UNITED STATES ENVIRONMENTAL PROTECTION AGENCY REGION 7

In the Matter of:

:Docket No. CWA 07-2007-0078

LOWELL VOS

d/b/a LOWELL VOS FEEDLOT :

VOLUME IV

WOODBURY COUNTY, IOWA :

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

PETERSEN COURT REPORTERS 317 Sixth Avenue, Suite 606 Des Moines, IA 50309-4155 (515) 243-6596

APPEARANCES:

For the Complainant:

J. DANIEL BREEDLOVE, ESQ. Assistant Regional Counsel Region VII Environmental Protection

Agency 901 North Fifth Street Kansas City, KS 66101

MARK A. RYAN, ESQ.
Assistant Regional Counsel
Environmental Protection
Agency
Idaho Operations Office
Region 10
1435 N. Orchard Street

Boise, ID 83706

For the Respondent:

ELDON McAFEE, ESQ.
Beving, Swanson & Forrest, P.C.
321 East Walnut Street

Suite 200 Des Moines, IA 50309-2048

<u>I</u> <u>N</u> <u>D</u> <u>E</u> <u>X</u>

WITNESS

DIRECT CROSS REDIRECT RECROSS

For the Complainant:

Bryan Hayes 740 782/793 787 Eugene D. Tinker 797 838 Jeffrey F. Prier 883 921 960/962 962/963

For the Respondent:

Michael Beavers 964 980

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COMPLAINANT'S EXHIBITS	RECEIVED
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<u>PROCEEDINGS</u>

THE ADMINISTRATIVE LAW JUDGE: Good morning.

We're on the record, and we're continuing with the testimony of Mr. Bryan Hayes. Okay.

Mr. Hayes, you're still under oath.

BRYAN HAYES,

resumed his testimony as follows:

CROSS-EXAMINATION

9 BY MR. McAFEE:

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- Q. Good morning, Mr. Hayes.
- 11 A. Good morning.
 - Q. My name is Eldon McAfee, and I'm representing Lowell Vos in this proceeding. And I have a few questions for you based on your testimony yesterday and the information we've been provided.

And I think what I want to do, I want to start with the exhibit you marked on yesterday. And if I may, I'll step up to this light pro, I guess it is we call it. Can you see that from where you're sitting?

- A. Yes, I can.
- Q. What I want to check, Mr. Hayes, is-THE ADMINISTRATIVE LAW JUDGE: Why don't you say what it is that you're looking at.

MR. McAFEE: I'm sorry, I did not identify

the exhibit. It is Complainant's Exhibit 51. 1 MR. BREEDLOVE: Your Honor, it's actually 2 53. I believe that was entered. 3 MR. McAFEE: Okay. Should I change that on 4 this copy? It says "51" right here. 5 MR. BREEDLOVE: Your Honor, that was marked 6 prior to trying to enter that. 7 THE ADMINISTRATIVE LAW JUDGE: Do you mind 8 if Mr. McAfee marks on it? 9 MR. BREEDLOVE: That's fine. 10 MR. McAFEE: Okay. I will change this from 11 "51" to "53" so there won't be any confusion, mainly 12 13 from me. BY MR. McAFEE: 14 All right. Mr. Hayes, we are now looking at 1.5 Complainant's Exhibit 53 on the--you can see it from 16 your chair there on the light pro on the screen. 17 Yesterday you marked three areas on this 1.8 exhibit; right? 19 20 Α. Yes. And they've been designated by your writing 21 on this exhibit as lower Elliot Creek, upper Elliot 22 Creek and the unnamed tributary; right? 23 Correct. 24 Α.

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Q.

Okay. Now, as you testified yesterday,

- these are, I believe, each 500-foot-long areas; is 1 that correct? 2 3
 - Yes. Α.

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- And you conducted -- what do you call it; fish assessments?
- Assessments of the fish population in those Α. 500-foot segments.
- Okay. Okay. Now, I want to make sure I understand from this exhibit, when you marked those areas, is that as close as you could to where they are actually located?
- A. Yes. It's not to scale. I wouldn't say it was to scale. But I marked as close as I could to the locations where we were in the stream.
- And how would you remember that as we were 0. standing here as you were doing that yesterday? from your memory?
- From my memory, yes. 18
- Okay. When you did these fish population 19 Q. assessments--is that a fair term? 20
 - Yes. Α.
 - --when you did those--and I believe you testified that you did those on August 5th of 2008?
 - Correct. Α.
 - Q. --did you make any notes or prepare a

- report? I guess there's two questions there. Let's start with the first one. Did you take any notes?
 - A. Yes.

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- Q. And what did you do with those notes?
- A. We have them.
- Q. Okay
 - A. I have a copy of them.
 - Q. Okay. But do you have them with you?
- A. No, I don't.
 - Q. Okay. Did you prepare a report of any kind?
 - A. Not to date. The end of the year we will prepare a report similar to Exhibits 44 and 45, and that data will go into the 2008 stream assessments.
 - Q. Okay. When you testified yesterday—and you had some fairly detailed testimony, including the locations of your fish population assessments as noted on Exhibit 53, plus the numbers of fish you found—how did you recall that testimony? Was it from your notes?
- 20 A. From memory.
 - Q. From memory. Okay. Looking at the data?
- 22 A. Looking at the data.
- Q. Looking at what data, sir?
 - A. The data we collected that day on August 5th.
 - Q. Again, is that recorded in your notes?

- A. What notes do you refer to?
- Q. The notes that you've testified this morning that you took the day you did the fish populations.
 - A. Yes.

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- Q. Is that recorded anywhere else?
- A. No.
- Q. Okay. Now, looking at Exhibit 53 on the screen where you have marked the area for your fish population assessment of the unnamed tributary, that looks to be very close to the fork--what I would call a fork. Maybe that's not the correct term.
- A. The confluence is maybe the more correct term.
- Q. Okay. --the confluence of the unnamed tributary with Elliot Creek where you have marked where you did your fish population assessment is very close to Elliot Creek; right?
- 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.
 - Q. But where you've marked it, your left-hand or lower boundary of your fish population assessment almost touches Elliot Creek?
 - A. We started that assessment not very far up

that unnamed tributary, but the exact distance I 1 don't recall. Let's kind of go back to how this Okav. 3 assessment came about. Was this a regularly scheduled fish population assessment, if there is such a thing? 5 No, this wasn't regularly scheduled. 6 Α. were requested to look at Elliot Creek. 7 And who requested you to do that? 8 To my knowledge, it was the Environmental Α. 9 Protection Agency. 10 Okay. And that's all I can ask you is what 11 0. you know. 12 MR. McAFEE: Your Honor, may we go off the 13 record? 14 THE ADMINISTRATIVE LAW JUDGE: 15 (Off-the-record discussion.) 16 Back on the THE ADMINISTRATIVE LAW JUDGE: 17 18 record. BY MR. McAFEE: 19 Who directly requested that you do the fish 20 Q. population assessment on--that's shown on Exhibit 53? 21 I was asked to be involved in this fish kill Α. 22 assessment by Marian Conover, our chief of fisheries. 23 The biologist that overseas Woodbury County was going 24

to be on vacation this week, so that's when I got

involved was when Marian Conover asked if I could be involved in this.

- Q. And when you refer to "this week," do you mean the week that the assessment was conducted?
 - A. No, the week of this scheduled trial.
- Q. Okay. So-- Well, that's your understanding as to how you got involved?
- A. I got involved when Lanny Miller, a biologist out of Lake View, had a Canada fishing trip planned for this week in September.
 - Q. Okay.

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- A. So they requested I get involved.
- Q. How long before going to this--to the area on August 5th, how long before that were you requested to do this assessment?
 - A. Probably a month in advance of that.
- Q. What did you do after you were asked to do it? How did you prepare?
- A. Just coordinated with Lanny Miller on a time for where and when to do this assessment was really the preparation.
- Q. And did Lanny Miller accompany you on this assessment?
 - A. Yes, he did.
 - Q. And what is Lanny Miller's position again?

He's a fisheries management biologist, just Α. 1 like I am. He works out of the Black Hawk district office and covers a district out of that office. 3 And was anyone else with you? 4 We had a crew of six that day; myself, Lanny 5 Miller, two natural resource technicians, Don Herrig, 6 Mark Boucher. And then there were two seasonal 7 employees, natural resource aides, Todd Perry and-the name of the natural resource aide that came from 9 out of Black Hawk, I don't know that name. But there 10 were six of us there that day. 11 Is that a--the usual number you would have 12 of people to do such an assessment like this? 13 That's a larger number. Typically we do Α. 14 this assessment with anywhere from three to four 15 people. 16 Do you know why you had more on this 17. 18 assessment? No particular reason. We were combining 19 offices and--but no particular reason. 20 assessment could have been done with a smaller crew. 21 Was it your decision to have more people 22 Q. conduct it or someone else's? 23 It was my decision to bring in the natural 24

resource technician that works with me and natural

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

- Q. I'll kind of move to the end, and then we've got a lot of things to go through here as far as the details of the assessment. But when this was completed, you've indicated there is no report, is that right, at this time?
 - A. It's in the raw data form right now.
- Q. Okay. Does that raw data form include your conclusions that you testified to yesterday regarding the Lowell Vos feedlot?
 - A. No, they don't.

