

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 7

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ENVIRONMENTAL PROTECTION
AGENCY-REGION VII
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 In the Matter of: :
 : Docket No. CWA 07-2007-0078
 LOWELL VOS :
 d/b/a LOWELL VOS FEEDLOT : VOLUME I
 WOODBURY COUNTY, IOWA :
 ----- X

Fourth Floor Courtroom
United States Courthouse
123 East Walnut Street
Des Moines, Iowa
Monday, September 15, 2008

The above-entitled matter came on for hearing
at 9:40 a.m.

BEFORE: WILLIAM B. MORAN, Administrative Law Judge

ORIGINAL

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I N D E XWITNESSDIRECT CROSS REDIRECT RECROSSFor the Complainant:

Lorenzo Paz Sena	42	102	132	136
Stephen R. Pollard	141	216		

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P R O C E E D I N G S

1
2 THE ADMINISTRATIVE LAW JUDGE: Good morning.
3 My name is Judge Moran, William B. Moran. We're here
4 this morning for the case which is captioned as In
5 the Matter of Lowell Vos, doing business as Lowell
6 Vos Feedlot, Woodbury County, Iowa, Docket No. CWA,
7 which stands for Clean Water Act, 07-2007-0078.

8 Will counsel identify themselves for the
9 record, please, beginning with counsel for EPA.

10 MR. BREEDLOVE: Yes, Your Honor. Dan
11 Breedlove, J. Daniel Breedlove--that's
12 B-R-E-E-D-L-O-V-E--counsel for Environmental
13 Protection Agency.

14 MR. RYAN: I'm Mark Ryan with the Boise,
15 Idaho, office, Assistant Regional Counsel, Region 10.

16 THE ADMINISTRATIVE LAW JUDGE: So you're
17 still out there in Idaho?

18 MR. RYAN: Yes, I am.

19 THE ADMINISTRATIVE LAW JUDGE: I thought
20 you'd relocated. All right.

21 MR. McAFEE: Your Honor, I'm Eldon McAfee.
22 I'm counsel for the Respondent, Lowell Vos.

23 THE ADMINISTRATIVE LAW JUDGE: Nice to meet
24 you.

25 MR. McAFEE: You just wanted counsel, I

1 gather?

2 THE ADMINISTRATIVE LAW JUDGE: I mean, these
3 are formal proceedings, but I'm not that strict. So
4 if you want to introduce the Respondent or
5 representative of the feedlot, I assume that
6 individual is here.

7 MR. McAFEE: This is Mr. Lowell Vos.

8 THE ADMINISTRATIVE LAW JUDGE: Nice to meet
9 you, sir.

10 MR. McAFEE: At counsel table with us is his
11 wife, Judy Vos.

12 THE ADMINISTRATIVE LAW JUDGE: Nice to meet
13 both of you.

14 All right. Before we begin, there's one
15 item that I'm going to deal with, and that is the
16 motion filed by EPA to supplement its prehearing
17 exchange.

18 With that, there was a response from the
19 Respondent and then a reply. The response is titled
20 as Respondent's resistance to the motion, and then
21 EPA filed a reply.

22 I won't take a lot of time to talk about
23 this. Provisionally, I'm denying the motion on EPA's
24 part to supplement this prehearing exchange. I say
25 "provisionally" because, as you'll see in a moment

1 when I talk about this, I think about the expression
2 about be careful what you wish for.

3 Unless I'm understating this, this
4 essentially consists of two photographs which EPA at
5 past the 11th hour attempted to put into evidence.

6 As EPA I think admitted in one of their
7 documents, they recognized that it was beyond the
8 15-day period for supplementing prehearing exchanges
9 per Section 22.22--yes, it's 22.22, entitled
10 evidence. And that section references 2219(a),
11 subpart a, e and f.

12 In the most generous construction as to when
13 this was filed, it was, at most, 14 days before and
14 not 15 days. And if one doesn't count the day that
15 it was actually filed--that's on the 8th--then it
16 would be 13 days before the hearing was to begin.

17 That is important. But what is even more
18 important is that these photos were taken on June 25,
19 2003. And although EPA expressed some surprise
20 because Mr.--I don't know if it's pronounced Prier or
21 Prier with the Iowa Department of Natural Resources--
22 EPA points out in one of their documents, "Well, this
23 is one of the Respondent's witnesses." But it's also
24 one of EPA's witnesses.

25 And the fact that these photographs were

1 taken way back, over five years ago, on June 25,
2 2003, to allow this evidence at this late date is
3 totally inconsistent with the spirit and the letter
4 of the section that I just cited.

5 It's incumbent upon EPA and incumbent upon
6 the Respondent in the spirit of the prehearing
7 exchanges to deliver all of the information which
8 they have at hand or could with reasonable diligence
9 acquire.

10 And certainly this last minute attempt to
11 ask this witness to scour his computer or whatever it
12 was and then miraculously comes up with a couple of
13 photos, I can't allow that.

14 And then the alternative would have been to
15 postpone the hearing. This hearing has been
16 scheduled for a very long period of time. And so,
17 therefore, that's my ruling on it.

18 Now, I said "provisionally" because I have
19 not had a chance to check what the Respondent's
20 position is on this. But since this is a Clean Water
21 Act case, therefore, it inevitably brings in the
22 issue of Rapanos, the Supreme Court decision in
23 Rapanos, which I have written about in two recent
24 Clean Water Act decisions, one of which I issued last
25 week.

1 The earlier one is entitled Smith Farms.
2 It's actually--the entire caption escapes me, but
3 it's Vico and then Smith Farms. And then there is
4 another Vico decision, and--it's Emilio Ventures,
5 that's it.

6 The second one is also informally known as
7 Lewis Farms, and that's the one I just issued last
8 week, in which the question of the Clean Water Act,
9 the various interpretations by the different groups
10 of judges, where I discuss the impact of that.

11 But one of the issues in there, in that case
12 and perhaps in this case, is the question of
13 connectivity.

14 So as I'm looking at these photographs,
15 which I would not--will not consider at all and which
16 I'm capable of totally ignoring in case there's any
17 worries on the part of Respondent. This is not like
18 some jury trial where the jury can't get something
19 out of their mind. Believe me, I can.

20 But as I'm looking at this, I'm wondering
21 does that really hurt the Respondent's case or help
22 the Respondent's case on the subject of connectivity
23 if that's something that Respondents are challenging.

24 I frankly can't--and I thought I would have
25 time this morning to go back over the answer and the

1 prehearing exchange filing, not the documents
2 themselves, but the filing to see what Respondent's
3 position was. But as it turned out, I had other
4 things going on and I didn't have a chance to refresh
5 my recollection about that.

6 But, nevertheless, in all of these Clean
7 Water Act cases involving the question of
8 whether--how there is a connection, a link to
9 navigable waters, navigable in fact waters and things
10 such as in the cases I alluded to a minute ago where
11 you have unnamed tributaries which eventually connect
12 up, then it gets into the question of whether the
13 unnamed tributary is dry most of the year or whether
14 there is in fact any real connection, as alluded to
15 by Justice Scalia in writing for a total of four.
16 Three other justices joined him in that.

17 And the phrases that he used--I should be
18 able to call them to mind--but it's essentially the
19 distinction between something that's running more
20 often than not, let's say. That's not the terms that
21 he used.

22 But, on the other hand, there are things I
23 think they described as something that's a wash, you
24 know, something that's so ephemeral, that the
25 connection is so minimal that there's a real question

1 whether there's any real connection in fact that's
2 recognized by the courts.

3 And then I'm not even going to get into it,
4 because this is not the forum right now for an
5 extended discussion of where Justice Kennedy's
6 perspective would be involved, but that's something I
7 would look at if that's raised by the parties.

8 In any event, to wind up a rather lengthy
9 discussion here, that is my ruling unless the
10 Respondent decides that, in fact, they do want those
11 photographs in, that the motion to supplement the
12 record at this late date for the reasons I've stated
13 is denied.

14 Now, are there any other existing motions
15 that I have to deal with? I think not.

16 MR. BREEDLOVE: Not that I'm aware of, Your
17 Honor.

18 THE ADMINISTRATIVE LAW JUDGE: Okay. Then
19 we're ready to begin. And I'll offer the parties the
20 opportunity to make an opening statement. It's not
21 required, but you have that option.

22 So, Mr. Breedlove, do you care to make an
23 opening statement?

24 MR. BREEDLOVE: Yes, Your Honor.

25 MR. RYAN: Your Honor, as a point of order

1 and before we do the opening statement, if I may,
2 the--we have stipulations as to most of the
3 documents.

4 THE ADMINISTRATIVE LAW JUDGE: Oh, you
5 mentioned that.

6 MR. RYAN: And we would like to know whether
7 you would like us simply to move the stipulated
8 documents en masse now.

9 THE ADMINISTRATIVE LAW JUDGE: Yes, let's do
10 that.

11 MR. RYAN: Eldon, please correct me if I'm
12 wrong, but we do not have a stipulation for Exhibit
13 9, do not. We also do not have a stipulation for
14 Exhibit 25. Exhibit 9 is the only one with no
15 stipulation. Exhibit 25 we will not be entering.
16 Exhibits 35 and 38 we will not be using--35 through
17 38.

18 THE ADMINISTRATIVE LAW JUDGE: You will not
19 be seeking to admit those?

20 MR. RYAN: We will not be seeking to admit
21 25, 35, 36, 37 and 38. Those are out.

22 THE ADMINISTRATIVE LAW JUDGE: Okay.

23 MR. RYAN: Exhibit 9 has not been stipulated
24 to. At the proper time we will lay a foundation and
25 move it into evidence.

1 THE ADMINISTRATIVE LAW JUDGE: Okay.

2 MR. RYAN: Otherwise, Your Honor, I would
3 move all exhibits except for 9, 25, 35 through 38 on
4 the Complainant's side into evidence.

5 THE ADMINISTRATIVE LAW JUDGE: Mr. McAfee.

6 MR. McAFEE: Your Honor, I would agree, with
7 the exception that I believe it's Exhibits 9, 10 and
8 11 that were not stipulated to.

9 MR. BREEDLOVE: To the point that it
10 included reference to the--

11 MR. McAFEE: I'm sorry.

12 THE ADMINISTRATIVE LAW JUDGE: Let's not
13 have this discussion on the record. Do you want a
14 moment to talk about this off the record?

15 MR. BREEDLOVE: Yes.

16 THE ADMINISTRATIVE LAW JUDGE: We'll go off
17 the record, please.

18 (Off-the-record discussion.)

19 THE ADMINISTRATIVE LAW JUDGE: We're back on
20 the record.

21 MR. RYAN: Your Honor, I'm sorry for the
22 confusion. There is no stipulation to Exhibit 9,
23 Exhibit 10, Exhibit 11 and Exhibit 23. We will lay
24 the proper foundation when the time comes to get
25 those into evidence.

1 As I stated earlier, Exhibits 25, 35, 36,
2 37, 38 will not be used by Complainant.

3 THE ADMINISTRATIVE LAW JUDGE: Are those in
4 these notebooks I have in front of me?

5 MR. RYAN: They are, and we will remove them
6 at the appropriate time.

7 THE ADMINISTRATIVE LAW JUDGE: Okay. Well,
8 let's--

9 MR. RYAN: So at this time I would move into
10 evidence all Complainant's Exhibits except 9, 10, 11,
11 23, 25, and 35 through 38.

12 THE ADMINISTRATIVE LAW JUDGE: Does that
13 sound right, Mr. McAfee?

14 MR. McAFEE: Yes, it does, Your Honor.

15 THE ADMINISTRATIVE LAW JUDGE: Then those as
16 described by Mr. Ryan, those exhibits--you don't
17 really have to worry about the ones that are not
18 going to be admitted in any event, but the ones that
19 will be removed from the record are 25, 35, 36, 37
20 and 38; is that right?

21 MR. RYAN: Correct, Your Honor.

22 THE ADMINISTRATIVE LAW JUDGE: Okay. And
23 then we'll deal with the others--9, 10 and 11 and
24 23--as they come up.

25

1 (Complainant's Exhibits 1 through 8,
2 12 through 22, 24, 26 through 34 and 39
3 through 49 were received in evidence.)

4 THE ADMINISTRATIVE LAW JUDGE: All right.
5 Mr. Breedlove, do you have stipulations from EPA as
6 to your exhibits?

7 MR. McAFEE: Yes, Your Honor. Mr. McAfee.

8 THE ADMINISTRATIVE LAW JUDGE: I'm sorry.

9 MR. McAFEE: That's okay. I just want to
10 make sure the record is clear.

11 THE ADMINISTRATIVE LAW JUDGE: You should do
12 that.

13 MR. McAFEE: I move for the Respondent that
14 pursuant to the joint stipulation that all of the
15 Respondent's exhibits are being admitted.
16 Mr. Breedlove and I discussed in the joint
17 stipulation--it's not in the notebook yet--but there
18 will be an original copy of a letter with signatures
19 that will be Exhibit 3 for Respondent, and that has
20 been stipulated to.

21 THE ADMINISTRATIVE LAW JUDGE: Okay. Is
22 that right, Mr. Breedlove?

23 MR. BREEDLOVE: It's Respondent's
24 Exhibit No. 2, Your Honor.

25 THE ADMINISTRATIVE LAW JUDGE: Okay.

1 MR. McAFEE: And we'll take care of that.
2 It will be in the notebook, Your Honor.

3 (Respondent's Exhibits 1 through
4 4 were received in evidence.)

5 THE ADMINISTRATIVE LAW JUDGE: Thank you.
6 All right. Then that stipulation is noted, as well.
7 Anything else in terms of housekeeping or just
8 streamlining this process?

9 Yes, Mr. Ryan.

10 MR. RYAN: Your Honor, I think what we're
11 stipulating to move into the record would be
12 Respondent's hearing exhibits as opposed to the
13 prehearing exchange. The stipulations we have
14 reference to about prehearing exchanges--a lot of the
15 documents have been removed from Respondent's
16 prehearing exchange. So we're stipulating to the
17 admissibility of the Respondent's hearing exhibits.

18 THE ADMINISTRATIVE LAW JUDGE: Okay. And,
19 frankly, unless there is a matter that requires me to
20 look at those prehearing exchange documents, I don't
21 look at them. I mean, I have other things to be
22 doing than just thumbing through potential exhibits.
23 So we never look at those things.

24 In fact, this is sort of a musing--a musing,
25 not amusing--about whether it's really wise to

1 continue this practice of sending in these
2 prehearing--voluminous, sometimes, prehearing
3 exchange documents when they're not part of the
4 record. Separate documents are admitted if it goes
5 to hearing in any event.

6 And it's just-- They're not necessary for
7 me unless it's in connection with some motion I have
8 to look at particular exhibits, and then they could
9 be submitted then.

10 Mr. Ryan, do the rules require that the
11 prehearing exchange documents be submitted to the
12 presiding officer; do you know?

13 MR. RYAN: That's my understanding, Your
14 Honor.

15 THE ADMINISTRATIVE LAW JUDGE: Okay.
16 Anything else?

17 MR. BREEDLOVE: No, Your Honor.

18 MR. McAFEE: No.

19 THE ADMINISTRATIVE LAW JUDGE: Let's begin
20 then.

21 Are you ready for your opening statement,
22 Mr. McAfee?

23 MR. BREEDLOVE: Mr. Breedlove, Your Honor.

24 THE ADMINISTRATIVE LAW JUDGE: Okay.

25 Mr. Breedlove.

1 MR. BREEDLOVE: Yes, I am, Your Honor. May
2 I approach the podium?

3 THE ADMINISTRATIVE LAW JUDGE: Yes.

4 MR. BREEDLOVE: Your Honor, if I may, I
5 would like to move the exhibit that's on the easel
6 into better light. It's a little easier to see.

7 THE ADMINISTRATIVE LAW JUDGE: Sure.

8 MR. BREEDLOVE: Your Honor, there's two
9 themes to this case. The first one is that water
10 must run downhill. It's a simple fact that when
11 water, enough of it, lands on the top of a hill in
12 the form of precipitation as the soil gets saturated
13 must run downhill. That's the basis that forms our
14 streams and our rivers.

15 In this instance, Mr. Vos has placed a
16 feedlot on top of a hill--Mr. Vos' feedlot is at the
17 top of the hill--and within that feedlot he has
18 placed at a time significant to this case thousands
19 of head of cattle.

20 With those thousands of head of cattle also
21 come thousands of tons of manure. When there's been
22 enough precipitation, the water comes down on that
23 manure and washes off a cocktail of contaminants,
24 pathogens, nutrients, solids, all things detrimental
25 to our streams.

1 In particular, in this instance we have an
2 unnamed tributary to Elliot Creek that is directly
3 west of the facility and that runs down to Elliot
4 Creek, which is a water of the U.S. as stipulated to
5 by the parties--excuse me--as admitted in
6 Respondent's answer to our complaint.

7 The Clean Water Act was created in the
8 seventies, and it named in particular concentrated
9 animal feeding lots as a point source, recognizing
10 the potential they have to cause harm to aquatic life
11 and the health of our streams.

