

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 5

IN THE MATTER OF:)
)
ROBERT J. HESER, ANDREW) DOCKET NO.
HESER and HESER FARMS) CWA-05-2006-0002
Respondents.)

Hearing held, pursuant to notice, on Thursday,
March 29, 2007 at the hour of 9:00 a.m. at Clinton
County Courthouse, 850 Fairfax, Carlyle, Illinois,
before THE HONORABLE WILLIAM B. MORAN, United States
Administrative Law Judge.

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By Laurel Patkes, Reporter, CSR #084-001340

A P P E A R A N C E S

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I N D E X

WITNESS	DIRECT	CROSS	REDIRECT	RE-CROSS
DANIEL HESER				
By Ms. Pellegrin	4		103/108	
By Mr. Small		51		108/112
WILLIAM HESER				
By Ms. Pellegrin	114		179	
By Mr. Small		155		
GREGORY CARLSON				
By Mr. Martin	184			

EXHIBITS

COMPLAINANT'S	MARKED	ADMITTED
8 (Bates 63 through 70)		129
11 (Bates 180 thru 181)		212
46		37
47		37
48		37

1 JUDGE MORAN: Okay. Mr. Hesper,
2 Daniel Hesper, good morning again. You're still
3 under oath. Have a seat. Be comfortable.

4 Go ahead, counsel for EPA.

5 MS. PELLEGRIN: Good morning,
6 Mr. Hesper.

7 THE WITNESS: Good morning.

8 DANIEL JOSEPH HESER
9 recalled as a witness herein, having been previously
10 sworn on his oath, was examined and testified as
11 follows:

12

13 DIRECT EXAMINATION

14 BY MS. PELLEGRIN: (Continuing)

15 Q. I believe you testified yesterday,
16 when we were looking at that video, you testified
17 about some portions of Martin Branch that we had
18 seen on that video?

19 A. Yes.

20 Q. And are you familiar with Martin
21 Branch?

22 A. Yes.

23 Q. And how are you familiar with Martin
24 Branch?

1 A. I've hunted down in that area and
2 lived in that area since what, '86, '87.

3 Q. Okay. And I think we were talking
4 about, we were describing the areas as upstream and
5 downstream of the alleged violation site.

6 You're familiar with those terms,
7 right?

8 A. Yes.

9 Q. And are you familiar with the areas
10 upstream of the site?

11 A. Yes.

12 Q. Are you familiar with the areas
13 downstream of the alleged violation site?

14 A. Yes.

15 Q. Are you familiar with what Martin
16 Branch looked like when it went through the alleged
17 violation site before the alleged violation
18 occurred?

19 A. Somewhat, yes.

20 Q. Somewhat. And can you tell me what
21 that looks like?

22 A. It had a lot of curves in the branch
23 itself. It was not a straight line by any means.

24 Q. And if you look at that blow-up on

1 Exhibit D, could you point to generally where Martin
2 Branch flowed through that site?

3 A. I believe so.

4 MS. PELLEGRIN: Your Honor,
5 permission for Mr. Hesel to approach.

6 JUDGE MORAN: Yes.

7 THE WITNESS: Would you like from
8 upstream going down?

9 MS. PELLEGRIN: Yes, right. Please
10 start from upstream going down.

11 THE WITNESS: Your Honor, can you
12 see?

13 JUDGE MORAN: When you move back like
14 that I can. That's great.

15 THE WITNESS: It followed the line
16 out approximately in that shape there. As memory
17 serves me, it followed more towards the outside of
18 what was in timber.

19 Q. BY MS. PELLEGRIN: Okay. And where
20 you're pointing for the record, if I can describe
21 it, what you're pointing to is, if my math serves
22 me, sort of the hypotenuse?

23 JUDGE MORAN: That's exactly what I
24 was thinking of.

1 Q. The hypotenuse of that L shaped
2 channel?

3 A. Yes.

4 Q. But instead of being a straight line
5 hypotenuse, your finger is drawing, describing a
6 curved line?

7 A. Yes, that's correct.

8 JUDGE MORAN: Curved or wavy.

9 THE WITNESS: Wavy line.

10 MS. PELLEGRIN: Okay. You may be
11 seated.

12 Q. And are you familiar with, if I use
13 the term the flow of Martin Branch, are you familiar
14 with that term?

15 A. Yes, I am.

16 Q. Okay. And are you familiar with the
17 flow of Martin Branch?

18 A. Yes, I am.

19 Q. And how are you familiar with the
20 flow of Martin Branch?

21 A. I go across the crossing where Martin
22 Branch crosses under Old Salem Road most every day.

23 Q. And you're in your vehicle? Is that
24 what you're talking about?

1 A. Yes.

2 Q. And can you describe, if I use the
3 term frequency of flow, just generally, can you
4 describe how often that area flows?

5 A. It flows most months out of the year.
6 Through the driest part of the summer, there is
7 usually no flow, but there is still pooling up
8 through the low areas, up through the rest of the
9 stream.

10 Q. Okay. And you say the driest parts
11 of the year. Are you familiar with what parts of
12 the year are the driest parts of the year?

13 A. Usually August and the first part of
14 September.

15 Q. Can you describe, have you had
16 occasion to view the flow of Martin Branch after a
17 rain event?

18 A. Yes, I have.

19 Q. And can you describe the flow of
20 Martin Branch after a rain event?

21 A. It doesn't take much rain to bring it
22 out of the banks.

23 Q. And have you had occasion to
24 photograph Martin Branch after a rain event?

1 A. Yes, I have.

2 Q. Okay. And have you had an occasion
3 recently to do that?

4 A. Yes, I have.

5 Q. And do you remember when that was?

6 A. It was February 24th.

7 Q. And what were the circumstances
8 surrounding that or what did you do on that day,
9 February 24th?

10 A. I went and took pictures of the
11 flooding that was occurring.

12 Q. Okay. Where did you start out when
13 you went?

14 A. I went to my mom and dad's and got a
15 camera and came back, and when I crossed Martin
16 Branch branch on Old Salem Road, I stopped and took
17 a picture there, and then went back to my house and
18 walked a quarter mile down, took pictures going
19 upstream.

20 JUDGE MORAN: Did you ask when this
21 was, what year?

22 MS. PELLEGRIN: Yes, Your Honor. I
23 believe he said February 24th, and I'm not sure if
24 he said the year.

1 THE WITNESS: No. February 24th,
2 2007.

3 JUDGE MORAN: Thank you.

4 Q. BY MS. PELLEGRIN: So approximately
5 one month ago?

6 A. Yes, approximately.

7 Q. And did you have occasion to find out
8 what the rainfall was on that day?

9 A. Yes. When I left to go to mom and
10 dad's to get the camera, I checked my rain gauge out
11 on the corner of my deck, and it had one inch rain
12 in it, and it did not rain between the time that I
13 went up there and got the camera and came back and
14 starting taking pictures.

15 Q. And after you took those pictures,
16 did you provide those to USEPA?

17 A. Yes, I did.

18 Q. Let me turn your attention to
19 Complainant's Exhibit 46 through 48.

20 JUDGE MORAN: When you ask questions
21 of Mr. Hesel, I assume you're going to tell me about
22 where on Martin Branch this was so I can orient
23 myself?

24 MS. PELLEGRIN: Yes, Your Honor.

1 Actually, I'll be having Mr. Heser approach the
2 blow-up and pinpoint approximately where, using this
3 blow-up, they were taken.

4 JUDGE MORAN: Okay. Thank you.

5 Q. BY MS. PELLEGRIN: Mr. Heser, if you
6 could look through Complainant's Exhibits 46, 47,
7 and 48 and familiarize yourself with those.

8 Now, let me just ask you to turn to
9 just Complainant's Exhibit 46.

10 Do you recognize this document?

11 A. The first picture?

12 Q. I'm sorry. Let me ask you if you
13 recognize these generally.

14 A. Yes, I do.

15 Q. Okay. And what are they generally?

16 A. They are pictures of flooding on
17 Martin Branch.

18 Q. Okay. And do you know who took these
19 pictures?

20 A. I took the pictures.

21 Q. And when did you take these pictures?

22 A. February 24, 2007.

23 Q. Okay. And looking at -- these were
24 taking via Polaroid camera, is that right?

1 A. Yes, it appears to be Polaroid.

2 Q. There appears to be numbers on the
3 bottom of these.

4 Do you know what these numbers
5 depict?

6 A. They were the numbers on the back
7 originally that was on the stamp that was on the
8 Polaroid itself.

9 Q. Okay. And did you write these
10 numbers on the front?

11 A. No, I did not.

12 Q. And do you know who wrote these
13 numbers?

14 A. Yes. Wendy wrote them on the front.

15 Q. Okay. And by Wendy, are you
16 referring to Wendy Melgin (M-e-l-g-i-n) of USEPA?

17 A. Yes.

18 Q. And turn to Complainant's Exhibit 47.
19 Do you recognize these photos?

20 A. Yes.

21 Q. And did you take these as well?

22 A. Yes, I did.

23 Q. And the same question about the
24 number on the bottom of these photos. What are

1 those?

2 A. I did not put them there.

3 Q. Okay. And are those the same on the
4 back of the photos, those numbers?

5 A. Yes.

6 Q. And they look like they go a little
7 bit out of sequence from the numbers on
8 Complainant's Exhibit 46. Do you know why?

9 A. Yes, because I had to change the film
10 in the camera.

11 Q. Okay. Turn to Complainant's
12 Exhibit 48. Do you recognize this document?

13 A. Yes, I do.

14 Q. Okay. And what is this document?

15 A. This is my description of where I
16 took these pictures at on that day so that I could
17 keep them in order of exactly where I was at.

18 Q. And there is typing on this page.
19 Did you type this?

20 A. Yes, I did. I did it on my computer.

21 Q. Okay. And did you provide this
22 document to EPA when you provided the photos?

23 A. Yes, I did.

24 Q. Okay. Let's turn back to

1 Complainant's Exhibit 46. In the top left corner of
2 this page there's a photo that I'll refer to by its
3 number, 9671.

4 A. Yes.

5 MS. PELLEGRIN: Your Honor, I would
6 like permission for Mr. Hesper to approach the map.

7 JUDGE MORAN: Yes.

8 MS. PELLEGRIN: And, Mr. Hesper, just
9 like yesterday, I'll have you write maybe -- I don't
10 know what number we're on -- maybe 5. If you could
11 draw maybe a dot where you took the picture and an
12 arrow, give yourself some room, an arrow and the
13 number 5 and your initials.

14 THE WITNESS: And the number 5?

15 MS. PELLEGRIN: Yeah. We'll start on
16 5 because I believe we ended on 4 yesterday.

17 JUDGE MORAN: Because you're going to
18 be marking, I assume you're going to be marking nine
19 different locations, is that right, one for each
20 photo?

21 MS. PELLEGRIN: There's nine photos,
22 yes, Your Honor.

23 JUDGE MORAN: So you better leave
24 room so you can put the dots and the arrows to the

1 dots and so forth.

2 MS. PELLEGRIN: Okay. So starting
3 with photo number 9671, Mr. Heser.

4 Your Honor, if we can go off the
5 record for a second.

6 JUDGE MORAN: Sure.

7 (Discussion held off the record.)

8 Q. BY MS. PELLEGRIN: Mr. Heser, if you
9 could mark on the record on Exhibit D where photo
10 number 9671 was taken and put your initials and then
11 the number 5?

12 (Whereupon the witness made the
13 requested marking.)

14 Q. And if you can describe for the
15 record what you have just marked and where that is
16 on this map, this aerial photo.

17 A. That is a view looking off of Old
18 Salem Road looking east overlooking Martin Branch
19 where it crosses underneath Old Salem Road.

20 Q. And is this area upstream or
21 downstream?

22 A. This is downstream from the alleged
23 site.

24 Q. Okay. And I don't know if you can

1 tell me as the channel turns, but can you tell me as
2 the crow flies generally how far away this is from
3 the alleged violation site?

4 A. As the crow flies?

5 Q. Or if you want, as the --

6 A. 600 feet approximately.

7 Q. Approximately. Okay.

8 And can you please describe what is
9 depicted in photo number 9671?

10 A. It's the flooding that was occurring
11 right where the culvert goes under the road.

12 Q. And so this is taken from the roadway
13 looking --

14 A. Yes. It's taken from right on top of
15 the bridge looking east.

16 Q. And in your experience -- you've seen
17 this area before I understand?

18 A. Yes.

19 Q. And in your experience, is this bank
20 full or where are the banks in this photo?

21 A. It is bank full on the south bank but
22 it is flooded to the north. The north is a little
23 lower than the south edge, yes.

24 Q. Okay. And by south, by looking at

1 the photos, that would be...

2 A. The right-hand side is the south.

3 Q. Okay. And then the left-hand side is
4 the overflowing side?

5 A. Yes.

6 Q. Okay. Now, turning your attention to
7 photo number 9672, can you please, using your
8 initials and an arrow and the number 6 denote where
9 that was taken from on Exhibit D?

10 (Whereupon the witness made the
11 requested marking.)

12 Q. And please describe for the record
13 where you've just drawn it on the aerial photo.

14 A. This is approximately 100, 150 feet
15 downstream from the alleged violation site.

16 Q. And whose property were you on when
17 taking that photo?

18 A. I was standing on my father's
19 property facing approximately due north.

20 JUDGE MORAN: And what mark did you
21 put to identify that where you put the dot?

22 THE WITNESS: DJH 6.

23 JUDGE MORAN: 6. Okay.

24 Q. BY MS. PELLEGRIN: And looking at

1 photo number 9672, Mr. Hesel, was that a different
2 time? Do you know why that's darker than the --

3 A. The camera doesn't take good in low
4 light, and that was a low light condition where I
5 was actually looking through the trees, and it had
6 clouded over some from the first picture.

7 Q. Okay. So approximately how long
8 after the first picture was taken was the second
9 picture taken?

10 A. Ten to fifteen minutes, whatever it
11 took to walk that quarter mile.

12 Q. Okay. And can you tell us what's
13 depicted in photo number 9672?

14 A. Running through approximately the
15 center of the picture, you can see Martin Branch,
16 and then you see the north bank of Martin Branch
17 above that, and on out past that is Robert and
18 Andrew's property that is flooded.

19 Q. Okay. So if I'm looking at the
20 photo, approximately the midsection on down, running
21 through the midsection on down of the photo is
22 water?

23 A. Yes.

24 Q. And then you can see at approximately

1 the line that divides the middle of the picture is
2 the bank, is that correct?

3 A. That's the north bank of Martin
4 Branch, yes.

5 Q. The north bank. Okay.

6 And then it looks like about an inch
7 or so to the left of the photo, it looks like
8 there's a lower part of the bank where there's water
9 going through, is that correct?

10 A. Yes, that is correct.

11 Q. Okay. And now looking at photo
12 number 9673, can you please write on the map with
13 your initials the number 7 where that is on the map
14 that that was taken?

15 (Whereupon the witness made the
16 requested marking.)

17 A. I have marked on the map with the
18 initials DJH 7 the location where the picture was
19 taken.

20 Q. And can you tell me what's depicted
21 on photo 9673?

22 A. This is on the downstream end of the
23 alleged violation site where Martin Branch crosses
24 the property line onto my father's property.

1 Q. Okay. And approximately how far is
2 the distance between photo number 9672 and the one
3 you've just described, 9673?

4 A. 100 to 150 feet.

5 Q. Okay. And so from photo 9672 to
6 photo 9673, you're walking upstream of the Martin
7 Branch channel, is that correct?

8 A. Yes, walking upstream.

9 Q. Towards the violation site?

10 A. Yes.

11 Q. Okay. And what's depicted in photo
12 number 9673?

13 A. It shows the flooding that was
14 occurring at that location. This was taken facing
15 northeast. That was as close as I could get to it
16 and get in to where I could take a picture of it.

17 Q. Okay. And the other one, 9672 was
18 facing north, and this one turns a little bit
19 northeast, is that correct?

20 A. Yes.

21 Q. A little bit downstream?

22 A. A little bit upstream.

23 Q. I'm sorry. A little bit upstream and
24 a little bit northeast?

1 A. Yes.

2 Q. And can you tell me, is that a
3 fingerprint smudge in the lower right-hand side?

4 A. I have no idea what that is. It has
5 a mark on it.

6 JUDGE MORAN: That wasn't there when
7 you, that wasn't part of the scenery when you were
8 there?

9 THE WITNESS: No, Your Honor, I do
10 not think it was part of the scenery. It may have
11 been a water drop. I don't know.

12 Q. BY MS. PELLEGRIN: Okay. And in the
13 bottom, I'm going to divide this in half again, it
14 looks like we can do that here too, the bottom half
15 of that photo, is that water actually in Martin
16 Branch?

17 A. Yes, the bottom half is actually in
18 Martin Branch.

19 Q. And then dividing, if we divide the
20 picture sort of in half, that darker area that runs
21 through it, is that approximately the bank of Martin
22 Branch?

23 A. There is a darker area that runs
24 through that divides the water, that is the grass

1 that's growing on the bank of Martin Branch, yes.

2 Q. Okay. And actually, now that I'm
3 looking at that photo a little closer, in the
4 background of this photo, it looks like looking in
5 the background, the water that I'm looking at, not
6 in the very far background but sort of in the mid
7 ground here, am I looking at what we described
8 yesterday as the east-west leg?

9 A. Yes, that is correct. That is the
10 east-west leg.

11 Q. And then it looks like it turns a
12 little bit, makes another corner into your father's
13 property?

14 A. Yes, it turns onto my father's
15 property.

16 Q. And then the area in the background
17 that looks like water, what is that?

18 A. That is the flooding that is on
19 Robert and Andrew's.

20 Q. Okay. And looking, if you can
21 remember the video we looked at yesterday, the
22 flooding that's occurring on Robert and Andrew's
23 property that you've depicted in this video, is that
24 the area that we looked at yesterday in the video?

1 A. Yes.

2 Q. Okay. And can you generally describe
3 what the area that we looked at yesterday in the
4 video looks like compared to how it looks here?

5 A. The area in the video is -- it runs
6 along the east-west leg. It's not looking out at
7 the exact corner where the cat was setting. It's
8 just a little bit to the, would be to the right of
9 it in the video, the upstream.

10 Q. Okay. So if we think back to that
11 backwards shaped L, that's not the area. It's right
12 inside the corner of that L, a little bit further
13 out of that corner but inside that area. If we drew
14 a triangle, it would be inside of that sort of
15 triangle, that L or triangle?

16 A. Yes.

17 Q. Okay. Now, let's turn to photo
18 number 9674. If you could approach Exhibit D and
19 point out where that is on the map.

20 (Whereupon the witness is making
21 a marking on the exhibit.)

22 A. I've marked it with a DJH 8. That
23 was taken from approximately the same location as
24 DJH 7 was taken except it was facing due north.

1 Q. Okay. What is depicted in photo
2 number 9674?

3 A. You can see a fence post
4 approximately in the midline to the left side. I
5 believe that's a fence post, and the trees that are
6 in the midline is the edge of Martin Branch on the
7 north side.

8 The water that you see to the bottom
9 is actually Martin Branch. Everything above that
10 line is the flooding out in Andrew and Roberts
11 field.

12 Q. Okay. And so in 9673, you were
13 facing a little northeast and you could get maybe a
14 little bit of a view of where part of that L-shaped
15 channel was, and in 9674, am I correct that you're
16 facing north and were not necessarily looking at
17 that L-shaped channel anymore?

18 A. That is correct.

19 Q. And what looks like the trees in the
20 far right of the photo, where are those trees?

21 A. Those are on my dad's side of the
22 property line. They're actually on the south edge
23 of Martin Branch.

24 Q. Okay. And would that be

1 approximately where the south bank of Martin Branch
2 is?

3 A. Approximately yes.

4 Q. On your father's property?

5 A. Yes.

6 Q. Was there any flooding occurring on
7 your father's property on the south bank?

8 A. Yes. It went over my boots a couple
9 times.

10 Q. So in 9674, it was overflowing its
11 banks on both the north and the south side of that
12 property?

13 A. That is correct.

14 Q. The north and the south bank.

15 And back to 9673, same question. Was
16 it overflowing its banks on either the north or
17 south side?

18 A. It was overflowing on both sides.

19 Q. Okay. And I'm sorry. We didn't talk
20 about this on 9672, but is it overflowing on both
21 sides in 9672?

22 A. Yes.

23 Q. Let's turn your attention to
24 Complainant's Exhibit 47.

1 Before I have you mark 7358, can you
2 tell me what's depicted in this very dark photo?

3 A. This is the same picture that was
4 taken looking the same direction as 9673.

5 Q. Okay. And this one is almost --

6 A. I tried to get a clearer picture.

7 MS. PELLEGRIN: Your Honor, I think
8 we're going to skip over 7358 as it is the same as
9 9673, and it's not very clear. You can't really see
10 it as well.

11 JUDGE MORAN: Okay.

12 Q. BY MS. PELLEGRIN: Okay. Mr. Heser,
13 can you please point, note on the map where picture
14 number 7359 was taken?

15 (Whereupon the witness made the
16 requested marking.)

17 A. I've marked on the map with initial
18 DJH 9 the location of that picture.

19 Q. And can you tell me what is depicted
20 in photo number 7359?

21 A. The picture is facing due north. It
22 is approximately 75 to a hundred feet upstream.

23 Q. Upstream from...

24 A. From the end or from the violation

1 site.

2 MS. PELLEGRIN: Your Honor,
3 permission to approach the blow-up?

4 JUDGE MORAN: Just let me ask this
5 here. I'm sorry. This is my not paying close
6 enough attention, but you said it's upstream. This
7 photo, are you telling me that you're above the site
8 or still below the site?

9 THE WITNESS: I am upstream from
10 the --

11 JUDGE MORAN: Take your time. Are
12 you below it or above it?

13 THE WITNESS: I'm moving upstream
14 from -- each picture is moving upstream.

15 JUDGE MORAN: Getting closer and
16 closer to --

17 THE WITNESS: To the top of the
18 violation site, to the top of the upstream.

19 MS. PELLEGRIN: To the top of the L.

20 THE WITNESS: To the top of the L.
21 I'm sorry, Your Honor.

22 JUDGE MORAN: No, please, you're
23 doing fine.

24 MS. PELLEGRIN: And that was my

1 question to you also. I think that's been answered.

2 Q. So picture number 7359, I'm sorry,
3 can you please repeat where that was taken from in
4 relation to the previous picture, how far.

5 A. Approximately 75 to a hundred feet.

6 Q. Okay. And this one is facing --

7 A. Facing north.

8 Q. Facing north again?

9 A. Yeah, just facing due north across
10 Martin Branch.

11 Q. And can you tell me what is depicted
12 in photo number 7359?

13 A. The tall weeds that run through the,
14 actually through basically the center of the picture
15 is the bank of Martin Branch, the north bank, and
16 the water above that is the flooding that's out on
17 Robert and Andrew's side.

18 Q. Looking at the bottom half of this
19 photo, is this the site of the alleged violation or
20 is this --

21 A. Yes, this is part of the alleged
22 violation.

23 Q. Okay. And so now in the bottom half
24 of photo number 7359, we're looking at part of the

1 east-west leg of the L?

2 A. Yes, this is the east-west leg.

3 Q. And the line that goes through the
4 middle is the, I'm going to call it the new north
5 bank of the east-west leg, is that correct?

6 A. That is correct.

7 Q. Now, turning your attention to photo
8 number 7360, can you please mark where that was
9 taken on the Exhibit D?

10 (Whereupon the witness made the
11 requested marking.)

12 A. I have indicated that on the map as
13 DJH 10. It is the corner of the L.

14 Q. And what direction is this facing?

15 A. This is facing due north of the
16 north-south leg.

17 Q. Okay. And what is depicted in photo
18 number 7360?

19 A. It shows the, through the middle of
20 it, you can see Martin Branch and the bank full in
21 through there.

22 Q. Okay. And on the right side of the
23 photo --

24 A. That is my dad's property line.

1 Q. And on the left side of the L,
2 north-south leg of the L?

3 A. You can see the bank of the new
4 channel.

5 Q. Okay. And can you mark, turning to
6 photo number 7361, can you mark where that was taken
7 on Exhibit D?

8 (Whereupon the witness made the
9 requested marking.)

10 A. I've indicated that on the map as DJH
11 11.

12 Q. Okay. And where was photo number
13 7361 taken?

14 A. Approximately the same as the
15 previous one, moved over a few steps. It's at the
16 corner of the L looking due west.