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- Q. Okay. It just includes maybe fish numbers?
- A. Fish numbers, species present. There's some habitat measurements that were made on the lower Elliot Creek. We wanted to treat this just like other Hydrologic Unit Codes. It designates a watershed size.

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

- Q. And we may have to come back to that. Does habitat measurements include more than counting the fish?
 - A. Yes, it does.

We'll maybe come back to that. And you did 1 Q. that on the lower assessment? Correct. Α. 3 The conclusions that you stated in the record yesterday regarding the possible effect of the 5 Lowell Vos feedlot on what you found in these 6 assessments, are those yours and yours alone? 7 Α. No. 8 Okay. Who else has participated in making Q. that conclusion? 10 Lanny Miller, the DNR biologist out of Lake 11 View. We discussed what was going on here, what we 12 13 found. And when did you discuss that? 14 I don't know the exact date, but it would 15 have been, obviously, after the 5th of August, 2008. 16 Did you discuss it that day? Q. 17 There was some discussion that day about it. Α. 18 And maybe I should ask this. How long did 19 Q. this assessment take, the three of them, I should 20 say? I'm just looking at total time. 21 We arrived at the stream around 9 a.m., and, 22 if I recall, we ate a late lunch right there at the 23 site at around 1 p.m. So roughly a four-hour time 24

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period.

Is that a normal amount of time to conduct 1 Q. this type of assessment? 2 Yes. Α. 3 And then what did you do after 1 o'clock? Q. 4 Were you all done then? 5 We headed home. Α. 6 Okay. Prior to-- Let me rephrase that. Q. When you were first contacted about doing this assessment, were you informed that it had to do with the Lowell Vos feedlot? 10 Yes. Α. 11 So before you ever started on this, you were 12 made aware that a purpose of this assessment was 13 related to this case that we are here today for and 14 the Lowell Vos feedlot? 15 A. Yes. 16 Q. What did you do to prepare to do your 17 assessment? 18 There was very little preparation, other 19 than coordinating a time and place to meet and 20 coordinating who's bringing what equipment and that 21 kind of stuff. Otherwise, there was no preparation 22 done in advance. 2.3

may have checked an aerial photo. Did you do that

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I believe yesterday you testified that you

before or after the assessment?

- A. That was after the assessment.
- Q. Before you actually got on the creek, so to speak, or the two creeks to do the assessment, did you drive the area?
 - A. I did not.

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- Q. Okay. Did you meet Mr. Miller and his crew there?
- A. We met at the convenience store in Lawton, and then we followed them out there.
- Q. Okay. We're looking again at Exhibit 53 on the screen here. If you need to come to the exhibit, you sure can, or can you tell us how you entered the area to perform the assessment.
- A. We entered the area from the farm--the set of farm buildings and the house there on the lower part of it off of--is that 110th Street?
- Q. Yes, I believe so. Would you like to come up here and look at the exhibit?
- A. Sure. We came in through this property and drove along the buffer strip, which is a strip of grass between--this was corn here and this is the buffer strip between here and the strip. We drove along the edge of the corn to access the sites.

 (Indicating throughout.)

MR. McAFEE: Okay. For purposes of the 1 record, Your Honor, may we go off the record for a 2 3 minute? THE ADMINISTRATIVE LAW JUDGE: Sure, go off 5 the record. (Off-the-record discussion.) 6 THE ADMINISTRATIVE LAW JUDGE: We'll go on 7 the record again. 8 BY MR. McAFEE: Q. Mr. Hayes, for purposes of the record you've 10 just shown on Exhibit 53 that you entered from the 11 south; is that correct? 12 Ά Correct. 13 Q. And there's a farm place there off of 14 110th Avenue, as the exhibit shows. And then 1.5 you--both crews drove up along the edge of Elliot 16 Creek to the site where you performed your first 17 assessment, I assume; is that correct? 18 Α. Yes. 19 Did you do the lower Elliot Creek assessment 20 Q. first? 21 Yes, you always assess from downstream to up 22 Α. so that you're not muddying the water as you go. 23 Okay. And had you contacted that landowner 24

ahead of time?

- A. I didn't, but the crew out of Lake View, the
 Black Hawk office did.

 Q. And what was the landowner's response, or do
- A. I don't know. But we don't do these assessments without permission.
 - Q. Sure. Do you know, had that crew--out of the Black Hawk office, you said?
 - A. Yes.

you know?

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- Q. --had they contacted anyone else about access, or do you know?
- 12 A. I don't know.
- Q. Okay. Before performing this assessment,

 Mr. Hayes, had you been to this area before?
- 15 A. No.
- Q. And by--I better be clear what I mean by
 "this area." There is this immediate area on Elliot
 Creek. You had not been there?
- 19 A. No.
- Q. What about the general area of Elliot Creek from, say, Lawton--I believe Elliot Creek goes to Lawton; is that correct?
- 23 A. Yes.
- Q. --had you been on Elliot Creek at any point there?

Not unless you include driving by it on Α. 1 Highway 20 on the way to Sioux City. No, I had never 2 been on Elliot Creek. 3 Okay. Now, when you arrived, then, to do your assessment, you said you started to do--you did the lower Elliot Creek assessment first? Yes. Α. Before doing that, do you walk up the creek 8 at all to get an idea of what the whole area looks 9 like or do you just start doing the assessment? 10 Basically, we make sure we have 500 feet, 11 and then we look for a place where we can get down 12 over the banks, just look for a place to access the 13 stream to start. 14 So you measure off 500 feet or someone does? 15 Ο. We use our range finder. Or if there's too 16 much vegetation or whatever, you can't use your range 17 finder, you just step it off. 18 And then I believe you testified yesterday .0. 19 you use some type of equipment that is on your back? 20 To do the electrofishing you use a backpack 21 electrofishing unit. 22 And out of the crew of six, how many do Q. 23 24 that?

One at a time. One person does the

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backpack--one person carries the backpack.

- Q. And do you do that all along the 500 feet area?
 - A. Yes.

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- Q. And then what do the other people do; count?
- A. The other people are carrying--well, we split up into two crews; a crew of three to do the habitat assessment and crew of three to do the fisheries assessment.
 - Q. Go ahead.
- A. In the crew of three we had one person carrying the backpack and two people carrying buckets and dip nets to help capture fish and take fish-transfer fish from the electrofishing-the people doing the electrofishing transfers the fish back to somebody holding the bucket.
- Q. You've mentioned a habitat assessment several times that was done on this portion; right?
 - A. Yes.
 - O. What's involved with the habitat assessment?
- A. You measure--go up the stream every--the stream width was six feet, so every six feet you're taking a width and depth measurement, you're looking at the angles of the bank, you're recording vegetation cover on the banks, whether there's

overhanging vegetation in the stream, in-stream cover, what's in the riparian zone, which is the zone up on top, also canopy covers are reported.

- Q. Could you tell us what you mean by canopy covers.
- A. If the stream is shaded by trees, you look at the percent of canopy cover. It's a pretty detailed assessment of the habitat, and it's done on transects throughout that 500-foot segment.
- Q. I have, I guess, a couple of things I want to understand about this. First of all, is any assessment done of other aquatic life as part of the habitat assessment?
 - A. No.

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- Q. Like for--I know you did the fish assessment, fish count. But like other aquatic life, bugs?
 - A. The invertebrates?
- Q. There you go.
- A. No, that's not included in the habitat assessment.
- Q. Was any study or assessment of the invertebrates done as part of your fish count or fish population assessment?
 - A. We made notes in the data of just basically

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

- Q. But that wasn't part of the habitat assessment?
 - A. No.

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- Q. By "invertebrates," are we talking about anything from very tiny--
- A. The Crayfish are invertebrates, Dragonfly larvae, Mayfly larvae, aquatic invertebrates, bugs living in the stream.
 - O. You said you made notes about that?
- A. We made notes on the data. I routinely do
 that, you know--
 - Q. Okay.
 - A. --just to make notes of presence or absence of invertebrates just to try and make the data sheets as complete as possible.
 - Q. And if we need to take them one at a time, we can. But in general, what was your--I'll use the word "assessment" of the invertebrates population in this area?
 - A. In lower Elliot Creek, we saw no invertebrates. In upper Elliot Creek, we noted 20 Crayfish. And in the unnamed tributary, we saw no invertebrates.

- Q. Now, again, you're talking bugs?
 - A. Right; bugs, Crayfish.
- Q. So you saw no even small invertebrates or anything like that, bugs or anything in the lower Elliot Creek assessment or in the unnamed tributary?
 - A. No.

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- Q. Okay. This would all be in your notes?
- A. Yes.
- Q. When you're doing-- First of all, let me ask you. In doing this assessment, did you take any photos?
- 12 A. Yes.
- 13 Q. And what were those photos of?
 - A. We took photos of the fish we captured. We took photos of the stream and took photos of electrofishing in the stream, photos of the habitat assessment.
 - Q. Do those photos in any way support your conclusions or-- Let me ask you. Do those photos in any way impact your conclusions as you're expressing them in this case?
- 22 A. No.
- Q. As part of these assessments, did you take any water samples?
- 25 A. No.

