

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 7

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 In the Matter of: :
 : Docket No. CWA 07-2007-0078
 LOWELL VOS :
 d/b/a LOWELL VOS FEEDLOT : VOLUME IV
 WOODBURY COUNTY, IOWA :
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Fourth Floor Courtroom
 United States Courthouse
 210 Walnut Street
 Des Moines, Iowa
 Thursday, September 18, 2008

The above-entitled matter came on for hearing
 at 9:30 a.m.

BEFORE: WILLIAM B. MORAN, Administrative Law Judge

ORIGINAL

CHRISTINE E. NUCKOLLS - CERTIFIED SHORTHAND REPORTER

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1 these are, I believe, each 500-foot-long areas; is
2 that correct?

3 A. Yes.

4 Q. And you conducted--what do you call it; fish
5 assessments?

6 A. Assessments of the fish population in those
7 500-foot segments.

8 Q. Okay. Okay. Now, I want to make sure I
9 understand from this exhibit, when you marked those
10 areas, is that as close as you could to where they
11 are actually located?

12 A. Yes. It's not to scale. I wouldn't say it
13 was to scale. But I marked as close as I could to
14 the locations where we were in the stream.

15 Q. And how would you remember that as we were
16 standing here as you were doing that yesterday? Just
17 from your memory?

18 A. From my memory, yes.

19 Q. Okay. When you did these fish population
20 assessments--is that a fair term?

21 A. Yes.

22 Q. --when you did those--and I believe you
23 testified that you did those on August 5th of 2008?

24 A. Correct.

25 Q. --did you make any notes or prepare a

1 A. What notes do you refer to?

2 Q. The notes that you've testified this morning
3 that you took the day you did the fish populations.

4 A. Yes.

5 Q. Is that recorded anywhere else?

6 A. No.

7 Q. Okay. Now, looking at Exhibit 53 on the
8 screen where you have marked the area for your fish
9 population assessment of the unnamed tributary, that
10 looks to be very close to the fork--what I would call
11 a fork. Maybe that's not the correct term.

12 A. The confluence is maybe the more correct
13 term.

14 Q. Okay. --the confluence of the unnamed
15 tributary with Elliot Creek where you have marked
16 where you did your fish population assessment is very
17 close to Elliot Creek; right?

18 A. Yes.

19 Q. Do you remember exactly how far away it was?

20 A. No, I don't recall exactly how far away it
21 was.

22 Q. But where you've marked it, your left-hand
23 or lower boundary of your fish population assessment
24 almost touches Elliot Creek?

25 A. We started that assessment not very far up

1 A. He's a fisheries management biologist, just
2 like I am. He works out of the Black Hawk district
3 office and covers a district out of that office.

4 Q. And was anyone else with you?

5 A. We had a crew of six that day; myself, Lanny
6 Miller, two natural resource technicians, Don Herrig,
7 Mark Boucher. And then there were two seasonal
8 employees, natural resource aides, Todd Perry and--
9 the name of the natural resource aide that came from
10 out of Black Hawk, I don't know that name. But there
11 were six of us there that day.

12 Q. Is that a--the usual number you would have
13 of people to do such an assessment like this?

14 A. That's a larger number. Typically we do
15 this assessment with anywhere from three to four
16 people.

17 Q. Do you know why you had more on this
18 assessment?

19 A. No particular reason. We were combining
20 offices and--but no particular reason. The
21 assessment could have been done with a smaller crew.

22 Q. Was it your decision to have more people
23 conduct it or someone else's?

24 A. It was my decision to bring in the natural
25 resource technician that works with me and natural

1 resource aide that works with me. It was my decision
2 to bring them along that day.

3 Q. I'll kind of move to the end, and then we've
4 got a lot of things to go through here as far as the
5 details of the assessment. But when this was
6 completed, you've indicated there is no report, is
7 that right, at this time?

8 A. It's in the raw data form right now.

9 Q. Okay. Does that raw data form include your
10 conclusions that you testified to yesterday regarding
11 the Lowell Vos feedlot?

12 A. No, they don't.

13 Q. Okay. It just includes maybe fish numbers?

14 A. Fish numbers, species present. There's some
15 habitat measurements that were made on the lower
16 Elliot Creek. We wanted to treat this just like
17 other Hydrologic Unit Codes. It designates a
18 watershed size.

19 We wanted to follow our standard procedures
20 doing these stream assessments. So we did include
21 some habitat measurements on the lower reach.

22 Q. And we may have to come back to that. Does
23 habitat measurements include more than counting the
24 fish?

25 A. Yes, it does.

1 Q. We'll maybe come back to that. And you did
2 that on the lower assessment?

3 A. Correct.

4 Q. The conclusions that you stated in the
5 record yesterday regarding the possible effect of the
6 Lowell Vos feedlot on what you found in these
7 assessments, are those yours and yours alone?

8 A. No.

9 Q. Okay. Who else has participated in making
10 that conclusion?

11 A. Lanny Miller, the DNR biologist out of Lake
12 View. We discussed what was going on here, what we
13 found.

14 Q. And when did you discuss that?

15 A. I don't know the exact date, but it would
16 have been, obviously, after the 5th of August, 2008.

17 Q. Did you discuss it that day?

18 A. There was some discussion that day about it.

19 Q. And maybe I should ask this. How long did
20 this assessment take, the three of them, I should
21 say? I'm just looking at total time.

22 A. We arrived at the stream around 9 a.m., and,
23 if I recall, we ate a late lunch right there at the
24 site at around 1 p.m. So roughly a four-hour time
25 period.

1 Q. Is that a normal amount of time to conduct
2 this type of assessment?

3 A. Yes.

4 Q. And then what did you do after 1 o'clock?
5 Were you all done then?

6 A. We headed home.

7 Q. Okay. Prior to-- Let me rephrase that.
8 When you were first contacted about doing this
9 assessment, were you informed that it had to do with
10 the Lowell Vos feedlot?

11 A. Yes.

12 Q. So before you ever started on this, you were
13 made aware that a purpose of this assessment was
14 related to this case that we are here today for and
15 the Lowell Vos feedlot?

16 A. Yes.

17 Q. What did you do to prepare to do your
18 assessment?

19 A. There was very little preparation, other
20 than coordinating a time and place to meet and
21 coordinating who's bringing what equipment and that
22 kind of stuff. Otherwise, there was no preparation
23 done in advance.

24 Q. I believe yesterday you testified that you
25 may have checked an aerial photo. Did you do that

1 before or after the assessment?

2 A. That was after the assessment.

3 Q. Before you actually got on the creek, so to
4 speak, or the two creeks to do the assessment, did
5 you drive the area?

6 A. I did not.

7 Q. Okay. Did you meet Mr. Miller and his crew
8 there?

9 A. We met at the convenience store in Lawton,
10 and then we followed them out there.

11 Q. Okay. We're looking again at Exhibit 53 on
12 the screen here. If you need to come to the exhibit,
13 you sure can, or can you tell us how you entered the
14 area to perform the assessment.

15 A. We entered the area from the farm--the set
16 of farm buildings and the house there on the lower
17 part of it off of--is that 110th Street?

18 Q. Yes, I believe so. Would you like to come
19 up here and look at the exhibit?

20 A. Sure. We came in through this property and
21 drove along the buffer strip, which is a strip of
22 grass between--this was corn here and this is the
23 buffer strip between here and the strip. We drove
24 along the edge of the corn to access the sites.

25 (Indicating throughout.)

1 MR. McAFEE: Okay. For purposes of the
2 record, Your Honor, may we go off the record for a
3 minute?

4 THE ADMINISTRATIVE LAW JUDGE: Sure, go off
5 the record.

6 (Off-the-record discussion.)

7 THE ADMINISTRATIVE LAW JUDGE: We'll go on
8 the record again.

9 BY MR. McAFEE:

10 Q. Mr. Hayes, for purposes of the record you've
11 just shown on Exhibit 53 that you entered from the
12 south; is that correct?

13 A. Correct.

14 Q. And there's a farm place there off of
15 110th Avenue, as the exhibit shows. And then
16 you--both crews drove up along the edge of Elliot
17 Creek to the site where you performed your first
18 assessment, I assume; is that correct?

19 A. Yes.

20 Q. Did you do the lower Elliot Creek assessment
21 first?

22 A. Yes, you always assess from downstream to up
23 so that you're not muddying the water as you go.

24 Q. Okay. And had you contacted that landowner
25 ahead of time?

1 A. Not unless you include driving by it on
2 Highway 20 on the way to Sioux City. No, I had never
3 been on Elliot Creek.

4 Q. Okay. Now, when you arrived, then, to do
5 your assessment, you said you started to do--you did
6 the lower Elliot Creek assessment first?

7 A. Yes.

8 Q. Before doing that, do you walk up the creek
9 at all to get an idea of what the whole area looks
10 like or do you just start doing the assessment?

11 A. Basically, we make sure we have 500 feet,
12 and then we look for a place where we can get down
13 over the banks, just look for a place to access the
14 stream to start.

15 Q. So you measure off 500 feet or someone does?

16 A. We use our range finder. Or if there's too
17 much vegetation or whatever, you can't use your range
18 finder, you just step it off.

19 Q. And then I believe you testified yesterday
20 you use some type of equipment that is on your back?

21 A. To do the electrofishing you use a backpack
22 electrofishing unit.

23 Q. And out of the crew of six, how many do
24 that?

25 A. One at a time. One person does the

1 backpack--one person carries the backpack.

2 Q. And do you do that all along the 500 feet
3 area?

4 A. Yes.

5 Q. And then what do the other people do; count?

6 A. The other people are carrying--well, we
7 split up into two crews; a crew of three to do the
8 habitat assessment and crew of three to do the
9 fisheries assessment.

10 Q. Go ahead.

11 A. In the crew of three we had one person
12 carrying the backpack and two people carrying buckets
13 and dip nets to help capture fish and take fish--
14 transfer fish from the electrofishing--the people
15 doing the electrofishing transfers the fish back to
16 somebody holding the bucket.

17 Q. You've mentioned a habitat assessment
18 several times that was done on this portion; right?

19 A. Yes.

20 Q. What's involved with the habitat assessment?

21 A. You measure--go up the stream every--the
22 stream width was six feet, so every six feet you're
23 taking a width and depth measurement, you're looking
24 at the angles of the bank, you're recording
25 vegetation cover on the banks, whether there's

1 the presence or absence of invertebrates as we went
2 up the stream in each segment.

3 Q. But that wasn't part of the habitat
4 assessment?

5 A. No.

6 Q. By "invertebrates," are we talking about
7 anything from very tiny--

8 A. The Crayfish are invertebrates, Dragonfly
9 larvae, Mayfly larvae, aquatic invertebrates, bugs
10 living in the stream.

11 Q. You said you made notes about that?

12 A. We made notes on the data. I routinely do
13 that, you know--

14 Q. Okay.

15 A. --just to make notes of presence or absence.
16 of invertebrates just to try and make the data sheets
17 as complete as possible.

18 Q. And if we need to take them one at a time,
19 we can. But in general, what was your--I'll use the
20 word "assessment" of the invertebrates population in
21 this area?

22 A. In lower Elliot Creek, we saw no
23 invertebrates. In upper Elliot Creek, we noted 20
24 Crayfish. And in the unnamed tributary, we saw no
25 invertebrates.

1 Q. Now, again, you're talking bugs?

2 A. Right; bugs, Crayfish.

3 Q. So you saw no even small invertebrates or
4 anything like that, bugs or anything in the lower
5 Elliot Creek assessment or in the unnamed tributary?

6 A. No.

7 Q. Okay. This would all be in your notes?

8 A. Yes.

9 Q. When you're doing-- First of all, let me
10 ask you. In doing this assessment, did you take any
11 photos?

12 A. Yes.

13 Q. And what were those photos of?

14 A. We took photos of the fish we captured. We
15 took photos of the stream and took photos of
16 electrofishing in the stream, photos of the habitat
17 assessment.

18 Q. Do those photos in any way support your
19 conclusions or-- Let me ask you. Do those photos in
20 any way impact your conclusions as you're expressing
21 them in this case?

