is there any reason that you can give why  
5 you defer enforcement of these two tracts?

6 A. We didn't have any other history of  
7 either permitting or violations with the Hesers. And  
8 we do have discretionary authority over pursuing  
9 violations.

10 And we looked at where the violations  
11 occurred and then took into consideration things like  
12 that. But we wanted to also ensure that we put a  
13 stop to it.

14 So I sent them this letter and basically  
15 said you need to -- you can't be doing this. You  
16 need to have a permit.

17 Q. Did you receive a response to this letter

18 from the Hesers?

19 A. No, I did not, I just received -- I  
20 believe this was sent certified mail. So other than  
21 that, that's the only receipt we have.

22 Q. So how do you know this was sent  
23 certified mail?

24 A. On the bottom of the front page, it's

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1 noted that it was sent certified.

2 Q. Do you have personal knowledge of whether  
3 you received the certificates received associated  
4 with certified mail?

5 A. Yes, sir.

6 Q. And did we?

7 A. Yes, sir.

8 MR. SMALL: Your Honor, just to be clear for  
9 the record, again, it's the same objection,  
10 continuing objection on relevancy, the five-year  
11 Statute of Limitations, and the five-year prior  
12 adjudication limits.

13 JUDGE MORAN: Okay.

14 BY MR. MARTIN:

15 Q. Mr. Lenz, you looked over the entire



16 complaint and the Exhibit 8, have you not?

17 A. Yes, sir.

18 Q. This is the EPA excerpts of the Corps of  
19 Engineers' referral letter?

20 A. (Nodded head up and down.)

21 Q. What were the only parts missing from the  
22 Corps file, from these excerpts?

23 A. The parts missing were the ones that we  
24 tabbed yesterday, which would be the USDA

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1 correspondence.

2 We're missing pieces of those.

3 MR. MARTIN: Your Honor, at this time I would  
4 like to move to include Complainant's Exhibit 8 into  
5 the record.

6 JUDGE MORAN: And when you say 8, you mean  
7 except for the speed memos.

8 MR. MARTIN: Yes, sir.

9 JUDGE MORAN: These are letters which are CX  
10 57 through CX 60 which was objected to by Mr. Small,  
11 if I recall.

12 MR. MARTIN: I'm sorry. I was just paging  
13 through this.

14 JUDGE MORAN: Well, I said that -- you're  
15 moving for the introduction of Complainant's  
16 Exhibit 8 --

17 MR. MARTIN: Yes.

18 JUDGE MORAN: -- (continuing) except for the  
19 pages that deal with the speed memo from Mr. Tony  
20 Antonacci.

21 MR. MARTIN: Antonacci, correct. That would  
22 be pages 57 through 60.

23 MR. NORTHRUP: Your Honor, we would still  
24 object to at least those portions of Exhibit 8,

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1 particularly the photos and the videotape for which  
2 no foundation has been provided.

3 We also raise the issue with Bates Number  
4 152 and 153, which was the aerial photos.

5 And so I raise the same issues. We just  
6 don't have a foundation as to when that picture was  
7 taken. But I think that the primary objection is  
8 with these photos and videotape.

9 JUDGE MORAN: Well, the videotape is not part  
10 of Exhibit 8. I've seen no videotape other than what  
11 was delivered to my office, which I did not look at,

12 which was part of the prehearing exchange.

13 But we have no --

14 MR. MARTIN: I believe Mr. Lenz testified as  
15 to the videotape, yesterday.

16 JUDGE MORAN: Are you telling me that I  
17 missed that?

18 MR. MARTIN: No, the existence of a  
19 videotape. We have another witness to introduce the  
20 content of the videotape, although at this time we  
21 move to put the videotape into the television set and  
22 watch it.

23 JUDGE MORAN: No. You need to have a proper  
24 foundation for the videotape to be put in.

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1 Mr. Lenz did go into some extensive  
2 testimony about this as I recall - and correct me if  
3 I'm wrong about this - but the photographs which were  
4 part of Exhibit 8, except for the first group which  
5 began on CX 63.

6 If I recall correctly the other group of  
7 photographs which was part of 8 which begin on 146,  
8 he went into some detail yesterday explaining how he  
9 and Miss Kelly were there together. He remembered

10 the photographs, described in some detail.

11 So I don't have a problem with those.  
12 But, Counsel, you'll have to help me about the  
13 others. I think we just -- didn't we skirt over --  
14 the record will show what it was. But CX 63 through  
15 70, that was not as I recall the focus of Mr. Lenz's  
16 testimony.

17 MR. NORTHRUP: Your Honor, I misspoke. I  
18 don't a problem with the photos that Mr. Lenz talked  
19 about. It is these photos from pages 63 to 70 that  
20 I'm raising the objection on.

21 JUDGE MORAN: Okay. And I recall,  
22 Mr. Martin, you were going to have another witness  
23 explain and provide a foundation for these photos;  
24 isn't that right?

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1 MR. MARTIN: That's correct.

2 JUDGE MORAN: Okay. So I'm admitting  
3 Exhibit 8 - if there's any other objections I want to  
4 hear about them - except for CX 63 through CX 70 and  
5 except also the speed memo pages - that's a short way  
6 of describing it - begins on CX 57 through CX 60.  
7 And I'm going to keep them in my binder for now.

8                    If those documents are not properly -- if  
9                    there's not a proper foundation, then you'll have to  
10                    remind me, Mr. Northrup, about that.

11                    And at the end of the proceeding -- or at  
12                    the end of the Government's case, I'll have those  
13                    withdrawn from my notebook.

14                    Okay, did you hear me? You did?

15                    MR. NORTHRUP: No, I did not.

16                    JUDGE MORAN: Well, I was saying there are  
17                    two groups within Exhibit 8 which are not going to be  
18                    admitted at this time.

19                    MR. NORTHRUP: Correct.

20                    JUDGE MORAN: They may be cured potentially  
21                    before EPA rests.

22                    If they're not cured then at that time I  
23                    will move those two from my official exhibit book,  
24                    return them to Counsel, and that will be the end of

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1                    those out of Exhibit 8.

2                    So that's my ruling.

3                    Exhibit 8 is admitted except for those  
4                    things that I've just identified.

5                    (WHEREUPON, a portion of

6 Complainant's Exhibit Number 8  
7 was admitted into the record.)

8 MR. MARTIN: Your Honor, just to clarify that  
9 the videotape was marked as Exhibit 8C and is part of  
10 the Corps' referral for EPA. The videotape was part  
11 of the initial Complaint.

12 JUDGE MORAN: Sure. But it isn't into  
13 evidence.

14 MR. MARTIN: I was just clarifying that it  
15 was part of the exhibit. I realize we need  
16 to authenticate the exhibit.

17 JUDGE MORAN: Okay. And I haven't been  
18 provided -- have I been provided with a copy of the  
19 videotape here in this proceeding?

20 MR. MARTIN: I have an extra copy.

21 JUDGE MORAN: Remember, I sent out a notice  
22 about a week before, Hearing Procedure Reminders,  
23 telling both sides that the fact that I may have  
24 received a courtesy copy for purposes of ruling on

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1 any Motions of prehearing exchange material, that  
2 doesn't ergo make those part of the record at all.

3 And that's why I said in my brief notice

4 that the Parties have to provide exhibits for  
5 admission at the hearing and that there isn't some  
6 sort of method where they're in because they were  
7 provided to me for the prehearing exchange process.

8 MR. MARTIN: We have a copy for the Court,  
9 your Honor.

10 JUDGE MORAN: All right. That's my ruling on  
11 Exhibit 8.

12 We still have Exhibit 14. Is that later,  
13 Mr. Martin?

14 MR. MARTIN: Yes.

15 JUDGE MORAN: Okay, fine.

16 Do you need a break here to get  
17 organized?

18 MR. MARTIN: Just, Judge, just checking my  
19 notes.

20 JUDGE MORAN: Okay, then let's take a  
21 five-minute break.

22 (Whereupon a short recess was  
23 taken.)

24 JUDGE MORAN: Go ahead, Mr. Martin.

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2 Q. Mr. Lenz, just a couple more questions:  
3 Did your Corps District Office receive a permit  
4 application under Section 404 of the Clean Water Act  
5 from the Hesper brothers prior to the alleged filling  
6 activities at the alleged violation site?

7 A. No, sir.

8 Q. Based on your experience in the  
9 Regulatory Branch of your Corps Office processing  
10 permits and your experience and observations of the  
11 site and filling activities, do you have an opinion  
12 of whether such a permit would have been issued?

13 A. No, sir, it would not have.

14 Q. So, you have an opinion?

15 A. Yes, sir.

16 Q. And what is that opinion?

17 A. In my opinion, a permit would not have  
18 been issued for the work that was accomplished.

19 Q. Can you give us the reason for that?

20 A. That project would have had to have been  
21 evaluated as an individual permit. They would have  
22 had to have showed a purpose and need for the  
23 project.

24 We would have to evaluate in accordance

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1 with 404(b) (1) guidelines, NCCO(sp) requirements.  
2 They would had purpose need for the project. Is the  
3 propose to increase crop production, is it to  
4 alleviate flooding when it occurred, what is the  
5 purpose of the project?

6 Since there were wetlands present at the  
7 site as well which are considered a special aquatic  
8 site, then the Corps has to make an automatic  
9 presumption up front -- in the beginning of the  
10 permit process, we have to make the assumption that  
11 there are other less damaging alternatives than  
12 conducting a project or filling in a wetland, that  
13 there are alternatives.

14 So they would have had to conduct  
15 alternative analysis and basically rebutted that  
16 assumption.

17 Also, that project would have gone out on  
18 a public notice. It would have to everybody,  
19 adjacent landowners, other agencies. We would have  
20 gotten input from Illinois EPA, Department of Natural  
21 Resources and those folks. We would have gotten info  
22 from the agencies on the project.

23 We also would have to look at -- in  
24 general when permits of this type are submitted in an

1 application, during the permit review process, the  
2 project is modified so that you don't end up with  
3 just -- like the channel just on the property line as  
4 it is now.

5                   There is mitigation that happens as a  
6 last step of the process. The sequence of steps we  
7 would look at would be avoidance of impact - this is  
8 aquatic recourse - avoidance of impacts, minimization  
9 of impacts, and then the last resort would be  
10 mitigation.

11                   Q. You mentioned the fact that you feel that  
12 an individual permit would have been required here.  
13 Can you explain that?

14                   A. It could have been required because if  
15 the project out on-site is automatically an adverse  
16 impact. It's above any threshold we have for any  
17 general or nationwide permit.

18                   So automatically it's an adverse impact.  
19 It would have had to have been a process of  
20 individual permit.