Do you ever take water samples as part of a Q. fish population assessment? 2 Α. No. 3 What about a habitat assessment? 0. No, the water samples aren't included in Α. 5 6 habitat assessments. Did you have the equipment with you to take 7 . 0. water samples? 8 Α. No. So neither crew had any equipment to take a 10 Q. water sample? 11 No, not to my knowledge. 12 I believe you testified yesterday that you 13 made a -- you drew some conclusion about the water 14 quality at least in the unnamed tributary and lower 15 Elliot Creek and also upper Elliot Creek; is that 16 correct? 17 Α. Yes. 18 That you drew a conclusion about the water 19 0. 20 quality? Α. Yes. 21 And what was that conclusion? 22 Based on what I saw doing the fishery 23

invertebrates, mainly the Crayfish, I concluded that

assessment and based on the notes I made about

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

- Q. Would a water sample properly taken--I'll finish my question. Would a water sample properly taken help you make--draw any conclusions about the water quality there?
 - A. Yes.
 - Q. Are you trained in taking water samples?
 - A. No.

- 11 Q. Was anyone in your crew trained to take 12 water samples?
 - A. No, not to my knowledge.
 - Q. Have you ever taken a water sample of a creek?
 - A. No. Well, let me rephrase that. Yes, I've taken water samples. When I worked in the northeast part of the state, we were looking at the Maquoketa River and tributaries and did event-driven sampling-I mean after rainfall events--trying to look at the different tributaries and deciding where to focus dollars. We grabbed samples off bridges, sent samples away to hygienics labs for analysis.

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

- Q. And do you know the reason that you don't do that?
 - A. Well, we have an environmental services office that—and there's a—there's other parts of the DNR that are involved more in that than I am.

 There's a water resources section of the DNR that do far more thorough assessments of—by "thorough," I mean fish assessments, as well as water quality assessments.
 - Q. I'm sorry. Who does that, did you say?
 - A. There's a water resources section.
 - Q. And they do fish population assessments also?
 - A. They monitor fish populations because fish population--fish are an indicator of water quality.
 - Q. Okay. I guess I just want to make sure I understand this testimony here and what was done. First of all, I want to ask you as part of that, prior to doing these fish population assessments on August 5th--is that correct?
 - A. Correct.

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

quality sample as part of this fish population assessment?

A. No.

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- O. It was never considered, as far as you know?
- A. It was never relayed to me. I don't know if it was ever considered, but it was never requested of me.
- Q. You testified yesterday that—in response to several questions from Mr. Breedlove about—well, and you've testified again this morning that your conclusion is that the Lowell Vos feedlot was having an impact on the water quality in the unnamed tributary; is that correct?
- A. I mean, I testified yesterday that the most likely source for what I saw was the Lowell Vos feedlot.
- Q. And I believe you testified in response to a question from Mr. Breedlove as to what is the feedlot runoff that would be detrimental to fish or whatever the proper word is?
 - A. Yes.
- Q. And what are those components or compounds, whatever you want to call them?
- A. What comes off of feedlots first and foremost that affects fish and aquatic life is the

ammonia. It's toxic to fish. Also, there is organic
matter, the manure itself that puts an organic load
in the stream that can cause fluctuations in
dissolved oxygen and kill fish that way.

- Q. Now, what I want to ask you--is that it?
- A. Is that it?

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- Q. Is that it as far as those substances or whatever they are that you would consider detrimental to fish that could come from a feedlot?
- A. Well, there's also sediment. If the feedlot is yielding a lot of sediment runoff, it can impact habitat.
 - Q. Okay. Let's start with--is that it?
 - A. Yes, to my knowledge.
- Q. Let's start with the first one then.

 Ammonia, could you tell if ammonia was present at a level that you would consider detrimental to fish when you conducted these fish population assessments?
 - A. No.
- Q. How would you tell if ammonia was present at a level to be detrimental to aquatic life? I'll use that term.
 - A. You would test for it.
- Q. By testing, you mean a water sample?
 - A. Yes, or a test kit. There's test kits that

you can test right on the stream.

- Q. But you did not do that?
- 3 A. No.

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- Q. Okay. So do you know if ammonia was present at levels that were detrimental to aquatic life that day?
 - A. I do not know.
- Q. Now, let's take the next one, organic matter. What are you referring to for organic matter?
- A. Well, it can be anything; the manure, sometimes it can be corn that's in the manure.
- Q. Did you-- How would you know if that is present?
- 15 A. You would observe it.
- Q. And did you observe that?
- A. No, not on that day.
 - Q. Then sediment, I think, is the next thing you mentioned; correct?
- 20 A. Correct.
 - Q. How would you know if sediment is present?
 - A. Well, if you're carrying a 25-pound backpack walking up the stream you know how soft the bottom is. And the bottom was fairly firm, was fairly easy walking that day.

- Q. And that would mean to you what?
- A. Lack of sediment.

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- Q. So just to make sure our record is clear here, you did not--let me ask you. Did you observe in any way a level of sediment that you would consider detrimental to the aquatic life that day?
 - A. Not that day.
- Q. So just to make sure I have this clear to me, anyway, then, of the conditions you listed that you would consider from a feedlot to be detrimental to aquatic life, of those you listed you found none of them present that day you were there?
- A. We did not test for them. No, I did not find them present.
- Q. Okay. Let's go back to the assessments you were conducting. First of all, how deep was the water in the lower Elliot Creek assessment area; do you remember?
- A. I remember going through areas of that stream that were around knee deep. So it's a foot and a half.
 - Q. It depends--
- A. It depends on how tall you are. But, you know, when I see water that that's deep, I'm thinking there should be fish, I should be capturing fish with

- my electrofishing gear when I'm in water that deep.
- And in Elliot Creek, was it ever any deeper 0. than knee deep that you can remember?
 - Not that I recall.
 - Q. Okay. Then what about in-- Well, you next went to upper Elliot Creek--is that right?
- Yes. Α.

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- -- to do your assessment. What was the depth of the water there?
- Again, there was water near knee deep, 10 Α. again, a foot, foot and a half depth. 11
 - So not a whole lot different?
- Not a whole lot different. 13 Α.
- Now, let's go over to the unnamed tributary. Ο. What was the depth of the water there? 15
 - It was shallower. Α.
- Can you give me an idea? 17
- Instead of a foot and a half, maybe we got 18 Α. into some water that was eight to ten inches deep.
 - So shoe top high, boot high? Q.
- Over your ankles. 21 Α.
- Okay. Is that as deep as it got in that 22 Q.
- 23 area?
- Α. Yes. 24
- So would you say quite a bit different than 25 Q.

Elliot Creek?

- A. It was smaller, yes, different.
- Q. Okay. That's fair. What about the width of the stream in those two places? And if you testified to all of this yesterday, I apologize, I don't remember hearing all of this. But please go through this if you would.
- A. The width of the stream in Elliot Creek, both the lower and upper, were six feet. The width of the unnamed tributary, I don't think that was recorded. It was probably three to four feet based on memory.
- Q. Okay. Thank you. What type of fish would you normally expect to find in foot-and-a-half deep water or knee-deep water in this type of creek?
- A. Minnows, like Fathead Minnows, Sand Shiners, Big Mouth Shiners, Sucker species, White Suckers are common in these types of streams.
- Q. And these are all Minnows or some type of Minnow?
 - A. Minnows or Suckers, yes.
 - O. You're speaking to a nonfisherman here.
- A. Okay. Yeah, they're all Minnows, Suckers.

 One common Sunfish we see is a Green Sunfish that are present in streams this size.

- Now, we're using the term "fish" here which 7 Ο. I assume biologically is the correct term to use; is 2 that right? 3 Α. Yes. 4 As a nonfisherman, sometimes I think of a 5 Q. fish as something that will go into the frying pan. 6 Is what we're talking about something that would, 7 quote/unquote, in my words go into the frying pan? No. Α. Not unless it got ate by something else, 10 Q. right, as bait; is that correct? 11 Α. Correct. 12 1.3
 - So these are very small, is that accurate, these fish you're talking about?
 - The Creek Chubs that were in this stream and Α. in a lot of streams like this, they'll reach a maximum size of 12 inches. People do catch and consume Creek Chubs.
 - Would you expect to see a Creek Chub of that 0. size in this type of water, knee deep?
 - I wouldn't be surprised if I saw it. mean, it depends.
 - Okay. Did you see any of that size the day you were there?
- 25 Α. No.

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1	Q. When you conduct a fish assessmentI'll
2	start in generaldo you check forlike go
3	downstream and check for obstructions or something
4	like that that may present a physical obstruction
5	that would hinder fish movement?
6	A. Yes. You check aerial photos or databases
7	that would have that kind of information, the
8	presence of dams or weirs.
9	Q. Would a tree that has fallen in the crick,
10	would that be an obstruction?
11	A. No, unlikely.
12	Q. Okay. Because fish could get around it?
13	A. Yeah, it wouldn't be a permanent obstruction
14	by any means.
15	Q. And did you check for obstructions when you
16	did thisthese assessments?
17	A. The crew out of the Lake View office did.
18	And I asked the question, are there any dams or weirs
19	on this stream, and their answer to me was no.
20	Q. And do you know how they checked?
21	A. I do not.
22	Q. And do you know if they checked the day that
23	you were there or previous?
24	A. I don't know.