22 A. No.

23 Q. As part of these assessments, did you take
24 any water samples?

25 A. No.

1 Q. Do you ever take water samples as part of a
2 fish population assessment?

3 A. No.

4 Q. What about a habitat assessment?

5 A. No, the water samples aren't included in
6 habitat assessments.

7 Q. Did you have the equipment with you to take
8 water samples?

9 A. No.

10 Q. So neither crew had any equipment to take a
11 water sample?

12 A. No, not to my knowledge.

13 Q. I believe you testified yesterday that you
14 made a--you drew some conclusion about the water
15 quality at least in the unnamed tributary and lower
16 Elliot Creek and also upper Elliot Creek; is that
17 correct?

18 A. Yes.

19 Q. That you drew a conclusion about the water
20 quality?

21 A. Yes.

22 Q. And what was that conclusion?

23 A. Based on what I saw doing the fishery
24 assessment and based on the notes I made about
25 invertebrates, mainly the Crayfish, I concluded that

1 the upper Elliot Creek has better water quality than
2 either the lower Elliot Creek or the unnamed
3 tributary.

4 Q. Would a water sample properly taken--I'll
5 finish my question. Would a water sample properly
6 taken help you make--draw any conclusions about the
7 water quality there?

8 A. Yes.

9 Q. Are you trained in taking water samples?

10 A. No.

11 Q. Was anyone in your crew trained to take
12 water samples?

13 A. No, not to my knowledge.

14 Q. Have you ever taken a water sample of a
15 creek?

16 A. No. Well, let me rephrase that. Yes, I've
17 taken water samples. When I worked in the northeast
18 part of the state, we were looking at the Maquoketa
19 River and tributaries and did event-driven sampling--
20 I mean after rainfall events--trying to look at the
21 different tributaries and deciding where to focus
22 dollars. We grabbed samples off bridges, sent
23 samples away to hygienics labs for analysis.

24 But routinely when we do these fishery
25 assessments, we do not routinely take water samples.

1 Q. And do you know the reason that you don't do
2 that?

3 A. Well, we have an environmental services
4 office that--and there's a--there's other parts of
5 the DNR that are involved more in that than I am.
6 There's a water resources section of the DNR that do
7 far more thorough assessments of--by "thorough," I
8 mean fish assessments, as well as water quality
9 assessments.

10 Q. I'm sorry. Who does that, did you say?

11 A. There's a water resources section.

12 Q. And they do fish population assessments
13 also?

14 A. They monitor fish populations because fish
15 population--fish are an indicator of water quality.

16 Q. Okay. I guess I just want to make sure I
17 understand this testimony here and what was done.
18 First of all, I want to ask you as part of that,
19 prior to doing these fish population assessments on
20 August 5th--is that correct?

21 A. Correct.

22 Q. --did you have any discussions with anyone
23 or did anyone within the department that you were
24 working with--on preparing to do these assessments,
25 did anyone talk to you about maybe doing a water

1 quality sample as part of this fish population
2 assessment?

3 A. No.

4 Q. It was never considered, as far as you know?

5 A. It was never relayed to me. I don't know if
6 it was ever considered, but it was never requested of
7 me.

8 Q. You testified yesterday that--in response to
9 several questions from Mr. Breedlove about--well, and
10 you've testified again this morning that your
11 conclusion is that the Lowell Vos feedlot was having
12 an impact on the water quality in the unnamed
13 tributary; is that correct?

14 A. I mean, I testified yesterday that the most
15 likely source for what I saw was the Lowell Vos
16 feedlot.

17 Q. And I believe you testified in response to a
18 question from Mr. Breedlove as to what is the feedlot
19 runoff that would be detrimental to fish or whatever
20 the proper word is?

21 A. Yes.

22 Q. And what are those components or compounds,
23 whatever you want to call them?

24 A. What comes off of feedlots first and
25 foremost that affects fish and aquatic life is the

1 Q. And that would mean to you what?

2 A. Lack of sediment.

3 Q. So just to make sure our record is clear
4 here, you did not--let me ask you. Did you observe
5 in any way a level of sediment that you would
6 consider detrimental to the aquatic life that day?

7 A. Not that day.

8 Q. So just to make sure I have this clear to
9 me, anyway, then, of the conditions you listed that
10 you would consider from a feedlot to be detrimental
11 to aquatic life, of those you listed you found none
12 of them present that day you were there?

13 A. We did not test for them. No, I did not
14 find them present.

15 Q. Okay. Let's go back to the assessments you
16 were conducting. First of all, how deep was the
17 water in the lower Elliot Creek assessment area; do
18 you remember?

19 A. I remember going through areas of that
20 stream that were around knee deep. So it's a foot
21 and a half.

22 Q. It depends--

23 A. It depends on how tall you are. But, you
24 know, when I see water that that's deep, I'm thinking
25 there should be fish, I should be capturing fish with

1 Elliot Creek?

2 A. It was smaller, yes, different.

3 Q. Okay. That's fair. What about the width of
4 the stream in those two places? And if you testified
5 to all of this yesterday, I apologize, I don't
6 remember hearing all of this. But please go through
7 this if you would.

8 A. The width of the stream in Elliot Creek,
9 both the lower and upper, were six feet. The width
10 of the unnamed tributary, I don't think that was
11 recorded. It was probably three to four feet based
12 on memory.

13 Q. Okay. Thank you. What type of fish would
14 you normally expect to find in foot-and-a-half deep
15 water or knee-deep water in this type of creek?

16 A. Minnows, like Fathead Minnows, Sand Shiners,
17 Big Mouth Shiners, Sucker species, White Suckers are
18 common in these types of streams.

19 Q. And these are all Minnows or some type of
20 Minnow?

21 A. Minnows or Suckers, yes.

22 Q. You're speaking to a nonfisherman here.

23 A. Okay. Yeah, they're all Minnows, Suckers.
24 One common Sunfish we see is a Green Sunfish that are
25 present in streams this size.

1 Q. Now, we're using the term "fish" here which
2 I assume biologically is the correct term to use; is
3 that right?

4 A. Yes.

5 Q. As a nonfisherman, sometimes I think of a
6 fish as something that will go into the frying pan.
7 Is what we're talking about something that would,
8 quote/unquote, in my words go into the frying pan?

9 A. No.

10 Q. Not unless it got ate by something else,
11 right, as bait; is that correct?

12 A. Correct.

13 Q. So these are very small, is that accurate,
14 these fish you're talking about?

15 A. The Creek Chubs that were in this stream and
16 in a lot of streams like this, they'll reach a
17 maximum size of 12 inches. People do catch and
18 consume Creek Chubs.

19 Q. Would you expect to see a Creek Chub of that
20 size in this type of water, knee deep?

21 A. I wouldn't be surprised if I saw it. I
22 mean, it depends.

23 Q. Okay. Did you see any of that size the day
24 you were there?

25 A. No.

1 informed. And so to your knowledge, there were no
2 obstructions that would prohibit fish movement that
3 could affect your results?

4 A. To my knowledge, there was no obstruction,
5 but it's recorded on the data. That's one line on
6 the data sheet, obstructions or barriers.

7 Q. Okay. I want to go back now to where these
8 areas were located. It appears from Exhibit 53 that
9 the lower Elliot Creek assessment area is further
10 down from the confluence with the unnamed tributary
11 than the assessment area in the unnamed tributary is
12 from the confluence; is that correct?

13 A. Correct.

14 Q. You were a little further down?

15 A. Correct.

16 Q. Was that by choice?

17 A. Yes.

18 Q. And why was that?

19 A. In the unnamed tributary and in upper Elliot
20 Creek we were up against boundaries, and we wanted to
21 be sure we had 500 feet and not run out of room and
22 get onto somebody else's property we did not have
23 permission to be on.

24 Q. Okay.

25 A. We had a lot more room to work with in lower

1 Elliot Creek.

2 Q. I see. So you're saying like the upper
3 Elliot Creek assessment area, I believe, from Exhibit
4 53 we can see, is that a property boundary at the
5 northern edge of your assessment area?

6 A. Yes.

7 Q. And so that's how you fit it in?

8 A. Correct.

9 Q. Now, over on the unnamed tributary is there
10 a property boundary close to that assessment area?

11 A. I don't know.

12 Q. So was there-- It doesn't appear or do you
13 know? Was there a reason that you had to fit it in
14 where you did as far as being close to the
15 confluence?

16 A. I don't know if there was a boundary up
17 above there we were trying to fit in. I was under
18 the-- From my recollection, we did not have a lot of
19 room to work with in that upper tributary, the
20 unnamed tributary.

21 Q. Okay. And just for purposes of what we're
22 looking at here today--and I understand you're going
23 from memory--but do you see anything on Exhibit 53
24 that looks like a property boundary to the east of
25 your assessment area of the unnamed tributary?

1 tributaries or small tributaries with water that's
2 ankle deep.

3 THE ADMINISTRATIVE LAW JUDGE: So are you
4 saying that based on your experience there is no
5 preference because of some of the reasons you just
6 stated? Fish do not generally, as a rule of thumb,
7 prefer to be in wider, deeper water, they would just
8 as soon be in shallower, narrower water?

9 THE WITNESS: Well, it depends on a lot of
10 things.

11 THE ADMINISTRATIVE LAW JUDGE: So you can't
12 make any general statement about that, really?

13 THE WITNESS: It's hard to make a general
14 statement about that. Fish would move into that
15 unnamed tributary to feed. Smaller fish would use it
16 as a nursery area. It's hard to say.

17 THE ADMINISTRATIVE LAW JUDGE: All right.

18 THE WITNESS: I expected to find fish in
19 both areas.

20 THE ADMINISTRATIVE LAW JUDGE: Thank you.
21 Go ahead, Mr. McAfee.

22 BY MR. McAFEE:

23 Q. Mr. Hayes, I believe you just testified that
24 maybe a smaller fish would want to stay in the
25 shallower water of the unnamed tributary to avoid

1 BY MR. MCAFEE:

2 Q. Would you-- In coming to that conclusion,
3 then, that the Lowell Vos feedlot is the most likely
4 source--and you were fully aware that you were
5 conducting this fish population assessment for
6 purposes of this hearing; is that right?

7 A. Yes.

8 Q. --did you consider taking another fish
9 assessment further upstream the unnamed tributary
10 closer to the Lowell Vos feedlot?

11 A. No.

12 Q. And why not?

13 A. I thought that, you know, just above that
14 confluence would be the best case scenario for that
15 unnamed tributary. The further you get away from
16 confinement would have been the best case scenario
17 for that unnamed tributary, in my opinion.

18 Q. So, in other words, you thought that was the
19 best chance of finding something right there. And if
20 there was nothing there, there was no reason to go
21 anywhere else?

22 A. Correct.

23 Q. Would it surprise you if you learned
24 that--I'm just asking if it would surprise you--if
25 there were fish, the type of fish you were looking

1 Mr. Hayes. Mr. McAfee had asked about some of the
2 other fishery employees that attended the stream
3 assessment with you. What was the-- He asked about
4 some of the discussions following this sampling.

5 What was the general consensus of those that
6 were involved in the sampling in regard to your
7 findings?

8 A. The general consensus was that we had
9 extremely low diversity and extremely low abundance.
10 And visiting with Lanny Miller, who he's actually the
11 senior fisheries biologist in the state, he's got
12 more time in than anybody else--

13 MR. McAFEE: Your Honor, I'm sorry. I know
14 we're looking at getting information in this hearing.
15 I'm willing to have some--from my perspective,
16 anyway--willing to tolerate some discussion, hearsay
17 of what somebody else has said. But I can't--at
18 least from my perspective I will have to object if it
19 goes too far. That person is not here testifying.

20 THE ADMINISTRATIVE LAW JUDGE: Fair enough.
21 So be ready to make your objection. You say that--

22 MR. McAFEE: Well, I'm objecting.

23 THE ADMINISTRATIVE LAW JUDGE: You're saying
24 so far-- Hearsay is admissible in these proceedings.

25 MR. McAFEE: I understand that, Your Honor.

1 the different types of fish you would expect to find
2 in streams the size of Elliot Creek and the unnamed
3 tributary. There's reference to a number of them
4 being Minnows. Did I understand you correctly,
5 Shiners are considered a type of Minnow?

6 A. Shiners are Minnows, yes.

7 Q. Now, there are different levels of tolerance
8 to feedlot-related contamination between different
9 kinds of Minnows?

10 A. Different fish, different Minnows have
11 different levels of tolerance. The Fathead Minnows
12 in this case are the most tolerant fish that we see
13 in Iowa.