12 Part of the Clean Water Act required
13 controls pursuant to NPDES permits, National
14 Pollution Discharge Elimination System permits, for
15 facilities like Mr. Vos' to put runoff control
16 structures in place to make sure that that runoff
17 didn't enter our streams.

18 In this instance, Mr. Vos was given an
19 opportunity early on. In 1991 he was issued a permit
20 by the Iowa Department of Natural Resources, giving
21 him permission to go ahead and construct those
22 controls, create the runoff control structures to
23 prevent this facility from having runoff go into the
24 streams.

25 Those controls--

1 THE ADMINISTRATIVE LAW JUDGE: That date was
2 what?

3 MR. BREEDLOVE: 1991, Your Honor. Those
4 controls were never constructed. To this date, these
5 controls have not been constructed.

6 The EPA will introduce evidence of
7 investigations performed by the Iowa Department of
8 Natural Resources, their fisheries division, looking
9 at the diversity and populations that are found in
10 Elliot Creek along the stretch southwest of the
11 facility and also a 500-foot stretch of the unnamed
12 tributary.

13 We will present evidence that these fish
14 populations have been nearly decimated, that
15 diversity is not near what it should be compared to
16 other streams in Northwest Iowa.

17 The second theme of this case is opportunity
18 lost. Like I mentioned, in 1991 Mr. Vos was issued
19 an NPDES permit by the Iowa Department of Natural
20 Resources and required to build controls pursuant to
21 it. As I said, those controls were never built.

22 In 2000 and 2001, in recognition of
23 widespread noncompliance with the Clean Water Act in
24 Iowa, the Iowa Department of Natural Resources came
25 up with a registration plan.

1 That registration plan gave large facilities
2 like Mr. Vos' an opportunity to come into compliance,
3 presented a five-year amnesty period by which the
4 facility could use that period without threat of
5 enforcement of state law if they came into compliance
6 by the end of the compliance period. The Iowa Plan
7 was 2001 through 2006.

8 THE ADMINISTRATIVE LAW JUDGE: The amnesty
9 period was 2001--in terms of the state's perspective,
10 2001 to when?

11 MR. BREEDLOVE: The Iowa Plan, the period of
12 time that they had, the large CAFOs had an
13 opportunity to come into compliance was that
14 five-year period, Your Honor, 2001 to 2006.

15 THE ADMINISTRATIVE LAW JUDGE: When in 2006?
16 When did it end?

17 MR. BREEDLOVE: It would be April 1, 2006,
18 around that date, Your Honor.

19 THE ADMINISTRATIVE LAW JUDGE: Okay. So
20 that's--is that fair to describe that as the period
21 of amnesty?

22 MR. BREEDLOVE: No, Your Honor, it would not
23 be. That was the period provided for by the Iowa
24 Department of Natural Resources to come into
25 compliance.

1 Now, amnesty was provisioned on full
2 compliance with this Iowa Plan; and with that, full
3 compliance meant full compliance with the Clean Water
4 Act by April of 2006.

5 THE ADMINISTRATIVE LAW JUDGE: Okay.

6 MR. BREEDLOVE: The simple fact is that
7 period came and went, and Mr. Vos did not build
8 controls. In fact, there were a number of milestones
9 set up by the Iowa Department of Natural Resources
10 during that five-year period, and not a single one of
11 those milestones were met.

12 So the Iowa Plan ended, Mr. Vos was not in
13 compliance, amnesty was lost. I need to reiterate
14 that amnesty was only for state law, did not apply to
15 federal law.

16 So the simple fact is IDNR came up with
17 another opportunity for Mr. Vos to come into
18 compliance after full knowledge as of 1991 that he
19 had to be in compliance. That opportunity was lost,
20 it was not taken advantage of.

21 During the period of noncompliance, Mr. Vos
22 experienced significant financial benefit from not
23 having to build the controls. The simple fact is
24 these controls are expensive. With that expense
25 comes the avoided or delayed cost that he avoided or

1 that he--excuse me-- With that delay or failure to
2 build those controls came the economic benefit he
3 received from not having to put that money into the
4 capital improvements of his facility.

5 This is money that other facilities in Iowa
6 did put into their facilities at that time. Roughly
7 100 or so facilities came into compliance pursuant to
8 the Iowa Plan. Mr. Vos was not one of them.

9 To establish a prima facie case, the
10 Government has to show that there was a discharge of
11 pollutants from a point source to water of the United
12 States without a permit.

13 In his answer, Respondent admitted that he
14 was a point source, that Elliot Creek is a water of
15 the U.S. and that he did not have an NPDES permit.
16 The only issue at issue is whether discharge has
17 occurred at this facility.

18 Mr. Lorenzo Sena, the EPA inspector that
19 inspected Mr. Vos' facility in 2006, identified
20 significant erosional features from Mr. Vos' facility
21 demonstrating that livestock--feedlot runoff is
22 leaving his facility and heading towards Elliot
23 Creek--excuse me--the unnamed tributary of Elliot
24 Creek. At the time of that inspection there was
25 water flowing in the unnamed tributary.

1 Mr. Stephen Pollard, EPA's compliance
2 officer, has been to the site three times. Each time
3 there has been water flowing in the unnamed
4 tributary.

5 During those visits he was able to walk the
6 flow paths where the feedlot flowed from Respondent's
7 facility all the way to the unnamed tributary.

8 Mr. Pollard has then also reviewed aerial
9 photography showing that the similar erosional
10 features that he saw in 2008 were also present in
11 2002, 2004, 2005 and 2006.

12 So in short, this facility has been
13 discharging for a number of years and the erosional
14 features demonstrate a clear and unobstructed
15 connection between the feedlot and the unnamed
16 tributary, which also has a direct connection to
17 Elliot Creek.

18 Sandy Doty is a hydrologist that's going to
19 be presenting some mathematical modeling. The simple
20 fact is that there is an unobstructed path and
21 discharges do occur from this facility. There is
22 nothing to stop them.

23 The real question is when and how much do
24 get to the stream, the unnamed tributary. That's
25 what Ms. Doty will speak to.

1 Jonathan Shefftz will be our expert dealing
2 with economic benefit analyses, and he will present
3 evidence that Mr. Vos experienced somewhere between
4 65 and 196 thousand dollars, depending on whether the
5 costs are delayed or whether the costs are avoided
6 depending on when he puts his controls in place. To
7 this date, they have not been put in place.

8 Mr. Bryan Hayes is a fisheries biologist
9 with the Department of Natural Resources of Iowa.
10 He's the one that performed the fish study down in
11 Elliot Creek, and he'll testify to the impacts the
12 feedlot runoff has had on this stream.

13 Gene Tinker is the animal feeding operations
14 coordinator for the Iowa Department of Natural
15 Resources. He'll testify as to the requirements to
16 be in this Iowa Plan and the background behind that
17 Iowa Plan.

18 Finally, Jeff Prier, IDNR's inspector who
19 has been out to the facility, will testify that he
20 has been there when discharges have occurred. And he
21 will also testify to the number of milestones that
22 Mr. Vos missed and, therefore, did not meet the
23 requirements of the Iowa Plan to receive that state
24 amnesty.

25 Again, Your Honor, the question in this case

1 is not so much if the discharges occurred, the
2 question is when and how much. Thank you.

3 THE ADMINISTRATIVE LAW JUDGE: Don't leave.
4 I'm going to ask a few questions of you.

5 MR. BREEDLOVE: Sure.

6 THE ADMINISTRATIVE LAW JUDGE: In terms of
7 understanding EPA's perspective, you just said,
8 Mr. Breedlove, that there are--no controls are in
9 place even as of today?

10 MR. BREEDLOVE: That is correct.

11 THE ADMINISTRATIVE LAW JUDGE: None?

12 MR. BREEDLOVE: No. Nothing adequate, Your
13 Honor.

14 THE ADMINISTRATIVE LAW JUDGE: Is it true at
15 least from--all of these questions are from EPA's
16 perspective--Elliot Creek is a perennial stream?

17 MR. BREEDLOVE: Yes, Your Honor.

18 THE ADMINISTRATIVE LAW JUDGE: There is no
19 dispute that it's a perennial stream nor that it's
20 considered a water of the United States?

21 MR. BREEDLOVE: No. Respondent admitted it
22 was a water of the United States in his answer.

23 THE ADMINISTRATIVE LAW JUDGE: Okay. And is
24 there any dispute that the unnamed tributary, in
25 fact, connects to Elliot Creek? Do the parties have

1 any dispute about that?

2 MR. BREEDLOVE: I do not believe there is
3 any dispute that it connects.

4 THE ADMINISTRATIVE LAW JUDGE: And so the
5 way you described it is the only issue is whether
6 there was, in fact, a discharge; correct?

7 MR. BREEDLOVE: Correct.

8 THE ADMINISTRATIVE LAW JUDGE: All right.
9 Thank you, Mr. Breedlove.

10 Let the record note I got the name straight
11 that time. Sorry about that.

12 Okay. Mr. McAfee, are you ready?

13 MR. McAFEE: Yes, I am, Your Honor. If it
14 works for you, I would prefer to stay here.

15 THE ADMINISTRATIVE LAW JUDGE: That works
16 fine. If you would just at some point during your
17 opening statement just indicate to me whether you're
18 waiving the objection to the supplemented exhibits.

19 And I'm not suggesting, by the way, that you
20 should waive it. I did just throw that issue out as
21 to whether it helps or hurts the Respondent, and you
22 would have a better handle as to the impact,
23 potential impact of that. But just mention that for
24 me, please, at some point. Go ahead.

25 MR. McAFEE: I will, Your Honor. Thank you.

1 Maybe I better do it right now before I forget. The
2 Respondent does not waive their objection.

3 THE ADMINISTRATIVE LAW JUDGE: Okay.

4 MR. McAFEE: Your Honor, I don't have a
5 lengthy opening statement, as I think I prefer to
6 just get into the evidence and let's take a look at
7 what this case provides.

8 But I do want to give you an overview for
9 answering any questions you may have. I generally
10 agree with the EPA's opening statement. You might
11 suspect I have a few disagreements with them or we
12 wouldn't be here today, but I think Mr. Breedlove has
13 outlined it very well.

14 The Respondent, our position is--and as we,
15 I think, clearly state in our answer--we do not
16 believe the Complainant has proven the most critical
17 part of any discharge action under the Clean Water
18 Act, and that is that there was an addition of actual
19 pollutants to the water of the United States from a
20 point source.

21 Everything is there except the proof of an
22 actual discharge. And we believe all of the evidence
23 they are going to present--and I'll be the first to
24 admit, Your Honor, as Mr. Breedlove and EPA knows,
25 Your Honor, I like to call--I like to look at it and

1 not spend anybody's time arguing over things that are
2 apparent.

3 They have evidence that gets very close, but
4 it doesn't get there. And I believe that's a very
5 high standard to meet, as set forth in the
6 Waterkeeper's decision. There has to be proof of
7 actual discharge of pollutants.

8 And they--again, we'll get into the
9 evidence, and that will be the time that we can go
10 through that. That is the critical element that is
11 missing. And I don't believe anything they are going
12 to present over the next few days that I have seen to
13 this point makes that link; therefore, we believe
14 that their case fails.

15 On the issue of-- One thing I would say,
16 Your Honor, I know you asked Mr. Breedlove during his
17 opening about the controls that are in place and not
18 in place, and it is correct Respondent has not
19 constructed controls as of this date.

20 Respondent does have-- As the testimony
21 indicates, the Respondent now does have an NPDES
22 permit that has been issued for controls, and the
23 plans for the controls have been approved and are
24 ready to go.

25 What Respondent has done is reduced his

1 feedlot capacity as of--and we'll show this in the
2 evidence--as of February of 2007. His feedlot
3 capacity is below 1,000 head now, which means as of
4 then he is not a point source.

5 So that is the approach Respondent has taken
6 to compliance pending the outcome of this case.

7 THE ADMINISTRATIVE LAW JUDGE: So as of this
8 point in time, at least, per the NPDES permit, the
9 Respondent is in compliance because he need not do
10 anything because he has a thousand head or less?

11 MR. McAFEE: Correct.

12 THE ADMINISTRATIVE LAW JUDGE: Okay.

13 MR. McAFEE: I think Your Honor is going to
14 hear a lot of evidence about, as Mr. Breedlove said,
15 water rolls downhill. But I guess-- I was a farmer
16 before I became an attorney, and we also know what
17 else rolls downhill, as the old saying goes.

18 But as I said, I think that's the part of
19 their case that's missing. We don't dispute that
20 water flows downhill and that there are defined
21 drainage pathways from that feedlot. You'll see
22 that. We're not going to argue with that.

23 The point is they have not proven what was
24 in that water when it reached the unnamed tributary,
25 if it reached the water of the United States.

1 I believe the EPA's position will be that
2 once something got into the unnamed tributary, it had
3 to get to the water of the United States.

4 I think that if you look at scientific
5 evidence, it routinely and regularly confounds
6 experts as to what should happen, but doesn't happen.
7 And we believe that is the failure of the EPA case
8 here.

9 They will spend a lot of time showing us
10 what should happen. The computer modeling expert
11 will say, "Yeah, this should happen with all these
12 factors in place," but they don't have the proof that
13 it did happen. We'll get into all that in the
14 evidence.

15 THE ADMINISTRATIVE LAW JUDGE: I take it
16 it's your perspective that while modeling is very
17 interesting, it isn't sufficient by itself to get you
18 there?

19 MR. McAFEE: That is correct, Your Honor.
20 We will have our expert to respond to the modeling
21 report produced by EPA, Mr. Gerald Hentges, who is a
22 hydrologist with Terracon Consultants, a man with his
23 feet on the ground, out there in the field who does
24 work for clients daily on these types of issues, and
25 he'll testify to that.

1 We don't believe the model was ever intended
2 to be used as it is trying to be used here. I use
3 the word "the model." And that's not correct.
4 There's several models being used.

5 But we don't believe any of the models that
6 EPA is using in this case were ever intended to be
7 used for enforcement purposes under the Clean Water
8 Act to say when it rained this much and that water
9 fell on this feedlot, that a pollutant did get into
10 this water of the United States.

11 That is not the purpose of these models, and
12 we do not believe they should be used for that. But
13 we'll get into all that, of course.

14 The second part of the case--and again, I
15 agree with Mr. Breedlove--deals with the Iowa Plan.
16 We have a different perspective on that. We believe
17 Mr. Vos did comply with the Iowa Plan to the extent
18 that he could. We can't say that he had controls
19 constructed by the end of the Iowa Plan's time
20 period, this five-year time period.

21 Now, we will argue, as we've argued in our
22 answer, that it was not a hard and fast five-year
23 time period; that the word "goal" was used. And
24 we'll present evidence to that effect.

25 THE ADMINISTRATIVE LAW JUDGE: Okay.

1 MR. McAFEE: Beyond that, there are reasons
2 why Mr. Vos did not have his controls in place by the
3 end of the five-year goal, as I have called it. EPA
4 will look at it differently.

5 The reasons were--we'll present evidence
6 that from the beginning of the Iowa Plan, both the
7 Iowa Department of Natural Resources and the EPA in
8 Kansas City were made aware--and DNR agreed and I
9 believe EPA agreed, but that may be a source of
10 contention or a point of contention--that there were
11 real world limitations that were going to affect
12 whether people could actually get that done.

13 And we will talk about those through several
14 witnesses who worked for the Iowa Cattlemen's
15 Association at the time and were very instrumental
16 and very involved in the development and
17 implementation of the Iowa Plan.

18 Those real world limitations were getting
19 engineers that could get the work done in time and
20 the DNR getting their work done in time. And I
21 believe it will be--I was going to use the word
22 "undisputed." I hesitate to say that because there
23 may be some dispute--but I think it's been recognized
24 by EPA that there were DNR delays here that ate up a
25 lot of this time period.

1 At the same time, Mr. Vos will be the first
2 to admit, as he looks back at that five-year period,
3 he might do something differently. But when you look
4 at what was happening at the time, he believes he did
5 everything he could to get things done within the
6 five-year period. It didn't happen, and that's why
7 we're here today.

8 We believe he should still get the
9 protection of that five-year period--I call it the
10 five-year period--with the goal of the five-year
11 period, and we believe it should extend beyond that
12 period. He, in fact, did receive his NPDES permit in
13 August of 2006.

14 THE ADMINISTRATIVE LAW JUDGE: Okay. Go
15 ahead. I don't want you to feel you are neglected,
16 so I have a couple questions for you when you're
17 done.

18 MR. McAFEE: Okay. The economic benefit, I
19 understand how that's calculated, and I understand
20 the reasoning behind it and penalty calculation, et
21 cetera. And we don't have an expert on that issue.

22 THE ADMINISTRATIVE LAW JUDGE: Well, you
23 hope never to get to that point. But assuming
24 liability is established, then we're talking now
25 about a penalty; right?