Okay. But to your knowledge, you were

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

- A. To my knowledge, there was no obstruction, but it's recorded on the data. That's one line on the data sheet, obstructions or barriers.
- Q. Okay. I want to go back now to where these areas were located. It appears from Exhibit 53 that the lower Elliot Creek assessment area is further down from the confluence with the unnamed tributary than the assessment area in the unnamed tributary is from the confluence; is that correct?
 - A. Correct.
 - O. You were a little further down?
- A. Correct.
- Q. Was that by choice?
- 17 | A. Yes.

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- 18 Q. And why was that?
 - A. In the unnamed tributary and in upper Elliot Creek we were up against boundaries, and we wanted to be sure we had 500 feet and not run out of room and get onto somebody else's property we did not have permission to be on.
 - Q. Okay.
 - A. We had a lot more room to work with in lower

| Elliot Creek.

- Q. I see. So you're saying like the upper Elliot Creek assessment area, I believe, from Exhibit 53 we can see, is that a property boundary at the northern edge of your assessment area?
 - A. Yes.
 - Q. And so that's how you fit it in?
 - A. Correct.
- Q. Now, over on the unnamed tributary is there a property boundary close to that assessment area?
 - A. I don't know.
- Q. So was there— It doesn't appear or do you know? Was there a reason that you had to fit it in where you did as far as being close to the confluence?
- A. I don't know if there was a boundary up above there we were trying to fit in. I was under the-- From my recollection, we did not have a lot of room to work with in that upper tributary, the unnamed tributary.
- Q. Okay. And just for purposes of what we're looking at here today—and I understand you're going from memory—but do you see anything on Exhibit 53 that looks like a property boundary to the east of your assessment area of the unnamed tributary?

- A. I don't know where the property boundary is there to the east.
- Q. I understand. But just looking at Exhibit 53, do you see anything that compares to what you saw on the northern edge of the upper Elliot Creek assessment area?
 - A. No.

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- Q. But I understand you don't know for sure if there's one there, or not. When the assessment area and the unnamed tributary is located as close as it is to the confluence with Elliot Creek, could that have an influence on your fish population assessment and the numbers you would find in that area?
 - A. Yes.
 - O. And what effect could it have?
- A. It could, in my opinion, elevate the number of fish in that unnamed tributary because you're close to the confluence and we know there were fish in Elliot Creek. The closer you go to the confluence, the more likely you'd find them in the unnamed tributary.
 - Q. Okay. Could it have the opposite effect?
 - A. Not in my opinion.
- Q. Okay. Could it have the effect of--I'll put it in nonfisherman terms--could it have the effect of

if I'm a fish, why would I want to live in eight to ten inches of water when I could live in a foot and a half of water?

- A. Can you repeat that question?
- Q. Sure.

MR. McAFEE: May we go off the record a second?

(Off-the-record discussion.)

THE ADMINISTRATIVE LAW JUDGE: Let's go on

10 | the record.

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BY MR. McAFEE:

- Q. Mr. Hayes, I believe my question was that if I'm a fish and I have a choice, why would I want to stay in Elliot Creek that's eight to ten inches deep and fairly narrow--excuse me. I said that wrong--why would I want to stay in the unnamed tributary when it's only eight to ten inches deep when right around the corner I could be in Elliot Creek that's knee deep?
- A. Well, one explanation is fish use shallow water to escape from predators, for example. So if you're a small fish, that may be forage. You may want to be in that unnamed tributary where larger fish could not get at you.

Routinely we sample fish in small unnamed

tributaries or small tributaries with water that's 1 ankle deep. 2 THE ADMINISTRATIVE LAW JUDGE: So are you 3 saying that based on your experience there is no 4 preference because of some of the reasons you just stated? Fish do not generally, as a rule of thumb, prefer to be in wider, deeper water, they would just as soon be in shallower, narrower water? THE WITNESS: Well, it depends on a lot of 9 things. 10 THE ADMINISTRATIVE LAW JUDGE: So you can't 11 make any general statement about that, really? 12 THE WITNESS: It's hard to make a general 13 statement about that. Fish would move into that 14 unnamed tributary to feed. Smaller fish would use it 15 as a nursery area. It's hard to say. 16 THE ADMINISTRATIVE LAW JUDGE: All right. 17 THE WITNESS: I expected to find fish in 18 both areas. 19 THE ADMINISTRATIVE LAW JUDGE: Thank you. 20 Go ahead, Mr. McAfee. 21 22 BY MR. McAFEE:

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maybe a smaller fish would want to stay in the

shallower water of the unnamed tributary to avoid

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Mr. Hayes, I believe you just testified that

- being eaten by a larger fish out in Elliot Creek; is
 that correct?
 - A. Yes.

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- Q. Were there any larger fish out in Elliot

 Creek that would be--that would prey on the smaller

 fish?
 - A. There's seven-inch Creek Chubs that at times would prey on smaller fish.
 - Q. They were present?
 - A. They were present.
- Q. Okay. You testified yesterday that in the upper Elliot Creek assessment area you found--was it Crayfish?
- 14 A. Yes.
- Q. Is that -- To this old farm boy that's not a fisherman, is that a Crawdad?
- A. That's a Crawdad, yes.
- Q. Okay. And you found how many there?
- 19 A. Twenty.
- Q. Okay. And you didn't find them in either of the other assessment areas?
- A. Correct; we did not find them in the other two assessment areas.
- Q. And how do you find a Crawdad during your assessments?

They're affected by the electrical field we 1 put in the water. It brings them up off the bottom, 2 and they'll end up in your nets. They'll come off the bottom and drift with the flow into your nets. Is there-- Do Crawdads, Crayfish, do they 5 0. burrow into the bank at all? 6 Yes. 7 Α. Can they do that to get away from your 8 9 zapper? A. If they're in the stream, we generally 10 collect them. So no. 11 How do you know if they burrow in? I'm just 12 asking. If they would burrow in, how would you know 13 you wouldn't get them? 14 The Crayfish burrows I see are up on the Α. 15 There's a mound of mud there the Crayfish are 16 17 in. And if you see one of those, do you check to 18 Q. see if there's a Crayfish in it? 19 No. No, we don't. Α. 20 Did you see any Crayfish burrows in any of 21 Q. these assessment areas? 22 No. Α. 23 Even in the upper Elliot Creek assessment

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area?

1 A. No.

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- 2 | 0. Is that unusual?
 - A. No, not--no, I don't think so.
 - Q. I want to go back a second to the water quality issue. Again, your testimony regarding water quality in these three assessment areas, is it based solely on the fish population counts you did?
 - A. It's also based on the invertebrates that we observed and noted. Most of it's based on the fish.
 - Q. And I'm sorry, I didn't mean to leave the Crayfish out of that question. Maybe I should ask, is it based solely on the aquatic life you observed?
 - A. It's based on the aquatic life I observed.
 - Q. Is your testimony—and, therefore, I'll use the word "assessment"—of the water quality based on anything else, such as observation of the water itself?
 - A. No.
 - O. Okay. Smell?
- 20 A. No.
 - Q. None of that played into your conclusions about the water quality?
 - A. None of that did.
 - Q. Again, you've testified--that I think the words you've used is that the Lowell Vos feedlot is

- the most likely source of contamination that you
 believe is causing this reduced fish count and
 aquatic life in the lower Elliot Creek and unnamed
 tributary assessment areas.
 - A. Yes.

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- Q. Could there be other conditions that could be causing that?
- A. I don't know. I don't know, I guess, if there could be other ones.
- Q. Did you consider other possible reasons for the lower counts?
- A. I did observe, you know, or look at aerial photos to see what else might have been going on in that watershed. But my conclusion was that the most likely source was the Lowell Vos feedlot.
- Q. How far is the Lowell Vos feedlot from where you did the unnamed tributary assessment; do you know?
- A. Not specifically.
- Q. Did you drive up to the Lowell Vos feedlot that day?
 - A. No.
- Q. So you haven't actually observed the Vos 24 feedlot?
 - A. Only through an aerial photo.

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1	Q. And did that aerial photo also show you
2	thehow the unnamed tributarywhere it drains from
3	and where it passes by the feedlot, et cetera?
4	A. Yes.
5	Q. And from that aerial photo, is that how you
6	concluded that the Lowell Vos feedlot would be the
7	most likely source of contamination?
8	A. From that aerial photo, as well as the
9	aquatic life that we assessed.
10.	Q. I've already asked you, of course, whether
11	taking a water sample would help with your conclusion
12	that the Lowell Vos feedlot is the most likely
13	source, at least I believe I've asked you that, and I
14	want to make sure. Would a water sample help?
15	MR. BREEDLOVE: Objection, Your Honor. This
16	has been asked and answered. We've already been
17	through this.
18	THE ADMINISTRATIVE LAW JUDGE: Mr. McAfee.
19	MR. McAFEE: As I stated in my question, if
20	I have asked that I apologize. I just want to make
21	sure that that's in the record.
22	THE ADMINISTRATIVE LAW JUDGE: I think you
23	went through it.
24	MR. McAFEE: Okay. All right.

