

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 5

IN THE THE MATTER OF:

ROBERT J. HESER, ANDREW
HESER, and HESER FARMS,

DOCKET NO.
CWA-05-2006-0002

Respondents.

Proceeding to Assess a Class II
Civil Penalty Under Section
(G) of the Clean Water Act,
U.S.C. Section 1319(g).

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

SULLIVAN REPORTING CO.,
By: Jami Tepker, Reporter
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EXHIBIT INDEX

ADMITTED INTO EVIDENCE:

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1 MR. MARTIN: The following documents have
2 been agreed to be stipulated into the record,
3 reserving objections for relevancy.

4 But as to the authenticity of the
5 following documents: Complainant's Exhibit 2,
6 Complainant's Exhibit 5, Complainant's Exhibit 6,
7 Complainant's Exhibit 7, Complainant's Exhibit 15.

8 ADMINISTRATIVE LAW JUDGE MORAN: 15?

9 MR. MARTIN: I'm sorry. That's not right.

10 MR. NORTHRUP: Wrong list.

11 ADMINISTRATIVE LAW JUDGE MORAN: None of
12 these are right?

13 MR. SMALL: Let's just start over.

14 ADMINISTRATIVE LAW JUDGE MORAN: None of
15 these are right. Okay.

16 MR. NORTHRUP: Your Honor, if I could go
17 ahead and read into the record what we've stipulated
18 to.

19 ADMINISTRATIVE LAW JUDGE MORAN: Okay. And
20 then we'll flip it.

21 And EPA, will you pay attention to what
22 Mr. Northrup says and at the end indicate your
23 assent or disagreement?

24 MR. MARTIN: Yes.

1 ADMINISTRATIVE LAW JUDGE MORAN: Go ahead,
2 Mr. Northrup.

3 MR. NORTHRUP: Complainant's Exhibit 2,
4 Complainant's Exhibits 5 and 6.

5 And with respect to those, we are not
6 agreeing to any of the factual matters that are
7 contained in those documents, but to authenticity and
8 foundation, we stipulate to that.

9 ADMINISTRATIVE LAW JUDGE MORAN: Okay.

10 MR. NORTHRUP: Complainant's Exhibit 13.

11 ADMINISTRATIVE LAW JUDGE MORAN: So after 6
12 comes 13?

13 MR. NORTHRUP: Correct.

14 ADMINISTRATIVE LAW JUDGE MORAN: All right.

15 MR. NORTHRUP: Complainant's Exhibit 24,
16 Complainant's Exhibit 25, Exhibit 26, Complainant's
17 Exhibit 28, Complainant's Exhibit 29, Complainant's
18 Exhibit 30, 31, 36, and 39.

19 ADMINISTRATIVE LAW JUDGE MORAN: Okay. Court
20 Reporter, you got all those and I wrote them down
21 as well.

22 And I have put in my notes as I've
23 continued here with the exhibits which have been
24 admitted, these, of course, being admitted by

1 stipulation.

2 Does EPA agree with the list that Mr.
3 Northrup just read into the record?

4 MR. MARTIN: Yes, Your Honor.

5 ADMINISTRATIVE LAW JUDGE MORAN: Okay.
6 That's fine. So all those are admitted.

7 Any other housekeeping matters before we
8 resume with Mr. Carlson?

9 MR. MARTIN: No, Your Honor.

10 ADMINISTRATIVE LAW JUDGE MORAN: Okay. Would
11 you all make sure that your microphones are on and
12 I'll make sure mine's on.

13 And yours is on, Mr. Carlson. Mr.
14 Carlson, sir, you're still under oath.

15 MR. MARTIN: Okay.

16 GREGORY CARLSON
17 resumed the stand, having been previously duly sworn,
18 was examined and testified further as follows:

19 DIRECT EXAMINATION (CONT'D)

20 BY MR. MARTIN:

21 Q. Good morning, Mr. Carlson. There's one
22 carryover item from yesterday.

23 You created a Demonstrative Exhibit E,
24 which is labeled Probability Scale. This is related

1 to plan indicator status. You drew a diagram and
2 explained it yesterday.

3 And I would like to move to include this
4 Exhibit E into the record.

5 MR. NORTHRUP: No objection.

6 ADMINISTRATIVE LAW JUDGE MORAN: Okay.
7 Complainant's Exhibit, Demonstrative Exhibit E is
8 admitted.

9 (Demonstrative Exhibit E
10 was admitted into
11 evidence.)

12 MR. MARTIN: Q. Mr. Carlson, just picking up
13 on our discussion yesterday about hydrophytic
14 vegetation, in general, what does one look for to
15 determine if a site has vegetation?

16 A. You look for a predominance of
17 hydrophytic vegetation over the site.

18 Q. And how does one measure the word
19 "Predominance" on a site?

20 A. Well, there's different methodologies to
21 measure a plant dominance. The manual requires
22 looking at dominants per plant strata.

23 The common plant stratas that we're
24 looking at to measure are the trees layer, the

1 shrub-and-sapling layer, a herbaceous layer, and a
2 vine layer. And within each of those strata you
3 measure for dominance.

4 For example, trees, there are a number of
5 different methods. You could use the basal area,
6 which is a forestry term referring to how much board
7 feet of lumber you could get per tree.

8 So the bigger trees would be your more
9 dominant trees. We use aerial cover and apply what
10 is called a 50/20 rule.

11 Q. Could you explain how the 50/20 rule
12 works?

13 A. Within a particular sample location in
14 the area that you're characterizing, you pick a
15 representative sample location that's indicative of
16 the plant community you're in.

17 And for instance, this case we looked at
18 what I would call forested floodplain.

19 ADMINISTRATIVE LAW JUDGE MORAN: I'm sorry.
20 What did you say? What floodplain?

21 THE WITNESS: A forested floodplain.

22 ADMINISTRATIVE LAW JUDGE MORAN: Okay.
23 Forested.

24 THE WITNESS: And just to take the tree

1 layer, you're measuring percent aerial cover and you
2 use a 30 foot diameter sample plot.

3 So you're -- what you do is you stand in
4 the middle of that sample plot or stand on the edges
5 where you can get a good view of the aerial coverage
6 of the vegetation overhanging that sample spot.

7 So a tree, for instance, doesn't have to
8 be rooted within the 30 foot to count it, but you are
9 essentially measuring a relative percentage of
10 percent cover vegetation per plant species.

11 So at the -- at the -- in the -- to follow
12 through with the example and apply it to the Hesper
13 site, we had one dominant in the tree layer and that
14 was American elm. And that was because American elm
15 consumed more than 50 percent of the aerial cover of
16 all the tree species noted in that plot.

17 I mentioned the 50/20 rule. The 50
18 references that measurement of greater than 50
19 percent. I gave you the easiest example, American
20 elm. It covered more than 50 percent, so that was
21 the only dominant. That's the easiest possible
22 example.

23 The 20 part of that rule refers to are
24 there any other plants in the tree layer, any other

1 particular species that covers at least 20 percent of
2 that sample plot.

3 And if there was, you would include that
4 as one of your dominants in the tree layer. And you
5 apply that per strata, and that gives you all your
6 dominants per strata.

7 Then to define whether or not that site
8 has positive confirmation of hydrophytic vegetation,
9 you apply the rule that if greater than 50 percent of
10 the dominants are facultative or wetter, which means
11 including facultative plants, fac plus, fac wet
12 minus, fac wet, fac wet plus, and obligate plants,
13 greater than 50 percent of those are fac or wetter,
14 you can say, yes, this is a hydrophytic-vegetative
15 community.

16 MR. MARTIN: Q. Is the 50/20 rule widely
17 used by those patrolling wetlands under the 1987
18 manual?

19 A. Yes, it is.

20 Q. Who uses this rule?

21 A. All the federal agencies involved in
22 wetland delineations, including the corps of
23 engineers, the U.S. Fish and Wildlife Service, U.S
24 Department of Agriculture, natural resources,

1 conservation service, and state agencies use it too.

2 Q. And did you use the method in this case
3 on the area of the alleged violation?

4 A. No.

5 Q. You didn't use the 50/20 rule. Explain
6 that.

7 A. Well, the alleged violation site is a
8 disturbed site. The natural vegetation is not there.
9 So I'm in the atypical section. So I used it on what
10 I call my reference site.

11 Q. Okay. We'll return to that later.

12 You mentioned hydric soils. What is a
13 hydric soil?

14 A. Generally, hydric soils can be broken
15 into two main classifications: Organic soils.

16 Organic soils consist of partially
17 decomposed plant remains. In other words, the area
18 is so wet for so long that plants don't decompose.
19 They actually build up and you build up organic
20 soils.

21 The other half are what we call hydric
22 mineral soils. Mineral soils are soils composed of
23 varying percentages of sand, silts, and clays.
24 That's what we have at this site.

1 Those soils are -- can be hydric because
2 they're either saturated for a long enough time,
3 ponded for a long enough time, or flooded for a long
4 enough time to create anaerobic conditions in the
5 upper part of the soil profile.

6 Q. What is the definition of hydric soil?

7 A. Hydric soil is a soil that has developed
8 under saturated, ponded, or flooded conditions at a
9 frequency and duration that creates anaerobic
10 conditions in the upper part in the growing season.

11 Q. In general what does one look for to
12 determine the existence of hydric soils?

13 A. The main characteristics are color and
14 redoxymorphic features.

15 Q. Could you explain what redoxymorphic
16 features are.

17 A. Well, more -- I'll break that word down
18 into two parts. Redox is one part. Morphic refers
19 to the shapes, what it looks like.

20 Redox refers to a chemical reaction,
21 reduction oxidation. In a soil that's saturated
22 within the growing season, that means all the pores
23 are filled with water, the microorganisms in the soil
24 are respiring. Eventually they use up all the

1 oxygen.

2 You have anaerobic conditions without
3 oxygen. When that happens -- and I'll use iron as
4 the one, as Mr. Ward said, that paints the soil.
5 That's the common mineral we see changed under this
6 chemical reaction.

7 Iron in the soil becomes reduced from an
8 oxidized state to a reduced state because the
9 oxygen's used up. When that happens, iron goes into
10 solution.

11 And iron is washed from the soil profile
12 if it's there long enough.

13 That gives you instead of brighter soil
14 colors grayer, duller soil colors. When the soils --
15 which they commonly do and is the instance in this
16 case -- become oxygenated again, say the water tables
17 fall, iron can come back out of solution.

18 And that's the oxidation part of the
19 reaction. And what happens is they form features in
20 the soil. The oxygen aggregates itself in what we
21 call soft masses or pore linings.

22 And pore linings are along routes because
23 the plant is bringing in oxygen from the atmosphere.
24 So that's why you see around a root channel iron

1 form, because that's where you have some oxygen in an
2 otherwise anaerobic condition.

3 So those are the two main features, soft
4 masses and pore linings for redoxymorphic features.

5 Q. Does that chemical reaction that you
6 mentioned create the color you're looking for?

7 A. Yes. The iron comes back out and it's
8 rust. Think of it as rust. It's bright orange,
9 brighter browns.

10 Q. How does one determine in the field
11 whether a soil sample has the color necessary to be
12 considered hydric?

13 A. Well, one samples the soil and describes
14 what one sees. And you use the Munsell Soil Color
15 Chart to do your colors, both matrix color -- that's
16 the major portion of the soil -- and then the
17 redoxymorphic features if they're there.

18 Cover both of those with the same color
19 chart.

20 Q. Is there field guidance for this under
21 the 1987 manual?

22 A. Yes. There's a section in the manual
23 that deals with digging a hole --

24 Q. Okay.

1 A. -- and sampling soils.

2 Q. All right. You mentioned the Munsell
3 Soil Chart. How exactly does that work in the field?

4 A. Well, Mr. Ward went over with regard to I
5 think he called it -- made an analogy to paint chips.
6 And that's correct.

7 You have different -- the soil, Munsell
8 Soil Color Chart is broken down into three main
9 characteristics of color: Hue, value, and chroma.

10 The hue is the major color and it's --
11 you're generally looking at reds or yellows. And
12 that's common in the Midwest. So we found a lot of
13 colors that were 10 YR.

14 YR refers to yellow-red. It's the major
15 -- it will take you to a particular page. These
16 Munsell color books have about, oh, about eight main
17 hue color pages.

18 So once you're on the right page, the 10
19 YR page, then you look for value. That's the
20 brightness of the soil, and the chroma.

21 So you got 10 YR 3/2, for example, is one
22 of the colors in Ward's samples. The 3 is the value
23 of the color and the 2 is the chroma. The chroma is
24 the critical one for wetland delineations and for

1 determining hydric soils.

2 You're looking for 2 chroma or less, two
3 1's or zero. Those are indicative of soils where
4 iron that had been saturated or ponded, inundated
5 long enough where iron can be removed and you see
6 chroma as generally 2 or less.

7 Q. Mr. Carlson, finally, is it possible to
8 test soils on sites that are disturbed?

9 A. Yes.

10 Q. How does one do that?

11 A. You still simply sample what's there.
12 Generally in disturbed sites if there's fill in
13 place, you can still dig through fill and get to a
14 natural soil profile if it's not too deep. So you
15 still sample the soils.

16 Q. All right. The third part that you
17 mentioned is wetland hydrology. What is the
18 definition of that term?

19 A. Wetland hydrology refers to water on the
20 landscape at a frequency and duration that supports
21 hydrophytic vegetation.

22 Q. In general what does one look for to find
23 wetland hydrology on a site?

24 A. The manual lists sort of an order of

1 priority of indicators that you look for to determine
2 wetland hydrology.

3 First would be recorded measurements.
4 If, for instance, they put a well field out there,
5 groundwater wells and you, you know, stuck around for
6 a couple years, you could get an accurate
7 representation.

8 You don't even have to have the so-called
9 normal year, which really you never get. But we
10 don't have recorded data here. But if you did, that
11 would be good. Second would be actual observations
12 of inundation or soil saturation.

13 Lacking those two, then you're looking
14 for field indicators in the soil. And indicators in
15 the manual are divided into primary indicators, in
16 other words, the ones that are most reliable, and
17 secondary indicators that are less reliable but are
18 still used.

19 Q. What are some examples of secondary
20 indicators?

21 A. If I could refer to one of the data
22 sheets, I could -- that would easily -- people could
23 all observe those and I wouldn't have to try and
24 remember everything. Should I do that?

1 Q. Okay. We'll return to that later.

2 On the three wetland parameters, which is
3 often the hardest to find?

4 A. Wetland hydrology.

5 Q. Why is that?

6 A. Because wetland hydrology can come and
7 go. Soils aren't moving around. Generally the
8 plants aren't jumping up and running around.
9 Hydrology can come and go particularly in a seasonal
10 wetland, which is what I think we have here.

11 So it's just more difficult to catch.
12 And since you're only there -- you're not there, you
13 know, every day. You come down for a site inspection
14 one year and you might come back at other times.

15 Q. Under the manual can a positive indicator
16 of wetland hydrology be found without directly
17 observing water on the site?

18 A. Yes.

19 Q. Mr. Carlson, are you familiar with the
20 Hesper property which is the subject of this
21 enforcement action?

22 A. Yes, I am.

23 Q. How did you first get acquainted with the
24 Hesper property?

1 A. I received the corps case referral file
2 from one of my co-workers in I believe about early
3 June 2002.

4 Q. Who in your office received this corps of
5 engineers correspondence?

6 A. David Schulenberg.

7 Q. And how did he receive it?

8 A. I received it from him.

9 Q. Did you receive and review the
10 attachments that were included in that letter?

11 A. Yes.

12 Q. Let's turn to Complainant's Exhibit
13 Number 8, Bates page 39.

14 A. I'm there.

15 Q. Do you recognize this document?

16 A. Yes, I do.

17 Q. What is it?

18 A. This is the corps case file sent in 2002.

19 Q. Just -- strike that.

20 Did you compile Exhibit 8, Complainant's
21 Exhibit 8 from this letter and its attachments?

22 A. I did.

23 Q. Mr. Carlson, who was your enforcement
24 contact at the corps of engineers for the Hesper

1 property that's the subject of this
2 corps-of-engineers letter?

3 A. My primary contact was Ward Lenz.

4 Q. And did you discuss this matter with him?

5 A. Extensively.

6 Q. Specifically, did you discuss with Mr.
7 Lenz the corps-of-engineers February-2000 inspection
8 of the site?

9 A. Yes.

10 Q. If you could turn to Bates page 112.

11 A. All right.

12 Q. Do you recognize this document?

13 A. I do.

14 Q. What is it?

15 A. This is one piece of Ward Lenz and
16 Katherine Kelly's field notes, depicts the -- his --
17 he was measuring the dimensions of the disturbed
18 channel -- or excuse me -- the new channel.

19 And he's measuring the Martin Branch
20 channel in its natural condition both up- and
21 downstream of the site.

22 Q. First of all, there's some handwritten
23 notes on this document. Are you familiar with these
24 handwritten notes?

1 A. I am.

2 Q. How are you familiar with them?

3 A. They're my notes.

4 Q. Are there any -- is there any
5 significance to these notes?

6 A. Well, you can see the 5.7 feet equals eye
7 level. I was going through the same process that
8 this court was with regard to trying to figure out
9 how Ward measured the depths of the channel.

10 So that was finding out that his eye
11 level was 5.7 feet. I just made a note of it.

12 The gibberish on the lower right-hand
13 side is we're discussing the transects. And I can't
14 really figure out what's going on down there anymore
15 either. It was just at that time I was scribbling
16 notes.

17 Q. Okay. So these notes reflect notes that
18 you took during your discussions with Mr. Lenz?

19 A. Some yes and others no.

20 Q. After you reviewed this document and
21 discussed it with Mr. Lenz, how did you use this
22 information in your investigation?

23 A. Well, I used it to help me to
24 characterize what the site had been, and I also used

1 it to help me characterize the site as it is now.