21                   Q. Are you familiar with nationwide permit  
22 number 26?

23                   A. Yes, sir.

24                   Q. What does that -- what does that permit

1 contain?

2 A. We no longer have nationwide permit forms  
3 at this time, but at the time of the violation  
4 nationwide permit 26 was available as one of the  
5 nationwide permits.

6 At that time nationwide permit 26 had  
7 impact thresholds of one third of an acre wetland  
8 impact required notification to the Corps.

9 And we could authorize up to three acres  
10 of wetland impact under nationwide permit 26. The  
11 upper limit on stream channel impacts was 500 feet.

12 So above those thresholds, a project  
13 would be considered automatically an adverse impact.  
14 It would require individual permit review.

15 Q. Did you testify that notice under  
16 nationwide permit 26 is required for fills over  
17 one-third of an acre?

18 A. Yes, sir, it requires notification to the  
19 Corps so that we can review the project and determine  
20 whether or not it is, in fact, a minimal impact or  
21 not.

22 Just because nationwide permit 26 allows

23 up to three acres of impact doesn't mean that we  
24 would authorize three acres under nationwide permit

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1 26.

2 Q. How are the states a part of the  
3 nationwide permit program?

4 A. The states are responsible for Section  
5 401 is of the Clean Water Act which gives them the  
6 opportunity to review these projects and certify --  
7 do a water quality certification so that there's  
8 no -- it's the state's opportunity to look for the  
9 state's interest in terms of impacting water quality  
10 of the state's waters.

11 Q. Is state water quality certification  
12 required for each individual permit under Section  
13 404?

14 A. State water quality certification is  
15 required for all permits, individual permits and  
16 nationwide permits.

17 Q. How is state water quality certification  
18 provided for nationwide permits?

19 A. For nationwide permits, how water quality  
20 certification is done is when the nationwide permits

21 are issued, once every five years, the states have  
22 the opportunity to refer all of the nationwide  
23 permits.

24 And what they'll do is they will either

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1 issue water quality certification, they'll issue it  
2 with conditions, they can waive certification or they  
3 can deny certification.

4 If they deny water quality certification,  
5 it doesn't mean that a nationwide permit is not  
6 available when they do that. It just means that  
7 people that would receive a nationwide permit have to  
8 go separately to the state and get an individual  
9 water quality certification for that particular  
10 nationwide permit.

11 Q. At the time of the alleged unauthorized  
12 activities in this case, had the state of Illinois  
13 provided water quality certification for nationwide  
14 26?

15 A. No, sir.

16 Q. What was their action as to nationwide  
17 26?

18 A. Pardon?

19 Q. Was it a denial or was it a?

20 A. The state denied water quality  
21 certification for nationwide permit 26. In essence  
22 that means that they wanted to see every one and look  
23 at it before they issued water quality certification  
24 and condition it however they saw fit.

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1 MR. MARTIN: I have no further questions,  
2 your Honor.

3 JUDGE MORAN: Okay, are you ready, Counsel,  
4 for Respondent to conduct cross-examination?

5 Let's go off the record.

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

8 JUDGE MORAN: Okay, Mr. Lenz, so you're going  
9 to be excused. Don't talk with anyone about this  
10 case except in cross-examination and you're not to be  
11 discussing this with any of the other EPA witnesses  
12 or Counsel.

13 (WHEREUPON, there was then had  
14 an off-the-record discussion.)

15 JUDGE MORAN: Back on the record. And you  
16 say Miss Court Reporter that you already have on the

17 record that the cross-examination of Mr. Lenz has  
18 been deferred so that we can hear first from the  
19 second EPA witness, which is Miss Joan Rogers, right?

20 And also in an off-the-record discussion,  
21 Counsel for the Respondent requested that Mr. Lenz  
22 not be in the court reporter since he has not been  
23 subject to cross-examination.

24 So he has left the courtroom. And he'll

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1 return when it's time for him to go in  
2 cross-examination.

3 Now, I'll swear in our witness.

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

7 JUDGE MORAN: And you might have seen how  
8 Mr. Lenz did it, just state your name and then spell  
9 it for us.

10 THE WITNESS: Okay. My name is Joan Rogers,  
11 and my last name is spelled R-O-G-E-R-S.

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

15

DIRECT EXAMINATION

16

BY MS. PELLEGRIN:

17

Q. Good afternoon, Miss Rogers. I'm going to start with some questions about your educational background.

20

Do you hold any educational degrees?

21

22

23

24

A. Yes, I have a Bachelor's Degree that majors in mathematics with a minor in chemistry from Roosevelt University in Chicago. And I also have a Bachelor's Degree in meteorology from Northern

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1

Illinois University.

2

3

Q. Let's start with your first Bachelor's Degree. When did you earn that degree?

4

A. 1997.

5

6

Q. And you said that it was in math and chemistry, what kind of course work did you take?

7

8

9

10

A. The full series of mathematical classes all the way through calculus, real analysis. I also took a lot of statistical and probability classes because I was in the actuarial program.

11

12

Q. And just briefly, actuarial programs?

A. Actuaries are the mathematicians for



13 insurance companies, and at the time I was thinking  
14 of pursuing that as a career.

15 Q. And you mentioned about a Bachelor's  
16 Degree in Meteorology? Why did you get a bachelor's  
17 degree?

18 A. At the time and still there is no local  
19 university that offers Master's Degree in  
20 Meteorology. The closest one would have been  
21 Valparaiso University. It was too far to drive.

22 Q. And when did you earn that second  
23 bachelor's degree?

24 A. 2003.

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1 Q. Okay. And what does the study of  
2 meteorology entail?

3 A. The study of the atmosphere and its  
4 motion.

5 Q. And can you conduct any research  
6 while you were earning a Bachelor's Degree in  
7 Meteorology?

8 A. Yes, I did. I did two semesters of micro  
9 meteorology research that studies energy fluxes and  
10 moisture fluxes at the ground level.

11 Q. And what is a flux?

12 A. A flux energy movement through a plane or  
13 let's say through a surface.

14 Q. And were you employed in any  
15 environmentally field while you were in school?

16 A. While I was in school, I earned a  
17 certificate from the National Weather Service to take  
18 surface weather observations. And I acquired a job  
19 taking weather observations at both Midway and O'Hare  
20 airports.

21 Q. And what does taking weather observations  
22 entail?

23 A. At the majority of the airports, there  
24 are humans that every hour we describe the

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1 atmospheric conditions, and put that into a report,  
2 and also work closely with air traffic controllers  
3 for severe weather that comes into the airport.

4 Q. And did you take any courses or training  
5 since earning your Bachelor's Degree?

6 A. Yes, I earned a certificate in Geographic  
7 Information Systems, also known as GIS, and I am now  
8 currently in the naturalist certificate program

9 that's also run in conjunction the University of  
10 Chicago.

11 Q. And let's turn to your GIS certificate.  
12 When did you earn that?

13 A. 2004.

14 Q. And what do you have to do to earn a GIS  
15 certificate?

16 A. You take course work in GIS in  
17 understanding how a GIS works within the computer,  
18 how relational databases work, how to manipulate  
19 digital layers of spatial information. And we also  
20 took course work in maps and map making and  
21 understanding projections and how things are  
22 represented on maps.

23 Q. Okay. And can you tell us a little more  
24 about what GIS is?

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1 A. GIS in an information system that has a  
2 geographic extent to it. So things are located at  
3 someplace on our Earth, and GIS realized heavily on  
4 computer software for its applications.

5 Q. And can you give us an everyday use for  
6 GIS?

7           A. Map Quest is a GIS. Google, all those  
8 things are GIS.

9           Q. And were you employed while you were  
10 studying for the GIS certificate?

11           A. Just at the weather observations. And  
12 immediately after I got the GIS certificate, I did  
13 get employment in the GIS field.

14           Q. Okay. And where was that?

15           A. It was at the Village of Lombard in  
16 Illinois. I was an assistant to the GIS technician  
17 there, and I learned how GIS was used in the  
18 community environment.

19           Q. And what specifically were your job  
20 duties for the Village of Lombard?

21           A. Job duties were to help maintain the GIS  
22 layers of their infrastructure in the Village,  
23 sewers, to help transform existing CAD maps - you  
24 know, the old-time CAD maps - to a GIS layer and then

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1 we worked on a project to map out all the sanitary  
2 sewers within the Village.

3           Q. And how did you go about mapping out the  
4 sanitary sewers in the Village of Lombard?

5           A. We used aerial photos, and we went around  
6 to each sanitary sewer, opened them up, took down  
7 attributes of the sanitary sewer, how many inlets,  
8 what its condition was, et cetera, et cetera, and we  
9 put those into a GIS layer.

10           Q. Now you mentioned GIS layer. What is a  
11 GIS layer?

12           A. GIS layer would be like an individual map  
13 that shows one thing. So you have just the sanitary  
14 sewers plotted on it and it becomes available for  
15 your computer usage.

16           Q. And how did the Village of Lombard  
17 realize GIS?

18           A. They have a GIS layer of every one of  
19 their infrastructures. They have a storm sewer  
20 layer, they have a sanitary sewer layer. They  
21 actually have a layer that has all their trees that  
22 were planted in the Village with all of associated  
23 attributes for each tree, when it was planted, what  
24 type, when it was last pruned, et cetera, et cetera.

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1           Q. And by layer, do you mean something  
2 digital?

3           A. It's a digital layer on a computer,  
4           uh-huh.

5           Q. And do you go and click on that digital  
6           layer?

7           A. You can click on any of the features in  
8           that layer and you can bring up a table that brings  
9           up all the attributes of that layer.

10          JUDGE MORAN: And please ask her, she  
11          mentioned CAD maps, what are they?

12          BY MS. PELLEGRIN:

13          Q. And, Miss Rogers, can you explain what  
14          the CAD mapping is?

15          A. I'm not sure what the CAD word -- term  
16          means. It's an old-time engineering computer  
17          software system that they used for mapping, but  
18          things have progressed to GIS.

19          BY MS. PELLEGRIN:

20          Q. So it's an older form?

21          A. It's an older form of it. It's not as  
22          useful as a GIS.

23          Q. And have you taken any training after  
24          your job at the Village of Lombard? And where, if

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1 anywhere, did you work next?

2 A. I became employed with the Federal EPA,  
3 the U.S. EPA in Chicago.

4 Q. And how long have you worked with the  
5 EPA?

6 A. Two and a half years.

7 Q. And when did you begin?

8 A. September of '04.

9 Q. And do you have specific title?

10 A. I'm Research Associate in the GIS  
11 department.

12 Q. And what are some of your job duties as a  
13 research associate?

14 A. I was hired, myself and another  
15 gentleman, we were hired to digitally produce a  
16 watershed map for the state of Wisconsin to create  
17 and define the watershed boundaries in Wisconsin and  
18 then produce this map.