BY MR. McAFEE:

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- Q. Would you -- In coming to that conclusion, then, that the Lowell Vos feedlot is the most likely source -- and you were fully aware that you were conducting this fish population assessment for purposes of this hearing; is that right?
 - A. Yes.
- Q. --did you consider taking another fish assessment further upstream the unnamed tributary closer to the Lowell Vos feedlot?
 - A. No.
 - Q. And why not?
- A. I thought that, you know, just above that confluence would be the best case scenario for that unnamed tributary. The further you get away from confinement would have been the best case scenario for that unnamed tributary, in my opinion.
- Q. So, in other words, you thought that was the best chance of finding something right there. And if there was nothing there, there was no reason to go anywhere else?
 - A. Correct.
- Q. Would it surprise you if you learned that--I'm just asking if it would surprise you--if there were fish, the type of fish you were looking

for in that size of stream, further upstream in the unnamed tributary?

- A. Well, as I testified yesterday, fish will migrate up these unnamed tributaries if conditions permit them to. If you had a period when the water was favorable or allowed fish to migrate up there, I wouldn't be surprised to find them up there.
 - Q. What about Crayfish?
- A. They're not as migratory as fish. They do move, but they're not as migratory as fish. I don't know. It's hard to predict if you would find Crayfish up there.

THE ADMINISTRATIVE LAW JUDGE: But the question is whether it would surprise you.

THE WITNESS: It would surprise me if we found Crayfish up there.

17 BY MR. McAFEE:

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- Q. I believe you testified you did not drive any of the other area; right? You drove into here, did the assessment and drove out to the south also?
 - A. Correct.
- Q. Then would it surprise you to find something like a beaver dam on this unnamed tributary?
 - A. No, it wouldn't surprise me.
 - Q. Now, I realize you're a--

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1	A. Fisheries biologist.
2	Q. There we go. Do beaver feed on fish?
3	A. No.
4	Q. Okay. Do they feed on any type of aquatic
5	life?
6	A. No.
7	Q. Do you know
. 8	A. No, they're a herbivore. They're a plant
9	eater.
10	Q. And you're certain of that?
11	A. To my knowledge about beavers, they're not
12	predatory on fish.
13	MR. McAFEE: I don't have any further
14	questions, Your Honor.
15	THE ADMINISTRATIVE LAW JUDGE: Okay. Are
16	you ready to do your redirect?
17	MR. BREEDLOVE: Just one minute.
. 18	THE ADMINISTRATIVE LAW JUDGE: Sure.
19	(Off-the-record discussion.)
20	THE ADMINISTRATIVE LAW JUDGE: Let's go back
21	on the record.
22	Go ahead, Mr. Breedlove.

I just have a few questions for you,

REDIRECT EXAMINATION

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BY MR. BREEDLOVE:

·Q.

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

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

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

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

THE ADMINISTRATIVE LAW JUDGE: Fair enough.

So be ready to make your objection. You say that--

MR. McAFEE: Well, I'm objecting.

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

MR. McAFEE: I understand that, Your Honor.

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THE ADMINISTRATIVE LAW JUDGE: But, yes, I 1 think there are some bases to object. 2 MR. McAFEE: I kind of feel it coming, so to 3 speak, in this discussion with Mr. Miller, who cannot 4 be here today. I'm objecting at this point to the 5 witness getting into a detailed discussion with Mr. Miller about the conclusions. I believe the record should be based on Mr. Hayes' conclusions. 8 THE ADMINISTRATIVE LAW JUDGE: Okay. So you 9 are making an objection? 10 MR. McAFEE: Yes. 11 THE ADMINISTRATIVE LAW JUDGE: 12 sustain the objection. 13 BY MR. BREEDLOVE: 14 In regard to HUC 12 surveys for fish, is 15 Ο. water sampling a routine part? 16 No. Α. 17 Is sampling typically part of the event-Q. 18 driven sampling? Let me clarify. The event-driven 19 sampling -- I'm asking is typically sampling involved 20 in relation to some sort of rain event? 21 It depends on what you're looking for. Our Α. 22 section, the fisheries section of the DNR, does not 23 do this type of sampling.

There were several questions in regard to

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

A. Shiners are Minnows, yes.

- Q. Now, there are different levels of tolerance to feedlot-related contamination between different kinds of Minnows?
- A. Different fish, different Minnows have different levels of tolerance. The Fathead Minnows in this case are the most tolerant fish that we see in Iowa.
- Q. And you did not find some of the less tolerant species?
- A. We did not find what would be considered less tolerant, sensitive species.
- Q. There was some discussion about the size of the fish and frying pan, the importance of them. I was wondering if you could maybe educate us a little bit on the importance of these smaller fish in the larger environment, in particular in the lower reach of the streams, lakes, that sort of thing.
- A. Well, the quality of your stream or river, it starts up in your tributary streams. The analogy

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

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

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

- Q. Just a couple more questions. In regard to the locations of the sampling, I want to make sure that the record is clear. Is it your belief that sampling closer to Elliot Creek would actually skew the numbers upwards? Is that correct?
 - A. Yes.
- Q. Just one last question, Mr. Hayes. In the 200 surveys, or so, have you ever seen a stream this bad?
- A. I can't recall ever seeing this low of abundance in a stream in a 500-foot sample segment.

 I don't ever recall seeing this few of fish.

MR. BREEDLOVE: Thank you. No further

787 questions, Your Honor. THE ADMINISTRATIVE LAW JUDGE: Okay. 2 Mr. McAfee. 3 MR. McAFEE: Thank you, Your Honor. 4 RECROSS-EXAMINATION .5 BY MR. McAFEE: Mr. Hayes, you just testified as to the importance of smaller streams for the food chain to larger streams; is that right? 9 Correct. 10 Α. And would you consider Elliot Creek 11 downstream to be like closer to Lawton, which I 12 believe is four, five miles south of where you were--13 is that correct? 14 A. Yes. 15 --did you consider that to be a larger 16 Q. stream? 17 It would be a larger tributary. Elliot 18 Creek is located within the Little Sioux River basin, 19 and so it feeds the Little Sioux River. 20 I just--that brought-- Your testimony there 21

- on redirect brought to my attention, there is--I'd like to have you take a look at Complainant's Exhibit 26. Are you familiar with that?
 - No, I'm not. Α.

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Would you please take a look at that and--1 Q. Where am I going to find that? Α. 2 THE ADMINISTRATIVE LAW JUDGE: Let's go off 3 the record for a moment. 4 (Off-the-record discussion.) 5 THE ADMINISTRATIVE LAW JUDGE: Let's go back on the record. 7 Go ahead, Mr. McAfee. 8 BY MR. McAFEE: 9 Mr. Hayes, do you have Complainant's Exhibit 1.0 26 in front of you? 11 Yes. 12 Α. Can you tell the Court what that is. 13 Ο. Site 1037-5, aquatic/recreation, Elliot Α. 14 It's aquatic life assessment--it's an aquatic 15 Creek. life assessment field data form. 16 Q. And you're welcome, Mr. Hayes, to look at 1.7 the entire document since you haven't seen it before. 18 Is this similar to what--have you seen documents like 19 this before? 20 Yes. Α. 21 Is this a standard form that the department 22 uses? 2.3 It's not a form that the fisheries section 24 Α.

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uses.

Which section would use it; do you know? Ο. 1 I believe this is done by our water 2 Α. resources section. 3 After you've had a chance to look through it and feel comfortable with the document, I'd like to 5 go back to the second page. It would be the page following the aerial photo. Α. Okay. 8 These pages aren't numbered, but for Q. 9 purposes of the record we're looking at the second 10 page of the exhibit, which again is the page 11 following the aerial photo. Could you read the 12 heading on that page. 13 Aquatic life assessment field data form. 1.4 Α. MR. BREEDLOVE: Your Honor, this is getting 15 quite a ways beyond the scope of redirect. 16 THE ADMINISTRATIVE LAW JUDGE: Well, I 17 hadn't thought about that. But I want to hear from 18 Mr. McAfee first. 19 BY MR. McAFEE: 20 Mr. Hayes, there's a comment section there--21 THE ADMINISTRATIVE LAW JUDGE: Do you want 22 to respond to Mr. Breedlove's objection? 23 MR. McAFEE: I'm sorry, Your Honor. This is 24

a report done on a larger portion of the stream which

- Mr. Hayes testified to depends on the smaller

 portions, as I understand it. And this form, I

 believe, shows that the larger portion of the stream

 according to this assessment was okay. And it was

 done the year before in 2007.
 - That's the reason for my line of questioning following Mr. Breedlove's question about the chain of--the food chain.
- 9 THE ADMINISTRATIVE LAW JUDGE: Okay. Fair 10 enough. I'll allow the question.
- 11 A. Can you repeat the question?
- 12 BY MR. McAFEE:

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- Q. Yes. On the second page there with the heading aquatic life assessment field data form, first of all, it says "water body name: Elliot Creek." Do you see that?
- 17 A. Yes.
 - Q. And then do you see down below it states, "If electrofishing was used in the assessment, how long of a transect was being assessed?"
 - A. Correct.
 - Q. And what's it say?
- 23 A. 500.
 - Q. Okay. Does that mean 500 feet?
 - A. Yes, I believe so.