2 Q. Please turn to pages 114 through 145.

3 A. Okay.

4 Q. Do you recognize this document?

5 A. Yes.

6 Q. What is it?

7 A. These are the data sheets put together by
8 Ward Lenz and Katherine Kelly on their site
9 inspection from February 15, 2000.

10 Q. First of all, where does this data form
11 originate?

12 A. It says right up on the top of CX 114,
13 third line down says 1987 Corps COE, which stand for
14 Corps of Engineers, Wetland Delineation Manual. They
15 come right out of the manual.

16 Q. Is it required to use this data form
17 under the manual?

18 A. No, it's not required. It's commonly
19 used.

20 Q. Referring back to your previous testimony
21 regarding positive indicators -- soil, vegetation,
22 and hydrology -- does this data form set out those
23 indicators?

24 A. Yes, it does. For wetland hydrology, on

1 the first page, lower right-hand side,
2 wetland-hydrology indicators are listed as primary
3 and secondary.

4 Looking at CX 115, wet hydric-soil
5 indicators are listed under the top box labeled by
6 soils. Looks like the third block down labeled
7 Hydric Soil Indicators, the indicators are listed out
8 there.

9 Q. Could you briefly go through these
10 indicators and give a description starting with the
11 hydrology block on Bates page 114?

12 A. Okay. Well, once you're on site, you're
13 characterizing the site, you're looking for
14 wetland-hydrology indicators.

15 If you saw standing water, you would
16 check it, inundate it, you'd make some notation of
17 the depth and the aerial extent.

18 Saturated in the upper 12 inches, that's
19 referring to a soil hole that you would have dug to
20 describe the soil profile and look for saturated soil
21 versus soil that's standing on the surface.

22 Soggy upper 12 inches, that's a primary
23 indication. You would mark depth below the surface.

24 Water marks are listed third. Water

1 marks are in floodplain situations where the water in
2 a flooded condition makes marks on trees like rings
3 at the level the water stood at long enough to make
4 that mark.

5 Drift lines are similar. They're largely
6 found in riparian systems where a stream is flooding.
7 And when streams do that, they can carry debris with
8 them. That debris gets hung up in channel,
9 side-channel vegetation and forms a drift line.

10 You can actually see the direction of
11 flow by how the material is laid out. It points
12 towards the direction of flow.

13 Sediment deposits are again related to
14 flooding or ponding where the water itself has picked
15 up sediments. And once that water stops flowing and
16 eventually recedes down to a ponded condition, then,
17 you know, evaporation-transpiration can occur.

18 The sediment that was in the water drops
19 out on vegetation leaflet or on the ground, sticks,
20 and you can observe that.

21 Drainage patterns in wetlands refers
22 again to flooding situations and a typical one is
23 scour. You can see where floodwaters have scoured
24 out areas, removing vegetation. These are the

1 primary indicators.

2 Under Secondary Indicators and you see
3 the note here under Secondary Indicators on 114 lower
4 right-hand side that says two or more required. So
5 you need at least two indicators, secondary
6 indicators to say, yes, this site has wetland
7 hydrology. Primary you only need one.

8 So under the secondary the ones listed,
9 oxidized root channels, which now we call oxidized
10 rhizospheres, but that's just a fancy word for root
11 channels in the upper 12 inches.

12 Further note they need to be on live
13 roots. And in this particular instance Ward has
14 checked that, and that's what he found when he dug to
15 sample his soils.

16 Below that are water-stained leaves.
17 That's another ponded-flooding situation where the
18 water's there long enough it changes the color of the
19 leaves. Basically they get blackened. They're
20 starting a partial decomposition. That's
21 water-stained leaves.

22 Local soil-survey data refers to if you
23 can verify on a site what your soil series is, you go
24 back to that soil survey we referenced from Marion

1 County and look at the data within there,
2 particularly in regard to either flooding or soil
3 saturation in the terms of a high water table.

4 And with Ward being the professional soil
5 scientist, having mapped in the adjacent county, he
6 was able to do that.

7 And if you could verify that series and
8 its drainage class and you could confirm that high
9 water table or flooding or ponding within that soil
10 survey, that's one you can check. But it is a
11 secondary indicator.

12 Fac-neutral tests, that refers to your
13 vegetation. And you basically take facts out of the
14 equation.

15 I earlier referenced that to say yes to
16 hydrophytic vegetation, you had to have greater than
17 50 percent of your dominants fac or wetter.

18 In the fac-neutral test, you just hold
19 the -- you take the facts out because facts could go
20 both ways. So they're held neutral.

21 And then you look at -- this is referring
22 to your dominants and the vegetation now, only the
23 dominants that you've gotten by the 50/20 rule we
24 earlier talked about.

1 Hold the facs neutral. Just throw them
2 out and then count the number of fac wets and
3 obligate plants and count the number of fac up or
4 upland plants.

5 If there are more fac wet and obligates
6 than there are fac up or ups, you can say yes to the
7 fac-neutral test as a secondary indicator of wetland
8 hydrology because wet plants are influenced by
9 wetland hydrology.

10 Q. Okay. Thank you.

11 On page 115 there is hydric-soil
12 indicators about the middle of the page. Would you
13 describe those indicators?

14 A. Histosols -- I assume everybody's at the
15 location. We're on page 115. We're at the first box
16 labeled Soils, and we are in the sub box, the third
17 one labeled Hydric Soil Indicators.

18 Histosols are organic soils. So if you
19 had -- most all organic soils are hydric by
20 definition. Not every single one, but most.

21 A histic epipedon refers to an
22 accumulation of organic material on top of mineral
23 soils. In other words, it's organic material, but
24 it's not thick enough to rate as an organic soil in

1 the soil-classification scheme.

2 But an accumulation of organic material
3 on top of a mineral soil is a good indication that
4 that's a wet soil.

5 Sulfitic order refers to rotten-egg
6 smell. And that refers to long-term saturation of
7 the soil.

8 Whereas long-term saturation of the soil
9 will wash iron out of the soil, in this indicator,
10 sulfate gets reduced and you can smell it. And
11 that's long-term saturation if you can smell that.

12 Aqua moisture reserve regimen refers to a
13 soil classification that Ward had mentioned. Soils
14 are classified by their, how wet they are.

15 Reducing conditions in glade or
16 low-chroma soils are the common ones we use. And
17 that refers to the low-chroma soils we talked of
18 earlier, 2 chroma or less, including redoxymorphic
19 features.

20 Concretions, at the top of the second
21 column, refer to generally iron or manganese
22 concretions. And these are actual hard nodules in
23 the soil that form from repeated drying and wetting
24 of the soils.

1 I failed to mention there is also an Other category
2 under the hydrology indicators. And that's just
3 other evidence you might find that gives you an
4 indication that the soils are hydric.

5 Q. Okay. I'd like to turn your attention to
6 page 115 to the Profile Description box, which is the
7 second box on this page.

8 And do you see those handwritten notes in
9 this box?

10 A. I do.

11 Q. What do those reflect?

12 A. That is Ward Lenz describing what he sees
13 in the soil profile by horizon depth on the left-hand
14 side and by the matrix color in the third column
15 labeled Matrix Color, Munsell moist, 'cause you do
16 your soil colors in a moist condition, not a dry
17 condition.

18 Next column over is the Model Color.
19 That's the redoxymorphic features we were talking
20 about. And if they're there, they're noted.

21 On the far right-hand column he's made
22 notes regarding texture and silt coats.

23 Q. Did you discuss with Mr. Lenz his
24 profiled descriptions for all the samples that he

1 took during his inspection?

2 A. Yes. We went over each of the sample
3 points and his findings.

4 Q. How many samples in all were there?

5 A. You know, my guess, having looked at this
6 many, many times, is sixteen. But I can count and
7 confirm it.

8 Sixteen.

9 Q. Okay. So you went through each of these
10 data forms and discussed with Mr. Lenz his
11 soil-profile findings?

12 A. Yes, many times. Gone over this plenty.

13 Q. Including his findings or nonfindings of
14 hydric soils on the Hesper site?

15 A. Yes.

16 Q. Did you agree with his soils
17 determination?

18 A. Yes, I did, although during his testimony
19 I was somewhat confused over one particular
20 description.

21 Q. Which one was that?

22 A. You know, you can help me. What I'm
23 looking for is the one where he made the comment
24 that, you know, this data was the same as the next

1 one.

2 Okay. Here it is.

3 Transect 3, Plot 4, and Transect 3, Plot

4 --

5 ADMINISTRATIVE LAW JUDGE MORAN: What page
6 are you on, sir?

7 THE WITNESS: I'm on Transect 3, Plot 3.
8 That's 126 and 127. And then Transect 3, Plot 4,
9 which is the very next two pages, 128 and 129. And
10 on 127, the hydric soils listed there, that was a
11 nonhydric call.

12 And then where I got a little bit
13 confused was when he was describing then the next
14 point. And on 129 when he's describing the soils,
15 his remark is, Similar to Plot 3, Transect 3 to the
16 previous point.

17 Well, since that one was nonhydric, this
18 one would be nonhydric. And I think Ward was getting
19 confused because up top he --

20 MR. NORTHRUP: I would object, Your Honor.

21 ADMINISTRATIVE LAW JUDGE MORAN: Sustained.

22 MR. MARTIN: Q. Mr. Carlson, please turn
23 your attention to page 127 in the soil-profile
24 description.

1 Now, given those results, how would you
2 analyze these results in terms of whether they show
3 hydric soils?

4 A. They show a nonhydric soil.

5 Q. Given your knowledge of the site, do you
6 have anything to add to the analysis that took place
7 for this soil location?

8 A. Well, the reason it's nonhydric is if you
9 look at that 8-to-14 layer, that's a 10 YR 4/3. So
10 the chroma is a 3. It's not a chroma of 2 or less.

11 So it's a brighter colored subsoil below
12 the horizon, and that's going to kick it out of the
13 hydric. So it's not -- that particular point is a
14 nonhydric data point.

15 Q. Turning to page 129, is this the page
16 that is the source of your confusion regarding Mr.
17 Lenz's conclusions?

18 A. Well, it's not confusing to me as to my
19 conclusions. I heard -- what I was referring to is I
20 heard Ward's testimony and on this particular point I
21 thought he was giving us a somewhat different answer.

22 Q. Are you familiar with the Transect ID 3,
23 Plot ID 4?

24 A. Yes. That's what we're looking at right

1 now.

2 ADMINISTRATIVE LAW JUDGE MORAN: Can we make
3 this a little simpler, please, for me.

4 Looking at pages 128 and 129, which
5 relates, as I understand it, to Transect ID 3, Plot
6 ID 4, are you there, Mr. Carlson?

7 THE WITNESS: I am.

8 ADMINISTRATIVE LAW JUDGE MORAN: Okay.
9 Looking at those two pages, is there any indication
10 from this data form that hydric soil was involved at
11 that location?

12 THE WITNESS: No, there's not.

13 ADMINISTRATIVE LAW JUDGE MORAN: Okay.

14 MR. MARTIN: Okay, Your Honor.

15 Q. Mr. Carlson, after you reviewed the
16 information in the corps-of-engineers' referral, what
17 other information did you gather?

18 A. Two types: In-house reference materials,
19 which would include USGS topographic maps of the
20 area; U.S. Fish and Wildlife Services' National
21 Wetland Inventory Map of the area; Marion County soil
22 survey.

23 And then I would have also began the
24 process of collecting aerial photography of the site.

1 And then the second part of that is we
2 commonly and in this case did send Section 308
3 information requests to the two Respondents.

4 Q. Mr. Carlson, could you turn to
5 Complainant's Number 45, page 1376.

6 ADMINISTRATIVE LAW JUDGE MORAN: Is it 45?

7 MR. MARTIN: Yes.

8 Q. Page 1376.

9 A. 1376. Okay.

10 Q. And this has been included in the record,
11 although I will note that this copy of that exhibit
12 does reflect handwritten notes.

13 Do you recognize this document, Mr.
14 Carlson?

15 A. I do.

16 Q. What is it?

17 A. This is the mosaic of USGS topographic
18 quadrangle maps that Ms. Rogers testified about. And
19 it divides the -- it illustrates the Martin Branch
20 watershed, also referred to as the Lake Centralia
21 watershed.

22 Did you ask me to describe it further?
23 I'm sorry.

24 Q. How did you obtain this exhibit?

1 A. Well, Ms. Joan Rogers had put this
2 together for us and put the watershed boundaries on
3 it. And I made the hand notations.

4 Q. Did you request her to prepare this?

5 A. Yes.

6 Q. Do you recognize the handwritten notes on
7 page 1376?

8 A. I do.

9 Q. What are they?

10 A. Those are my notations to identify where
11 Martin Branch is above and below the site. It
12 identifies the alleged impacted site.

13 And it identifies Old Salem Road crossing
14 and identifies the Mount Moriah Road crossing. It
15 identifies Lake Centralia and it has Exhibit A on it.

16 Q. Is review of topographic maps a routine
17 part of your work?

18 A. Yes.

19 Q. What information can be gained from
20 review of topographic maps?

21 A. Well, you get an understanding of what's
22 up and what's down, what's high and what's low, water
23 features, roads, agricultural areas versus forested
24 areas.

1 ADMINISTRATIVE LAW JUDGE MORAN: Counsel, I
2 just want to note for the record, my notes did not
3 indicate -- you made a reference -- when you started
4 questioning Mr. Carlson about this, you said -- you
5 asserted that Complainant's Exhibit 1376 was
6 admitted, which is part of 45.

7 My notes do not indicate that 45 was
8 moved for admission. Is that your understanding?

9 MR. NORTHRUP: No. I assumed he was talking
10 about the Joan Rogers --

11 MR. MARTIN: Right, the Joan Rogers.

12 MR. NORTHRUP: Not this particular page.

13 MR. MARTIN: Demonstrative Exhibit A.

14 ADMINISTRATIVE LAW JUDGE MORAN: I remember
15 that was admitted. But this is -- this may be a
16 re-creation of that, but it hasn't been admitted in
17 the record.

18 MR. MARTIN: Okay. Your Honor, I'll ask Mr.
19 Carlson a couple questions and then move to include
20 this exhibit into the record.

21 ADMINISTRATIVE LAW JUDGE MORAN: And that
22 would include, I take it, the documents which precede
23 that, which is Mr. Carlson's declaration. I don't
24 know what else is in there.

1 And then there were photographs. None of
2 that's been admitted.

3 MR. MARTIN: That's correct, Your Honor. We
4 were planning on covering photographs later at this
5 time.

6 ADMINISTRATIVE LAW JUDGE MORAN: That's fine.
7 I just wanted to alert you that certain documents --
8 my notes and confirmed by counsel for the Respondent
9 -- have not been admitted as distinct from
10 Demonstrative Exhibit A, which is admitted.

11 MR. MARTIN: Q. Mr. Carlson, does this
12 reflect the same document as was introduced prior as
13 Demonstrative Exhibit A?

14 A. I'd prefer to look at Demonstrative
15 Exhibit A before I answered that question.

16 MR. MARTIN: Permission to approach?

17 ADMINISTRATIVE LAW JUDGE MORAN: Sure.

18 And while it's obvious that the two
19 documents are not identical, I'm sure that Mr.
20 Martin's going to be asking some questions about the
21 similarities between -- the one is obviously more
22 detailed than the other.

23 He's not asking you if it's exactly the
24 same. They're not.

1 MR. MARTIN: Q. Mr. Carlson, you're familiar
2 with Exhibit A, which has been displayed on the
3 easel?

4 A. I am.

5 Q. And how are you familiar with that
6 document?

7 A. I requested that it be created, and I had
8 earlier looked at the USGS topographic quadrangle
9 that make up that mosaic.

10 Q. And turning your attention to page 1376,
11 was this document attached to a declaration that you
12 did in this case?

13 A. Yes, it was.

14 Q. And where does this document come from?

15 A. This was just an earlier version of
16 Demonstrative Exhibit A.

17 Q. Okay. And this earlier version of
18 Exhibit A is written on the document?

19 A. My hand notations are on this document at
20 1376.

21 MR. MARTIN: Your Honor, I would move to
22 include page 1376 into the record.

23 MR. NORTHRUP: No objection to that.

24 ADMINISTRATIVE LAW JUDGE MORAN: Yes. 1376

1 is in.

2 MR. MARTIN: Your Honor, permission for the
3 witness to approach Exhibit A.

4 ADMINISTRATIVE LAW JUDGE MORAN: Sure.

5 Actually, it would be better if you stay
6 on that side. I think then I can see it and counsel
7 for Respondent can see it better.

8 MR. MARTIN: Q. Mr. Carlson, can you locate
9 the site of the alleged violation on this map?

10 A. Yes, I can.

11 Q. What, if anything, does this map tell you
12 about that location?

13 ADMINISTRATIVE LAW JUDGE MORAN: Well, first
14 doesn't he have to first locate it?

15 Ask him to --

16 MR. MARTIN: Q. Where is it?

17 A. I'm taking a black magic marker and I'm
18 going to mark a circle around the approximately 5 1/2
19 acre site of the alleged impacts. I'm going to call
20 it G1.

21 ADMINISTRATIVE LAW JUDGE MORAN: So noted a
22 circle in G1 on Demonstrative Exhibit A.

23 MR. MARTIN: Q. What, if anything, does this
24 map tell you about that site that you just marked?

1 A. Well, what it tells me with regards to
2 its geographic location is that it is up in the
3 headwaters of the watershed.

4 ADMINISTRATIVE LAW JUDGE MORAN: And what are
5 the headwaters?

6 THE WITNESS: The areas farthest away from
7 the main part of the watershed where it outlets. The
8 outlet of the watershed would be the mouth where it
9 joins Crooked Creek way on the top upper left-hand
10 side of the topal mosaic.

11 And this is farthest away from that up
12 where the watershed is just -- is beginning up at the
13 top of it where the relief is highest.

14 MR. MARTIN: Q. What, if anything, does this
15 map tell you about Martin Branch?

16 A. It is mapped intermittent by the USGS
17 people who made the map and that Martin Branch is the
18 largest watershed amongst all the watersheds mapped
19 on this map and that it is largely an agricultural
20 watershed.