17 Q. Due west. Okay.
18 So if 7360 is the north-south of the
19 leg, 7361 is the east-west leg?

20 A. Yes.

21 Q. And what is depicted in photo number
22 7361?

23 A. You can see the branch running full
24 and see on the right-hand side of that the new bank,

1 and towards the upper part, you can see the flooding
2 that's on Robert and Andrew's side.

3 Q. I can see some tiny perhaps
4 structures in the background of this photo. It's
5 towards the upper left-hand side.

6 Can you tell me, and I think we may
7 have seen this in the video yesterday, what that is?

8 A. That is Mark Mercer's house.

9 Q. And so the water that is depicted in
10 sort of the upper right-hand corner toward the
11 middle that you said was water on Andrew and Bobby
12 Heser's side, is that part of what we were looking
13 at on the video yesterday?

14 A. Yes, that's part of the alleged site.

15 Q. Okay. Turning your attention to
16 Complainant's Exhibit 48.

17 JUDGE MORAN: Okay. Before he does
18 that, just let me ask one question just out of
19 curiosity.

20 Do you know, Mr. Heser, if you look
21 first at 7360 -- and this is only if you know, okay?
22 Are you looking at photo 7360?

23 THE WITNESS: Yes, Your Honor.

24 JUDGE MORAN: Maybe you did or maybe

1 you know otherwise, and if you did, you'll have to
2 explain how.

3 If you were to be standing in the
4 middle of that new channel of water that's depicted
5 at 7360, do you have any sense of how deep that is
6 for me? Do you know? Is it six inches?

7 THE WITNESS: No. It's four to five
8 feet I think.

9 JUDGE MORAN: Oh, you think so?

10 THE WITNESS: Yes.

11 JUDGE MORAN: And how do you know
12 that?

13 THE WITNESS: Just judging by the way
14 that -- I've seen it when it's dry.

15 JUDGE MORAN: And what about 7361, if
16 you were standing in the middle of that part of the
17 channel.

18 THE WITNESS: There again, Your
19 Honor, it's approximately the same depth.

20 JUDGE MORAN: Four to five feet in
21 depth?

22 THE WITNESS: Yes.

23 JUDGE MORAN: Okay. Thank you.

24 Q. BY MS. PELLEGRIN: I believe I had

1 you turn to Complainant's Exhibit 48. The photo
2 7362 on this page, can you please draw where that
3 was taken on Exhibit D?

4 (Whereupon the witness made the
5 requested marking.)

6 A. I have marked on the map with the
7 initials DJH 12 the location in that picture.

8 Q. And where was this picture taken?

9 A. Approximately 60 feet inside my dad's
10 property line, it would be east of the alleged
11 violation site looking northwest, north, northwest,
12 just indicating the flooding that was occurring on
13 my dad's side of the alleged site.

14 Q. And if I look at that tree line in
15 this photo, behind those trees or the background
16 behind those trees, would that be part of the
17 alleged violation site?

18 A. Yes, behind those trees would be the
19 alleged violation site.

20 Q. Okay. And in the foreground in front
21 of those trees on this photo, this is all your
22 dad's?

23 A. That is correct.

24 Q. Okay. And do you know what the

1 vegetation is on your dad's site on this picture?

2 A. I'm sorry. I did not hear you.

3 Q. Do you know what the vegetation is on
4 your dad's field?

5 A. Dad has that in a cover crop for a
6 filter strip.

7 Q. Okay. And now, Mr. Hesel, this
8 exhibit that I'm looking at, Complainant's
9 Exhibit 48, we talked about earlier there's typing
10 on this photo, and it appears to be describing all
11 the photos.

12 I'd like for you to take just a
13 moment to read through that and -- well, just read
14 through that just for a moment.

15 (Pause)

16 A. Yeah, that is what I wrote. The only
17 thing I would change is after reviewing where I took
18 the pictures at, picture 9359, that was not halfway
19 up the east-west leg.

20 JUDGE MORAN: I don't see a 9359,
21 Mr. Hesel.

22 THE WITNESS: Oh, 7359. I'm sorry,
23 Your Honor.

24 JUDGE MORAN: That's okay. I just

1 want to make sure the record is clear.

2 So you're talking about 7359?

3 THE WITNESS: Yes.

4 JUDGE MORAN: And you wrote -- did
5 you type what's on this?

6 THE WITNESS: Yes, I did.

7 JUDGE MORAN: And so you're making
8 one change about what you typed?

9 THE WITNESS: Yes.

10 JUDGE MORAN: And that is what?

11 THE WITNESS: That it was not halfway
12 along the east-west leg.

13 JUDGE MORAN: It was what?

14 THE WITNESS: It was approximately a
15 hundred, I think I said a hundred feet from the
16 previous picture.

17 Q. BY MS. PELLEGRIN: And besides that,
18 is everything else, I know you've added more detail
19 today, but is this a true and accurate and complete
20 description of the photos?

21 A. Yes.

22 Q. And the photos in Complainant's
23 Exhibits 46, 47, and 48, in addition to the writing
24 we just described, is this a true, accurate and

1 complete copy of the photos that you took on
2 February 24, 2007?

3 MS. PELLEGRIN: Okay. Your Honor, at
4 this time, I'd like to move to admit Complainant's
5 Exhibits 46, 47 and 48.

6 MR. SMALL: Your Honor, we would have
7 no objection to that so long as appropriate changes
8 are made to the verbiage that is talked about being
9 the location of the one picture, and also, photo
10 7358 I believe we skipped over because that was a
11 poor representation, so with that minor issue.

12 JUDGE MORAN: Yes, and, of course,
13 when you say changing it, the record already
14 reflects... You're not suggesting that what's
15 written on page Bates 1388 literally be changed, but
16 the record reflects that the witness amended orally
17 at this hearing his description for that one photo
18 that appears on the text for 1388, right?

19 MR. SMALL: That's correct, Your
20 Honor.

21 JUDGE MORAN: Okay. Thank you.

22 Then Complainant's Exhibits CX 46, 47
23 and 48 are admitted.

24

1 (Whereupon Complainant's Exhibits
2 46, 47 and 48 were admitted into
3 evidence at this time.)

4 Q. BY MS. PELLEGRIN: Mr. Hesel, you
5 mentioned I believe earlier that you were a farmer
6 for a number of years?

7 A. Yes, I was.

8 Q. And approximately how many years were
9 you a farmer?

10 A. From '85 to '94.

11 Q. And as a farmer, are you interested
12 in tracking rainfall?

13 A. I do on occasion, yes.

14 Q. And as a farmer, are you interested
15 for your livelihood on when and how much it rains
16 generally?

17 A. Yes.

18 Q. And can you tell, we talked about
19 these photos and you mentioned that it was a one
20 inch rainfall. Did you have occasion to know during
21 that period if any more rain fell?

22 A. It rained approximately three-tenths
23 of an inch before I got back to the house. That's
24 the reason there is no more photos than what you

1 have. I didn't go on upstream because I was getting
2 wet.

3 Q. Okay. And can you tell me, if you
4 know, approximately just very generally how often
5 you get that kind of a rainfall, approximately a
6 one-inch rainfall in this area?

7 A. Once a month anyway I would think.

8 Q. And, Mr. Heser, as a farmer, are you
9 familiar with the term conservation practices?

10 A. Yes, I am.

11 Q. And what does that term mean to you?

12 A. It means doing things to keep the
13 soil erosion down.

14 Q. Okay. And have you had occasion to
15 implement any conservation practices on the land
16 that you farmed?

17 A. Yes, I did, on that 180 acres when I
18 owned it.

19 Q. Okay. And what kind of conservation
20 practice have you implemented?

21 A. We did no till farming on some of the
22 ground for a period of time and then went to contour
23 strip cropping.

24 Q. And what does no till farming mean?

1 A. You plant in the previous years
2 vegetation, stubble. Like if it was corn stubble,
3 you go in and plant your beans directly and that
4 without doing any tillage to it.

5 Q. Okay. And for folks who aren't
6 familiar with farming, can you tell me what tilling
7 is?

8 A. Tillage?

9 Q. Yeah, tilling, tillage.

10 A. It's taking a disk or field
11 cultivator or, you know, any implement to disturb
12 the soil surface.

13 Q. And why is there a need to disturb
14 the soil surface? Why would that be done?

15 A. To dry out the soil. The tillage
16 would be done to dry the soil out for planting.
17 Also to take any weeds out that are there prior to
18 planting so you don't have to use any chemicals to
19 control them.

20 Q. And you mentioned contour farming?

21 A. Contour strip farming.

22 Q. And what is contour strip farming?

23 A. They lay outlines around the slope of
24 the hill to redirect the water so that when you farm

1 it, it actually catches the water and actually
2 redirects it around in a slower manner, and you have
3 what they call a border strip around this that is
4 seeded in permanent grass, and that catches the
5 sediment in the water as it comes out before it goes
6 into the natural watershed.

7 Q. And I believe you said yesterday you
8 can identify your property from an aerial photo, and
9 we have one on Exhibit D that you've been using.

10 Your Honor, permission to put another
11 aerial photo up for Mr. Hesper?

12 JUDGE MORAN: Sure.

13 Q. BY MS. PELLEGRIN: Mr. Hesper, we've
14 just put up Complainant's Exhibit C on the easel.

15 Do you recognize what this Exhibit C
16 depicts?

17 A. Yes, I do.

18 Q. Okay. And do you see any of your
19 property on Exhibit C?

20 A. Yes; the property that's down in the
21 lower right-hand corner.

22 MS. PELLEGRIN: Your Honor,
23 permission for Mr. Hesper to approach Exhibit C?

24 JUDGE MORAN: Yes.

1 Q. BY MS. PELLEGRIN: And, Mr. Heser, if
2 you could please just generally circle or put a line
3 around where you see your property on Exhibit C?

4 A. Do you want the whole property or
5 just the area of the contour stripping?

6 Q. If you can put the whole property
7 would be good.

8 (Whereupon the witness made the
9 requested marking.)

10 Q. And if you could put your initials on
11 this one. We'll start back with 1, DJH 1.

12 (Whereupon the witness made the
13 requested marking.)

14 Q. And what you've just depicted on this
15 photo, is that all your property or your father's
16 property?

17 A. It is now my father's property. It
18 was mine at the time this photo was taken.

19 Q. And how do you know it was yours at
20 the time this photo was taken?

21 A. You can see the lines of the contour
22 strip farming.

23 Q. Okay. So on the Exhibit D, you
24 outlined that property that was your father's

1 property at the time Exhibit D was taken?

2 A. Yes.

3 Q. And on Exhibit D, are you generally
4 describing that same area as your property at the
5 time this aerial photograph was taken?

6 A. Yes.

7 Q. Okay. And can you point to the areas
8 and describe where you're pointing and actually
9 maybe even make another line on this aerial photo of
10 where the contour strips you are discussing is.

11 (Whereupon the witness made the
12 requested marking.)

13 Q. And using Exhibit C, can you describe
14 again what contour strips are, and actually, is your
15 home depicted in Exhibit C?

16 A. The bottom edge of the photo was cut
17 off.

18 Q. Okay. So if you would, your home
19 would be somewhere off the photo at the bottom?

20 A. Yes, approximately right here.

21 (Whereupon the witness is making
22 a marking on the exhibit.)

23 Q. Okay. You put a DJH 2 there.

24 Describe for the record where you

1 have just drawn a box.

2 A. I have put a box off the bottom of
3 the map indicating with DJH 2 the approximate
4 location of where my house is.

5 Q. Okay. And now, I'm sorry, can you
6 please describe for the record what a contour strip
7 is using Exhibit C?

8 A. A contour strip, as I stated earlier,
9 is farming around the hill. Instead of up and down
10 the slope, you farm around it, and they are laid out
11 to redirect the water in a slower fashion.

12 As I said before, the filter area is
13 what they call border strips. You can see one of
14 them in the lower left-hand corner along the timber
15 here.

16 Q. And actually, if you can please put a
17 DJH 3 to the area that you were just describing as
18 the filter strip.

19 (Whereupon the witness made the
20 requested marking.)

21 A. I have marked that with a D, outlined
22 that and marked it with a DJH 3.

23 JUDGE MORAN: And I would just note
24 that all of these markings that this witness has put

1 on here as opposed to prior markings are done with
2 an orange marker, is that right?

3 THE WITNESS: That is correct.

4 Q. BY MS. PELLEGRIN: And I believe the
5 area that you marked as DJH I think 3 are the
6 contour lines?

7 A. That is the actual border strip along
8 the timber.

9 Q. Okay. And did we mark the contour
10 lines?

11 A. No, we have not.

12 Q.

13 Okay. Can we mark that as DJH, what
14 are we on now, 4?

15 (Whereupon the witness made the
16 requested marking.)

17 A. They're hard to see on this photo.
18 They were 90 feet wide.

19 Q. Okay. So it looks like you've just
20 marked one of the stripes, I'll characterize it for
21 the record, marked one of the stripes on the bottom
22 right-hand corner, and you've placed a DJH 4?

23 A. That is correct.

24 Q. Okay. And you're saying that the

1 area that you've marked as DJH 4 is approximately
2 90 feet wide?

3 A. The contour strips were laid out as
4 90 feet wide. That particular area there looks to
5 include two. The color differentiation is hard to
6 exactly find the exact line.

7 Q. Okay. And how is it that there is a
8 color differentiation? How does that show up on an
9 aerial photo?

10 A. It's depicted by the type of crop
11 that's growed out there. Crops give off different
12 colors when they take photos. They show up as
13 different colors.

14 Q. And do you remember what the darker
15 row crop was and lighter row crop?

16 A. At the time that that was taken, no,
17 I don't.

18 Q. Okay. You can have a seat,
19 Mr. Heser.

20 Approximately how long did you
21 contour farm this area, if you know, or let's say
22 approximately what time did you start contour
23 farming this area? And if you don't remember...

24 A. I'm thinking '89.

1 Q. Approximately?

2 A. Approximately.

3 Q. And do you know approximately when
4 you stopped contour farming this area?

5 A. It was contour farmed until my dad
6 took it over.

7 Q. And when was that?

8 A. '94. Well, 94 was the last year I
9 farmed it.

10 Q. And what is that area now, do you
11 know?

12 A. Most of all of that is in hay,
13 pasture land now.

14 Q. If I can get you to look at another
15 aerial photo.

16 Turning your attention to
17 Complainant's Exhibit 8 with Bates number 152.

18 (Pause)

19 MS. PELLEGRIN: Your Honor,
20 permission to approach?

21 JUDGE MORAN: Yes.

22 Q. BY MS. PELLEGRIN: Mr. Heser, you've
23 looked now, you've had to look at two aerial photos
24 now to identify your property. I'm looking on

1 Exhibit 8, Bates number 152.

2 Do you recognize your property on
3 this aerial photo?

4 A. Yes, I recognize the property.

5 Q. Okay. And I'm going to draw your
6 attention to what appears to be very similar to
7 although it looks like it's more extensive than the
8 contour of lines that you just depicted on Exhibit
9 C.

10 A. Yes.

11 Q. Is that an accurate characterization
12 of these contour lines?

13 A. Yes, it is.

14 Q. Okay. And is this the same -- are
15 all these contour lines depicted on 152 all on your
16 property?

17 A. Yes.

18 Q. Okay. And then Exhibit C, it looks
19 like it's I would say cut off about halfway through
20 the contour lines. It's a depiction of 152, similar
21 to 152 except that half the contour lines are cut
22 off. That half of the picture is cut off.

23 A. Yeah.

24 Q. And please take your time and bring

1 this photo to Exhibit C and...

2 A. Yeah, the right-hand portion I think
3 is cut off in that.

4 Q. Okay. Let me draw your attention to
5 the words on this page written in white. It says
6 "not to scale." Can you read that into the record?

7 A. It's 1998.

8 Q. Mr. Hesper, is that an accurate date,
9 1998, of this map, if you know?

10 A. No, that is not accurate.

11 Q. And why do you say that?

12 A. The contour lines should not be
13 there. This was taken -- this was a photo that
14 would have represented when I was farming it. This
15 was no longer farmed this way. It was farmed no
16 till up until it was put down in hay and pasture, so
17 those lines would not show up anymore.

18 Q. Okay. So when you ceased contour
19 lining, that signature of the contour lining you're
20 saying no longer shows in an aerial photo?

21 A. It no longer shows in a new aerial
22 photo.

23 JUDGE MORAN: So just to be clear in
24 my own mind, the years that this contour farming

1 occurred as depicted in 152 and also in Exhibit C,
2 what were the years that that existed, do you know?

3 THE WITNESS: Approximately '89 to
4 '94.

5 JUDGE MORAN: From '89 to '94?

6 THE WITNESS: Yes.

7 JUDGE MORAN: Okay. And is that why
8 you're saying that the 1998 date on the upper
9 right-hand portion of 152 could not be correct?

10 THE WITNESS: That is correct, Your
11 Honor.

12 JUDGE MORAN: And you're telling me
13 that in 1998, that same area where we see the
14 contour farming, how was that area farmed in 1998?

15 THE WITNESS: I believe that was
16 still being no tilled at the time.

17 JUDGE MORAN: No, but was there
18 contour farming on it?

19 THE WITNESS: No, there was no
20 contour farming on it, Your Honor.

21 JUDGE MORAN: Okay. Is there contour
22 farming on there now?

23 THE WITNESS: No. That area is now
24 in hay land, hay and pasture.

1 JUDGE MORAN: Thank you.

2 And by the way, I would just comment
3 that since this hearing is going to continue in any
4 event, I see no impediment, and I would do the same
5 things for both sides, and this is the respondents'
6 issue, but there's no impediment to the EPA during
7 the interim acquiring a certified copy from the
8 source of this photo with a certification from the
9 photo source that would indicate the date the photo
10 was taken.

11 It doesn't have to give an
12 explanation as to what that "not to scale" language
13 means, but you could introduce a certified copy as
14 the hearing continues so we don't get sort of bogged
15 down on what I consider to be a sub small dispute in
16 this evidentiary information.

17 MS. PELLEGRIN: Yes, Your Honor, we
18 will definitely endeavor to do so.

19 JUDGE MORAN: It's not to criticize
20 the testimony you're trying to do. I understand the
21 purpose of what you're trying to do. I'm just
22 adding that as a thought.

23 Okay. Go ahead.

24 MS. PELLEGRIN: Okay. I have no

1 further questions of Mr. Heser.

2 JUDGE MORAN: You're done with your
3 direct examination?

4 MS. PELLEGRIN: Yes.

5 JUDGE MORAN: Okay. Do you want to
6 pick up right now with cross or do you want a
7 five-minute break?

8 MR. MARTIN: We'll take five minutes,
9 Your Honor.

10 JUDGE MORAN: Okay.

11 (Recess taken.)

12 JUDGE MORAN: Okay. You're done with
13 the direct examination, Ms. Pellegrin?

14 MS. PELLEGRIN: Yes, Your Honor.

15 JUDGE MORAN: Mr. Small?

16 MR. SMALL: If it may please the
17 Court.

18 CROSS-EXAMINATION

19 BY MR. SMALL:

20 Q. Will you please state your name?

21 A. Daniel Joseph Heser (H-e-s-e-r).

22 Q. And, Mr. Heser, do you mind if I call
23 you Danny?

24 A. Dan.

1 Q. Dan. Okay. I'll try and do that.
2 Hopefully I won't misspeak.

3 Now, I want to go through just some
4 basics first off.

5 You are the cousin of Bobby Hesper and
6 Andy Hesper, is that correct?

7 A. That is correct.

8 Q. And your uncle and aunt are Robert
9 Hesper, Bob Hesper, and Shelby Jean Hesper?

10 A. That's correct.

11 Q. And Bob Hesper and Shelby Jean Hesper
12 are sitting out behind the counsel table here for
13 the respondents, is that correct?

14 A. That's correct.

15 Q. And for the record, your father's
16 name is Bill Hesper, right, William Hesper?

17 A. That is correct.

18 Q. And he's commonly known as Bill?

19 A. Yes.

20 Q. And is it a fair characterization
21 that over the past few years that you and your
22 father have had numerous problems with Bob Hesper,
23 Jean Hesper, Andrew Hesper, and Bobby Hesper?

24 MS. PELLEGRIN: Your Honor, I'm going

1 to object. Numerous problems is ambiguous and also
2 possibly beyond the scope.

3 I think if he's referring to a
4 specific case, that's one thing, but I'm not sure
5 where he's going with this, and I think it's going
6 to be beyond the scope.

7 JUDGE MORAN: Well, I don't know
8 about beyond the scope.

9 MS. PELLEGRIN: Beyond the scope of
10 my direct examination.

11 JUDGE MORAN: Well, cross-examination
12 isn't limited to the scope of the direct
13 examination. Another purpose of cross-examination,
14 which has nothing to do with the scope, can be to
15 demonstrate bias or prejudice on the part of the
16 witness, and I assume that that's the direction that
17 this cross-examination is taking at this point at
18 least.

19 That has nothing to do with the way
20 you confined it. That's more typically an objection
21 when if you resumed on redirect and started covering
22 material that could have been covered during the
23 direct, so I overrule your objection.

24 MS. PELLEGRIN: Okay. Your Honor, so

1 I don't keep standing up, I would like to have a
2 continuing objection to material that's beyond the
3 scope, just to reserve my objection, preserve my
4 objection, for whatever it's worth, Your Honor.

5 JUDGE MORAN: Well, that's under some
6 old pleading methods. Your objection is noted, and
7 it's been overruled for the reasons I went to some
8 length to explain why.

9 MS. PELLEGRIN: Thank you, Your
10 Honor.

11 JUDGE MORAN: Go ahead, Mr. Small.

12 MR. SMALL: Thank you, Your Honor.

13 Q. Now, back several years ago, Dan,
14 your father, Bill Hesper, and Bob Hesper had farming
15 operations together, is that correct?

16 A. That is correct.

17 Q. And then there was a split between
18 the two brothers, is that right?

19 A. That is right.

20 Q. And so each family went their own
21 direction for farming purposes, correct?

22 A. Correct.

23 Q. Now, your dad's mother was Winnie
24 Hesper, was she not?

1 A. That is correct.

2 Q. And there was a lawsuit filed by Bob
3 Heser against Bill Heser for Bill Heser taking
4 certain funds from the Winnie Heser estate, is that
5 correct?

6 A. I have no knowledge of that.

7 Q. Are you aware that there was a
8 judgment entered against Bill Heser indicating that
9 he should return funds to that estate?

10 A. No, I am not.

11 Q. Okay. Are you aware of an incident
12 in 2004 when your father, Bill Heser, was driving a
13 semi and drove by a truck, a semi truck being driven
14 by Bob Heser and tore off his mirror and kept on
15 going?

16 A. You're --

17 JUDGE MORAN: His question is are you
18 aware of that.

19 THE WITNESS: I am aware of an
20 incident, but it's not as he had stated it.

21 JUDGE MORAN: Okay. So the way to
22 handle it is you just answer the question and then
23 you can add to it or it may be when counsel for EPA
24 gets you back on redirect.

1 So you first answer the question.
2 Then you can say, but I do not agree with the way
3 you characterized the events, something like that.

4 Q. BY MR. SMALL: And, in fact,
5 referring to that incident when the mirror was torn
6 off of the vehicle, the sheriff did come out to talk
7 to your father about it, did he not?

8 A. As I recall, yes.

9 Q. Now, did you file an action against
10 Bobby Hesel in court with the state's attorney one
11 time?

12 A. No, Your Honor.

13 Q. Or did your father file an action
14 against Bobby Hesel?

15 A. Not that I have knowledge of.

16 Q. Do you recall any lawsuit that was
17 brought by a relative, yourself or your father about
18 shooting a gun over a roadway that was prosecuted by
19 a state's attorney?

20 A. As far as it being prosecuted, I do
21 not know that it was prosecuted.

22 Q. Okay. You remember it being
23 dismissed, do you not?

24 A. All I knew is they came out and

1 talked to them. I recall the incident you are
2 talking about now, yes.

3 Q. And nothing came of that case, did
4 it?

5 A. No.

6 Q. And you were the complainant?

7 A. Yes.

8 Q. Okay. So now you do remember, right?

9 A. Yeah.

10 Q. Do you remember an incident where
11 your father had placed a fence down the middle of a
12 roadway between the Bob Hesper property and your
13 father's property just recently within the last
14 year?