- Q. And under comments, would you please read what is in the form.
- A. "Fish found throughout. Fish found in manmade ripples. Fish appear healthy. Creek may be slightly elevated."
- Q. Okay. Thank you. Then down below there's a fish collection field data list. Does it list a number of fish that you've been talking about today?
 - A. Yes.

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- Q. And does it show the presence of those fish?
- 11 A. Yes, it does.
 - Q. And again, this was taken in Elliot Creek; is that correct?
- 14 A. Yes.
- O. And you've not seen this until today?
 - A. I have not reviewed it, no.
 - Q. Mr. Hayes, Mr. Breedlove asked you a question on redirect regarding sampling and what you would normally do, et cetera. And what I wanted to just pinpoint here is you testified yesterday about this stream being subject to chronic conditions, I believe it was--
- 23 A. Yes.
- 24 | Q. --versus an acute event?
- 25 A. Correct.

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

A. Yes.

- Q. Versus an acute event that happens quickly and then it's gone?
 - A. Correct.

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- Q. We're talking about a contamination event here?
 - A. We're talking about a pollution event.
- Q. Wouldn't water sampling be more appropriate to do in a chronic event, as you've testified--a chronic event as you've testified is present here?

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

MR. McAFEE: My response, Your Honor, is I just--again, his testimony on redirect was regarding why they wouldn't do sampling, and his testimony yesterday was that this was a chronic situation that is different than the acute situations that he has testified to. And I just want to make sure the 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

clarify we're talking about Exhibit --1 MR. BREEDLOVE: 26, Your Honor. 2 MR. McAFEE: Thank you. 3 Yep, that's THE ADMINISTRATIVE LAW JUDGE: 4 5 correct. It says 9-5-2007. 6 Α. BY MR. BREEDLOVE: 7 So it was performed a year before--Α. Correct. 9 Let me just finish. -- the year before you 10 Q. did your assessment; is that correct? 11 Correct. Α. 12 Okay. Mr. Hayes, do you have any knowledge 13 as to how far downstream this facility is from--this 14 assessment was performed from yours? 15 Α. No. 16 Would distance from the tributary-- Let me 17 rephrase that. The farther you get from the feedlot, 18 is it greater the likelihood that you're going to 19 find more fish? 20 A. Yes, because you're going to get other 21 tributaries coming in. The greater the distance, the 22 more likelihood you would find fish or find more, you 23 know, I guess a more diverse community.

Now, without knowing the distance away, is

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it really possible for you to draw conclusions as to the health of this stream and impact on Elliot Creek and the unnamed tributary by Mr. Vos' feedlot?

A. No.

- Q. Just one last question. I want to touch upon-- You testified yesterday as to the range of diversity you're finding in HUC 12 streams?
 - A. Correct.
- Q. Now, if I remember correctly, you testified that the HUC 12 assessments on fairly small streams were between 160, or so, fish up to 2,000; is that correct?
 - A. Yes.
- Q. Now, looking at the assessment that's performed here, they just put what appears to be on this page of Complainant's Exhibit 26 "greater than 50" for a number of them. Is it possible for you to draw conclusions as to the actual health of this stream based on the information that's provided?

 THE ADMINISTRATIVE LAW JUDGE: We hope so. That's the title of the exhibit.
- 22 BY MR. BREEDLOVE:
 - Q. I'm asking in comparison to the assessment you did.
 - A. You can draw some conclusions, the number of

,	What this document tolls
1	species and the abundance. What this document tells
2	me is that there's a refuge population of fishnow,
3 ·	I don't know how far awaybut 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

very nice fellow, a credible witness. He didn't seem

to have any agenda, so I enjoyed his testimony.

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1	Mr. Breedlove, are you ready for your next
2	witness?
3	MR. BREEDLOVE: Yes, we are. The EPA calls
4	Gene Tinker with the Iowa Department of Natural
5	Resources.
6	THE ADMINISTRATIVE LAW JUDGE: Okay.
7	EUGENE DAVID TINKER,
8	called as a witness by counsel for the Complainant,
9 %	being first duly sworn by the Administrative Law
10	Judge, was examined and testified as follows:
11	THE ADMINISTRATIVE LAW JUDGE: The format
12	that we use here is you first state your name and
13	spell it for us so we have it on the record.
14	THE WITNESS: Eugene David Tinker,
15	E-U-G-E-N-E D-A-V-I-D T-I-N-K-E-R.
16	THE ADMINISTRATIVE LAW JUDGE: Go ahead,
17	Mr. Breedlove.
18	MR. BREEDLOVE: Thank you, Your Honor.
19	DIRECT EXAMINATION
20	BY MR. BREEDLOVE:
21	Q. Mr. Tinker, please provide us some
22	information on your educational background.
23	A. I've got a Bachelor Degree from Iowa State
24	University in ag education and also animal science.
25	I've got a Master's Degree from Oklahoma State

- University in animal science and a Ph.D. from

 Oklahoma State University in animal breeding and

 genetics.
 - Q. For whom do you work?
 - A. The Iowa DNR.
 - Q. And how long have you worked for the IDNR?
 - A. Since April of 2003.

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- Q. What is the position you currently hold?
- A. I am the animal feeding operations coordinator.
 - Q. What's involved in that position?
- A. I am the department's liaison with the ag commodity groups, Iowa State University, Natural Resources Conservation Service and other entities that work with the department for all activities relating to permitting and regulation of animal feeding operations.

I also work with our field staff to ensure we have consistent implementation of the regulations across the state.

- Q. Have you had any other positions since you've been at IDNR?
 - A. No, I have not.
- Q. Okay. Mr. Tinker, let's go ahead and just dive right into it. Are you familiar with what's

known as the Iowa Registration Plan?

A. Yes, I am.

- Q. Can you please describe what that plan was.
- A. The plan was a registration plan to get open feedlot operations in the State of Iowa to register with the Iowa Department of Natural Resources so that we could work with those producers to help them come into compliance with federal and state laws with regard to manure control runoff, water requirements and any NPDES permitting requirements that those feedlots may have.
 - Q. Now, what was your role with the Iowa Plan?
- A. It was developed by the time I started working with the department, so I worked primarily with implementing the plan, making sure we got the word out, that producers understood the requirements of the plan, making sure that they understood what they needed to do to stay in the plan as far as continuing to move forward and making progress on getting proper control structures built.
- Q. Now, why was-- The Iowa Registration Plan, why was that implemented?
- A. The department had been very lax in its enforcement through the history. So a lot of feedlot operators didn't know what the requirements were

because the department was not enforcing those
requirements. Therefore, we had widespread
noncompliance with state and federal laws. The
department didn't know where many of the open
feedlots were.

So the registration plan allowed those feedlots to register with the department without fear that we were going to show up and penalize them for not having the proper controls in place and allowed the department to work with those producers to timely develop plans and construct controls and follow through with NPDES permits so that they would meet all state and federal regulations.

- Q. Now, what facilities were eligible for the Iowa Plan?
- A. It was basically facilities that hadn't been previously permitted would have been those facilities that the department had not worked with; and, therefore, the producers may not know what the requirements were.

So it was those facilities that basically the department hadn't had any interaction with so that the producers would have known the requirements they needed to meet.

Q. Now, was there an amnesty component to this

plan?

- A. Yes.
- Q. I would like to go into detail about that. What was the amnesty component of the Iowa Plan?
- A. The amnesty was that by registering with the department so that the department now knew about those feedlots, the department would not immediately go out and do compliance inspections to determine if they were in violation of laws and take enforcement action.

The intent was to make those producers know that this was a program to assist them into coming into compliance, not to just find out about them so we could take enforcement action.

So the amnesty that was provided was that there would not be any compliance visits. There would be visits—— If there were complaints to the feedlot that we needed to follow up on or if there were fish kills that we needed to follow up on, there could be visits from that standpoint. But there would not be compliance visits to determine whether or not they were in compliance with state and federal law.

In addition, there was limited penalties for any water quality violations that may occur

throughout the Iowa Plan as we worked with these 1 operators to get their feedlots into compliance. 2 THE ADMINISTRATIVE LAW JUDGE: Just one 3 question. Would you attach a year to what you just 4 testified to. What year are we talking about, what 5 6 year? THE WITNESS: The plan was developed in 7 2001. THE ADMINISTRATIVE LAW JUDGE: Okay. THE WITNESS: It was a five-year plan, so it 10 would have ended in 2006. 11 THE ADMINISTRATIVE LAW JUDGE: And this 12 amnesty aspect, what year in that whole range are you 13 14 saying--THE WITNESS: It varied by when the feedlot 15 had their initial assessment. And so once a producer 16 had their initial assessment, there was a schedule by 17 which they were to move forward with meeting the 18 compliance as in submitting permits beginning 19 construction and such. So as long as they maintained 20 on their schedule to meet the deadlines that were 21 set, they would continue to have amnesty. 22 THE ADMINISTRATIVE LAW JUDGE: Okay. 23 THE WITNESS: If they missed some of their 24 deadlines, then that amnesty went away. So they had

1 to move forward.

THE ADMINISTRATIVE LAW JUDGE: Okay. Thank

3 | you.

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Go ahead, Mr. Breedlove.