1 MR. McAFEE: Right. I will have some
2 questions for the EPA expert about the economic
3 benefit, how it's calculated.

4 And I think, putting it in a nutshell, we
5 believe that one thing is costs have increased
6 since-- Did Mr. Vos receive an economic benefit by
7 not constructing, or is he being, to an extent,
8 penalized because costs have increased? If he would
9 have built it when EPA says he should have, it might
10 have been a lot cheaper than it's going to be now.
11 EPA may look at that differently than I do.

12 No. 2, we believe the Iowa Plan needs to be
13 taken into account as to when you start that period
14 of noncompliance; and, as Mr. Breedlove mentioned
15 several times, it was an amnesty program. And that
16 word will be used during testimony. It has been used
17 in the prehearing exchanges.

18 And the question is during this period of
19 time, which we believe Mr. Vos complied with, but
20 let's say the EPA is correct that he didn't, in the
21 Court's eyes shouldn't that period be excluded in
22 figuring any economic benefit or, going back to the
23 heart of it, figure his period of noncompliance.

24 So those are things we will both present to
25 you, Your Honor, now and also in the posthearing

1 briefs to summarize all of this and hopefully put it
2 in perspective for you.

3 THE ADMINISTRATIVE LAW JUDGE: Thank you.

4 MR. McAFEE: You have some questions?

5 THE ADMINISTRATIVE LAW JUDGE: Yes. Looking
6 at Page 4 of Respondent's answer where you reference
7 that there was no need to have an NPDES permit until
8 July 31, 2007, is that still your position?

9 MR. McAFEE: Yes, it is, Your Honor. And
10 I'm glad you brought that up because I kind of lumped
11 that into whether there was a discharge, or not.

12 If Mr. Vos' facility-- And we will be
13 presenting evidence to this effect, that he was not
14 required to have an NPDES permit under previous
15 regulations because those regulations only required a
16 permit if you discharged into a water of the United
17 States in a storm event less than the 25-year,
18 24-hour storm.

19 Mr. Vos' position--and we believe it shows
20 he did not do that, there's no evidence to show that
21 there was any discharge, in our opinion; therefore,
22 he was not required to have an NPDES permit until the
23 regulations changed in April of 2003--I want to make
24 sure I have my dates right--and that made him a newly
25 defined CAFO.

1 As a newly defined CAFO, he is not and was
2 not required to have an NPDES permit until July 31 of
3 2007. In fact, he received his on April--excuse me--
4 on August--I'm not going to give a date because I may
5 not have it right here--but it was August of 2006
6 when he received it, so he is in compliance with that
7 regulation.

8 But, in fact, Your Honor, since I filed my
9 answer that date has been extended again by the
10 federal EPA through regulations. To have an NPDES
11 permit in place for newly defined CAFOs is now
12 February of '09. So as we stand here today, he would
13 not be, in my opinion--

14 THE ADMINISTRATIVE LAW JUDGE: No matter how
15 many head of cattle he had?

16 MR. McAFEE: Correct, as a newly defined
17 CAFO. EPA obviously disagrees that he was a newly
18 defined CAFO.

19 THE ADMINISTRATIVE LAW JUDGE: Just for the
20 record, clarification of the record, the parties
21 have--at least Mr. McAfee has done this--alluded to a
22 CAFO. That stands for concentrated animal farming
23 operation or feeding operation?

24 MR. McAFEE: Yes, Your Honor, concentrated
25 animal feeding operation.

1 THE ADMINISTRATIVE LAW JUDGE: C-A-F-O.
2 Sometimes that's referred to when the parties settle
3 a case. That's a different type of CAFO. That
4 refers to consent agreement and final order. So we
5 don't want any confusion about that. We're not
6 talking about that.

7 Okay. Anything else, Mr. McAfee?

8 MR. McAFEE: I don't believe so, Your Honor.
9 I think we'll be ready to present our case.

10 THE ADMINISTRATIVE LAW JUDGE: Okay.
11 Obviously, I have read through the Waterkeepers,
12 which is not an enforcement case. But I would-- In
13 fact, I'm surprised that this wasn't dealt with in a
14 motion earlier in the case to rule on the impact of
15 that. But it will be something you have to deal with
16 in the posthearing briefs.

17 And you answered my other questions, but one
18 thing that I want the parties to help me out with
19 here is that--I mean I got the sense from hearing
20 Mr. Breedlove, as well as Mr. McAfee, that apparently
21 Iowa, through the IDNR, the Iowa Department of
22 Natural Resources--is that right?

23 MR. McAFEE: Yes.

24 THE ADMINISTRATIVE LAW JUDGE: --that there
25 seems to be a tension, that they're at odds, their

1 position is at odds with EPA's position because
2 Mr. Breedlove a couple times made emphasis that what
3 Iowa says, that that does not bind the hands of the
4 EPA, the federal position.

5 So if there is some sort of a tension and
6 conflict there, I'd like that--I'd like you to assist
7 me in understanding that with the NPDES permit and
8 how they all mesh together.

9 I mean, I assume that Iowa is one of these
10 states where EPA grants the authority to the state to
11 issue these permits?

12 MR. BREEDLOVE: Yes.

13 THE ADMINISTRATIVE LAW JUDGE: Yet, maybe
14 this tension between EPA disagreeing with a position.
15 I don't know yet, but I'll know that by the end of
16 the week.

17 But I got the sense that there's some sort
18 of a conflict here between--potential conflict
19 between what Iowa says and what that would mean and
20 EPA's different take on that, despite the fact of
21 having delegated to Iowa the authority to deal with
22 these issues.

23 Do you want to address that briefly or wait
24 on it?

25 MR. BREEDLOVE: If I may, Your Honor, I

1 don't believe the tension is so much between IDNR and
2 EPA as much as how Mr. McAfee and his client would
3 like it to be interpreted. I think the simple fact
4 is that the Iowa Plan gave an amnesty to state law
5 for a period of five years for those facilities that
6 used the plan to come into compliance.

7 EPA was not a partner to that and didn't
8 waive its right to apply federal law to it. I think
9 you'll see where there is a tension between EPA and
10 IDNR is the agreement between IDNR and EPA that the
11 requirements of this plan weren't met; and,
12 therefore, he wouldn't have amnesty under the Iowa
13 Plan nor under federal law.

14 So I don't believe there is any tension
15 between the State and Federal Government at this
16 point.

17 THE ADMINISTRATIVE LAW JUDGE: Okay. You
18 don't have to comment now, but if you want to,
19 Mr. McAfee, go ahead.

20 MR. McAFEE: Just briefly, Your Honor, that
21 I would say that while the Iowa Plan was, as we note
22 in our answer, in the Iowa regulations, and, no, you
23 will not find it in the federal regulations, our
24 testimony that we will present will show that it was
25 everyone's understanding that the federal EPA was

1 recognizing the Iowa Plan.

2 And, in fact, I think it's borne out by the
3 fact that in this case Mr. Vos was not investigated
4 until May 31 of '06 following the end of the
5 five-year period, which Iowa, of course, argues goes
6 beyond that.

7 So I believe EPA was, at least informally,
8 going along with the Iowa Plan. They may disagree
9 with that, obviously.

10 But the tension between the DNR and EPA that
11 I guess we see is--and the fact that was DNR doing
12 its job to help producers get into compliance with
13 the Iowa Plan and were there delays that were
14 attributable to DNR and how is EPA recognizing those
15 versus delays that they are attributing to the
16 Respondent.

17 THE ADMINISTRATIVE LAW JUDGE: Okay. We're
18 going to go off the record for a second.

19 (Off-the-record discussion.)

20 THE ADMINISTRATIVE LAW JUDGE: Back on the
21 record.

22 Mr. Breedlove or Mr. Ryan, are you ready for
23 your first witness?

24 MR. RYAN: Yes, Your Honor. I would like to
25 call Mr. Lorenzo Sena to the stand, please.

1 MR. McAFEE: Excuse me, Your Honor. Could
2 we go off the record for a minute.

3 THE ADMINISTRATIVE LAW JUDGE: Sure.
4 (Off-the-record discussion.)

5 THE ADMINISTRATIVE LAW JUDGE: Back on the
6 record.

7 LORENZO PAZ SENA,
8 called as a witness by counsel for the Complainant,
9 being first duly sworn by the Administrative Law
10 Judge, was examined and testified as follows:

11 THE ADMINISTRATIVE LAW JUDGE: State your
12 name and spell it for the court reporter.

13 THE WITNESS: My name is Lorenzo Paz Sena,
14 L-O-R-E-N-Z-O P-A-Z Sena, S-E-N-A.

15 DIRECT EXAMINATION

16 BY MR. RYAN:

17 Q. Mr. Sena, would you please--you've already
18 stated your name for the record. Who's your
19 employer?

20 A. United States Environmental Protection
21 Agency.

22 Q. And how long have you been with the EPA?

23 A. About 10 years.

24 Q. What is your current job at EPA?

25 A. Current job, I'm the lead field chemist for

1 the air monitoring team.

2 Q. And how long have you been in that position?

3 A. Two years.

4 Q. Prior to becoming part of the air monitoring
5 team, what did you do at EPA?

6 A. I did NPDES inspections and I was the
7 manager for the regional ambient fish tissue
8 monitoring program.

9 Q. What is an NPDES inspection?

10 A. An NPDES inspection is an inspection of--it
11 would include the waste water treatment facilities,
12 concentrated animal feeding operations, storm water
13 inspections.

14 Q. And NPDES, what does that stand for?

15 A. National pollutant discharge elimination
16 system.

17 Q. Is that part of the Clean Water Act?

18 A. Yes, it is.

19 Q. So you were doing primarily Clean Water Act
20 inspections--

21 A. Yes.

22 Q. Let me finish my question first before you
23 answer, and our court reporter will be much happier.

24 Okay. So you were doing Clean Water Act
25 inspections for six of your eight years with EPA?

1 A. No, I've been with EPA 10 years. I've been
2 doing it for eight years.

3 Q. Eight years for the EPA?

4 A. Yes.

5 Q. So you spent eight years prior to joining
6 the air group as an NPDES inspector; is that correct?

7 A. Yes, I did.

8 Q. Could you summarize your education for me,
9 please.

10 A. I have a Bachelor of Science in biology and
11 Bachelor of Arts in chemistry.

12 Q. And you mentioned that one of the things you
13 inspected as an NPDES inspector was feedlots.
14 Approximately how many CAFO inspections have you done
15 as an EPA inspector?

16 A. Approximately 80.

17 Q. Have you been to other CAFOs where you
18 weren't doing any inspection?

19 A. Yes, I have.

20 Q. Approximately how many CAFOs have you
21 visited?

22 A. Approximately 150.

23 THE ADMINISTRATIVE LAW JUDGE: Let me just
24 stop you. Are you saying CAFOs?

25 MR. RYAN: I always say CAFOs.

1 THE ADMINISTRATIVE LAW JUDGE: For the
2 reporter's benefit, he's talking about C-A-F-O.

3 Go ahead.

4 MR. RYAN: Thank you, Your Honor. Good
5 point. I have to keep forgetting my Idaho roots and
6 remember I'm in Iowa now.

7 BY MR. RYAN:

8 Q. So are you-- Based on your approximately 80
9 inspections, 150 site visits of CAFOs, would you say
10 you're generally familiar with feedlots and other
11 setups?

12 A. Yes, I am.

13 Q. Are you familiar with the-- Do you have any
14 special training in feedlots?

15 A. No, I don't.

16 Q. I mean, have you done any--have you had any
17 training on nutrient management plans?

18 A. Yes, I have.

19 Q. Are you familiar with the Vos case?

20 A. Yes, I am.

21 Q. And how are you familiar with it?

22 A. I inspected the facility.

23 Q. When did you inspect it?

24 A. May 31, 2006.

25 Q. Would you please-- In front of you there is

1 a binder. Would you please turn to Exhibit 23.

2 THE ADMINISTRATIVE LAW JUDGE: 23, Mr. Ryan?

3 MR. RYAN: Yes, sir; 23. That would be
4 Complainant's 23.

5 BY MR. RYAN:

6 Q. Do you recognize this document, Mr. Sena?

7 A. Yes, I do.

8 Q. What is it?

9 A. It's my inspection report.

10 MR. RYAN: And just for the record, Your
11 Honor, this is one of the exhibits which was not
12 stipulated to.

13 THE ADMINISTRATIVE LAW JUDGE: Thank you.

14 BY MR. RYAN:

15 Q. Turning to Page 8 of 8 on Exhibit 23, do you
16 see that on the bottom of the page where it says
17 "inspector's signature"?

18 A. Yes, I do.

19 Q. Is that your signature?

20 A. Yes, it is.

21 Q. The date there, June 8, 2006, what does that
22 date represent?

23 A. That is the date I completed the report.

24 Q. Okay. And going back to the first page of
25 the report, I believe you testified earlier that you

1 did your inspection on May 31, 2006. Is that the
2 date reflected on the first line on the top of Page 1
3 of 8 of Exhibit 23?

4 A. Yes, it is.

5 Q. And there are a number of attachments to
6 this inspection report. Do you see starting just
7 after Page 8 of 8 there's a letter dated August 19,
8 1991, and at the top of the page it says--someone has
9 written in "attachment No. 1." Do you see that?

10 A. Yes, I do.

11 Q. Whose handwriting is that "attachment No. 1"?

12 A. That is my handwriting.

13 Q. There are other various documents which are
14 attached. At the bottom right-hand corner of this
15 attachment No. 1, it says "Page 1 of 27." Did you
16 write that there?

17 A. Yes, I did.

18 Q. And then this goes through--back to Page 27
19 of 27. Can you tell me what these documents are in
20 general without going into any specifics? Where did
21 you get these and why are they in here?

22 A. I obtained copies of these documents when I
23 went to the DNR field office No. 3.

24 Q. And why did you go to the DNR field office?

25 A. Just for an idea of the regulatory history

1 of the facility.

2 Q. Is that something that you do generally
3 before inspecting facilities?

4 A. Yes, I do.

5 Q. So before going out and inspecting Mr. Vos'
6 feedlot, you went to the IDNR office and looked at
7 documents. Are these some of the documents you
8 looked at?

9 A. Yes, they are.

10 Q. And is it your practice to copy such
11 documents and put them in your inspection report?

12 A. Yes, it is.

13 Q. And is this all the documents that were in
14 the IDNR files or just ones you picked out?

15 A. Just ones I picked out.

16 Q. Okay. And did you discuss any of these
17 documents with the IDNR staff when you copied them?

18 A. No, I did not.

19 Q. So then let's go to attachment No. 2 real
20 quick, which is the next page. It says "Page 1 of 4,"
21 so it's a photograph of a handwritten spiral
22 notebook. Do you see that?

23 A. Yes, I do.

24 THE ADMINISTRATIVE LAW JUDGE: Which page
25 are you on, Mr. Ryan?

1 MR. RYAN: This would be attachment No. 2 to
2 Exhibit 23. It starts just after Page 27 of 27 of
3 attachment 1.

4 THE ADMINISTRATIVE LAW JUDGE: Okay.

5 MR. RYAN: It's a color photograph of a
6 spiral bound notebook.

7 BY MR. RYAN:

8 Q. Did you take that photograph, Mr. Sena?

9 A. Yes, I did.

10 Q. And the same thing with the other
11 photographs in attachment No. 2?

12 A. Yes, I did.

13 Q. Did you take those-- When did you take
14 those photographs?

15 A. On the inspection day, May 31, 2006.

16 Q. Moving on to attachment No. 3, which is
17 after the last photo attachment No. 2, is that your
18 handwriting again at the top of attachment No. 3?

19 A. Yes, it is.

20 Q. It says "attachment 3." And I believe
21 that's a two-page attachment, Page 1 and 2 of--excuse
22 me--1 of 2 and 2 of 2, followed by attachment 4,
23 which it says at the bottom right-hand corner to
24 attachment 4 to Exhibit 23, Page 1 of 16. Do you see
25 that?

1 A. Yes.

2 Q. Is that your handwriting at the top and
3 bottom of that page?

4 A. Yes, it is.

5 Q. And if you go back through a series of
6 photographs that end at Page 16 of 16, after that is
7 attachment No. 5. Do you see that after the last
8 photograph?

9 A. Yes.

10 Q. Last photograph of attachment 4 is Page 16
11 of 16. Then we're at attachment 5, which appears to
12 be a form which says "United States Environmental
13 Protection Agency confidentiality notice." Do you
14 see that?

15 A. Yes, I do.

16 Q. Is that your handwriting at the top on this
17 form?

18 A. Yes, it is.

19 Q. Is that your signature in the middle of the
20 page of attachment 5?

21 A. No, it is not.

22 Q. Whose signature is that?

23 A. Mr. Lowell Vos'.

24 Q. Did he sign that during your inspection?

25 A. Yes, he did.

1 Q. On the date there it says "May 30th." And I
2 believe the first page of your inspection says "May
3 31." Did you visit with Mr. Vos the day before, or
4 was this the--why is there different dates?

5 A. I just messed up on the date.

6 Q. So you wrote that date in of May 30th?

7 A. Yes.

8 Q. But it was actually May 31st?

9 A. Yes.

10 Q. Going on to attachment No. 6 to Exhibit 23--

11 THE ADMINISTRATIVE LAW JUDGE: Let me just

12 stop for a second. Off the record.