19 Q. Okay, first of all, Miss Rogers, let's  
20 talk about what a watershed is?

21 A. A watershed is an area whereby the water  
22 flows down hill into a water body or into a stream.

23 Q. And can you explain how many watersheds  
24 are there?

1           A. Oh, lots. I mean, it could be anywhere  
2 from a large size anything that flows into the  
3 Mississippi River down to a local contributory. They  
4 range in size.

5           Q. And you mentioned a watershed mapping.  
6 How much of your job duties entail watershed mapping?

7           A. 100 percent.

8           Q. And by watershed map, can you tell me how  
9 generally that's done?

10          A. I use my GIS software, and I look at a  
11 base layer, which is a topographic map. And I find  
12 the divide between where the water flows one way or  
13 the other.

14                   And I put in -- I create a line on the  
15 screen and that goes into my layer of where the  
16 watershed boundaries are.

17          Q. And you mentioned a topographic map.  
18 What is a topographic map?

19          A. A topographic map is basically a relief  
20 map. It's a map that shows elevation and many other  
21 symbols that are useful. But it's basically a relief  
22 map.

23          Q. And you mentioned you use these maps  
24 digitally?



1 A. Yes, uh-huh.

2 Q. How are those used digitally?

3 A. They're brought up on my screen, on my  
4 computer screen, and I'm able to create my layer of  
5 the watershed boundaries.

6 Q. And where do those maps come from?

7 A. The topographic maps?

8 Q. Correct.

9 A. They are produced by -- the original  
10 topographic maps were produced by the U.S. GS I  
11 believe back in the 70s.

12 Since then, the NRCS, the Natural  
13 Resource Conservation Service, has taken those  
14 individual quad maps, quadrangle maps, and they  
15 mosaic them together by county. And those  
16 topographic maps are free on the Internet form the  
17 NRCS website

18 Q. And you mentioned you use them digitally.  
19 Have you ever created a watershed boundary on paper?

20 A. Yes, sir.

21 Q. What is preferable? Digital or paper for  
22 producing a watershed map?

23 A. Digital would be more accurate because I

24 can zoom in as close as I need to be on the screen.

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1 Whereas a map, you know, you can hold it closer to  
2 your face but you can't make the contours get any  
3 wider.

4 Q. And in your work with the U.S. EPA, how  
5 many watershed maps have you created?

6 A. How many watershed boundaries or maps  
7 themselves?

8 Q. I'll verify the question. As I  
9 understand it, you're putting boundaries on a  
10 topographic map?

11 A. Correct.

12 Q. How many watershed boundaries --

13 A. A couple thousand. I have not counted,  
14 but at least 1500, possibly up to 4,000.

15 Q. And were you asked to create a watershed  
16 boundary in this case?

17 A. Yes, I was.

18 Q. And who asked you to create a watershed  
19 boundary?

20 A. Greg Carlson.

21 Q. Let me turn your attention to

22 Complainant's Exhibit 45, document Bates Number 1376.

23 JUDGE MORAN: Will you state again the pages,  
24 the Bates pages, Counsel, on Complainant's

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1 Exhibit 45?

2 MS. PELLEGRIN: Certainly. Bates Number  
3 1376.

4 JUDGE MORAN: I'm sorry, 1-3 what?

5 MS. PELLEGRIN: 1376.

6 JUDGE MORAN: Through?

7 MS. PELLEGRIN: That's it.

8 JUDGE MORAN: Okay.

9 THE WITNESS: Got it.

10 BY MS. PELLEGRIN:

11 Q. Miss Rogers, you mentioned that you  
12 created a map for this case. Do you recognize there  
13 document?

14 A. Yes, I do.

15 Q. What is that document?

16 A. This document is a map of my digitized  
17 line work representing Lake Centralia and all its  
18 intermittent streams and the area below the dam at  
19 Lake Centralia.

20 Q. And is this the original or a copy?

21 A. This is a black and white copy.

22 Q. Was your original in color?

23 A. Yes, it was.

24 Q. Is this your handwriting on this

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1 document?

2 A. No, it isn't.

3 Q. No?

4 A. It's Greg Carlson's.

5 Q. Okay.

6 MS. PELLEGRIN: For the court reporter's sake  
7 we should talk separately --

8 THE WITNESS: Okay.

9 MS. PELLEGRIN: -- (continuing) so that  
10 she --

11 THE WITNESS: All right.

12 MS. PELLEGRIN: I'll ask the question again.

13 BY MS. PELLEGRIN:

14 Q. Do you know whose handwriting this is?

15 A. Yes.

16 Q. And whose handwriting is this?

17 A. Greg Carlson.

18 MS. PELLEGRIN: Your Honor, permission to --  
19 do you know --

20 BY MS. PELLEGRIN:

21 Q. First of all, Miss Rogers, do you know if  
22 there is a large blowup exhibit that entails this  
23 document that we're looking at now?

24 A. Yes.

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1 MS. PELLEGRIN: Your Honor, permission to  
2 approach, Miss Rogers?

3 JUDGE MORAN: Yes.

4 And, Miss Pellegrin, I'm hoping this is a  
5 yes, but I see the demonstrative exhibit being set  
6 up.

7 Do you intend to make that part of the  
8 record?

9 MS. PELLEGRIN: Yes, your Honor. Absolutely.

10 BY MS. PELLEGRIN:

11 Q. And, Miss Rogers, I just put up a large  
12 blowup exhibit which is labeled Exhibit A, Lake  
13 Centralia and Intermittent Streams.

14 Do you recognize this large blowup  
15 exhibit?

16 A. Yes, I do.

17 Q. And is this the same exact -- does this  
18 look the same as the black and white smaller exhibit  
19 that's Bates Number 1376?

20 A. Yes, with some minor adjustments.

21 Q. Okay, and can you tell me what those are?

22 A. The scale bar is different. That happens  
23 when you use a different page setup on your computer.  
24 And the north arrow has just been moved down to the

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1 bottom. A different north arrow, too.

2 Q. And is there any handwriting on this  
3 large blowup --

4 A. No handwriting, and also Martin Branch,  
5 the word watershed was added after Martin Branch.

6 Q. Okay. The watershed boundaries which you  
7 stated that you created for this document, are those  
8 exactly the same as the black and white document  
9 Bates Number 1376?

10 A. Yes.

11 Q. Okay, now let's see, Miss Rogers, if you  
12 could get out of your seat --

13 MS. PELLEGRIN: Permission for the witness to

14 approach the exhibit.

15 JUDGE MORAN: Yes.

16 BY MS. PELLEGRIN:

17 Q. And you mentioned earlier the definition  
18 of a topographic map?

19 A. Uh-huh.

20 Q. Can you explain using this document what  
21 a topographic map is?

22 A. The base map behind my redline work is  
23 the topographic map. It's zoomed in and printed up  
24 here. It shows lines of constant elevation and

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1 you're able to determine the elevations at any point.

2 It has other information like roads and  
3 lakes on it, also.

4 Q. Okay. And by lines of constant  
5 elevation, are those contour lines?

6 A. They're called contour lines, yes.

7 Q. Okay. And that document has heavier  
8 contour lines and lighter contour lines.

9 Can you explain why?

10 A. The heavier contour lines are called  
11 index contours. They're usually at the fifty or the

12 hundred mark.

13 That would be this line around, going up  
14 at the top by the word thirty-three just above the  
15 word thirty-three, and over crossing Interstate  
16 Highway 57.

17 Q. And now if you look in the lower  
18 left-hand corner of the map in the area that's  
19 denoted as number five?

20 A. Uh-huh.

21 Q. There's something called Fike's(sp) Hill.  
22 Can you illustrate -- can you explain what the  
23 concentric circles that are denoted by Fike's Hill  
24 indicate?

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1 A. When you have a closed contour that you  
2 can see the whole thing on your map, that's a hill.  
3 In the darker index contour at the base of the hill  
4 is at 550 feet.

5 As you go into the center of the circle,  
6 the contours are not bolded, they're 5 foot contours.  
7 It's representing that you are going up by five feet  
8 every time you cross on of those contours up to the  
9 peak of the hill which is at 575 feet.



10 Q. And for the record, the smallest circle  
11 inside Fike's Hill, would that be the top of Fike's  
12 hill?

13 A. That's the peak, yes.

14 Q. Okay. And now what do the red lines on  
15 this document indicate?

16 A. The red lines are the boundaries between  
17 where water flows one way or the other.

18 Q. And who created those red lines?

19 A. I did.

20 Q. And can you - and maybe you want to move  
21 a little bit to the left so the Judge can see - can  
22 you explain how those red lines were created?

23 A. The red lines are created because I  
24 started the out left of a stream or something, and I

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1 try and get up hill as soon as possible.

2 I follow the contours always trying to  
3 stay at the highest elevation so I can determine  
4 where the water is flowing.

5 At the top of the map by the Number 33,  
6 you'll see that I stay inside of 560 -- and I'm not  
7 sure if they're five-foot contours. I think at some

8 point on this map they change to ten-foot contours.

9 So I stay within the top of the hill, and  
10 I try and stay above that elevation without dipping  
11 down into the valleys. As you learn to read these  
12 Topo maps, you can determine where there are valleys,  
13 these little indentations on the contour represent a  
14 valley that water is flowing away from the top of the  
15 hill.

16 Q. Okay. And, generally, why are you trying  
17 to stay on the top of the ridges when you're creating  
18 a watershed map?

19 A. Because the water flows down hill, so I  
20 want to find the representation where the divide is  
21 between water flowing from one -- into one watershed  
22 from other.

23 Q. So, is it your testimony that the -- the  
24 larger red lines surrounding the entire map, water

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1 would flow into the middle and not outside of those  
2 lines --

3 A. Correct.

4 Q. -- (continuing) is that correct?

5 A. Correct.

6 Q. Now I see there are a number of numbers,  
7 one through five, and then Martin Branch Watershed.

8 What do those denote?

9 A. The numbers one through four -- nope,  
10 sorry. The Number three is actually Lake Centralia,  
11 the watershed just of Lake Centralia.

12 The other numbered watershed and the  
13 Martin Branch watershed represent the area of the  
14 intermittent streams that flow into Lake Centralia.

15 Q. And how do those separate smaller  
16 watersheds fit within those larger watersheds?

17 A. They're nested inside. As they approach  
18 the boundaries of the whole larger polygon larger  
19 watershed, they would encompass that boundary also.

20 Q. Okay. And let's look on the map where --  
21 if you can see where Number one is on the map --

22 A. Yeah.

23 Q. -- (continuing) the area encompassing  
24 Number one?

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1 A. Yes.