21 MR. SMALL: Objection, Your Honor. I don't
22 see --

23 ADMINISTRATIVE LAW JUDGE MORAN: You have to
24 stop when there's an objection.

1 You mumbled a little bit, Mr. Small. You
2 object because?

3 MR. SMALL: I'm objecting, Your Honor,
4 because that map in and of itself to the best of my
5 knowledge doesn't purport to show what types of
6 businesses or anything else is there. And so --

7 ADMINISTRATIVE LAW JUDGE MORAN: Okay. That
8 could be a subject for cross-examination, but I'll
9 sustain the objection.

10 MR. MARTIN: Q. Mr. Carlson, could you trace
11 on Exhibit A Martin Branch from its beginning to its,
12 where it outlets to Lake Centralia?

13 A. Sure.

14 Q. Would you use not a marker, but something
15 a little bit more fine.

16 A. Going to use a blue Sharpie.

17 And I'll just trace it because the
18 intermittent stream noted as Martin Branch is already
19 in blue on this exhibit.

20 Q. Mr. Carlson, maybe a highlighter --
21 permission, Your Honor?

22 ADMINISTRATIVE LAW JUDGE MORAN: Yes.

23 THE WITNESS: I'm going to use a green
24 highlighter to cross over it. And before I really

1 get into this, so it reflects well in the transcript

2 --

3 MR. SMALL: Your Honor --

4 ADMINISTRATIVE LAW JUDGE MORAN: Yes. That's
5 right. You can't let your witness run amuck. You
6 can't be giving all this prefatory information.

7 You can only respond to questions and
8 proceed with directions. If the counselor asked you
9 to mark Martin's Branch, then that's the only thing
10 you should be doing right now.

11 THE WITNESS: Okay.

12 ADMINISTRATIVE LAW JUDGE MORAN: Okay. Now,
13 I want you, before you get your next question from
14 EPA counsel, to just describe what you did.

15 THE WITNESS: I'm not finished, sir.

16 ADMINISTRATIVE LAW JUDGE MORAN: Oh, fine.

17 THE WITNESS: Okay.

18 MR. MARTIN: Q. Please describe what you
19 just did.

20 A. Beginning on the upper end of the stream
21 channel as mapped by the U.S. geological survey, I
22 have traced the entire channel from its upstream end
23 downstream through the alleged impact site.

24 Then we're moving in a

1 western-southwestern direction. It's moving through
2 farmland where it's white. It's moving through
3 forest where the topal map depicts green.

4 It's meandering for the most part,
5 although there looks to be channelized sections, and
6 it crosses Old Salem Road going west.

7 Continuing southwest and it goes
8 underneath Interstate 57. Continues west-southwest
9 in a meandering fashion for another half mile, at
10 which time it flows under Mount Moriah Road.

11 Continues west for about a quarter mile
12 meandering and then heads northwest for it looks like
13 about a quarter mile. Turns about due west, meanders
14 another half mile.

15 And turns north, meandering another about
16 a half mile and enters Lake Centralia, which is an
17 impoundment of Martin Branch.

18 Then we skip -- the line ends at where it
19 enters the southern end of Lake Centralia. And Lake
20 Centralia is a 450 acre body of water that at its
21 northwest end is impounded with a dam, which has a
22 spillway on it.

23 At that spillway --

24 MR. SMALL: Your Honor, I'm going to object.

1 He asked where Martin Branch is, not where Lake
2 Centralia --

3 ADMINISTRATIVE LAW JUDGE MORAN: Yes. I
4 sustain it.

5 Actually, all I was looking for was a
6 simple statement. And then if counsel wanted to
7 expound upon it, would be something to the effect of,
8 I just marked with a green highlighter the course of
9 Martin's Branch on this map as I understand it to
10 flow.

11 That was basically -- in other words, it's
12 just a short sentence describing what you just did as
13 opposed to what ultimately counsel for Respondent
14 objected to.

15 So can you shorten it up and just tell us
16 if that -- what I just described, is that what you
17 did? Did you mark with a green pen, a green
18 highlighter your understanding of the course of
19 Martin's Branch on this map?

20 THE WITNESS: Yes.

21 ADMINISTRATIVE LAW JUDGE MORAN: Okay. Now,
22 if you have other questions that you feel are
23 important to ask, Mr. Martin, do ask those.

24 MR. MARTIN: Q. Mr. Carlson, you also marked

1 an area that is appears northeast of the inlet of
2 Martin Branch on the northwest part of Lake
3 Centralia?

4 A. I'm sorry?

5 Q. That area.

6 A. Yes.

7 Q. What's the significance of those
8 markings?

9 A. Well, correct my earlier testimony. I
10 said it was mapped as intermittent. And it is up
11 through where it joins Lake Centralia, which, of
12 course, is an impoundment of Martin Branch.

13 Northwest of where it outlets from Lake
14 Centralia it is mapped as a perennial stream till it
15 joins Crooked Creek.

16 Q. When you say that Lake Centralia is an
17 impoundment of Martin Branch, what do you mean?

18 A. That back in 1910 a dam was constructed
19 across the then Martin Branch channel to create Lake
20 Centralia.

21 Q. How do you know this?

22 A. Researched it. It's on a variety of web
23 sites for Salem, Illinois, has information regarding
24 Lake Centralia.

1 Q. What, if anything, does this map tell you
2 about the site's relationship with Lake Centralia?

3 A. It tells me it's intimately connected.

4 Q. Can you tell how far away the site is
5 from Lake Centralia?

6 A. Yes. I measured that previously. And I
7 believe it was 2.8 miles as you follow the stream.

8 Q. How did you measure this distance?

9 A. I used a string and you place it on the
10 topal map, try and follow the bends. It's a
11 relatively crude method, but it gets the bends, the
12 bigger bends.

13 You get a little more accurate
14 measurement of that distance than you would have if
15 you just straight-lined it and ignored the meandering
16 bends of the stream.

17 Q. What, if anything, does this map tell you
18 about the Martin Branch watershed?

19 A. It tells me that the upper part of the
20 watershed is largely agricultural. And overall in
21 the big picture it shows me that every single
22 drainage mapped here that goes into Lake Centralia is
23 similar. And it's similar in that they're all mapped
24 as intermittent drainages.

1 So the five watersheds mapped with
2 Numbers 1 through 5 indicated on this map in red,
3 those are all intermittent drainages -- excuse me --
4 except for Number 3, which is the watershed of the
5 lake itself.

6 2, 1, 4, and 5 follow intermittent
7 drainages to the lake. Martin Branch is the largest
8 of all these, and it also tells me there's a
9 perennial connection below the dam at Lake Centralia
10 to Crooked Creek.

11 ADMINISTRATIVE LAW JUDGE MORAN: Mr. Carlson,
12 would you continue to stand to the right of that.
13 Then you're not blocking the view of counsel.

14 And you can reach over and point the
15 areas. Then we can all see it without your blocking
16 the view.

17 THE WITNESS: Okay.

18 The other thing it tells me about the map,
19 as you go downstream from the site, the stream is
20 dropping relative to the surrounding landscape. In
21 other words, it's becoming more ravines. And the
22 areas adjacent to it are higher up and they are not
23 being farmed as much as upstream.

24 And that's why you see a lot more green

1 around the channel, particularly west of Interstate
2 37. But also just east of Interstate 37 there's a
3 large block of woods around Martin Branch.

4 And I would also note that these are 19
5 -- these topal maps are -- the one on the right-hand
6 side in terms of the mosaic is a 1965 topal map photo
7 revised in 1978.

8 And the one on the west half is a topal
9 map I believe from 1970. And from my observations of
10 driving around this area, there is even more woods
11 west of Interstate 57 than shows on this map.

12 MR. MARTIN: Q. How do you know that the map
13 reflects agricultural activities?

14 ADMINISTRATIVE LAW JUDGE MORAN: Reflects
15 agricultural what?

16 MR. MARTIN: Q. Agricultural activities.

17 A. Because I never look at any one map in
18 isolation. You look at it with all the other maps
19 you have. The soil-survey maps are aerial
20 photography --

21 MR. SMALL: Your Honor, I'm going to object
22 because he's saying that he's looking at other maps.

23 ADMINISTRATIVE LAW JUDGE MORAN: That's
24 right. The question was -- I sustained the

1 objection. The question was, how do you know from
2 this map? And the answer is, I don't from this map.

3 Seems to me from what he -- the objection
4 is sustained.

5 THE WITNESS: But that --

6 MR. MARTIN: Q. On this map, Mr. Carlson,
7 what do the green areas reflect?

8 A. Forests.

9 Q. Mr. Carlson, is there any way of
10 determining from this map the presence of
11 agricultural activities?

12 A. Yes. The white areas are cleared areas
13 that have been cleared of trees. And in a rural
14 landscape like this, I would have thought that those
15 were agricultural areas looking at this map and only
16 this map.

17 Q. Okay.

18 MR. SMALL: I would move to strike what he
19 just, tail end of his sentence about agricultural
20 areas again because it's the same --

21 ADMINISTRATIVE LAW JUDGE MORAN: I'm going to
22 allow that. Still based on his opinion about what
23 the map tells him. You can hammer him if you feel
24 it's appropriate or productive on cross-examination.

1 MR. SMALL: Thank you.

2 MR. MARTIN: Thank you.

3 Can we take a five-minute break?

4 ADMINISTRATIVE LAW JUDGE MORAN: Sure.

5 (A short recess was
6 taken.)

7 ADMINISTRATIVE LAW JUDGE MORAN: Just let me
8 note that in an off-the-record discussion, that
9 Counsel did clarify for me that the videotape was
10 admitted yesterday and what were the other related
11 photograph numbers that were admitted that were
12 initially in issue?

13 MS. PELLEGRIN: Bates -- Complainant's
14 Exhibit 8, Bates Numbers 63 through 70.

15 ADMINISTRATIVE LAW JUDGE MORAN: Oh, I did
16 mark that. Okay. Thank you. Okay.

17 Go ahead, Mr. Martin, with your
18 questioning of Mr. Carlson.

19 MR. MARTIN: Q. Please turn to Complainant's
20 Exhibit Number 20.

21 A. I'm there.

22 Q. That is excerpts from soil survey of
23 Marion County, Illinois, Bates Numbers 242 through
24 260. Do you recognize this document, Mr. Carlson?

1 A. I do.

2 Q. What is it?

3 A. Excerpts from the Marion County soil
4 survey.

5 Q. When did you obtain this document?

6 A. We've had this document in our possession
7 for -- since I've been employed at the -- since
8 I've been in the wetlands program.

9 Q. And why were you looking at it?

10 A. Because it's a reference. It contains a
11 lot of useful information about the landscape.

12 Q. What type of information?

13 A. Primarily map soil surveys and it also
14 has water features. It gives you your growing
15 season, gives you information on climate,
16 precipitation. It gives you a little bit of a
17 general history of the county.

18 Q. Please turn to Plaintiff's Exhibit 260 --
19 I'm sorry -- Bates Number 260.

20 A. Okay.

21 Q. Mr. Carlson, did you review this map in
22 your investigation of this case?

23 A. Yes.

24 Q. What does this map -- can you locate the

1 site on this map?

2 A. I can.

3 Q. What does this map tell you about the
4 soils located on the site of the alleged violation?

5 A. There are three soil units that are
6 mapped on this site. Number 12 is the Wynoose soil.
7 It's mapped on the very west and northwest edges of
8 the site. It's indicated by a polygon with the
9 Number 12 in it.

10 Along the Martin Branch stream channel as
11 it flows through the site, paralleling it on each
12 side is the Holton loam map unit, which, with a
13 number of 3225.

14 On the southeast portion of the site,
15 there is a Map Soil Unit Number 218, which is Newbury
16 silt loam. Newbury Silt Loam 218 is a -- is listed
17 on the county hydric-soil list.

18 Number 12, Wynoose silt loam, is listed
19 on the county hydric-soil list. And the Holton loam,
20 the 3225 soil is -- has bird soil series inclusions
21 listed on the county hydric-soil list.

22 Q. Mr. Carlson, I'm going to ask you now to
23 circle the site as it is located on Bates page 260.

24 ADMINISTRATIVE LAW JUDGE MORAN: You're going

1 to mark on this?

2 MR. MARTIN: Yes, Your Honor.

3 ADMINISTRATIVE LAW JUDGE MORAN: Okay. Do
4 that procedure.

5 We'll go off the record.

6 (Off-the-record
7 discussion.)

8 ADMINISTRATIVE LAW JUDGE MORAN: Back on the
9 record.

10 Just so the record's clear, there was --
11 in an off-the-record discussion, it was determined
12 that the mark that Mr. Martin intended to have Mr.
13 Carlson make on this exhibit already is there.

14 Is that right, Mr. Martin?

15 MR. MARTIN: Yes, Your Honor.

16 Q. Okay. Just to confirm, Mr. Carlson, your
17 copy of the soil map you are looking at does have the
18 site circled already?

19 A. It does.

20 Q. And you agree with that circle?

21 A. Well, it's a much broader circle than the
22 site itself, but the site is within that circle.

23 Q. Mr. Carlson, did you listen to the
24 testimony of Mr. Lenz on the topic of soil types on

1 the site of the alleged violation?

2 A. I did.

3 Q. Did you agree with it?

4 A. Yes.

5 Q. Why are soil surveys important in
6 delineating wetland?

7 A. Because they help you characterize an
8 area and can give you information about the soils,
9 about water features, and about land use. And it
10 also shows I think I mentioned water features.

11 It's a map that shows things that can
12 help you figure out what's going on at any particular
13 site.

14 Q. Could you describe the soil types that
15 are found on the site of the alleged violation?

16 A. Yes.

17 Q. Please, starting with Wynoose, could you
18 describe the characteristics of that soil type.

19 A. Well, it's a -- it's a -- excuse me.
20 It's a soil that's listed on county hydric-soil list
21 because of seasonal high water tables. That
22 information is reflected in the soil survey itself
23 under the water features.

24 It describes a typical soil profile for

1 Wynoose, in other words, what are the likely
2 horizonations and per horizon, what are the soil
3 colors, what are the redoxymorphic features. It does
4 that for all these soils that are mapped here.

5 And Newbury is also mapped and listed on
6 the county hydric-soil list, and its profile similar
7 to Wynoose is described. And from that soil profile
8 you could make a hydric or nonhydric call based on
9 the colors you see there.

10 Of course, you confirm it in the field,
11 but in the book, the profiles are listed. And since
12 they listed colors and they list redoxymorphic
13 features, you could actually apply the field
14 indicators for a typical profile that you see in the
15 book.

16 And for the Holton soils, it lists bird
17 inclusions as a hydric component of that soil series
18 and similar to Wynoose and Newbury. The soil survey
19 will have a typical profile of what birds soil series
20 looks like.

21 And it will give information regarding
22 seasonal high water table on birds also.

23 Q. What is the significance of the soil
24 appearing on a county hydric-soil list?

1 A. It was one of the hydric-soil indicators.

2 Q. Could you turn to Complainant's Exhibit
3 Number 21.

4 A. Okay.

5 Q. Do you recognize this document?

6 A. I do.

7 Q. What is it?

8 A. This is the Marion County, Illinois,
9 hydric-soils list.

10 Q. Is this the hydric-soils list that you
11 just referenced?

12 A. It is.

13 Q. And could you locate the soils that are
14 mapped for the site on this list?

15 A. I can.

16 Q. Please do so.

17 A. On page 262, six rows down there is a
18 Number 12. And that is the Wynoose silt loam. The
19 whole unit is considered hydric.

20 That's on the third column that says
21 hydric. Says yes on Wynoose. I'm just -- I'm
22 reading the Wynoose silt loam from left to right
23 along its row and referencing it to the column
24 headings above.

1 It gives a general location and it gives
2 you the hydric criteria code, the 2B3.

3 Q. What is that, Mr. Carlson?

4 A. That references the formal definition of
5 a hydric soil, and it's telling you what -- by the
6 2B3, that's one part of that definition. And since
7 it's a definition of a hydric soil, it's telling you
8 where in that definition Wynoose fits.

9 Q. What definition are you referring to?

10 A. Definition of a hydric soil.

11 Q. Where would that be found with reference
12 in the hydric-soils list?

13 A. It's listed in the 1987 corps manual, but
14 that definition has subsequently been revised.

15 Q. So on page 262 in the column marked
16 hydric criteria code, this refers to a section of the
17 1987 manual?

18 A. Yes, it does. And it also refers to the
19 hydric-soil definition, which is, you know, it's a
20 regulatory definition. It's in the regulations that
21 the USDA Natural Resources Conservation Service puts
22 out.

23 My only point is that it was revised from
24 1987 and these would not reflect the 1987 manual

1 definition. They would reflect the current USDA
2 definition.

3 Q. Okay. Could you continue on explaining
4 the columns for the Wynoose silt loam.

5 A. For Wynoose, the next column over under
6 what hydric-soils criteria is met, this explains the
7 2B3, by the way, that it meets the saturation
8 criteria. It says yes there.

9 It does not meet the criteria for
10 flooding or ponding. And in the last column lists
11 the approximate acreage within the soil survey.

12 Q. Could you find for us the reference to
13 the Holton soil type?

14 A. Holton is found on page 265.

15 Q. Could you describe starting with its
16 component what this list says about this soil type?

17 A. Holton is Number 3225. It's the sixth
18 row down under Map Symbol and Map Unit Name column.
19 It's called Holton loam frequently flooded.

20 Frequently flooded means it has a 50
21 percent chance of occurring in any given year, at
22 least, in other words, once every two years. That's
23 the definition of frequent flooding.

24 Within Holton, they list a birds

1 inclusion. The Holton unit itself under hydric is
2 no, and that's sort of the end of the story for
3 Holton loam.

4 But within Holton loam inclusions include
5 bird soils. And following the birds row from left to
6 right, it is identified as a hydric soil under the
7 hydric column.