13 (Off-the-record discussion.)

14 BY MR. RYAN:

15 Q. Attachment No. 6, do you see that?

16 A. Yes, I do.

17 Q. Okay. And again, is that your handwriting
18 at the top of the page?

19 A. Yes, it is.

20 Q. That says "attachment 6." Okay. So we have
21 Exhibit 23 of your inspection report along with six
22 attachments. You prepared this entire report?

23 A. Yes, I did.

24 Q. Along with the attachments to it?

25 A. Yes.

1 MR. RYAN: Your Honor, at this time I would
2 like to move Exhibit 23.

3 THE ADMINISTRATIVE LAW JUDGE: Okay. EPA
4 Exhibit 23, which has been offered for purpose of
5 identification, is now offered.

6 Do you have an objection, Mr. McAfee?

7 MR. MCAFEE: Your Honor, I do. And it does
8 not go to the entire document. As the Court is
9 aware, there were previous documents that were not
10 stipulated to. And this document, this exhibit,
11 contains some of those documents. So that's why I
12 had to object to this one.

13 THE ADMINISTRATIVE LAW JUDGE: Okay. I
14 understand.

15 MR. MCAFEE: My objection is to Page 1 of 27
16 in attachment No. 1.

17 THE ADMINISTRATIVE LAW JUDGE: Let me just
18 get to that now.

19 MR. MCAFEE: Sure.

20 THE ADMINISTRATIVE LAW JUDGE: Page 1 of 27.

21 MR. MCAFEE: And Page 2 of 27 and Page 3 of
22 27.

23 THE ADMINISTRATIVE LAW JUDGE: Okay. So 1,
24 2 and 3 of attachment 1, which contains 27 pages. So
25 what's the nature of your objection, if it's one

1 objection to all three of those pages, Mr. McAfee?

2 MR. McAFEE: Yes, it is, Your Honor. And it
3 relates to the--well, it's actually the Cutler
4 decision regarding--and I use the term "Cutler
5 decision." It's an Administrative Law Judge decision
6 on the Clean Water Act appeal, and it relates to
7 calculation of the penalty and what matters can be
8 taken into account.

9 In essence, the nature of my objection is
10 this is regarding a permit that was issued to Mr. Vos
11 in 1991, an NPDES permit.

12 Mr. Vos did not construct pursuant to that
13 permit, and the EPA is alleging that that shows some
14 sort of pattern of noncompliance on his part. And I
15 believe that that is outside of the statute of
16 limitations period, and the Cutler decision discusses
17 that.

18 Pursuant to that decision--which the
19 Environmental Appeals Board did overturn the decision
20 specifically in that case, but that was a wetlands
21 field case, is my understanding. We are not in that
22 type of case here, we are in a Clean Water Act appeal
23 here.

24 And I believe based on the Cutler decision
25 and the analysis that considering something like this

1 in any penalty phase of this hearing would be
2 inappropriate since it's outside of the statute of
3 limitations period.

4 THE ADMINISTRATIVE LAW JUDGE: Okay.

5 Mr. Ryan, do you want to respond to that?

6 MR. RYAN: Yes, Your Honor. The Cutler case
7 was my case, so I know quite a bit about it.

8 Yes, Mr. McAfee is correct. We were
9 successful in having Judge Nissen reversed at the AB
10 level on his holding that nothing outside the statute
11 of limitations should be considered as one of the
12 Section 309(G)(6) penalty factors. That is the law.

13 You can go outside the statute of
14 limitations for purposes of showing--

15 THE ADMINISTRATIVE LAW JUDGE: You're
16 speaking too quickly and you're mumbling.

17 MR. RYAN: I'm sorry. The law is clear that
18 we can go outside the statute of limitations for
19 looking at the prior history of violations, which is
20 one of the statutory penalty factors under Section
21 309(G)(6).

22 And the fact that Mr. McAfee attempted to
23 distinguish the case on the grounds that it was a
24 wetlands case, that is of no moment. It was a Clean
25 Water Act case with the exact same statutory penalty

1 factors applied to wetlands cases as to these cases.

2 THE ADMINISTRATIVE LAW JUDGE: Okay. Here's
3 my ruling. I'm going to defer making a ruling on
4 this, giving Mr. McAfee the opportunity, if he
5 wishes, to file this in the posthearing brief as one
6 of the issues, how it is that this should be
7 distinguished from the Cutler case or any other
8 theory that you have.

9 And so as of now it's in, but with the
10 provision that I can remove it if I'm persuaded by
11 arguments which may be raised by Mr. McAfee post-
12 hearing. That's my ruling.

13 MR. McAFEE: Thank you, Your Honor.

14 THE ADMINISTRATIVE LAW JUDGE: Okay. Were
15 there any other pages within EPA Exhibit 23?

16 MR. McAFEE: No, Your Honor. So that is the
17 extent of my objection. I do not object to the
18 remainder of the exhibit.

19 THE ADMINISTRATIVE LAW JUDGE: Okay. So
20 with the provisions that I just related to the
21 possible revisiting, Complainant's EPA Exhibit 23 is
22 admitted.

23 (Complainant's Exhibit 23
24 was received in evidence.)

25

1 BY MR. RYAN:

2 Q. Mr. Sena, describe for us generally what you
3 do when you show up at an inspection for a CAFO and
4 how you prepare your report.

5 A. Okay. Generally what I do prior to the
6 inspection, actually, I call the producer and ask
7 them if they have any biosecurity protocols and also
8 to schedule an appointment for an inspection.

9 And then when I do show up at the facility,
10 I just normally do a facility walk-through, walk
11 around the perimeter of the site, and then after that
12 I go through any paperwork the facility has.

13 Q. Okay. And then after you conduct the
14 inspection, when do you start documenting it?

15 A. Well, I start documenting during the
16 inspection.

17 Q. Okay.

18 A. And I take with me an aerial photograph of
19 the site. It just makes it much easier. I take
20 notes on the aerial photograph. And then I also take
21 pictures and take notes on where the pictures were
22 taken. When I get back to the motel room that night,
23 I label my photos.

24 Q. So you're labeling them when it's all still
25 fresh in your mind?

1 A. Yes.

2 Q. Now, did you reach a conclusion based on
3 your inspection of Mr. Vos' facility on May 31, 2006,
4 regarding whether he was discharging, or not?

5 A. Yes, I made a conclusion. My conclusion was
6 that he had over a thousand head on site at the time
7 of the inspection, these cattle were maintained for a
8 period greater than 45 days, and there were no
9 postharvest residues or crops in the production area
10 at the time.

11 THE ADMINISTRATIVE LAW JUDGE: There were no
12 postharvest?

13 THE WITNESS: Yes.

14 THE ADMINISTRATIVE LAW JUDGE: Okay.

15 A. (Continuing) And also that the facility had
16 no controls, and there was evidence as to discharge
17 in the waters of the U.S.

18 Q. So the first three elements I believe you
19 mentioned were the 45 days, the number of head of
20 cattle and the postharvest residue or vegetative
21 growth. Are those all part of the definition of what
22 is a CAFO?

23 A. Yes, they are.

24 Q. So you concluded that he was a CAFO?

25 A. Yes, I did.

1 Q. And you mentioned evidence of discharges.
2 Let's go through your report. Let's look at Page 1
3 of 8. Do you have that in front of you?

4 A. Yes.

5 Q. Looking at the approximately lower half of
6 the page, there's a--the second to the last line
7 before the text, there is a question that says, "How
8 long has this facility been operating at this
9 location?" And I believe you wrote "31 years." Do
10 you see that?

11 A. Yes, I do.

12 Q. And where did you get that number 31 years?

13 A. Mr. Vos told me.

14 Q. Okay. And higher up it says "length of time
15 in current position, 61 years." Again, where did you
16 get that number?

17 A. Mr. Vos told me that also.

18 Q. Now, in the text below "31 years" two lines
19 down there is a sentence that says, "The facility was
20 issued NPDES permit No. IA 0078701 on August 19,
21 1991." Do you see that?

22 A. Yes, I do.

23 Q. And it says, "The permit has since expired."
24 What is the relevance to you of an NPDES permit for
25 this facility?

1 A. The NPDES permit outlines the requirements
2 of the facility to keep as far as record keeping and
3 as well as controlling runoff from the feedlot or
4 production area.

5 Q. And why did you note in here that there was
6 an expired permit from 1991?

7 A. That's what it says on attachment 1 on the
8 NPDES permit, construction permit.

9 Q. Okay. Now, is that NPDES construction
10 permit actually part of your Exhibit 23?

11 A. Yes, the construction permit is.

12 Q. Okay. Excuse me. The NPDES permit, is that
13 included in your Exhibit No. 23?

14 A. No, it is not.

15 Q. Could you please turn to Exhibit 9.

16 MR. RYAN: Again, for the purposes of the
17 record, this exhibit was not stipulated to.

18 THE ADMINISTRATIVE LAW JUDGE: Okay.

19 BY MR. RYAN:

20 Q. Under Exhibit 9 we have one of the letters
21 which I believe is found in your attachment No. 1 to
22 your Exhibit 23 inspection report. Do you see that?

23 A. Yes, I do.

24 Q. And then the second page of Exhibit 9 is a
25 State of Iowa Department of Natural Resources

1 construction permit. Do you see that?

2 A. Yes, I do.

3 Q. Third page would be that construction
4 permit, as well. And then the fourth page of Exhibit
5 9 is a document entitled at the top "Authorization
6 from the Iowa Department of Natural Resources to
7 discharge into the National Pollutant Discharge
8 Elimination System." Do you see that?

9 A. Yes, I do.

10 Q. Is that the NPDES permit that you are
11 referencing on Page 1 of your inspection report,
12 which is Exhibit 23?

13 A. Yes, it is.

14 Q. And did you review this permit prior to
15 doing your inspection?

16 A. No, I did not.

17 Q. Okay. But this is the-- This is the permit
18 that you reference on Page 1?

19 A. Yes.

20 MR. RYAN: Your Honor, at this time I'd move
21 Exhibit 9 into evidence.

22 THE ADMINISTRATIVE LAW JUDGE: Okay. As
23 alluded to earlier, this exhibit has been offered for
24 purposes of identification, EPA or Complainant's
25 Exhibit 9.

1 Do you have an objection, Mr. McAfee?

2 MR. MCAFEE: Yes, Your Honor. The objection
3 I have is the same objection I had to the portion of
4 Exhibit 23. So I won't take the Court's time unless
5 you have a question for me.

6 THE ADMINISTRATIVE LAW JUDGE: No. So my
7 ruling will be consistent, same thing will apply.
8 The exhibit is admitted subject to posthearing
9 argument as to why aspects of it should not be
10 considered by the Court. And that apparently would
11 involve some sort of--not limiting your argument, but
12 some sort of distinction basis from the Environmental
13 Appeals Board in the Cutler case. That's my ruling.
14 Exhibit 9 is in with those provisos.

15 (Complainant's Exhibit 9
16 was received in evidence.)

17 BY MR. RYAN:

18 Q. Mr. Sena, please turn to Page 7 of 8 of
19 Exhibit 23, which is your inspection report, Page 7
20 of 8.

21 A. Okay.

22 Q. And do you see in approximately the middle
23 of the page there's a pen number with current number
24 of cattle? Do you see that?

25 A. Yes, I do.

1 Q. At the bottom of the current number of
2 cattle column it says 2,221. Is that the number of
3 head that were present on the date of your
4 inspection?

5 A. Yes.

6 Q. And how do you know that number?

7 A. Mr. Vos told me.

8 Q. Now, referring back to Page 1 of your
9 inspection report, the first narrative paragraph at
10 the bottom of the page, the second to the last
11 sentence you say, "He showed us these records, and I
12 photographed them, and they are included as
13 attachment 2. These records show the number of head
14 near the end of 2005 and are close to the number of
15 head on site at the time of the inspection."

16 And these, I believe, are the photographs of
17 the spiral-bound notebook you're referring to in
18 attachment No. 2 that we discussed earlier in your
19 testimony. Do you recall that?

20 A. Yes.

21 Q. Now, why did you mention the 2005 head count
22 for the feedlot?

23 A. Because there were no records of the number
24 of cattle in 2006.

25 Q. No records other than what Mr. Vos told you?

1 A. Yes.

2 Q. And those photographs that we see of the
3 spiral notebooks in attachment 2, did those indicate
4 to you how many head were present the year before?

5 A. Yes.

6 Q. Now, do those photographs include all of the
7 pens at the feedlot?

8 A. No, they do not.

9 Q. When I say "those photographs," I'm
10 referring to attachment No. 2. So were there more--
11 Is it your understanding there would be more cattle
12 there than were present in these four photographs?

13 A. Yes.

14 Q. Let's go to Page 2 of 8 of your inspection
15 report, which is Exhibit 23. Approximately-- Let's
16 look at the top of the page again. There the number
17 2,221 is present for beef cattle. Does that reflect
18 the number of cattle that were present when you
19 inspected?

20 A. Yes, it does.

21 Q. The capacity shows 3,000 head. Where did
22 you get that number from?

23 A. That was provided to me by Mr. Vos.

24 Q. So he told you he has a capacity of 3,000?

25 A. Yes.

1 Q. Let's look at No. 6 down below under B again
2 on Page 2 of 8 of Exhibit 23. It says, "Has the
3 facility had contact with other agencies regarding
4 current construction and operation of the LWCF
5 associated with the operation?" What is LWCF?

6 A. It stands for Livestock Waste Control
7 Facilities.

8 Q. Would that be the types of controls that
9 would prevent runoff?

10 A. Yes.

11 Q. And when you visited the site, did you see
12 any runoff controls?

13 A. No, I did not.

14 Q. What do runoff controls typically look like
15 at a CAFO?

16 A. Normally there's diversion berms which lead
17 to a sedimentation basin. Then the sedimentation
18 basin discharges to an impoundment basin, and from
19 there these liquids are normally land applied.

20 Q. And so did you see any berming at the site?

21 A. No, I did not. There was one terrace around
22 the west end of the site.

23 Q. Other than the terrace at the west end of
24 the site, did you see any berming on, say, the north
25 end of the site?

1 A. No.

2 Q. Or on the south end of the site?

3 A. No.

4 Q. And if water were to flow off this feedlot
5 to the north of the house, was there anything to
6 prevent it from flowing off the feedlot?

7 A. No, there was not.

8 Q. Now, under No. 6 you wrote, yes, that the
9 facility had had contact with another agency about an
10 LWCF. How do you know that?

11 A. It is in the attachment No. 1. I noticed
12 that during the file review. It would be Page 19 of
13 27 of attachment 1.

14 Q. And did you ask Mr. Vos whether he planned
15 to put in any controls?

16 A. I don't recall, but I'm sure I did.

17 Q. Let's look at the photos you took at the
18 site. Let's go through those.

19 Let's turn to attachment No. 4, which is a
20 16-page document attached to Exhibit 23, your
21 inspection report. And Page 1 of 16--

22 MR. RYAN: May we go off the record for just
23 a second, Your Honor, so I can set up the light pro?

24 THE ADMINISTRATIVE LAW JUDGE: Sure. Off
25 the record.

1 (Off-the-record discussion.)

2 THE ADMINISTRATIVE LAW JUDGE: Back on the
3 record. In an off-the-record discussion, for my own
4 clarification, I wanted to be sure the record shows
5 that this witness, this first EPA witness, his last
6 name is Sena, S-E-N-A, Mr. Sena. Correct?

7 THE WITNESS: Yes.

8 BY MR. RYAN:

9 Q. Mr. Sena, were you accompanied on this
10 inspection by anyone else from EPA?

11 A. Mr. Chris Goschen.

12 Q. But you prepared this report, not Mr. Goschen;
13 correct?

14 A. Yes, I did.

15 MR. RYAN: For purposes of the record, the
16 witness has stepped outside the witness box and is
17 now standing at the light pro where we will go
18 through some of the photographs that are contained in
19 attachment 4 to Exhibit 23.

20 If you could zoom in just a little bit,
21 Mr. Sena, please, for those old guys like me who have
22 bad eyes. Thank you.

23 Q. Now, explain to us, please, what Page 1 of
24 16 of attachment 4 is.

25 A. It is an aerial photograph which I prepared

1 for this inspection report. And it indicates the
2 runoff paths, as well as the location that the
3 photographs were taken.

4 Q. Okay. If you could zoom in just a little
5 bit so we could see those small numbers in the round
6 circles. There we go. Thank you.

7 So, for example, the light tan area, is that
8 the feedlot?

9 A. Yes, it is.

10 Q. And the darker green around it, is that farm
11 fields and pastures?

12 A. Yes, it is.

13 Q. Now, there's a number-- Around the
14 periphery, approximately the periphery of the light
15 tan area, the feedlot, there are a number of small
16 numbers, 1 through 14. Do you see those little
17 numbers?