2 Q. The line that divides that area in the  
3 Martin Branch Watershed, can you explain how you

4 decided to put that line -- where that particular  
5 line would go?

6 A. There's a 550-foot hill here with a  
7 couple smaller 550-foot peaks. I tried to maintain  
8 equidistant between the edges of that 550 contour,  
9 and jumped -- got up onto the 560 foot peak when I  
10 approached them and connected up to the other line  
11 that's there.

12 Q. Okay. And let's take say a drop of rain  
13 falls and hits just on the side of that redline that  
14 encompasses that Number one, where does that water  
15 go?

16 A. The water would flow into the number one  
17 intermittent stream.

18 Q. And say the hypothetical drop of water  
19 drops on the other side of the that line dividing  
20 number one and Martin Branch Watershed, where does  
21 that water go?

22 A. It would flow into the Martin Branch  
23 eventually.

24 Q. Okay. And now let me ask you, there's

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1 a -- on the -- just to the right of middle, there are

2 two heavy double lines running north-south through  
3 the --

4 A. Yes.

5 Q. What do those double lines indicate?

6 A. Interstate 57.

7 Q. And to the right of that, there's another  
8 large -- on the end of the Martin Branch Watershed,  
9 there's another line large line running north and  
10 south. What is that line?

11 A. It's highway 37.

12 Q. Okay. And when you are drawing your  
13 watershed boundaries, do you take into account  
14 interstates and highways?

15 A. No. We try and maintain natural features  
16 as best as possible. And a very swampy or flat area,  
17 the interstate may actually be the divide.

18 But in an area like this, with all this  
19 relief and elevations, I would assume it was  
20 culverted.

21 Q. Okay. And when you were drawing that  
22 map, you were assuming that it was culverted?

23 A. Yes.

24 Q. And have you confirmed your assumption

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1 since in the area called --

2 A. Yes, I have.

3 Q. And who have you confirmed and what did  
4 you confirm?

5 A. I asked Greg Carlson because I know he'd  
6 been out to the site and looked at all that. And he  
7 confirmed that there were culverts going under both  
8 of those roads.

9 Q. Okay. Looking at the legend on the lower  
10 left-hand corner of that page, what does that mean?

11 A. It indicates the different intermittent  
12 streams and Lake Centralia and the acreage of each.

13 Q. Who calculated the acreage?

14 A. I did.

15 Q. And how often do you calculate acreage  
16 when you draw a watershed map?

17 A. Every single one.

18 Q. Okay. And how do you calculate acreage?

19 A. The computer software as you create a  
20 polygon, a closed line work polygon, it calculates  
21 it. It calculates it in square miles. And then I  
22 just applied a conversion factor to get to acres.

23 Q. And can you, with your finger, sort of  
24 run through the Martin Branch Watershed and describe

1 to us how that particular watershed was created?

2 A. How I created it on the computer?

3 Q. Trace with your finger just so we --

4 A. I started at the outlet where it enters  
5 Lake Centralia. I tried to maintain the highest  
6 elevation in the 550 and higher range, trying not to  
7 cross any valleys because they flow one way or the  
8 other.

9 So I tried to maintain that the valley  
10 flows directly into the Martin Branch. And just  
11 closed my polygon.

12 Q. And you said you do these digitally. I  
13 think you may have testified about this, but do you  
14 sometimes do them on paper?

15 A. Yes.

16 Q. Okay. And, Miss Rogers, have you been  
17 asked before today to calculate the acreage on the  
18 smaller subsection of the Martin Branch Watershed?

19 A. Yes, upstream of generally this point  
20 right here (indicating).

21 Q. Okay. Have you been asked to calculate  
22 the area of the -- have you been asked to draw a  
23 watershed boundary for the area including upstream of  
24 the alleged violation site?

1 A. Yes.

2 Q. And have you done that already?

3 A. Yes.

4 Q. Okay. And could you do that on this map  
5 right now?

6 A. Sure.

7 Q. Okay. Let me give you a --

8 JUDGE MORAN: They're all up here.

9 MS. PELLEGRIN: Okay.

10 BY MS. PELLEGRIN:

11 Q. You can select a color and go ahead and  
12 do that for us.

13 A. I selected purple. And I would pretend  
14 that that's the outlet, and I would start from there,  
15 and generally draw a line that would go up and meet  
16 the watershed boundaries that exist. And then do the  
17 same thing for the southern end of it.

18 Q. And can you describe for the record what  
19 you've just done to Exhibit A?

20 A. I've drawn a line that separates out the  
21 upstream area from an area along Martin Branch that  
22 connects to the other watershed boundary.



23 Q. Okay.

24 JUDGE MORAN: And just -- if you would, in

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1 case there are other lines -- my suggestion would be  
2 - it's your call.

3 Or if there's going to be other markings,  
4 just an arrow so that -- I'll remember when I'm  
5 looking at this, but an arrow and then a designation  
6 such as one, two -- you have one and two on there,  
7 but a letter.

8 Whatever you want to use, just bearing in  
9 mind which I don't know whether this witness will be  
10 marking other things on this demonstrative exhibit.

11 MS. PELLEGRIN: I believe that's all she's  
12 going to be marking. There may be other witnesses.  
13 So I'm more than happy to have her --

14 JUDGE MORAN: Her initials.

15 MS. PELLEGRIN: I'm sorry?

16 JUDGE MORAN: Her initials on there.

17 MS. PELLEGRIN: Right.

18 JUDGE MORAN: Okay.

19 So you're going to mark -- draw an arrow  
20 from that line you just marked and indicate that --

21                   Okay, and that line you just drew which  
22                   is on the outside, that's not a continuation of the  
23                   line --

24                   THE WITNESS: No.

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1                   JUDGE MORAN: -- (continuing) with an arrow  
2                   pointing to the line that's in purple?

3                   THE WITNESS: Correct.

4                   JUDGE MORAN: Okay, thanks.

5                   BY MS. PELLEGRIN:

6                   Q. Miss Rogers, before today, have you been  
7                   asked to calculate the acreage of the smaller  
8                   subsection of the Martin Branch Watershed which  
9                   you've just recreated for us on this Exhibit A?

10                  A. Yes.

11                  Q. And how you calculated that acreage?

12                  A. Yes.

13                  Q. And what is that acreage?

14                  A. It was 446 acres.

15                  MS. PELLEGRIN: Your Honor -- Miss Rogers,  
16                  you may be seated.

17                               Your Honor, at this time I'd like to move  
18                               to admit Complainant's Exhibit -- we'll call it

19 Exhibit A for the record, which is this large blowup  
20 which Miss Rogers has just marked on.

21 JUDGE MORAN: And you're sure -- remember we  
22 had a problem with the previously named B --

23 MS. PELLEGRIN: This is the A. That's why we  
24 started on B and C.

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1 JUDGE MORAN: Okay.

2 Counsel?

3 MR. NORTHRUP: We would object just to the  
4 extent of -- can we get a little more information on  
5 the underlying Topo map? What year? Things like  
6 that.

7 JUDGE MORAN: All right. Okay, do you want  
8 to ask those -- why don't you ask those questions  
9 now, and then I'll make a ruling.

10 Go ahead.

11 VOIR DIRE

12 BY MR. NORTHRUP:

13 Q. Well, what year is the underlying Topo  
14 map?

15 A. Most of the topographic maps were created  
16 by the USGS in the 1970s. So this Topo map is just a

17 mosaic together of those original ones.

18 The NRCS mosaic ed together the original  
19 quad maps. They've never been changed, they've never  
20 been redone.

21 They mosaic ed them together and they've  
22 made a digital copy. They were scanned into the  
23 computer and they were made available free on the  
24 Internet.

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1 Q. Okay, so it's a mosaic. That's not  
2 something you did? That's something that --

3 A. No, it's something the NRCS does. The  
4 original topographic maps have a border around it,  
5 they have a lot of information in that border.

6 Those borders were stripped off so that  
7 you can actually merge together the line work.

8 But these are the original USGS  
9 topographic maps from the 1970s.

10 Q. And the green areas, again, those appear  
11 on your exhibit as they appear on these Topo maps?

12 A. Uh-huh.

13 Q. And what does the green signify?

14 A. Green usually signifies a forested area.

15 Q. Have you gone out to confirm whether any  
16 of those green areas exist?

17 A. No, I haven't.

18 Q. Have you done any sort of field work to  
19 determine whether the --

20 JUDGE MORAN: Counsel, not to interrupt you,  
21 but those questions really go toward  
22 cross-examination, not to the foundational question  
23 whether this exhibit -- you've moved into straight  
24 cross-examination.

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1 So do you have any questions that are not  
2 in that category in terms of voir dire?

3 By MR. NORTHRUP:

4 Q. Do you know how these 1970's Topo maps  
5 were originally created?

6 A. They're created through a U.S. geological  
7 survey through a -- that was their main job at the  
8 time to produce topographic maps for the United  
9 States.

10 They are the only set of topographic maps  
11 that they have produced for the United States.

12 Q. And were these done by people going out

13 and actually verifying --

14 A. Yes.

15 Q. -- (continuing) information as far as you  
16 know?

17 A. Yes, they were. They used elevation data  
18 for the elevation on there.

19 Yes, they were.

20 MR. NORTHRUP: My objection --

21 JUDGE MORAN: You objected a voir dire and so  
22 I've heard that. And there are no other objections  
23 other than -- you wanted to ask some additional  
24 questions about the basis of the map.

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1 Any other questions about that?

2 (No audible response.)

3 JUDGE MORAN: Okay.

4 Ready, Counsel?

5 MS. PELLEGRIN: Yes, your Honor.

6 JUDGE MORAN: All right, EPA's Demonstrative  
7 Exhibit A is admitted.

8 (Whereupon Complainant's

9 Demonstrative Exhibit

10 Number A was admitted

11 into the record.)

12 BY MS. PELLEGRIN:

13 Q. And, Miss Rogers, I'm kind of backing up  
14 a little bit, but what kind of training have you had  
15 on creating watershed boundaries?

16 A. The USGS National coordinators on a  
17 project called the Watershed Boundary Delineation  
18 Project came to Chicago and personally trained myself  
19 and my partner. We had a week-long, intensive  
20 training on how to determine where the watershed  
21 boundary is.

22 Q. And did you have any off-site training?

23 A. Sorry?

24 Q. Did you have any off-site training in

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1 using watershed boundaries?

2 A. We have gone and field checked some of  
3 the areas that we have done in the past.

4 Q. And your job at the EPA as an EPA  
5 Research Associate, does that entail any supervisory  
6 roles?

7 A. I currently review three other people's  
8 work, yes.

9 Q. And what positions are those other  
10 people?

11 A. They hold the same title as I do, but  
12 their watershed delineations are not as accurate as  
13 they could be sometimes.