8 It's indicated to exist within the
9 landscape under local land form as in the floodplain.
10 Its criteria is similar to Wynoose. It's a 2B3,
11 meaning it meets the saturation criteria. It does
12 not meet the criteria for flooding or ponding.

13 There are two other designations under
14 Holton that are not associated with the soil survey.
15 They're simply associated with those areas can have
16 longer duration flooding. And if they did and you
17 were able to document that, that would also be
18 hydric.

19 And then it has another -- also located
20 in the floodplain would be under -- long duration
21 flooding. And that's under hydric criteria code.
22 That's Number 4.

23 And if you go further to the right,
24 you'll see a yes under the meets flooding criteria.

1 It has another inclusion called other wet areas that
2 are also hydric if they're in the floodplain and they
3 meet Hydric Criteria Code 2A, which is saturation in
4 this case.

5 Q. Does this explain why there's a reference
6 to the birds inclusion in Mr. Lenz's data forms in
7 his inspection report from the February-2003
8 inspection?

9 A. After having talked with Ward, that's my
10 understanding.

11 Q. That he was looking for birds inclusions
12 --

13 A. Correct.

14 Q. -- on the alleged violation site?

15 A. Correct.

16 The next soil unit is Newbury. It's
17 found on page 263. It's the third row down. It's
18 Number 218.

19 It's called Newbury silt loam. The whole
20 component of Newbury is hydric.

21 It's found in terms of land forms in
22 depressions. Its hydric criteria code is 2B3, which
23 in the next column over means it meets the saturation
24 criteria.

1 And that's referring to the seasonal high
2 water tables. It's not meeting the criteria for
3 flooding or ponding, and it gives proximate acreage
4 within the county.

5 ADMINISTRATIVE LAW JUDGE MORAN: While you're
6 preparing your next question, I'm going to ask a
7 question of Mr. Carlson so I can understand this a
8 little better.

9 Mr. Carlson, looking at the page you were
10 just referring to, page CX 263.

11 THE WITNESS: Yes.

12 ADMINISTRATIVE LAW JUDGE MORAN: Where you
13 were discussing Newbury silt loam, silt loam, which
14 is the third line down. Right?

15 THE WITNESS: Correct.

16 ADMINISTRATIVE LAW JUDGE MORAN: Okay. My
17 question for you is, under the hydric-soils criteria,
18 if one has only one of the three boxes checked -- by
19 those three boxes I mean meets saturation criteria;
20 second box, meets flooding criteria; third box, meets
21 ponding criteria.

22 My question is, if as in this case only
23 one of those three criteria is marked, in this case
24 it being yes for meets saturation criteria, is that

1 enough for one to conclude that this is hydric soil
2 by itself?

3 THE WITNESS: Yes, it is.

4 ADMINISTRATIVE LAW JUDGE MORAN: And on what
5 do you base that that one criterion is sufficient to
6 reach that conclusion that it is hydric soil?

7 THE WITNESS: Because it meets the definition
8 of what a hydric soil is.

9 ADMINISTRATIVE LAW JUDGE MORAN: And so I
10 take it that the definition of a hydric soil is
11 sufficient to meet that definition if it simply says
12 meets saturation criteria?

13 THE WITNESS: That's correct, but -- that's
14 correct.

15 ADMINISTRATIVE LAW JUDGE MORAN: Okay. Thank
16 you.

17 MR. MARTIN: Q. Just to go beyond that, when
18 you visit -- when you inspect sites and take soil
19 samples, one of your goals is to confirm the presence
20 of map soil units?

21 A. That's correct. We confirm -- we confirm
22 this information by sampling in the field. We just
23 don't rely on the book.

24 Q. And that's what you did in this case?

1 A. That's correct.

2 Q. So what you did in this case when you
3 confirmed the presence of hydric soil was to confirm
4 the map units as reflected in some county-soil map?

5 A. No. No. We used the field indicators
6 and then in one particular respect I think we found
7 the birds. So for one of the four. One of the birds
8 as the hydric unit is the one we believe we confirmed
9 out there.

10 Q. Could you turn to Complainant's Exhibit
11 Number 2.

12 ADMINISTRATIVE LAW JUDGE MORAN: 2? Exhibit
13 2?

14 MR. MARTIN: Yes. Your Honor, this is one of
15 the exhibits that we have stipulated to enter into
16 the record.

17 ADMINISTRATIVE LAW JUDGE MORAN: Okay. I
18 just have to find it. Mine goes from Complainant's
19 Exhibit 1 to -- I found it. Thank you.

20 Go ahead.

21 MR. MARTIN: Q. Mr. Carlson, do you
22 recognize this document?

23 A. I do.

24 Q. What is it?

1 A. This is a photocopy excerpt of the U.S.
2 Fish and Wildlife Services National Wetland Inventory
3 Map of this area.

4 Q. And how did you obtain this document?

5 A. We have them on file at the office.

6 Q. Why did you obtain this document?

7 A. It's a piece of reference material that
8 we would use to characterize the site. Gives you an
9 early indication of whether there might be wetlands
10 on site if it was so mapped.

11 Q. What information generally do these maps
12 provide?

13 A. Well, you can see in the background these
14 National Wetland Inventory Maps are placed over the
15 USGS topographical maps.

16 So the topographic maps from the U.S.
17 Geological Survey are the base maps, and they overlay
18 over that their photo interpretation of wetland on
19 the landscape.

20 They use high-altitude aerial
21 photography. Most of this was done in the early
22 '80s. There was a mandate from Congress for them to
23 do this.

24 And the symbols on the map refer to their

1 classification system. Where you see numeric
2 designations with a line pointing to a particular
3 feature, that is somewhat highlighted as a polygon.

4 Q. Is the site located on this map?

5 A. It is.

6 Q. And is it designated a wetland according
7 to this map?

8 A. It is not.

9 Q. Do you have attached any significance to
10 this?

11 A. I think it's of limited significance
12 because the U.S. -- excuse me -- the U.S. Fish and
13 Wildlife Service as a policy matter did not map in
14 agricultural areas.

15 The other significance and what limits it
16 from my interpretation is it's high-altitude aerial
17 photography. It's a very small site and it's
18 forested.

19 Forested wetlands are the most difficult
20 to interpret from aerial photography because the
21 trees are in the way, generally speaking.

22 Q. Just for the record, how is -- is the
23 site circled on this map?

24 A. Yes, it is.

1 Q. And what is the significance of the
2 number next to the circle 9906800?

3 A. That's the U.S. -- excuse me. The corps
4 of engineers made that circle, and that's the
5 corps-of-engineers' case-file number next to it.

6 Q. Are you aware of the National Wetland
7 Inventory Maps being ground-truthed?

8 A. Yes.

9 Q. Was this map ground-truthed?

10 A. It was not.

11 Q. How do you know that?

12 A. Because there's a particular asterisk
13 indicator for ground-truthed wetlands on National
14 Wetland Inventory Maps. And that indicator, that
15 symbol is not on this map, this area.

16 Q. Where would that symbol appear if this
17 map had been ground-truthed?

18 A. It would appear next to the wetland that
19 they ground-truthed or the area that they
20 ground-truthed if they found it wasn't wetland.

21 Q. So each designation on this map would
22 have an asterisk by it if it had been ground-truthed?

23 A. Yes. But they don't do any -- they do a
24 few per -- I mean, they sample. So they're not

1 looking at every mapped unit within a particular
2 area. They'll pick out a smaller sample to look at.

3 Q. Mr. Carlson, could you now turn to
4 Complainant's Exhibit Number 13.

5 A. Okay.

6 Q. Do you recognize this document?

7 A. I do.

8 ADMINISTRATIVE LAW JUDGE MORAN: I'm sorry.
9 Would you tell me that again. I was writing. What
10 exhibit number are you on?

11 MR. MARTIN: 13, Your Honor.

12 ADMINISTRATIVE LAW JUDGE MORAN: Exhibit 13.
13 Okay. Thank you.

14 MR. MARTIN: Q. Do you recognize this
15 document?

16 A. I do.

17 Q. What is it?

18 A. This is a printout from the
19 TerraServer.com website of an aerial photograph that
20 includes the site at issue.

21 And it provides a variety of information
22 on the left-hand side in the boxes regarding the
23 resolution, which is 8 meters; where it's located by
24 latitude and longitude; the size of the image; who

1 created it, in this case the U.S. Geological Survey;
2 the nearest city; the date of the photograph, which
3 is April 14, 1998.

4 Gives you an idea of where the best
5 resolution is. It's the 1 meter and it has a scale,
6 1 inch equals 768 meters.

7 Q. How did you obtain this document?

8 A. On the World Wide web.

9 Q. Why did you obtain this document?

10 A. Because I'm checking -- in aerial
11 photography, I'm looking for a trend. And over a
12 number of years I'm trying to figure out what
13 happened on the landscape.

14 So in 1998 April is prior to the Hesers'
15 purchase of the property. So I'm attempting to see
16 what the site looked like before purchase.

17 ADMINISTRATIVE LAW JUDGE MORAN: Let me just
18 ask a question, sir.

19 This -- you're telling me that this
20 aerial photograph on CX 190 is from prior -- is in
21 1998 or prior to 1998? Which did you say?

22 THE WITNESS: It's dated April 14, 1998.

23 ADMINISTRATIVE LAW JUDGE MORAN: And is that
24 date on here?

1 THE WITNESS: Yes. It's in that box on the
2 left side under image information.

3 ADMINISTRATIVE LAW JUDGE MORAN: Oh, I'm
4 sorry. Okay. Thank you.

5 MR. MARTIN: For the record, Your Honor, this
6 is another document that the parties have stipulated
7 to as to authenticity.

8 ADMINISTRATIVE LAW JUDGE MORAN: Sure.

9 MR. MARTIN: Q. Mr. Carlson, is the site
10 located on this aerial photograph?

11 A. It is.

12 Q. I'm going to ask you to take your pen and
13 circle the site, if you would.

14 ADMINISTRATIVE LAW JUDGE MORAN: Off the
15 record.

16 (Off-the-record
17 discussion.)

18 ADMINISTRATIVE LAW JUDGE MORAN: Show it to
19 counsel for the Respondent.

20 MR. MARTIN: Let the record reflect that I'm
21 showing the three TerraServer aerial photographs to
22 --

23 MR. SMALL: Appear to be accurate.

24 ADMINISTRATIVE LAW JUDGE MORAN: Thank you,

1 Mr. Martin.

2 Go ahead, Mr. Martin. You had a question
3 to ask?

4 MR. MARTIN: Yes.

5 Q. Were you able to analyze the site on this
6 photograph?

7 A. Yes.

8 Q. How did you do that?

9 A. I observed it on the computer screen and
10 had a copy printed.

11 Q. And what did you find in your analysis of
12 the site?

13 A. All I could really observe besides the
14 agricultural landscape streets was that the site
15 itself was still forested.

16 Q. So it was forested at the time of the
17 photograph, which is April 14, 1998?

18 A. That's my opinion, yes.

19 Q. What does this aerial photograph tell you
20 about the surrounding landscape adjoining the site?

21 A. That it's predominantly agricultural with
22 scattered wood lots.

23 Q. And how can you tell that?

24 A. By the signatures that the land form

1 show, the blockiness of them for fence lines, sort of
2 rural residential widely scattered homes. That's
3 all.

4 Q. Thank you.

5 Mr. Carlson, did you send out an EPA
6 information request in this case?

7 A. I prepared one. The water-division
8 director issued it.

9 Q. Could you turn to Complainant's Exhibit
10 Number 22.

11 ADMINISTRATIVE LAW JUDGE MORAN: Now, 22,
12 correct me if I'm wrong, that's not one of the ones
13 that's been stipulated to. Correct?

14 MR. NORTHRUP: That's correct.

15 ADMINISTRATIVE LAW JUDGE MORAN: Okay.

16 MR. MARTIN: Q. Mr. Carlson, do you
17 recognize this document?

18 A. Yes, I do.

19 Q. Actually, it's more than one document.
20 What is it?

21 A. There are three documents in this
22 section, and the first two are essentially identical.
23 They are -- this is an information-request letter
24 issued on September 16, 2002, to both Respondents,

1 Andrew and Robert Jeffrey Hesel. Each got an
2 identical document.

3 And there is a two-page cover letter. It
4 is copied to a number of different agencies. And the
5 main body of the information request begins on 269,
6 and that is directed at Robert Jeffrey Hesel and
7 Andrew Hesel as Respondents.

8 It identifies three distinct sites in
9 which the EPA is asking for records and information
10 on. One of the three sites, Numbered 3, is the site
11 at issue here.

12 And at the end of the document, 273 and
13 275 is an exhibit that illustrates the sites that
14 we're looking at. And the site at issue here is on
15 273 designated as Site 3. It also contains a copy of
16 the certified-mail receipt on 274.

17 Beginning on 276 there is a similar green
18 card for the one addressed to Robert Jeffrey Hesel at
19 a different address than Andrew.

20 It contains the essentially identical
21 cover letter, identical request for information, and
22 identical maps at the end to indicate the locations
23 of the three sites I'm seeking information on.

24 Document beginning at 285 is a letter

1 from EPA to the Hesers' attorney at this particular
2 time dated October 18, 2002, that is dealing with a
3 little bit of a mix-up on how the sites were labeled
4 originally.

5 And then this is clarifying from Ms.
6 Perkins, the counsel for the Hesper Respondents, that
7 this is the right map for the -- for designating the
8 sites and it just is telling her that EPA wants
9 information on three sites, not just one.

10 Q. Mr. Carlson, did you help prepare these
11 three documents for issuance?

12 A. Yes. I drafted these documents.

13 Q. In general what does Section 308 of the
14 Clean Water Act require?

15 A. It requires of owners and operators of
16 point sources that they provide information that can
17 assist the government in determining whether or not a
18 violation has occurred on a site.

19 And it also is much broader authority for
20 sampling purposes. This section of the act is used
21 by other programs within EPA.

22 Q. Have you issued other Section 308
23 requests?

24 A. I've issued many such requests.

1 Q. What is the purpose of issuing Section
2 308 letters?

3 A. This is part of the enforcement
4 investigation where we're trying to collect evidence
5 and information to help us determine what happened at
6 any particular alleged violation site.

7 It also is an instrument that allows the
8 people it's directed at to give us their side of the
9 story.

10 Q. Is this a routine enforcement practice of
11 the EPA?

12 A. Yes.

13 Q. Are these three documents part of your
14 official case file in this matter?

15 A. They are.

16 Q. Were these documents received by Andrew
17 Hesper and Robert Hesper?

18 A. Well, the green cards indicate the person
19 who accepted them both at two different addresses,
20 although as on the signature on the green card on
21 274, it looks to be Jean Hesper received it on
22 September 21 of '02.

23 And the green card for Robert Jeffrey
24 Hesper on page 276 indicated Jean Hesper accepted that

1 mail also on that same date, September 21, 2002.

2 Q. Now, what other actions would suggest to
3 you that Hesel brothers received the Section 308
4 letter?

5 A. Because I received a call from their
6 attorney prior to Ms. Perkins, a gentleman by the
7 name of John Narmont. Mr. Narmont is identified on
8 285 within our letter referencing a conversation that
9 I had with him.

10 And he called me with my understanding
11 that they had received a 308 and he was making some
12 initial inquiries. And they also subsequently
13 responded to the information request, which leads me
14 to believe that they were aware of it.

15 MR. MARTIN: Your Honor, at this time I would
16 like to move for inclusion into the record of
17 Complainant's Exhibit Number 22.

18 ADMINISTRATIVE LAW JUDGE MORAN: Okay.

19 MR. SMALL: Your Honor, we're going to object
20 to the extent that these letters indicate sites that
21 have nothing to do with this case here and may also
22 be outside of the five-year time frame.

23 When you talk about -- well, just leave it
24 at that.

1 ADMINISTRATIVE LAW JUDGE MORAN: Thank you.
2 Okay.

3 I'm going to allow the exhibit.
4 (Complainant's Exhibit 22
5 was admitted into
6 evidence.)

7 ADMINISTRATIVE LAW JUDGE MORAN: And the
8 five-year time frame has already been discussed in
9 this proceeding several times. It's something I'm
10 going to have to resolve.

11 And in terms of the parts of the document
12 that don't relate to this particular site, that's
13 easily resolved because, unlike if there were a jury
14 here, I'm able to ignore the irrelevant portions of
15 this and focus only on what's relevant.

16 And for the sake of completeness also,
17 having the entire document in is better. As with
18 some other exhibits, we've had that issue in front of
19 us.

20 So I'm overruling the objection and the
21 Document CX 22 is admitted.

22 MR. MARTIN: Q. Mr. Carlson, could you turn
23 to Complainant's Exhibit Number 23. This is a
24 document that extends from page 287 to 397.

1 Take a minute to look it over, please.

2 A. Okay.

3 Q. Do you recognize this exhibit?

4 A. I do.

5 Q. What is it?

6 A. This is the Hesers' response to our
7 information requests, and it's enclosed in two
8 separate submissions. The first submission is on --
9 begins at 287. So the letter dated October 16, 2002.

10 It's addressed to me. It's from the
11 attorneys, the Hesers' attorney, Tracy Perkins, whose
12 name is identified on 288. It contains excerpts of
13 their response. I believe it's excerpted.

14 And beginning on page 359 is the second
15 response. It's dated November 20, 2002. It's also
16 directed to me from the same person previously
17 identified, the Hesers' counsel.

18 And the subsequent pages include excerpts
19 of their response to this information request.

20 Q. Did you receive this response?

21 A. I did.

22 Q. So you're saying that this is not the
23 complete response that you received?

24 A. No. I believe it's excerpted.

1 Q. How is it excerpted?

2 A. For the preparation of the prehearing
3 exchange, we extracted relevant portions and put
4 those in our prehearing exchange.

5 Q. Can you characterize material that has
6 been taken out of the original response from this
7 exhibit?

8 A. Yeah. All the material relating to the
9 other two sites except for the U.S. Department of
10 Agriculture letters, those were -- those remained.