18 A. Yes, I do.

19 Q. What do those numbers represent?

20 A. Those represent the direction and photo
21 number of the photos taken and attached in attachment
22 No. 4.

23 Q. So if, for example, looking at the top
24 left-hand corner of what we see on the screen right
25 now, No. 1, which is right on top of that blue line,

1 what does the blue line represent?

2 A. That represents the unnamed tributary to
3 Elliot Creek.

4 Q. And that No. 1, is that picture No. 1 which
5 is found at Page 2 of 16 of the attachment 4?

6 A. Yes, it is.

7 Q. And the little arrow that we see on No. 1 on
8 Page 1 of 16 that's pointing approximately to the
9 north, is that the direction you were facing when you
10 took the picture?

11 A. Yes, it is.

12 Q. Now, all of the attached pictures to
13 attachment 4, did you take all of those photographs
14 yourself?

15 A. Yes, I did.

16 Q. Okay. So going back to Page 1 of 16, you've
17 identified where you took the attached photographs to
18 these numbers and you also have a number of arrows
19 pointing in different directions.

20 There are also a number--the feedlot itself
21 is broken into apparently subsections or pens. Could
22 you tell us what those are, what the numbers
23 represent.

24 A. Those numbers represent the pen numbers.

25 THE ADMINISTRATIVE LAW JUDGE: The what now?

1 THE WITNESS: Pen numbers.

2 THE ADMINISTRATIVE LAW JUDGE: P-E-N?

3 THE WITNESS: Yes.

4 BY MR. RYAN:

5 Q. How did you know which pens were numbered
6 which number?

7 A. Mr. Vos told me.

8 Q. And then it's a little bit hard to see on
9 this blow-up, but in the picture there is a dotted
10 yellow line approximately bisecting the feedlot from
11 left to right or east to west. Do you see that?

12 A. Yes, I do.

13 MR. RYAN: Is Your Honor able to see it?

14 THE ADMINISTRATIVE LAW JUDGE: I'm able to
15 see it both on my Exhibit 1 of 16 for Exhibit 23, as
16 well as on the screen.

17 MR. RYAN: Thank you.

18 BY MR. RYAN:

19 Q. And what does that dotted yellow line
20 represent?

21 A. It represents the top of the hill, the ridge
22 line which runs through the pens.

23 Q. So would that be the high point of the pens?

24 A. Yes, it is.

25 Q. Now, generally speaking, what's the local

1 topography like here?

2 A. The feedlot is up on top of a hill, and it
3 gradually slopes towards these drainage ways which
4 can be seen in the aerial photograph.

5 Q. Is the unnamed tributary which is
6 represented by a blue line on Page 1 of 16 of
7 attachment 4, is that even with the elevation of the
8 feedlot or is it uphill or downhill?

9 A. It's downhill.

10 Q. Okay. So on Page 1 of 16 we see a number of
11 arrows pointing in different directions. What do
12 those arrows represent?

13 A. Those arrows represent runoff paths.

14 Q. And how did you determine which way water or
15 the runoff path would go?

16 A. I sketched these on an aerial photograph
17 while I was doing the facility walk-through.

18 Q. And was that based on your eyeball
19 observations at the time at the site--

20 A. Yes, it was.

21 Q. --while on the ground? And when you say a
22 "runoff path," what do you mean by "runoff path"?

23 A. What I mean by runoff path is a well defined
24 drainage way discharging from the pens into this
25 field shown just south of the pens and north of the

1 pens.

2 Q. So if it were to rain on the day you were
3 there, would you expect to see water flowing in the
4 direction of these arrows?

5 A. Yes, I do.

6 Q. And if there were snow on the ground and it
7 melted, which way would it flow when it melted?

8 A. Directions of these arrows.

9 Q. So let's talk about the north side of the
10 property first. Approximately where the number 14
11 is, which is right on the street, you've labeled
12 100th Street. Do you see that?

13 A. Yes.

14 Q. That's approximately the northeast corner of
15 the feedlot. And picture No. 14 is facing north.
16 Why did you take that picture there?

17 A. To show a drainage path towards the unnamed
18 tributary of Elliot Creek.

19 Q. That drainage path, is that something you
20 were able to identify with your own eyes on the
21 ground?

22 A. Yes, it was.

23 Q. So that was a drainage path to the north.
24 Were there any other drainage paths off of the
25 feedlot that you identified?

1 A. Yes, there were.

2 Q. Which other ones did you see?

3 A. I saw one drainage path on the west side of
4 the feedlot, as well as on the south side of the
5 feedlot.

6 Q. Okay. Let's talk about the west side of the
7 feedlot. The photo No. 15, would that be
8 representative of what you saw on the west side?

9 A. Yes, it would be.

10 Q. Okay. We'll get to these photos in a minute
11 and look at them in more detail. I'm just trying to
12 get an overview at this point.

13 So you witnessed the discharge path to the
14 west, a discharge path to the north and then you also
15 mentioned one to the south. Describe the one to the
16 south for me, please.

17 A. South consisted of four different discharge
18 paths, and they ran from the pens to a low spot,
19 which was also a well defined drainage way towards
20 the unnamed tributary to Elliot Creek.

21 Q. And is that depicted by that red line which
22 runs approximately east-west just to the south of the
23 feedlot?

24 A. Yes, it is.

25 Q. Now, you mentioned there were four drainage

1 paths that you observed. Again, these are not things
2 you necessarily identified back in the lab, these
3 were things you identified while out in the field;
4 correct?

5 A. Correct.

6 Q. And there's one there that has photos No. 5
7 and 6 next to it. Is that one of the four drainage
8 paths that you identified?

9 A. Yes, it is.

10 Q. Okay. And then photos 7 and 8, is that
11 another one?

12 A. Yes.

13 Q. Okay. How about-- What are the other two
14 remaining drainage paths that you identified?

15 A. Where photos 9 and 10 were taken, as well as
16 where photos 11 and 12 were taken.

17 Q. Okay. Let's go ahead and turn to Page 2 of
18 16 of attachment 4 to Exhibit 23.

19 THE ADMINISTRATIVE LAW JUDGE: Before he
20 does that, sometimes I try not to ask too many
21 questions, but I want to ask this before you move
22 along, Mr. Sena.

23 Looking still at 1 of 16, if I look where
24 photographs 11 and 12 were taken, those two circles,
25 and using the scale in the bottom left, it looks like

1 it's--and I don't have a ruler--but we're talking
2 about, what, a distance of a couple of miles before
3 in theory this runoff would reach the unnamed
4 tributary, or am I wrong about the sense of distance?

5 THE WITNESS: If you look on photo number--

6 THE ADMINISTRATIVE LAW JUDGE: You can't
7 tell me from this right here what that distance would
8 be?

9 THE WITNESS: It's approximately .7 miles--

10 THE ADMINISTRATIVE LAW JUDGE: Okay.

11 THE WITNESS: --from the point where No. 12
12 was taken.

13 THE ADMINISTRATIVE LAW JUDGE: All right.

14 Go ahead, Mr. Ryan.

15 BY MR. RYAN:

16 Q. Turn quickly, Mr. Sena, to Page 4 of 8 of
17 your inspection report--

18 A. 4 of 8. Okay.

19 Q. --under E, receiving surface water. Do you
20 see that?

21 A. Yes.

22 Q. Okay. Approximately halfway down through
23 Section D there on Page 4 of 8 it says, "Runoff from
24 portions of pens 2 and 3 flows southwest
25 approximately 0.4 miles through a well defined

1 drainage way to a point where it flows to the unnamed
2 tributary to Elliot Creek." You say, "See attachment
3 No. 4, photos 5 and 6."

4 The next one down references a 0.55 miles.
5 Are those estimates you made of distance from the
6 pens to the unnamed tributary during your inspection?

7 A. Yes. I used the measure tool on the USGS
8 national map to get those distances.

9 THE ADMINISTRATIVE LAW JUDGE: Okay. Thank
10 you. It gives me a sense of perspective.

11 BY MR. RYAN:

12 Q. Let's go back to attachment 4.

13 THE ADMINISTRATIVE LAW JUDGE: Attachment 4
14 has how many pages?

15 MR. RYAN: Attachment 4 has 16 pages.
16 They're marked in the lower right-hand corner. It's
17 attachment 4 to Exhibit 23. We're now at Page 2 of
18 16 of attachment 4--

19 THE ADMINISTRATIVE LAW JUDGE: Okay.

20 MR. RYAN: --to his inspection report.

21 BY MR. RYAN:

22 Q. Now, I think you testified before that photo
23 No. 1 was represented on Page 1 by a small No. 1
24 pointing to the north. Do you recall that?

25 A. Yes, I did.

1 Q. So this photograph, then, is not taken on
2 the feedlot, is it?

3 A. No, it is not.

4 Q. What does this photograph show?

5 A. This shows the unnamed tributary to Elliot
6 Creek upstream of 100th Street.

7 Q. So are we looking north in this photo No. 1
8 on Page 2 of 16?

9 A. We're looking northeast.

10 Q. Okay. And was the unnamed tributary flowing
11 at the time?

12 A. Yes, it was.

13 Q. Is that water that one can see there in the
14 picture in the tributary in approximately the bottom
15 center?

16 A. Yes, it is.

17 Q. And why did you take that picture?

18 A. To show what the unnamed tributary to Elliot
19 Creek looked like.

20 Q. Okay. And let's go back to the photo No.
21 14. We started off talking about the discharge to
22 the north. That's depicted on the overview map on
23 Page 1 of 16 as No. 14. So let's turn to photo No. 14.
24 Photo No. 14 is found at Page 15 of 16 of attachment 4.

25 Tell us what you see here.

1 A. This is the discharge end of the culvert
2 which crosses under 100th Street.

3 Q. And you said you saw during your inspection
4 a discharge point. Is that visible in this picture?

5 A. Yes, it is.

6 MR. RYAN: With Your Honor's permission, I
7 have left a Sharpie up on the witness stand. I'd
8 like to have the witness mark this exhibit, and this
9 exhibit would go to the court reporter and would
10 become the official exhibit. And either the court
11 reporter can make copies for everyone or we can take
12 it on, whatever works for Your Honor.

13 THE ADMINISTRATIVE LAW JUDGE: Let's go off
14 the record on that.

15 (Off-the-record discussion.)

16 THE ADMINISTRATIVE LAW JUDGE: Back on the
17 record. Just before you move on, Mr. Ryan, I want to
18 make sure I'm following this.

19 When you were talking, Mr. Sena, a minute
20 ago about photograph 1, which is on Page 2 of 16--do
21 you have that?

22 THE WITNESS: Yes, I do.

23 THE ADMINISTRATIVE LAW JUDGE: --and that
24 photograph 1 is the same one that's marked as a photo
25 on--what is that other number? Is that the same--

1 THE WITNESS: The number would correspond to
2 the number and arrow on Page 1.

3 THE ADMINISTRATIVE LAW JUDGE: What page is
4 that on?

5 THE WITNESS: It's Page 1 of attachment 4.
6 It should be right before all the photos.

7 THE ADMINISTRATIVE LAW JUDGE: Okay. That's
8 fine. But that's what it refers to?

9 THE WITNESS: Actually, it should be behind
10 that--behind the one you have already opened to.
11 There should be a topo map.

12 THE ADMINISTRATIVE LAW JUDGE: I have this.
13 Let's go off the record.

14 (Off-the-record discussion.)

15 THE ADMINISTRATIVE LAW JUDGE: Let's go back
16 on the record. Go ahead, Mr. Ryan. I just had a
17 clarification about finding these. It's part of
18 attachment 4, Page 1 of 16 within attachment 4, that
19 photograph that you just alluded to, that photograph
20 being photo 1 on 2 of 16 of the same attachment. Go
21 ahead.

22 BY MR. RYAN:

23 Q. Okay. So you testified earlier about the
24 discharge to the north from photo 14 which is found
25 at Page 15 of 16 of attachment 4. Could you-- Is

1 the unnamed tributary to Elliot Creek visible in this
2 photo?

3 A. Yes, it is.

4 Q. And could you write an arrow indicating
5 approximately the location of the unnamed tributary.

6 A. (Witness marks on exhibit.)

7 Q. And write the letters "UNT" for unnamed
8 tributary.

9 A. (Witness marks on exhibit.)

10 Q. And you stated that you saw a discharge
11 point coming off of Mr. Vos' feedlot. Is that
12 visible here in this photograph?

13 A. Yes, it is.

14 Q. And could you circle the feature you're
15 referencing.

16 A. (Witness marks on exhibit.)

17 Q. Could you write on the right-hand side "flow
18 path."

19 A. (Witness marks on exhibit.)

20 Q. Now, this flow path that we're looking at in
21 photograph 14 is on the far side of the road from
22 Mr. Vos' facility, isn't it?

23 A. Yes, it is.

24 Q. And how does the water or the-- Was that
25 flow path caused by water?

1 A. Yes, it was.

2 Q. Okay. And how did the water get from
3 Mr. Vos' feedlot to this spot you see in photo 14?

4 A. If we look at photo 13 of attachment--

5 Q. Photo 13 would be at Page 14 of 16 of
6 attachment 4?

7 A. Yes. --it shows the low point near--on the
8 south side of 100th Street. There is a culvert which
9 crosses at the point where that bush is near the
10 center of the page, and it crosses to almost the
11 point where the telephone pole is on the right-hand
12 side of the page.

13 Q. Could you put a little arrow there and write
14 in "culvert" where you saw the culvert.

15 A. (Witness marks on exhibit.)

16 Q. And is there-- So is it your testimony that
17 if it rained, water would flow from this portion of
18 the feedlot into that culvert?

19 A. Yes.

20 Q. And were there any berms or any kind of
21 control devices to prevent water from flowing off
22 this portion of the feedlot into that culvert?

23 A. No, there was not.

24 Q. And did that culvert exit on the other side
25 of the road?

1 A. Yes, it did.

2 Q. And is that exit from that culvert on the
3 other side of the roadway depicted in photo 14 at
4 Page 15 of 16?

5 A. Yes, it is.

6 THE ADMINISTRATIVE LAW JUDGE: Let's go off
7 the record for a moment.

8 (Off-the-record discussion.)

9 MR. RYAN: For purposes of identification,
10 just for the record, photos No. 13 and 14 of
11 attachment 4 to Exhibit 23, I would offer these into
12 evidence as Exhibits 23A and 23B.

13 And if I could just--with Your Honor's
14 permission, Mr. Sena would write "23A" on photo
15 No. 15--excuse me--photo No. 14 at Page 15 of 16.

16 THE WITNESS: At the top?

17 MR. RYAN: Write "23A" on that page.

18 THE ADMINISTRATIVE LAW JUDGE: That's good.

19 MR. RYAN: On photo No. 13, the previous
20 page, 14 of 16, attachment 4, would you write "23B."

21 (Witness marks on exhibit.)

22 MR. RYAN: So for purposes of
23 identification, these would now be known as 23A and
24 B, and I would offer them at this time into evidence.

25 MR. McAFEE: No objection, Your Honor.

1 THE ADMINISTRATIVE LAW JUDGE: Okay. That's
2 a good system to be working with now. 23A and 23B
3 without objection are admitted.

4 (Complainant's Exhibits 23A and 23B
5 were received in evidence.)

6 MR. RYAN: For purpose's of clarification,
7 the original 23 would be unmarked. Thank you.

8 BY MR. RYAN:

9 Q. So that's the discharge to the north. Let's
10 talk about the discharge to the west, which I believe
11 is depicted on Page 1 of 16 of attachment 4 as photo
12 No. 15. Is that correct?

13 A. It is 16 of 16, photo No. 15.

14 Q. Photo No. 15, which is at Page 16 of 16.
15 What does this photo show?

16 A. This photo shows the discharge path on the
17 west end of the facility that does not flow towards
18 the sediment basin, what I call the sediment basin.

19 Q. And did this discharge point that you see in
20 this photograph, did it reach the unnamed tributary?

21 A. Yes, it did.

22 Q. Where is the unnamed tributary in this
23 photograph?

24 A. It is-- Do you want me to mark it?

25 Q. Could you mark it like we did before with an

1 arrow saying "UNT" for unnamed tributary.

2 A. (Witness marks on exhibit.)

3 Q. Is the unnamed tributary visible at the
4 left-hand margin of the photograph, as well?

5 A. Yes, it is.

6 Q. Could you mark that, as well.

7 A. (Witness marks on exhibit.)

8 Q. The left-hand.

9 A. Left-hand. Sorry. It's right over here.

10 Q. And now, the flow path that you discussed
11 that was visible in this picture, could you circle it
12 and write "flow path," please.

13 A. (Witness marks on exhibit.)

14 Q. Now, you obviously saw this flow path from
15 the point at which you took this photograph. Did you
16 see this flow path from any other point, any other
17 perspective?

18 A. Yes, it was visible from 100th Street.

19 Q. And where were you on 100th Street when you
20 saw this flow path?

21 A. Approximately the point where this arrow is
22 drawn.

23 Q. Okay. And could you write-- For that
24 second arrow in the upper right-hand corner, could
25 you write "observation point."