14 Q. Okay. And I don't want to embarrass you,  
15 Miss Rogers, but I understand you have been given  
16 sort of a designation, an informal designation by the  
17 USGS.

18 Can you state for the record what that  
19 is?

20 A. National Coordinators on this project  
21 have said I'm the second best in the nation in  
22 delineating watersheds, yes.

23 Q. Okay.

24 MS. PELLEGRIN: Your Honor, I don't have any

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1 more questions for her on this map. But I don't  
2 want to -- there's a Respondent's exhibit I think  
3 that Miss Rogers could shed a little bit of light on  
4 with her experience as a weather person at O'Hare  
5 Airport.

6 So I would like for her to talk a little



7 bit about the rain data from wonder(sp) ground that  
8 Respondent has offered in a prehearing exchange  
9 attachment to Mr. --

10 JUDGE MORAN: This is all brought about  
11 because this witness will hopefully head back home,  
12 and Mr. Northrup is nodding, do you have a copy of  
13 that EPA -- as well?

14 MR. NORTHRUP: Yes.

15 JUDGE MORAN: All right, so then proceed with  
16 that.

17 MS. PELLEGRIN: And just for the record,  
18 we're not going to object to the introduction of the  
19 wonder ground data into the record.

20 It's not that we want to impeach the data  
21 in any way. We just want Miss Rogers to shed some  
22 light on some of the items.

23 JUDGE MORAN: Okay. Before you ask her that,  
24 I just ask to ask, Miss Rogers:

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1 You said you've gone out on occasion and  
2 done field checks, right?

3 THE WITNESS: Yes.

4 JUDGE MORAN: And the purpose of that field

5 check, I take it, was to see if in fact what you did  
6 back in the office was correct when you were actually  
7 outside?

8 A. Correct, to determine if water was  
9 flowing one way or the other.

10 Q. Right. But you didn't tell us what  
11 happened.

12 Did you find out whether you made  
13 mistakes or were you right on, as they say?

14 A. I would say 70 percent of the time we  
15 were right. 30 percent of the time, there may have  
16 been some altercations.

17 And 20 percent of the time there might  
18 have been some alterations that allowed the water to  
19 go a different way. And the other 10 percent we  
20 weren't conclusive even in field checking.

21 JUDGE MORAN: Okay.

22 MS. PELLEGRIN: And looking at Respondent's  
23 binder -- I don't know --

24 JUDGE MORAN: We'll go off the record while

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1 you work that out.

2 (WHEREUPON, there was then had

3 an off-the-record discussion.)

4 MS. PELLEGRIN: In an off-the-record  
5 discussion me, Miss Pellegrin, myself and  
6 Mr. Northrup have agreed to stipulate to the  
7 authenticity of the wonder ground data which is an  
8 Attachment C to Respondent's Exhibit 19 which is a  
9 February 15, 2007 report from Raps(sp) Engineering.

10 We're stipulating only to the daily  
11 precipitation data which is Attachment C and not the  
12 remainder of the document.

13 MR. NORTHRUP: That is correct.

14 JUDGE MORAN: Okay. Is that the extent of  
15 the stipulation?

16 MS. PELLEGRIN: Yes, your Honor.

17 JUDGE MORAN: Okay. And Mr. Northrup has  
18 agreed to it.

19 So does that mean you do or do not have  
20 any other questions to ask Miss Rogers about that?

21 MS. PELLEGRIN: I have no further questions  
22 for Miss Rogers.

23 JUDGE MORAN: Period.

24 MS. PELLEGRIN: Period.

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1 JUDGE MORAN: Okay.

2 Are you ready for Cross or do you need a  
3 minute, Mr. Northrup?

4 MR. SMALL: Miss Rogers, if I ask you any  
5 questions that you don't understand, just tell me so  
6 and I'll try and rephrase it for you.

7 THE WITNESS: Okay.

8 MR. SMALL: I just have a few points of  
9 clarification.

10 CROSS-EXAMINATION

11 BY MR. SMALL:

12 Q. You indicated that when you were drawing  
13 these maps where you show which direction the water  
14 flows, that you don't take into account any roadways;  
15 is that correct?

16 A. Our project is to determine naturally  
17 where water flows. Most roadways are culverted  
18 except for perhaps in very swampy or low lying areas.

19 Q. In particular referring to your exhibit  
20 in front of us here, which is a blowup of Exhibit 45?

21 JUDGE MORAN: 1376?

22 MR. SMALL: Yes, 1376 being the base  
23 document.

24 BY MR. SMALL:

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1           Q. Does that indicate that Interstate 64 and  
2 Illinois State Route 37 run through the Martin Branch  
3 watershed?

4           A. No, it does not. It shows that  
5 Interstate 57.

6           Q. I'm sorry, I misspoke.

7           A. Uh-huh. Yes, it does show that.

8           Q. Those two roads, correct?

9           A. Yes.

10          Q. And you have not personally gone out and  
11 checked the culverts on either of those roads within  
12 that watershed, have you?

13          A. No, I have not.

14          Q. Now I've got another question for you:

15                 When you drew your line on the map  
16 indicating which direction or limiting the direction  
17 of where the water would flow from a certain point on  
18 the Hesper property, what do you do when you have an  
19 area that's flat?

20                 How do you determine where those lines  
21 are to go?

22          A. Truly flat is a very difficult  
23 delineation. A lot of times we just determine not to  
24 put a line there.

1                   It's very rare to find that, and in the  
2 states I worked on I have found very few areas like  
3 that.

4                   Q. Did you personally go out and review any  
5 of your -- in the field in the area designated as  
6 Martin Branch Watershed?

7                   A. No.

8                   Q. All of this is done off 1970s maps that  
9 were later placed in quadrangle maps and then  
10 overlay; is that how you do it?

11                  A. They were originally quadrangle maps and  
12 they were later mosaic ed together. Quadrangle maps  
13 are cumbersome to work with.

14                  But you pretty much can assume that hills  
15 are not going to go anywhere, mountains aren't going  
16 to move that far. It's very stable

17                  Q. Well, let me ask you then, I think you  
18 indicated that 70 percent of the time you were  
19 accurate?

20                  A. Uh-huh.

21                  Q. And 20 percent of the time you weren't  
22 accurate?

23                  A. Uh-huh.

24 Q. And 10 percent of the time it's a toss

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1 up, I guess?

2 A. Or the time of year that we went to visit  
3 wasn't ideal.

4 Q. If in fact these underlying maps from the  
5 1970s that you used produced potential errors of up  
6 to 30 percent, how do you account for that?

7 A. The areas that we're field checking are  
8 very minor. We're talking very small streams or very  
9 small -- a lot of times we're checking for culverts.  
10 Those are very easy to see.

11 So those would be the 70 percent. The  
12 culverts or a stream that's been diverted would be  
13 something in the 20 percent range.

14 Those things -- yes, it does produce  
15 inaccuracies. But with the 1970 topographic maps  
16 being the best layer that we have, that's the best  
17 that they're expecting at this time for our project.

18 Q. So if I understand you correctly, if a  
19 culvert had been changed on either the Interstate 57  
20 or the State Route 37, since the 1970s, that could  
21 affect what your determinations would be for those

22 boundary lines?

23 A. Correct. When we do our project, we're  
24 not doing it in a vacuum either. We're working

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1 closely with state agencies such as the Department of  
2 Natural Resources and USGS people. They have  
3 intricate knowledge of many of this stuff, and they  
4 can attest to any changes that need to be included in  
5 our data. And then we would of course include it.

6 Q. Now referring again to Exhibit 45, base  
7 document 1376, this is just a calculation of where  
8 you think the water tends to flow, correct?

9 A. In my opinion, yes.

10 Q. But it doesn't take into account any  
11 velocities of water?

12 A. No.

13 Q. Or any other --

14 A. That's not the intent of my line work at  
15 all.

16 Q. So the sole purpose of this is just to  
17 see which way the water flows?

18 A. Exactly.

19 Q. Okay. And the fact that you have Martin



20 Branch at least on this exhibit - I know you  
21 indicated it wasn't potentially drawn to scale here -  
22 but it appears as if the Martin Branch Watershed is  
23 much, a much larger area.

24 The fact that it's much larger doesn't

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1 necessarily mean anything as far as the total amount  
2 of rainfall that that area would receive in  
3 relationship to the other areas shown on that map; is  
4 that correct?

5 A. No. This is drawn to scale. These maps  
6 are scaled. It is accurate that Martin Branch is the  
7 largest stream to Lake Centralia. It will receive  
8 more rainfall than any of the other ones.

9 Q. But you're making the assumption there  
10 that the rainfall would be even across the whole  
11 area; is that right?

12 A. That's true, yes.

13 Q. And so it's possible that even though  
14 it's -- let's say area Number three and I don't  
15 know which lake -- that's Lake Centralia, might  
16 actually receive more rainfall than Martin Branch  
17 which appears to be larger in size on any given day?



16 Q. Let me go back to Mr. Small asked you  
17 some questions about the inaccuracies, the 20 percent  
18 that you found when you field checked were  
19 inaccurate.

20 What was the scale of those inaccuracies?  
21 How much did that change your line work?

22 A. Very little. They were small, maybe  
23 small little intermittent streams, maybe even smaller  
24 than Martin Branch that I either couldn't determine

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1 from the topographic maps which way it flowed or --

2 And we really wouldn't go out and field  
3 check unless we heard from somebody else that they  
4 thought that something had been changed.

5 So it was basically a lack of information  
6 that my data was wrong. So with the additional data  
7 that we got by field checking, we were able to make  
8 it more accurate.

9 Q. And Mr. Small asked you a question about  
10 Highway 37, if there was a change in culvert in  
11 Highway 37.

12 If a culvert was moved or a culvert was  
13 enlarged on Highway 37, how would that affect your

14 drawing of that particular watershed boundary?

15 A. I believe the only way it would change is  
16 if it was removed.

17 Q. If the culvert was removed?

18 A. And even then the water would have to  
19 flow up 30 feet to end up in a different watershed.  
20 And it would probably flow over the road before it  
21 did that.

22 Q. Okay. So you're saying that the water  
23 level would have to rise 30 feet in an area outside  
24 of that watershed?

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1 A. Yes. Where Highway 37 crosses Martin  
2 Branch, that's below 580 feet. The boundary is at  
3 600 feet. So the water would have to flow 20 to  
4 25 feet up -- it would have to raise 20 - 25 feet up  
5 to get over that hill.

6 MS. PELLEGRIN: Your Honor, I have no further  
7 questions for Miss Rogers at this time.

8 JUDGE MORAN: Now, Miss Rogers, and I'll give  
9 you another opportunity for recross if you have any,  
10 all right?

11 You referenced to some questions posed by

12 Mr. Small, Counsel for Respondents, he made a mention  
13 - and you allowed it as well - about the age of this  
14 map.