15 A. I know the fence you're talking
16 about, yes.

17 Q. Okay. And you realize that that's an
18 entryway onto the Bob Hesper property, correct?

19 A. That line, as far as my
20 understanding, was surveyed and had been legally
21 declared abandoned years ago.

22 Q. You understand there's a dispute
23 involved, correct?

24 A. I understand that.

1 Q. Now, yesterday we saw a videotape,
2 and I think it was marked Exhibit CX 8, and it was a
3 little over six minutes in length.

4 Do you recall seeing that tape?

5 A. Yes, I recall seeing that tape.

6 Q. And that tape was primarily depicting
7 some pictures of the, I'll call it the L that was
8 constructed from one end of the Bobby and Andy Hesper
9 property to the exit through the natural stream
10 again downstream, is that correct?

11 A. That's correct.

12 Q. Now, I just want to clarify a few
13 things about that in general because when I was
14 looking at that zooming in and out, from time to
15 time, it almost would make me dizzy. I mean, when
16 you zoomed in, it really slowed a close-up, a very
17 tight close-up, did it not?

18 A. Yes, it did.

19 Q. And when you zoomed out, it seemed
20 like whatever was being looked at in the distance
21 was a mile away, far far away?

22 JUDGE MORAN: Give him a chance to
23 say whether he agrees with your characterization or
24 not.

1 Q. Do you agree with that?

2 A. The video was deceiving of depth
3 perception, yes.

4 Q. Yes. That's what I'm getting at.

5 And there were various points in time
6 in that video when you panned one direction and then
7 maybe panned back a different direction.

8 Do you recall that?

9 A. Yes, I recall that.

10 Q. And so my first question to you is
11 this.

12 As a matter of fact, there was just
13 one pile of debris that was burning, correct?

14 A. I believe that to be correct, yes.

15 Q. Because when I looked at that tape, I
16 was lead to believe that there might be multiple
17 piles burning, but there was only one pile burning.

18 A. From what I remember of the video,
19 yes.

20 Q. And referring to that pile of debris
21 that was burning, that pile was not that tall, was
22 it? You could see over it, could you not?

23 A. It had been burning for quite some
24 time.

1 Q. My question is could you see over it?

2 A. Yes.

3 Q. And was it approximately, at most,
4 six feet in height.

5 A. That would probably be a fair
6 characterization.

7 Q. And the length of that pile, would
8 that be approximately 15 to 20 feet in length?

9 A. It would be longer than that.

10 Q. Well, what do you think it would be?

11 A. Probably 40 feet.

12 Q. Now, in that pile of burning debris,
13 I think your testimony was you saw treetops?

14 A. The remnants of the treetops.

15 Q. And you saw I guess portions, what
16 appeared to be portions of logs?

17 A. In the pile?

18 Q. Yes.

19 A. Yes.

20 Q. And you saw some tree stumps, did you
21 not?

22 A. Yes.

23 Q. Okay. Now, referring to those logs,
24 it's the same question.

1 As we were panning back and forth, I
2 was lead to believe that it looked like there was
3 multiple piles but, in fact, there was just one
4 pile, correct?

5 MS. PELLEGRIN: Your Honor, I would
6 just like to object to Mr. Small's characterization
7 of lead to believe. I just have a problem with the
8 wording as unclear.

9 MR. SMALL: I said I've been lead to
10 believe.

11 MS. PELLEGRIN: I don't want the
12 record to reflect that anyone tried to lead or tried
13 to deceive Mr. Small into believing something. I'm
14 just taking issue with his characterization of the
15 terms lead to believe, Your Honor.

16 JUDGE MORAN: Okay. That's noted,
17 and please be precise, Mr. Small, that this was your
18 interpretation and not some sort of finding of fact
19 as to that.

20 MR. SMALL: Certainly, Your Honor.

21 Q. Now, Dan, there was one pile of logs
22 out on the site, correct?

23 A. Of logs cut for logs, yes.

24 Q. And those logs were all straight,

1 were they not?

2 A. Fairly straight, yes.

3 Q. And is the reason why -- I mean, to
4 the best of your knowledge, is the reason why they
5 were straight is that if somebody was going to log
6 any area that they would cut out the portions of
7 those logs that were crooked because those portions
8 would be unusable for board footage?

9 A. Yes. They take the straight part of
10 the tree.

11 Q. And so some of those portions, those
12 crooked portions of those logs were part of the
13 debris that were being burned, is that correct?

14 A. There possibly was some of the
15 treetops left from the logging, yes.

16 Q. Okay. Now, do you know where those
17 logs came from personally?

18 A. Personally, no. They were laying in
19 the site.

20 Q. And do you know whether or not those
21 logs came from I'm going to say an area much farther
22 north than to the L but still located on the Bobby
23 and Andy Hesper property?

24 A. I cannot say for certainty.

1 Q. I think you testified three times
2 yesterday and I think your answer was that all of
3 the logging or a substantial amount of the logging
4 took place prior to the Hesers obtaining title to
5 the property.

6 A. That's correct.

7 Q. And so the total amount of logs that
8 you saw when you took that video or when your
9 brother took that video was approximately seven logs
10 total?

11 A. That was what was laying there at the
12 time the video was taken, yes.

13 I would just like to add, we don't
14 know that there wasn't any taken out prior to the
15 video being taken.

16 JUDGE MORAN: Okay. But even though
17 I said you could do that generally, we'll let
18 your --

19 THE WITNESS: Sorry, Your Honor.

20 JUDGE MORAN: No, don't worry, but if
21 your counsel feels that's important, they'll usually
22 pick up on that.

23 Q. BY MR. SMALL: Did you see any logs
24 being taken off?

1 A. Not that I recall.

2 Q. And you live within a quarter of a
3 mile of the location, is that correct?

4 A. That is correct.

5 Q. Do you know if the Hesers received
6 any money for these logs?

7 A. No, I do not.

8 Q. Now, when you were taking this video,
9 when your brother was taking the video, I understand
10 you were standing next to him, is that right?

11 A. Yes.

12 Q. And you were on Bobby and Andy
13 Hesper's property at the time you were taking that
14 video, is that correct?

15 A. No, sir.

16 Q. Okay. Tell me where you were.

17 A. We were on my dad's side of the
18 property line.

19 Q. Okay. So you're further away but
20 you're zooming in and out, is that right?

21 A. The property runs right along the
22 alleged site. It borders right to it. Everything
23 was cleared back as far as it could to the property
24 line.

1 Q. Now, do you recall seeing when you
2 watched that video certain trees that were on both
3 sides of the fence row that ran on the north-south
4 leg of that L?

5 A. The trees that were left to my
6 knowledge were all on my father's side of the
7 property line.

8 Q. But you're not certain of that?

9 A. By where all the fence posts, the old
10 fence posts and the markers are down through there,
11 if they are on the line, you cannot legally touch
12 them if they're splitting the line.

13 Q. There were certain trees that were
14 part of that fence row?

15 A. I'm not understanding you.

16 Q. Were there certain trees on the
17 north-south leg of the L that were a part of the
18 fence row.

19 As I understand it, there was barbed
20 wire and fence post, correct?

21 A. Yes, barbed wire and fence post,
22 correct.

23 Q. And occasionally, that barbed wire
24 would go into a tree, is that correct?

1 A. That's correct.

2 Q. And that would be a boundary line
3 tree as you would put it?

4 A. Yes.

5 Q. Okay. And so that's owned by both
6 brothers?

7 A. Correct.

8 Q. Did you notice when you were taking
9 that video with your brother that there were certain
10 portions of that fence that had been taken down and
11 certain posts that had been removed?

12 A. No, I did not.

13 Q. You didn't notice that?

14 A. No.

15 Q. Did you notice three separate
16 occasions where there had been Vs cut into the
17 ground from Bill Hesper's property into the channel?

18 JUDGE MORAN: When there had been
19 what cut into the ground?

20 MR. SMALL: Vs or ditches cut from
21 the Bill Hesper property to drain into the L.

22 A. Those were natural areas that had
23 been there for years.

24 Q. Oh, so they do exist?

1 A. There is natural areas where the
2 water comes to and goes across onto the other
3 property, yes.

4 Q. And you would clean those out from
5 time to time?

6 A. When I owned it, I did at one time to
7 take the buildup along the edge of the fence row
8 back away from the fence row so that it would follow
9 the natural watershed.

10 Q. And so these Vs, I'm going to call
11 them Vs, ditches --

12 A. Ditches.

13 Q. -- that are cut from the Bill Hesper
14 property were cut by either you or Bill Hesper or
15 somebody, his agent, and it drains into the L, is
16 that correct?

17 A. They were not put there -- those were
18 natural ones that were there. They were just kept
19 cleaned out.

20 Q. Okay. And there's at least three of
21 those, correct?

22 A. To my knowledge, I know of two
23 locations on the north-south L, one on the upstream
24 end and one approximately to the middle.

1 Q. And are they approximately -- let's
2 start with the one on the north. Is it
3 approximately a hundred feet south of the north part
4 of the L?

5 A. Yeah. That's a natural washout
6 that's been there.

7 Q. And the second drainageway from Bill
8 Heser's properties into the L would be about a
9 hundred feet north of where the L intersects?

10 A. Approximately.

11 Q. Okay. And you recall another ditch
12 that was cut from the Bill Heser property on the
13 east-west leg of the L?

14 A. No.

15 Q. Now, just some general observations
16 if you can.

17 When you looked at that video, you
18 saw numerous shade that was falling upon the
19 L-shaped configuration from trees?

20 A. Yes.

21 Q. And there was no water in that
22 L-shaped configuration?

23 A. There was at the very upper end of
24 it.

1 Q. But the rest of it was dry, correct?

2 A. Correct.

3 Q. And I think you've indicated in your
4 testimony today that it had been dug down four or
5 five feet?

6 A. To my best recollection of what it
7 looks like, yes.

8 Q. So even at four or five feet, it was
9 still dry. Is that your testimony?

10 A. Yes.

11 Q. Okay. And that L was sloped on both
12 sides, is that correct?

13 A. That's correct.

14 Q. And it was gently sloped? Would you
15 call it gently sloped?

16 A. That's marginal on gently sloped.

17 Q. There were no sharp embankments were
18 there?

19 A. No sharp embankments, no.

20 Q. And the property had been seeded, is
21 that correct?

22 A. That's correct.

23 Q. And were you able to ascertain what
24 sort of seed had been planted there?

1 A. No.

2 Q. And the slope banks were also
3 strawed, is that correct?

4 A. If I remember what the video showed,
5 the upper portions of it were strawed, yes.

6 Q. And why would that be strawed, if you
7 know?

8 A. It's sometimes the normal practice to
9 do that to help keep the soil that's there from
10 getting washed away before the grass gets
11 established and to hold moisture.

12 Q. And to hold moisture so that the
13 grass could come up?

14 A. Yes.

15 Q. And that would prevent erosion?

16 A. The grass would when it was
17 established, yes.

18 Q. Now, referring to the L and where it
19 intersects from the north-south leg and the
20 east-west leg, would you characterize that as a
21 gently sweeping turn?

22 JUDGE MORAN: As what, sir?

23 Q. Gently sweeping turn.

24 A. Yeah, I would say so.

1 Q. Okay. And I think your testimony has
2 been that you or your father owned land upstream
3 from the L and downstream from the L, is that
4 correct?

5 A. That is correct.

6 Q. And in particular, you're very
7 comfortable with the upstream property, are you not?

8 A. I know the upstream part of it, yeah.

9 Q. You owned it.

10 A. Yeah.

11 Q. And you're familiar with that
12 upstream channel?

13 A. Yes.

14 Q. And are you aware in 1997 that there
15 was certain straightening of that stream on the Bill
16 Heser property?

17 A. Yes, I am.

18 Q. And to the best of your knowledge,
19 were there certain monies paid to Mark Ayet
20 Excavating in order to straighten that stream, to
21 perform certain stream stripping upstream from the
22 Bobby and Andy Heser property?

23 A. Yes.

24 Q. And as a matter of fact, there were

1 certain brush and trees that were pushed out at that
2 time?

3 A. That is correct.

4 Q. And the stream itself was dug out at
5 that time, correct?

6 A. That is correct.

7 Q. And whatever meanders were there,
8 they were taken out at that time?

9 A. That is correct.

10 Q. And there were numerous dirt piles at
11 that time as a result of that stream straightening,
12 right?

13 A. I don't recall. I think there was,
14 but I'm not positive.

15 Q. And was that dirt eventually pushed
16 and spread out around your property at that time?

17 A. I think it was distributed out along
18 the edges of the new channel that was formed up
19 there, yes.

20 Q. And the brush and the trees that had
21 been pushed down, those were pushed down to an area
22 of woods, was it not?

23 A. Yes.

24 Q. Now, I'd like you to refer to Exhibit

1 CX 182.

2 MS. PELLEGRIN: You mean Bates number
3 182?

4 MR. SMALL: Yeah, Bates number 182.

5 JUDGE MORAN: It does say CX though,
6 CX and then some zeros we're omitted and then
7 182-1997.

8 The exhibit, if counsel for
9 respondent would confirm this, it's CX 000182-1997.

10 Are you there on that one?

11 THE WITNESS: No, Your Honor.

12 JUDGE MORAN: Okay. Sure. We'll
13 help you do that.

14 Counsel, will you come up?

15 We'll go off the record.

16 (Discussion held off the record.)

17 JUDGE MORAN: We're back on the
18 record.

19 Go ahead.

20 MR. SMALL: Thank you, Your Honor.

21 Q. Referring to exhibit, well, I'm going
22 to refer to it as Exhibit CX 182, do you have that
23 in front of you now, Dan?

24 A. Yes, I do.

1 Q. And looking at that, do you see an
2 orange colored circle on that exhibit?

3 A. Yes, I do.

4 Q. And is that roughly the area that is
5 presently owned by Andy and Bobby Hesel?

6 A. That is a portion of it.

7 Q. And that is the area in which we're
8 talking about where the L was constructed?

9 A. That is correct.

10 Q. Okay. Now, going directly to the
11 right of that circle, are you going upstream?

12 A. Yes.

13 Q. And do you see a white area, like a
14 white strip area?

15 A. Yes, I do.

16 Q. Okay. And is that where the stream
17 straightening project that we've been talking about
18 was conducted by Bill Hesel?

19 A. Yes, it is.

20 Q. Would you put a green box around that
21 area for us, please?

22 JUDGE MORAN: Let's go off the
23 record.

24 (Discussion held off the record.)

1 JUDGE MORAN: Mr. Small, do you want
2 to have him on the record confirm what he has just
3 done, right?

4 MR. SMALL: Yes, Your Honor.

5 First off, Your Honor, could we have
6 the complainant's counsel review all these documents
7 and make certain that they're all the same or
8 substantially the same?

9 JUDGE MORAN: Yes, including mine.

10 (Whereupon Ms. Pellegrin
11 confirmed that all the documents
12 were the same.)

13 Q. BY MR. SMALL: Now, Mr. Heser, you
14 have put a green box around the area that was part
15 of the stream straightening that was done in August
16 1977, is that correct?

17 A. That's not correct.

18 Q. What would the date be?

19 A. I don't know, but it was after I had
20 the property.

21 Q. If I told you that you had paid a
22 bill that indicated that the work had been done on
23 August 1, 1977, would that seem --

24 A. That would be when my father had it,

1 yes.

2 Q. Okay. And that would be
3 approximately the correct date, right?

4 A. Approximately.

5 Q. Now, looking at that Exhibit 1997 and
6 specifically to the area that you put the green box
7 around, it appears to be whitish in color, is that
8 correct?

9 A. That's correct.

10 Q. And is that because there's no
11 vegetation in that area?

12 A. That would be a possibility I
13 suppose. Either that or it's just a lighter
14 vegetation than the surrounding areas.

15 JUDGE MORAN: Right, so if you don't
16 know, you should -- you don't have to give a yes or
17 no. You can say I don't know or, as you did, you
18 could speculate another reason.

19 Go ahead.

20 Q. BY MR. SMALL: Okay. Now, Mr. Hesel,
21 I'd like you to refer to Exhibit No. 27. All right.
22 I'm going to refer you first off to Exhibit CX 427.

23 JUDGE MORAN: Let me make this
24 understood by me, Mr. Small. You're talking about

1 Complainant's Exhibit 27, right?

2 MR. SMALL: That is correct, Your
3 Honor.

4 JUDGE MORAN: But Complainant's
5 Exhibit 27 is not part of the record yet, is that
6 correct?

7 MR. SMALL: That is correct.

8 MS. PELLEGRIN: Can you tell me what
9 Bates number? I missed that part.

10 MR. SMALL: 427, and it's Exhibit 27.

11 JUDGE MORAN: Does EPA still intend
12 at some point to admit this as an exhibit because if
13 not, then the respondent would have to identify it
14 as its own exhibit. Exhibit No. 27, of course, is a
15 lot of pages.

16 MS. PELLEGRIN: I'm sorry. Bates
17 number what?

18 MR. MARTIN: Yes, Your Honor, we
19 intend to introduce this.

20 MR. SMALL: And actually, I'm going
21 to talk about 427, 449, and 450.

22 MS. PELLEGRIN: Your Honor, we are
23 going to have this admitted. I'm not sure where
24 they're going with this, but I might have an

1 objection if they're going to ask Mr. Heser about
2 this. He didn't take these photos; Mr. Carlson did.

3 JUDGE MORAN: You're giving me a
4 warning of an objection which may come?

5 MS. PELLEGRIN: I guess so, yes.

6 JUDGE MORAN: Just make the objection
7 when you have one, okay?

8 MS. PELLEGRIN: Sure.

9 MR. SMALL: Thank you, Your Honor.

10 JUDGE MORAN: Okay. And just for
11 clarification, what Mr. Small is doing is referring
12 to the Bates number which appears with all of these
13 EPA exhibit numbers except for the demonstrative
14 exhibits.

15 MR. SMALL: That's correct, Your
16 Honor. It falls under tab 27, Exhibit 27, but the
17 first picture that I want to talk about is page
18 number 427.

19 Q. Now, Dan, are you at that page now?

20 A. Yes, I am.

21 Q. Is that part of the stream
22 straightening project that was done that we just
23 talked about?

24 A. I don't know. I cannot tell by the

1 photos.

2 MS. PELLEGRIN: Your Honor, I'm just
3 going to object to the foundation. He hasn't even
4 asked Mr. Heser if he even recognizes this photo,
5 but I think Mr. Heser has answered the question, so
6 I'll withdraw the objection.

7 JUDGE MORAN: Okay. All right.
8 Thank you.

9 Go ahead, Mr. Small.

10 So your answer was that you don't
11 know if that's part of the stream straightening
12 project that was alluded to?

13 THE WITNESS: No, I do not, Your
14 Honor.

15 JUDGE MORAN: Okay.

16 Q. BY MR. SMALL: Okay. I want you to
17 refer to page, we're in the same exhibit,
18 Exhibit 27, Page 449.

19 You're there?

20 A. I am there.

21 Q. And you've had a chance to look at
22 that picture, have you not?

23 A. Yes.

24 Q. After looking at that picture, do you

1 know if that's a part of the stream straightening
2 project of Bill Hesper?

3 A. No, I do not.

4 Q. You don't know whether it is or not?

5 A. I do not know whether it is or not.

6 Q. You don't see any water in that
7 picture, do you?

8 A. There's a pool towards the top of it,
9 yes.

10 Q. Oh, there's just a little area of
11 water, is that correct?

12 A. Yes.

13 Q. The rest is dry?

14 A. Yes.

15 MS. PELLEGRIN: Your Honor, I'm going
16 to again object. Mr. Hesper hasn't said he
17 recognized this photo. For him to be talking about
18 the contents of this photo I think is improper in
19 light of --

20 JUDGE MORAN: I don't have to have
21 seen this photo. If someone asked me, and I've
22 never been here, although I might before this
23 proceeding is over, if someone says to me, do you
24 see the color green, I can say yes. So I overrule

1 your objection. He can respond to that question.

2 Q. BY MR. SMALL: And I want you to
3 refer to the same exhibit, Exhibit 27, on Page 450.

4 A. I'm there.

5 Q. And have you looked at that
6 photograph?

7 A. I see the photograph you're talking
8 about, yes.

9 Q. Okay. Do you know if that's part of
10 the stream straightening project of your father's?

11 A. I do not.

12 Q. You don't know?

13 A. No.

14 Q. And again, in that picture, do you
15 see any water in the channel?

16 A. There does not appear to be any.

17 Q. Now, Mr. Hesel I think in your
18 testimony today you indicated that, I think your
19 words were that you were somewhat familiar with
20 Martin Branch.

21 A. That is correct.

22 Q. Now, I'm going to refer to Exhibit
23 No. 46 first. That's Complainant's Exhibit No. 46.
24 If you could find that.

1 JUDGE MORAN: No. 46, unless counsel
2 disagrees with me, these would be the photographs
3 that you testified about earlier. I'm looking at
4 your notebook. 46 I think, counsel, is that right?

5 MR. SMALL: That's correct, Your
6 Honor.

7 JUDGE MORAN: He's not on the right
8 page. Look at the tab first, and the tab should say
9 Complainant's Exhibit 46.

10 Are you in the right volume?

11 THE WITNESS: No.

12 JUDGE MORAN: Just take your time,
13 relax. We're not going to rush here. 46 is near
14 the very back.

15 THE WITNESS: Yes. Okay. I have the
16 page.

17 MR. SMALL: Okay. Thank you, Dan.

18 Q. And referring to picture No. 9671,
19 would you look at that first?

20 A. Yes.

21 Q. Now, your testimony was I believe
22 that you took these pictures, these still
23 photographs, on February 24, '07, is that correct?

24 A. That is correct.

1 Q. And that day, you had indicated you
2 had checked your rain gauge and there was an inch of
3 rain?

4 A. That's correct.

5 Q. And after you got back, there was
6 another three-tenths of an inch of rain, right?

7 A. After the pictures were taken, yes.

8 Q. Okay. So there was an inch and a
9 third that day?

10 A. That day.

11 Q. Okay. Now, I hope you can remember
12 this, but wasn't that a week when it was just a, the
13 week before that day, wasn't it just every day it
14 rained and rained? It rained off and on. It was
15 very unsettling weather that whole week, was it not?

16 A. That I do not recall.

17 Q. You can't recall?

18 A. No, not for certainty, no.

19 Q. Okay. Were your boots getting stuck
20 in the mud that day?

21 A. No. I had more trouble with water
22 going over them.

23 Q. Let's refer to photograph 9671.
24 You've indicated that that was a photograph that was

1 taken at the crossing of the Old Salem Road?

2 A. That is correct.

3 Q. And is that the road you're talking
4 about? You say, you know, I see Martin Branch every
5 day. I drive it. That's where I see Martin Branch.
6 Is that the portion you're talking about?

7 A. I see that portion most every day,
8 yes.

9 Q. Was that what you were referring to
10 when you say I see Martin Branch? Is that the area
11 that you more probably than not would see?

12 A. That I would see every day, yes.

13 Q. And is that the basis for your
14 statement earlier that that's where you would view
15 Martin Branch on almost a daily basis?

16 A. That's where I would view it on a
17 daily basis, yes.

18 Q. Okay. Now, is there a culvert there
19 at that roadway?

20 A. Yes, there is.

21 Q. And that culvert directs the water,
22 does it not?

23 A. It takes the water under the road.

24 Q. Yeah. And it points in a certain

1 direction, right?

2 A. Yes.

3 Q. And in this case, you're at least
4 600 feet away from the nearest point of the Hesper
5 property, correct?

6 A. I would say that's probably a close
7 approximation, yes.

8 Q. Now, you farmed this -- strike that.
9 Mr. Hesper, you know, this whole case
10 revolves around this construction of an L.

11 Have you ever seen anything
12 downstream of the L ever flood before the L was
13 placed there?

14 A. I've seen the whole thing flood at
15 times.

16 Q. So it's really dependent upon the
17 amount of rain or snowfall or precipitation of some
18 sort that comes down, correct?

19 A. Correct.

20 Q. And in this particular photograph,
21 we're in the natural stream bank, is that correct?

22 A. That's correct.

23 Q. And it's flooding there, isn't it?

24 A. That's correct.

1 Q. Okay. Now, I want you to refer to
2 photograph 9672.

3 Have you had a chance to look at
4 that?

5 A. Yes.

6 Q. And again, this is downstream from
7 the Hesper L, is that correct?

8 A. That's correct.

9 Q. And so again, this is the natural
10 stream condition, correct?

11 A. Yes.

12 Q. And it's flooded there, isn't it?

13 A. Yes.

14 Q. Okay. I'm going to refer you to
15 photograph 9673.

16 A. Okay.

17 Q. And I think your testimony was that
18 was taken from, this is again downstream where
19 you're taking the photograph from?