1 A. (Witness marks on exhibit.) On this arrow
2 over on this side, on the left side of the page?

3 Q. Yeah.

4 A. Actually, it's a little more right here, if
5 I could just clarify. (Witness marks on exhibit.)

6 Q. Okay. So that was the discharge point to
7 the west. Let's talk about the discharge point to
8 the south. Which photos show the-- I believe you
9 testified earlier that there were four discharge
10 points which merged with one larger path. Where were
11 those discharge points located?

12 A. They would be photos 5--

13 MR. RYAN: Excuse me, Your Honor, I'd like
14 to move at this point the last photograph we just
15 talked about, which would be photograph 15, which is
16 Page 16 of 16 of attachment 4, move that in for
17 purposes of identification as Exhibit 23C.

18 MR. McAFEE: Your Honor, as we go through
19 these, if I have a question about like the arrow on
20 the left-hand margin of this exhibit right now--and I
21 know Mr. Sena tried to move it a little bit, I'm not
22 real sure I agree with where the arrow is drawn and
23 what it depicts--but should I handle that on
24 cross-examination?

25 THE ADMINISTRATIVE LAW JUDGE: Yes.

1 MR. McAFEE: Other than that, I have no
2 objection.

3 THE ADMINISTRATIVE LAW JUDGE: With that
4 said, Exhibit 23C is admitted.

5 (Complainant's Exhibit 23C
6 was received in evidence.)

7 BY MR. RYAN:

8 Q. Okay. I'm sorry I interrupted. Going back
9 to the south side of the lot, which pictures show the
10 discharges to the south?

11 A. Photos 5, 6, 7, 8, 9, 10, 11 and 12.

12 Q. Why don't we start with pictures 5 and 6.

13 For the record, picture 5 starts at Page 6
14 of 6 of attachment 4 to Exhibit 23. So we can move
15 along a little bit more quickly, could you circle the
16 runoff path you observed there in photo No. 5.

17 A. (Witness marks on exhibit.)

18 Q. And mark it "runoff path:"

19 A. (Witness marks on exhibit.)

20 Q. And was there-- Were there any control
21 structures to prevent runoff in the feedlot we see in
22 photo No. 5 from exiting the feedlot?

23 A. No, there were not.

24 Q. In your experience as a CAFO inspector, a
25 facility that has controls, what would you expect to

1 see along that fence line?

2 A. Diversion berms towards a sediment basin.

3 MR. RYAN: For purposes of identification,
4 I'd like to call this Exhibit 23D. I would move it
5 into evidence.

6 MR. McAFEE: No objection.

7 THE ADMINISTRATIVE LAW JUDGE: 23D is
8 admitted.

9 (Complainant's Exhibit 23D
10 was received in evidence.)

11 BY MR. RYAN:

12 Q. Let's look now at photo No. 6, which is Page
13 7 of 16 of attachment 4 to Exhibit 23. That's the
14 next photo group. What does this photo show?

15 A. It shows a continuation of the discharge
16 point shown in photo No. 5.

17 Q. So this is just looking the other direction?

18 A. Yes, it is.

19 Q. And could you circle for us the discharge
20 path that you identified in this photograph.

21 A. (Witness marks on exhibit.)

22 Q. And is it your opinion that this discharge
23 path was caused by flowing water?

24 A. Yes.

25 Q. And where would this water flow to?

1 A. To the unnamed tributary to Elliot Creek.

2 Q. Is that in the distance in this photograph?

3 A. No, it is not. What you see in the distance
4 is a drainage path towards the unnamed tributary to
5 Elliot Creek.

6 THE ADMINISTRATIVE LAW JUDGE: But your
7 answer is that it is not in the photograph?

8 THE WITNESS: No, it isn't.

9 MR. RYAN: I would move this photo No. 6,
10 which is Page 7 of 16 of attachment 4 to Exhibit 23,
11 into evidence as Exhibit 23E.

12 MR. McAFEE: No objection.

13 THE ADMINISTRATIVE LAW JUDGE: 23E is
14 admitted.

15 (Complainant's Exhibit 23E
16 was received in evidence.)

17 BY MR. RYAN:

18 Q. Let's move on to photo No. 7. Where was
19 photo No. 7 taken?

20 A. It was taken at the southeast corner on the
21 south side of pen No. 2 looking east.

22 Q. And did you identify a discharge point off
23 of the feedlot in photo No. 7?

24 A. Yes, I did.

25 Q. Could you circle that discharge point,

1 please, and mark it as before.

2 A. (Witness marks on exhibit.)

3 Q. And as before, were there any types of berms
4 or other controls to prevent runoff from the feedlot
5 from exiting the feedlot on the left-hand side of
6 photo No. 7 and draining off into what you call the
7 discharge point?

8 A. No, there were not.

9 MR. RYAN: I would like to move this exhibit
10 into evidence as Exhibit 23F?

11 MR. McAFEE: No objection.

12 THE ADMINISTRATIVE LAW JUDGE: 23F is
13 admitted.

14 (Complainant's Exhibit 23F
15 was received in evidence.)

16 BY MR. RYAN:

17 Q. Let's move on to photo No. 8, which is 9 of
18 16 in attachment 4 of Exhibit 23. Could you-- What
19 do you see in this particular photograph?

20 A. Runoff path from the southeast corner of pen
21 No. 2 and southwest corner of pen No. 1.

22 Q. Okay. Could you again circle the runoff
23 path that you identified during your site inspection
24 and mark it.

25 A. (Witness marks on exhibit.)

1 MR. RYAN: Your Honor, move this in as
2 Exhibit 23G.

3 MR. McAFEE: No objection.

4 THE ADMINISTRATIVE LAW JUDGE: 23G is
5 admitted.

6 (Complainant's Exhibit 23G
7 was received in evidence.)

8 BY MR. RYAN:

9 Q. Let's now look at photo No. 9. Did you see
10 any-- What does this picture show?

11 A. It shows the runoff paths from the southwest
12 corner of pen No. 13.

13 Q. And as before, could you mark the runoff
14 paths that you observed.

15 A. (Witness marks on exhibit.)

16 MR. RYAN: And for purposes of
17 identification, I would like to move this Page 10 of
18 16 of attachment 4 to Exhibit 23 into evidence as
19 Exhibit 23H.

20 MR. McAFEE: No objection.

21 THE ADMINISTRATIVE LAW JUDGE: 23H is
22 admitted.

23 (Complainant's Exhibit 23 H
24 was received in evidence.)

25

1 BY MR. RYAN:

2 Q. Again, are there any berms or other runoff
3 controls visible in this photograph?

4 A. No, there are not.

5 Q. Let's look at photo No. 10. What does photo
6 No. 10 show?

7 A. It shows a runoff path from the southwest
8 corner of pen No. 13.

9 Q. So is this a different angle on the same
10 photo we saw in photo No. 9?

11 A. Yes, it is.

12 Q. So can you please circle for us once again
13 the runoff path that you observed in photo No. 10,
14 which is Page 11 of 16.

15 A. (Witness marks on exhibit.)

16 MR. RYAN: Your Honor, move Page 11 of 16 of
17 attachment No. 4 to Exhibit 23 in as Exhibit 23I.

18 THE ADMINISTRATIVE LAW JUDGE: Okay.

19 MR. McAFEE: No objection.

20 THE ADMINISTRATIVE LAW JUDGE: 23I is
21 admitted.

22 (Complainant's Exhibit 23I
23 was received in evidence.)

24 BY MR. RYAN:

25 Q. Photo No. 11. What does photo No. 11 show?

1 A. It shows the runoff path from the south side
2 of pen No. 13.

3 Q. Okay. And is this a different runoff path
4 from what we saw in photos 9 and 10?

5 A. Yes, it is.

6 Q. And could you once again circle the runoff
7 path that you witnessed during your inspection in
8 photo No. 11.

9 A. (Witness marks on exhibit.)

10 MR. RYAN: Your Honor, I would move Page 12
11 of 16 of attachment 4 to Exhibit 23 into evidence as
12 Exhibit 23J.

13 MR. McAFEE: No objection.

14 THE ADMINISTRATIVE LAW JUDGE: 23J is
15 admitted.

16 (Complainant's Exhibit 23J
17 was received in evidence.)

18 THE ADMINISTRATIVE LAW JUDGE: When you get
19 through with this series on the--I guess it would be
20 the bottom section there, we're going to take a
21 10-minute break. We'll go off the record now.

22 (Off-the-record discussion.)

23 THE ADMINISTRATIVE LAW JUDGE: Back on the
24 record.

25

1 BY MR. RYAN:

2 Q. Let's look at photo No. 12 now. What does
3 photo No. 12 show?

4 A. The runoff path from the south side of pen
5 No. 13.

6 Q. And once again, could you circle the runoff
7 path that you identified?

8 A. (Witness marks on exhibit.)

9 MR. RYAN: Your Honor, I would move photo
10 No. 13 into evidence as 23K.

11 MR. McAFEE: No objection.

12 THE ADMINISTRATIVE LAW JUDGE: 23K is
13 admitted.

14 (Complainant's Exhibit 23K
15 was received in evidence.)

16 BY MR. RYAN:

17 Q. Mr. Sena, could we turn back to Page 1 of 16
18 of attachment 4, the aerial photograph.

19 A. Okay.

20 Q. Now, all of those photographs that we just
21 discussed that were subsequently labeled 23A through
22 K, are all of those photographs depicted on this Page
23 1 of 16 as the little circles 1 through 14? Is that
24 correct?

25 A. Yes, they are.

1 Q. Now, in looking to the south, for example,
2 the south you identified four discharge points, the
3 first one being photos 5 and 6. And did you-- How
4 did you determine whether those flowed through--down
5 to the unnamed tributary?

6 A. I could visibly see them flowing down to the
7 red line near the center of the page.

8 Q. The long red line that extends from the
9 east--approximately the east end of the feedlot to
10 the unnamed tributary?

11 A. Yes, it is.

12 Q. And who put that red line on this
13 photograph?

14 A. I did.

15 Q. And how did you determine where to put that
16 red line?

17 A. The drainage path was visible on the aerial
18 photograph.

19 Q. So was there any doubt in your mind that
20 runoff from any of these four discharge points to the
21 south entered that long red line flowing towards the
22 unnamed tributary?

23 A. No.

24 MR. RYAN: Mr. Sena, you can take your seat
25 again.

1 THE ADMINISTRATIVE LAW JUDGE: Do you have
2 some other questions about these photos?

3 MR. RYAN: I think I'm going to have him
4 done pretty quickly. In five or ten minutes I will
5 be done with this witness.

6 THE ADMINISTRATIVE LAW JUDGE: Okay. That's
7 fine.

8 MR. RYAN: If that's appropriate, Your
9 Honor.

10 BY MR. RYAN:

11 Q. Mr. Sena, would you look at Page 4 of 8 of
12 your inspection report, please. This is Exhibit 23.
13 Near the top of the page it says "receiving surface
14 waters." Do you see that?

15 A. Yes.

16 Q. Look at No. 3, which is approximately the
17 middle of the page. It says, "What is the name of
18 the nearest named surface water?" You wrote in
19 "Elliot Creek." How did you determine that?

20 A. From a USGS topographic map.

21 Q. And does the unnamed tributary, which we've
22 been referencing in many of the previous photos, flow
23 into Elliot Creek?

24 A. Yes, it does.

25 THE ADMINISTRATIVE LAW JUDGE: Which page

1 were you on just then, Mr. Ryan?

2 MR. RYAN: That was Page 4 of 8 of Exhibit
3 23.

4 THE ADMINISTRATIVE LAW JUDGE: Thank you.

5 BY MR. RYAN:

6 Q. Let's look at Page 5 of 8 of Exhibit 23,
7 very top of the page. Do you see that?

8 A. Yes, I do.

9 Q. Under No. 1, what is the 25-year, 24-hour
10 rainfall amount for this location? Did you write in
11 5.2 inches?

12 A. Yes, I did.

13 Q. And is that 5.2 inches per day, or what's
14 the unit on that?

15 A. That is 5.2 inches for the 25-year, 24-hour
16 storm event.

17 Q. So in a 24-hour period you would expect to
18 see 5.2 inches of rainfall?

19 A. Yes.

20 Q. And where did you get that number?

21 A. I got those from an NRCS rainfall map.

22 Q. What is NRCS?

23 A. Natural Resources Conservation Service.

24 Q. And is that a reliable source for
25 determining rainfall events in Iowa?

1 A. Yes, it is.

2 Q. And why is that number important?

3 A. It is the amount of rainfall that a facility
4 would have to contain. It would have to contain
5 runoff from 5.2 inches of rainfall to contain all of
6 the runoff from a 25-year, 24-hour storm event.

7 Q. Is that a condition of the NPDES permit?

8 A. Yes, it is.

9 Q. Let's look at the very last two pages of
10 Exhibit 23, which would be labeled as attachment No. 6.
11 What is this?

12 A. This is a Region 7 multimedia screening
13 checklist.

14 Q. Is this something you carry with you in the
15 field?

16 A. Yes, it is.

17 Q. And in the upper right-hand corner it says
18 "L. Sena." Is that your handwriting?

19 A. Yes, it is.

20 Q. And down a couple lines below your name it
21 says "5-30"--it looks like the zero has been
22 scratched out and a 1 added--"06." Is that the date
23 of your inspection?

24 A. Yes, it is.

25 Q. Did you make that change from 30 to 31?

1 A. Yes, I did.

2 Q. Looking down the page close to the bottom of
3 the first page of attachment 6 to Exhibit 23, there
4 is a larger heading that says "Clean Water Act." Do
5 you see that?

6 A. Yes, I do.

7 Q. There are five numbers there. No. 3 says,
8 "During rainfall events, can storm water carry
9 pollutants from manufacturing, processing, storage,
10 disposal, shipping," et cetera, "to storm sewers or
11 surface water?" Do you see that?

12 A. Yes.

13 Q. And it looks like you've marked off "yes."
14 Do you see that?

15 A. Yes.

16 Q. Was it your conclusion that this facility
17 you were inspecting on May 31, 2006, Mr. Vos'
18 facility, was capable of discharging to surface
19 waters?

20 A. Yes.

21 MR. RYAN: May I have 30 seconds, Your
22 Honor?

23 THE ADMINISTRATIVE LAW JUDGE: Sure.

24 (Short pause.)

25

1 BY MR. RYAN:

2 Q. I have one final question, Mr. Sena. Could
3 you please turn to the photographs that we looked at
4 again, which is attachment 4 to Exhibit 23, and look
5 in particular at photo No. 3.

6 A. Okay.

7 Q. We already identified the runoff path from--
8 Actually, I just realized we did not discuss photos 3
9 and 4. I have four more questions.

10 MR. RYAN: I'm sorry, Your Honor.

11 Q. (Continuing) Before we get to photos 3 and
12 4, photo No. 3, how high are those crops that we see
13 planted there?

14 A. Approximately one foot maximum.

15 Q. And would you say this was freshly tilled
16 ground, or had it been tilled sometime before?

17 A. That's freshly tilled.

18 Q. Okay. And would the-- Let's look at photo
19 No. 4, attachment 4. Is that a closer picture of the
20 planted crops?

21 A. Yes, it is.

22 Q. And would you still say they're
23 approximately one foot in height in those?

24 A. Yes.

25 Q. Photos 3 and 4, where were those photos

1 taken?

2 A. They were taken near the southwest corner of
3 pen No. 5.

4 Q. And do they-- As we discussed with the
5 others, 23A through K, do these show runoff paths?

6 A. Yes, they do.

7 Q. And could you park them, please, as we did
8 before.

9 A. (Witness marks on exhibit.) I'm marking on
10 photo No. 3 right now.

11 THE ADMINISTRATIVE LAW JUDGE: Let's go off
12 the record.

13 (Off-the-record discussion.)

14 THE ADMINISTRATIVE LAW JUDGE: We'll take a
15 10-minute break and then resume.

16 (Short recess.)

17 THE ADMINISTRATIVE LAW JUDGE: Back on the
18 record.

19 BY MR. RYAN:

20 Q. Just before the break, Mr. Sena, I asked you
21 to mark on photo No. 3, which is Page 4 of 16 of
22 Exhibit 23. And as His Honor pointed out, we didn't
23 have the light pro running. So you marked it
24 previous to our break.

25 Now that we've got the light pro up and

1 running, just for the record, the marks you have
2 there on photo No. 3, which we are looking at now on
3 the light pro, are those the marks you made just
4 prior to the break?

5 A. Yes, they are.

6 Q. And what do those marks represent?

7 A. The runoff path from the southwest corner of
8 pen No. 5.

9 MR. RYAN: So, Your Honor, I would move
10 photo No. 3 into evidence as Exhibit 23L.

11 MR. McAFEE: No objection.

12 THE ADMINISTRATIVE LAW JUDGE: 23L is
13 admitted.

14 (Complainant's Exhibit 23L
15 was received in evidence.)