15 And what was the year that this was  
16 created?

17 THE WITNESS: I don't believe we know the  
18 exact year that this one quadrangle map in this  
19 section. And this is actually two quadrangle maps  
20 mosaic ed together. But it was in the '70s the USGS  
21 was asked to make these.

22 JUDGE MORAN: But then if I understood your  
23 testimony correctly, you talked about how there are  
24 people that you can consult with to determine if

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1 there's more intimate data?

2 THE WITNESS: Correct.

3 JUDGE MORAN: Okay. And did you, in fact,  
4 consult about this and seek out this intimate data?

5 THE WITNESS: Yes. I asked Greg Carlson if  
6 the roads had been culverted. And that was it.

7 JUDGE MORAN: So that was the extent of the  
8 inquiry of the intimate data? You asked only if it  
9 was culverted?

10 THE WITNESS: Yes, because that would be the  
11 only thing that would affect my decision on where to  
12 put the line.

13 JUDGE MORAN: And that information then, did  
14 or did not it impact the line?

15 THE WITNESS: It did not impact the line. I  
16 assumed that the road was culverted and it was.

17 JUDGE MORAN: All right. Now, are you  
18 familiar with the property that's at issue in this  
19 legal proceeding?

20 THE WITNESS: Only just from this week.

21 JUDGE MORAN: Okay. Even though it's recent,  
22 are you able to identify on Exhibit A where that  
23 property is located?

24 THE WITNESS: I assume that it's near that

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1 line that I added to the map today because that would  
2 basically affect the outcome of the trial.

3 JUDGE MORAN: But you don't know? In other  
4 words, you drew a line, that purple line - or is it  
5 an arrow - so you don't know looking at this map  
6 right now, to your right, you don't know exactly  
7 where the property is located?

8 THE WITNESS: No, I don't.

9 JUDGE MORAN: Now a last question for you:

10 Am I correct in listening to your  
11 testimony in concluding that irrespective of that  
12 purple line the one mark that you made on this  
13 exhibit, the whole of the area that is designated the  
14 Martin Branch Watershed and it's not a circle, it's a  
15 closed loop, right?

16 THE WITNESS: A polygon, we call it.

17 JUDGE MORAN: Am I correct that any water  
18 within that Martin Branch Watershed -- again, we're  
19 including also not just where you limited it by the  
20 purple line, the whole thing.

21 Am I correct that all of the water,  
22 assuming sufficient rainfall, would end up at Lake  
23 Centralia?

24 THE WITNESS: Yes, it would end up at the one

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1 point, poor point we call it, at the one point that  
2 ends in Lake Centralia.

3 JUDGE MORAN: Poor point?

4 THE WITNESS: Poor point.

5 JUDGE MORAN: Poor point, and do you know

6 what a poor point is?

7 THE WITNESS: The poor point is at Lake  
8 Centralia.

9 JUDGE MORAN: I thought you were talking  
10 about a specific location on Lake Centralia.

11 THE WITNESS: Right at the southern end of  
12 Lake Centralia.

13 JUDGE MORAN: And this is just a curiosity,  
14 but as I'm looking at this map, I found Lake  
15 Centralia seems to be listed twice: once in light  
16 blue and once in dark blue; is that right?

17 THE WITNESS: Yes, it is. That's probably  
18 where two quadrangle maps were merged together.

19 JUDGE MORAN: But it's all still the same  
20 contiguous --

21 THE WITNESS: Yes, it is.

22 JUDGE MORAN: Map.

23 Okay, does Counsel for Respondent have  
24 any questions to ask?

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1 MR. SMALL: Just a few minor follow-up  
2 questions, your Honor.

3

RE CROSS EXAMINATION



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BY MR. SMALL:

Q. You indicated that you talked to Greg Carlson about culverts --

A. Yes.

Q. -- (continuing) where culverts were located?

A. Yes, I did.

Q. Did you specifically asked him if any culverts were changed from the 1970s to present?

A. No, I didn't really care what happened in the 1970s. I wanted to know that my watershed boundary delineations were current today, so I asked him if there were culverts present there now.

Q. But your maps are based on the 1970s?

A. My maps are based on the hills that were present in the 1970s and are still there.

Q. Now, another statement you made was:

All of the water of Martin's Branch would end up in Lake Centralia.

But as a matter of fact there are other things that could take place, right? Seepage up

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1 water?

2           A. My project does not include water that  
3 flows vertically into the ground and becomes part of  
4 the groundwater sources. This is a surface water  
5 map.

6           Q. And did you take into account evaporation  
7 of water?

8           A. No.

9           Q. Did you take into account any kind of  
10 ponding?

11          A. No. But if a pond were to overflow, it  
12 would fill in the direction that my map -- my lines  
13 would take it.

14          MR. SMALL: Nothing further, your Honor, not  
15 at this time.

16          JUDGE MORAN: Counsel for EPA?

17          MS. PELLEGRIN: No further questions, your  
18 Honor.

19          JUDGE MORAN: Okay, then I just want to make  
20 sure that everyone understanding Miss Rogers will not  
21 be available for recall. She's departing.

22                   Okay, we thank you for your testimony.

23          THE WITNESS: Thank you.

24                                   (WHEREUPON, the Witness was

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1 pick up on something, not that he would, but he may  
2 alter or modify his testimony.

3 MS. PELLEGRIN: Your Honor if I can respond?

4 JUDGE MORAN: Go ahead.

5 MS. PELLEGRIN: The way we've done it in my  
6 experience, we do it at the beginning. And then we  
7 have Respondent -- you know, have people out, our  
8 people out.

9 It's not something to do in the middle of  
10 the hearing. And I understand sequestration, expert  
11 witnesses are allowed to listen to the fact testimony  
12 in fact the examination of other witnesses so that  
13 they may use them in forming their own expert  
14 opinions.

15 JUDGE MORAN: I agree, okay. That's my  
16 ruling for now. Mr. Carlson may stay in the  
17 proceedings.

18 Okay, ready for cross-examination?

19 MR. NORTHRUP: Yes, your Honor. Thank you.  
20  
21  
22  
23  
24

1                                   WARD LENZ,  
2           having previously been duly sworn by the  
3           Administrative Law Judge, witnesseth and saith as  
4           follows:

5                                   CROSS EXAMINATION

6                                   BY MR. NORTHRUP:

7                   Q.   And I will an apologize for bouncing  
8           around a little bit, Mr. Lenz, on some of these  
9           questions.

10                   Do you know who Mr. Bill Hesper is?

11                   A.   Yes, sir.  He's the person that we  
12           received a complaint from.

13                   Q.   Do you know what his relationship is to  
14           Andy and Bobby Hesper, the family relationship?

15                   A.   I have been told, but I don't recollect.

16                   Q.   You know he's not their father, correct?

17                   A.   Yes, sir.

18                   Q.   Do you know anything about the  
19           relationship between Mr. Bill Hesper and Andy and  
20           Bobby Hesper?

21                   A.   No, sir.

22                   Q.   Have you ever talked to Mr. Bill Hesper?

23                   A. No, sir, I don't believe I have. I just  
24 received the referral.

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1                   Q. Now you indicated you worked for the  
2 Clinton County Soil Survey; is that correct?

3                   A. Yes, sir.

4                   Q. And you would go out and actually perform  
5 the surveys, correct?

6                   A. Yes, sir.

7                   Q. And how many samples would you take per  
8 acre to come up with your calculations?

9                   A. I don't know. It wasn't based on acres.  
10 It was based on landscape position.

11                  Q. If you were walking across a farm field,  
12 would you generally take a sample an acre or sample  
13 every ten acres?

14                  A. For example, I would generally map  
15 approximately -- let's say 320 acres a day. And I  
16 may take, depending on landscape positions, maybe 20  
17 to 40 samples within that period.

18                  Q. And when you performed those  
19 calculations, were those in field examinations of the  
20 soil and then you would write the results down or you

21 would have to send them out for analysis?

22 A. That was all done in the field.

23 Q. Like the analysis you did that's

24 reflected in your data forms that you did on the

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1 Heser site?

2 A. Yes, sir.

3 Q. Now, do you know how the Marion County  
4 soil survey employees conducted their survey?

5 A. Yes, sir.

6 Q. Okay, and how's that?

7 A. They did it similar to us. All of the  
8 surveys were done in the same fashion and we  
9 coordinated with other counties and we did the soil  
10 surveys.

11 Q. Did you know any of the individuals who  
12 were taking Marion County soil surveys?

13 A. Yes, sir.

14 Q. Do you know for a fact they did it the  
15 same way you did?

16 A. Yes, sir.

17 Q. And how is that?

18 A. Because we met with them. For ongoing

19 soil surveys, we commonly meet them and discuss  
20 matters with them since they were in the adjacent  
21 county.

22 Q. But you never observed them doing their  
23 work?

24 A. Yes, sir. We met them in the field, in

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1 Marion County, and I did work with them at least one  
2 time.

3 Q. One time over a how many year period?

4 A. Other a three-year period.

5 Q. You indicated that the Hesper site area  
6 had a high water table; do you remember that?

7 A. Yes, sir.

8 Q. And that was more apparent in the months  
9 November through May; is that accurate?

10 A. Yes, sir.

11 Q. Okay. Now the first time that you were  
12 at the site was in February 2000?

13 A. Yes, sir.

14 Q. Is that correct?

15 A. Yes, sir.

16 Q. So that's a period during this high water



17 table period, correct?

18 A. Yes, sir.

19 Q. When you were -- I want to reference a  
20 document here.

21 I'd like you to take a look at your field  
22 notes from your February 15th site visit, which is  
23 Bates Numberer CX 112.

24 A. Yes, sir.

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1 Q. Before I forget, you've got a little hand  
2 drawing diagram down in the bottom right-hand corner;  
3 is that correct?

4 A. Yes, sir.

5 Q. Is that a diagram that you did?

6 A. I believe so, but I'm not sure that I  
7 could explain it.

8 Q. That's my next question. What is it?  
9 What does it depict or is it just a doodle?

10 A. I'm not sure. It looks like I started  
11 doing a cross section on one part of it and it looks  
12 like I was doing something with samplings on the  
13 other, so I'm not sure.

14 Q. But looking at it as you sit here today

15 that doesn't jog your memory about what it was for or  
16 what it says about the site or anything like at that?

17 A. No, sir, I'm not sure.

18 Q. Looking at your point number one, which  
19 begins downstream end of channel, I believe your  
20 testimony was that when you took those measurements,  
21 you were standing in water; is that correct?

22 A. Yes, sir.

23 Q. Okay, how much water?

24 A. Three inches.

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1 Q. Okay. And how big of an area was that  
2 water?