20 A. Correct.

21 Q. Let's say the bottom half of that
22 photograph is actually water that is downstream from
23 any channel that's been constructed by the Hesper,
24 correct?

1 A. Yes.

2 Q. And then just slightly above that,
3 there is a darkened area and then what appears to be
4 a little water and then another darkened area. Is
5 that the Hesper channel?

6 A. That is still part of the old
7 channel.

8 Q. Oh, okay. So we've still got more
9 flooding there?

10 A. The new channel is going up the right
11 side of the picture along the tree line.

12 Q. Okay. So I want to be clear here.
13 In the middle of that picture, there
14 appears to be some brush or trees or something, and
15 then there appears to be a little bit of water right
16 above it and then another strip of what appears to
17 be ground or brush or something.

18 A. Would you please point that out, what
19 you're looking at in this picture for me? I'm not
20 understanding what you're --

21 JUDGE MORAN: If you're not sure, you
22 need to ask for that clarification.

23 MR. SMALL: May I approach?

24 JUDGE MORAN: Yes.

1 MR. SMALL: Mr. Hesel, I apologize.
2 I'm not getting my question out clear enough for
3 you.

4 What I'm pointing to is this area
5 right here.

6 THE WITNESS: This crossing here or
7 this --

8 MR. SMALL: No. I'm talking about
9 right here. What is that? And I'm talking about
10 what appears to be water between two land masses.

11 A. That is the new channel. That's the
12 east-west leg.

13 Q. And that is part of the Hesel L,
14 correct?

15 A. That is correct.

16 Q. And it's containing water in that L,
17 correct?

18 A. There is water contained in it.
19 There is also water off to the side of it.

20 Q. And there is a small amount of water
21 a little further up in that picture, is that
22 correct?

23 A. That is correct.

24 Q. All right. Now, I want to refer to

1 photograph 9674.

2 A. Yes.

3 Q. I think you indicated that is
4 approximately the exact same location as 9673, is
5 that right?

6 A. That is correct.

7 Q. So roughly the bottom third of that
8 whole photograph would represent water that is
9 downstream from the Hesper L?

10 A. That is correct.

11 Q. Okay. Now I'm going to refer to
12 Complainant's Exhibit No. 47.

13 JUDGE MORAN: That's your next tab.

14 THE WITNESS: Okay.

15 Q. BY MR. SMALL: I'm going to refer you
16 to photograph 7359.

17 A. Yes.

18 Q. Now, your testimony there was on the
19 east-west leg of the L that you are approximately 75
20 to a hundred feet from where that L exits into the
21 natural downstream?

22 A. That is correct.

23 Q. All right. And does the bottom half
24 of that photograph depict the water that is

1 contained in the Hesper L?

2 A. Yes.

3 Q. Okay. And so it is keeping that
4 water in the L to the extent that it can, correct?

5 A. Correct.

6 Q. I'm going to refer you to the next
7 picture, 7360.

8 A. Yes.

9 Q. And I believe your testimony was that
10 that's the north-south leg of the L looking north?

11 A. That is correct.

12 Q. And in that picture, it shows, does
13 it not, that the water is being contained in that L?

14 A. Yeah, that's what the photo shows.

15 Q. And it's kind of faint, but when you
16 look at that photograph and you're looking at the
17 right hand side of that photograph to the right of
18 the water, the channel, you see some land between
19 there and the trees?

20 A. Yes.

21 Q. So as a matter of fact, it's
22 contained within the L, is it not?

23 A. It appears to be by the photo, yes.

24 Q. Okay. Now, photograph 7361, if you'd

1 look at that.

2 A. Yes.

3 Q. I think your testimony was that that
4 was the east-west leg of the L?

5 A. That is correct.

6 Q. And again, that photograph, does that
7 appear that the majority of the water is contained
8 within the L area?

9 A. That's what the photo depicts, yes.

10 Q. Now, when you look at 7361 and you
11 see some additional water up about two-thirds of the
12 way up that photograph, do you know how deep that
13 water was?

14 A. No, I do not.

15 Q. You didn't go on the property for
16 that?

17 A. I had no need to know how deep it
18 was.

19 Q. I'm going to next refer to
20 Complainant's Exhibit No. 48, and there's a
21 photograph there, 7362.

22 A. Yes.

23 Q. Okay. Now, 7362, does that depict
24 actually a picture of the Bill Hesser property?

1 A. Yes. That's what I stated.

2 Q. And that's property to the north and
3 to the east of the top of the L, correct?

4 A. The backwards L is off the corner of
5 the L.

6 MR. SMALL: Your Honor, if I could
7 approach.

8 JUDGE MORAN: Yes.

9 MR. SMALL: And have the witness go
10 to Exhibit C so he could point this out.

11 JUDGE MORAN: Yes, and refresh my
12 recollection, counsel, or Mr. Hesper can do it.
13 Didn't you mark where 7362 is on Exhibit C or was
14 that on a different exhibit?

15 THE WITNESS: It was on Exhibit D I
16 think.

17 JUDGE MORAN: On Exhibit D. Okay.
18 Thanks.

19 Go ahead, Mr. Small.

20 Q. BY MR. SMALL: Now, Dan, if you
21 would... First off, point out to me where the L is
22 located.

23 A. The L runs (witness indicating on the
24 photograph).

1 Q. Okay. And so when we were looking at
2 this last photograph, could you point that out?

3 A. It was right here, east side of the
4 north-south leg.

5 Q. I want to make certain that you're
6 looking at the right one.

7 A. Yes.

8 Q. Okay. So you're indicating --

9 JUDGE MORAN: Hold on. Don't you
10 need to mark it so I can later on understand where
11 this is?

12 MR. SMALL: Would you mark with this
13 blue pen where photograph 7362 was taken?

14 JUDGE MORAN: And let the record
15 reflect that Mr. Daniel Hesper is marking this on
16 Complainant's Exhibit C, demonstrative Exhibit C.

17 MR. SMALL: And if you would put
18 7362.

19 (Whereupon the witness made the
20 requested marking.)

21 JUDGE MORAN: And then, Mr. Hesper,
22 also, just per your prior practice, would you put
23 your initials as you did with the others?

24 MR. SMALL: He did.

1 THE WITNESS: I did, Your Honor.

2 JUDGE MORAN: Thank you.

3 MR. SMALL: Your Honor, I'd like the
4 record to reflect that Mr. Hesper has placed his
5 initials and the number 7362 on the Bill Hesper
6 property which is located approximately where the L
7 meets.

8 MS. PELLEGRIN: Your Honor, a point
9 of clarification just so the record is clear.
10 Exhibit C is actually, Mr. Hesper outlined he
11 actually owned the property at the time Exhibit C
12 was taken. I don't think it's a different area, but
13 just so that it's clear, he's saying, Mr. Small is
14 saying Bill Hesper's property...

15 JUDGE MORAN: Counsel, you'll deal
16 with that on redirect.

17 Q. BY MR. SMALL: Now, I think you
18 indicated that that picture, 7362, was 60 feet
19 inside of your father's property, Bill Hesper, is
20 that correct?

21 A. Approximately 60 feet, yeah.

22 Q. All right. Now, looking at that
23 photograph, does it appear that there are certain
24 channels that are being cut through that property by

1 water?

2 JUDGE MORAN: Which photograph?

3 MR. SMALL: I'm sorry if I didn't
4 reference it, Judge.

5 Q. Looking to Exhibit 7362 again.

6 A. Yes.

7 Q. Now, looking to where the water is
8 located, it appears that the water is basically
9 diffused over a lot of areas but does it appear that
10 there are some channels of water there on that
11 property?

12 A. No.

13 Q. Do you see continuous areas of water
14 on that picture?

15 A. Yes.

16 Q. I guess you're disputing the
17 terminology, but it's continuous bands of water?

18 A. Yes, continuous bands of water.

19 Q. Okay. And it's pretty well all over
20 that picture, is it not?

21 A. Yes.

22 Q. Okay. And this is the filter strip,
23 is it not?

24 A. That is correct.

1 Q. That abuts up against the Andy and
2 Bobby Hesper property?

3 A. That is correct.

4 Q. And that is also the area where the
5 three Vs were cut to drain into the Hesper L, is that
6 correct?

7 A. There was two natural drains into it,
8 yes.

9 Q. So your answer is yes as to two?

10 A. As to two.

11 Q. Okay. Now, Mr. Hesper, your testimony
12 yesterday indicated that you or your father at some
13 point in time owned 180 acres of land that adjoined
14 the Bobby and Andy Hesper property, is that correct?

15 A. That's correct.

16 Q. Does Exhibit C show 180 acres?

17 A. No. Part of it's cut off.

18 Q. Okay. And the portion that's cut off
19 contains the area where the stream was straightened
20 upstream by your father, is that correct?

21 A. That's correct.

22 Q. As a matter of fact, you own 200
23 acres, don't you, in that location?

24 A. Dad has another 20 that was not part

1 of this 180, yes.

2 Q. And that's contiguous to it?

3 A. Yes.

4 Q. Okay. So really, we're talking about
5 200 acres that you have next to this property,
6 correct?

7 A. That my dad has now, yes.

8 Q. And then you have property
9 downstream, correct, downstream from the L?

10 A. Yes.

11 JUDGE MORAN: Do you mean separate
12 from the 200 acres?

13 MR. SMALL: Separate from the 200
14 acres.

15 A. It's all joined as one tract.

16 Q. So it ravel's around it?

17 A. Yes.

18 JUDGE MORAN: For a total of 200
19 acres?

20 THE WITNESS: Yes.

21 JUDGE MORAN: Thank you.

22 Q. BY MR. SMALL: Now, let's get a
23 little bit into these conservation practices.

24 The fact that as a farmer you would

1 use no till methods doesn't mean that it's not going
2 to flood there, does it?

3 A. No.

4 Q. And the fact that you contour farm
5 doesn't mean that it's going to stop any kind of
6 flooding either, is it?

7 A. No. It's supposed to help reduce.

8 Q. And I'm going to go back again to
9 Exhibit 182, excuse me, Bates number 182 that we
10 talked about before that you put the green box on.

11 A. Yes. Complainant's number?

12 Q. It's Exhibit 12, page 182.

13 A. Okay.

14 Q. Now, does that photograph show any
15 contour farming by either you or your father of any
16 of that 200 acres that surrounds the Bobby and Andy
17 Hesel property?

18 A. No, it does not.

19 Q. Okay. And that's exactly what you
20 said. You said you don't do that anymore, correct?

21 A. That's correct.

22 Q. So what is shown on Exhibit C where
23 you just marked where it shows those contour strips,
24 that's no longer there, correct?

1 A. Correct.

2 Q. Now, in the past, on that 200 acres
3 that surrounds the Heser property, and specifically
4 I'm going to talk just about the property that's
5 upstream from the Andy and Bobby Heser property.

6 A. Yes.

7 Q. Isn't it a fact that you've hired
8 Mark Ayet to perform certain excavation work to
9 clear certain trees and timber and fence rows?

10 A. I had a couple fence rows removed,
11 yes.

12 JUDGE MORAN: Counsel, just define a
13 fence row, please, ask him to define a fence row.

14 Q. BY MR. SMALL: Yeah. Could you
15 define a fence row for us, Mr. Heser?

16 A. A fence row is usually trees that
17 divide property or where an old fence was at one
18 time that the trees grewed up in.

19 JUDGE MORAN: Okay. Thank you.

20 Q. And sometimes that would be between
21 fields, and they could be your own fields, right?

22 A. Correct.

23 Q. And you've had that done before,
24 right?

1 A. Yes, I did.

2 Q. You didn't apply for any permits for
3 that, did you, when you did that kind of excavation
4 work?

5 A. No.

6 Q. Now, your last one was in 1994, is
7 that right?

8 A. That's correct.

9 Q. Have you been on Bobby and Andy
10 Heser's property in the L ever since they owned the
11 property?

12 A. No, I have not.

13 Q. Going back to the question of these
14 debris piles that we were talking about in the video
15 that you saw yesterday.

16 A. Yes.

17 Q. And I think today you said, well,
18 they weren't that tall, you could see over them, and
19 then you had estimated that -- I asked you if they
20 were 20 feet in length, and you said, no, you
21 thought they were 40.

22 Did you measure those piles?

23 A. No.

24 Q. That's just a guess?

1 A. Yes.

2 Q. Now, going back to this contour
3 farming again, the fact that you have 90-foot strips
4 doesn't mean that you're using different crops in
5 each strip, does it?

6 A. That was what it was to be, 90 foot
7 of either row crops and then they prefer that you
8 have a close grown crop with wheat or clover or
9 pasture or anything like that in alternating strips
10 so that one was not tilled at the same time the
11 other strip was below it.

12 Q. Would you use a different seed of the
13 same crop in those strips?

14 A. Of the same crop, no. You could go
15 like soybeans and then you'd have either wheat or
16 clover and then corn.

17 Q. Is it possible some of the good
18 effect of that would be pollination of the crops, if
19 you know?

20 A. I don't know.

21 MS. PELLEGRIN: I'm going to ask for
22 a break.

23 JUDGE MORAN: Sure.

24 MR. SMALL: I've got one more

1 question.

2 JUDGE MORAN: And then we're going to
3 take a ten-minute break, and we'll try and finish
4 up, whenever that occurs, before we go to lunch.
5 We'll finish up with this witness if we can today, I
6 mean before we go to lunch.

7 MR. SMALL: Mr. Hesel, one last
8 question.

9 Q. How wide were those debris piles that
10 were being burned?

11 JUDGE MORAN: If you know.

12 A. I don't know for certain.

13 Q. Could you make an estimate? Were
14 they ten feet wide?

15 A. I couldn't estimate. It's been long
16 enough, I could not estimate.

17 Q. You just can't remember? It's been
18 too many years ago?

19 A. It has been a long time.

20 MR. SMALL: Okay. Thank you, Your
21 Honor.

22 JUDGE MORAN: Okay. Now we're going
23 to take a ten-minute break, and we'll resume with
24 redirect.

1 (Recess taken.)

2 JUDGE MORAN: We're back on the
3 record.

4 REDIRECT EXAMINATION

5 BY MS. PELLEGRIN:

6 Q. Good morning, Mr. Heser.

7 Now, Mr. Small when he was
8 cross-examining you, I think he mentioned that he, I
9 forget his exact wording, but let me just ask you
10 this.

11 When you were taking or when you and
12 your brother were taking the video together, the
13 depth perception issues, how it looked to us
14 watching it far, near, the depth perception issues
15 that I think you testified about, Mr. Heser, did you
16 have any intent to deceive anyone by the camera
17 angles or the panning in and out or zooming in and
18 out?

19 A. No.

20 Q. I think you also testified that the
21 pile had been, the pile which I'll refer to as the
22 debris pile burning on the alleged violation site,
23 you had mentioned it had been burning for quite some
24 time.

1 How do you know that it had been
2 burning for quite some time?

3 A. As much as it was burnt down.

4 MR. SMALL: I'm sorry. I didn't hear
5 that.

6 THE WITNESS: I said as much as it
7 was burnt down.

8 Q. BY MS. PELLEGRIN: Could you see,
9 from your home, could you see the burning or smoking
10 pile?

11 A. Yes, I could.

12 Q. Mr. Small also asked you a number of
13 questions about what he described as Vs cut, and I
14 think you made the record clear but I want to make
15 sure.

16 Your testimony is not that anything
17 was cut but that it was natural drainage, is that
18 correct?

19 A. That is correct.

20 Q. Okay. And can you, if you can,
21 describe the dimensions and width of the natural
22 drainage?

23 A. As they are now?

24 Q. As they are now.

1 A. The one that I know of for sure
2 that's still there is a couple feet wide.

3 Q. Okay. And if you can, can you
4 describe the depth of those natural channels or
5 natural drainages when it's dry?

6 A. Foot, foot and a half.

7 Q. Okay. Let's turn your attention to
8 Complainant's Exhibit 47.

9 JUDGE MORAN: And, of course, this
10 would be the photos that you took, right?

11 THE WITNESS: I got it this time,
12 Your Honor.

13 Q. BY MS. PELLEGRIN: Let's see, I'm
14 looking at No. 7359.

15 Are you there?

16 A. 7359, yes.

17 Q. Photo number 7359 on Bates number
18 1387.

19 I believe Mr. Small asked you a
20 question, and he described the bottom half of this
21 photo.

22 In the middle of the photo, there
23 appears to be the bank you described, and he said
24 the bottom half of the photo, and I think you'll

1 agree with him, that that was part of the new L
2 channel?

3 A. That is correct.

4 Q. And I think Mr. Small asked you, I
5 think his words were something like it's keeping the
6 water in to the extent that it can?

7 A. I believe that was his words, yes.

8 Q. And the water behind that bank, the
9 water that's behind that bank, would you agree that
10 that water is also, to use Mr. Small's terms, that
11 it's letting water out to the extent that it can't
12 hold it?

13 A. Yes.

14 Q. Okay. And I think Mr. Small asked
15 you a question about whether contour farming would
16 stop flooding, and I believe, although I couldn't
17 quite hear your response, I believe you said --
18 well, let me just ask you.

19 What is the purpose of contour
20 farming in your mind?

21 A. It's to control erosion.

22 Q. Okay. And why would you want to
23 control erosion?

24 A. To save the topsoil.

1 MS. PELLEGRIN: Your Honor, I have
2 nothing further.

3 JUDGE MORAN: Okay. Before I allow
4 any recross, let me just ask you, when you talked
5 about this burning pile, and again, I don't know
6 that it's particularly important but since questions
7 were asked several times about it, did you just
8 respond to EPA's counsel, Ms. Pellegrin, stating
9 that you could see the pile burning from your house?

10 THE WITNESS: Yes.

11 JUDGE MORAN: Okay. And do you have
12 any recollection as to, first, tell me whether you
13 have any recollection, okay, as to the number of
14 hours or days that you observed the burning piles.

15 Do you have any recollection of that?

16 THE WITNESS: No, I do not, Your
17 Honor.

18 JUDGE MORAN: Okay. So since you
19 don't have that, it could have been that you only
20 observed it during part of one day or some other
21 period of time. You don't know.

22 THE WITNESS: Not for certainty, Your
23 Honor.

24 JUDGE MORAN: Okay. That's all I had

1 to ask.

2 Recross?

3 MR. SMALL: Just one question, Your
4 Honor.

5 RECROSS-EXAMINATION

6 BY MR. SMALL:

7 Q. Again, referring to Exhibit 47, Bates
8 number 7359, I just want to clarify this. When you
9 say it's letting water out of the channel to the
10 extent it can, do you know that the water is going
11 out or do you know that the water is coming into the
12 channel?

13 JUDGE MORAN: Do you know?

14 A. No, I do not.

15 MR. SMALL: That's it.

16 JUDGE MORAN: Okay. Anything on
17 redirect?

18 MS. PELLEGRIN: Yes.

19 REDIRECT EXAMINATION

20 BY MS. PELLEGRIN:

21 Q. Mr. Heser, Mr. Small asked you a
22 question about the property, an alleged
23 straightening of a channel on your father's property
24 I believe.

1 A. Yes.

2 MR. SMALL: It's not within the
3 scope. I mean, we're not narrowing the issues,
4 Judge.

5 JUDGE MORAN: He's right. This is
6 sort of like an afterthought.

7 MS. PELLEGRIN: Your Honor, it is. I
8 forgot.

9 JUDGE MORAN: However, just beware
10 now, Mr. Small, frankly, I would tend to let this go
11 and let her ask the question, but I can agree with
12 you. But remember, that can be turned around on
13 you.

14 MR. SMALL: Then I'll waive it, Your
15 Honor. Give us the same --

16 MS. PELLEGRIN: Your Honor, I
17 withdraw the question. I'd rather it not be
18 permissive for both parties. I will withdraw the
19 question. I forgot, but I have another witness I
20 can ask that question of, Your Honor.

21 JUDGE MORAN: So you have a way
22 around it.

23 MS. PELLEGRIN: Yeah, I believe I do.

24 JUDGE MORAN: That does not mean that

1 I might not allow, just so you know, I might still
2 in my discretion allow counsel for the other side to
3 ask a question which they forgot to ask because the
4 purpose is not so much gamesmanship as it is to make
5 sure this is a full and fair hearing, and if it's
6 something important, then it would be rather
7 arrogant of me to just on a procedural technical
8 basis say no, you can't ask that question. Sorry.
9 You forgot. Too bad. I don't like to do that.

10 Now, you want to ask your question?

11 MS. PELLEGRIN: Well, with that
12 knowledge, Your Honor, yes, I would like to ask my
13 question.

14 JUDGE MORAN: Go ahead.

15 Q. BY MS. PELLEGRIN: Mr. Hesel, I just
16 have one or two more questions for you, one, what
17 I'll refer to as a 1997 work that Mr. Small asked
18 you about on your father's property.

19 A. Yes.

20 Q. Do you know, and only if you know, do
21 you know if your father was working with any
22 governmental agencies to perform that work?

23 A. Yes, he was.

24 Q. And do you know which government

1 agency your father was working with?

2 A. I'm not sure if it was under soil
3 conservation office or how it was worded, but that's
4 who you were working with.

5 Q. Okay. And then I have just one more
6 question.

7 You know, Mr. Small asked a number of
8 questions about past issues that your family or
9 parts of your family have had amongst each other.

10 You and your brother took the video
11 of this site that we saw yesterday?

12 A. Yes.

13 Q. Can I ask, why did you do that?

14 A. It was our understanding that any
15 time you touched a natural watershed, it fell
16 underneath guidelines that had to be followed to do
17 so.

18 Therefore, we took the video, not
19 knowing whether they had permission or not had
20 permission, we took the video and submitted it to
21 the proper authorities to let you handle it.

22 MS. PELLEGRIN: Thank you, Mr. Hesar.
23 I have no further questions.

24 MR. SMALL: Just a few questions.

1 REXCROSS-EXAMINATION

2 BY MR. SMALL:

3 Q. First off, do you know on this
4 stream straightening project that your father did
5 and which you put a green box around, did your
6 father receive money from the government for this
7 project?

8 A. This I do not know.

9 Q. Okay. Now, do you know when your
10 father filed this confidential complaint against
11 Bobby and Andy Hesel?

12 A. I am assuming right after, shortly
13 after the video was taken. I do not know the exact
14 date.

15 Q. Okay. Because I want to know about
16 the, a little bit about the timing of when you took
17 that video.

18 Now, the video was dated September 4,
19 and I'm going to have to dig for the year here.

20 The video was September 4, 1999, is
21 that correct?

22 A. I believe that is correct, yes.

23 Q. And if I told you the complaint was
24 filed September 1, '99, would that seem fair to you?

1 A. I have no knowledge for sure when it
2 was filed.

3 MR. SMALL: Okay. That's fine.
4 Thank you.

5 JUDGE MORAN: Okay. Any last
6 questions from EPA based on the questions that were
7 asked by Mr. Small?

8 MS. PELLEGRIN: No, Your Honor.

9 JUDGE MORAN: You're done. Thank you
10 for your testimony.

11 By the way, I'm curious, my own
12 edification, in these parts at least, is 200 acres
13 considered to be a small farm, a medium farm, a
14 large farm? I'm not a farmer.

15 THE WITNESS: Tiny.

16 JUDGE MORAN: I would have guessed
17 that, but I wasn't sure.

18 (Witness excused.)

19 JUDGE MORAN: Okay. It's 11:47.
20 We'll take our break and the next witness will be...

21 MS. PELLEGRIN: Bill Hesper.

22 JUDGE MORAN: Bill Hesper. Okay.

23 So just make it simple. I have some
24 calls to make. We'll start at 1 o'clock.

1 (Whereupon the lunch recess was
2 taken.)

3 MS. PELLEGRIN: Your Honor, at this
4 time, complainant calls Bill Hesel to the stand.

5 JUDGE MORAN: Good afternoon,
6 Mr. Hesel. Step up here.

7 (Whereupon the witness was sworn
8 by Judge Moran.)

9 JUDGE MORAN: What we'll want you to
10 do, since your voice seems a little soft, make sure
11 you're speaking close to the microphone.