16 BY MR. RYAN:

17 Q. Next to photo No. 4, which is the last
18 photograph I will discuss with you, where was this
19 photograph taken?

20 A. This was taken from the southwest corner of
21 pen No. 5 looking northeast.

22 Q. And did you identify a runoff path in this
23 photograph?

24 A. Yes, I did.

25 Q. Could you mark in photograph 4 where you saw

1 the runoff path.

2 A. (Witness marks on exhibit.)

3 MR. RYAN: I would move this photo into
4 evidence as Exhibit 23M as marked.

5 MR. McAFEE: No objection.

6 THE ADMINISTRATIVE LAW JUDGE: 23M is
7 admitted.

8 (Complainant's Exhibit 23M
9 was received in evidence.)

10 BY MR. RYAN:

11 Q. One final question, as with all the other
12 photographs we saw with runoff paths, were there any
13 berms or controls in place during your site visit
14 that would prevent runoff from exiting the feedlot
15 and flowing downhill?

16 A. Other than the terrace which is located on
17 the west side of the facility, there was not.

18 MR. RYAN: I have no further questions, Your
19 Honor.

20 THE ADMINISTRATIVE LAW JUDGE: Okay. You
21 can resume your seat. We'll keep the machine on for
22 you.

23 MR. McAFEE: Thank you, Your Honor.

24
25

CROSS-EXAMINATION

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BY MR. McAFEE:

Q. Mr. Sena, can you hear me okay?

A. Yes, I can.

Q. Okay. Let's go to your inspection report first, if we could, Mr.--is it Sena?

A. It's Sena.

Q. Okay. And what I wanted to start with are the attachments like Page 1 of 27, which is attachment 1. And I believe you testified that you received these attachments from the DNR field office before you did the inspection.

A. Yes, I went to the DNR field office and copied these.

Q. Okay. Was that the day before?

A. No, it would have been--I'm not sure what day that was, but normally on Mondays.

Q. Okay. And then whatever day you would have been--whatever day of the week it fell on that you were at Mr. Vos' feedlot would have been the Monday before?

A. Yes.

Q. One reason I asked this--and lawyers are notorious for looking at things like this--you see the fax marks at the top of Page 1 of 27?

1 A. Yes, I do.

2 Q. And it says a date of June 6--excuse
3 me--June 10, 2005, this was faxed, I assume, from
4 Iowa DNR. It shows here to somewhere. Was this
5 faxed to you?

6 A. I don't recall. Actually, I do recall.
7 Their copier was down, so I stapled and put
8 paperclips on the papers I did want to keep. Then
9 they faxed a copy to me.

10 Q. Okay. But this gives a date of June 10,
11 2005. You were there on May 30--somewhere around May
12 31, 2006?

13 A. They mailed me copies. That's what it was.
14 They did mail me copies because the copier was down.
15 This date, I'm not sure what that means.

16 Q. Okay. This is not a date that you recognize
17 as it being faxed to you or anything like that?

18 A. No.

19 Q. But now again just to make sure I
20 understand, you reviewed the file that day prior to
21 your inspection and then they sent you the copies at
22 sometime later?

23 A. Yes.

24 Q. Okay. There's also some handwriting at the
25 top of--I'm looking at Page 1 of 27 again.

1 A. Okay.

2 Q. There's some initials on the left-hand side,
3 a KH and NC. Do you know what those regard?

4 A. No, I don't.

5 Q. Now, if you would go to Page 4 of 27 of that
6 exhibit, please.

7 A. Okay.

8 Q. Can you describe this for the record,
9 please.

10 A. This appears to be a public notice for the
11 Lowell Vos Feedlot.

12 Q. Okay. It follows, of course, Page 3 of 27,
13 which is the construction permit from 1991; is that
14 correct?

15 A. Yes.

16 Q. However, if you look at this closely, this
17 is dated October 6 of 2004. And I just want to make
18 sure I understand why it's in here. You've testified
19 that you included certain copies from the DNR file
20 and other copies you didn't. What is your purpose
21 for including this publication notice from 2004?

22 A. Because it was a publication, proof of
23 publication for this permit--

24 Q. For the 19--

25 A. --for a permit.

1 Q. Okay. I'm sorry, I didn't mean to interrupt
2 you. I'm trying to determine-- It couldn't be a
3 publication notice for the 1991 permit since it's
4 dated October of 2004. What were you looking at
5 here?

6 A. It was probably just attached to the permit,
7 and I copied that bundle of permits, whatever they
8 had in the file.

9 Q. Okay. But would you agree with me that
10 it--I guess I won't speak for you--but it doesn't
11 appear that it could relate to the previous permit?

12 A. It says October 2004. I don't know if it
13 relates to the other permit, or not.

14 Q. Okay. I'd like to go back to Page--the
15 first page of that exhibit, please, Mr. Sena, which
16 would be Page 1 of 8. And I have just a few
17 questions about the form itself and how it was
18 completed. I believe you testified you completed
19 this form; is that correct?

20 A. Yes, I did.

21 Q. And I believe--and you previously testified
22 that on Page 8 of 8 you signed it on June 8 of '06?

23 A. Yes.

24 Q. And did you prepare this form yourself with
25 any input from anyone else?

1 A. Other than Mr. Vos, no.

2 Q. Okay. And the person who accompanied you
3 that day did not have input?

4 A. No.

5 Q. Tell me what was the purpose for--is it
6 Mr. Goschen?

7 A. Yes.

8 Q. --what was the purpose for him accompanying
9 you?

10 A. Observation to see how we do CAFO
11 inspections.

12 Q. In training?

13 A. Yes.

14 Q. Okay. Did anyone review your report prior
15 to it being signed by you?

16 A. Mr. Goschen.

17 Q. Okay. Does the EPA follow a procedure where
18 someone else reviews your report, say, a supervisor
19 or someone?

20 A. Yes, a supervisor reviewed this.

21 Q. And who would that have been?

22 A. Mr. John Houlihan.

23 Q. Did Mr. Houlihan have any comments about
24 your report prior to it being signed by you?

25 A. Content, no.

1 Q. Didn't make any changes?

2 A. No.

3 Q. You answered "content, no." That leads me
4 to believe did he have some other comments?

5 A. Typographical errors.

6 Q. Could we go to Page 3 of 8 of the report. I
7 believe you earlier testified that in your words
8 there were no controls in place at the Vos feedlot;
9 is that correct?

10 A. Yes.

11 Q. Now, I know you've also recognized there was
12 a terrace there, and you don't consider that to be a
13 control?

14 A. No, not a design control for the 25-year,
15 24-hour storm event.

16 Q. I want to make sure the record is clear on
17 what you mean by the terrace. Isn't there also a
18 basin present on the west side of the feedlot?

19 A. Yes, there is a small basin on the west side
20 of the feedlot.

21 Q. Okay. And it's different than the terrace;
22 is that right?

23 A. Yes, it is.

24 Q. Do you know if the terrace is constructed in
25 any way to divert or channel whatever gets to the

1 terrace to the basin? Do you know?

2 A. I don't recall.

3 Q. Did you talk with Mr. Vos about that when
4 you were there?

5 A. No. Mr. Vos did not accompany me on the
6 walk-through.

7 Q. Okay. Maybe I should go back. When you
8 arrived that day, first of all, did you notify
9 Mr. Vos prior to doing your inspection?

10 A. Yes, I did.

11 Q. Do you remember when you notified him?

12 A. It would have been the night before.

13 Q. And by telephone?

14 A. Yes.

15 Q. Okay. So he knew you were coming, and he
16 was present?

17 A. Yes.

18 Q. Was there anyone else present besides you,
19 Mr. Goschen and Mr. Vos?

20 A. No.

21 Q. Do you do an initial discussion with Mr. Vos
22 here?

23 A. Yes.

24 Q. And tell me a little bit about that
25 discussion.

1 A. I just explained the procedures of the
2 inspection and just see what his preferences are to
3 go through paperwork first or walk around first.

4 Q. Okay. Can you tell me, how was Mr. Vos'
5 feedlot selected for an inspection by you?

6 A. It was on a list provided by NPDES
7 facilities management branch within EPA, and I don't
8 know how they targeted it.

9 Q. And that was provided to you with no other
10 explanation?

11 A. Yes.

12 Q. And, Mr. Sena, I want to make sure I
13 understand. You received some instruction from--what
14 was the branch again?

15 A. NPDES facilities management branch.

16 Q. That's within EPA?

17 A. Yes, it is.

18 Q. Is that a normal procedure for you when you
19 were conducting NPDES permit inspection services?

20 A. Yes, it is.

21 Q. Did you have any other knowledge about
22 Mr. Vos' facility, other than it was on this list you
23 were given?

24 A. No.

25 Q. Other than copying records from the local

1 DNR office, did you have any discussion with them
2 about the inspection of the facility?

3 A. No, I did not.

4 Q. Were you aware that Mr. Vos had participated
5 in what has been called and will be referred to
6 throughout this proceeding as the Iowa Plan?

7 A. Yes.

8 Q. And tell me how you knew that.

9 A. It's in the file review.

10 Q. What file review is that?

11 A. That I conducted before the inspection.

12 Q. Okay. Is that documented?

13 A. Attachment 1.

14 Q. Attachment 1. But is it reflected in
15 Exhibit 23 anywhere that you know of?

16 A. Yes, it is attachment 1.

17 Q. Okay. And could you--I must be-- Could you
18 point to attachment 1 where it is. Is the form in
19 here?

20 A. Yes, it is.

21 Q. Okay. What page is that?

22 A. Well, there is an open feedlot registration
23 form for the Iowa Plan.

24 THE ADMINISTRATIVE LAW JUDGE: Would it help
25 us out with the page number? There's 27 potential

1 pages; is that correct?

2 THE WITNESS: Yes, there are. It would be
3 Page 21 of 27.

4 THE ADMINISTRATIVE LAW JUDGE: Did you hear
5 that, Mr. McAfee?

6 MR. McAFEE: Yes, I did.

7 BY MR. McAFEE:

8 Q. You referred to Page 21 of 27. Mr. Sena, I
9 believe it's Page 5 of 27. My goal is not to make
10 you rifle through a bunch of pages here searching for
11 something.

12 A. Okay.

13 THE ADMINISTRATIVE LAW JUDGE: Do you agree?

14 THE WITNESS: Yes, I do. Sorry.

15 BY MR. McAFEE:

16 Q. And so by that document there you had
17 knowledge that Mr. Vos had registered for the Iowa
18 Plan; is that correct?

19 A. Yes.

20 Q. Had you heard of the Iowa Plan before that?

21 A. Yes.

22 Q. How had you heard of it?

23 A. I just heard it was a five-year period that
24 these facilities were granted amnesty from state
25 regs.

1 THE ADMINISTRATIVE LAW JUDGE: His question
2 was how, not the substance of it. How did you hear
3 of it?

4 A. Just discussions during meetings, prior
5 meetings back in 2001.

6 BY MR. McAFEE:

7 Q. At the time you conducted the inspection of
8 Mr. Vos' feedlot, did you have any knowledge of where
9 we were at in the Iowa Plan as far as number of
10 years?

11 A. I knew it was past. It was at the end.

12 Q. And how did you know that?

13 A. Just hearing that.

14 Q. Was it discussed in meetings within EPA?

15 A. I would imagine so.

16 Q. Okay. You've testified you've conducted
17 quite a few NPDES permit inspections; is that
18 correct?

19 A. Yes.

20 Q. You may have testified to this, and I
21 apologize if I'm not remembering, but I assume that
22 some of those were not feedlots, but other types of
23 permitted facilities?

24 A. Yes.

25 Q. Such as what would the other types be?

1 A. Industrial users, waste water treatment
2 facilities, just about anybody that uses water, storm
3 water also.

4 Q. Okay. Now, of the feedlots you inspect, are
5 some of them not in Iowa?

6 A. Yes.

7 Q. Because your region, Region 7, covers which
8 other states?

9 A. Missouri, Kansas, Iowa, Nebraska.

10 Q. Now, at this time when you conducted
11 Mr. Vos' inspection, were you conducting other
12 inspections of other Iowa feedlots?

13 A. Yes, I was.

14 Q. And, do you know, were those related to the
15 Iowa Plan also?

16 A. Yes.

17 Q. Do you recall how many?

18 A. No, I don't.

19 Q. And, do you recall, was it right around this
20 time in spring of '06 that would have been, as you've
21 testified, after the close of the Iowa Plan?

22 A. Yes.

23 Q. Do you recall conducting any inspections of
24 Iowa feedlots that had registered for the Iowa Plan
25 prior to that time period?

1 A. No.

2 Q. Do you recall any discussion within your
3 department--within EPA about conducting inspections
4 prior to the close of the Iowa Plan?

5 A. No.

6 Q. But you don't recall conducting any?

7 A. No, I didn't.

8 Q. Okay. Mr. Sena, when you conducted the
9 inspection of Mr. Vos' feedlot, did you make any
10 observation as to the feedlot pens themselves where
11 the cattle were?

12 A. Yes, I did.

13 Q. And what was that observation?

14 A. It appeared well kept, well maintained.

15 Q. And by-- Could you tell me a little bit
16 more what you mean by that, by well kept?

17 A. It looked like he scraped regularly, scraped
18 manure.

19 THE ADMINISTRATIVE LAW JUDGE: When one
20 scrapes manure, what does one do with it?

21 THE WITNESS: Normally stockpile it
22 somewhere and later apply it on land.

23 BY MR. McAFEE:

24 Q. Mr. Sena, did you see any stockpiles of
25 manure?

1 A. No.

2 Q. So he could also have scraped it and hauled
3 it directly out to the field; is that correct?

4 A. Yes.

5 Q. Did you have any discussion with Mr. Vos
6 about this feedlot management of the pens while you
7 were there that day?

8 A. I don't recall.

9 THE ADMINISTRATIVE LAW JUDGE: And he was
10 not with you when you went out there with the
11 trainee?

12 THE WITNESS: No.

13 THE ADMINISTRATIVE LAW JUDGE: It was just
14 the two of you out there, but not with Mr. Vos with
15 you; correct?

16 THE WITNESS: That's correct. I spoke with
17 him after the inspection after I walked through.

18 BY MR. McAFEE:

19 Q. Mr. Sena, I'd like to have you take Exhibit
20 23 to the projector. I'm not going to go through all
21 of those photos, there's just a couple I want to have
22 you look at. And if you would bear with me a minute
23 while I review my notes here.

24 Would you please go to photo 3, which is--
25 well, it's probably easier for you to identify it as

1 photo 3. You're already there. And in the caption
2 of photo 3 could you--well, could you please read the
3 caption where it says "photo showing."

4 A. Okay. It says, "The runoff path from
5 southwest corner of pen No. 5. The runoff from this
6 corner of pen No. 5 flows southwest towards the
7 terrace."

8 Q. And this is the terrace you have spoken of
9 that's on the west side of the feedlot; correct?

10 A. Yes, it is.

11 Q. And you're not-- Well, you've indicated
12 this is a runoff path towards the terrace; is that
13 right?

14 A. Yes.

15 Q. Did you make any observation or take any
16 photos below the terrace?

17 A. No, I did not.

18 Q. So you don't have any observation or photo
19 of any runoff path below the terrace where this
20 runoff path led to the terrace?

21 A. No, I do not.

22 Q. Let's see. I wanted to go back to the photo
23 where--I think it was one of the first ones we did
24 where you had drawn in an arrow and you kind of
25 changed the arrow where I think it's--I think

1 photo--it's either 5 or 7. It might be before that.
2 Maybe start at the beginning. I'm sorry, photo 1.

3 MR. RYAN: Was it perhaps photo 15?

4 MR. McAFEE: Is that where you started?

5 MR. RYAN: Yes.

6 MR. McAFEE: I apologize. Let's try photo
7 15.

8 THE ADMINISTRATIVE LAW JUDGE: Is that the
9 photo you wanted to get to, Mr. McAfee?

10 MR. McAFEE: Yes, it is.

11 THE ADMINISTRATIVE LAW JUDGE: Okay. Photo
12 15.

13 BY MR. McAFEE:

14 Q. Thank you. Mr. Sena, I don't know that I
15 want you to write on this because I understand what
16 you were trying to do, I believe, but I just want
17 some clarification that counsel had you mark where
18 you thought the--on the left-hand side of the photo
19 where the unnamed tributary was, and you first drew
20 an arrow that you have since scratched out that
21 appears to me--and I want your thought on this--it
22 appears to be the terrace.

23 A. Yes, the actual terrace is that green
24 vegetated area on the left-hand side of the page.

25 Q. Yes. Mr. Vos can help us with this when he

1 testifies, but do you have any further thought on
2 where the ending tributary would be on that photo?

3 A. Yes, it is right next to the structure on
4 the left-hand of the page.

5 Q. And I would be okay with you writing on that
6 if--

7 MR. McAFEE: I guess I'll ask counsel for
8 EPA if you're okay with that.

9 THE ADMINISTRATIVE LAW JUDGE: Mr. Ryan?

10 MR. RYAN: Yes, I apologize. I have no
11 objection.

12 BY MR. McAFEE:

13 Q. Would you please mark another arrow, if you
14 would, where the unnamed tributary is next to a
15 structure you've marked.