BY MR. BREEDLOVE:

- Q. So what was the ultimate goal of this Iowa Plan? Was it full compliance from all facilities?
- A. Yes.
- Q. Now, by "facilities," how would you define "facilities" in the context of the Iowa Plan?
- A. The Iowa Plan was generally designed for open feedlot operations that needed an NPDES permit.

 We had a vast number of smaller operations that
- 14 registered because they felt it was the right thing
 15 to do. But there was not any focus on those feedlots
- 16 because unless they had special conditions, they
- 17 | would not have needed permits.
- So the focus, the primary purpose of the plan was those larger feedlots that needed a permit to get them in compliance.
- Q. By "larger feedlots," you mean a thousand or more?
- A. A thousand or more or 300 head or more with special conditions.
 - Q. What would those special conditions be?

A. If there were a stream that runs through the feedlot or if there were a manmade conveyance from the feedlot to a water source.

Q. Now, this amnesty provision, did that extend

to state law only or did it include federal law, as

- 7 A. The agreement was between ICA and the Iowa 8 DNR.
 - Q. Define what ICA is.

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well?

A. The agreement was-- Iowa Cattlemen's Association. They were the entity that was representing the Iowa cattle producers in the negotiation with the Iowa DNR in development of this plan.

So the agreement was between the Iowa
Cattlemen's Association and the Iowa Department of
Natural Resources. Those were the two entities that
signed the agreement. And so it was--mandated what
the Iowa DNR would and would not do throughout the
Iowa Plan.

- Q. Now, could you explain EPA's role in the Iowa Plan.
- A. EPA was an observer through the development of the Iowa Plan. They participated in the discussions, but they were not an active participant.

They didn't have any agreements and they did not sign off on the plan.

In fact, once the agreement was signed by the director of the DNR and the past president of the Iowa Cattlemen's Association, that—a letter was sent with the signatures from those two individuals, Jeff Vonk and Dave Petty, to EPA to inform EPA of the agreement that had been worked out between the two entities.

So EPA was aware of the negotiations, but did not actually participate in the final agreement, per se.

- Q. Did EPA waive any rights of enforcement or in any way indicate that, this plan extended to federal law?
 - A. No.

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- Q. Mr. Tinker, I'd like to focus on some of the specifics of the producer requirement to receive the amnesty. For that I think I'd like you to look--I would like you to look at Respondent's Exhibit No. 3.
 - A. Respondent's Exhibit--
 - Q. Respondent's Exhibit 3.
- MR. BREEDLOVE: May we go off the record a moment, Your Honor?
- 25 THE ADMINISTRATIVE LAW JUDGE: Yes.

(Off-the-record discussion.) 1 THE ADMINISTRATIVE LAW JUDGE: Let's go back 2 on the record. 3 BY MR. BREEDLOVE: Mr. Tinker, could you please turn to Page 3 5 of Respondent's Exhibit 3. 6 7 Α. Okay. MR. BREEDLOVE: Pardon me for one moment, 8 Your Honor. I left my Respondent's exhibit at the desk. 10 THE ADMINISTRATIVE LAW JUDGE: Sure. 11 (Short pause.) 12 13 BY MR. BREEDLOVE: Mr. Tinker, focusing your attention on Page 14 Ο. 3 of Respondent's Exhibit 3, I'd like to focus on 15 Section 2 on that page. 16 17 Α. Yes. And I believe it addresses what a producer 18 must do to receive the benefit of the amnesty 19 provided by this plan. In particular, could you 20 focus on 2, Subparagraph C--21 22 Yes. Α. --that paragraph? 23 . Q. 24 Α. Yes.

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Q.

Could you please read that first sentence

into the record, please.

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- A. "The producer must maintain reasonable progress towards compliance as discussed in Sections 4 through 7 below."
- Q. And now would you please turn to the next page on Page 6 of Respondent's Exhibit 3, Subparagraph 6. Could you please read that first paragraph into the record.
- A. "The provisions of Paragraph 2 will apply so long as the facility operator is cooperating with the department to achieve compliance within a reasonable time."
- Q. Thank you. Now, reasonable time, were there certain milestones set out by this plan, by the Iowa Plan, to determine whether a facility was making reasonable progress?
 - A. Yes. After a producer had an on-site visit, they were required to--
 - Q. Hold on one second, Mr. Tinker. Let's step back further. What got a facility into the Iowa Plan? There's a number of processes that are involved, if I understand it correctly.
 - A. Yes. The Iowa Plan went into effect in March of 2001. And to be a participant in the Iowa Plan, the producer would have had to send in their

registration information by December 31st of 2001.

That would enroll the producer and their feedlot in the Iowa Plan.

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

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

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

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

Q. Now, I'd like to step back for a second.

The assignment priority. You mentioned there was high, medium or low. You mentioned the environmental harm or environmental threat.

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

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

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

- Q. In relation to the higher priority facility; is that correct?
 - A. Yes.

- Q. So the high priority assignments within the Iowa Plan, were those closest to streams? What were some of the bases behind the assignment?
- A. It would be the size of the feedlot and, thereby, how much manure would be generated at that feedlot; the distance from a stream which would have an impact on possibility of runoff from the feedlot getting to the stream; also the slope of the land from the feedlot to the stream, which, of course, would have a bearing on the chance of runoff from a feedlot getting to a stream.

Also, we looked at other environmental 1 2 factors, such as if it was in karst terrain, if there were ag drainage wells, drinking wells, anything that 3 could have a potential impact on the environment. THE ADMINISTRATIVE LAW JUDGE: Did you say 5 in coarse terrain, C-O-A-R-S-E? 6 7 THE WITNESS: Karst, K-A-R-S-T. THE ADMINISTRATIVE LAW JUDGE: In karst 8 9 terrain? THE WITNESS: Yes. 10 11 BY MR. BREEDLOVE: Could you elaborate a little bit on what 12 karst terrain is. 13 Karst terrain is where we've got limited 14 distance between the soil surface and to rock 15 formations below the soil surface. It also has to do 16 with the make-up of those rock formations. 17 18 For example, in Northeast Iowa we've got a lot of limestone that dissolves over time which 19 creates voids below the surface, and in time that 20 soil surface caves in, and we have sinkholes. 21 22 Obviously, this is thought to be a direct conduit to our groundwater aquifers. Therefore, any 23

time we have feeding operations in karst terrain

there's concern for groundwater contamination. So

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1 | that's an issue.

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THE ADMINISTRATIVE LAW JUDGE: Thanks.

BY MR. BREEDLOVE:

- Q. Mr. Tinker, I just want to clarify that this in-house assessment—the high, medium or low priority assessment—was that in any way a determination of actual harm to the environment or assessment of impact, other than potential?
 - A. No, it was a potential--
- 10 Q. Sorry.
- 11 A. --it was a potential for environmental damage.
 - Q. And was that for the sole purpose of assigning a priority for the Iowa Plan?
 - A. That was the department's purpose for assigning that. There were other agencies that utilized that ranking, but that was the sole purpose for the department.
 - Q. Okay. Thank you. So was this in-house assessment value, was that then followed up with an on-site assessment?
 - A. Yes, that was the protocol. An on-site assessment would be scheduled with the producer, and those assessments were based upon the in-house ranking.

The high ranking feedlots, since they were presumed to have a greater environmental risk, we wanted to begin working with them and get them in the process of moving forward sooner.

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So those high ranking feedlots on sites, it was designed for on-site inspections to be scheduled in 2001. Medium ranking feedlots should have been 2002. Excuse me.

The high ranking were scheduled for 2001 and 2002. The medium ranking feedlots, they were scheduled for 2003 and 2004. The low priority feedlots, on-site should have been conducted in 2004 and 2005.

- Q. Did this also have the side attempt— This spacing of the on-site assessments, did that also have the intent to also spread the massive amount of work that needed to be done in the state among the different resources that were available?
- A. Definitely. The procedure by which a feedlot would begin moving forward after their on-site assessment was the same for a high priority feedlot as it was for a low priority feedlot.

So the way the plan was designed, the high priority feedlots would go through the process of getting an engineer, putting a design together,

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

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

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

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

- Q. You mentioned that each of the facilities that received an on-site assessment had different time lines and they were all the same for each of the rankings. Could you elaborate on what some of those requirements were, the time lines.
- A. Once they had their on-site assessment in which the field office staff would assess whether the in-house ranking was correct and would do a general assessment and discuss with the producer in general

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

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

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

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

lines were mandated by IDNR when those had to be done and submitted?

- A. Yes. When the field office staff submitted a follow-up letter to the producer summarizing the on-site, it stated in that letter when these different things needed to be submitted to the department.
- Q. And so following submission of the plan of action, within that plan of action was the schedule that was established by the producer; is that correct?
 - A. Yes; that's correct.

- Q. So following the submission and approval of the plan of action, IDNR at that point was not mandating the time lines at that point?
- A. Not mandating, other than reminding the producer that they had deadlines that they needed to meet that they had submitted themselves. So we were mandating that they follow their own plan of action.
- Q. So did IDNR eventually incorporate the deadlines established by the producer as the deadlines for the Iowa Plan?
- A. For individual feedlots, yes. So those deadlines that producers submitted were the deadlines for those feedlots.