3 A. That water was within in that three-foot  
4 bottom width. So it was contained within that  
5 three feet. Three inches of water was contained  
6 within three-foot width.

7 Q. Okay, so that was like three-foot square  
8 then?

9 A. No, sir. It's three-foot wide channel.  
10 We're talking lineal length of channel, three-foot  
11 wide, three inches deep, flowing in the channel.

12 Q. Okay, so when you say flowing, what do

13 you mean by that?

14 A. It means -- I'm not sure I can describe  
15 flowing, going through the channel.

16 Q. If you looked back upstream through the  
17 Hesers's channel, would you see a continuous band of  
18 water --

19 A. Yes, sir.

20 Q. -- (continuing) all the way?

21 A. Yes, sir.

22 Q. And how wide would that have been out  
23 there?

24 A. It varied with the channel configuration.

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1 So it would go from maybe a foot wide to 3-foot wide.  
2 It varies with the channel bottom, because you've got  
3 shelving going on in some places, got pools in other  
4 places. So there's a lot of variability in the flow  
5 depending on the configuration of the channel.

6 Q. Okay, now if you turn and look the other  
7 way, going downstream, could you see a continuous  
8 line of water?

9 A. Yes, sir.

10 Q. At this location Number 1, what were the

11 side slopes of the bank? Can you describe those for  
12 me, please?

13 A. The side slopes, you had some slope to  
14 them because you had a bottom width and a top width.  
15 So you had that configuration, that U or V-shaped  
16 channel configuration, like I drew of the cross  
17 section the other day.

18 So you have that V or U-shape kind of a  
19 look to it and then the sides of the banks  
20 themselves, like in those photographs, you had some  
21 vegetation, trees growing within, channel roots  
22 coming out of the bank and going down to the channel  
23 bottom.

24 You had the ordinary high water mark on

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1 the bank up to a point. You had leaf debris and  
2 things of that nature.

3 Q. What kind of vegetation do you remember  
4 seeing on the banks at this location Number one?

5 A. At location Number one the only  
6 vegetation that really sticks out in my mind is trees  
7 and tree roots. That's all I can recall.

8 Q. No grasses or anything like that?

9 A. No, sir.

10 Q. At location Number two, Number two which  
11 is also downstream from location one; is that right?

12 A. Yes, sir.

13 Q. If you looked further down downstream,  
14 could you see a continuous body of water?

15 A. From Number two?

16 Q. From number two.

17 A. Yes, sir.

18 Q. And then if you turned around and looked  
19 back upstream, was there a continuous body of water  
20 in the channel?

21 A. Yes, sir. I was looking back over point  
22 Number one at that point as well.

23 Q. How far is point two from point one?

24 A. I'm not sure, maybe 50 feet.

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1 Q. Do you recall what the weather was on  
2 that day?

3 A. No, sir, other than it was cold.

4 Q. Because this is February?

5 A. Yes, sir.

6 Q. Do you recall any precipitation on or

7 before that day?

8 A. No, sir.

9 Q. Now, let's look at point Number three,  
10 now you're back upstream of the new channel.

11 Now when you took those measurements,  
12 were you standing in water there as well?

13 A. Yes, sir.

14 Q. How big of an area was that water you  
15 were standing in at that time?

16 A. I'm not sure. I have six and a half foot  
17 bottom width here. So I would say with that kind of  
18 a bottom width, you had more shaping and more channel  
19 contouring going on.

20 I have a note here that there was seven  
21 inches of water in the middle of the channel. So it  
22 was deeper on the upstream end. But I'm not sure of  
23 the width, because of channel variability. I'm not  
24 sure.

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1 Q. How about vegetation at that location  
2 along the banks -- or the slopes, I'm sorry, the  
3 slopes I mean?

4 A. On the bank, the vegetation, I can't

5 recall specifically. I know there was an ordinary  
6 high water mark. And at some point there was the  
7 vegetation above that. Above the ordinary high water  
8 mark, I had vegetation.

9 Q. And what type of vegetation would that  
10 be?

11 A. I'm not sure. I can't recall the  
12 vegetation types. I know that there were roots and  
13 trees that actually stick out in my mind. But I  
14 don't remember the herbaceous vegetation.

15 I mean, you have it growing over the  
16 banks. I just can't recall species.

17 Q. Well, that's certainly understandable.  
18 It was seven years ago?

19 A. Yes, sir.

20 Q. Can you identify for me what the grade or  
21 percentage of slope it was? Was it straight up and  
22 down or was it a gentle slope at location  
23 Number three?

24 A. Location Number three, you're going from

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1 a six and a half foot bottom width to a 15-foot top  
2 width. So you have a -- whatever difference that is

3 on both sides. That's your steepness.

4 You're what 6 to 12 -- no, 6 to 15, so  
5 you've increased by nine feet. So four and a half  
6 feet on each side then.

7 So that would be -- to get depth -- I'm  
8 not sure. I'd have to calculate what the depth is  
9 and then that difference in slope.

10 Q. And that's a calculation we can could by  
11 just looking at these numbers?

12 A. Yes, sir.

13 Q. In your line of work, would you commonly  
14 refer to that as being steep or gentle or something  
15 in between?

16 A. For a natural channel, I would say it  
17 would be typical.

18 Q. Why don't you look at point Number four  
19 which is also upstream point, 35 feet upstream from  
20 Point three; is that correct?

21 A. Yes, sir.

22 Q. Now were you standing in water there?

23 A. Yes, sir.

24 Q. How much water?

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1           A. I'm not sure. I don't have a note on the  
2 depth.

3           Q. Do you recall though standing in some  
4 water or mud?

5           A. Yes, sir, I was in water the whole time  
6 in the channel.

7           Q. Okay. Looking at sort of the new channel  
8 notation here, did you observe water in a continuous  
9 band all the way down throughout the new channel?

10          A. Yes, sir.

11          Q. And was that water moving?

12          A. Yes, sir.

13          Q. How do you know it was moving?

14          A. I observed it moving. I could see it  
15 flowing.

16          Q. Do you have a rate of flow?

17          A. No, sir.

18          Q. Did you take any water samples when you  
19 were there on the 15th?

20          A. No, sir.

21          Q. Did you do any kind of flow measurements  
22 when you were there on the 15th?

23          A. No, sir.

24          Q. I note that on this, this page, you have

1 clearing started in Spring of '99.

2 Now prior to February of 2000, you had  
3 never been to the site, correct?

4 A. That's correct.

5 Q. So you have no personal knowledge of any  
6 clearing on the site; is that correct?

7 A. This is strictly from the information  
8 that we had gathered prior to the site visit from  
9 just our pre-site visit investigation, the Complaint  
10 referral.

11 But I had not been to the site before  
12 this points, so that's from that.

13 Q. So that's accurate? You had no personal  
14 knowledge of what the site looked like before  
15 February 15, 2000?

16 A. That's correct.

17 Q. You also at some point in your testimony  
18 referenced what may have been -- I think you called  
19 it a meandering channel that went across the Hesper  
20 property; do you remember that?

21 A. I'm sorry, I'm not sure I understand.

22 Q. I believe in your testimony you indicated  
23 that you believed there was a distinct channel that  
24 went across the Hesper property?



24 influence and flow strictly after storm events for a

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1 few hours.

2 Q. How would you determine if -- well,  
3 strike that.

4 Martin Branch is identified as an  
5 intermittent stream, correct?

6 A. Yes, sir.

7 Q. To get to that designation, do you know  
8 if anyone went out and observed to see if there was  
9 any groundwater flow that was coming into the stream?

10 A. No, sir.

11 Q. Certainly you didn't take any samples or  
12 analysis in terms of groundwater at the site,  
13 correct?

14 A. Just my soil borings.

15 Q. And those weren't actually in the  
16 channel, correct?

17 A. That's correct.

18 Q. In the definition of an intermittent  
19 stream, is that a definition in terms of flow --  
20 well, what does that definition mean in terms of  
21 flow? Constant? Sometimes?

22           A. It really didn't -- it doesn't give you a  
23 length or duration. Intermittent just means that it  
24 flows seasonally or a certain period. Certain parts

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1 of the year it flows.

2           Q. You indicated at one point in your  
3 testimony that you observed fish in the Martin  
4 Branch; do you recall that?

5           A. Yes, sir.

6           Q. Where did you make that observation?

7           A. That was the downstream end, below the  
8 project site, from the road. Where the channel goes  
9 under the road, right next to the site, on the  
10 downstream then.

11          Q. How far away is that location from where  
12 the construction work -- well, how far away is that  
13 from when the channel leaves the Heser property?

14          A. I don't know exactly. I would estimate  
15 200 feet, 300 feet.

16          Q. And was this on your first site visit,  
17 the one in February or was that later?

18          A. This was on the first site visit.

19          Q. What kind of fish was it, do you know?

20 A. I don't know, sir.

21 Q. Big fish, minnow, what can you tell me  
22 about it?

23 A. I would say they were small.

24 Q. A inch or smaller?

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1 A. Yes, we're talking --

2 Q. Minnows?

3 A. Yes.

4 Q. Now I believe you indicated you had been  
5 at the site three times in total; is that correct?

6 A. Yes, sir.

7 Q. I think we only talked about the one time  
8 during your cross-examination; is that correct?

9 A. Yes, sir.

10 Q. Did you observe any fish on either of  
11 your latter two site visits?

12 A. No, sir.

13 Q. When was the second time you went to the  
14 site?

15 A. The second time was when I accompanied  
16 Greg Carlson.

17 Q. Was anyone else there at the time?

18 A. Just myself, Katherine Kelly, and Greg  
19 Carlson.

20 Q. And when was this site visit?

21 A. I don't recall the exact date.

22 Q. Approximation?

23 A. I'm not sure. It was after my site  
24 visit. It was after the referral. It was after the

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1 referral to EPA.

2 Q. And the referral was in 2002?

3 A. 2002.

4 Q. January of 2002?

5 A. I believe so.

6 Q. What time of year was it?

7 A. I'm not sure.

8 Q. Was it cold? Was it hot? Do you  
9 remember wearing a coat?

10 A. I'm not sure.

11 Q. Did you prepare any written document of  
12 your site visit?

13 A. No, I let Greg -- I basically helped him  
14 with the sampling and pointed out where to him,  
15 here's where I took my samples. And basically let

16 him call the shots, and I was just kind of there to  
17 help out.

18 Q. Did you observe any water in the channel  
19 that the Hesers had constructed?

20 A. On my second site visit?

21 Q. On the second site visit, correct.

22 A. I don't recall, and I didn't make any  
23 notes.

24 Q. Do you recall whether there was any water

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1 in the upstream portion of Martin Branch, beyond  
2 where Hesers constructed their channel?