16 A. Okay. (Witness marks on exhibit.)

17 MR. RYAN: For purposes of clarification,
18 we're now marking on Exhibit 23C.

19 THE WITNESS: I'm going to use a ball point
20 pen because the tip of the Sharpie is just too large.
21 (Witness marks on exhibit.)

22 THE ADMINISTRATIVE LAW JUDGE: Is that what
23 you wanted him to indicate there, Mr. McAfee?

24 MR. McAFEE: It still looks to me like we're
25 pointing at the terrace. I know it's difficult to do

1 with the angle of the photo.

2 THE WITNESS: (Witness marks on exhibit.)
3 The tributary goes right here--actually, right here.

4 MR. RYAN: Let the record reflect that the
5 witness just--what did you mark in with your pen
6 there?

7 THE WITNESS: I marked the unnamed tributary
8 to Elliot Creek.

9 MR. RYAN: Is it the line on the left-hand
10 side of the photo?

11 THE WITNESS: Yes, it is.

12 BY MR. McAFEE:

13 Q. I'm fine with that. I just want the record
14 to be clear that the unnamed tributary is not the
15 terrace, and I think we can do that through other
16 photos, et cetera. I think the record will be clear,
17 but, Mr. Sena, I want to give you the benefit of
18 clarifying what you previously marked. Are you
19 comfortable with what you marked there as unnamed
20 tributary?

21 A. Yes, I am.

22 THE ADMINISTRATIVE LAW JUDGE: Let me chime
23 in here, as well. If someone, in addition to me when
24 I look at this--now on this exhibit we have three
25 markings indicating UNT for unnamed tributary. The

1 last, most recent one, is the one that Mr. McAfee was
2 asking about.

3 My suggestion would be that after that one
4 put a parenthesis, and within that parenthesis put an
5 X referring to cross-examination. And then we'll
6 know that on the record when someone is reviewing
7 this that that's what you're talking about.

8 So in effect--tell me if this is a fair
9 characterization--your first marking was less
10 accurate because that really was closer to the berm--
11 the terrace, I'm sorry--whereas now, Mr. Sena, where
12 the X is, where it says "UNT (X)" you feel that's a
13 more accurate depiction of the location of the
14 unnamed tributary; is that fair?

15 THE WITNESS: Yes, I do.

16 THE ADMINISTRATIVE LAW JUDGE: What isn't
17 clear is that you've drawn a line from that down to
18 the point in front of that structure, but also there
19 is a faint line moving laterally across there, which
20 is prior to that unnamed tributary.

21 It would be better, I think, if you made
22 that a little clearer because it's only dark at the
23 beginning of that near the structure. But your
24 intention is that goes all the way across almost to
25 the road?

1 THE WITNESS: Yes.

2 THE ADMINISTRATIVE LAW JUDGE: Is that true?

3 THE WITNESS: Yes. The problem is the
4 ballpoint pen doesn't mark on the glossy photo.

5 THE ADMINISTRATIVE LAW JUDGE: Try this blue
6 pen. I don't know if it will show up as blue.

7 (Witness marks on exhibit.)

8 THE ADMINISTRATIVE LAW JUDGE: The last
9 suggestion I would make is you have one arrow by the
10 UNT (X). Draw a second arrow from there in a vector
11 out to show that it's not one spot, but an entire
12 line, an upside down V. Where you put the X, where
13 you have the X, wouldn't it be fair to have an upside
14 down V where you have one line going down from
15 UNT (X) to this one spot, but it really represents
16 not one spot but a whole line.

17 (Witness marks on exhibit.)

18 THE ADMINISTRATIVE LAW JUDGE: Yes. That
19 would then indicate that it's referring to an entire
20 distance of this unnamed territory. Thank you.

21 Is it also fair to state before I stop
22 interrupting here that the UNT on the right-hand
23 corner, that also would be inaccurate based upon your
24 second UNT (X) marking that the UNT which is just
25 next to where it says "observation point," that that

1 UNT is also not correct?

2 THE WITNESS: No, that one should be correct
3 at the point of the culvert which crosses under 100th
4 Street.

5 THE ADMINISTRATIVE LAW JUDGE: Okay. Go
6 ahead, Mr. McAfee.

7 MR. McAFEE: Thank you, Your Honor.

8 Thank you, Mr. Sena, for clarifying this. I
9 understand it's difficult to do with this type of
10 photo. But as the Court has indicated, when somebody
11 else looks at this down the road a ways, we won't
12 have the benefit of recovery in time plus having your
13 explanation.

14 Anyway, I think we've taken care of this.

15 THE ADMINISTRATIVE LAW JUDGE: Good. You
16 have another photo?

17 MR. McAFEE: No, but I do have another
18 question on this photo.

19 BY MR. McAFEE:

20 Q. You have circled the flow path, I think,
21 throughout these photos that you have drawn on. You
22 have used the term "runoff path," I believe, "flow
23 path, discharge path." In all of these you're
24 referring to the same thing; is that right?

25 A. Yes, I am.

1 Q. And in any of these photos-- First of all,
2 I'll ask you what you see in the photos. Do you see
3 any evidence in these photos of these flow paths of
4 any manure or any other type of what you would
5 consider a pollutant from the feedlot?

6 A. No.

7 Q. Did you see any-- Aside from these photos
8 on the day of your visit, did you see anything
9 regarding discharge in, let's say, the cornfield from
10 the feedlot of any pollutants, manure or anything
11 else that you would consider in that category from
12 the feedlot?

13 A. No, it wasn't raining that day.

14 Q. So you didn't see any actual runoff
15 occurring; correct?

16 A. No, I did not.

17 Q. But did you see any evidence of runoff--I
18 don't want to--I'm not trying to trick you here. I
19 realize that these photos with the flow paths are
20 being presented for that purpose. What I'm asking is
21 did you see anything in these flow paths regarding
22 manure, feedlot runoff or anything like that?

23 A. No, I did not.

24 Q. Did you see anything like that in the
25 unnamed tributary of Elliot Creek?

1 A. No, I did not.

2 Q. And did you go down to Elliot Creek or--
3 excuse me. I said that wrong. Did you go to the
4 unnamed tributary and actually look at it?

5 A. Other than the point at the culvert on 100th
6 Street, I did not.

7 Q. So you did not walk the unnamed tributary?

8 A. No, I didn't.

9 Q. What about Elliot Creek, did you actually
10 follow the unnamed tributary to Elliot Creek?

11 A. No, I did not. But there is a topo map on
12 attachment 4. I think it's attachment 3, actually,
13 that shows the connectivity.

14 Q. Okay. I understand-- And those will be
15 exhibits. I'm asking you what you did and what you
16 saw. You did not follow the unnamed tributary to
17 Elliot Creek; is that correct?

18 A. No, I did not.

19 Q. Okay. During your inspection did you take
20 any other type of evidence--what I would consider
21 gathering evidence such as water samples?

22 A. No, I did not.

23 Q. Do you ever do that during an inspection?

24 A. Yes. In the event of an actual discharge
25 where it's flowing, I do.

1 Q. Okay. And you did not do that here because
2 you did not see a discharge--an actual discharge
3 flowing, I think is the words you've just used?

4 A. Yes.

5 Q. I think I'm done at the projector there.
6 I'm almost positive I am. So if you would like to go
7 back, I just have a few more questions, I believe,
8 regarding your report.

9 A. Okay.

10 Q. Mr. Sena, it's in the actual form itself. I
11 think that's the first eight pages of Exhibit 23.
12 Would you please go to Page 5.

13 A. Okay.

14 Q. The second line down on the form--and my
15 paper punch has taken this out--is there a number
16 there below No. 1?

17 A. No. 2.

18 Q. That would make sense. Thank you. And
19 that's followed by A, B, C, D, E, et cetera; right?

20 A. Yes.

21 Q. And that line 2 says, "Have there been any
22 documented discharges of livestock waste to surface
23 water in the past year?" And you have checked "no,"
24 is that correct?

25 A. Yes.

1 Q. Thank you. Now, down to No. 3--and you've
2 previously testified to this--it asks, "Is the
3 facility currently discharging livestock waste from
4 the production area?" And you checked "no."

5 I want to clarify. When the form says
6 "currently," does the form mean when you're there,
7 right there that day?

8 A. Yes, it does.

9 Q. Have you had inspections where there was a
10 discharge occurring?

11 A. Yes, I have.

12 Q. And I guess I should clarify an inspection
13 of a CAFO feedlot?

14 A. Yes.

15 Q. Okay. Back on the page before that--I
16 believe it is--it's No. 2 on Page 4 of 8--it asks
17 about man-made features that could affect runoff; is
18 that right?

19 A. Yes.

20 Q. And I guess I wasn't fair when I read that.
21 It actually says, "Are there any man-made features
22 not associated with the production area that could
23 affect runoff?" And you checked "no."

24 So did you answer that meaning that
25 this--the terrace and the basin that you've indicated

1 were there, that they're part of the production area?

2 A. I'm not sure if they're actually part of the
3 production area.

4 Q. Are you not considering them a man-made
5 feature that would affect runoff?

6 A. Yes, but they would not be sufficient to
7 contain a 25-year, 24-hour event.

8 Q. I understand that's your testimony. I just
9 want to clarify when you answer no to this question,
10 I mean, there is a terrace--at the time of your
11 inspection if there was a terrace and a basin there,
12 why did you not indicate in the answer to this
13 question that they were there?

14 A. Because the intent of the form was manmade
15 features that could affect or which could contain the
16 25-year, 24-hour event.

17 Q. Okay. So the intent of the question, even
18 though it doesn't say that, is related to the 25-
19 year, 24-hour event?

20 A. Yes.

21 Q. And you have quite a bit of experience with
22 this form, I take it?

23 A. Yes.

24 Q. Has this form changed during the period of
25 time you were doing inspections of feedlots?

1 A. Yes, it has.

2 Q. And did you have any input into how this
3 form was prepared?

4 A. Yes, I did.

5 Q. Tell me about that.

6 A. Our inspectors and our compliance people got
7 together and put this form together.

8 Q. Okay. I want to make sure, then, just that
9 I'm clear that you're not indicating that--you're not
10 arguing with the fact that there is a terrace there
11 and that there is a basin--what you call a
12 sedimentation basin, that that is there?

13 A. Correct.

14 Q. And would you agree that it could affect
15 runoff even though it may not contain the 25-year,
16 24-hour storm?

17 A. Yes.

18 Q. Okay. In your experience in inspecting
19 feedlots, do you see how other features such as corn
20 rows could affect runoff?

21 A. Yes.

22 Q. Tell me how.

23 A. Normally it spreads it out or it runs down
24 the corn row depending on how it was disked.

25 Q. Okay. So corn rows, of course, are a

1 product of planting corn in a line so it can be
2 cultivated, harvested, et cetera; is that correct?

3 A. Yes.

4 Q. And as a part of some soil conservation
5 practices--and, in fact, in most areas--those corn
6 rows are perpendicular to the flow path?

7 A. Yes.

8 Q. So they do provide some impediment to
9 runoff?

10 A. Yes, they do.

11 Q. Okay. Did you observe that here?

12 A. I observed the corn rows were perpendicular
13 to direction runoff.

14 MR. McAFEE: Okay. If I could, Your Honor,
15 have just a minute?

16 THE ADMINISTRATIVE LAW JUDGE: Absolutely.

17 (Short pause.)

18 MR. McAFEE: Your Honor, thank you.

19 BY MR. McAFEE:

20 Q. I don't believe I'll need you to use the
21 projector, but I do want to go back to a couple of
22 the photos and just ask you some questions about
23 them. It would be photos 13 and 14. I apologize,
24 I'm looking in my notes. Do we have an exhibit
25 number for those photos? Maybe they weren't marked

1 on.

2 MR. RYAN: Yes, they were. Photo 13, which
3 is Page 14 of 16 of attachment 4 to Exhibit 23, has
4 been marked as 23B, and photo 14 has been marked as
5 23A.

6 MR. McAFEE: Thank you.

7 BY MR. McAFEE:

8 Q. So these were the first two photos I believe
9 that you marked on. And I don't need to go back to
10 your markings, but what I want to clarify here is you
11 talked, I believe, in your testimony about runoff,
12 you know, and flow paths from the feedlot.

13 Based on your inspection that day would you
14 agree that this area is more than just feedlot, that
15 there's cropland that drains here also?

16 A. Yes.

17 Q. So some of the flow would be from cropland
18 also?

19 A. Yes.

20 Q. And talking more generally about some of the
21 other photos, I guess, on the south side of the
22 feedlot that you've testified to today--these are
23 from the north side--but also some of the photos from
24 the south side, that, in fact, that's a fairly large
25 drainage area; is that correct?

1 A. Yes, it is.

2 Q. And so there are more areas that drain into
3 those flow paths than just the feedlot?

4 A. Yes.

5 MR. McAFEE: We have no further questions,
6 Your Honor.

7 THE ADMINISTRATIVE LAW JUDGE: Okay. What
8 we're going to do is break for lunch. If there is
9 any redirect, we'll take that after lunch.

10 (Recess at 12:40 p.m., until 1:40 p.m. of
11 the same day.)

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AFTERNOON SESSION1:40 p.m.

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2 THE ADMINISTRATIVE LAW JUDGE: Back on the
3 record. Mr. McAfee had finished his
4 cross-examination. Anything on redirect, Mr. Ryan?

5 MR. RYAN: Yes, Your Honor, just a few
6 questions.

7 THE ADMINISTRATIVE LAW JUDGE: Sure.

REDIRECT EXAMINATION

8
9 BY MR. RYAN:

10 Q. Mr. Sena, do you recall talking on
11 cross-examination about Mr. Vos maintaining a well
12 kept lot? Do you remember that testimony?

13 A. Yes, I do.

14 Q. Now, is that term "well kept lot," does that
15 refer to his compliance with the Clean Water Act or
16 something else?

17 A. It applies to the cleanliness of his pens.

18 Q. Is that more related to the health of his
19 animals or his compliance with the Clean Water Act?

20 A. Health of his animals.

21 Q. Now, let's get photos 3 and 4. You
22 testified about photos 3 and 4, which are part of
23 attachment 4 to your inspection report, Exhibit 23.

24 Do you recall that?

25 A. Yes.

1 Q. And there was testimony as to whether those
2 discharge--those photos 3 and 4 discharge through the
3 terrace. Do you recall that?

4 A. Yes.

5 Q. Now, you recall during your direct testimony
6 that you identified four--I believe it was four
7 discharge points from the south part of the lot?

8 A. Yes, I did.

9 Q. Were photos 3 and 4 part of those four
10 discharges?

11 A. No, they were not.

12 Q. Okay. You were asked if you saw any manure
13 in the runoff. Do you recall that question?

14 A. Yes.

15 Q. Is it possible that runoff can occur and not
16 leave a manure trace behind?

17 A. Yes, it's possible.

18 Q. And are there other dissolved pollutants and
19 runoff from feedlots?

20 A. Yes, there are.

21 Q. Would nitrogen, for example, be a dissolved
22 pollutant?

23 A. Yes.

24 Q. You wouldn't necessarily see nitrogen in the
25 runoff path?

1 A. No, you would not.

2 Q. Now, looking at Page--can you please turn to
3 Page 5 of 8 of your inspection report. You were
4 asked about No. 2 at the top of Page 5 of 8. "Have
5 there been any documented discharges of livestock
6 waste to surface water in the past year?" You
7 checked "no."

8 Do you recall that testimony?

9 A. Yes, I do.

10 Q. Does that mean that there were no discharges
11 or you just don't know of any?

12 A. That means that I didn't know of any in the
13 past year.

14 Q. Is it possible there were discharges, you
15 just don't know about them?

16 A. Yes.

17 Q. And on cross-examination you were also asked
18 some questions about the terrace and basin on the
19 west side of the facility. Based on your
20 observations at your site inspection, did that
21 terrace or that basin that was part of that terrace
22 system on the west, did that have any effect
23 whatsoever on discharges to the south of the
24 facility?

25 A. No, it did not.

1 Q. And how about discharges to the north?

2 A. It did not either.

3 Q. Based upon your observations, where was the
4 majority of the discharge from the site happening?

5 A. From the south.

6 Q. And you also recall on cross-examination you
7 were asked about the corn rows and how they typically
8 run perpendicular to flow paths. Do you recall that
9 testimony?

10 A. Yes, I do.

11 Q. And could you turn to photo No. 5, please,
12 which is part of attachment 4 to Exhibit 23.

13 THE ADMINISTRATIVE LAW JUDGE: Photo 5?

14 MR. RYAN: Yes. That would be Page 6 of 6
15 of attachment 4 to Exhibit 23.

16 A. Okay.

17 BY MR. RYAN:

18 Q. Looking at photo 5, for example, would you
19 say that flow path is cutting perpendicular to the
20 corn rows?

21 A. Yes, it is.

22 Q. And is the-- Is there any question in your
23 mind that it's cutting through those corn rows?

24 A. No, there is no question.

25 Q. Let's look at photo No. 6, the next page,