12 What I'd like you to do is first
13 state your name and spell it for us.

14 THE WITNESS: William E. Hesel
15 (H-e-s-e-r).

16 WILLIAM E. HESER
17 called as a witness herein, having been first duly
18 sworn on his oath, was examined and testified as
19 follows:

20 DIRECT EXAMINATION

21 BY MS. PELLEGRIN:

22 Q. Good afternoon, Mr. Hesel. Where do
23 you live?

24 A. I live at 4168 Church Road at Salem.

1 Q. And how long have you lived there?

2 A. Since early '80s. I think it's about
3 '81 but don't hold me to the year.

4 Q. Okay. And how long have you lived in
5 and around the Salem, Illinois area?

6 A. Well, I actually lived in Centralia
7 till we moved out there, but I've been out in that
8 area at my grandfather's farm since I was a baby.

9 Q. What is your current occupation? I'm
10 sorry. Let me back up. Let me ask you about your
11 educational background.

12 Do you hold any educational degrees?

13 A. Yes. I have a B.S. in business
14 management with a specialization in corporate
15 finance at SIU-Carbondale.

16 Q. Okay. And when you graduated with
17 your B.S., your Bachelor's of Science degree -- is
18 that what B.S. is?

19 A. Yes.

20 Q. When you graduated with your Bachelor
21 of Science degree, did you work after that?

22 A. I went to work for Country Mutual
23 Insurance for two months, and I had worked five
24 Christmases as a temporary before that off the civil

1 service roster down at the post office. That's
2 where I got a chance to go to work for the post
3 office, and I went to work for the post office, and
4 I had just about 32 years in when I retired from
5 there.

6 I've been retired, it will be 16
7 years the 29th of May.

8 Q. Okay. And once you retired from the
9 post office, did you work at all after that?

10 A. Well, on the farm, yes, ma'am. We
11 grain farmed some. We had some cattle. My brother
12 and I farmed together for a time, and then we split
13 up, and we gradually decreased the grain farming and
14 went into cattle, and my grain farming operation is
15 completely gone now.

16 Q. And so you're currently --

17 A. I'm basically a cattleman now.

18 Q. A cattleman. Okay.

19 And how long, before you became a
20 cattleman, how long had you farmed in some capacity,
21 approximately?

22 A. Probably since 16, 17, helping my
23 grandfather, and even back before that, I was
24 helping out other farm owners when I was probably

1 only 13 years old.

2 Bob and I actually started, I think
3 when we started doing a little together out there
4 with them, I think I was 16, and don't hold me to
5 the year.

6 Q. When you were farming, what kind of
7 farming were you doing?

8 A. Well, are you referring to when we
9 started farming together or with my grandfather or
10 uncles and aunts and so forth or since then?

11 My farming, after Bob and I
12 separated, I grain farmed some and had the cattle.
13 I went with the cattle operation, and gradually the
14 cattle grew and the grain farming went down.

15 Q. And why did you choose to do cattle
16 farming?

17 A. Well, my wife and I loved cattle.
18 She worked beside me out there every day probably
19 harder than I did, and we liked the cattle. We
20 enjoyed that a lot more than rooting, I call it
21 rooting around in the dirt. We would rather watch
22 those cow graze.

23 And I've actually done a lot with the
24 cattle at all the universities. I've been tied with

1 Purdue and University of Illinois and now retired
2 extension man in southern Illinois, but back in
3 1995, my wife and I got the commercial cattleman
4 award of the year from the Illinois Beef
5 Association, and that's tied in with the University
6 of Illinois, their recommendation.

7 Q. And when you get a cattleman award,
8 what is that award for generally or what are you
9 being awarded for?

10 A. For your work in what you've done as
11 far as performance testing 20 years on the
12 universities. Cow cat performance test record, and
13 I ran bulls out of my herd at SIU and clear up at
14 Macomb and principally over at Purdue University.
15 The test stations at Bedford, Indiana, I sent bulls
16 over there, took bulls over there for about 12
17 years.

18 Q. And what are they testing for?

19 A. Growth. The index at Purdue is the
20 toughest that I know of. It's all based on average
21 daily gain weight per day of age. They drop, the
22 bottom third goes out, and two different times over
23 there -- they run summer and winter test both. The
24 winter test are seven states' bulls over there you

1 go against. I had the top get of three in the
2 seven, once in the winter test and once in the
3 summer test, and the university bought two of the
4 bulls for their farm down in southern Indiana,
5 Purdue did.

6 And I have also had lots of my cat
7 fed out through the Purdue IBF program when they
8 send them up to Iowa and they're sold on carcass
9 value and based on the value of retail cuts out of
10 them, and you're paid on that basis, and mine are
11 way above standard.

12 Q. Okay. Are you familiar, Mr. Hesel,
13 with the respondents in this case, Andrew and Bobby
14 Hesel?

15 A. Yeah, my brother's boys.

16 Q. And are you familiar with what
17 respondents' occupations are?

18 A. Yeah. I think they both farm, but I
19 don't know if they do anything else for sure or not.
20 I think they both just farm.

21 Q. And do you know where they farm I
22 guess in relation to your property?

23 A. Well, they farm some probably all
24 around it. I'm not sure if some of the land is

1 their father's, my brother's or theirs that adjoins
2 me, but they farm around me.

3 Q. Okay. And when I use the term site
4 of the alleged violation, we've been talking about
5 the L-shaped channel. Are you familiar with that
6 term?

7 A. Yes, I am.

8 Q. Okay. And are you familiar with the
9 site of the alleged violation?

10 A. Only seeing it from the road or from
11 my side of the property. I've never been on that
12 piece of property.

13 Let me correct myself. I was on that
14 property at one time back before they owned it when
15 Max and Dorothy Mercer owned it, and their brothers,
16 Dorothy's brothers, Dwight and Vernice Heyduck
17 (H-e-y-d-u-c-k), came over one year when Bob and I
18 were still farming together, and we had an offset
19 disk at the time that we used to do tillage with,
20 and they had one too, but it was a different type,
21 and it wouldn't put the weeds under, and they came
22 over and asked if we were in that 15 acres to get
23 the weeds down for them. We had had a wet spring,
24 and they were pretty big.

1 Q. Okay. But you are familiar with the
2 alleged violation that took place at that site,
3 correct?

4 A. Yes, ma'am.

5 Q. When you became familiar with the
6 site of the alleged violation, did you have occasion
7 to report that violation, alleged violation?

8 A. Yes. Actually, I called the NRCS and
9 said, what can I do, and they said, well, we can't
10 do anything. They're not in the farm program, and
11 your recourse, or something like this, is the Corps
12 of Engineers, and they gave me a phone number to
13 call.

14 Q. And did you contact the Corps of
15 Engineers?

16 A. I contacted the Corps of Engineers.
17 It was a lady, and I'm not sure, Karen somebody I
18 think it was, and she says, I'll send you a form.

19 And she filled out a form and sent it
20 to me, and I didn't send it back real quick. It was
21 a few days before I got done with it and got
22 everything together.

23 Q. Okay. And I'm going to ask you to
24 turn to somebody in that exhibit binder. It's

1 Complainant's Exhibit 8, Bates stamp 4245.

2 Mr. Hesel, I've asked you to turn to
3 Complainant's Exhibit 8 Bates stamped 42 through 45.
4 If you can page through those pages and let me know
5 when you've had a chance to look through them.

6 (Pause)

7 A. Okay. What do I need to do?

8 Q. Okay. I'm going to ask you some
9 questions about them.

10 Now, let's look at page 42. You
11 mentioned that you talked to someone named Karen?

12 A. Yeah, that's the name, Karen. It's
13 not real clear in this photocopy, Marzer (phonetic
14 spelling). I'm not sure if that's it, the
15 pronunciation.

16 Q. Okay. And whatever her last name is,
17 is that the Karen that you mentioned that you spoken
18 with?

19 A. Yes, it is.

20 Q. Okay. I think you testified you
21 filled out a form. Is your handwriting on this
22 page?

23 A. That is my handwriting on down from
24 where it says alleged violators. That's mine below

1 that in that certain section there where it says
2 alleged violators and contract information.

3 Then that's her handwriting on the
4 location.

5 Then this is my printing below that
6 where it says date of occurrence on down to the
7 bottom of that page.

8 Q. Okay. And let me ask you to read
9 into the record just below what you testified is
10 Karen's handwriting, "Complainant informed of
11 rights." Can you read that into the record, that
12 line?

13 A. "Complainant informed of rights under
14 the privacy act before giving information."

15 Q. And can you read the line below that
16 into the record, please?

17 A. Confidentiality requested by
18 complainant.

19 Q. And are the yes boxes checked on that
20 one?

21 A. Both yes boxes are checked, yes,
22 ma'am.

23 Q. And so at the time that you submitted
24 the complaint, you requested confidentiality. Is

1 that a fair statement?

2 A. Yes, I did.

3 Q. Okay. And at some point in the
4 future, did you waive that confidentiality?

5 JUDGE MORAN: You know what it means
6 to waive confidentiality?

7 A. Yeah, give it up.

8 They told me that if they went ahead
9 with, I think Tony Antonacci up at the NRCS was the
10 first one that called me, and he said they've
11 requested the file, and I thought this thing
12 actually had died because it had been over eight
13 years I guess since I'd even heard anything, and he
14 said, they've requested the file, and if it goes
15 ahead, you'll have to waive your privacy rights. I
16 said, go ahead, yeah, I waive it. It's a long
17 story, but I waived it.

18 JUDGE MORAN: Respondents' counsel
19 appreciates that story, I'll tell you that.

20 Q. Mr. Heser, turning your attention to
21 Complainant's Exhibit 43, is that your handwriting
22 on this page?

23 A. That is all my handwriting on that
24 page, yes, ma'am.

1 Q. And what about 44, is that your
2 signature?

3 A. That's my signature, and that's the
4 date I signed it and sent it into the Corps of
5 Engineers at the address they'd given me.

6 Q. Okay. And for the record, could you
7 please read that date into the record?

8 A. September 13, 1999.

9 Q. Okay. And on the next page which is
10 page 45, Complainant's Exhibit CX 45, is that your
11 handwriting on that?

12 A. That's my handwriting on that page.

13 Q. Okay. And just turning real quickly
14 back to Bates stamp 43, can you read the statement
15 part of this into the record, please?

16 A. "I certify that all statements
17 contained herein are true, complete and correct to
18 the best of my knowledge and belief and are made in
19 good faith and of my own free will and that I have
20 received a complete copy of the statement showing my
21 initials or corrections, if any."

22 Q. Okay. Can you turn to page --

23 MR. NORTHRUP: Your Honor, where was
24 this?

1 MS. PELLEGRIN: I believe that was on
2 page CX 44.

3 JUDGE MORAN: If we have an
4 objection, you have to first state it.

5 What is your objection?

6 MR. NORTHRUP: The objection was I
7 didn't understand what he was reading from. It was
8 a point of clarification, not really an objection.

9 JUDGE MORAN: And you were reading,
10 Mr. Hesel, from where, what page?

11 THE WITNESS: At the bottom where it
12 says, witness statement, regulatory complaint. I
13 don't see -- oh, okay. Here's 44, CX 44.

14 JUDGE MORAN: Okay. So that solves
15 that?

16 MR. NORTHRUP: Yes.

17 MS. PELLEGRIN: I'm sorry. They are
18 really small numbers at the bottom of the page,
19 Mr. Hesel.

20 Q. Can you turn to the page right before
21 that? It's page 43.

22 A. I'm there.

23 Q. And that statement, can you read that
24 into the record?

1 A. "I observed the bulldozer and earth
2 mover work, and my sons took the pictures and video
3 of the new channel and cleared area from my side of
4 the property line."

5 Q. And when you brought or sent in the
6 complaint, at some point, did you send in the video?

7 A. I sent the video and I sent some
8 pictures.

9 Q. Okay. And let me turn your attention
10 to -- we're still in Complainant's Exhibit 8,
11 Mr. Hesel.

12 Your Honor, permission to approach?

13 JUDGE MORAN: Yes.

14 Q. Mr. Hesel, turning your attention to
15 Complainant's Bates number 63 to 70 which is the
16 photos in the sleeves in that document, are these
17 the photos that were sent in?

18 A. These look like they're from the
19 video. I can't tell if they're off still slides on
20 the video or not because I only looked at that video
21 once, and it's been eight, nine years ago. I'm not
22 sure. I haven't counted the time off, but, yes,
23 these are basically pictures of that area.

24 MS. PELLEGRIN: Okay. And, Your

1 Honor, I just want to state for the record, we're
2 not going to move to admit these because we
3 understand Mr. Hesper doesn't remember exactly who
4 took them, and we're happy that the video speaks for
5 itself in the record. I just wanted to clarify for
6 the record why we weren't going to move to admit
7 these photos.

8 MR. SMALL: Your Honor, we will waive
9 that.

10 MS. PELLEGRIN: Okay. Well, then, if
11 they'll stipulate to the authenticity, which is
12 something we've talked a little bit about earlier,
13 then I...

14 MR. NORTHRUP: Right.

15 JUDGE MORAN: You haven't moved for
16 the rest of the document, but at least as to CX 63
17 through CX 70, the respondents are waiving any
18 objection to questions of foundation, right?

19 MR. NORTHRUP: Correct.

20 MR. SMALL: Correct.

21 JUDGE MORAN: All right. Then
22 they're admitted.

23

24

1 (Whereupon Complainant's Exhibit
2 8 Bates numbers 63 through 70
3 were admitted into evidence at
4 this time.)

5 MS. PELLEGRIN: And I think the other
6 parts of this document or some of the parts were
7 admitted, but this is part of Complainant's 8 that
8 wasn't previously admitted.

9 I believe the initial complaint --

10 JUDGE MORAN: -- was already
11 admitted?

12 MS. PELLEGRIN: -- was already
13 admitted.

14 JUDGE MORAN: Okay. Let me check my
15 notes.

16 Yes.

17 Q. BY MS. PELLEGRIN: Mr. Heser, you
18 mentioned that you were a farmer for a good number
19 of years, is that right?

20 A. That's right.

21 Q. Are you familiar with the term
22 conservation practices?

23 A. Yes, I am.

24 Q. Okay. And what does that term mean

1 to you?

2 A. Well, it's an effort to conserve
3 soil, prevent erosion by lots of different means.
4 Some part of it is a type of tillage. Some part of
5 it involves ground cover, possibly no till where you
6 use chemicals and don't till the soil at all.

7 These practices can include filter
8 strips along the edges of water courses.

9 Q. Okay. And have you had occasion to
10 implement any conservation practices on any areas
11 that you have farmed?

12 A. Several of them.

13 Q. Several. Okay.

14 Can you tell me what those are?

15 A. Well, down on this particular tract
16 of land that I own, there are quail habitat strips
17 on part of it where they wouldn't take a filter
18 strip because of some reason. I don't know the
19 regulations, but wherever they wouldn't take a
20 filter strip, they gave me the option of a quail
21 habitat strip which is planting maybe grass along
22 there so the quail will have a place to nest, have a
23 refuge.

24 All the rest of the way on my

1 property down along the existing Martin Branch clear
2 to Old Salem Road there is a filter strip all the
3 way down the edge. That's designed to prevent any
4 pollutants from flowing off land catch soil. If you
5 have cattle down there, it's designed to filter out
6 anything so it doesn't get in the water supply.

7 We used, after Danny gave up the
8 farming, we used no till down there almost
9 exclusively on that for the years until we did put
10 all of that part into a grass clover mixture on that
11 hill for cover where the runoff parts were the
12 worst.

13 I have since seeded two more
14 additional pieces down there in the grass. In fact,
15 the only piece down there on that tract of land that
16 is not seeded in through the grass right now is
17 outside those filter strips, and the intentions are
18 to seed that in this fall.

19 This work has all been done under the
20 NRCS, Natural Resource Conservation Service, or it
21 used to be called the Soil Conservation Service,
22 with their guidance. They provide all that.

23 In addition, the government offers a
24 program that they call, it's shortly termed EQIP,

1 Environmental Quality Incentives Program, where it
2 has a twofold purpose, both conservation and try and
3 keep livestock in Illinois because much of it's
4 gone, and they will actually help pay for part of
5 your fence, to put in a water supply of some kind,
6 and they like to see you actually use city water,
7 which all my cattle are on city water, and they will
8 help pay for a percent of the water lines, a percent
9 of the fence. They will help pay for establishing
10 grass cover out there.

11 JUDGE MORAN: You got me going there,
12 and I'm curious. Once you put in the quail strip,
13 do they then provide you with quail or do you just
14 cross your fingers and some quail will show up?

15 THE WITNESS: No, but there's a lot
16 of quail down there, Your Honor, and quite frankly,
17 once you get these fences in, you can't farm right
18 against the fence, so that area along the fence, you
19 have to figure out how far you want to stay away
20 from it so you can do whatever, mow and rake or
21 whatever. That's left protected.

22 It's going to grow up to some extent.
23 You try to keep the brush out of it but you're going
24 to get some over time unless you stay out there with

1 a spray can, and I don't like to use those
2 chemicals.

3 So the clover that's growed up along
4 that fence, you know, it will get sometimes even as
5 tall as this desk here is. Though the wildlife
6 seems to learn pretty quick, that area doesn't get
7 disturbed. There's probably more quail down there
8 than there was before but there is a considerable
9 number.

10 JUDGE MORAN: Thank you.

11 Q. BY MS. PELLEGRIN: Mr. Heser, you
12 mentioned in the beginning when you were talking
13 about this that they like you to... I think you
14 used the word they. You mentioned later in that
15 statement, NRCS, Soil Conservation Service, is the
16 they.

17 A. Yeah, I think EQIP is administered by
18 the NRCS, and Tony Antonacci is the one that takes
19 care of the contract.

20 But when you do this, they set you up
21 on a schedule that you have to perform these
22 practices by or go in and ask for an adjustment
23 because you have to have them done by a certain
24 time.

1 They actually want you to fence, try
2 to fence the cattle away from water. If you do use
3 a stream for water, you have to put in a crossing
4 there and only allow them access to that water at
5 that crossing.

6 It's designed to really improve the
7 water quality that's run off the land and also
8 provides cover for the wildlife.

9 Q. Okay. And when did you,
10 approximately when did you begin to implement some
11 of these conservation practices?

12 A. I think my first EQIP projects are
13 four or five years old from when we started them. I
14 think they give you about a ten-year time frame.
15 That area down there was one of the first projects
16 that was -- I had two others along with it, but
17 those were the first ones that were approved in
18 Marion County.

19 Q. The first EQIP projects approved in
20 Marion County?

21 A. The first EQIP projects, yes, ma'am.

22 Q. Okay. And you mentioned earlier a
23 filter strip. When did you begin, when did you do
24 any filter strips on your property?

1 A. Those filter strips were seeded a
2 year ago last fall.

3 Q. Okay. And which --

4 A. And the quail habitat strips were
5 seeded that spring because they want you to use
6 native grass on those. You don't use the same
7 grasses, and that native grass is seeded in the
8 spring.

9 Q. Okay. And when did you begin -- I
10 think you mentioned NRCS. When did you begin to
11 work with the NRCS to implement conservation
12 practices?

13 A. Well, it was then shortly after my
14 brother and I split up because we did some
15 conversion of what's called this HEL, highly
16 erodible land. The State of Illinois at that time
17 had a program that would pay 60 percent of your
18 costs in terms of fertilizer, tillage costs, and
19 seeding if you would take that highly erodible lands
20 out of row crop production and put it into grass,
21 hay or pasture, and I took advantage of that to get
22 pasture and hay land established.

23 That was done shortly after my
24 brother and I split up, and I think the year was

1 1985 but don't hold me to the exact year.

2 Q. Okay. And, Mr. Hesel, would you be
3 able to identify your property on an aerial photo if
4 I showed it to you?

5 A. I think I can.

6 Q. Okay. And let me turn your attention
7 to Complainant's Exhibit 12, document Bates stamped
8 189.

9 A. I think you're going to have to help
10 me find the right place.

11 MS. PELLEGRIN: Okay. Your Honor,
12 can we go off the record for a second?

13 JUDGE MORAN: Yes.

14 We're off the record.

15 (Discussion held off the record.)

16 JUDGE MORAN: You've switched pages.

17 MS. PELLEGRIN: Complainant's
18 Exhibit 12, Bates number 182 first.

19 JUDGE MORAN: You're on that,
20 gentlemen, for the respondents?

21 MR. SMALL: Yes.

22 JUDGE MORAN: Okay. 182.

23 Q. BY MS. PELLEGRIN: Mr. Hesel, do you
24 recognize your property on this aerial photo that's

1 in front of you?

2 A. Yes, I do, ma'am.

3 Q. Okay. And let me turn your attention
4 to the area within the green box.

5 A. Yes, I see it.

6 Q. Okay. And do you recognize that
7 area?

8 A. Yes. That's where the -- do you want
9 to elaborate on that?

10 Q. Oh, please.

11 A. Okay. This is where there was an
12 erosion control project implemented through the NRCS
13 to stop gullies that were washing down both sides of
14 the original channel that were so deep that if you
15 dropped a tractor wheel in them, you turned the
16 tractor over.

17 There's another area on that
18 somewhere that it shows as they were originally.

19 Q. Okay. I'm turning your attention to
20 Complainant's Exhibit 189 which is a few pages, the
21 one I originally had you turn to, Mr. Heser.

22 Do you recognize your property on the
23 document Bates stamped CX 189?

24 A. Yes, I do.

1 Q. Okay. And let me ask you to draw a
2 circle around -- actually, strike that.

3 Do you recognize, the area that had
4 the green box in it in the other photo, do you see
5 that same area in this photo?

6 A. I haven't found one with a green box
7 yet.

8 Q. CX 182 I think is the one. I think
9 it's the first one.

10 Actually, Your Honor, may I approach?

11 A. Oh, it doesn't have green -- oh,
12 okay, here it is. I found it. Yeah, I recognize
13 the area.

14 JUDGE MORAN: Okay. And now, just
15 for the record, Mr. Bill Hesel has in front of him
16 182, CX 182 and 189.

17 And you were able to spot, Mr. Hesel,
18 on 182 the rectangle which encircles a white strip
19 on that?

20 THE WITNESS: Yes, the green
21 rectangle that encircles the white strip.

22 JUDGE MORAN: Okay. Now counsel has
23 a question for you.

24 Q. BY MS. PELLEGRIN: And are you able

1 to recognize that same area on the other document,
2 CX 189?

3 A. Yes, I do.

4 MS. PELLEGRIN: Okay. And, Your
5 Honor, I'd like for Mr. Hesper to draw a green box on
6 this one as well and everyone else's.

7 JUDGE MORAN: Okay. Sure. We'll go
8 off the record.

9 (Off the record.)

10 Q. BY MS. PELLEGRIN: For the record,
11 Mr. Hesper has just drawn a green box on CX 189
12 representing the same thing but has a green box
13 around it on CX 182, and respondents' counsel has
14 agreed that it is substantially similar on all of
15 the copies, correct?

16 MR. NORTHRUP: That's correct.

17 MR. SMALL: That's correct.

18 JUDGE MORAN: Okay.

19 Q. BY MS. PELLEGRIN: Okay. Mr. Hesper,
20 looking at CX 189, the green box that you just drew,
21 what's inside that green box?

22 A. There is an erosion control structure
23 that the NRCS did the design work and the
24 requirements on for the contractor.

1 There is also a quail habitat strip
2 down the south edge of that.

3 Q. Okay. And the quail habitat strip is
4 included within that green box?

5 A. It is included within that green box,
6 yes, ma'am.

7 Q. Okay. And looking at this map,
8 there's a red circle to the left of the green box.
9 Do you see that?

10 A. Yes, I do.

11 Q. And can you tell me, it looks like
12 there's a light colored line that runs sort of from
13 the middle of the red circle or from the side of the
14 red circle toward the green box.

15 Do you see that?

16 A. Yes, ma'am. That is a filter strip
17 that runs all the way up from that red circle clear
18 back up to the green box. That is a filter strip.

19 Q. Okay. And where that filter strip
20 ends sort of in that red circle following that white
21 line down along an L-shaped path, do you see that,
22 that white line that makes an L-shaped path along
23 the property line?

24 A. Yes, I do.

1 Q. First of all, that white line, whose
2 property is that, if you know?

3 A. That white line is on my side of the
4 property, ma'am. It's on my side of the fence row.

5 Q. And what is that?

6 A. That's all filter strip.

7 Q. That's all filter strip. Okay.

8 A. It goes -- it actually comes up along
9 the edge of a little fence row and then back down
10 the edge of it as it gets on down there. It
11 actually goes clear out to Old Salem Road along my
12 side of Martin Branch. That's completely covered on
13 the south side of Martin Branch.