11 I believe there's a full-sized copy of a
12 topal map that was not put in. I believe there's a
13 series of photographs, color photographs of the site
14 that were not put in in this prehearing exchange.

15 Q. When you say that -- I'm sorry to
16 interrupt. When you say the site, are you referring
17 to the site of the alleged violation?

18 A. I am, as well as pictures of the other
19 two sites.

20 Q. Like to turn your attention to page 294.
21 I just have a question.

22 A. All right.

23 Q. 294 is designated page 5 of response.

24 Page -- following page, 295, is designated page 7 of

1 the site.

2 A. I see that.

3 Q. Is there an explanation for that?

4 A. It appears that page 6 has been -- is
5 missing.

6 Q. Well, aside from that, are the -- is the
7 text of the response in both of these responses
8 complete?

9 A. Yes. The cover letters that included,
10 you know, the two-page cover letter or one-page cover
11 letter, as the case may be, is included.

12 And then their written narrative response
13 to the questions are included in full, except
14 apparently for page 6 of the October 16, 2002
15 response.

16 And it's where not -- the complete
17 response was not put in refers to the -- refers to
18 the attachments.

19 So it's the attachments that were --
20 pieces were left out.

21 Q. So notwithstanding the one page of the
22 text, the documents excerpted from this exhibit are
23 all attachments to the two responses. Is that
24 correct?

1 A. That's correct.

2 Q. Does EPA retain a complete copy of both
3 of these responses in its files?

4 A. It does.

5 ADMINISTRATIVE LAW JUDGE MORAN: Would that
6 include the missing page 6?

7 THE WITNESS: Hopefully.

8 MR. MARTIN: Q. Did you bring that file to
9 this hearing?

10 A. I did.

11 MR. MARTIN: Your Honor, at this time I'd be
12 happy to provide Respondents' counsel with a complete
13 copy of their responses to the extent they don't have
14 them already.

15 And I'd be happy also to replace that
16 complete copy as the exhibit.

17 ADMINISTRATIVE LAW JUDGE MORAN: Similar to
18 the way we handled this problem in an earlier part of
19 the proceeding?

20 MR. NORTHRUP: Right. We would want it to be
21 the full copy.

22 ADMINISTRATIVE LAW JUDGE MORAN: Are you
23 saying, Mr. Northrup, that you want the full copy
24 made as the exhibit, not the excerpted copy, or did

1 you just want to have it available to you?

2 MR. NORTHRUP: Yeah, the full copy.

3 ADMINISTRATIVE LAW JUDGE MORAN: All right.
4 So we're going to substitute this EPA Exhibit 23 with
5 the unexcerpted -- that runs a little bit against
6 your earlier objection.

7 MR. NORTHRUP: I understand that, Your Honor.
8 I understand.

9 ADMINISTRATIVE LAW JUDGE MORAN: So that's an
10 administrative thing we'll take care of between now
11 and when we resume in May.

12 MR. MARTIN: Yes.

13 ADMINISTRATIVE LAW JUDGE MORAN: Okay. So
14 are you -- Mr. Northrup, so are -- this is a little
15 bit difficult to handle in a way.

16 You can't really say whether you object
17 until you see the full document, I guess. You're not
18 going to object to the inclusion of parts that don't
19 relate to this, obviously, but --

20 MR. NORTHRUP: No. And given your prior
21 ruling, we would not.

22 ADMINISTRATIVE LAW JUDGE MORAN: All right.
23 So -- but I can't admit a document I don't have yet
24 in front of me. And I don't have the document. I

1 don't have the Document 23. So how can I admit it?

2 I have an excerpted version, which is not
3 going to be admitted. So you can just ask questions
4 of it and when we resume, then present the full
5 Exhibit 23. And I'll hold in abeyance admitting it.

6 But you can still ask him any questions
7 about it, and then we'll note that those pages are
8 within the Revised Exhibit 23.

9 Go ahead, Mr. Martin.

10 MR. MARTIN: Q. Mr. Carlson, you reviewed
11 these responses to EPA's information requests?

12 A. Yes.

13 Q. Generally how would you characterize
14 these responses?

15 A. I would say for the most part they appear
16 to have provided the information requested. In one
17 -- really the main piece of it is relating to
18 Question 3.

19 And in that response I thought it was an
20 incomplete response in terms of describing what
21 happened on the site.

22 Q. Pardon me. What information was sought
23 in Question 3?

24 A. Question 3 were -- it's a specific

1 question about give us a time-annotated specific
2 description of activities for the conversion of any
3 noncropland, in other words, forests within any of
4 the three sites.

5 But in this particular site -- I believe
6 our site is Number 3 -- to croppable land, including
7 all these earthmoving activities that are described
8 in here including the equipment.

9 See here. Hang on. Oh, no. I'm sorry.
10 This question doesn't include the equipment. The
11 equipment question comes later.

12 But this is asking for what happened on
13 the site once you purchased it, obtained control of
14 the site that, where it ended up in crops. I'm
15 asking them what did they do on the site over time,
16 describe for us.

17 Q. And what was the response as reflected in
18 this 308 response?

19 A. Well, their response indicates -- and
20 this is on page 291 past the objection paragraph in
21 the middle of the page. It begins, Trees had been
22 cut down on the property by calling Wood Products
23 prior to their purchase of the property, their
24 referring to the Hesers.

1 It goes on to say that left heavy logging
2 debris in the former drainage ditch. Then they get
3 to what the cause of the problem.

4 They say, Work was also performed on the
5 drainage ditch upstream of the Hesers' property by an
6 adjoining landowner which straightened the ditch
7 upstream of the property and caused water to flow
8 more quickly through the site during storm events.

9 They go on to describe the combination of
10 higher water flow during storm events and the logging
11 debris located in the drainage ditch began causing
12 severe erosion on the property.

13 They say the area was disturbed from
14 logging activities without vegetation. And without
15 vegetation tells me that -- I interpret that as it's
16 clear cut and the soil was being washed away.

17 They go on to describe runoff from
18 Highway 37 draining into the ditch that subsequently
19 drains to their property and describe problems that a
20 neighboring property owner had from the salt from
21 Highway 37 killing things in his field.

22 And then the sentence beginning with, In
23 approximately 1998, Andrew and Robert Hesel removed a
24 few stumps from a row near the western portion of the

1 site and in a row in the central portion of the
2 sites, they described these stumps as being left from
3 the previous logging operation prior to their
4 purchase of the property.

5 They go on to explain that the stumps
6 were placed in a pile elsewhere on the site or the
7 Hesers' property and/or burned.

8 They further describe that in August or
9 September of 1999 that the two Hesper brothers dug a
10 small, new storm-water ditch at the edge of the site
11 which diverted the water from a small portion of the
12 eroding and debris-filled intermittent drainage ditch
13 in order to maintain the ditch and that they graded
14 this area of the site.

15 They describe the ditch with the concrete
16 at the bends to combat further erosion problems.
17 They described debris removed from the channel and
18 burned.

19 Q. Mr. Carlson, what part of this response
20 is in your opinion inaccurate?

21 A. Well, I would have a hard time doing that
22 at this stage without getting to the subsequent
23 question regarding equipment.

24 ADMINISTRATIVE LAW JUDGE MORAN: He can't

1 answer your question.

2 MR. MARTIN: Q. All right. Proceed with
3 your analysis of the next question.

4 A. Question Number 4 on page 292 asks them
5 to identify the persons and companies involved. And
6 then they have so done so in there, that they
7 themselves did the work and that they hired help.

8 They mention in the answer to Question 4
9 that they rented a scraper and a paddle wheel from a
10 Dale Henson. They used a chain saw to remove debris,
11 that they also used a couple of bulldozers, one of
12 which they owned and one of which they rented.

13 That they hired a gentleman to spread
14 fertilizer on the site, lime on the site. They hired
15 a person to place the concrete on the ditch bends,
16 the stream bends.

17 Response to Question 6 --

18 ADMINISTRATIVE LAW JUDGE MORAN: Are you just
19 having this witness read? You said analysis. He's
20 reading the responses. Okay. But if you're going to
21 -- you can't just let him go on and read on all of
22 these pages endlessly.

23 He can read directly from it or he can
24 just summarize what the answer is and then if you

1 have a question about that, deal with that then and
2 then move on to the next one.

3 You have a question about his reading --
4 it's not his analysis. He's reading the answer for
5 Question 4.

6 MR. MARTIN: What I'm trying to get to is his
7 analysis of the response.

8 ADMINISTRATIVE LAW JUDGE MORAN: Well, it's
9 not an analysis. It's -- the word "analysis" doesn't
10 fit. He's read a response. You can say, Do you take
11 issue with that response, yes or no, or however he
12 answers.

13 If he says yes, then say, Please explain
14 the basis for your taking issue with this response.

15 MR. MARTIN: I understand, Your Honor.

16 Q. Mr. Carlson, which response do you take
17 issue with?

18 ADMINISTRATIVE LAW JUDGE MORAN: If any?

19 THE WITNESS: Okay. It relates to the
20 response to Question 3, 4, and 6.

21 And the section in Question 6 response of
22 292 refers to their statement in the second paragraph
23 past the objection paragraph that says, As stated
24 above, a small portion of the site had been logged by

1 calling Wood Products prior to Andrew and Robert's
2 purchase of the site.

3 I find that inconsistent with what was
4 described in 3 where they describe the trees had been
5 cut down on this property and there was no vegetation
6 left. They seem to have changed their response to
7 say, Only a small portion of trees were cut down.

8 That's what I see in there. And they
9 also basically haven't told us, you know, this paddle
10 wheel, this scraper, these two bulldozers, under
11 Question 3 we're asking for what happened on this
12 site, what did that equipment do?

13 And I didn't see that described. So I
14 thought that was somewhat incomplete.

15 MR. MARTIN: Q. Anything else?

16 A. Well, it identifies that the Hesers are
17 the owners, and it identifies when they owned the
18 property with regard to their response.

19 Q. Any other responses that you felt weren't
20 accurate, Mr. Carlson?

21 A. Yes. On Question 10 on page 294, at this
22 -- we're asking them for their interactions with the
23 U.S. Department of Agriculture specifically relating
24 to swamp-buster provisions. And their response is

1 they have not received any correspondence from that
2 agency.

3 And I thought that was somewhat
4 misleading in the sense that or could be interpreted
5 as misleading because I had a whole file of material
6 from the ag department on swamp buster on both Andrew
7 and Robert Hesper.

8 That would complete it for this
9 particular response.

10 Q. Thank you, Mr. Carlson.

11 Could you please turn to Bates page 297
12 and 298 marked as a warranty deed.

13 A. Okay.

14 Q. Are you familiar with this document?

15 A. I am.

16 Q. Was it an attachment to the Section 308?

17 A. It was.

18 Q. What is the significance of this
19 document?

20 A. This is a warranty deed and was filed on
21 August 6th of 1998. And it indicates that the --
22 Robert -- that Robert and Andrew Hesper purchased
23 property, obtained property from Max and Dorothy
24 Mercer.

1 And it's a 60 acre parcel of land that
2 includes the site at issue.

3 Q. How do you know this?

4 A. Well, I've seen many warranty deeds
5 regarding property ownership in the past. And that's
6 my understanding of that's the transaction that's
7 being -- that is happening here is a
8 property-ownership transaction.

9 Q. Well, I understood your testimony as
10 stating that this warranty deed includes the alleged
11 violation site. How do you know this?

12 A. From the legal description, you can trace
13 out that legal description on the topographic maps.
14 And that includes the site. And it's also their
15 response to our question about the site.

16 Q. Is this warranty deed dated?

17 A. It's dated in two locations.

18 Q. What is the date?

19 A. Well, the filing date at the county clerk
20 and recorder's office is August 6, 1998.

21 Q. Is there another date noted?

22 A. Yeah. The grantors, Max and Dorothy
23 Mercer, appear to have signed it on August 5, 1998.

24 Q. Thank you.

1 Could you please turn to page 299. Do
2 you recognize this document?

3 A. I do.

4 Q. What is it?

5 A. This is a property-tax-assessment record
6 for the property at issue.

7 Q. Does this document relate to the alleged
8 violation site?

9 A. I believe it's the same 60 acre parcel.

10 Q. Within which the alleged violation site
11 is located?

12 A. That's correct.

13 Q. What significance do you attach to this
14 document?

15 A. Well, it identifies the area as farmland
16 and that the Heser brothers are paying property
17 taxes.

18 Q. Could you turn to Bates date -- strike
19 that.

20 Could you turn to page 305. Do you
21 recognize this document?

22 A. I do.

23 Q. What is it?

24 A. It looks like one of those cutouts from

1 the U.S. Department of Agriculture files on their
2 aerial photography.

3 Q. Was this part of the Section 308 response
4 by the Hesper brothers?

5 A. Yes, it was.

6 Q. What significance do you attach to this
7 document?

8 A. At the property site, which is
9 approximately -- if you put your finger in the center
10 of that document, the site is about 3 inches to the
11 southwest of center.

12 North is to the left if you have this up
13 and down. In other words, 305 is your number at the
14 top.

15 That's facing east. So north is to the
16 left. And the
17 site is -- you can see the site there.

18 And it appears to be enforced and that
19 there -- although hard to see, there's a W indicated
20 in the lower right-hand corner of that -- of this
21 map.

22 Q. And are you aware of what that W stands
23 for?

24 A. Yes, I am.

1 Q. What does it stand for?

2 A. The U.S. Department of Agriculture, the
3 farm bill, produced the wetland inventory for
4 agricultural lands.

5 And 1990 was the first time that they
6 placed designations of wetland or nonwetland or other
7 designations related to the farm bill on these type
8 of maps for different tracts and for different
9 property owners.

10 And that W is an indication that they
11 felt a portion of this site was a wetland.

12 ADMINISTRATIVE LAW JUDGE MORAN: The USDA
13 first began designating this when?

14 THE WITNESS: 1990 was the first time they
15 had to certify their wetland determinations.

16 ADMINISTRATIVE LAW JUDGE MORAN: 1990?

17 THE WITNESS: Correct.

18 ADMINISTRATIVE LAW JUDGE MORAN: And I don't
19 see this W anywhere on this map.

20 MR. MARTIN: I'm going to have the witness
21 circle the site, Your Honor.

22 ADMINISTRATIVE LAW JUDGE MORAN: If you can
23 do that right now.

24 And then why don't you pick a good spot

1 to stop 'cause we're going to be stopping at three,
2 but we want to take lunch. It's 12:19.

3 We'll go off the record.

4 (Off-the-record
5 discussion.)

6 ADMINISTRATIVE LAW JUDGE MORAN: Let the
7 record reflect that the witness has made a red
8 outline on the site on page 305 and has also made a
9 mark within that red circle and that Respondents'
10 counsel has looked at the marks made on all the
11 exhibits and has agreed that they're all the same.

12 MR. NORTHRUP: That's correct.

13 ADMINISTRATIVE LAW JUDGE MORAN: Is that
14 right, Mr. Northrup?

15 MR. NORTHRUP: That's correct.

16 ADMINISTRATIVE LAW JUDGE MORAN: Okay.
17 Great. So that mark has been made.

18 And of course, you're going to have to --
19 when you give me the unexcerpted version, you're
20 going to have to substitute this page and any other
21 page where you have a marking just to make it a
22 little more complicated for you.

23 But you know what? I just want to
24 comment and hopefully at some point you'll either

1 tell me I'm right in posthearing briefs or -- but all
2 of this sort of escapes me.

3 We've got a million maps and -- not a
4 million literally, but we have lots of maps, lots of
5 aerial photos

6 And I was just positive that if every one
7 of these photos, every one of them showed this was
8 not a wetland, it's not a wetland, not a wetland, not
9 a wetland. But then we have people like Mr. Lenz go
10 on the site and they say, well, whatever the map
11 said, we were there in person and we determined
12 through criteria that we apply that it's a wetland.

13 Then it seems to me like all of this --
14 cutting through all of this business of maps of high
15 altitude, low altitude, you know, what does it
16 matter? It could be me being obtuse.

17 But it would seem to me that that would
18 trump photographs just as if you had a hundred maps
19 showing it's wetlands, it's always been called a
20 wetland, but Mr. Lenz goes to the site, he can't find
21 wetland to save his life.

22 So then it would seem to me that if I'm
23 right about that premise, then the question is is --
24 and this is just my thought about this, but I'd like

1 to let the parties know because it could help direct
2 you in terms of your arguments to me.

3 Then it seems to me the question is,
4 well, if we have -- and I don't know about whether
5 there will be evidence showing it's not a wetland.

6 They can test the soil samples, whatever
7 to the extent cross-examination Respondents' own
8 witnesses bring in their own samples and show
9 something different, speculating.

10 But then it seems to me the question then
11 would be, well, if we assume for the sake of argument
12 we have a wetland, is this an isolated wetland?

13 I mean, because it seems to me that's the
14 bigger question here as to whether this is something
15 that fits within Supreme Court inklings or, you know,
16 divided as they are hints about the nature of this.

17 So I'm just -- you know, it seems to me
18 like the more important focus would be not on this
19 map and that map, but the actual direct evidence and
20 then what evidence EPA has, if any, and what evidence
21 the Respondents have, if any, relating to whether
22 this is an isolated, unconnected water body or not.

23 And then I have sufficient factual
24 information to be able to say yea or nay and why,

1 what my reasoning is, etc.

2 And I have -- another thought is I noticed
3 in -- this is for the benefit of Respondents'
4 counsel, that in one of the Hesel responses to
5 information inquiries which I guess were on Exhibit
6 22, which was admitted, if I have the right -- this
7 is when they had different attorneys.

8 Maybe it was 23. Yeah, it was 23 --
9 excuse me -- which is not admitted yet for the
10 reasons we explained. The -- one of the responses
11 indicated all we're doing is ditch maintenance.