14 Q. And you did not find some of the less
15 tolerant species?

16 A. We did not find what would be considered
17 less tolerant, sensitive species.

18 Q. There was some discussion about the size of
19 the fish and frying pan, the importance of them. I
20 was wondering if you could maybe educate us a little
21 bit on the importance of these smaller fish in the
22 larger environment, in particular in the lower reach
23 of the streams, lakes, that sort of thing.

24 A. Well, the quality of your stream or river,
25 it starts up in your tributary streams. The analogy

1 that's often made for these tributary streams is that
2 of a tree. And if you cut off all of the branches of
3 a tree, the tree's going to die.

4 Similar with the stream, if you degrade the
5 tributary streams, the larger tributaries and the
6 rivers that depend on these tributary streams for
7 nursery areas that provide food as these fish migrate
8 back to those larger streams, it will degrade those
9 larger tributary streams and rivers.

10 As I said, the health of your larger
11 tributary streams and your rivers really starts up in
12 these small tributaries.

13 Q. Just a couple more questions. In regard to
14 the locations of the sampling, I want to make sure
15 that the record is clear. Is it your belief that
16 sampling closer to Elliot Creek would actually skew
17 the numbers upwards? Is that correct?

18 A. Yes.

19 Q. Just one last question, Mr. Hayes. In the
20 200 surveys, or so, have you ever seen a stream this
21 bad?

22 A. I can't recall ever seeing this low of
23 abundance in a stream in a 500-foot sample segment.
24 I don't ever recall seeing this few of fish.

25 MR. BREEDLOVE: Thank you. No further

1 questions, Your Honor.

2 THE ADMINISTRATIVE LAW JUDGE: Okay.

3 Mr. McAfee.

4 MR. McAFEE: Thank you, Your Honor.

5 RECROSS-EXAMINATION

6 BY MR. McAFEE:

7 Q. Mr. Hayes, you just testified as to the
8 importance of smaller streams for the food chain to
9 larger streams; is that right?

10 A. Correct.

11 Q. And would you consider Elliot Creek
12 downstream to be like closer to Lawton, which I
13 believe is four, five miles south of where you were--
14 is that correct?

15 A. Yes.

16 Q. --did you consider that to be a larger
17 stream?

18 A. It would be a larger tributary. Elliot
19 Creek is located within the Little Sioux River basin,
20 and so it feeds the Little Sioux River.

21 Q. I just--that brought-- Your testimony there
22 on redirect brought to my attention, there is--I'd
23 like to have you take a look at Complainant's Exhibit
24 26. Are you familiar with that?

25 A. No, I'm not.

1 Q. Which section would use it; do you know?

2 A. I believe this is done by our water
3 resources section.

4 Q. After you've had a chance to look through it
5 and feel comfortable with the document, I'd like to
6 go back to the second page. It would be the page
7 following the aerial photo.

8 A. Okay.

9 Q. These pages aren't numbered, but for
10 purposes of the record we're looking at the second
11 page of the exhibit, which again is the page
12 following the aerial photo. Could you read the
13 heading on that page.

14 A. Aquatic life assessment field data form.

15 MR. BREEDLOVE: Your Honor, this is getting
16 quite a ways beyond the scope of redirect.

17 THE ADMINISTRATIVE LAW JUDGE: Well, I
18 hadn't thought about that. But I want to hear from
19 Mr. McAfee first.

20 BY MR. McAFEE:

21 Q. Mr. Hayes, there's a comment section there--

22 THE ADMINISTRATIVE LAW JUDGE: Do you want
23 to respond to Mr. Breedlove's objection?

24 MR. McAFEE: I'm sorry, Your Honor. This is
25 a report done on a larger portion of the stream which

1 Q. And I want to make sure the record is clear.
2 Chronic is something that happens over a longer
3 period of time?

4 A. Yes.

5 Q. Versus an acute event that happens quickly
6 and then it's gone?

7 A. Correct.

8 Q. We're talking about a contamination event
9 here?

10 A. We're talking about a pollution event.

11 Q. Wouldn't water sampling be more appropriate
12 to do in a chronic event, as you've testified--a
13 chronic event as you've testified is present here?

14 MR. BREEDLOVE: Objection, Your Honor. He's
15 testified a number of times that that wasn't the
16 purpose of this inspection, that he doesn't do water
17 sampling. We've addressed this issue three or four
18 times now.

19 MR. McAFEE: My response, Your Honor, is I
20 just--again, his testimony on redirect was regarding
21 why they wouldn't do sampling, and his testimony
22 yesterday was that this was a chronic situation that
23 is different than the acute situations that he has
24 testified to. And I just want to make sure the
25 record is clear about the difference between that.

1 THE ADMINISTRATIVE LAW JUDGE: I'll allow
2 the question.

3 A. Can you repeat the question.

4 BY MR. McAFEE:

5 Q. In a situation with a chronic condition, as
6 you have testified that the unnamed tributary and
7 Elliot Creek are subject to from the Lowell Vos
8 feedlot, in that situation wouldn't water sampling be
9 more appropriate than in an acute event?

10 A. Yes.

11 MR. McAFEE: I have no further questions,
12 Your Honor.

13 MR. BREEDLOVE: Your Honor, I'm asking for a
14 little bit of leeway in asking some more questions.
15 I think Mr. McAfee has really expanded the scope
16 beyond what redirect was.

17 FURTHER REDIRECT EXAMINATION

18 BY MR. BREEDLOVE:

19 Q. Mr. Hayes, what year was the aquatic life
20 assessment performed? Can you tell from the
21 document?

22 A. I--

23 THE ADMINISTRATIVE LAW JUDGE: If you look a
24 few pages in, you'll see it, I think.

25 MR. McAFEE: Your Honor, I just want to

1 species and the abundance. What this document tells
2 me is that there's a refuge population of fish--now,
3 I don't know how far away--but that potentially could
4 migrate up into the Elliot Creek where we were at and
5 repopulate.

6 Q. But you didn't see those fish?

7 A. No, we did not see those fish.

8 MR. BREEDLOVE: No further questions, Your
9 Honor.

10 MR. McAFEE: I have no more questions, Your
11 Honor.

12 THE ADMINISTRATIVE LAW JUDGE: All right.
13 Mr. Hayes, thank you for your testimony. It was
14 interesting to listen to what you had to say. I
15 appreciate your being here.

16 THE WITNESS: Thank you, Your Honor.

17 (Witness excused.)

18 THE ADMINISTRATIVE LAW JUDGE: We're going
19 to take a five-minute break now.

20 (Short recess.)

21 THE ADMINISTRATIVE LAW JUDGE: Thank you.
22 Please be seated.

23 Mr. Hayes is on his way back, right? He's a
24 very nice fellow, a credible witness. He didn't seem
25 to have any agenda, so I enjoyed his testimony.

1 into the record, please.

2 A. "The producer must maintain reasonable
3 progress towards compliance as discussed in Sections 4
4 through 7 below."

5 Q. And now would you please turn to the next
6 page on Page 6 of Respondent's Exhibit 3,
7 Subparagraph 6. Could you please read that first
8 paragraph into the record.

9 A. "The provisions of Paragraph 2 will apply so
10 long as the facility operator is cooperating with the
11 department to achieve compliance within a reasonable
12 time."

13 Q. Thank you. Now, reasonable time, were there
14 certain milestones set out by this plan, by the Iowa
15 Plan, to determine whether a facility was making
16 reasonable progress?

17 A. Yes. After a producer had an on-site visit,
18 they were required to--

19 Q. Hold on one second, Mr. Tinker. Let's step
20 back further. What got a facility into the Iowa
21 Plan? There's a number of processes that are
22 involved, if I understand it correctly.

23 A. Yes. The Iowa Plan went into effect in
24 March of 2001. And to be a participant in the Iowa
25 Plan, the producer would have had to send in their

1 registration information by December 31st of 2001.
2 That would enroll the producer and their feedlot in
3 the Iowa Plan.

4 The department then would do an in-house
5 assessment based upon the information that was
6 submitted by the producer, the location of the
7 feedlot, the number of cattle that they fed.

8 Our department staff would pull up aerial
9 photos that they had access to to determine a ranking
10 based upon that feedlot and the environmental risk.

11 So they would be assigned a ranking of low,
12 medium or high priority based upon that in-house
13 assessment. So that was done strictly in Des Moines
14 based upon the materials that were submitted by the
15 producer and other information that was widely
16 acceptable.

17 They would follow that up with a letter, a
18 response letter to the producer stating what their
19 ranking was and basically when they could expect to
20 have an on-site visit by one of the field staff from
21 the DNR.

22 Q. Now, I'd like to step back for a second.
23 The assignment priority. You mentioned there was
24 high, medium or low. You mentioned the environmental
25 harm or environmental threat.

1 Does that mean a low priority facility for
2 the Iowa Plan, that there was low risk of
3 environmental harm?

4 A. It meant that there was a probable lower
5 risk based upon the information that was provided,
6 and that's why the on-site assessment followed up to
7 determine whether or not that in-house assessment was
8 really correct.

9 So it was basically an estimate based upon
10 that information, and a low priority feedlot would be
11 estimated to have a lower environmental risk.

12 Q. In relation to the higher priority facility;
13 is that correct?

14 A. Yes.

15 Q. So the high priority assignments within the
16 Iowa Plan, were those closest to streams? What were
17 some of the bases behind the assignment?

18 A. It would be the size of the feedlot and,
19 thereby, how much manure would be generated at that
20 feedlot; the distance from a stream which would have
21 an impact on possibility of runoff from the feedlot
22 getting to the stream; also the slope of the land
23 from the feedlot to the stream, which, of course,
24 would have a bearing on the chance of runoff from a
25 feedlot getting to a stream.

1 that's an issue.

2 THE ADMINISTRATIVE LAW JUDGE: Thanks.

3 BY MR. BREEDLOVE:

4 Q. Mr. Tinker, I just want to clarify that this
5 in-house assessment--the high, medium or low priority
6 assessment--was that in any way a determination of
7 actual harm to the environment or assessment of
8 impact, other than potential?

9 A. No, it was a potential--

10 Q. Sorry.

11 A. --it was a potential for environmental
12 damage.

13 Q. And was that for the sole purpose of
14 assigning a priority for the Iowa Plan?

15 A. That was the department's purpose for
16 assigning that. There were other agencies that
17 utilized that ranking, but that was the sole purpose
18 for the department.

19 Q. Okay. Thank you. So was this in-house
20 assessment value, was that then followed up with an
21 on-site assessment?

22 A. Yes, that was the protocol. An on-site
23 assessment would be scheduled with the producer, and
24 those assessments were based upon the in-house
25 ranking.

1 applying for permits, being permitted and
2 constructing, while the low priorities were still
3 having on-site assessments.

4 And so the structure for the plan was to get
5 the high priority started and have them working
6 through the system while we were still doing on-sites
7 for the low priorities.

8 They all had the same schedule. They all
9 needed to begin and continue making progress
10 throughout because we knew if they all came in at the
11 end, we would have a bottleneck that we wouldn't be
12 able to handle.

13 So the plan was to get everybody on the same
14 schedule so those that had early assessments would be
15 permitted and out of the way by the time the lower
16 priority assessments came in.

17 Q. You mentioned that each of the facilities
18 that received an on-site assessment had different
19 time lines and they were all the same for each of the
20 rankings. Could you elaborate on what some of those
21 requirements were, the time lines.

22 A. Once they had their on-site assessment in
23 which the field office staff would assess whether the
24 in-house ranking was correct and would do a general
25 assessment and discuss with the producer in general

1 what kinds of control structures could be utilized,
2 the producer then needed to retain an engineer, and I
3 believe it was in 45 days inform the department of
4 who that engineer was.

5 They then needed to follow up--and, of
6 course, they had an engineer on staff now to assist
7 them with that. They would follow up with submitting
8 a preliminary plan, basically what they intended to
9 do and a plan of action, which is a time line which
10 they will meet different goals throughout that
11 compliance period, when they will submit their full
12 engineered design and permit application, when they
13 will begin construction and when construction will be
14 complete and they will be able to operate that
15 facility based upon the design.

16 So these were dates that the producer
17 submitted to the department. The department
18 determined whether or not those dates that were
19 submitted by the producer were acceptable and then
20 responded with a letter to the producer saying, "This
21 plan of action is acceptable," or, "It's unacceptable
22 due to this. Please submit something that the
23 department will approve."