14 Q. Okay. And Martin Branch, as I'm
15 looking -- I'm sorry. And Old Salem Road, is that
16 the road...

17 A. That's the black line off to the left
18 of that red circle about an inch on my copy here.

19 Q. Thank you, Mr. Hesel. You're a lot
20 better at describing things on a map than I am.

21 Okay. And the filter -- well, let me
22 bring your attention back to the area in the green
23 box.

24 I believe you testified that you did

1 that project -- well, let me ask you.

2 Did you do that project in
3 consultation with any governmental agency?

4 A. Yeah. The NRCS did actually all of
5 it. I went to them and said, "What can we do about
6 these gullies or can we do anything?" Because I
7 know you don't mess with natural streams, water
8 courses, or whatever.

9 And they said, "Well, let me ask
10 Burke Davies," who was the person involved with this
11 at the NRCS.

12 And he came back -- here again, this
13 is memory. He came back, it seems like it was three
14 weeks later, it might have been longer more or less,
15 but he came back and he said, yeah, we can do an
16 erosion control structure there, but, he said, we'll
17 have to remove what brush is in the middle of it,
18 and he said, it's actually a lot higher than those
19 gullies, and it's from silting in from farming
20 operations upstream.

21 And I said, "Well, just make sure we
22 stay legal, Burke. I don't want any trouble."

23 So they oversaw the whole thing, and
24 then we did the seeding ourselves as per the

1 regulations and mulching it and everything else, and
2 Burke actually complimented me on it. He said, "You
3 got a better catch of fescue in that thing than I
4 believe I've ever seen."

5 It held through that winter which the
6 first winter is your real tough time. And maybe we
7 were fortunate with the rainfall records back then,
8 but it held and it's held ever since.

9 Actually, I have never mowed that
10 over twice, and I've never mowed the bottom of it.
11 I leave that tall grass there because if you cut it
12 down, then the water will come through that short
13 grass faster than the tall grass.

14 But the banks have been mowed at
15 least once but not more than twice. I remember us
16 mowing there once to get, they're like horse weeds.
17 They're over your head. They grow up there till the
18 grass gets established and chokes them out.

19 Right now it's been over four years
20 since that was mowed. There's briars along the
21 north side of it. There's thorn trees coming up as
22 big around as my arm that I'm going to get cut out
23 before they cause me problems, but the fescue out
24 there on the sides of it is above your knees.

1 Q. Okay. And do you know approximately
2 what year that was performed, that work was
3 performed?

4 A. Not off the top of my head, ma'am. I
5 would have to actually go back to their records and
6 dig back in mine. I really can't tell you off the
7 top of my head.

8 Q. And are you familiar with how the
9 flow was through those gullies before the project?

10 A. Well, water running over bare ground
11 or a bare gully just, it's only common sense that it
12 runs a lot faster than it does if there's anything
13 there to restrict it, whether it's grass or weeds or
14 whatever, but the idea is to slow it down with
15 something like this.

16 And quite frankly, it has done a
17 marvelous job on it. In fact, it has almost filled
18 the thing up with silt.

19 When we were down there this spring,
20 there's a minimum of three I'd estimate from the
21 previous work that was done to as much possibly as
22 five feet of silt accumulated in the bottom of that
23 thing. It's done a wonderful job.

24 Q. You mentioned upstream farmers.

1 Do you know who farms upstream of
2 this particular area?

3 A. The only -- well, my nephews farm up
4 there. There's a little bit of the ground that's, I
5 guess this terminology here is the ground off to the
6 southeast on the east side of 37. I think part of
7 that Steve Wagner farms. It was part of the old
8 Hugh Blair ground that runs into that. Well, it
9 would be north of the Carter Road and to the east of
10 Illinois Route 37.

11 Some of that drains into it, and then
12 the 20 acres south of my, I guess it's my brother's
13 ground or his nephew's, and I'm not sure what name
14 the property is in, there's 20 acres off to the
15 south of them that also drains into that.

16 Q. And can you give me an estimate of
17 approximately how many -- you mentioned conservation
18 practices. Can you give me an estimate of
19 approximately how many conservation practices you've
20 engaged in over the years, implemented over the
21 years?

22 A. At least I was involved in grass,
23 either filter strips or pasture hill in savings and
24 loan without the no till aspect of it because I was

1 doing almost exclusively no till while I was still
2 grain farming, especially in the latter years of
3 that.

4 Q. And you mentioned quail habitat. Is
5 it just the one quail habitat area?

6 A. That's only actually quail. Well, it
7 runs further than what was shown on this thing.

8 If you will look at that green box on
9 189, there's a little piece of timber just to the
10 right of that. It shows a little woods there.

11 Q. Okay. I see that.

12 A. Okay. There's nothing around that
13 woods, and I could have signed that up, but I didn't
14 because I was concerned that I would pond water out
15 there on that ground. It's pretty flat.

16 But as soon as you get over to the,
17 up to going on around that little piece of woods to
18 where that line goes on out there, that's Route 37
19 over there, there's a quail habitat strip all the
20 way up to Route 37.

21 Q. Okay. So if I'm looking at the green
22 box, the darker area...

23 A. The darker area is woods.

24 Q. ...is woods.

1 And then just to the right of that,
2 the straight line that goes out to the black line
3 which you testified was Highway 37?

4 A. Yeah. That's all quail habitat right
5 along there. You can see some white.

6 I had a chance to have that timber
7 logged, and I wouldn't let them do it. I left it.

8 Q. Mr. Hesel, it sounds like you engage
9 in quite a few conservation practices.

10 Why do you do that?

11 A. Well, I like to keep what soil is on
12 my land there. I'll be 71 the end of May. I'd like
13 to leave things a little better for my heirs than
14 what I received it, and honestly, if we don't do
15 something more to it and preserve some of this, one
16 of these days, we're going to be in a world of
17 ditches and essentially no environment because
18 you've got to have some kind of cover for the
19 wildlife.

20 MS. PELLEGRIN: Your Honor, if I can
21 just have five minutes to consult my notes, I think
22 I might be done.

23 JUDGE MORAN: Sure. Let's go off the
24 record, and you can do that.

1 (Recess taken.)

2 JUDGE MORAN: Okay. We're back on
3 the record.

4 MS. PELLEGRIN: I have a couple
5 questions for you, Mr. Hesel.

6 Q. Turning your attention back to CX
7 182, that first aerial photo I had you look at. Are
8 you there?

9 A. I'm there.

10 Q. Okay. And I'm not sure if this was
11 clear for the record, so I'd like for you to
12 describe the area within that green box.

13 A. That encompasses the, I think the
14 actual erosion control strip, the project that was
15 done through the NRCS, that is, before the filter
16 strip or quail habitat strips were added.
17 Especially that would be quail habitat up there, but
18 that's before that was added.

19 Q. Okay. So would this be -- and let's
20 look at and compare CX 182 with the other one you
21 drew the green box in which is CX 189.

22 A. Okay.

23 Q. And can you compare the, just for the
24 record, the coloration in CX 182 versus the color in

1 that green box of CX 189?

2 A. Well, I don't know why this is as
3 white as it looks on 182 because I guess I don't
4 know when this was taken or at what time of the
5 year.

6 It's possible that that was taken
7 right before this thing was seeded right after the
8 actual completion of the actual dirt work, and that
9 could be why it looks that way.

10 It could, I guess they weren't
11 thinking winter. If they were, if that stuff browns
12 up, why, it could look that way. I don't know why
13 it would look that way in the summer, but that other
14 one over here looks like the vegetation is growing.
15 It's that much wider. It's probably at least three
16 times, maybe closer to four the width on that that's
17 protected there.

18 MR. NORTHRUP: Your Honor, and I know
19 it's late, and I wanted to let him go on but we
20 would object. It's speculation. There's no
21 foundation that he's an expert in aerial.

22 JUDGE MORAN: Sustained.

23 MR. MARTIN: And I would ask that it
24 be stricken.

1 JUDGE MORAN: Yes.

2 MS. PELLEGRIN: Okay. Just for the
3 record, I believe these have been admitted, these
4 aerial photos have been admitted, CX 182, is that
5 correct, through Mr. Carlson I believe?

6 MR. NORTHRUP: Yes.

7 JUDGE MORAN: Yes. I'm just
8 checking. This was from exhibit what?

9 MS. PELLEGRIN: CX 12.

10 JUDGE MORAN: Yeah, CX 12, it's all
11 in.

12 Q. BY MS. PELLEGRIN: Mr. Hesper, if you
13 can look at the Bates number 182 at the bottom of
14 your page or the side I guess of the aerial photo,
15 can you read that number into the record just after
16 the dash?

17 A. 1997.

18 Q. Okay. And I believe there's been
19 testimony, Mr. Hesper, from Mr. Carlson prior to your
20 being here that this is a 1997 photo.

21 You mentioned earlier that you didn't
22 remember quite the year that you began your project
23 with the NRCS due to the quail habitat.

24 Does the date of this aerial photo,

1 does it refresh your recollection as to that date?

2 MR. SMALL: Your Honor, I'm going to
3 object. I'm not certain that that was what
4 Mr. Carlson testified to the other day. I think we
5 were looking at different maps at the time.

6 JUDGE MORAN: Yeah, you can't -- it's
7 too much to try and characterize that.

8 You can ask him questions, but I
9 don't know that he's -- don't you have to lay some
10 sort of foundation that he has -- doesn't it require
11 a certain skill other than to recognize someone's
12 general property? To go into that kind of detail,
13 wouldn't you require an expert to be able to
14 interpret the particulars of this map other than
15 what he's testified to generally about these things?

16 MS. PELLEGRIN: Well, I guess, Your
17 Honor, if I can clarify, Mr. Carlson had --

18 JUDGE MORAN: No. Why don't you just
19 ask him a question. Assume that...

20 MS. PELLEGRIN: Okay. Assuming that
21 this photo is 1997.

22 JUDGE MORAN: Well, however, you want
23 to do it, and then I don't know if he's qualified to
24 answer the question. There may be an objection when

1 you ask it, but go ahead.

2 MS. PELLEGRIN: Okay.

3 Assuming -- you know, I'll just
4 withdraw the question. I think I'm satisfied that
5 we'll be able to demonstrate the date of that from
6 some other means, and I think Mr. Hesel has
7 testified that...

8 JUDGE MORAN: See, that's the thing.
9 If you were trying to get him to tell you what date
10 he thought this photograph was taken...

11 MS. PELLEGRIN: No, no, that's not
12 correct, Your Honor. What I'm trying to do, I
13 believe he's testified that the area that he drew in
14 the green box is the area where he did his quail
15 habitat.

16 JUDGE MORAN: Yes.

17 MS. PELLEGRIN: And he said he didn't
18 remember what that date was, and he didn't know the
19 date of the photo he specifically testified to.

20 So I was trying to show him that this
21 photo is dated -- Mr. Carlson has testified that
22 this is a 1997 photo, and does that refresh his
23 recollection about when he did the quail habitat.

24 THE WITNESS: Your Honor, I can

1 clarify it a little bit myself.

2 JUDGE MORAN: No, we can't do that.

3 So you are withdrawing your question?

4 MS. PELLEGRIN: Yes.

5 JUDGE MORAN: You can try it again,

6 and we'll see if there's an objection to it.

7 MS. PELLEGRIN: I will withdraw my

8 question because I believe we'll be able to show

9 this through some other source.

10 JUDGE MORAN: Okay.

11 MS. PELLEGRIN: I think the testimony

12 stands that Mr. Hesper identified the area within the

13 green box on CX 182 which is the area of his quail

14 habitat that he did with NRCS.

15 THE WITNESS: Yes.

16 MS. PELLEGRIN: Okay. Mr. Hesper, we

17 won't talk about aerial photos anymore. I have just

18 a few other questions.

19 Q. I believe you testified a minute ago
20 that you reported the violation to the Army Corps of
21 Engineers, the alleged violation to Army Corps of
22 Engineers?

23 Did you have any concerns about how
24 that alleged violation impacted your property

1 nearby?

2 A. Initially, I was probably as
3 concerned about the cutting of those tree roots on
4 those trees along that fence line as anything else
5 because I figured we'd get a big wind storm, they're
6 all going to be out in the field or they'll die when
7 you remove that much root growth.

8 We lost some of them. There's some
9 dead ones still standing. We didn't lose the number
10 I feared we would, but the other aspect of it was
11 the possible flooding from not being right over
12 against that line and actually cutting clear out
13 across that end and then down in the branch.

14 Q. And in your experience, after the
15 L-shaped channel was cut in that property, have you
16 experienced any increased flooding on your property?

17 A. Yeah, because that channel is now
18 against the edge of my property when it does come
19 out of the channel, where before, that channel was
20 way away from the edge of the property on out
21 through there before it joined back into my property
22 again.

23 So now the water is right over
24 against me, and it's going to come out on me when it

1 comes out instead of being on their property when it
2 comes out.

3 So, yes, I have experienced increased
4 flooding.

5 MS. PELLEGRIN: Okay. I have no
6 further questions.

7 JUDGE MORAN: Are you ready to pick
8 right up with cross?

9 MR. SMALL: Yes, Your Honor.

10 JUDGE MORAN: Okay.

11 MR. SMALL: Mr. Heser, my name is
12 Brad Small.

13 THE WITNESS: I know you, sir.

14 MR. SMALL: If I ask you any
15 questions that you don't understand, please let me
16 know. I'll try and clarify them for you so that
17 we're both on the same track here.

18 CROSS-EXAMINATION

19 BY MR. SMALL:

20 Q. Mr. Heser, you were in the courtroom
21 and you heard your son Daniel Heser testify, did you
22 not?

23 A. That is correct, sir.

24 Q. And I want to reference that

1 testimony.

2 You indicate that that testimony is
3 correct from your son Daniel? You agree with it?

4 A. I don't agree with some of the
5 verbiage, and while he was there, he was not
6 directly involved in this project with NRCS.

7 Q. All right. So your only exception to
8 his testimony would be the indication that he was
9 directing the stream straightening project on your
10 property? Is that what you're saying?

11 A. No. My objection is to your
12 phraseology of the stream straightening project,
13 sir.

14 The NRCS, that stream was not
15 straightened. It was put back in the same channel
16 if you look at the maps. That's where it was. They
17 didn't straighten anything. I think you'll find
18 that follows the same channel.

19 Q. Okay. Let's just say we use your
20 terminology here today, that it's, as you label it,
21 an erosion control project, with that exception.

22 A. Yeah. That's the terminology the
23 NRCS used.

24 Q. Okay. And with that change in

1 phraseology, would you be in agreement that his
2 testimony is truthful and what you would have said
3 too?

4 A. As best I can recollect, sir, because
5 right now I certainly couldn't quote it.

6 Q. Okay. Because that will save us a
7 whole lot of time here if you're in agreement with
8 that.

9 JUDGE MORAN: I'm just going to
10 interject here, Mr. Small. I don't know if that's
11 quite fair. Mr. Daniel Hesel was here for two days.
12 I don't know if Bill Hesel was here during that
13 whole time, and I think you have to qualify your
14 question, to be fair with Bill Hesel, about whether
15 his general recollection is that he agrees with the
16 testimony with the qualification he's already made.

17 But if you have specific questions
18 where even though it might take more time where you
19 want to challenge... Because I don't think it's
20 fair, I'm not suggesting you're going to do this,
21 but to trap the witness by saying, well, you agreed
22 with everything, and then start to pick it apart.

23 You ought to ask specific questions
24 to be fair with him.

1 MR. SMALL: We agree with that, Your
2 Honor, and we intend to ask additional questions
3 here too.

4 JUDGE MORAN: Okay. So why don't you
5 put generally he agrees with the exception he's
6 already stated, but then you're going to get into
7 specifics, and then we'll learn more about...
8 Because he's even said that that's a lot for him to
9 remember. It's a lot for me to remember from
10 yesterday.

11 MR. SMALL: Okay. Fair enough.

12 Q. Mr. Hesper, is it fair to characterize
13 that you and your son and Daniel have had
14 substantial misunderstandings or disagreements with
15 your brother Bob and with Andy and Bobby Hesper over
16 the last several years?

17 A. I don't think the term substantial is
18 fair, sir. We have had disagreements. We had
19 disagreements before my brother and I split up, but
20 substantial, no.

21 Q. You've been involved in some lawsuits
22 with each other?

23 A. The only lawsuit that I can think
24 of -- well, let's see. I don't recall an actual

1 lawsuit at this time. There's a fence dispute
2 possibly pending.

3 A lawsuit? We've had disagreements.
4 I never filed a lawsuit, and I didn't have one filed
5 against me.

6 Q. Do you remember having a lawsuit
7 involved in your mother's estate?

8 A. Yes. There was a disagreement over
9 the disposition of some CDs that had both names, my
10 mother's name on them, and my attorney handled that,
11 and it never actually got through that. There was a
12 summary judgment as I recall. He ruled against
13 summary judgment, but then they came back and
14 offered a compromise, and that was as far as it ever
15 got.

16 Q. You were ordered to turn over money
17 into the estate, were you not?

18 A. It had already been taken.

19 Q. Do you remember driving a semi-truck
20 within the last two years and hitting your brother's
21 mirror and knocking it off and going on?

22 A. I didn't drive a semi-truck, sir. I
23 was driving a hay wagon.

24 Q. Okay. A hay wagon.

1 A. And the semi was parked on the road,
2 and there just simply wasn't enough room to get by,
3 and I had the hay wagon clear to the ditch, and the
4 back wagon got his mirror. There was a bale
5 sticking out a little further, and it certainly
6 wasn't intentional.

7 Q. But you kept on going, right?

8 A. I didn't even realize it happened. I
9 guess the terminology here, to explain it, those are
10 what I would call double header. I'm pulling 16 of
11 these big round bales at a time behind a tractor.
12 There's two wagons, and apparently one bale was
13 sticking out further on the back wagon, and it got
14 the mirror, and I didn't even realize it had got it.

15 Q. Until the sheriff arrived and talked
16 to you about it, right?

17 A. Yeah.

18 Q. Okay.

19 A. And he did agree it was an accident,
20 and there were no charges filed.

21 And it was unfortunate, sir. I
22 regret that it happened, and I told the deputy that.

23 Q. Mr. Hesel, let's get into the
24 property that Bobby and Andy Hesel own which is the

1 subject of this dispute here.

2 A. Right.

3 Q. And when I reference an L, I'm
4 talking about a ditch that was constructed in the
5 form of an L that carries the water from your
6 property.

7 Your property is upstream from that
8 area, correct?

9 A. Yeah. It carries water from my
10 property and several others.

11 Q. And you own that property there?

12 A. I own that property upstream.

13 Q. Upstream?

14 A. Part of it. I don't own all the
15 watershed if that's what you're talking about.

16 Q. I understand. You don't own the
17 whole -- you wish you did.

18 A. No, I really have all I need and
19 probably then some at my age.

20 Q. Well, how many acres do you farm?

21 A. I own 600 acres.

22 Q. 600 acres. Okay.

23 And this represents about 200 acres
24 of your farm, right?

1 A. Yes, and I think actually my son did
2 not take his five acres out of it. If you want the
3 record to be straight, it's 195.

4 Q. Okay. 195.

5 Now, on this 195 acres, as I
6 understand it, you have cattle on that?

7 A. No, I do not, sir. I do not have
8 cattle on it yet, no, I do not.

9 Q. Okay. Have you ever had cattle on
10 it?

11 A. No, I have not.

12 Q. Okay. You're familiar with the Bobby
13 and Andy Hesser property that was purchased from Max
14 and Dorothy Mercer, correct?

15 A. Yeah.

16 Q. Did Max and Dorothy Mercer offer that
17 piece of property to you to purchase?

18 A. No, sir.

19 Q. Did they make that offer to your son?

20 A. No, not to my knowledge.

21 Q. Okay.

22 A. Actually, that property that they
23 acquired, they...

24 Q. Let me just ask questions, okay?

1 A. Okay. Sorry.

2 Q. Now, referencing what I refer to as
3 the straightening stream project but you label it as
4 environmental -- what do you call that again?

5 A. I use the NRCS version, sir, and I
6 think that's appropriate. It's erosion control
7 project.

8 Q. Okay. Erosion control project.
9 If you would look at Complainant's
10 Exhibit 12 and look at Page 189, please.

11 A. Okay. That's the one we had out.
12 I'm there.

13 JUDGE MORAN: Yes, it's one of the
14 ones you marked, Mr. Hesel.

15 THE WITNESS: Yes.

16 Q. BY MR. SMALL: Okay. Now, looking --
17 do you have that in front of you?

18 A. Yes, I do.

19 Q. Okay. Looking at the green box
20 that's on that document, is that where your
21 environmental project is located?

22 A. Well, that's where the one you're
23 referring to right now is located, yes, sir.

24 Q. Okay. And do you see any trees

1 anywhere within that green box?

2 A. No, I don't.

3 Q. Now, I believe your testimony is,
4 still looking at that same document, 189, that there
5 is a strip that is a little wider, in looking at
6 this photo, it looks like it's a little wider than
7 the rest of the area that follows that Martin Branch
8 all the way down past the L and goes on after that,
9 and what is that?

10 A. That goes all the way down from that
11 green box, is that what you're referring to, sir,
12 that white strip?

13 Q. Right.

14 A. That is a filter strip.

15 Q. That's your filter strip.

16 A. Yes, sir.

17 Q. You put that in there?

18 A. Yes.

19 Q. And you put that in last year, is
20 that right?

21 A. I think it was a year ago last fall,
22 sir, so it's been in. That was seeded in the fall I
23 think, and I think that's been complete through one
24 summer, so it's actually been there I guess about a

1 year and a half.

2 Q. Okay. So that's fall of 2005, right?

3 A. I think that's correct on how long
4 it's been there.

5 Q. And your complaint that you filed was
6 September 1, 1999, is that correct?

7 A. No. The complaint was actually --
8 well, yeah, I called it in September 1st. I sent
9 the paperwork in the 13th.

10 Q. And it was dated on the first page of
11 your complaint as September 1, '99 but then dated
12 September 13 when you sent it back, is that correct?

13 A. That's her handwriting on the date
14 that I called the complaint in on the first page,
15 sir. That is my date when I put it on there and
16 sent it in.

17 Q. So somebody at the Corps of Engineers
18 helped fill out that form, is that correct?

19 A. She filled the top, those parts that
20 are in her handwriting.

21 Q. And just so that we're all
22 understanding this, this is Exhibit 8 and pages 42
23 through 45.

24 A. Okay. I'm at 42.

1 Q. Okay. Now, look at page 43, please,
2 of that exhibit, and although that page is not
3 signed by you, you say that's your handwriting,
4 right?

5 A. That's right, sir.

6 Q. And I just want to clarify.

7 You start out by saying, "I observed
8 the bulldozer and earth mover work."

9 Do you mean by that that you saw the
10 bulldozer and you saw what some kind of mechanical
11 device had done?

12 A. I drove by there at one time while
13 the machinery was still working once or twice.

14 I didn't stay there -- if you're
15 referring to me standing there and watching the
16 whole time, no, I did not.

17 Q. And you didn't know who was on the
18 bulldozer or anything like that, right?

19 A. No. There was a truck down there at
20 one time. I think that's where I got the name off
21 of.

22 Q. Okay. So when you make that
23 observation or when you put that down, you're not
24 necessarily saying I specifically saw any machinery

1 or anything doing anything. I was just driving by
2 and that's what I saw on the ground. I saw some
3 work and I saw a bulldozer there.

4 A. Well, we drove by slow. I guess
5 that's the proper way to do it.

6 Q. Okay.

7 A. We saw them working out there.

8 As far as what they were actually,
9 how much and what they were actually doing, I didn't
10 stay there and observe that whole thing.

11 Q. Okay. Now, I want to, I'm sorry but
12 I'm going to skip back again to your one exhibit
13 which is the environmental project that you
14 referenced that was with NRCS. That was part of
15 that exhibit that had the green box on it.

16 A. Okay.

17 Q. Do you have that in front of you?

18 A. Are you looking at Page 189?

19 Q. Yeah, I believe that's correct. I've
20 got to get to it.

21 A. I didn't put it back in the book so
22 it's...

23 Q. Okay. 189, you're correct.

24 Is it your testimony that to the

1 extent of your work involved in that project that
2 you seeded the sides of that creek area?