12 And I didn't get the sense that that -- is
13 that an argument you're still making, that this was
14 not a change of channel but that the existing channel
15 is the same as it always was, it was just cleaned up?
16 You're not suggesting that, are you?

17 MR. NORTHRUP: No.

18 ADMINISTRATIVE LAW JUDGE MORAN: No.

19 So even though that response indicated
20 that, that's something that new counsel you've
21 dropped that?

22 MR. NORTHRUP: Well, we don't dispute that
23 this L was something new --

24 ADMINISTRATIVE LAW JUDGE MORAN: Okay.

1 MR. NORTHRUP: -- that was not preexisting.
2 We were just cleaning it out.

3 ADMINISTRATIVE LAW JUDGE MORAN: Okay. All
4 right.

5 MR. MARTIN: Your Honor, very briefly on what
6 you just said about maps, we're not using this map to
7 prove this area is wetlands. We are relying on Mr.
8 Lenz's visit to the site as well as Mr. Carlson.

9 This goes more to notice to the Hesper
10 brothers of wetland requirements and potential
11 wetlands on the site. But that is the only reason we
12 will use this area.

13 ADMINISTRATIVE LAW JUDGE MORAN: Really goes
14 more towards if I get past the other burdens like
15 statute of limitations, like whether it is a wetland
16 that's covered under the Clean Water Act, then this
17 is directed more towards they knew about it and that
18 ought to be a consideration if I get to the point of
19 determining there should be a penalty.

20 MR. MARTIN: Correct, Your Honor.

21 ADMINISTRATIVE LAW JUDGE MORAN: Okay. All
22 right. It's 12:27. We'll meet promptly at 1:30 and
23 then we will adjourn at 3:00.

24 (A lunch recess was
 taken.)

1 discussing the Heser brothers' response to second
2 request. Could you turn to page 308.

3 ADMINISTRATIVE LAW JUDGE MORAN: 308?

4 MR. MARTIN: Yes.

5 THE WITNESS: All right.

6 MR. MARTIN: Q. Do you recognize this
7 document?

8 A. I do.

9 Q. What is it?

10 A. It's a receipt of purchase provided by
11 the Hesers in their response. And it identifies that
12 they have purchased diammonia phosphate, looks like
13 about 300 pounds of it.

14 It's a fertilizer. Potash, another
15 fertilizer, another 300 pounds. Indicates a spraying
16 spinner unit was purchased. Allocates the purchase
17 equally between Bobby and Andy Heser are labeled as
18 partnership splits.

19 Q. I believe you indicated this, but was
20 this an attachment to the 308 response of Heser
21 brothers?

22 A. It was.

23 Q. What do you find significant about this
24 sales invoice?

1 A. Well, this attachment relates to our
2 questions, back to the questions. And what it
3 indicated was that they had placed this amount of
4 material onto the impacted site.

5 Q. And in your opinion, what effect would
6 this have?

7 A. Well, these are fertilizers. This is
8 nitrogen, phosphorous, and potassium, common
9 fertilizers used by farmers for plant growth.

10 And it just indicates to me that this
11 material was placed on the site when read in
12 conjunction with their narrative response.

13 Q. Which narrative response are you
14 referring to?

15 A. Oh, in response to Question 5 on page
16 292, their answer references Attachment 3, and also
17 in response to Question 4, same page, 292.

18 Q. Could you read the relevant provision of
19 the answer to Question 4.

20 A. Sure. It's the fifth sentence.
21 And it begins with, The Hesers retained Effingham
22 Clay Service Company, P.O. Box 985, Salem, Illinois,
23 to spread fertilizer and Dean Junio Francois
24 Brothers, Inc., to spread lime around the new portion

1 of the drainage ditch when completed.

2 Q. Okay. What is the concern about this
3 practice?

4 A. Well, the concern is these are potential
5 pollutants that could enter waterways.

6 Q. Could you turn to page 309.

7 A. Okay.

8 Q. Do you recognize this document?

9 A. I do.

10 Q. What is it?

11 A. This is another -- this is an invoice
12 from Dale Hanson, one of the persons identified as
13 being paid to use a bulldozer on site. It's a dated
14 invoice, September 20, 1999.

15 And it lists 17 1/2 hours of dozer work
16 at \$55 an hour. And it lists the scraper rental,
17 apparently costed 50. And it makes reference to a
18 check from -- for Andy, Check 1609.

19 Q. And was this document included as an
20 attachment to Hesper brothers' response to the 308
21 request?

22 A. It was.

23 Q. And what do you find significant about
24 this document?

1 A. It's a point source.

2 And it also indicates the amount of
3 resources expended by the Hesers to alter the site.

4 Q. And what is the significance of the term
5 point source?

6 A. Point source is one of the legal elements
7 that must be proved in a case such as this.

8 Q. Please turn to page 369 through 397.

9 A. Can you give me the page numbers again?

10 Q. I'm sorry. 369 through 397. Can you
11 take a moment just to look through these documents.

12 ADMINISTRATIVE LAW JUDGE MORAN: You have to
13 keep your voice up, Mr. Martin.

14 MR. MARTIN: I'm sorry.

15 Q. Could you take a moment to look through
16 these documents.

17 A. Okay.

18 Q. Do you recognize these documents?

19 A. I do.

20 Q. What are they?

21 A. They were provided by the Hesers in their
22 response to our information request. And these came
23 in the second document, the second response on the
24 information request.

1 with a request from Robert Jeffrey Heser to basically
2 look at his lands, determine if he has wetlands and
3 where they sit with regard to the swamp buster rules.

4 And the -- there's a duplicate. Pages
5 389, 390, and 391 is just a duplicate of 392, 393,
6 and 394.

7 And USDA is informing Robert Jeffrey
8 Heser on this particular tract, which I identified as
9 5041, and this is indicated on -- the substance of
10 it's indicated on what is known as a 1026 form.

11 And it's Bates Number 395. The Bates
12 number is kind of hidden. It's about 2 inches up the
13 lower right-hand corner of this particular page.
14 It's labeled highly erodible land and wetland
15 conservation determination.

16 Robert Jeffrey Heser is identified as the
17 person requesting a determination. Excuse me. I'm
18 on Bates 393. There's two forms. The one I want is
19 the one that's dealing with Tract 5041. That's 393.
20 I'm sorry. It's the same form, just a different
21 site.

22 Robert Jeffrey Heser is identified as
23 requesting a determination via Tract Number 5041 as
24 identified on the top of the page. The request is

1 dated January 16, 1991.

2 And under what would be Number 16 -- the
3 questions on the left-hand side are numbered. And
4 the box with regard to nonexempted wetlands is -- has
5 data in it. And that's what's significant.

6 The NRCS is making a call that these
7 wetlands were converted after December 23, 1995.
8 They say in Field Number 2 for Tract 5041 there is 55
9 acres of total wetland area that's estimated to have
10 been converted.

11 ADMINISTRATIVE LAW JUDGE MORAN: Did you say
12 1995 in your answer?

13 THE WITNESS: No. No. 1991 is this set of
14 documents.

15 ADMINISTRATIVE LAW JUDGE MORAN: I must have
16 misheard you. I thought you said something about
17 1995.

18 THE WITNESS: I said 55 acres were estimated
19 as the amount of wetlands that were converted on this
20 particular tract of land.

21 ADMINISTRATIVE LAW JUDGE MORAN: Okay.

22 THE WITNESS: Okay. That's 5041 and that's
23 Robert Jeffrey and that's in 1991. There's a
24 subsequent correspondence dated February 13th. I'm

1 there and do a field visit to finalize the
2 determination.

3 MR. MARTIN: Q. Are you saying that the
4 revision that you just mentioned is at Bates 387 from
5 6 to 8 acres?

6 A. That's correct.

7 Q. From 8 to 6 acres.

8 A. That's correct. He's revising his
9 determination downward. And he makes a note of that
10 under 21 under Remarks on 387 where he says, This
11 supersedes determination made on February 5th of 1991
12 subject to a field check.

13 The rest of the documents are dated
14 October 18, 1996. There's two sets of those. Again,
15 one set from October 18th, '96, goes to Andrew Hesper.
16 It's on Tract Number 5041.

17 It's a preliminary determination that in
18 that tract, 5041, in Field Number 2 they're making a
19 preliminary call that there's been wetlands
20 converted.

21 And this gives him all the information
22 regarding appeal rights and other things that --
23 other procedures under the farm bill. He signed --
24 Tony Antonacci signs these.

1 These documents are paired -- just to
2 give you an explanation, there are -- there's two
3 separate sites and two separate letters. The
4 October-1996 letters give a preliminary determination
5 of converted wetland calls in 1996.

6 The 1996 letter to Andrew Hesper
7 identifies the same tract and the same field number,
8 Number 2, that is being converted from 1991.

9 And the other significance of these
10 October-1996 letters is some of the information they
11 include. And I want to point -- take your attention
12 to 383, which is an attachment to the October 18,
13 1996 letter to Andrew Hesper on Tract 5041.

14 On that -- on that page 383, you see a
15 Section 2 labeled Wetlands.

16 MR. SMALL: Your Honor, there was one
17 question five minutes ago.

18 ADMINISTRATIVE LAW JUDGE MORAN: Absolutely.
19 You just can't let this witness go on. A narrative
20 answer is appropriate, but this is a speech.

21 And the question -- you have to have
22 discrete questions, have him answer that, and then
23 you should be the maestro here and ask him more
24 specific questions. I can't let this witness -- I

1 sustain the objection. He can't go on forever.

2 MR. MARTIN: Well, Mr. Carlson analyzed these
3 letters and his position --

4 ADMINISTRATIVE LAW JUDGE MORAN: Ask him
5 discrete questions about it.

6 MR. MARTIN: Well --

7 ADMINISTRATIVE LAW JUDGE MORAN: This is not
8 free-range testimony.

9 MR. MARTIN: Yes, Your Honor.

10 Q. Mr. Carlson, you were just looking at
11 Bates page 383. This involves Tract 5041?

12 A. That's correct.

13 Q. Is this Tract 5041, was that also the
14 subject of the letters that you discussed from back
15 in 1991?

16 A. It is.

17 Q. Is there more than one parcel of property
18 associated with 5041 or is it just one tract?

19 A. 5041 designates one tract. There can be
20 a number of fields within a tract.

21 Q. Are there -- is it important that --
22 strike that.

23 Are we talking about one field associated
24 with 5041?

1 A. We're focussing on Field Number 2.

2 Q. Number 2.

3 And was there a different field
4 associated with wetlands determinations in 1991 with
5 regard to the different field associated with 5041?

6 A. No. It's identified as Field 2 in 1991
7 as well.

8 Q. So it's your intent just to go through a
9 history of one field associated with 5041?

10 ADMINISTRATIVE LAW JUDGE MORAN: No. That's
11 what you do through your questions.

12 You go through the history, you ask the
13 questions, and then you can have a grand statement at
14 the end summing it up. But that's how you do it.

15 MR. MARTIN: Q. Mr. Carlson, are these 1996
16 letters, are they included in the corps of engineers'
17 referral marked as Complainant's Exhibit 8?

18 A. I'm sorry. Can you repeat that question?

19 Q. With regard to the 1996 letters from the
20 USDA, are these letters included in the corps of
21 engineers' referral marked Complainant's Exhibit 8?

22 A. They are.

23 Q. What, if anything, do the 1991 letters
24 add to our understanding about the Hesper brothers'

1 knowledge of wetland requirements?

2 MR. SMALL: Your Honor, at this point in time
3 I'm going to object on relevancy. I'm also going to
4 object on statements that took place more than five
5 years ago. I mean, we're talking about time frames
6 here before we even show the beginning of
7 construction here.

8 So I think they are too remote in time.
9 And previously I had indicated to the court too that
10 I feel there's sufficient case law that should
11 exclude this evidence since we're too far removed.

12 ADMINISTRATIVE LAW JUDGE MORAN: Okay. I
13 hear -- it sounds like you're going to add an
14 objection. So I'm going to wait.

15 MR. NORTHRUP: Your Honor, I'm sorry. I was
16 talking over you to Mr. Small.

17 ADMINISTRATIVE LAW JUDGE MORAN: Okay. Is
18 that your objection?

19 MR. SMALL: Yes, it is.

20 ADMINISTRATIVE LAW JUDGE MORAN: All right.
21 And I overrule the objection.

22 In the first place I want to explain that
23 you've already made many times your arguments which
24 related to statute of limitations and variations of

1 that.

2 But Mr. Martin has explained that this
3 testimony, although it's exclusively for this
4 purpose, it's for the purpose of showing elements
5 which might come into consideration if we get to the
6 juncture where there's a violation established and a
7 penalty is appropriate.

8 And it seems to me that if -- there was
9 testimony that, just to use a colorful example --
10 Mr. Hesler, next to you, who are you?

11 MR. HESER: I'm Bobby.

12 ADMINISTRATIVE LAW JUDGE MORAN: Bobby.

13 If Bobby -- if there was testimony that
14 when Bobby was in the 11th grade that he did a report
15 about wetlands and EPA introduced that report to show
16 that he knew what wetlands were, I wouldn't say,
17 Well, gee, that was too old.

18 It would be relevant to state of knowledge
19 about what wetlands are. And that could go towards
20 penalty consideration as opposed to the person who
21 went, Wetlands, you know, what's that? You know.

22 That's what they're trying to show as far
23 as I understand their testimony. And so your
24 objection is overruled.

1 MR. MARTIN: Q. Well, I believe the question
2 was, looking at the 1991 letters from the USDA, what
3 does that add to our understanding of the Hesper
4 brothers' knowledge of Section 404 and
5 wetlands-protection programs?

6 A. Well, it indicates to me that Robert
7 Jeffrey Hesper was astute enough to ask for assistance
8 from the USDA office on whether lands that he owned
9 had wetlands on them and what was the status of them
10 relative to the farm-bill provisions and that he
11 received this correspondence.

12 It identifies U.S. Army Corps of
13 Engineers in these 1991 letters. Specifically
14 references the Section 404 program. It specifically
15 tells Mr. Hesper on, for example, on page 392, I'll
16 just read this straight out.

17 It says, Per your request, I also spoke
18 to a Harry Slaughter regarding your conversation with
19 him on January 16, 1991.

20 Mr. Slaughter stated firmly that current
21 USDA wetland-conversion rules and regulations do not
22 -- and not is underlined for emphasis -- exempt you
23 from obtaining a Corps of Engineers' Section 404
24 permit and a State of Illinois permit for your

1 wetland conversions.

2 For further information on required
3 permits, you will need to contact the follow
4 agencies. And the Corps of Engineers' Louisville
5 office is noted as well as the Indiana Department of
6 Transportation Water Resources Division office.

7 Q. And that was read from page 392. Is that
8 correct?

9 A. That's correct.

10 Q. All right. Let's move on to the
11 inspection of the site.

12 Have you been to the area of the alleged
13 violation, Mr. Carlson?

14 A. I have.

15 Q. How many times?

16 A. I've been on the site on two occasions.
17 On the third occasions we were denied access. So I
18 watched the site from the adjacent property.

19 Q. Let's talk about the first time you
20 visited the site. When did this take place?

21 A. On September 19, 2003.

22 Q. What, if anything, did you do to prepare
23 yourself prior to inspecting the site?

24 A. Prior to arriving on the site, on

1 September 18th, the previous day, I stopped in and
2 reviewed the aerial photographic resources and
3 soil-survey information in-house at the U.S.
4 Department of Agriculture's Natural Resources,
5 Conservation, and Farm Service Agency office in
6 Salem, Illinois.

7 Q. Could you turn to Complainant's Exhibit
8 12. That would be Bates 182 through 189.

9 Starting with Bates Number 182, do you
10 recognize this document?

11 A. I do.

12 Q. What is it?

13 A. This is a color photograph of a
14 photographic print, photographic print obtained from
15 the farm-service agency's annual crop slides for
16 1997.

17 Q. And I'm going to ask you to take a look
18 at this photo and describe what you see of the site
19 which is circled by a red circle.

20 A. The site appears forested and it's
21 surrounded for the most part by a lot of agricultural
22 land. I can see Martin Branch in spots.

23 And I can see a wooded riparian corridor
24 around it on the site as well as upstream of the site

1 and areas downstream of the site.

2 Q. Moving to Bates 183, again, could you
3 describe what this photo depicts about the site of
4 the alleged violation?

5 A. Well, I neglected to mention previously
6 these are growing-season photographs. So they're
7 taken in the summer generally between late June and
8 early September.

9 And again, the 1998 photograph shows
10 essentially an identical forested riparian corridor
11 on the site up- and downstream of the site surrounded
12 by agricultural land.

13 Q. When you say this is a growing-season
14 photograph, what does that refer to?

15 A. Well, the growing season is defined on
16 when crops are generally grown in an area. I
17 specifically mention these growing-season photographs
18 were taken in the summer when crops are viewable.

19 Q. And what do you base that conclusion on?

20 A. I have looked at hundreds of these sites,
21 and I'm familiar with their program and why they --
22 when I say they, I mean the USDA -- on why they fly
23 these and what their purposes are for.

24 And I also mentioned that I have

1 specialized training in reading these aerial -- this
2 type of aerial photography for wetland signatures in
3 ag land with the memorandum of agreement 1994.

4 Q. And when you referenced that these photos
5 were taken during the summer, which months would you
6 associate with that?

7 A. I have seen these photographs from the
8 end of June through early September. That's the
9 range. Depends on the weather conditions on when
10 they can get the flight in.

11 Q. Could you describe the site as it's
12 depicted in this photograph comparing it with the
13 previous photograph from 1997?

14 A. You know, looking at the relative size,
15 it looks like there's no changes on the site with
16 regard to its forested cover.

17 Q. Could you describe a little bit more the
18 nature of the forested cover of the site in this
19 photograph?

20 A. By forest, I'm referring to trees. So I
21 see treetops. I see a canopy, texture. And you
22 know, since I've been to the site essentially
23 field-truthing it, I know there's a forest upstream
24 that's still there.