24 Q. So the plan of action--submission of
25 engineer's name, plan of action, those dates and time

1 So, obviously, every feedlot had had a
2 different series of deadlines, but those deadlines
3 were what was required for that feedlot.

4 And if a feedlot for some reason wasn't able
5 to meet that deadline, they needed to share with the
6 department what was holding them up from meeting that
7 deadline and providing us a new deadline, which the
8 department in most cases, as far as I know probably
9 in every case, would accept as long as the rationale
10 for not meeting that deadline was acceptable.

11 So we continued to work with those feedlots
12 to make sure that they continued to make progress.

13 Q. And so these deadlines-- The facility had
14 to meet these deadlines in order to meet the
15 requirements of the Iowa Plan?

16 A. Yes, they had to move forward.

17 Q. And in order to receive the amnesty that
18 that plan would provide?

19 A. Yes.

20 Q. What was IDNR's expectations at the
21 conclusion of this plan?

22 A. We expected to have feedlots that needed to
23 be permitted to have permits in hand and controls in
24 place to properly protect our streams.

25 Q. Overall, would you say the plan was

1 successful?

2 A. We got an additional 100 feedlots with
3 controls in place and NPDES permits they're operating
4 by. So, yes. Although I would say we had some
5 difficulties, it was successful because of our
6 accomplishment in getting more feedlots with proper
7 runoff controls and permits.

8 Q. So could you elaborate on some of those
9 difficulties you just mentioned.

10 A. Well, as much as we tried to not have a
11 stockpile or backlog of permitting at the end of the
12 plan, it did happen. We had a large number of
13 applications that did come in toward the end of the
14 plan. We also had a finite staff. We were not
15 budgeted to hire additional review engineers to
16 review the permit applications and issue permits.

17 Also at that time we were having record
18 applications for confinement construction permits.

19 Q. You might elaborate for the Court what the
20 difference is between the open feedlots and
21 confinement operations if you're going to discuss it.

22 A. Okay. Open feedlots by Iowa law are
23 partially roofed or nonroofed, whereas confinements
24 are totally roofed. The Iowa legislature has
25 mandated that there is a much stricter and much

1 Q. Would you say that the backlog was--the
2 applications that weren't submitted timely pursuant
3 to the Iowa Plan, was that a significant factor in
4 causing the delay in approving permits?

5 A. I wouldn't call it a significant factor. It
6 was a factor because we did have some applications
7 that were delayed in being submitted, which did add
8 to that backlog. But I wouldn't say it was a
9 significant factor because it was the large number
10 that were on schedule that were also coming in at
11 that time.

12 So it contributed to it, it made the backlog
13 worse. But I don't think we had enough feedlots that
14 were that delayed that it would have caused a
15 significant backlog.

16 Q. Mr. Tinker, are you familiar with the Lowell
17 Vos feedlot?

18 A. I have not been to the feedlot, but I am
19 aware of it.

20 Q. Was Mr. Vos' feedlot a participant in the
21 Iowa Plan?

22 A. They did register, yes.

23 Q. Okay. I'd like to step back in time a
24 little bit and look at Complainant's Exhibit No. 9.

25 MR. BREEDLOVE: Your Honor, may I approach

1 that Mr. Vos did not have containment for the 25-year
2 storm?

3 A. Yes; that would be correct.

4 Q. And so the submission of an application for
5 this-- Let me rephrase that. So the permit
6 application-- I think we've covered that, Mr. Tinker.

7 Let's move on to Exhibit No. 10, please,
8 Complainant's Exhibit No. 10. Could you please
9 identify Exhibit No. 10 for the Court.

10 A. This is a June 8, 2000, letter from the Iowa
11 Department of Natural Resources to Lowell Vos stating
12 that while reviewing existing files for open
13 feedlots, they recognize that this feedlot had been
14 issued an operation permit in 1991, which would have
15 expired in 1996.

16 They asked Mr. Vos to review his feedlot to
17 see if it met the requirements for needing an NPDES
18 permit. They apparently enclosed an application form
19 for an NPDES permit and asked him to review if those
20 requirements were met. And, if so, to please submit
21 a renewal for that NPDES permit.

22 Q. Did you receive any response from Mr. Vos?

23 A. No.

24 MR. MCAFEE: Your Honor, I didn't want to
25 interrupt the witness. The same would go for Exhibit

1 10 and Exhibit 11 regarding the Court's ruling
2 prehearing?

3 THE ADMINISTRATIVE LAW JUDGE: Yes.

4 MR. McAFEE: Thank you.

5 THE ADMINISTRATIVE LAW JUDGE: I have no
6 problem with you reminding me of that. So thank you.

7 BY MR. BREEDLOVE:

8 Q. Mr. Tinker, before we turn to Complainant's
9 Exhibit No. 11, I just want to step back on the NPDES
10 permit, construction permit. Did that permit create
11 a duty for Mr. Vos to construct controls for the
12 facility?

13 A. Yes.

14 Q. Did the NPDES permit create a duty for
15 Mr. Vos to contain all runoff from this facility,
16 except for that 25-year, 24-hour storm?

17 A. Yes.

18 Q. Now, turning to Complainant's Exhibit 11--
19 and you can just summarize--can you please summarize
20 the document identified as Complainant's Exhibit 11.

21 A. This is a September 13, 2000, letter from
22 the Department of Natural Resources to Lowell Vos,
23 which is a follow-up to the June 8th letter stating
24 the same things. "We haven't received a permit
25 renewal, please determine whether your feedlot needs

1 Q. I believe you stated earlier that the Iowa
2 Plan was intended for unpermitted facilities?

3 A. Yes; that's correct.

4 Q. Now, at this point in time why was Mr. Vos
5 allowed into the Iowa Plan since he already had an
6 NPDES and failed to meet your requirements of that?

7 A. It would have been oversight on the
8 department's part.

9 Q. But he was allowed to participate,
10 nonetheless?

11 A. Yes.

12 Q. So when he was allowed to participate, did
13 that grant him the benefits of being in the Iowa
14 Plan, the five years' amnesty--excuse me--the five
15 years to come into compliance and the benefit of the
16 amnesty provided?

17 A. Yes, that was provided to him.

18 Q. If he met the requirements of the Iowa Plan?

19 A. Yes.

20 Q. Could you please turn to Complainant's
21 Exhibit No. 13, Mr. Tinker. Please identify that for
22 the Court and summarize its contents.

23 A. This is a May 15, 2001, letter from the
24 department to Lowell Vos acknowledging that we--the
25 department had received his registration for his

1 facility, letting him know that an in-house
2 assessment would be conducted and he would receive
3 information on that.

4 Q. So this is basically--to summarize, it's
5 telling him that he's been allowed in the Iowa Plan?

6 A. Yes.

7 Q. Now, please focus your attention on
8 Complainant's Exhibit 14. Please summarize the
9 contents of this letter for the Court.

10 A. This is an October 16, 2001, letter from the
11 Department of Natural Resources to Lowell Vos
12 indicating that the in-house assessment for his
13 feedlot has been conducted; that that assessment
14 resulted in 132 points for his feedlot, meaning he
15 would be in the medium priority group.

16 Q. Did it establish a date for his on-site
17 assessment pursuant to the plan?

18 A. It stated that medium priority feedlots
19 should receive an on-site assessment sometime in 2003
20 or 2004.

21 Q. Now, Mr. Prier is expected to testify to
22 much of the requirements that--the steps in meeting
23 the requirements of the Iowa Plan or in this case not
24 meeting the Iowa Plan.

25 I'd like to focus your attention to

1 Complainant's Exhibit 22 that was issued on April 28,
2 2005. Would you please identify that exhibit for the
3 Court.

4 A. This is a certified letter dated April 28,
5 2005, from the Department of Natural Resources to
6 Lowell Vos and Lowell Vos Feedlot.

7 Q. I'd like to focus your attention to the
8 sentence in bold in the center of that. Could you
9 please read that for the Court.

10 A. It states, "If your final engineering plan
11 is not submitted within 30 days of your receipt of
12 this letter, your facility will no longer be a
13 participant in the Iowa Plan."

14 Q. So just to summarize, I know-- Are you
15 familiar with the history of this facility?

16 A. Somewhat.

17 Q. Can you just perhaps summarize some of the
18 events that might have led up to the issuance of this
19 letter.

20 A. Mr. Vos and his engineer submitted a plan of
21 action by which he would submit final engineering
22 plans so that those plans could be reviewed and a
23 construction permit issued.

24 And he was deficient in getting those plans
25 submitted in a timely fashion, and so this is a

1 A. "Facilities no longer participating in the
 2 Iowa Plan are no longer covered under its amnesty
 3 provisions and, as a result, could be subject to
 4 inspections, penalties, court injunctions or other
 5 appropriate remedies by the DNR, the Iowa Attorney
 6 General or the EPA for violations of the Clean Water
 7 Act or Iowa law."

8 Q. What is IDNR's position in regard to the
 9 amnesty provided to Mr. Vos pursuant to the Iowa
 10 Plan?

11 A. After this letter, he no longer had any.

12 Q. Provided he didn't submit his plans within
 13 30 days?

14 A. Correct; yes.

15 Q. To your knowledge, did he submit those
 16 plans?

17 A. No.

18 Q. So is it IDNR's position that Mr. Vos was no
 19 longer to receive the benefit of the amnesty provided
 20 by the Iowa Plan?

21 A. That's correct.

22 Q. Therefore, IDNR could bring suit?

23 A. That's correct.

24 Q. Mr. Tinker, Respondent in his briefs has
 25 presented some arguments in regard to failure on the

1 to object to that question, asking the witness to--

2 THE ADMINISTRATIVE LAW JUDGE: Sustained.

3 Don't phrase it that way. I'll let you ask one more
4 time. Maybe you can ask something that would help
5 direct his attention if you feel that there's
6 something he omitted, but his memory may be exhausted
7 on this and you'll have to live with that.

8 MR. BREEDLOVE: I understand, Your Honor.
9 My apologies.

10 BY MR. BREEDLOVE:

11 Q. Mr. Tinker, during the implementation of the
12 Iowa Plan, was there a period of time during the Iowa
13 Plan where IDNR assessed--

14 MR. BREEDLOVE: Can I have a moment, Your
15 Honor?

16 THE ADMINISTRATIVE LAW JUDGE: Sure. We're
17 off the record for a minute.

18 MR. BREEDLOVE: Thank you.

19 (Off-the-record discussion.)

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

22 MR. BREEDLOVE: After careful consideration,
23 I have no further questions at this time.

24 THE ADMINISTRATIVE LAW JUDGE: Okay. Do you
25 need a minute?

1 MR. McAFEE: Please.

2 THE ADMINISTRATIVE LAW JUDGE: Sure. We'll
3 take a five-minute break.

4 (Short recess.)

5 THE ADMINISTRATIVE LAW JUDGE: Let's go back
6 on the record.

7 CROSS-EXAMINATION

8 BY MR. McAFEE:

9 Q. Good morning, Mr. Tinker. I am Eldon
10 McAfee. I guess you know who I am; right?

11 A. Yes, I do.

12 Q. As you're aware, I'm representing Lowell Vos.
13 today in this action, and I'm going to be asking you
14 a few questions regarding testimony primarily
15 regarding the Iowa Plan, and then we'll get into the
16 permitting process some.

17 I just want to start with--you testified to
18 this--you came to the department in your current
19 position--which is the position you're still in,
20 right?

21 A. That's correct.

22 Q. --you came to the department in April of
23 2003?

24 A. Yes.

25 Q. And the Iowa Plan actually began in March of

1 2001; is that right?

2 A. Yes.

3 Q. So any of the discussions about--that would
4 have occurred about implementing, beginning
5 implementation of the Iowa Plan, developing the Iowa
6 Plan, you were not at the Iowa Department of Natural
7 Resources at that time?

8 A. That's correct.

9 Q. I want you to turn to in the notebook--
10 they're Respondent's exhibits--turn to Exhibit 2.
11 And what do you see there? What is Exhibit 2?

12 A. This is a letter on Iowa DNR letterhead
13 to--it's dated March 22, 2001. It's directed to Dale
14 Hutton, Director of Water Wetlands and Pesticides at
15 EPA in Kansas City, and it's cosigned by Jeff Vonk,
16 Director of the Department of Natural Resources, and
17 David Petty, past president of the Iowa Cattlemen's
18 Association.