3 I think you indicated NRCS was in
4 charge of it. They did it all?

5 A. They oversaw it. They didn't do any
6 of it, but, yes, they actually paid for your time
7 seeding it and paid you for the mulch, a portion of
8 the mulch. It's actually a portion of your time, a
9 portion of the mulch, a portion of the seed. They
10 share the cost of the whole project.

11 Q. So you are actually paid what portion
12 of that project?

13 A. It's supposed to amount to 60
14 percent, and that would be pretty close.

15 Q. Okay. But as a practical matter, you
16 hired out the work to be done, correct?

17 A. I hired out the earth moving.

18 Q. And was that with Mark Ayet
19 Excavating?

20 A. Yes. Mark Ayet did it.

21 Q. And do you recall paying him on or
22 about August 5, 1997 the sum of \$1,540 for his work?

23 A. I would assume that since you have
24 the bill there, that's the figure, but I don't

1 recall the amount myself out of my head.

2 Q. Do you know whether that work
3 consisted of pushing out brush and trees?

4 A. There would be some tree removal in
5 that that was actually sediment buildup in the
6 middle of that thing where the water was running
7 down the edges.

8 Q. Right now I'm talking just about the
9 brush and the trees.

10 There were brush and trees that were
11 removed?

12 A. There was some.

13 Q. And that's the reason why when we
14 look at page 189 we don't see trees there, is that
15 right?

16 A. That would be correct.

17 Q. And with those brush and trees that
18 were removed, were they, to the best of your
19 knowledge, were they pushed against other trees that
20 were adjacent to the environmental project as you
21 call it?

22 A. They would be outside that project.

23 Q. Right. They would be outside that
24 project, but you didn't burn those trees?

1 A. No. They actually like for you to
2 leave those things piled up as wildlife cover.

3 Q. Okay. So you pushed them or had them
4 pushed to the trees nearby?

5 A. Right.

6 Q. Okay.

7 A. That's where NRCS said to put it.

8 Q. And there was a substantial amount of
9 dirt that was dug out of that stream at that time
10 too?

11 A. Yes. It was taken out of the middle
12 of where it used to be.

13 Q. And when they were doing this, there
14 were several large piles of dirt that accumulated
15 because of this removal, right?

16 A. I think they had more -- they were
17 put there at the time because there was more than
18 that they could put on the edges of it and still
19 keep the water flowing into it.

20 Q. So they took quite a bit out?

21 A. Yeah. I can't give you a figure on
22 the yards. I imagine the NRCS probably has a
23 yardage figure.

24 Q. Now, today, when was the last time

1 you were at that environmental project that we're
2 talking about?

3 A. I've been down there once this
4 spring, sometime back in January or February. I'm
5 not sure of the dates.

6 Q. Okay. All right. So you're talking
7 January/February 2007 now?

8 A. Yeah.

9 Q. Did you have an opportunity to view
10 the bottom of that stream on that visit?

11 A. Yes.

12 Q. And isn't it a fact that that stream
13 right now contains grooves in it?

14 A. No, sir. I don't see any grooves in
15 it from my observation. I didn't walk down the
16 whole thing.

17 It actually had between three and
18 five foot of sediment silt that it's collected and
19 trapped.

20 Q. And when there would be a big rain or
21 precipitation, some of that sediment would be pushed
22 downstream, correct?

23 A. No. The grass is growing up through
24 it. It's holding it.

1 Q. You have grass growing all the way
2 through, all the way through that stream?

3 A. All way through that sediment. It's
4 gradually accumulated and the grass keeps coming.

5 Q. So it's kind of blocked off is what
6 you're saying?

7 A. It's slowing water down, yes. It's
8 reduced I guess the water carrying capabilities of
9 it.

10 Q. How wide is that erosion or that
11 filter strip that is adjacent to the ditch that's on
12 your property?

13 A. Are you talking about on the edge of
14 this?

15 Q. Yes.

16 A. This quail habitat?

17 Q. Still referring to the area within
18 the box, green box.

19 A. Okay. I think, I'm not dead sure,
20 but I think the quail habitat strip is 30 feet.

21 Q. I'm sorry. I didn't hear you.

22 A. I think the quail habitat strip is
23 30 feet, but I am not absolutely sure.

24 Q. And when you say 30 feet, is that

1 15 feet on both sides?

2 A. No. That quail habitat strip is only
3 on the south edge.

4 Q. Just on the one side?

5 A. Yeah.

6 I had an opportunity to assign the
7 other side up, but they wouldn't take it on down by
8 the trees on down there past this piece, and
9 consequently it would have made a crook there in it,
10 and right now, that's been seeding into hay in that
11 field on the other side of it, so I didn't want to
12 have to put a jog in there to cut it.

13 Q. Did you, again, referring to this
14 area within the green box, your erosion control
15 strip I think you call it, did you hire an engineer
16 for that project?

17 A. You're talking about this erosion
18 control project?

19 Q. Yeah.

20 A. No. The soil conservation oversaw
21 that. That's not a requirement.

22 Q. You didn't personally do any kind of
23 engineering working. You're not an engineer.

24 A. No, sir, I'm not an engineer, and

1 they actually have to oversee it or they won't pay
2 it.

3 Q. Do you know if there was an engineer
4 involved in this?

5 A. No, I don't. I would suspect that
6 the --

7 Q. Well, I don't want you to speculate.

8 A. Okay. No, I don't know.

9 Q. Now, Mr. Hesper, I'm going to change
10 your focus down to the L on the Bobby and Andy Hesper
11 property.

12 A. Okay.

13 Q. There was some testimony by your son
14 earlier today that there were some cuts from your
15 property into the L for drainage.

16 MS. PELLEGRIN: Objection, Your
17 Honor. Mischaracterization. I believe Mr. Hesper
18 repeatedly testified that it was a natural
19 drainageway, and he took exception with Mr. Small's
20 use of the word cuts.

21 JUDGE MORAN: Try and restate the
22 question a little fairer, Mr. Small. You can ask
23 him specifically his description, if he's aware of
24 such things and how he describes it.

1 Q. BY MR. SMALL: Are you aware of two
2 waterways -- we'll characterize it like that for
3 right now -- that go from your property adjacent to
4 the L into the L proper?

5 A. I am aware of those, yes.

6 Q. Okay. And how would you characterize
7 those?

8 Let's take the one, first off, there
9 was testimony that there was one about a hundred
10 feet south of the north part of the L.

11 Can you characterize that waterway?

12 A. As best I can recollect, that is
13 where the water went out of the field into their
14 property previously.

15 Q. And when you say out of the field,
16 you mean out of your field?

17 A. Out of my field.

18 Q. So it's draining water from your
19 field into that L, correct?

20 A. It is now, yes.

21 Q. Okay. Now, let's go down to the
22 other waterway which there was testimony that it was
23 about a hundred feet north of the intersection of
24 the two legs of the L.

1 How would you characterize it?

2 A. That was a natural place the water
3 also went out.

4 Q. Natural place that what?

5 A. That was a Natural place that water
6 went out.

7 Q. Okay. And does it go from your
8 property into the L?

9 A. It does now.

10 Q. Okay. Now, when you say it does now,
11 does that mean that you've used some kind of
12 mechanical equipment to help it get through the L?

13 A. No, sir, I have never cut a drain out
14 through that.

15 Q. And you're saying that as to both of
16 those, you'd characterize them natural waterways, is
17 that correct?

18 A. The water cut a channel out there,
19 yes.

20 Q. Okay. Now, before the L was there,
21 where did it go?

22 A. It went over onto their ground.

23 JUDGE MORAN: I'm sorry. It went
24 over what?

1 THE WITNESS: I should get up to the
2 mike. Sorry, sir.

3 The water went out across their
4 ground. It probably didn't go out it at as fast a
5 rate as it did after it could fall right into that
6 L.

7 Q. BY MR. SMALL: So it went out at
8 different areas, is that correct?

9 A. No. It went out through those same
10 places.

11 Q. Well, I know that, but I mean after
12 it goes out onto the Andy and Bobby Hesel property,
13 it could just go wherever it wanted to, correct?

14 A. I assume that but, here again, I
15 don't know how the water flowed on their property.

16 Q. There was no natural channel. There
17 was no stream with four-foot tall banks, was there?

18 A. No, no.

19 Q. Okay. As to either of those
20 locations, correct?

21 A. No, no, there was no...

22 Q. Now, are you familiar with a natural
23 waterway on the east-west leg of the L that comes
24 from your property?

1 A. Natural waterway on the east-west...

2 Q. Yeah.

3 A. I'm not following you.

4 Q. Is there any other waterways other

5 than the two that we were talking about on the

6 north-south leg, was there any natural waterway from

7 your property to the Andy and Bobby Hesel property

8 on the east-west leg of that L?

9 A. Not that I can think of, sir.

10 On back up, there's places on my

11 property where that L drains into that area of the

12 Martin Branch that's on my property that's natural

13 water courses, but I've never cut any drains out

14 through there.

15 Q. Your property flooded before the L

16 was there, correct, on occasion?

17 A. On occasion.

18 Q. Upstream and downstream, correct, on

19 occasion?

20 A. Yeah, on occasion; I'll buy that.

21 (Pause)

22 JUDGE MORAN: Are you ready to

23 resume?

24 MR. SMALL: Yes, Your Honor.

1 Just a few more questions, Mr. Heser.

2 Q. I think your son Daniel testified
3 that as to these two natural water courses that went
4 from your property into the L that he, in fact, had
5 cleaned them out in the past.

6 To the best of your knowledge, has
7 any other person cleaned out those waterways from
8 your property into the L?

9 A. No, sir, not to my knowledge. If
10 Danny did it, it was while he owned it, and he was
11 taking care of his stuff then, and I wouldn't have
12 any knowledge of what he did then other than what he
13 has testified.

14 MR. SMALL: Thank you.

15 JUDGE MORAN: Okay. Redirect?

16 REDIRECT EXAMINATION

17 BY MS. PELLEGRIN:

18 Q. Mr. Heser, Mr. Small asked you a
19 question about the Max and Dorothy Mercer property.
20 I think he asked if it was offered to you or offered
21 to Danny, and I think you wanted to say something
22 more about it, so I would like to know, do you have
23 anything to add to that?

24 A. Well, the property that they owned

1 was originally part of the property that I owned.
2 It was the old Hawkins place, and it consisted of
3 160 acres.

4 When my brother and I bought part of
5 that, Max and Dorothy bought the other part. They
6 actually engineered the purchase with Oscar Hawkins'
7 widow, Nona Hawkins, and they took that 60, and we
8 took the hundred.

9 And then while Danny had -- Danny and
10 his first wife wanted to buy that from me, wanted to
11 try to farm. That was a mistake I made, but that's
12 besides the point, but they added on that second 80
13 acres to the east of it, and that's how that became
14 180 acres.

15 Then there was 20 acres from my
16 mother's estate that went on out to Route 37. That
17 became 200 when Danny gave up the farm after his
18 marital difficulties. He kept five acres there with
19 the house, and that's how the actual acreage is 195.

20 I never had a chance to buy that
21 other. I don't think I would have took it if I did
22 have a chance.

23 One of the, I don't know if the
24 correct terminology is defendants or what, but Bobby

1 called me twice to try to buy my property.

2 Q. Okay. And let me ask just a few more
3 questions about the -- let me use the right term
4 here -- the erosion control project that you
5 performed under the guidance of NRCS or that you had
6 performed under the guidance of NRCS which is the
7 quail habitat and filter strip area.

8 Were there specific NRCS guidelines
9 that you had to follow in implementing this project?

10 A. Yeah. They want you to put down a
11 certain kind of fertilizer there for a starter.
12 They give you an option on some different grass seed
13 mixes, but you have to follow one of them, and you
14 have to put some clover in it too, and you have to
15 use some kind of a cover crop out there at a low
16 rate, some kind of a small grain which would be rye,
17 wheat or oats to protect that grass till it comes up
18 and provide cover, erosion control, and usually the
19 clover is frost seeded the next spring after the
20 grass is seeded in the fall.

21 You seed grasses in the fall and
22 clovers are usually frost seeded in the spring.
23 Sometimes what's frozen right after the freeze goes
24 out, the ground is still loose, and clover will go

1 in by itself.

2 Q. And did you, to your knowledge,
3 follow all the guidelines at NRCS?

4 A. Absolutely.

5 Q. And did NRCS agree with you either
6 formally or informally that you had followed all of
7 its guidelines in completing this project?

8 A. Yeah. They come out and check all
9 the projects.

10 Q. Mr. Small asked you a question about,
11 something about why there were no trees out there.

12 Did any of those guidelines at NRCS
13 require that you put trees in that area?

14 A. No, and they actually approved
15 whatever trees were moved up in that part of it
16 whenever the erosion control project was done
17 because they had to okay that because it wouldn't
18 have been touched without their okay.

19 MS. PELLEGRIN: I have no further
20 questions.

21 JUDGE MORAN: Okay. Anything
22 further?

23 MR. SMALL: No, nothing, Your Honor.

24 JUDGE MORAN: All right. You're

1 done. Thank you.

2 (Witness excused.)

3 JUDGE MORAN: All right. We'll take
4 a five-minute break.

5 (Recess taken.)

6 JUDGE MORAN: Just a housekeeping
7 matter.

8 I have during the break determined
9 that the courtroom is available on May 1st, so if
10 counsel from each side would come up here, I'm going
11 to issue what's described as a notice of
12 continuation of hearing announcing that it will be
13 in this same courtroom starting on May 1st, which is
14 a Tuesday, of course, and continuing through the
15 4th. So here's your notice right now.

16 All right. Now we're ready to
17 continue with the next witness. It's going to be
18 Mr. Carlson I understand.

19 MR. MARTIN: Yes, Your Honor.

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

22 MR. MARTIN: Good afternoon,
23 Mr. Carlson.

24 MR. CARLSON: Good afternoon.

1 GREGORY CARLSON
2 called as a witness herein, having been previously
3 sworn on his oath, was examined and testified as
4 follows:

5 DIRECT EXAMINATION

6 BY MR. MARTIN:

7 Q. Let's start off by talking about your
8 educational background.

9 Where did you go to undergraduate
10 school?

11 A. The University of Wisconsin at
12 Stevens Point.

13 Q. And when did you graduate?

14 A. I graduated in 1982.

15 Q. What degree did you receive?

16 A. Bachelor of Science degree.

17 Q. What was your major?

18 A. I had three majors. The first was
19 resource management, the second was political
20 science, and the third was public administration and
21 policy analysis.

22 Q. Describe the environmental course
23 work that you had.

24 A. With regard to resource management,

1 the resources you're referring to include courses in
2 forestry, soils, water, resource economics,
3 wildlife, and you have basic courses in ecology,
4 geology, biology, chemistry.

5 I also had courses in economics and
6 calculus, a course in, since the soil surveys has
7 been an issue in this hearing, I had a specific
8 course called soil interpretation for land use
9 planning that was a two-credit course for a full
10 semester just on that manual.

11 One other thing, Mr. Martin. I'm
12 sorry.

13 With regard to the resource courses,
14 we also then did field instrumentation for each of
15 those disciplines in water like we did lake mapping,
16 stream mapping, benthic surveys, which is towards
17 the bottom of the stream, surveying for forestry,
18 using aerial photography, locate yourself in the
19 field doing compass and pace, measuring tree
20 heights, slopes.

21 Q. Mr. Carlson, what does the term
22 benthic refer to?

23 A. I mentioned that benthic refers to
24 the organisms that live in the bottom of a stream

1 channel or in the bottom sediments of the lake.

2 Q. Did you attend graduate school?

3 A. I did.

4 Q. Where?

5 A. At Indiana University in Bloomington,
6 Indiana.

7 Q. When did you graduate from Indiana
8 University?

9 A. In 1986.

10 Q. What type of degree did you receive
11 from IU?

12 A. Called a master of public affairs.

13 Q. And what types of environmental
14 courses did you take at IU?

15 A. Environmental law with the law school
16 there. There was an environmental analysis
17 workshop, and there was a course in the National
18 Environmental Policy Act.

19 Q. Have you taken any postgraduate
20 courses?

21 A. I have.

22 Q. Where?

23 A. In universities that surround the
24 Chicagoland area.

1 Q. Please describe the postgraduate
2 courses you have taken.

3 A. In 1990, shortly after I got hired
4 into the wetlands program, I took a course in
5 wetland communities at Northern Illinois University,
6 a semester long course, three credit hours.

7 Subsequent to that, I took a course
8 in plant taxonomy through Aurora University. I
9 believe that was in 1993, and I took a summer course
10 in field methods and hydrogeology through
11 Northeastern Illinois University.

12 Q. And what does plant taxonomy refer
13 to?

14 A. It's a classification system on how
15 all plants are ordered. It's a classification
16 system for plants.

17 Q. When did you take those courses?

18 A. I mentioned I took the wetland
19 community course in 1990. I mentioned that I took
20 the field methods in the summer of 1994, and I
21 believe the plant taxonomy was 1993.

22 Q. What formal training programs have
23 you had at EPA while in the wetlands protection
24 program?

1 A. I have had many courses in plant
2 identification and particularly hydrophytic or
3 wetland vegetation, hydric soils, identifying hydric
4 soils, advanced courses in identification of hydric
5 soils, course in hydrology tools, courses in risk
6 assessment.

7 Actually, I recalled a course as I
8 was doing this. I want to supplement my previous
9 answer on my course work in college. I forgot about
10 the air photo interpretation class. I have had air
11 photo interpretation training, a number of courses
12 with EPA through the course of my wetlands career.

13 Oh, a course in, it's called wetland
14 functional assessment. It's called hydrogeomorphic
15 assessment of wetlands.

16 Q. What did that entail?

17 A. Well, hydrogeomorphic, you break that
18 down into three terms. The hydro refers to water,
19 the geo refers to the landscape, and morphic is just
20 where on the landscape you're at.

21 So we often refer to it as the
22 hydrogeomorphology of a site as a landscape
23 position, where in the landscape are you likely to
24 find wetlands, and this method just, you evaluate

1 the functional values of the wetlands through the
2 soils of the water in the plants.

3 Q. Are you finished with your answer on
4 training?

5 A. That's all I can remember right now.

6 Q. Okay. Well, you mentioned air photo
7 interpretation. I was wondering what training that
8 entailed.

9 A. I mentioned we had a three-credit
10 semester course in college on air photo
11 interpretation specifically, and that included the
12 field instrumentation actually used in the field.

13 At EPA, I've had two week-long
14 courses, one in Louisiana with the National
15 Biological Survey on air photo interpretation
16 specific to wetlands; involved classroom work and
17 field trooping wetlands in the field.

18 Had a similar course about three
19 years ago out in eastern Pennsylvania put on by the
20 U.S. Army Corps of Engineers and EPA's national
21 aerial photography expert by the name of Pete
22 Stokeley. That was a full week course similarly
23 geared towards identifying wetlands via air photo
24 interpretation.

1 And I've also had in-house courses on
2 air photo interpretation, not necessarily specific
3 to wetlands - - --

4 Q. You mentioned field instrumentation
5 in your answer regarding aerial photography.

6 What type of field instruments are
7 you referring to?

8 A. -- stereoscopes is the main tool that
9 I use. Stereoscopes allow you to see land in three
10 dimensions, so instead of just looking at a flat
11 piece of paper in two dimensions, you can use a
12 stereoscope with the proper aerial photography and
13 you can see three dimensions.

14 You use dot grids to measure acreage.
15 You use planimeters to measure acreage. You use
16 rulers. The stereoscope, there are different kind
17 of stereoscopes. There are pocket stereoscopes and
18 what I used in this particular case called a mirror
19 stereoscope.

20 Q. And how is that used, a mirror
21 stereoscope?

22 A. That was used to view the site in
23 three dimensions.

24 Q. And how is that physically done?

1 A. You have to have aerial photography
2 that is rectified. All that means is that when
3 you're up in a plane and you're taking these
4 photographs, you know, this is called remote
5 sensing. It's a bigger picture. You're sensing the
6 earth from a remote location; in this case, aerial
7 photography. They do it with satellites, very
8 common.

9 In any case, a rectified photograph
10 is just something that you can measure off of it and
11 have confidence in the precision of your
12 measurements. Essentially, the earth's surface is
13 not flat, and airplanes don't always stay level, so
14 you correct for tilt of the airplane wings. You
15 correct for the curvature of the earth, and that
16 photography is what you use.

17 And then you have to have overlapping
18 photography. In other words, imagine a plane just
19 flying across the sky and it's called a flight line.
20 It's its path. It's taking photographs as it goes.
21 They overlap each other.

22 It's with that overlap of the
23 photographs, two consecutive photographs that
24 overlap about, I think it's about two-thirds is the

1 general, with that overlap, you basically have a
2 picture from, you know, if you're in the plane, you
3 have a picture from one angle, and then you have a
4 picture from the other angle, so that is what gives
5 you the stereoscopic, the ability to use a
6 stereoscope and to see relief on an otherwise plane
7 drawing.

8 Q. You also mentioned a planimeter.
9 What is a planimeter?

10 A. There are digital ones and there are
11 manual ones. I actually like to use the manual
12 ones. They're older. It's calibrated for acreage,
13 so when you measure, you know, it's a piece of
14 steel. It's got a calibration arm to it, and you
15 use that to measure along a boundary, so you are
16 moving a mechanical arm across a drawing, and
17 through the calibration wheel, that's keeping track
18 of area, and then you do a bit of calculation to get
19 it into acres.

20 And the main data you need is what
21 the reading of the calibration wheel is, and you
22 need to know the scale of your photograph.

23 Q. So the purpose of that instrument is
24 what?

1 A. To characterize an area in terms of
2 its size.

3 Q. And you also mentioned a dot grid.
4 What is a dot grid?

5 A. It's an alternative form of measuring
6 space. It's based upon on -- it's an 8-1/2 by 11
7 sheet of paper. It's usually transparent, and it
8 has a big square on it, and within that square is
9 rows and columns of dots.

10 Those dots can be associated with a
11 particular scale of an aerial photograph, be it one
12 inch equals 400 to one inch equals 800, and they
13 have calculated on that sheet what each dot
14 represents in terms of acreage.

15 You overlay that dot grid onto your
16 photograph, and within the area you're measuring,
17 you count the dots, and then those dots times the
18 conversion factor gives you size.

19 Q. Have you used all those instruments
20 and methods in your job at EPA as a wetlands
21 delineator?

22 A. Yes, I have.

23 Q. Have you taught or lectured on topics
24 relating to skills used in your position at EPA?

1 A. I have.

2 Q. Could you tell us what type of
3 courses or lectures you've given?

4 A. I generally would lecture on the
5 things I know about, and the two main topics are the
6 general 404 regulatory program. Those are similar
7 to the lectures that Ward Lenz testified to. You
8 give them to developers, public officials at the
9 local and state level, college classes.

10 I've given that type of course as
11 part of the continuing legal education credit for
12 attorneys up in Milwaukee a couple years ago.

13 And the second part is specific to
14 wetland delineation. I'm one of the instructors,
15 and instruction is in a team. It's usually
16 interagency, and we go out on a regional basis,
17 that's within the Midwest, and we train largely USDA
18 NRCS audiences, but the audiences also include state
19 personnel involved in the environmental programs,
20 particularly wetlands because it's a course on
21 wetlands delineation.

22 I teach, generally I teach the
23 hydrophytic vegetation section, and I teach the
24 methodology sections of the manual. Other people

1 cover hydrology. Other people cover soils.

2 Classroom field, and I just mentioned
3 I do it on a regional basis. I've done it in
4 Indiana, Illinois, Minnesota.

5 Q. Okay. Mr. Carlson, let's turn to
6 your employment history.

7 Where do you currently work?

8 A. I work in the U.S. Environmental
9 Protection Agency's regional office in Chicago,
10 Illinois, and I work within the water division, and
11 within the water division, I'm in the watershed and
12 wetlands branch.

13 Q. And what is your current position,
14 title?

15 A. I'm a life science enforcement
16 officer.

17 Q. How long have you been a life science
18 enforcement officer for the USEPA?

19 A. I've been an enforcement officer
20 since May of 1990 when I joined the program.

21 About three, four years ago I had my
22 position modified so that I was qualified as a life
23 scientist.

24 Prior to that, I was considered

1 environmental protection specialist.