1 And that the signature of that forest
2 matches the signature of the forest just on the
3 impacted site. So I would conclude that it's still
4 in forest.

5 Q. So you can tell from this photograph that
6 the forest that existed and depicted in this picture
7 in 1998 is similar to the forest that currently
8 exists upstream at the site?

9 A. No. I said it had the same signature, so
10 it's similar in that it's forested. It's, you know,
11 generally in the same landscape position. So the
12 sites should be similar.

13 Q. Could you turn to Bates 185.

14 A. Okay.

15 Q. Can you tell us what this photograph
16 depicts of the site of the alleged violation?

17 ADMINISTRATIVE LAW JUDGE MORAN: How about
18 directing his attention to a specific part of that,
19 Mr. Martin.

20 Isn't this exhibit marked?

21 MR. MARTIN: I'm sorry?

22 ADMINISTRATIVE LAW JUDGE MORAN: Isn't this
23 exhibit marked on your copy on 185?

24 MR. MARTIN: Yes, it is.

1 Q. And I'd direct your attention to the red
2 circle on Bates 185.

3 A. All right.

4 Q. What does the photograph depict within
5 this red circle?

6 A. The photograph is dated from 2001, and
7 it's a very poor photograph in terms of observing the
8 site. But I can see that the forest is no longer
9 there compared to just upstream where that forest is
10 still there.

11 And it looks more rough textured than the
12 surrounding crop fields to the north and west of the
13 circle and east of the circle below the upstream
14 forest.

15 So it's indicating to me that the forest
16 has been cleared out of there and it's without its
17 tree canopy now.

18 Q. And what about the photo tones of this
19 photograph leads you to that conclusion?

20 A. No. This is a poor photograph. I would
21 not have been using this photograph to really talk
22 about photo tone since it's pretty poor quality. I
23 mean, I can see that the darkness of the trees is no
24 longer there compared to upstream.

1 That's about all. And it looks rougher
2 than -- and that's photo tone textures of photo
3 signature, it looks different than the smoothness to
4 the northeast and west.

5 Q. All right. Mr. Carlson, the photo that
6 we just looked at, Bates 185, is marked as the 2001
7 photograph.

8 I'd like to draw your attention to Bates
9 184, an aerial photograph dated from 1999. Call your
10 attention to the site within the red circle.

11 A. I'm there.

12 Q. What does this photograph depict of the
13 site in 1999?

14 A. I would say roughly the -- from one-third
15 to close to one-half the site on its northwest half
16 is -- has been cleared. And it appears to be cropped
17 in 1999. The southeast half of the site remains with
18 a forest canopy.

19 Q. What do you base -- strike that.

20 What about this photograph leads you to
21 believe that part of the site has been cropped?

22 A. Well, compare the 184 to 183 just above
23 it. And if you look at that 183, sort of at the
24 northwest corner of the site, I call that the

1 shoulder of the site, kind of looks like a bit of a
2 rounded shoulder.

3 And then there's a notch just to its
4 right. So that's a shape I'm looking at. I'm
5 interpreting that as a shape. Then I look at the '99
6 photograph, the shape is different and the shoulder's
7 gone.

8 And so it looks like there was a diagonal
9 cut across that site roughly and that the northwest
10 quadrant has been cut off.

11 And I look at the '99 photograph and I
12 see the smooth green signature that's telling me that
13 that smoothness is an indication of a monotype, a
14 crop that looks all the same, all about at the same
15 height, reflecting a uniform signature of smoothness.

16 Now, it's not completely as uniformly
17 green as areas to the north or west because you can
18 see just a little bit of brown in there.

19 And I would -- you know, if a forest had
20 been cleared, I would suspect the next -- you know,
21 once it had grown up, you might still see for some
22 time indications of disturbance.

23 But anyway, that's how I believe they
24 began the clearing by this date.

1 Q. Again, by date, you previously referred
2 to these photos being taken during the summer months?

3 A. Yeah. From late June to as late as early
4 September they're taken that I've seen.

5 Q. Okay. Again, let's look at Bates page
6 185, which is a photo from 2001. Direct your
7 attention to -- looking at Bates 185?

8 A. Yes.

9 Q. The photograph from 2001.

10 A. Yes.

11 Q. Directing your attention to the site
12 within the red circle.

13 A. Okay.

14 Q. What is your opinion of what this photo
15 depicts?

16 A. That the site at issue has now been
17 completely cleared of its tree canopy.

18 And it's too poor of quality for me to
19 talk about whether it's cropped or not. Possibly a
20 later photograph.

21 Q. Let's turn to Bates 186, a photo from
22 2002.

23 A. I'm sorry. I went the wrong direction.
24 Okay.

1 Q. Directing your attention to the site
2 within the red circle --

3 A. All right.

4 Q. -- what does the photo depict to you
5 about the site?

6 A. This photo depicts to me that it's
7 clearly now completely -- there's no doubt and there
8 wasn't any doubt in the previous photograph but you
9 see it better here that the tree canopy is gone.

10 Just compare it to what's just to the
11 right and that wooded riparian corridor that's still
12 there. And it's now bean-cropped. You can see the
13 fence line L fairly well also.

14 It's not sufficient enough to actually
15 see where the altered Martin Branch is located, but
16 you do see the shape of the L pretty well. That
17 fence line has still got trees on it.

18 Q. What about this photo made you believe
19 that the area is being row cropped?

20 A. Compare its signature to other areas in
21 this agricultural area, it's, again, a relatively
22 smooth photo tone.

23 And that -- to me, in this part of the
24 country, that that is a signature of a crop.

1 Q. Turning to Bates page 187, photo from
2 2003. Again, I direct your attention to a site
3 within the red circle.

4 A. All right.

5 Q. What does the photo depict?

6 A. It's -- I have a similar interpretation
7 of this photo, that it appears cropped to me.
8 Appears to be without a tree canopy.

9 And the other photo signature there I
10 pick up is you see in that that corner of that
11 square. And by the square I mean the bigger square
12 outside of the orange circle. It's in light brown
13 and our site is sort of the far southeast corner of
14 that brown square.

15 There's a darker photo tone showing up,
16 and that's generally an indicator of moister soils.
17 So my interpretation of that is that corner is a
18 little moister than the rest of that field.

19 Q. Okay. Turning to page 188, photograph
20 marked F at the top of it, 2004 Marion County Imagery
21 Section 11 Township?

22 A. All right.

23 Q. Directing your attention to the site
24 within the circle, what does this photo depict?

1 A. This photo is a color infrared photo, so
2 it's a bit different type. It's not a color photo.
3 Looking at a different wave length of light. So
4 that's why it's all reddish toned.

5 And the red is signifying vegetative
6 growth in the color infrared photograph. And this
7 clearly shows the contrast between the intact
8 riparian coridor upstream of the site where Martin
9 Branch travels through and then the site itself.

10 Now, with a crop you can see the smooth
11 signature indicating that the vegetation within the
12 circle is the same as vegetation outside of the
13 circle to the west. The fence, the L fence line is
14 still there.

15 I see a little bit of a white signature
16 along the north-south lake where we defined the L
17 before. And that might be a different -- that's a
18 different photo signature than the red that's next to
19 it.

20 So that's probably an indication that
21 there's a little different vegetation growing along
22 that narrow edge.

23 And I'd also point out just for
24 photo-interpretation purposes, as you look at that

1 north-south leg, you can see some darkness kind of
2 cutting across the white. That's a shadow. Those
3 are shadows of trees.

4 So I'm just pointing out that in photo
5 interpretation, shadowing is something you need to be
6 aware of 'cause it can hide things because of the
7 blackness of the shadow.

8 Q. Finally, turning to Bates page 189.

9 A. All right.

10 Q. This is marked 2005 Marion County Section
11 11 Raccoon Township. Directing your attention to the
12 site within the circle, could you tell us what this
13 photograph depicts?

14 A. Another crop year with another crop.
15 Everything else looks pretty much the same. You can
16 see Bill Heser's filter strip quail habitat along the
17 south edge in white.

18 Below the -- to the east of the
19 north-south leg of the L and to the south of the
20 east-west leg of the L, that white border, it's about
21 three-eighths of an inch wide, that's -- having heard
22 Mr. Heser's testimony, that's just filter-strip
23 signature.

24 Q. Have you personally ground-truthed the

1 fact that this filter strip exists on the site --

2 A. I have.

3 Q. -- on Bill Hesper's property?

4 A. Yes, I have.

5 Q. Directing your attention to the site
6 within the green box.

7 A. All right.

8 Q. Can you interpret this part of the photo?

9 A. Well, it's without any obvious large-size
10 trees. I see no canopy there. So it's probably
11 herbaceous and possibly some shrubbiness to it. It's
12 too poor of a quality photograph to really say
13 anything other than that.

14 There doesn't appear to be trees there,
15 and there's a very slight dark line through the
16 middle of it that is probably indicating either moist
17 soil, possibly standing water within the -- within
18 where the upper reaches of Martin Branch is.

19 Q. Mr. Carlson, have you personally been to
20 the area that is within the green box at Bates 189?

21 A. Yes, I have.

22 Q. What are your observations of that area?

23 A. That it is a -- it is a depressed area
24 where the Martin Branch has been mapped through this

1 area as an intermittent stream. And it has very
2 subtle banks to it, broad.

3 It's -- I would call it a broad swale.
4 And it's a little wider in the swale than on to the
5 north or south of it where it looks a little darker.
6 That's just an indication to me that there are crops
7 on either side of it.

8 But there's a different type of
9 vegetation bordering the swale or channel in that
10 location. So that is telling me it's not cropped
11 right down to the waterline.

12 Q. Were you present when Mr. Bill Hesper
13 testified as to the location of quail habitat on this
14 property?

15 A. Yes.

16 Q. Is this the area that Mr. Hesper was
17 referring to within the green box?

18 A. I believe so, yes.

19 Q. When was the first time you were actually
20 on the site of the alleged violation?

21 A. September 19, 2003.

22 Q. At this September 19, 2003 inspection,
23 who else attended?

24 A. The field visit was attended by Ward Lenz

1 and Katherine Kelly. We had additional meetings with
2 the Respondents, Robert and Andrew Hesper. We met
3 with them in the morning at Old Salem Road, and their
4 mother and father was with them at that time.

5 We then did our field visit, myself, Ward
6 Lenz, and Katherine Kelly. And then after that we
7 met back with the Hesperes, Robert and Andrew, and
8 their attorney to discuss where we were at with
9 regard to the site investigation and EPA's
10 involvement in the site.

11 Q. Prior to going to the site, did you check
12 the antecedent weather conditions to calibrate your
13 eyes to what they are seeing in the field?

14 A. Yes.

15 Q. Why did you do that?

16 A. It's a common practice of mine for site
17 inspections. I find out generally from the local
18 paper where we're at in terms of the season and
19 rainfall. And I ask the people who live there that
20 I'm meeting what's the weather been like.

21 And then generally later -- and not all
22 the time, but I'll check the NOAA weather records
23 where you actually get official government records
24 off a rain gauge of some usually more distant

1 location than the site.

2 And that just helps you figure out what
3 you might expect to see.

4 Q. In general, Mr. Carlson, what did you
5 observe on your site visit, your first site visit?

6 A. That it was a bean field and there was a
7 -- that the channel of Martin Branch was no longer on
8 the -- at its original location.

9 There was no evidence of a stream channel
10 and that the Martin Branch channel had been diverted
11 into a new channel right up against the east property
12 line and right up against the south property line in
13 that L shape.

14 Q. Was there any natural vegetation on the
15 site?

16 A. No. I only observed soybean plants.

17 Q. And how was the hydrology altered on the
18 site?

19 A. Well, the stream was no longer --

20 MR. NORTHRUP: I'll object. Assumes facts
21 not in evidence.

22 ADMINISTRATIVE LAW JUDGE MORAN: See if you
23 can restate the question.

24 MR. MARTIN: Q. Given your observations

1 about the site, did you conclude whether hydrology
2 had been altered?

3 A. Yes, I did.

4 Q. And how was it altered?

5 A. It was altered in a number of ways, first
6 of which is that the original stream channel was no
7 longer bisecting the site. And it had been replaced
8 by a, what appeared to be an engineered structure. In
9 other words, very uniform in its dimensions. And
10 that channel was placed right up against the east and
11 south property lines.

12 And that the natural vegetation of the
13 forest had been completely removed. And when that
14 happens, areas like this are now exposed with much
15 more energy of the sun and the wind.

16 And in that sense, compared to a forested
17 situation, that's a drier environment. And that
18 generally the site was --

19 MR. NORTHRUP: Your Honor, I'm going to
20 object. I don't think there's been any foundation
21 evidence where this original stream site was period.

22 ADMINISTRATIVE LAW JUDGE MORAN: Well, my
23 understanding is that this witness is really talking
24 more about what he observed in the new channel. Is

1 that right?

2 Are you talking about the original channel
3 or the new channel right now?

4 A. I was talking about both.

5 ADMINISTRATIVE LAW JUDGE MORAN: He was
6 there. He observed both the preexisting channel --
7 you saw the remnants of the channel, the remnants of
8 the preexisting channel?

9 THE WITNESS: No. I didn't see remnants of a
10 preexisting stream channel on the site.

11 ADMINISTRATIVE LAW JUDGE MORAN: Okay. Then
12 you can only testify about the altered channel if you
13 didn't see that one.

14 MR. SMALL: Thank you, Your Honor.

15 MR. MARTIN: Q. Mr. Carlson, going back to
16 the aerial photographs that you just discussed, was
17 the actual stream channel ever evident to you from
18 any of those photographs?

19 MR. SMALL: Asked and answered, Your Honor.

20 ADMINISTRATIVE LAW JUDGE MORAN: I'll sustain
21 that. He already talked about the natural channel, I
22 believe, in the earlier photographs, through the
23 progression how it became --

24 MR. MARTIN: That's actually the foundation

1 for his testimony here that --

2 ADMINISTRATIVE LAW JUDGE MORAN: He's talking
3 now ground level. He said he saw no signs of the
4 preexisting channel when he was there on the ground.
5 That's what he just told me.

6 MR. MARTIN: Okay.

7 ADMINISTRATIVE LAW JUDGE MORAN: Is that a
8 fair statement of what you told me, sir?

9 THE WITNESS: It is.

10 MR. MARTIN: Q. Like to turn to
11 Complainant's Exhibit Number 7. That is Bates Number
12 22 through 38.

13 ADMINISTRATIVE LAW JUDGE MORAN: Okay. And 7
14 my records show was not previously admitted.
15 Correct?

16 MR. MARTIN: Yes.

17 ADMINISTRATIVE LAW JUDGE MORAN: Okay.

18 THE WITNESS: I'm there.

19 MR. MARTIN: Q. Do you recognize this
20 document?

21 A. I do.

22 Q. What is it?

23 A. It's my site-inspection report from my
24 September 18 and 19, 2003 visit to the area,

1 including the site.

2 Q. When did you write this report?

3 A. I began writing it after the inspection.
4 And it looks like I finished it on December 23, 2003.

5 Q. You said this inspection report involves
6 other sites. Does it involve the site of the alleged
7 violation?

8 A. It does.

9 Q. And how is the site of the alleged
10 violation referred to in this report?

11 A. I call it Site 1.

12 Q. In general what activities are documented
13 in this inspection report?

14 A. This documents our field work that we
15 completed on that day, including characterizing the
16 site, characterizing an adjacent site in terms of
17 hydric soils, wetland hydrology, and hydrophytic
18 vegetation.

19 And generally I'm characterizing the site
20 as I see it. So it includes that type of information
21 that would characterize the site.

22 Q. Did you take soil samples on the site?

23 A. I did.

24 Q. How many did you take?

1 Q. 2000?

2 A. -- inspection that I am basically working
3 off of.

4 Q. Was Mr. Lenz with you at the time of the
5 inspection?

6 A. Yes.

7 Q. How did you take into account Mr. Lenz's
8 data points in locating data points that you took on
9 site?

10 A. Well, I mapped them out so I knew --
11 first I located where his data points were on his
12 three transects. So I understood where he was at on
13 the site versus where I thought I needed to be to do
14 additional work to adequately characterize the site.

15 Q. Was Mr. Lenz there to help you locate the
16 samples that took previous investigation?

17 A. Yes. That he was, in addition to Miss
18 Kelly, too.

19 Q. Like to turn to Bates page 33.

20 A. All right.

21 Q. Do you recognize this document?

22 A. I do.

23 Q. What is it?

24 A. This is basically part of my field notes.

1 I'm sketching out on a scaled drawing the
2 outlines of the site, the location of the -- the new
3 location of Martin Branch and locations of the three
4 transects and where the sample points are along each
5 of those three transects.

6 It also includes information regarding
7 the location of the original Martin Branch and has
8 some miscellaneous notes on it.

9 Q. Are you looking at your original
10 document?

11 A. No.

12 Q. Do you have a copy?

13 A. We have a blow-up copy of this, and this
14 is a copy that I'm looking at.

15 Q. Okay. When you drew the original, was
16 the original on a different type of paper?

17 A. Yes. It's on graph paper.

18 Q. What is graph paper?

19 A. Graph paper and you can see the remnants
20 of it up at the top in the heading, the background of
21 the heading, little squares.

22 It's just rows and columns equally spaced
23 so you can scale a drawing, have an accurate
24 depiction of the area.

1 Q. Is that why you used graph paper in this
2 case?

3 A. Yeah. Yes.

4 Q. Could you generally describe the,
5 starting at the top of the diagram, the meaning of
6 the circles and the dots that appear.

7 A. Okay. Up at the very top right of the --
8 of this sketch under Approved By, you see a little
9 dot with a line and an FP.

10 That's just locating a fence post. And
11 it was my understanding that fence post was a corner
12 fence post. In other words, the north-south of that
13 line of that FP was near the property line.

14 And east of that dot generally in a
15 straight line would have been the south property
16 border of the other portion of the Heser site.