19 Q. And so going by the date on the letter,
20 which was contemporaneous with the beginning of the
21 Iowa Plan, but you were not at the department at that
22 time?

23 A. That's correct.

24 Q. And so you wouldn't have any individual
25 knowledge regarding this letter and Mr. Vonk's

1 signature to it and any discussions within the
2 department regarding this letter; is that right?

3 A. Not prior to the letter being signed; that's
4 correct.

5 Q. Okay. Have you since become aware of this
6 letter?

7 A. Yes.

8 Q. And how have you become aware of it?

9 A. When I came to the department it was part of
10 the documents that we had accumulated pertaining to
11 the Iowa Plan for registration.

12 Q. And did you have reason to look at the
13 letter for anything to do with your job
14 responsibilities?

15 A. Yes.

16 Q. And what was that reason?

17 A. To familiarize myself with the Iowa Plan and
18 the interactions that had gone on between IDNR, ICA
19 and EPA Region 7.

20 Q. Okay. Would you look at the first page of
21 Exhibit 2. There's a paragraph about two-thirds of
22 the way down, the first paragraph following the
23 bullet points.

24 A. Yes.

25 Q. Would you read that paragraph into the

1 record for us, please.

2 A. "The plan has the goal of bringing open
3 feedlots into compliance within five years. It
4 recognizes the real world limitations of staffing and
5 time for the DNR, time and money for cattlemen and
6 infrastructure problems with existing engineering,
7 cost share and contractors."

8 Q. Now, it says quite a few things there.
9 Let's take them a few at a time. First of all, the
10 real world limitations of staffing time for the DNR.
11 I believe you've testified to that this morning,
12 haven't you?

13 A. Yes.

14 Q. And apparently at the time this letter was
15 written that was already recognized to be a potential
16 concern?

17 A. Yes.

18 Q. Okay. And then it also refers to time and
19 money for cattlemen. Tell me what that means for
20 you.

21 A. There are only so many engineering firms in
22 the Midwest that producers could hire to develop
23 plans for them, and those engineering firms only have
24 so many staff and so much time.

25 So cattlemen are limited by the ability to

1 get an engineer who's got time to develop a plan for
2 them and follow through the permitting process, the
3 construction process.

4 The money is obvious, that cattlemen are
5 going to have to spend some money to construct these
6 facilities, to pay their engineers, to pay the
7 contractors that would move the dirt.

8 There was work being done to assist
9 cattlemen with getting EQIP money, and such, but we
10 acknowledged the fact that some producers may have
11 difficulty getting the financing to build the
12 structures.

13 Q. Gene, you used the term EQIP. Maybe we
14 ought to provide some explanation for the record what
15 that is. What does EQIP--is that E-Q-I-P?

16 A. Yes; that's correct.

17 Q. --and what does that stand for?

18 A. That's a USDA program that is implemented by
19 the Natural Resources Conservation Service, which is
20 cost share dollars made available to producers to
21 implement programs that will protect the environment.

22 Q. And as we sit here right now, do you know
23 what the acronym stands for? I'm not sure I do.

24 A. Environmental Quality Incentive Program.

25 Q. Thank you. Continuing on with your

1 discussion of this paragraph, also the--it refers to
2 the infrastructure problems with existing
3 engineering. Is that what you've already discussed?

4 A. Yes.

5 Q. Okay. And then the cost share, would that
6 be EQIP?

7 A. Yes.

8 Q. And maybe any other cost share programs?

9 A. That's correct. There may be others
10 available, as well.

11 Q. Were there any others available that you
12 remember during the Iowa Plan?

13 A. There may have been cost share available in
14 individual watersheds as part of watershed
15 improvement programs, but I'm not positive on that.
16 So there may have been additional funds available,
17 but I'm not sure.

18 Q. And then the final item in that paragraph,
19 referring to the real world limitations, cost share
20 contractors, would you, if you can, explain that a
21 little bit, what that means to you.

22 A. Yes. There's-- You know, there's only so
23 many businesses that are in the business of moving
24 dirt and building such structures. And they have to
25 have adequate work to properly finance their

1 operations.

2 So the work available supports so many
3 firms. And so if there's not adequate work
4 available, there's firms that can't pay their bills,
5 and, thereby, they discontinue operating. So there's
6 a limited amount of contractors available to do this
7 kind of work.

8 Q. Okay. And did you see-- During the period
9 of the Iowa Plan, did you see these things come to
10 bear, so to speak?

11 A. Yes, many of them.

12 Q. Any of those you discussed that actually
13 didn't turn out to be a concern?

14 A. I cannot address the money issue because I
15 don't know the financial status of the operators.

16 Q. Would you turn to the next page, please, of
17 Exhibit 27. The very last sentence says--and I'll
18 just read it into the record--"The DNR and ICA are
19 also requesting the USEPA to agree to inspect only
20 unregistered, unpermitted lots when they resume
21 inspections."

22 Do you see that?

23 A. Yes.

24 Q. And maybe I should have started a little
25 earlier because it uses the term "resume

1 inspections." Do you know what's meant by that?

2 A. There was a request made to EPA to
3 discontinue inspections and compliance visits in Iowa
4 feedlots to allow the state's producers to become
5 compliant with adequate control structures.

6 Q. So those inspections if a feedlot
7 registered, they were--EPA was not to inspect someone
8 who was registered when they started doing the
9 inspections again; right?

10 A. Could you be a little more definitive,
11 please.

12 Q. Sure. Let's go to the sentence above it,
13 please. The sentence above it says, "The DNR and the
14 ICA are requesting that the USEPA continue to suspend
15 federal inspections until May 1, allowing time to
16 publicize the program to open feedlot producers and
17 give them time to sign up for the program."

18 Do you see that?

19 A. Yes.

20 Q. Now, that puts it in better context as to
21 what is meant by "resume inspections."

22 A. Yes.

23 Q. Okay. Could you tell us again what that
24 means to you when you were implementing the Iowa
25 Plan.

1 A. When the Iowa Plan was being developed,
2 basically in response to visits that EPA was
3 conducting, they requested EPA to discontinue those
4 inspections while the Iowa Plan was developed between
5 ICA and Iowa DNR.

6 And so the resuming would refer to EPA then
7 being able to resume inspections from the time that
8 they said they would not inspect during development
9 of the Iowa Plan.

10 Q. And did that, in fact, occur, to your
11 knowledge?

12 A. The resumption?

13 Q. Did-- When the Iowa Plan was put in place,
14 did USEPA agree to inspect only unregistered and
15 unpermitted lots when they resumed inspections?

16 A. I'm not sure what EPA agreed to. I do know
17 that they held off on some inspections, but I don't
18 know if they had agreed--I wasn't a party to that,
19 I'm sorry.

20 Q. No, I understand. I guess I'm not asking
21 you what you know they agreed to. I'm asking you
22 during your experience with the Iowa Plan, did EPA
23 not inspect--let me say it differently--did EPA only
24 inspect unregistered, unpermitted lots during the
25 period of the Iowa Plan?

1 A. Yes, feedlots that were not in the Iowa
2 Plan.

3 Q. Okay. So again, I'm not asking you if you
4 know what was agreed to, I'm asking you what actually
5 did happen, and you were in your position from 2003
6 on, which would include the rest of the Iowa Plan.
7 During that time it's your understanding and your
8 experience that EPA did not inspect feedlots in Iowa
9 unless they were not in the Iowa Plan?

10 A. Yes.

11 Q. Okay. And I guess maybe we should clarify
12 at least your understanding. When it says "inspect,"
13 that may not be as ominous to people reading that,
14 okay, so you don't get inspected.

15 But what normally followed an EPA
16 inspection? If there was something wrong, what
17 followed an EPA inspection?

18 A. I guess I haven't ever participated in any
19 EPA inspections. I do know they get a follow-up
20 letter. I'm not sure what's in those follow-up
21 letters because I haven't seen them.

22 Q. To your knowledge, does--following an EPA
23 inspection if there is any noncompliance can a
24 producer be subject to an enforcement action by EPA?

25 A. Yes, they can be.

1 Q. Okay. Now, let's go on to-- Well, let me
2 back up. To your knowledge--and again, you weren't
3 with the department at the time this letter was sent
4 in--to your knowledge, did EPA disagree with anything
5 in this letter? I'm asking you to your knowledge.

6 A. The March 22nd letter?

7 Q. Yes.

8 A. The question again?

9 Q. The question is, to your knowledge did EPA
10 disagree with anything in this letter regarding the
11 Iowa Plan?

12 A. No, they did not.

13 Q. Okay. Let's go to Exhibit 3, which is the
14 actual Iowa Plan. Down at the bottom of Page 1 of
15 this document--and-- Well, let me back up a second.
16 To your knowledge, was this document entered into
17 rules anywhere, regulations?

18 A. Not to my knowledge.

19 Q. Okay. To your knowledge, it wasn't adopted
20 into Iowa regulations?

21 A. No.

22 Q. Okay. Down there-- There's a Footnote 2,
23 and I want to have you--we want to discuss that a
24 little bit. But you testified earlier--

25 Before we get to that, you testified earlier

1 that one of the reasons for the Iowa Plan was that
2 DNR had been lax in its regulation of large open
3 feedlots.

4 A. Yes.

5 Q. And you weren't with the department at that
6 time, though; right?

7 A. That's correct.

8 Q. Are you making that testimony based on
9 what's in this Iowa Plan document?

10 A. That and based upon what my supervisor told
11 me when I was hired.

12 Q. Okay. And there is a-- Well, so there was
13 this at least understanding reflected in this
14 document that maybe DNR wasn't enforcing the NPDES
15 regulations as stringently as they should?

16 A. Yes.

17 Q. And that maybe some feedlots that needed an
18 NPDES permit didn't have one?

19 A. Yes.

20 Q. Okay. And I just want to clarify this, and
21 this is a legal issue, but Footnote 2--

22 MR. BREEDLOVE: Objection, Your Honor. I
23 think he's going to ask the witness for legal
24 conclusions.

25 THE ADMINISTRATIVE LAW JUDGE: Why don't you

1 wait and see what his question is.

2 BY MR. McAFEE:

3 Q. Please read to us Footnote 2.

4 A. "Under current federal law, livestock
5 operations with more than 1,000 animal units are not
6 required to have an NPDES permit if the operation
7 discharges only in the event of a 25-year, 24-hour
8 storm."

9 Q. And are you aware of what that footnote
10 means to you?

11 A. Yes.

12 Q. And what does it mean?

13 A. It means that if a large CAFO only
14 discharges when there is at least a 25-year, 24-hour
15 storm, that NPDES permit would not be needed.

16 Q. Okay. So based on that provision in
17 Footnote 2 there, would that be that a feedlot in
18 Iowa that was larger than a thousand head at that
19 time and maybe had been for a number of years and
20 didn't have an NPDES permit that they could still be
21 in compliance with federal and state law if they
22 complied with this requirement?

23 A. Yes.

24 Q. Okay. So the fact that there were feedlots
25 larger than a thousand head out there that didn't

1 have NPDES permits did not automatically mean they
2 were out of compliance; is that correct?

3 A. That's correct.

4 Q. If you'd turn to the next page, please.
5 There's a Footnote 4 at the bottom of that page that
6 essentially, in my opinion anyway, says essentially
7 the same thing, but I'd like to have you read that
8 and maybe read that into the record, please.

9 A. "Previously the Iowa DNR has not required
10 operating permits for open feedlots with more than a
11 thousand animal units if because of location, site
12 topography or other factors no waste from the feedlot
13 are discharged into a stream or other water of the
14 state."

15 Q. Thank you. Is that your understanding of
16 the regulations also?

17 A. Yes; that would be correct.

18 Q. Okay. So again, that goes back to why there
19 were some feedlots out there with more than a
20 thousand head that did not have NPDES permits. I'm
21 not saying all, by any means, but some that were
22 larger than that would not have been out of
23 compliance with state and federal law?

24 A. Possibly.

25 Q. Okay. Gene, have you been to the Lowell Vos

1 feedlot site?

2 A. No, I have not.

3 Q. In your work, do you visit quite a few
4 feedlots?

5 A. I did during implementation of the Iowa
6 Plan. I have not visited nearly as many lately.

7 Q. Okay. But you do get to a fair number of
8 feedlots or did get to a fair number of feedlots?

9 A. Yes.

10 Q. Okay. Are you familiar with a program or an
11 alternative in the Iowa regulations for a feedlot to
12 use what's called an alternative technology system
13 for feedlot runoff control?