2 Q. And what do you do as a life science
3 enforcement officer?

4 A. 80 percent of the work is enforcement
5 related. Enforcement entails a lot of different
6 things.

7 I mentioned yesterday that generally
8 I'm reacting to some particular project where we
9 have received, and this is generally how it works,
10 we received case referrals largely from the Corps of
11 Engineers. We can also get them from the state and
12 occasionally we generate them ourselves.

13 So I review particular cases, collect
14 evidence, determine if there is, you know, using the
15 legal phrases, there was a discharge of a pollutant
16 from a point source into a water of the United
17 States by persons without a permit.

18 So I'm collecting evidence through
19 the record and on my own to determine if there is
20 legal justification or a legal sufficiency standard
21 that, yes, we have met those, we have answered those
22 questions affirmatively, and I do that through
23 in-house review, interviewing people, going to sites
24 through site inspections, and all that comes to a

1 recommendation to my management on whether or not we
2 should enforce, and then I carry through cases to
3 their conclusion.

4 That's the major enforcement part
5 although another part of that is calculating civil
6 penalties; for instance, in this case, I do it for
7 civil referrals. Enforcement can be both formal and
8 informal.

9 Fifteen percent of my time is special
10 projects as I mentioned yesterday. Some of the
11 bigger ones, I had developed guidance on the farm,
12 excuse me, the forest road exemption under Section
13 404(f)(1).

14 I've also put together guidance on
15 another 404(f)(1) exemption, the maintenance of
16 drainage ditches.

17 I've participated in, done a lot of
18 the field work in some of our advanced
19 identification of wetlands projects. That's a
20 program that's in our regulations. It's similar to
21 a corps program called special area management
22 plans, and all it refers to, it refers to a specific
23 geographical area, and within that area, the agency,
24 we're the lead but we usually work with some partner

1 locally, you try to give the people within that area
2 an idea from a planning perspective, these are all
3 our highest quality wetlands, and you should know
4 that it would be tough to get a permit in these high
5 quality areas.

6 And then it generally has another
7 category that aren't so high quality, and whether or
8 not you split that further depends on the project,
9 but I do a lot of the wetland assessments to make
10 that determination of whether that's a high quality
11 wetland or not; done that on a couple of occasions.

12 The other special project was the
13 memorandum of agreement that you've heard about with
14 the agriculture department. This was after the
15 Clinton administration came in, and it was a
16 memorandum between the Department of Agriculture,
17 the USEPA, Fish and Wildlife Service at the federal
18 level, and, of course, the Corps of Engineers, and
19 it was just an effort, and this involved looking at
20 these crop slides, these annual crop slides that
21 have been entered in the record previously, on
22 whether or not the ag folks can use those to
23 delineate wetlands in agricultural landscapes.

24 So they came up with what they called

1 mapping conventions, and then we field tested those
2 mapping conventions. We made mapping convention
3 calls in the office based on those crop slides on ag
4 lands, not forested lands, not natural lands,
5 agricultural lands.

6 Then we went out into the field and
7 field checked those to see, you know, how valid and
8 reliable that kind of call was, and ultimately, the
9 call was you can't make those calls in ag lands from
10 crop sites. Get out in the field and do it.

11 And subsequently, the USDA Department
12 of Agriculture issued guidance in 1995 that
13 eliminated those cropping conventions.

14 I've been involved in projects on
15 evaluating the success of wetland mitigation, doing
16 a lot of the field work regarding evaluating the
17 restoration or mitigation.

18 Well, the success of wetland
19 mitigation, and wetland mitigation can be a number
20 of things -- restoring wetlands that were previously
21 drained. It can be making a wetland out of an
22 upland. It can be just taking a degraded wetland
23 and making it better. Those are all forms of
24 mitigation.

1 Q. You mentioned part of your job
2 involved site inspections.

3 Can you take us through a typical
4 site inspection process?

5 A. Before you went into the field, you'd
6 do what you could in-house to determine or to try
7 and characterize a particular piece of ground,
8 whatever the project area was.

9 Major reference materials used are
10 U.S.G.S. topographical maps that we've seen here.
11 The soil surveys are critical. They have a lot of
12 information in them. National Wetland Inventory
13 Maps are used. Aerial photography is used. You can
14 either purchase it or nowadays a lot more is
15 available digitally so it's a bit easier to get to
16 these days.

17 You'd make calls. You'd talk to the
18 person who made the referral and ask them, you know,
19 interview them about what happened.

20 You might call other people in the
21 local area, arrange visits like to the ag office in
22 Salem, so you'd do all the in-house stuff and become
23 familiar with the site so once you get out on the
24 site, you have some idea of what you're looking at

1 so you can more reasonably and accurately analyze
2 things.

3 Then you arrange to get out into the
4 site, and once you're out into the site, you're
5 looking to determine whether or not there's been
6 a... Generally, getting out on the site, you're
7 checking for discharges of dredged or fill material,
8 which is what we're regulating, and whether or not
9 those discharges were conducted within a water of
10 the United States, and that's where wetland
11 delineation comes in or delineating of the
12 jurisdiction of a stream.

13 Collect data in the field, go back,
14 analyze it, write it up, you know, assuming that
15 that's done, that that might be a complete
16 investigation, and then you make a recommendation to
17 management about where you want to go from there.

18 Q. During the time in your current
19 position, how many site inspections have you
20 conducted?

21 A. I recently estimated in a declaration
22 I made for this case 475, and that's a rough number.

23 Q. What percentage of time do you spend
24 in the field?

1 A. I'm going to say about 15 percent.

2 Q. How many administrative orders
3 involving Section 404 have you issued?

4 A. You're referring to Section 309(a)
5 only?

6 Q. Section 309(a) we'll start out with.

7 A. Those administrative compliance -- of
8 course, I don't issue them. I make a
9 recommendation, and the administrator has it
10 delegated down to our water division director who
11 issues those orders.

12 I've been involved in about 49. I
13 made up a score card recently, and I'm at 49 that I
14 can remember.

15 Q. Okay. And how many orders have you
16 helped prepare for EPA issuance under Section
17 309(g)?

18 A. Administratively penalty orders,
19 penalty assessments under 309(g), 43.

20 Q. Let's turn to your involvement in EPA
21 court proceedings.

22 Have you ever testified as a witness
23 for EPA in a court proceeding?

24 A. I have.

1 Q. Describe the subject matter of your
2 testimony generally.

3 A. It's going to be just like it is
4 today and tomorrow and however long I last. I
5 generally am the case officer, do the investigation,
6 make the recommendation to management, calculate the
7 civil penalty, get it approved through the lawyers
8 and management, manage the case to conclusion.

9 So in the testimony, I'm testifying
10 on how I did that; penalty, the water of the United
11 States that was impacted, its functional value. All
12 the statutory factors involved under Section 309(g)
13 are gone over, the nature, circumstances, extent and
14 gravity of violation, the prior history of the
15 violator, economic benefits, the culpability, the
16 degree of culpability of the alleged violators.
17 I've testified in expert wetland delineation and
18 wetland restoration.

19 Q. In any of these matters, were you
20 used as an expert?

21 A. I just mentioned in a couple judicial
22 cases I have filed expert reports on wetland
23 delineation and wetland restoration.

24 Q. And generally, what was the outcome

1 of those cases?

2 A. Well, there's only two, and the first
3 one is up in the Western District of Wisconsin.
4 That was in 2003.

5 MR. SMALL: Your Honor, I really
6 don't know how this is relevant to our case.

7 JUDGE MORAN: Yeah. What's the
8 relevance of the outcome? Unless you're asking
9 whether he was disqualified as an expert or
10 something, what do I care about the outcome? He's a
11 better witness if they adopted his point of view? I
12 don't know. I sustain the objection.

13 MR. MARTIN: Okay.

14 Q. Let's move on to wetlands
15 identification issues.

16 Would you briefly explain the three
17 characteristics of wetlands?

18 A. Well, wetlands are driven by
19 hydrology. In other words, water is the dominant
20 influence, and wetlands are identified and
21 characterized in the field according to three
22 parameters, and that is the prevalence of
23 hydrophytic vegetation, in other words, plants that
24 are adapted to living in inundated or saturated soil

1 conditions, that develop hydric soils, soils that
2 develop where saturation is there long enough in the
3 upper part where anaerobic conditions are produced
4 for main hydric soils, and water does all of that,
5 and the key on the water is how often and how long.

6 Q. What is an anaerobic condition?

7 A. Anaerobic, contrast that with
8 aerobic. Aerobic is with oxygen. Anaerobic is
9 without oxygen. The oxygen is used up in the soil
10 by microorganisms.

11 Q. What publication does EPA use in
12 delineating wetlands under Section 404 of the Clean
13 Water Act?

14 A. The 1987, U.S. Army Corps of
15 Engineers Wetlands Delineation Manual.

16 Q. How long have you used the 1987
17 manual?

18 A. Since 1991.

19 Q. Do other governmental agencies use
20 this manual?

21 A. Yes. It's the manual that the Corps
22 of Engineers uses, the Fish and Wildlife Service
23 uses, and the U.S. Department of Agriculture uses on
24 nonagricultural lands, and it's also used by some of

1 our regional or Midwestern states.

2 Q. In general, what does a manual
3 require to identify or delineate wetlands?

4 A. It requires positive confirmation of
5 each of the three parameters -- plants, wetland
6 soil, and wetland hydrology.

7 Q. What does the phrase positive
8 confirmation refer to?

9 A. It refers to finding evidence that
10 there are wetland plants, that there are hydric
11 soils, that there is wetland hydrology.

12 Q. Approximately how many delineations
13 have you conducted under the 1987 manual?

14 A. I will give you a rough estimate of
15 about 150.

16 Q. Is there such a thing as a wetland
17 determination?

18 A. Yes.

19 Q. Is that different from a wetlands
20 delineation?

21 A. Yes, it is.

22 Q. How many wetlands determinations have
23 you conducted for EPA?

24 A. Probably twice the number of wetland

1 delineations.

2 Q. And what is the difference between
3 the two?

4 A. A delineation, you're drawing a line
5 in the sand so to speak. You're putting a boundary
6 on an area.

7 A wetland determination is simply you
8 go to a site and say after analyzing for soils,
9 water, and plants that, yeah, there's a wetland
10 here. I'm not telling you the boundaries, but,
11 yeah, there's a wetland on this property.

12 JUDGE MORAN: Which one is that now?

13 THE WITNESS: That's a wetland
14 determination, and they're just much more frequent
15 because we don't necessarily do all the wetland
16 delineations.

17 In a situation like that, you're
18 saying, yeah, there's a wetland here. Best get a
19 consultant to get it delineated. Well, then we'll
20 review the delineation. That's how it often
21 happens.

22 JUDGE MORAN: So the delineation is
23 much more specific, right?

24 THE WITNESS: Correct.

1 Q. BY MR. MARTIN: And the delineation
2 also draws the boundary of the wetland/non-wetland
3 area?

4 A. That's correct.

5 Q. What types of delineation methods are
6 set forth in the 1987 manual?

7 A. The manual has sections on
8 methodologies for routine assessments, comprehensive
9 assessments, atypical assessments, and problem area
10 assessments.

11 Q. Now, can you give us a brief
12 definition of each?

13 A. Routine is the easiest, and it's
14 generally when the site is small and fairly simple,
15 and by simple, I mean there's not a lot of diversity
16 to it either in the landscape or the plants.

17 Comprehensive is generally a method
18 used when you know you're going to be in court, and
19 there's much more quantification. You go through --
20 you spend more time in the field.

21 Atypical assessments are what I do
22 mostly because I'm in enforcement, and when we get
23 to sites, there's generally some disturbance, so I'm
24 almost always there.

1 And then problem areas are for areas
2 that it's just difficult to figure out if you've got
3 wetlands, and we had that situation here in that I
4 would call these seasonal wetlands, and seasonal
5 wetlands are one of the wetlands that are problems.
6 It's a problem because it's seasonal. You could be
7 there at certain times and there's no water at all.

8 And so if you got there in such a
9 time as we did here, you have to rely on other
10 indicators that would tell you that, well, water was
11 here at one time. It might not be here now.

12 So that's the problem areas.

13 Q. So, Mr. Carlson, in your 16 years at
14 EPA applying the 1987 manual, have you applied all
15 four of these methods?

16 A. Yes.

17 Q. How many atypical situation method
18 delineations have you conducted?

19 A. You know, I don't keep track of
20 numbers that closely.

21 Any enforcement case that I've
22 issued, and we mentioned 49 AOs and 43 penalty
23 orders, and we didn't mention the nine referrals but
24 I'll take credit for those, each of those is

1 atypical, and I'm drawing a line, so, you know,
2 there's some double counting in there but mostly
3 atypical.

4 Q. When does one use the atypical
5 situation method in the manual?

6 A. When any or all, some combination of
7 one of the three parameters has been disturbed to
8 such a degree that it makes it difficult to
9 determine whether that parameter was there at the
10 site.

11 Q. Can you give us a common example of
12 an atypical situation?

13 JUDGE MORAN: Of a what?

14 MR. MARTIN: An atypical situation.
15 I'm asking him if he can give a common sample.

16 Q. Mr. Carlson, I'm asking you for a
17 common example of an atypical situation.

18 A. Well, why don't we take the site at
19 issue. You get there and it's a bean field, so you
20 don't see the natural vegetation is gone, but
21 apparently, the stream that used to bisect the site
22 is now looking like a drainage ditch over on the
23 edges, so there's likely some hydrological
24 disturbance there, and when we dig holes, we find

1 evidence of soil disturbance, so, you know, some of
2 the soil profiles are mixed up, so this particular
3 case has all three parameters disturbed.

4 Q. Okay. Thank you.

5 Could you turn to Complainant's
6 Exhibit 11, Bates numbers 180 and 181?

7 A. Okay.

8 Q. Do you recognize this document?

9 A. I do.

10 Q. What is it?

11 A. This is my resume.

12 Q. Who prepared this resume?

13 A. Did I.

14 Q. Is it a true, accurate, and complete
15 copy of your resume?

16 A. Yes.

17 Q. How accurately does this exhibit
18 describe your educational background?

19 A. It accurately describes my Bachelor's
20 and my Master's and continuing education.

21 Q. How accurately does it describe your
22 work experience?

23 A. It's right on point on my work
24 experience.

1 MR. MARTIN: Your Honor, I'd like at
2 this time to move to include Complainant's
3 Exhibit 11, Bates numbers 180 and 181, for inclusion
4 in the record.

5 MR. NORTHRUP: No objection.

6 MR. MARTIN: I'd also at this time
7 like to qualify Mr. Carlson as an expert in wetlands
8 delineation and wetlands values for the purposes of
9 this hearing.

10 JUDGE MORAN: Okay. One thing at a
11 time.

12 There's no objection to EPA
13 Exhibit 11 as to CX 180 and 181 so it will be
14 admitted.

15 (Whereupon Complainant's Exhibit
16 11 (Bates 180 & 181) were
17 admitted into evidence at this
18 time.)

19 JUDGE MORAN: The second issue is
20 qualification as an expert for testifying in this
21 proceeding.

22 Any objection?

23 MR. NORTHRUP: No objection.

24 JUDGE MORAN: Okay. There being no

1 objection, Mr. Carlson is designated as an expert.

2 MR. MARTIN: Thank you.

3 Q. Mr. Carlson, let's go back to the
4 three parameters of a wetland that you mentioned
5 earlier.

6 Starting with hydrophytic vegetation,
7 what is hydrophytic vegetation?

8 A. It's vegetation that has adapted
9 itself and can survive and sustain itself in wet
10 environments.

11 Q. Are plants classified as hydrophytic
12 and non-hydrophytic in the manual?

13 A. They are.

14 Q. And how are they so classified?

15 A. This is the plant indicator status
16 that's applied to wetland plants, and that's along a
17 probability continuum. The categories are obligate
18 wetland plants, facultative wet wetland plants, and
19 then there's facultative plants, and then there's
20 facultative upland plants, and there's upland
21 plants. That's all on a continuum from dry to wet;
22 dry upland, wet obligate. Wet is an obligate.

23 I could put it on a --

24 MR. MARTIN: If it would help

1 demonstrate what you're talking about, if I have
2 permission of the Court, we'd like to approach the
3 easel and make a diagram.

4 JUDGE MORAN: Sure. Why don't we go
5 off the record while we take a moment to do that.

6 (Off the record.)

7 JUDGE MORAN: Okay. We're back on
8 the record.

9 If you want this introduced as a
10 demonstrative exhibit, I don't know if you do, we'll
11 have to mark it whatever your next number is.

12 MR. MARTIN: Yes, Your Honor. We
13 would like to enter it in the record as
14 Demonstrative Exhibit E.

15 JUDGE MORAN: Okay. I'll get someone
16 to mark this. Mr. Carlson can do it or whatever.
17 He's going to talk about this now, and then at some
18 point we'll do that.

19 Go ahead.

20 MR. MARTIN: Okay. Let the record
21 show that Mr. Carlson has drawn what appears to be a
22 scale with a title probability scale above it.

23 Q. Mr. Carlson, can you explain what
24 you've just drawn on demonstrative Exhibit E?

1 A. Okay. This relates to applying a
2 particular indicator to a particular plant species.
3 Let's take one example. A cattail. Everybody is
4 familiar with cattails. Cattails are an obligate
5 wetland plant. That means when you see a cattail,
6 the probability that that's in a wetland is 99
7 percent or greater. That's the obligate category.

8 Okay. Let's take another plant,
9 American elm. It's a tree. That is a facultative
10 wetland plant. That means any time you see an
11 American elm, the probability that you are in a
12 wetland is greater than 65, up to 99 percent.
13 That's the facultative wetland category.

14 Facultative plants can go both ways.
15 A facultative plant is like poison ivy. That's
16 actually called fact plus, and I'll get to the
17 pluses and minuses, but it's a facultative plant.
18 That means that the probability of finding it in a
19 wetland, or if you saw poison ivy, the probability
20 you were in a wetland is from 34 to 67 percent. So
21 that means there is less than 50 percent chance on
22 certain facultative plants that they're not in a
23 wetland.

24 Poison ivy happens to be FAC plus.

1 All plus means is plus goes to the wetter side. So
2 poison ivy is FAC plus, so it's in the 50 to 67
3 percent category, and you can have FAC plus and
4 minuses to facultative wetland plants also, but this
5 just gives you an idea in the middle category
6 because FACs can go both ways.

7 The other FACs, they can go FAC
8 minus. Those are not considered hydrophytes, and
9 they span the short side of 50 percent. From 34
10 percent to 50 percent of the time, that would be the
11 probability that a FAC minus plant is in a wetland;
12 in other words, less than 50 percent chance.

13 Facultative upland plant, I think
14 Ward had one down, a white ash, facultative up. So
15 you look at that facultative upland plant, that
16 white ash, and you say to yourself, the chance that
17 that's in a wetland is from 34 percent down to 1
18 percent, so likely not in a wetland chances are.

19 An upland plant, oh, what's an upland
20 plant. I'd say like black oak. I'm actually not
21 sure that black oak is an upland plant but it's
22 definitely not a wetland plant, so let's just assume
23 for the purposes of demonstration that it is. If I
24 saw a black oak, the probability of that being in a

1 wetland is less than one percent.

2 So those indicators are applied per
3 plant species. FAC up can have plus and minus to
4 it. FAC can have a minus and a plus to it. FAC wet
5 can have a minus and a plus to it.

6 Just think of the plus going to the
7 wetter side or to the drier side, depending on the
8 indicator.

9 JUDGE MORAN: It would better,
10 Mr. Martin, I would suggest, if you have this
11 witness back up a bit. I mean, he's done this now,
12 but have him explain, ask him specific questions
13 what he has drawn and what the words are under the
14 table. Like by one percent, there are three letters
15 that are written. I can't see what that is, and
16 then by 99 percent, there are three letters that are
17 written. I can't read what that is.

18 It would just be clearer if you had
19 first set the stage before you went into this, but
20 now back up and do that.

21 MR. MARTIN: Yes, Your Honor.

22 Q. Can you explain what you've titled
23 this diagram?

24 A. I've entitled the diagram "A

1 Probability Scale."

2 Q. Could you describe what you've
3 written on Exhibit E?

4 A. The scale goes from zero percent to a
5 hundred percent. The percentages are probabilities
6 of finding of any particular plant species in a
7 wetland, so it's the probability of finding the
8 plant in a wetland.

9 I've divided the scale into segments.
10 On the dry end of the scale...

11 Q. Now, you're referring to the left
12 side of the scale that you've drawn?

13 A. The dry end of the scale is at the
14 left-hand side beginning at zero.

15 Below one percent is a designation
16 UPL which is shorthand for upland. If black oak is
17 an upland plant and you see it in an area, the
18 chances that you are in a wetland are one percent or
19 less.

20 The next category are facultative
21 upland plants. That's abbreviated on this scale as
22 FACU for facultative upland plant. White ash is an
23 upland plant. If you saw that white ash, the
24 chances you are in a wetland are between 1 and 34

1 percent of the time. The FAC up also has a plus to
2 the left of the F, and there are plants called
3 facultative up plus. That just means in that
4 bracket between one percent chance and 34 percent
5 chance, the FACs up would be the midline of that
6 which is, oh, what is that, about 16 percent is
7 halfway between one percent and 34 percent roughly.

8 Q. Mr. Carlson, could you explain the
9 notations that appear to be abbreviations of the
10 terms you're using here? Could you just go through
11 the notations on the scale?

12 A. The scale between, the scale range
13 between 34 percent and 67 percent on this map is
14 labeled FAC for facultative.

15 The next segment up is between 67
16 percent and 99 percent. That is designated by the
17 indicator status FACW which stands for facultative
18 wet.

19 Then the next segment between 99
20 percent and a hundred percent is designated on this
21 exhibit as OBL which is shorthand for obligate
22 wetland plant.

23 Going back to the FAC segment, it
24 also has a minus to the left of the F and a plus to

1 the right of the C in FAC. That indicator tells you
2 that you are on either the wetter or drier side of
3 the facultative category. The minus is the drier
4 side. The FAC plus is the wetter side.

5 The facultative wetland indicator
6 status on this scale has a minus to the left of the
7 F and a plus to the right of the W similar to the
8 two previous categories mentioned.

9 FAC wet minus plants, the probability
10 of seeing them in a wetland versus the FAC wet plus
11 is less. Just divide the segment between 67 and 99
12 percent in half and the lower segment between 67 and
13 whatever the midpoint is would be FAC wet minus, and
14 on the upper end of that segment is the...

15 Q. And now you're on the right-hand
16 side?

17 A. Yeah, I'm on the FAC wet plus, and
18 I'm defining FAC wet plus as on the -- when I say
19 wetter side, I'm referring to the probability of
20 finding that in a wetland area is greater for a FAC
21 wet plus than a FAC wet minus. I've labeled it
22 Exhibit E.

23 JUDGE MORAN: And I might have lost
24 my attention span for a second.

1 That last category is what, sir.

2 THE WITNESS: Here on the right-hand
3 side of the scale?

4 JUDGE MORAN: Yeah.

5 THE WITNESS: Those are obligate
6 wetland plants.

7 JUDGE MORAN: Okay. And it's as
8 certain as one can be if they find that plant that
9 it's in that category, it's a wetland plant, right?

10 THE WITNESS: Almost certain, yes.

11 JUDGE MORAN: It's time, folks.

12 MR. MARTIN: Just one more question.

13 JUDGE MORAN: Sure.

14 MR. MARTIN: And I think we can end
15 this topic of hydrophytic vegetation.

16 Q. These are the categories of
17 hydrophytic or non-hydrophytic plants.

18 Is there a list of places that plants
19 into these categories?

20 A. Yes, sir, there is.

21 Q. What is that list?

22 A. The U.S. Fish and Wildlife Service
23 has published a national list of plant species that
24 occur in wetlands, and we are in the north central

1 region which is Region 3, and that book has a
2 listing of plant species by genus and species, and
3 then it identifies, by species, it gives you an
4 indicator status.

5 Q. And when you say we are in, you refer
6 to the fact that the Hesper site is within that
7 region?

8 A. That's correct.

9 Q. Is the national list widely used and
10 accepted by wetland delineators?

11 A. Yes. Similar to the '87 manual, it's
12 used by all the federal agencies and many of the
13 states.

14 MR. MARTIN: I think that's a good
15 place to stop.

16 JUDGE MORAN: Okay. See you tomorrow
17 morning at 9.

18 (Whereupon the hearing was
19 continued to March 30, 2007 at
20 9:00 a.m.)
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24