17 Q. So that's marking for me a corner. Which
18 way is north?

19 A. North is to the top of this photograph --
20 or excuse me -- this copy. The scale -- is not noted
21 on here -- is 1 inch equals 100 feet.

22 In other words, each of those little
23 squares you can see behind -- where it says
24 Computation Sheet, do you see the squares back behind

1 it?

2 Each one of those squares is 10 feet, one
3 of those little squares. 10 of those in an inch, for
4 1 inch equals 100 feet.

5 Q. In terms of the circles and the darkened
6 circles and dots, what do those mean?

7 A. Those are the locations of the sample
8 points. And the dark-colored sample points, there's
9 a little dot in the middle and then a circle around
10 it that's shaded in. Those are hydric data points.

11 The white circles, with the exception of
12 one, are nonhydric sample points and the exception to
13 that is when you see T1 up there in the upper
14 right-hand corner, that's the first transect.

15 As you go west from that point running in
16 a straight line on an imaginary line we call the
17 transects, the third circle, it's somewhat less
18 distinct than the others. It's got a little V shape
19 or -- excuse me -- a little pointed shape below it.

20 It's the third circle, smaller than the
21 two to the right. That is not either a hydric or
22 nonhydric point. It wasn't determined at that
23 location.

24 That's just marking for me where we tried

1 to do a sample point but were prevented because of
2 charcoal debris. So we abandoned that and moved on
3 to find another location we could sample.

4 So that signifies neither hydric or
5 nonhydric.

6 It just signifies where we tried to do a sample.

7 Q. Do you recall Mr. Lenz's sample results?

8 A. Yes.

9 Q. What I'd like for you to do now is to go
10 through these points and mark which are the corps of
11 engineers' sample results, starting at the first
12 transect.

13 ADMINISTRATIVE LAW JUDGE MORAN: Well, first
14 you have to establish -- unless he already said this
15 and maybe I missed it, but my understanding was these
16 were the sample points not from the preexisting visit
17 by Mr. Lenz, but from the visit on February 19, 2003.

18 So he can't talk about previous ones
19 unless you can establish that those are marked on
20 there as well, unless I missed something.

21 MR. MARTIN: Q. Mr. Carlson --

22 ADMINISTRATIVE LAW JUDGE MORAN: Why don't
23 you ask him if the prior samples were only the
24 samples on this date.

1 the locations of your three sample points that you
2 took in your September-of-2003 inspection of the
3 site?

4 A. I did. I circled them in orange.

5 MR. MARTIN: Respondents' counsel agrees that
6 they're all similarly marked?

7 MR. NORTHRUP: I do, that's correct.

8 ADMINISTRATIVE LAW JUDGE MORAN: Thank you.

9 MR. MARTIN: Q. Mr. Carlson, you circled
10 three sample points on the diagram that is marked
11 page 33. How are these sample points referenced in
12 your inspection report?

13 A. Sample Point 1, Sample Point 2, and
14 Sample Point or Reference Sample Point 3.

15 Q. Okay. Where is -- which sample -- which
16 circle is Sample Point 1 on page 33?

17 A. 1, on the lower left.

18 Q. And which circle is Sample Point 2?

19 A. It is the sample point at the west end of
20 Transect 1.

21 Q. And the Sample Point 3, where is that
22 located?

23 A. That's at the upper right edge of page
24 33.

1 Q. Okay. Turning to your inspection report.

2 A. Okay.

3 Q. Page 23.

4 A. All right.

5 Q. Could you go through the findings of that
6 sample point?

7 A. I can.

8 Q. Soils criteria.

9 A. I can.

10 Q. Just start with the soils and tell us
11 exactly what you found.

12 A. Well, what I found here was a hydric
13 soil. It had a depleted matrix. And what I describe
14 as a depleted matrix is there with the soil color, 10
15 YR 4/1, you see it has the 1 chroma. 2 or less is
16 what we're looking for.

17 With common that means from 2 to 20
18 percent redoxymorphic concentrations below and in the
19 surface horizon. So that meets both the color
20 diagnostic field indicators from the '87 corps manual
21 2 chroma or less with bright models.

22 And it also meets a more updated
23 indication or a more updated manual on field
24 indicators of hydric soils as noted there. That's a

1 booklet. And that met what we call F3 as a depleted
2 matrix.

3 And I also found evidence of shallow
4 surface disturbance. There was woody debris and
5 blackened charcoal within the first 5 inches of the
6 soil. And we also took -- we also used the soil
7 probe to locate our sample points, our new ones.

8 And in a sample probe, representative
9 sample probe I found a fairly good indicator of what
10 I assumed -- what I believe to be dredge material on
11 the surface.

12 And we have a picture of that. But it
13 depicted about 4 inches of surface fill over charcoal
14 debris, charcoal and wood debris. And that is
15 reflected in Photo 6, which is on page 37.

16 You see -- on page 37 you see the soil
17 probe. This isn't the best color copy in the world,
18 but the plants beneath are soybeans. You can see my
19 Swiss Army knife on the right-hand side a bit for
20 scale.

21 And the surface is brighter-colored
22 brown, and it's over the top of charcoal. I think
23 there was 4 inches of fill in that location, and then
24 there's about 2 to 3 inches of charcoal.

1 And that indicates to me that the
2 charcoal was buried by a subsoil in that location.

3 Q. What vegetation did you find at Sample
4 Point 1?

5 A. Since this is the disturbed site, there
6 was no natural vegetation at the sample point. It
7 was all soybean plants. So you cannot adequately
8 characterize that type of situation with vegetation
9 when the natural stuff is not there.

10 Q. What indications of hydrology do you find
11 at Sample Point 1?

12 A. Under the hydrology section on page 323,
13 I have listed there that, similar to many of Ward
14 Lenz's points, there was -- oxidized rhizospheres
15 were abundant in live roots within the top 12 inches
16 of the soil surface. That's a secondary indicator of
17 hydrology.

18 In addition, about 25 feet northeast of
19 this particular sample point there was an area of
20 bare soil where it indicated to me that there had
21 been ponded water which prevented the soybean plants
22 from germinating and growing adequately, lacked
23 surface vegetations, and there were sediment deposits
24 and dried algae at that location as well as crawfish

1 burrows.

2 It's an indication that -- crawfish need
3 -- have gills. So they need -- when they're in their
4 burrows, they need to be in water. So that's sort of
5 a biological indicator that is -- gives some support
6 that there's moisture there.

7 And the sediment deposits are a primary
8 indicator of hydrology. The dried algae, I think
9 that also be a second indicator of hydrology.

10 Under the Other section, it indicates
11 that that water was there long enough that algae grew
12 at this location, though when I saw it it was dried
13 out.

14 Q. Mr. Carlson, looking at page 33, by
15 Sample Point 1 located farthest west of Sample -- of
16 Transect 3, looking at the area within the circle,
17 there's a box that seems to be cross-hatched next to
18 Sample 1.

19 What does that designate?

20 A. That roughly -- it's a square, but it was
21 really a circle. But that's a 50 feet square box.
22 And that indicates this area where I saw the evidence
23 of ponded water and the primary indicators of
24 hydrology.

1 Q. Moving on to Sample Point 2, which is the
2 farthest-west sample point of Transect 1, page 33,
3 could you give us the results of that soil sample,
4 starting with the soils parameter?

5 A. Well, it's a sample point that's located
6 216 feet west of the right descending bank of the
7 altered Martin Branch channel. And for the soils,
8 the soil profile was determined to be hydric.

9 And it was similar to the previous data
10 point in that it had depleted matrix right at the
11 surface just below the surface and with common
12 redoxymorphic concentrations in the horizon, a
13 horizon to surface horizon.

14 And similar to the previous soil, that
15 meets the color-related diagnostic field indicators
16 for a hydric soil in the '87 corps manual as well as
17 a newer manual for field indicators of hydric soils
18 in the U.S. And in that manual it's called F3 for a
19 depleted matrix.

20 Similar to the other soil, there was also
21 evidence of soil disturbance with organic debris and
22 blackened charcoal found at 10 1/2 inches below the
23 surface, indicating to me that the surface material
24 has been mixed.

1 Q. And what does the fact that the surface
2 material had not been mixed further indicate to you?

3 A. Well, it's an indication of, again, what
4 I would characterize as dredge material being moved
5 around the site, the charcoal being buried.

6 Q. What vegetation did you see at the sample
7 point?

8 A. There was no natural vegetation and this
9 is in the middle of the bean field, soybean plants.

10 Q. And what evidence of hydrology parameter
11 did you observe at the sample point?

12 A. This data point had -- oxidized
13 rhizospheres were abundant on live roots within the
14 top 8 inches of the soil. And that is a secondary
15 indicator of hydrology.

16 I then make a note that this is -- this
17 part of the season we're at about the driest time of
18 the year in late summer, early fall.

19 Transpiration, evaporation are at their
20 highest points. Seasonal water tables are probably
21 at their, near their low point. And I saw no other
22 indicator of hydrology in this area.

23 Q. Moving on to your Sample Point 3, which
24 you term your reference site, how did you choose the

1 location of this reference site?

2 A. Well, the reference site is a method to
3 -- a method to determine or try to characterize a
4 disturbed site by going to a nearby site that is
5 similarly affected by the water, the soil
6 development, and the likely plant communities.

7 This is immediately upstream and east of
8 this site in the riparian corridor that existed on
9 William Heser's property that had previously existed
10 on this property.

11 And that's a pretty good reference site.
12 In other words, I'm confident I can make an inference
13 from that site to what the altered site would have
14 been.

15 Q. And again, the location of that reference
16 site on Bates 33 is the circled area to the far right
17 and top of your grid diagram?

18 A. That's correct.

19 Q. What soils did you find at your reference
20 site?

21 A. The soil profiled was hydric. It had a
22 reduced soil matrix color of 10 YR 4/1 with common
23 redoxymorphic concentrations below the A horizon.
24 Also had indication of silt coats, which are very

1 lighter color on the ases of the soil profile.

2 And similar to the two previous data
3 points, this meets the color-related diagnostic field
4 indicator for hydric soils in the '87 manual as well
5 as the more recent manual for field indicators of
6 hydric soils in the United States, F3 for depleted
7 matrix.

8 Q. Did you find any evidence of fill
9 material at the site?

10 A. No.

11 Q. Regarding vegetation, how did you conduct
12 your analysis in reference to that?

13 A. At this particular site we used
14 essentially the routine method for determining
15 wetlands, although it's within the framework of an
16 atypical situation in a reference site. But it's
17 undisturbed. So it's like a normal site.

18 It's possible there was some impacts to
19 hydrology from the adjacent alteration of stream.
20 But it's -- it was an intact plant community. So I
21 consider it a natural situation.

22 And to determine the plant dominants, we
23 used that 50/20 rule that I previously explained.

24 And I determined the dominants in the tree layer to

1 be American elm, which is a fac-wet-minus plant or
2 considered a hydrophyte.

3 Then the shrub and sapling layer, we had
4 two hydrophytes. One was *Quercus palustris*, which is
5 pin oak, is fac-wet.

6 We had persimmon, which is a smaller,
7 smaller tree that was facultative. And then we had
8 an invasive honeysuckle, in other words, a nonnative
9 plant that is facultative up. So there was three
10 dominants in the shrub layer.

11 The dominants in the herb layer were
12 white grass, which is facultative wet, and *Polygonum*
13 *punctatum*, which is called dotted smartweed. And
14 that's an obligate plant.

15 In the vine layer we had *Campsis*
16 *radicans*, which is also known as trumpet creeper.
17 It's a vine. And that was facultative.

18 So the summary of that is six of the
19 seven dominants or 86 percent were fac or wetter,
20 meaning you can say, yes, this meets the
21 hydrophytic-vegetation criterion from the '87 manual.

22 (Off-the-record
23 discussion.)

24 Q. Finally, could you go through your

1 hydrology-parameter analysis for Sample Point 3.

2 A. Certainly.

3 In this area there were a number of
4 primary and secondary indicators of hydrology. And
5 this is within the riparian corridor of Martin
6 Branch. So it appears that this site is flooded
7 because there are primary indicators related to that.

8 And the ones we saw there were subtle
9 depressions meandering through the forest, indicating
10 scouring by moving floodwaters. That would relate to
11 the primary indicator for wetland-drainage patterns.

12 There was also sediment deposits on
13 vegetation a couple inches above the surface,
14 indicating to me that there was -- water had stood at
15 this particular -- within this particular area.

16 And that is a primary indicator of
17 wetland hydrology. There was a less reliable
18 indicator of hydrophytic plants, although I had under
19 here in Hydrology -- it's really misplaced.

20 But for a plant to have morphological
21 adaptations to wetness, that means the structure of
22 the plant is telling you that it's dealing with high
23 water.

24 And for a silver maple -- that's the

1 plant I'm referring to here -- it has two
2 indications. It's both multiple trunked and that's
3 essentially a physical attribute so they can support
4 themselves better in a wet environment.

5 And it has shallow rootedness, meaning
6 the roots aren't going down very much probably for a
7 combination of factors. You have heavier soils and a
8 high water table. So it stayed up closer to the
9 surface where it can get more oxygen.

10 But that is actually an indicator of
11 hydrophytic vegetations. But you know, since all
12 these are related by water, that's probably why it
13 got put there.

14 For secondary indicators, the fac-neutral
15 test was positive for wetland hydrology. And I
16 described the fac-neutral test earlier, but if you
17 look at Dominants 1 through 7 just above on 25, you
18 can do it yourself. Throw out the facts.

19 That's the persimmon and the trumpet
20 creeper. And that leaves you with one elm, fac-wet;
21 pin oak, fac-wet on one side; the honeysuckle fac up
22 for the other side.

23 Lyrsia, fac-wet. Three to one obligate.

24 Polygonum. It's four to one. It's four to one.

1 So that's a positive for a fac-neutral test.

2 And then we also had the oxidized
3 rhizospheres that were abundant on live roots within
4 the top 4 inches of the soil surface here.

5 And then the last secondary indicator of
6 hydrology -- and I make this conclusion in
7 conjunction with the expertise, what I consider the
8 expertise of Ward Lenz as a professional soil
9 scientist, that the soil we're digging through
10 appears to be very similar to the birds inclusions.

11 It matches fairly well with the surface
12 profile of it. It's in a depressional area within
13 the floodplain. So we felt we had confirmation that
14 that series was there.

15 And we look at that series in the
16 soil-survey manual, and that has a seasonal high
17 water table between March and June from a half a foot
18 above the surface to I believe it's a foot below the
19 surface.

20 So that's a positive check for the local
21 soil-survey data as a second indicator of hydrology.

22 Q. Okay. If you could turn to pages 29
23 through 31, tell me if you recognize these documents.

24 A. I do.

1 Q. What are they?

2 A. These are my data sheets for the three
3 sample points that we did.

4 Q. Did you fill these out?

5 A. I filled a relatively small portion out.
6 Most of the writing is by Katherine Kelly of the
7 corps.

8 Q. Was it filled out while you were doing
9 your soil analysis?

10 A. Yes.

11 Q. Do they accurately reflect your
12 observations as set forth in your inspection reports?

13 A. They do.

14 Q. Do they provide the basis for the
15 conclusions that hydric soils were present in the
16 three sample locations?

17 A. They do.

18 They also reflect positive indications
19 of hydrology too for that conclusion that since we
20 had three primary indicators and three secondary
21 indicators, that that reference site had a positive
22 indication of hydrology.

23 Q. Turning back to page 33.

24 A. Okay.

1 Q. Are the sample points that are not
2 circled on the site as depicted in this drawing, are
3 those the sample results of Ward Lenz from his
4 previous inspection?

5 A. They are with the exception of, as I
6 mentioned earlier, the third sample point on T1. The
7 white circle that's a little bit less distinguished
8 from the other two.

9 That, again, is my -- and we made a soil
10 bore hole attempt there but didn't complete it. All
11 the other ones are all located far along Ward Lenz's
12 transect.

13 Q. Mr. Carlson, based on your investigation,
14 what is your opinion of whether wetlands under the
15 1987 corps of engineers' manual exist on the site of
16 the alleged violation?

17 A. I concluded after further work that 2.1
18 acres of wetlands existed previously on the -- and I
19 would say approximately 2.1 acres of wetlands existed
20 on the altered site as well as the stream channel,
21 its dimensions and other all smaller tributaries
22 within that area.

23 But all as waters of the United States,
24 wetlands and streams, tributaries.

1 MR. MARTIN: That's the stopping point that I
2 had in mind.

3 ADMINISTRATIVE LAW JUDGE MORAN: Okay. So
4 we're going to wrap up, guys. A couple things I want
5 to say. First thing is, I'm going to be giving back
6 the exhibit books that EPA -- I don't want to cart
7 them back and forth.

8 My exhibit books are distinguishable in
9 that I put orange tabs at random locations in there
10 so you don't confuse Ms. Gilbor then with the other
11 exhibit book.

12 The other thing I want to say -- and
13 counsel for Respondent is free to look at this. I
14 made no markings on any of the exhibit books or my
15 notations on my personal yellow pad except on CX 262
16 where I put a check mark, a blue check mark besides
17 Wynoose silt loam.

18 It was just so I could spot it on that
19 page. You're welcome -- I put a tab, a yellow tab so
20 you can see that.

21 Other than that, I assure you that the
22 EPA has no advantage. There's no notations on these
23 exhibits. This yellow tab in 21, you can look at
24 that.

1 STATE OF ILLINOIS)
) SS.
2 COUNTY OF SANGAMON)

3

4

CERTIFICATE

5

I, Jami Tepker, Certified Shorthand

6

Reporter in and for said County and State, do hereby

7

certify that I reported in shorthand the foregoing

8

proceedings and that the foregoing is a true and

9

correct transcript of my shorthand notes so taken as

10

aforesaid.

11

I further certify that I am in no way

12

associated with or related to any of the parties or

13

attorneys involved herein, nor am I financially

14

interested in this action.

15

Dated this 16th day of April 2007.

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Certified Shorthand Reporter

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