14 A. Yes.

15 Q. Tell us what that means and a little bit
16 about that program.

17 MR. BREEDLOVE: Objection, Your Honor. This
18 is beyond the scope of the direct. I mean,
19 alternative programs, this isn't anything that was
20 discussed during the direct examination.

21 THE ADMINISTRATIVE LAW JUDGE: Okay. I
22 already alluded to the way I handle this. I mean,
23 it's like do you want it now or do you want it later?
24 Because I probably would allow Mr. McAfee, once I
25 hear from him, to later recall Mr. Tinker as a

1 hostile witness and ask him questions about that on
2 direct as opposed to on cross.

3 But do you want to respond to Mr. Breedlove's
4 objection that it's beyond the scope of direct?

5 MR. McAFEE: Yes, I would, Your Honor.

6 THE ADMINISTRATIVE LAW JUDGE: Okay.

7 MR. McAFEE: This witness is on our witness
8 list, too, as--you've used the term "hostile
9 witness." I don't want Mr. Tinker to take it--

10 THE ADMINISTRATIVE LAW JUDGE: That does not
11 mean literally. That's just the jargon that we use.

12 MR. McAFEE: --and I have been informed by
13 the Iowa Department of Natural Resources for him to
14 appear separately, other than when he's here right
15 now, I would need to subpoena him. And I would be
16 glad to do that, but I felt the best way to handle it
17 just for convenience of the witness is just to do it
18 all at once.

19 So this is really a combination of direct
20 examination and cross-examination.

21 MR. BREEDLOVE: Your Honor, I don't have any
22 objections if that's what it's for.

23 THE ADMINISTRATIVE LAW JUDGE: Okay.

24 MR. BREEDLOVE: When he's done, he's done,
25 and he's not going to be called back later.

1 THE ADMINISTRATIVE LAW JUDGE: Well, he's
2 not closing the door on that.

3 MR. BREEDLOVE: I understand that, Your
4 Honor.

5 THE ADMINISTRATIVE LAW JUDGE: He just might
6 have to get a subpoena, apparently, to do that and
7 pay for the witness' travel fees, et cetera.

8 All right. So I think I've made my ruling.
9 Go ahead with your questions, Mr. McAfee.

10 MR. McAFEE: Thank you.

11 BY MR. McAFEE:

12 Q. Do you remember the question, Gene, or
13 should I--

14 A. You better rephrase.

15 Q. I think I can come close to this. I was
16 just asking you to explain your knowledge of what's
17 called the alternative technology systems, what they
18 are, let's start with that.

19 A. Alternative technology systems have been
20 utilized by the department for permitted feedlots
21 that did not choose to build a settled open feedlot
22 effluent basin, also known as a runoff control basin.

23 So that rather than retain that settled open
24 feedlot effluent and later land-apply it, it would
25 actually treat it in a vegetated area. So it would

1 be a treatment system as opposed to a collection and
2 land application system.

3 Q. And under the Iowa DNR regulations, are
4 those systems recognized as a--as being in compliance
5 with the requirements to control runoff from a
6 feedlot of over a thousand head?

7 A. If the monitoring results from those
8 feedlots indicates equivalent performance to a
9 standard system with a basin, they would be
10 considered to be in compliance, yes.

11 Q. Do you recall when the regulations
12 authorizing the alternative technology system went
13 into place?

14 A. Which regulations?

15 Q. And if you don't recall, that will be part
16 of the posthearing briefs. And that's, of course, a
17 matter of record when those regulations went into
18 place.

19 But I just thought maybe you recalled when
20 the Iowa regulations setting in the standard for
21 alternative technology systems went into place.

22 A. The requirement to allow those systems would
23 have been in spring of '05 when 805 was passed by the
24 Iowa Legislature. The actual design and design
25 criteria for those systems would have been adopted

1 later when the DNR adopted their rules, which I think
2 was later in 2005.

3 Q. You do very well with dates with so many to
4 remember, I think. I think the record will reflect
5 that when we get to the briefing part of this.

6 You just mentioned 805. Let's clarify for
7 the record, are you referring to House File 805 or
8 805? Would that be a number corresponding to
9 legislation adopted by the Iowa Legislature?

10 A. I'm not sure if it was a House File or
11 Senate File. But, yes, it was due to legislation
12 from the Legislature.

13 Q. That is the Iowa Legislature that you're
14 referring to; right?

15 A. Yes.

16 Q. Okay. Now, do you know if Mr. Vos has an
17 alternative technology system permit?

18 A. He does not.

19 Q. Okay. So what-- The reason I'm asking you
20 about this is--a little background here. You just
21 testified as to when those regulations went into
22 place, late 2005, so give me-- How many years is
23 that after the Iowa Plan went into effect?

24 A. Well, it would have been--if the Iowa
25 Code--if 805 would have gone into effect roughly four

1 years after the Iowa Plan started and if the
2 administrative rules were adopted in late '05, that
3 would be about four-and-a-half years.

4 Q. Now, were-- Quite a few producers during
5 this period of the Iowa Plan were--in your
6 experience, there were producers interested in doing
7 alternative technology systems?

8 A. There was a lot of discussion. I don't know
9 if there were a lot of producers interested in
10 actually implementing a system.

11 Q. And why was there a lot of discussion?

12 A. Because this was the first time such
13 treatment systems would have been allowed for animal
14 feeding operations. And since we had some feedlots
15 in the State of Iowa that needed an NPDES permit,
16 there was interest if they could use a treatment
17 system like an alternative technology in place of the
18 standard basin to hold and land apply.

19 Q. And why would a producer want to use an
20 alternative technology system instead of a
21 traditional basin system?

22 A. It could potentially be less expensive to
23 build. They would not have a basin which would be
24 containing liquid and they wouldn't have all of that
25 settled open feedlot effluent that would need to be

1 land applied.

2 Q. And the concern of the producer to have all
3 of that settled open feedlot effluent to land apply,
4 is that a cost issue also?

5 A. Yes, it would cost to apply that.

6 Q. Okay. Do you still work-- As a regulator
7 with the Iowa Department of Natural Resources, do you
8 still work with feedlots that do have alternative
9 technology systems in place?

10 A. I work with those feedlots, but not as a
11 regulator..

12 Q. Okay.

13 A. I am not on the enforcement part of the
14 division.

15 Q. How do you work with them?

16 A. I share with them what the department's
17 requirements are and what they need to do to meet
18 those requirements. I try to assist those producers
19 in making sure that they're aware of the standards
20 that must be met.

21 Q. Okay. Now, I want to get back to the Iowa
22 Plan here and some of these real world limitations we
23 talked about. Let's talk about Lowell Vos' feedlot
24 here.

25 First of all, do you know when Lowell

1 registered for the Iowa Plan?

2 A. I believe it was in April of '01.

3 Q. Yeah. And I think that was one of the
4 exhibits that Mr. Breedlove went through with you.

5 MR. BREEDLOVE: I think it's 12.

6 MR. McAFEE: Thank you.

7 Q. I believe it's Exhibit 12. Do you have a
8 date there on that, Mr. Tinker?

9 A. Yes, it's April 4 of 2001.

10 Q. And I know you weren't with the department
11 at the time, but would you consider that, based on
12 what you know, to be fairly soon after registration
13 was available?

14 A. Yes.

15 Q. Then I believe in the record, then, that
16 Mr. Breedlove went through with you you talked about
17 the in-house assessment that was performed. And then
18 I don't believe Mr. Breedlove went through this with
19 you, which I would like to.

20 Go to Exhibit 15, and that is a--could you
21 tell me what that is.

22 A. This is the on-site feedlot inspection form
23 for the Lowell Vos feedlot dated June 25 of 2003.

24 Q. And you didn't conduct this; is that right?

25 A. That's correct.

1 Q. But this is the next step in the process
2 that I think you talked about with Mr. Breedlove;
3 would that be right?

4 A. This would follow the in-house assessment,
5 yes.

6 Q. And again, you just testified to the date as
7 June 25 of 2003. So that is--is that approximately
8 two years after Mr. Vos registered?

9 A. Yes.

10 Q. Okay. During that two-year time period,
11 would Mr. Vos have been able to do anything to
12 proceed with compliance with the Iowa Plan as far as
13 getting engineering work or anything done?

14 A. He could have called the department and
15 asked for an on-site visit sooner, which was part of
16 the Iowa Plan that, if requested, the department
17 would visit sooner to start the process.

18 Q. And did the department do that?

19 A. They were not requested to.

20 Q. Okay. Did they do that in some cases?

21 A. I can't respond to that. I'm not aware.

22 Q. Okay. And so how do you know a producer
23 could have done that?

24 A. Because it states so that compliance--excuse
25 me--that visits would not be made unless there were

1 complaints or the producer requested a visit. So if
2 a producer requested a visit, we would go sooner.

3 Q. And your testimony is that was not done in
4 this case; is that right?

5 A. Not to my knowledge.

6 Q. Okay. As a result of the in-house
7 assessment, Mr. Vos' lot was given a medium priority;
8 is that right?

9 A. That's correct.

10 Q. And, do you know, as a result of the on-site
11 assessment, did he receive the same--or was that
12 priority confirmed?

13 A. It does not state so on the form, but my
14 understanding was he retained his medium ranking.

15 Q. What does a medium ranking, in your words,
16 mean?

17 A. It means that of all feedlots registered in
18 the program that needed to be assessed they would
19 fall into the group that would have somewhat of a
20 medium risk for environmental contamination and,
21 therefore, would move through the process with a
22 medium ranking.

23 Q. Now, I believe in your testimony from
24 questions from Mr. Breedlove he focused on the
25 in-house assessment, and there was some testimony

1 about what that really meant as far as environmental
2 risk. But after the-- The on-site assessment means
3 someone was out there and actually looked at the
4 feedlot; right?

5 A. That's correct.

6 Q. And I know Mr. Prier did that, and he'll be
7 testifying here also. But in your experience and
8 your understanding when that on-site assessment
9 confirmed the medium rating, is that a better picture
10 of the true environmental risk from Mr. Vos' feedlot?

11 MR. BREEDLOVE: Objection, Your Honor.
12 We're going to have a witness who was on-site to
13 specifically testify to this issue. Mr. Tinker has
14 already said that he hasn't been to the facility. He
15 really isn't in a position to speak to this. We will
16 have a witness to discuss this.

17 THE ADMINISTRATIVE LAW JUDGE: Mr. McAfee.

18 MR. McAFEE: Mr. Tinker has extensive
19 experience in this plan, in the Iowa Plan, with all
20 these documents and he--it's not like he's totally
21 removed from them. He works with them a lot. And I
22 just want his understanding of what the on-site
23 assessment meant.

24 THE ADMINISTRATIVE LAW JUDGE: I'll allow
25 the question.

1 THE WITNESS: Can you restate it, please.

2 (Last question read by the reporter.)

3 A. Yes; that would be correct.

4 BY MR. McAFEE:

5 Q. Okay. Again, he remained in the medium risk
6 category?

7 A. Yes; that's my understanding.

8 Q. Okay. I now want to go to the thin notebook
9 up there of the exhibits, which would be Respondent's
10 exhibits. Would you go to tab 4, which would be
11 Exhibit 4. Do you see that?

12 A. Yes, I do.

13 Q. Okay. Is this the-- What is this form?

14 A. This is the priority assessment form that
15 was used during the in-house assessment.

16 Q. And, of course, this is in the record and
17 you testified to some of this, I believe, but is this
18 the form and are these the factors that was used by
19 the DNR to determine the in-house assessment for
20 environmental risk for the Iowa Plan?

21 A. Yes.

22 Q. And some of the-- Could you just read the
23 headings of the factors there that were looked at.

24 A. Animal units, topography, distance to
25 surface water bodies and flow pattern of runoff,

1 drainage area of the feedlot, including clean water
2 drainage which would traverse the feedlot,
3 classification of surface water, direct conduits to
4 surface or groundwater, parent material, soil type,
5 quaternary thickness and additional comments.

6 Q. And then there's a series of points that are
7 assigned for these factors in each one of those
8 categories; right?

9 A. Yes; that's correct.

10 Q. And the way the system worked-- Well, how
11 did it work? Was more points good or bad; do you
12 remember?

13 A. More points received a higher point total,
14 which would result in a higher classification or a
15 greater risk rating.