3 A. I don't recall anything like that.

4 Q. Did you go up there to that location?

5 A. Upstream?

6 Q. Upstream of the Hesper channel.

7 A. Yes, sir. We were both on the downstream  
8 and upstream end. We walked pretty much the entire  
9 area.

10 Q. Did you walk through the channel?

11 A. Yes, sir.

12 Q. So does that refresh your recollection  
13 whether there was any water in it?



14 A. No, sir, I'm sorry.

15 Q. How about downstream? Do you recall any  
16 water in the downstream channel?

17 A. No, sir, I do not.

18 Q. You just don't recall?

19 A. I just don't.

20 Q. Do you recall seeing any wildlife at the  
21 Hesper site during that visit?

22 A. No, sir.

23 Q. Were you particularly looking for any on  
24 that visit?

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1 A. I always have my eyes open. So if I had  
2 seen a deer, I probably would have remembered it.

3 Q. What if you saw a frog, would you make a  
4 mental note of that?

5 A. Probably not.

6 Q. On this visit, your second visit, did you  
7 take any water samples?

8 A. No, sir.

9 Q. Did you take any sludge?

10 A. No, sir.

11 Q. Now you did indicate, you or Mr. Carlson

12 took some soil borings?

13 A. Yes, sir.

14 Q. What was the purpose of taking the soil  
15 borings, if you know?

16 A. The soil borings were basically to  
17 conduct the actual wetland delineation. To be able  
18 to attach an area to the wetlands.

19 Q. And who ultimately performed the wetland  
20 delineation?

21 A. It was Mr. Carlson.

22 Q. When was the third time you were on the  
23 site?

24 A. The third time was approximately a month

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1 ago -- actually, I shouldn't say I was on the site.

2 I was adjacent to the site actually.

3 Q. Why didn't you go on to the site?

4 A. I did not have permission.

5 Q. The second time you were there, did you  
6 have permission to go on the site?

7 A. Yes, sir.

8 Q. Were the Hesers there during that site  
9 inspection?

10           A. I don't recall them being there in the  
11 beginning. They arrived later on to discuss -- or  
12 them and their attorney arrived later.

13           Q. And their attorney was not myself or  
14 Mr. Small, was it?

15           A. No, sir.

16           Q. The first time you were at the site, were  
17 the Hesers there?

18           A. Yes.

19           Q. And this February 15th. Now let me show  
20 you: This is Bobby and Andy Hesar. Were these the  
21 gentlemen that were there on your first site visit?

22           A. I only remember there were more people  
23 there when we were on the site.

24           Q. But you remember both of these gentlemen

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1           being there?

2           A. I don't remember both of them.

3           Q. Which one do you remember being there?

4           A. The gentleman in the blue.

5           Q. That's Bobby.

6           A. Okay.

7           Q. On your third visit, you indicated you

8 did not go on the Heser property on that visit; is  
9 that correct?

10 A. That's correct.

11 Q. Did you go downstream from the Heser  
12 property?

13 A. Well, I was -- I pulled the car over on  
14 the road on the downstream end, so I was at the  
15 downstream end.

16 Q. Did you observe the channel at that  
17 point?

18 A. Yes, sir.

19 Q. Was there any water in it?

20 A. There was water in the channel, yes, sir.

21 Q. At that location where you turned your  
22 car around?

23 A. Yes, sir.

24 Q. How far away is that from where the

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1 channel leaves the Heser property?

2 A. A couple hundred feet.

3 Q. How much water was there?

4 A. I don't recall. There was a pool there.

5 That's where I had originally seen fish in the

6 channel.

7 Q. Did you see fish there this time, on your  
8 third visit?

9 A. No, sir.

10 Q. Did you take any water samples?

11 A. No, sir.

12 Q. Did you do any kind of sampling at all on  
13 that visit?

14 A. No, sir.

15 Q. Who was there with you on that visit?

16 A. I was there with a group of people from  
17 EPA.

18 Q. And who was in that group?

19 A. There was Greg Carlson, Tom Martin,  
20 Chrissy, Wendy. There were a couple others, one or  
21 two other people. I don't recall names.

22 Q. How about Mr. Bill Hesel, was he there?

23 A. No, sir.

24 Q. Did you meet Bill Hesel at all on that

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1 day?

2 A. No, sir.

3 Q. Did you go upstream from the Andy and

4 Bobby Hesper channel?

5 A. I walked upstream on the -- Bill Hesper's.

6 Q. Did you have his permission?

7 A. Yes, sir.

8 Q. How about Danny Hesper, was he there?

9 A. No, sir.

10 Q. Do you know who Danny Hesper is?

11 A. No, sir.

12 Q. Was there water in upstream portion of  
13 the channel?

14 A. I don't recall seeing any water in that  
15 channel.

16 JUDGE MORAN: And, Counsel, help me out,  
17 which date are you referring to when he was going  
18 upstream to Bill Hesper's'?

19 MR. NORTHRUP: This is the third site visit.

20 JUDGE MORAN: Is that right, you were stating  
21 the third site visit?

22 MR. NORTHRUP: Yes, sir, approximately a  
23 month ago.

24 THE WITNESS: I didn't walk to the upstream

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1 end of the project though.

2 BY MR. NORTHRUP:

3 Q. I'm sorry?

4 A. I did not walk up to the upstream of the  
5 project.

6 Q. What did do you up there?

7 A. I just walked to the downstream end of  
8 the project.

9 Q. Oh, okay. When you say project, you mean  
10 the Hesper channel work?

11 A. Yes, sir.

12 Q. So you did not go east and then north up  
13 to where the Hesper channel began?

14 A. That's correct, I did not.

15 Q. From your vantage point, could you  
16 observe any water in the Hesper channel?

17 A. No, sir. We couldn't get close enough.  
18 There was only one point where we were actually close  
19 enough to see water in the channel, below the project  
20 area. We did not see water at that time.

21 Q. Now, I'm confused. Where was this one  
22 point that you were just talking about where you  
23 didn't see water?

24 A. Just below the project, the Hesper

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1 channel.

2 Q. Not in the channel, the Hesper channel?

3 A. That is correct, because I never got to  
4 an advantage point to see that.

5 Q. How far away was this point from where  
6 the Hesper channel left there?

7 A. The Hesper -- probably 15 - 25 feet.

8 Q. Now was this just a pool?

9 A. No, sir, there was no water at that  
10 point.

11 Q. The pool was down at the other end where  
12 you turned your car around?

13 A. It was downstream of the road.

14 Q. Downstream?

15 A. By the road.

16 Q. Earlier in your testimony, you referred  
17 to the Hesper as flagrant violators. Is that a term  
18 of art or is that just your characterization?

19 A. That's a term -- I only used that because  
20 that's the term that's provided in our Memorandum of  
21 Agreement with EPA on types of cases to refer.

22 They use the term repeat violator, they  
23 use the term flagrant violator. These are  
24 terminologies actually used for enforcement cases.



1 Q. And that's set out in this memorandum?

2 A. Yes, it is.

3 Q. Is that defined what a flagrant violator  
4 is?

5 A. Yes, sir.

6 Q. Can you tell me that definition is?

7 A. A flagrant violator would be somebody who  
8 we've determined has a knowledge of the permit  
9 program.

10 Q. And, again, what's your basis for the  
11 understanding that the Hesers had knowledge of the  
12 permit program?

13 A. I had sent them a letter a few years  
14 prior to this and informed them of two previous  
15 violations. This was in 1996, I believe.

16 So based upon that, that I had informed  
17 them at that time, I determined that they were repeat  
18 and flagrant violators.

19 Q. And is that your letter of December 22,  
20 1996; is that the letter you're talking about?

21 A. Yes, sir.

22 Q. I believe that was a part of Respondent's  
23 Exhibit 8?

24 A. Yes, sir.

1 Q. That would be Bates number CX 61?

2 A. Yes, sir.

3 MR. NORTHRUP: Can I approach, your Honor?

4 JUDGE MORAN: Yes.

5 BY MR. NORTHRUP:

6 Q. Now you testified earlier that this was  
7 sent certified mail, correct?

8 A. Yes, sir.

9 Q. Let me show you, and I will represent to  
10 the Court that what I'm holding in my hand is the  
11 file that was provided to me last night to take a  
12 look at, the full file that wasn't all included in  
13 Exhibit 8.

14 JUDGE MORAN: This was a file provided to you  
15 by EPA?

16 MR. NORTHRUP: Correct.

17 BY MR. NORTHRUP:

18 Q. Mr. Lenz, let me show you two green  
19 cards. Can you tell me what those are?

20 A. Yes, sir. These are the basically our  
21 certified mail receipts.

22 Q. And those are the cards that went out

23 with your letter of December 22, 1996?

24 A. Yes, sir.

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1 Q. And who are they addressed to?

2 A. One is addressed to Robert Hesper and one  
3 is addressed to Andrew Hesper.

4 Q. And is there a date when those were  
5 received?

6 A. December 27, '96.

7 Q. Okay. Who signed for those letters?

8 A. They were signed by Gene or Dean -- yeah,  
9 Gene Hesper.

10 Q. They were not signed by Robert or Andrew  
11 Hesper; is that correct?

12 A. That's correct.

13 MR. NORTHRUP: Your Honor, these are not  
14 previously marked but at this point I would like to  
15 mark them.

16 JUDGE MORAN: Yes.

17 MR. NORTHRUP: I would, if I could, mark them  
18 as Hesper Exhibit 25.

19 JUDGE MORAN: Okay.

20 MR. NORTHRUP: And would seek for their

21 admission.

22 JUDGE MORAN: Do you want to mark them 25A  
23 and B?

24 MR. NORTHRUP: Okay.

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1 (WHEREUPON, said documents were  
2 duly marked for purposes of  
3 identification as Hesper Exhibits  
4 25A and 25B, as of this date.)

5 JUDGE MORAN: Let's note for the record that  
6 Counsel for EPA has agreed that they will take care  
7 of making copies of Hesper Exhibit 25, which is  
8 stapled together, two pages of return green cards  
9 from certified mail, correct?

10 MR. NORTHRUP: Correct.

11 MS. PELLEGRIN: No objection.

12 JUDGE MORAN: Okay, so we'll pick up tomorrow  
13 morning at 9 A.M. with continuing cross-examination.

14 Okay, see you all in the morning.

15 (WHEREUPON the hearing in this  
16 matter was continued to  
17 Wednesday, March 28, 2007 at  
18 Carlyle Courthouse, Carlyle,



17 Dated at Springfield, Illinois, on this  
18 12th day of April, A.D., 2007.

19

20 Lori Bernardy  
21 Certified Shorthand Reporter

22

23

24

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