16 Q. Okay. And if we go back to the big notebook
17 there, those exhibits--

18 MR. McAFEE: Your Honor, may we go off the
19 record for a minute?

20 THE ADMINISTRATIVE LAW JUDGE: Sure. We're
21 off the record.

22 (Off-the-record discussion.)

23 THE ADMINISTRATIVE LAW JUDGE: Let's go on
24 the record.

25

1 BY MR. McAFEE:

2 Q. Gene, could you please go to Complainant's
3 Exhibit 16.

4 A. Okay.

5 Q. Would you take a look at the second
6 paragraph of Exhibit 16. And does that paragraph
7 give the number of points for the Lowell Vos feedlot
8 as a result of the in-house assessment?

9 A. Yes, it does.

10 Q. And what were those points?

11 A. One-hundred-thirty-two.

12 Q. And then, again, is it your understanding
13 that the on-site assessment confirmed those points?

14 A. Yes, it was given the correct priority
15 rating.

16 MR. McAFEE: Okay. Your Honor, may we go
17 off the record?

18 THE ADMINISTRATIVE LAW JUDGE: Sure. We'll
19 go off the record.

20 (Off-the-record discussion.)

21 THE ADMINISTRATIVE LAW JUDGE: We'll see you
22 all at 2 o'clock.

23 (Recess at 12:55 p.m., until 2 o'clock p.m.
24 of the same day.)

25

1 AFTERNOON SESSION

2:10 p.m.

2 THE ADMINISTRATIVE LAW JUDGE: Please be
3 seated.

4 Mr. Tinker, come back to the stand, please.

5 EUGENE D. TINKER,

6 resumed his testimony as follows:

7 CROSS-EXAMINATION (RESUMED)

8 BY MR. McAFEE:

9 Q. Gene, I just want to go through a few
10 specific points here that you testified to this
11 morning and then a couple of things to maybe wrap
12 everything up. Then we should have this taken care
13 of, at least from the cross-examination standpoint.

14 You testified this morning, as I recall
15 according to my notes, regarding EPA's involvement in
16 the Iowa Plan. I think you testified that in your
17 opinion, anyway, they were an observer to the
18 program; is that right?

19 A. They were observed during the discussions to
20 develop the program.

21 Q. And, of course, you weren't present during
22 those discussions, though; right?

23 A. That's correct.

24 Q. Okay. I think Mr. Breedlove asked you if
25 EPA waived any rights of enforcement. Do you recall

1 that question?

2 A. Yes.

3 Q. And do you recall your answer?

4 A. Not specifically.

5 Q. Okay. Do you believe EPA waived any rights
6 of enforcement under the Iowa Plan?

7 A. I don't believe they waived any rights.

8 Q. Okay.

9 A. I believe they delayed some inspections or
10 did not conduct some inspections, but I don't believe
11 they waived any rights.

12 Q. And you're making that--that's your
13 understanding of the process; is that correct?

14 A. Yes.

15 Q. Have you-- Well, that's fine. You've
16 clarified that for me based on--I know you and I
17 had--I asked you questions regarding the--whether
18 inspections had occurred during the Iowa Plan, et
19 cetera.

20 And I think you've clarified with your
21 answer--what you're saying, if I understand you, is
22 that EPA did not conduct inspections during the
23 period of the Iowa Plan for feedlots that were in the
24 Iowa Plan; is that correct.

25 A. Yes; that would be correct.

1 Q. Okay. I now want to talk about the
2 questions Mr. Breedlove had for you regarding--it's
3 the 1991 permit, is the way I describe it, and that's
4 Exhibit 10.

5 THE ADMINISTRATIVE LAW JUDGE: Do you mean
6 EPA Exhibit 10?

7 MR. McAFEE: Yes, Your Honor, Complainant's
8 Exhibit 10.

9 THE ADMINISTRATIVE LAW JUDGE: All right.

10 MR. McAFEE: Excuse me. I was looking at
11 the letter. I'm sorry, it's Complainant's Exhibit 9.

12 THE ADMINISTRATIVE LAW JUDGE: Okay.

13 BY MR. McAFEE:

14 Q. Mr. Breedlove had some questions for you
15 about this permit. Have you looked at this before
16 today or before preparing for this hearing?

17 A. Yes.

18 Q. And what opportunity or what reason would
19 you have had to look at this, other than for this
20 hearing?

21 A. That was the reason.

22 Q. Okay. And you testified, as I understand it
23 and recall, that this is a determination by DNR that
24 Mr. Vos did not have significant controls, or
25 something to that effect I think was your testimony;

1 is that correct?

2 A. Mr. Vos applied for a permit--

3 Q. Yes.

4 A. --which to me would indicate that he knew he
5 needed controls on the feedlot. Otherwise, he would
6 not have applied for a permit.

7 Q. And you're basing that conclusion on what?

8 A. On the fact that I don't believe he would
9 have applied for a permit if he didn't know that he
10 needed controls on his feedlot.

11 Q. But do you know that for a fact?

12 A. No, I do not.

13 Q. So that would be your opinion or your--I may
14 use the word "speculation." If you don't agree with
15 that word, please feel free to disagree. But you are
16 speculating that's why he applied for the permit?

17 A. I'm basing that on my conversations with
18 cattle producers.

19 Q. What cattle producers?

20 A. Cattle producers in the State of Iowa that
21 I've worked with since I've been with the Iowa DNR.

22 Q. But it's not based on a conversation with
23 Lowell Vos, is it?

24 A. That's correct.

25 Q. That's correct that it's not based on a

1 conversation with him?

2 A. Yes.

3 Q. Okay. So let's make sure we're clear there.
4 You did not have a conversation with Lowell Vos about
5 whether--about why he applied for the 1991 permit?

6 A. That's correct; I did not have a
7 conversation with him.

8 Q. Now, you have testified as to what you
9 believe this represents, and if you look at that, you
10 know, I think you testified also that the permit
11 created a duty to construct; is that right?

12 A. That's my opinion, yes.

13 Q. And that the NPDES permit, which is part of
14 Exhibit 9, created a duty to contain runoff?

15 A. Yes; that would be correct.

16 Q. Let's take a look at the letter that is the
17 first page of Exhibit 9. And the first sentence
18 says, "Enclosed are the construction and operation
19 permits issued for the runoff control system to serve
20 your 2,000 head open feedlot."

21 Do you know if that runoff control system
22 was built?

23 A. I personally don't know. I've been told
24 that it was not.

25 Q. Okay. So if the runoff control system were

1 not built, then this construction permit is of no
2 consequence; is that correct?

3 A. The construction permit was not acted upon,
4 nothing was built based upon the permit that was
5 issued.

6 Q. And so couldn't it be that if the runoff
7 control system were not built, no duty was created
8 under this construction permit because he didn't
9 build it; that the construction permit only applies
10 if you build a runoff control system, and you have to
11 do it pursuant to this construction permit? Is that
12 correct?

13 A. I'm not exactly sure what you're asking.

14 Q. Well, again, Gene, you testified that this
15 permit created a duty upon Mr. Vos to construct
16 something. My point is, is it not--the duty under
17 the construction permit was if he built something,
18 not that he had to build something?

19 A. The construction permit works in conjunction
20 with the NPDES permit, and he could not implement his
21 NPDES permit without implementing his construction
22 permit because there would not be adequate controls
23 to abide by the requirements of the NPDES permit.

24 Q. Okay. I'm not sure you answered my
25 question, but let's go that direction. Let's look at

1 the NPDES permit.

2 Well, first of all, Gene, do you know
3 whether the--is there anything in the record or that
4 you're aware of where the department mandated that
5 Mr. Vos get a construction permit that is represented
6 by Exhibit 9?

7 A. I'm not aware of anything.

8 Q. So you're not aware that he was told in any
9 way, shape or form by the department, "You have to
10 get a construction permit"?

11 A. I personally do not have knowledge of that.

12 Q. Okay. And so we look then at the NPDES
13 permit that you've referred to. Would you flip back
14 to that.

15 A. Uh-huh. Yes, I see it.

16 Q. Okay. The first page of the NPDES permit,
17 which for purposes of the record is the fourth page
18 of Exhibit 9--

19 A. Yes.

20 Q. --there's some headings there, but the first
21 paragraph of the body, I'll call it, the last
22 sentence, would you read that into the record.

23 A. In the body?

24 Q. The body of--the first paragraph in the body
25 of that page is what I would call it, anyway. Do you

1 see what I'm referring to?

2 A. The last sentence of the first paragraph?

3 Q. Yes, please.

4 A. "You are authorized to operate the runoff
5 control system and to discharge the pollutants
6 specified in this permit in accordance with the
7 effluent limitations, monitoring requirements and
8 other terms set forth in this permit."

9 Q. Okay. My question is if he does not build
10 the feedlot runoff control system that is mentioned
11 here and if he does not discharge pollutants as
12 specified in this permit, is there any duty created
13 by this permit?

14 A. He does have an active permit, and he is
15 to--he is to perform the duties of that permit, which
16 includes all the monitoring and such.

17 Q. But it's only if he has the runoff control
18 system, isn't it?

19 THE ADMINISTRATIVE LAW JUDGE: Counsel, I
20 understand your point. But isn't what you're trying
21 to get--you can argue with me--but isn't this purely
22 a legal argument that you're making?

23 MR. McAFEE: Yes, it is, Your Honor.

24 THE ADMINISTRATIVE LAW JUDGE: You don't
25 need him to make that legal argument. You don't have

1 to make him say "uncle," if you will, to the point
2 you're trying to make.

3 MR. McAFEE: Okay. I appreciate that, Your
4 Honor. If I could, if the witness would answer my
5 question. If not, I'll move on.

6 THE ADMINISTRATIVE LAW JUDGE: Okay.

7 (Last question read by the reporter.)

8 A. In my opinion is that the--

9 BY MR. McAFEE:

10 Q. I don't like to interrupt, but could you
11 please answer that yes or no. And then you're more
12 than welcome to explain what you want, but I would
13 like a yes or no answer to that question.

14 A. No.

15 Q. Okay. Did you want to add anything?

16 A. No.

17 Q. You also testified this morning that it was
18 oversight on the DNR's part that Mr. Vos was allowed
19 into the Iowa Plan?

20 A. Yes.

21 Q. Were you-- You weren't with the department
22 at that time?

23 A. That's correct.

24 Q. So what are you basing that statement on?

25 A. The actions of the department do not match

1 the purpose of the Iowa Plan.

2 Q. And again, that's in your opinion?

3 A. That's correct.

4 Q. Has anyone in the department that was there
5 at that time that would have made the decision to
6 allow Mr. Vos to participate in the Iowa Plan talked
7 with you about that?

8 A. No, they have not.

9 Q. I'd like to turn to Exhibit 22. This is the
10 letter that you testified to in response to
11 Mr. Breedlove's questions this morning about Mr. Vos'
12 status under the Iowa Plan; is that right?

13 A. Yes, it is.

14 Q. And I believe you testified that as a result
15 of this letter if he didn't do what he was supposed
16 to do under this letter that he would have been
17 kicked out, or whatever word you used, out of the
18 Iowa Plan.

19 A. He would no longer be a participant in the
20 Iowa Plan, yes.

21 Q. And did you testify-- Do you know for sure
22 if that is, in fact, what happened?

23 A. That he was removed from the Iowa Plan?
24 Yes, he was.

25 Q. And how do you know that?

1 A. Because that's what was agreed to was that
2 if he did not submit his engineering plans within 30
3 days, he would be out of the Iowa Plan. That was
4 agreed to within the department.

5 Q. Specifically as to Mr. Vos?

6 A. To all producers that were receiving such a
7 letter.

8 Q. But do you know specifically-- My question
9 is specifically, Mr. Tinker, do you know if Mr. Vos
10 was removed from the Iowa Plan, not other producers,
11 Mr. Vos?

12 A. Yes, he was.

13 Q. And how do you know that?

14 A. Because he did not submit within 30 days and
15 by the letter he was told if he did not submit within
16 30 days, he would be out of the Iowa Plan.

17 Q. Okay. You're basing that on Exhibit 22?

18 A. Yes.

19 Q. And is your testimony specifically to
20 Mr. Vos? Do you know, is there anything else in the
21 record to show that he actually was removed from the
22 Iowa Plan?

23 A. No, this is it.

24 Q. Okay. Have you-- Do you have any
25 knowledge, in talking with the field office, did they

1 send any--or did the DNR send any other notice to
2 Mr. Vos that he was no longer a participant in the
3 Iowa Plan?

4 A. Not to my knowledge.

5 Q. Do you know if the department took any
6 action against Mr. Vos as in your opinion you've
7 stated he was no longer in the Iowa Plan? Did they
8 take any action against him?

9 A. Not to my knowledge.

10 Q. You also testified that Mr. Vos received a
11 construction permit; is that correct? I'm not
12 talking about the 1991 permit, but subsequently he
13 did, in fact, receive a construction permit to
14 construct controls; is that correct?

15 A. Yes; that's correct.

16 Q. And I think you testified that in your
17 opinion, now, that permit has expired?

18 A. If no construction started based upon the
19 issuance of that construction permit, which is my
20 understanding.

21 Q. And that's based on your understanding of
22 the law?

23 A. Yes.

24 Q. Has any determination been made specifically
25 as to--or any notification sent to Mr. Vos that his

1 construction permit has expired?

2 A. Not to my knowledge.

3 Q. Is there also a provision in the law that
4 allows for the department to grant an extension for
5 good cause?

6 A. Yes, there is.

7 Q. And do you know, has that been done?

8 A. No, I do not.

9 Q. Mr. Tinker, are you aware of how many
10 feedlots in Iowa received a construction permit and
11 an NPDES permit after June 1 of 2006?

12 A. I do not have that number.

13 Q. If it were 37, would that surprise you?

14 A. No, that would not.

15 Q. And that would be permits received after the
16 completion or the end of the five-year period under
17 the Iowa Plan; is that right?

18 A. Yes.

19 Q. Now, I'm going to shift gears a little bit.
20 I'll just ask you up front, Mr. Tinker, you're not in
21 the enforcement part of DNR; is that correct?

22 A. That's correct.

23 Q. But do you keep an eye on or are you aware
24 of enforcement actions that are brought against
25 feedlots or animal feeding operations?

1 A. Yes.

2 Q. Is that part of your duties as an animal
3 feeding operation coordinator?

4 A. No.

5 Q. And how do you keep track of them?

6 A. When the documents are sent from the field
7 office to the legal bureau, I'm often carboned on
8 those documents so I can see what's proceeding. And
9 when the legal bureau chief assigns the case to an
10 attorney, I'm often carboned on that so I can see the
11 documents at that time, as well.

12 Q. Okay. So I just want to ask you, based on
13 your knowledge are you aware of the DNR using a
14 computer model or anything--a model, I'll say a
15 computer model, as evidence of a discharge to a water
16 of the state for a DNR enforcement action?

17 A. No, I'm not.

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

20 THE ADMINISTRATIVE LAW JUDGE: Okay. Before
21 we have redirect, let me just ask you one question,
22 Mr. Tinker.

23 If you go back to Complainant's Exhibit 22--
24 you were just on that, that's the failure to meet
25 submittal deadline.

1 THE WITNESS: Yes.

2 THE ADMINISTRATIVE LAW JUDGE: --it says
3 "Notice of Violation." Then it says--there's a
4 slash--"imminent termination of participation." Do
5 you see that?

6 THE WITNESS: Yes.

7 THE ADMINISTRATIVE LAW JUDGE: So let's
8 assume that it's Moran's feedlot, not Lowell Vos--
9 that's my last name, Moran--I understood your
10 testimony that it was your opinion, I gathered, that
11 there was no further letter required because imminent
12 termination, you would agree, is different from
13 termination?

14 THE WITNESS: Yes.

15 THE ADMINISTRATIVE LAW JUDGE: And so is it
16 your testimony, as far as you know, that one would
17 not receive--if I'm running a feedlot, I don't get
18 this final notice saying, "This is to confirm that
19 you're out of the program because you didn't submit
20 within 30 days of receipt of this letter. Now you
21 are no longer a participant in the Iowa Plan"? One,
22 I wouldn't get another letter telling me--confirming
23 that it's over, it's too late?

24 THE WITNESS: That was not our procedure,
25 no.

1 THE ADMINISTRATIVE LAW JUDGE: That was not
2 your procedure. Did you ever do that for anybody?

3 THE WITNESS: Not to my knowledge, not with
4 the Iowa Plan.

5 THE ADMINISTRATIVE LAW JUDGE: A phone call?

6 THE WITNESS: Not to my knowledge.

7 THE ADMINISTRATIVE LAW JUDGE: Okay.

8 THE WITNESS: May I add?

9 THE ADMINISTRATIVE LAW JUDGE: Sure.

10 THE WITNESS: At this point it was turned
11 over to our legal bureau, and that's why this letter
12 came from our bureau chief for legal services. They
13 were the ones that were making the calls on this and
14 they were doing all the follow-up.

15 THE ADMINISTRATIVE LAW JUDGE: Let me ask
16 you that, then, since you just brought that up. You
17 mean this letter dated April 28, 2005, wouldn't have
18 come from--this would come from the legal bureau; is
19 that right?

20 THE WITNESS: Yes, this came from our
21 attorney.

22 THE ADMINISTRATIVE LAW JUDGE: It says that,
23 legal services bureau?

24 THE WITNESS: Yes.

25 THE ADMINISTRATIVE LAW JUDGE: The legal.

1 services bureau doesn't then send the final notice
2 that the time has now lapsed and you are--because it
3 strikes me there is some degree of vagueness to this,
4 maybe not in this case, but it says "within 30 days
5 of receipt of this letter," whatever date that would
6 be, there are certain presumptions that operate.

7 But as far as you know, the legal department
8 has not ever and it was not their practice to send
9 someone the final notice indicating that--of course,
10 this was sent certified, I see.

11 THE WITNESS: Yes.

12 THE ADMINISTRATIVE LAW JUDGE: --you don't
13 get another notice, you don't get the notice
14 announcing that the time has now passed and you're
15 out?

16 THE WITNESS: That's correct. Our attorneys
17 discussed that and decided this one letter would be
18 adequate.

19 THE ADMINISTRATIVE LAW JUDGE: Okay. All
20 right.

21 Mr. Breedlove.

22 If you have questions, you'll have an
23 opportunity, Mr. McAfee.

24 MR. BREEDLOVE: Your Honor, I have no
25 further questions.

1 THE ADMINISTRATIVE LAW JUDGE: Mr. McAfee,
2 do you have any questions to ask? This does not
3 require that you ask a question.

4 MR. McAFEE: No, I do not. Thank you.

5 THE ADMINISTRATIVE LAW JUDGE: All right.
6 Mr. Tinker, it looks like you're well in advance of
7 the time you were concerned about. Thank you for
8 your testimony.

9 THE WITNESS: Thank you.

10 (Witness excused.)

11 THE ADMINISTRATIVE LAW JUDGE: We'll go off
12 the record.

13 (Off-the-record discussion.)

14 THE ADMINISTRATIVE LAW JUDGE: Back on the
15 record.

16 MR. BREEDLOVE: EPA calls Jeff Prier with
17 the Iowa Department of Natural Resources.

18 THE ADMINISTRATIVE LAW JUDGE: Okay.
19 Mr. Prier, come on up here.

20 JEFFREY FRANCIS PRIER,
21 called as a witness by counsel for the Complainant,
22 being first duly sworn by the Administrative Law
23 Judge, was examined and testified as follows:

24 THE ADMINISTRATIVE LAW JUDGE: State your
25 name and spell your name for the court reporter.

1 THE WITNESS: Jeffrey Francis Prier,
2 J-E-F-F-R-E-Y F-R-A-N-C-I-S P-R-I-E-R..

3 THE ADMINISTRATIVE LAW JUDGE: Go ahead,
4 Mr. Breedlove.

5 DIRECT EXAMINATION

6 BY MR. BREEDLOVE:

7 Q. Tell us a little bit about your educational
8 background.

9 A. Yes. I have a Bachelor of Science from Iowa
10 State University in fisheries and wildlife biology.

11 Q. For whom do you work?

12 A. Iowa Department of Natural Resources.

13 Q. And what is your current position?

14 A. I'm an environmental specialist.

15 Q. How long have you been in that position?

16 A. Since October of 1998.

17 Q. Did you have any positions with IDNR before
18 that?

19 A. Yes. I worked as a park aide, a natural
20 resources technician and currently as environmental
21 specialist.

22 Q. What do your current duties entail?

23 A. I inspect air quality from industrial
24 facilities, storm water from construction sites. I
25 do manure management plan reviews for animal feeding

1 operations, mainly confinements. And I do open
2 feedlot inspections under the Iowa Plan and for NPDES
3 permits.

4 Q. Approximately how many feedlots have you
5 been to?

6 A. Approximately 300.

7 Q. During your tenure at Iowa Department of
8 Natural Resources, have you been involved with
9 compliance efforts at Mr. Vos' feedlot?

10 A. Yes.

11 Q. What was your initial involvement at the
12 Lowell Vos feedlot?

13 A. My initial involvement was to conduct an
14 on-site assessment through the Iowa Plan that Mr. Vos
15 had registered for for open feedlots.

16 Q. So that on-site assessment involved a
17 facility inspection?

18 A. Yes.

19 Q. Did you generate an inspection form
20 associated with that inspection?

21 A. Yes, we completed an on-site assessment
22 form.

23 Q. Can you please turn to Complainant's Exhibit
24 15. Mr. Prier, is Complainant's Exhibit 15, is that
25 form associated with the inspection you performed at

1 the facility?

2 A. Yes, this is the on-site assessment form.

3 Q. And what date did you perform that
4 inspection?

5 A. June 25, 2003.

6 Q. And how many cattle did Mr. Vos have at the
7 facility at the time?

8 A. During that visit he said he had 1,500 head.

9 Q. And what was the capacity?

10 A. He stated 2,700 head.

11 Q. So what was the purpose of this on-site
12 inspection?

13 A. The purpose of this on-site was to verify
14 the in-house ranking for the Iowa Plan that rated
15 facilities in high, medium and low categories. And
16 then it was also to evaluate any existing manure
17 control structures at the site and to educate Mr. Vos
18 and other producers on the compliance schedule and
19 what they would need to do to bring their facility
20 into compliance with current laws.

21 Q. Did you meet with Mr. Vos while you were
22 there?

23 A. Yes.

24 Q. Did you make an assessment of the accuracy
25 of the in-house assessment?

1 A. Yes. After completing our form, we deemed
2 that a medium ranking was an appropriate ranking.

3 Q. Now, June 25, 2003, was the date that you
4 performed this on-site assessment; is that correct?

5 A. Yes.

6 Q. Where did this on-site assessment rank in
7 regard to-- Let me rephrase that. Where did this
8 on-site assessment fall in the number of on-site
9 assessments you performed? Was it beginning, end?

10 A. This was one of the very first ones that I
11 went to.

12 Q. Now, pursuant to the Iowa Plan, when were
13 the on-site assessments to take place for the medium
14 category?

15 A. In 2003 and 2004.

16 Q. So this inspection was done relatively early
17 in the Iowa Plan for medium facilities?

18 A. Yes.

19 Q. Now, let's talk a little bit about what you
20 found while you were there. Mr. Prier, did you find
21 any evidence of discharges occurring from the
22 facility?

23 A. Yes, we did that day. The facility was
24 discharging from the northwest corner of the feedlot
25 through a terrace, and it was going down through the

1 crop field and into the stream bank and then into the
2 unnamed tributary that was there.

3 Q. And were you able to observe this discharge?

4 A. Yes, we observed it from the road.

5 Q. Could you please describe that discharge.

6 A. The discharge was brown in color; and as it
7 cascaded down the stream bank, it caused a foaming
8 sensation in the liquid.

9 Q. Now, stream bank. What stream bank would
10 that be?

11 A. For the unnamed tributary.

12 Q. Unnamed tributary. Did you sample this?

13 A. We conducted a field sample of ammonia and
14 pH.

15 Q. Now, Mr. Prier--

16 MR. BREEDLOVE: Can we go off the record one
17 moment, Your Honor?

18 THE ADMINISTRATIVE LAW JUDGE: Yes.

19 (Off-the-record discussion.)

20 THE ADMINISTRATIVE LAW JUDGE: Let's go on
21 the record.

22 BY MR. BREEDLOVE:

23 Q. Mr. Prier, could you please come around on
24 the witness stand.

25 For the record, I'm asking Mr. Prier to mark