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

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

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

- Q. And so these deadlines -- The facility had to meet these deadlines in order to meet the requirements of the Iowa Plan?
 - A. Yes, they had to move forward.
- Q. And in order to receive the amnesty that that plan would provide?
 - A. Yes.

- Q. What was IDNR's expectations at the conclusion of this plan?
- A. We expected to have feedlots that needed to be permitted to have permits in hand and controls in place to properly protect our streams.
 - O. Overall, would you say the plan was

successful?

- A. We got an additional 100 feedlots with controls in place and NPDES permits they're operating by. So, yes. Although I would say we had some difficulties, it was successful because of our accomplishment in getting more feedlots with proper runoff controls and permits.
- Q. So could you elaborate on some of those difficulties you just mentioned.
- A. Well, as much as we tried to not have a stockpile or backlog of permitting at the end of the plan, it did happen. We had a large number of applications that did come in toward the end of the plan. We also had a finite staff. We were not budgeted to hire additional review engineers to review the permit applications and issue permits.

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

- Q. You might elaborate for the Court what the difference is between the open feedlots and confinement operations if you're going to discuss it.
- A. Okay. Open feedlots by Iowa law are partially roofed or nonroofed, whereas confinements are totally roofed. The Iowa legislature has mandated that there is a much stricter and much

tighter schedule for getting construction permits.

They were also mandated at that time to get

construction permits for confinements issued within

60 days.

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At the time of the development of the Iowa Plan, there was no mandate at which time open feedlot construction permits were issued. And since we had a record number of confinement applications, our review engineers were spending their time reviewing confinement applications because they had to be out in 60 days.

The open feedlots, there was no such requirement at that time; and, therefore, they did pile up because we were not mandated to get them out in 60 days.

So there were a number of factors; record number of construction permit applications for confinements, more than standard open lot applications because of producers that were coming through the Iowa Plan procedure and the fact that we had finite staff.

So we did get a backlog of open feedlot applications. Unfortunately, we did have some feedlots that delayed sending applications, which also contributed to our backlog.

- Would you say that the backlog was--the 1 applications that weren't submitted timely pursuant 2 to the Iowa Plan, was that a significant factor in 3 causing the delay in approving permits? I wouldn't call it a significant factor. 5 was a factor because we did have some applications 6 that were delayed in being submitted, which did add 7 to that backlog. But I wouldn't say it was a significant factor because it was the large number that were on schedule that were also coming in at 10
 - So it contributed to it, it made the backlog worse. But I don't think we had enough feedlots that were that delayed that it would have caused a significant backlog.
 - Q. Mr. Tinker, are you familiar with the Lowell Vos feedlot?
 - A. I have not been to the feedlot, but I am aware of it.
 - Q. Was Mr. Vos' feedlot a participant in the Iowa Plan?
 - A. They did register, yes.

that time.

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

MR. BREEDLOVE: Your Honor, may I approach

820 the witness? 1 THE ADMINISTRATIVE LAW JUDGE: Yes, you may. 2 We'll go off the record for a second. 3 (Off-the-record discussion.) 4 THE ADMINISTRATIVE LAW JUDGE: Okay. Back 5 on the record. 6 BY MR. BREEDLOVE: Mr. Tinker, do you have Complainant's Exhibit No. 9 in front of you? 9 A. Yes. 10 Q. . Could you please identify that exhibit for 11 the Court. 12 This is a certified letter from the State of 13 Iowa from the Iowa Department of Natural Resources to 14 Lowell Vos, Incorporated, dated August 19 of 1991. 15 And what is the subject of that letter? 16 This letter is indicating that enclosed with 17 the letter are construction and operation permits for 18 a runoff control system for a 2,000 head beef open 19 20 feedlot. Q. Can you discuss some of the requirements of 21

Q. Can you discuss some of the requirements of the construction permit.

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MR. McAFEE: Your Honor, I apologize. May I interrupt for a second to go off the record?

THE ADMINISTRATIVE LAW JUDGE: Yes, we'll go

off the record.

2 (Off-the-record discussion.)

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

Now, Mr. McAfee, you have made an off-therecord comment. Do you want to relay on the record
what that comment was, and I'll reiterate what I said
about that.

MR. McAFEE: Yes, Your Honor. Complainant's Exhibit 9, this is Exhibit 9 that Mr. Breedlove is discussing with the witness, that is the subject of an objection I raised at the beginning of the hearing. And we are just--I wanted to clarify now that the Court had ruled that that would be handled in post-trial briefs, and I just wanted to clarify at this point that that was the Court's ruling, and I don't need to do anything at this point to preserve my objection.

THE ADMINISTRATIVE LAW JUDGE: As I stated off the record, that's correct. So thank you for bringing that to my attention and helping me remember that. Thank you, Mr. McAfee.

MR. McAFEE: You're welcome.

THE ADMINISTRATIVE LAW JUDGE: Okay,

Mr. Breedlove.

BY MR. BREEDLOVE:

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- Q. Mr. Tinker, is Complainant's Exhibit No. 9-does it include the construction permit issued to
 Mr. Lowell Vos?
 - A. Yes, it does.
- Q. And what were the requirements of that construction permit?
- A. This is a permit for a runoff control system to retain all waste and runoff from a 19.7 acre open feedlot for 2,000 head of beef cattle located in Woodbury County.

It indicates that construction of the project shall be initiated with one-year issuance of the permit, or the permit would no longer be valid.

It indicates that within 30 days after completion, the permit holder should submit a notification stating that the project was completed in accordance with the approved construction permit documents.

It states that the design capacity is for 2,000 head of beef cattle, drainage area of 90.7 acres.

It states that a new construction permit shall be obtained prior to making any additions or alterations to the waste control system, making any

process changes that would materially affect the
waste control system or expanding the animal loading
or feedlot drainage area above the design capacity,
such application for a construction permit needed to
be submitted 90 days before that new construction
could be scheduled to start.

It also states overexcavation of two feet is required in the base and bottom. It states that the bottom enbankments must be compacted to meet the state's requirement of 1/16th inch--

Q. Mr. Tinker, I think that's enough. Thank you.

It included a notification requirement; is that correct?

A. Yes.

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- Q. So if Mr. Vos had completed construction, was he to provide notification to the state that that construction had been completed?
 - A. Yes.
- Q. Did IDNR ever receive notification of construction completion?
 - A. No.
 - Q. To your knowledge, did Mr. Vos build any controls pursuant to this permit?
 - A. No.

- Q. To your knowledge, did this permit expire after that one year past its issuance?
 - A. Yes, it did.

- Q. Now, also within Exhibit No. 9 I believe there's a National Pollutant Discharge Elimination Permit, NPDES. Without reading the whole thing, could you please just summarize some of the requirements.
- A. Yes. This is an NPDES permit for the Lowell Vos feedlot for a 2,000 head beef feedlot with 90.7 acre drainage area. It does also state that any change needs to be submitted to the department.

The issuance of the permit is August 19 of '91. The date of expiration is July 1 of 1996. And it states that filing for renewal should have occurred by April 1 of 1995.

- Q. In the NPDES permit, what are the minimum design storage requirements? It's on Page 2.
- A. It's supposed to have sufficient design storage to contain the feedlot runoff resulting from a 25-year, 24-hour precipitation event or 5 inches of rain for each contributing drainage area.
- Q. So when these two permits are read together, is this a determination by the Iowa Department of Natural Resources at the time it was issued in 1991

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

A. Yes; that would be correct.

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

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

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

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

- Q. Did you receive any response from Mr. Vos?
- A. No.

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

10 and Exhibit 11 regarding the Court's ruling 1 prehearing? THE ADMINISTRATIVE LAW JUDGE: Yes.

MR. McAFEE: Thank you.

THE ADMINISTRATIVE LAW JUDGE: I have no problem with you reminding me of that. So thank you. BY MR. BREEDLOVE:

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

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- Did the NPDES permit create a duty for Mr. Vos to contain all runoff from this facility, except for that 25-year, 24-hour storm?
 - Yes. Α.
- Now, turning to Complainant's Exhibit 11-and you can just summarize -- can you please summarize the document identified as Complainant's Exhibit 11.
- This is a September 13, 2000, letter from the Department of Natural Resources to Lowell Vos, which is a follow-up to the June 8th letter stating the same things. "We haven't received a permit renewal, please determine whether your feedlot needs

an NPDES permit and, if so, submit your renewal application."

- Q. Did you receive any response -- Excuse me.

 Did IDNR receive any response from Mr. Vos in regards
 to this September 13th letter?
 - A. No.

- Q. Can we please turn to Complainant's Exhibit 12.

 I believe this is approximately the time that the

 Iowa Plan came into existence. Could you please

 identify this Complainant's Exhibit 12.
- A. This is a registration form for the Iowa
 Plan Registration Program submitted for Lowell Vos
 farm and feedlot. It is dated April 4th of 2001, and
 it states that the maximum capacity of the feedlot at
 that time is 3,000 head.
- Q. What was IDNR's response to the registration for Mr. Vos?
- A. We sent a letter to Mr. Vos acknowledging that we had received his registration and would begin the process of working his application through the Iowa Plan.
- Q. Was there a recognition by IDNR at that time that Mr. Vos had already been issued a permit in 1991?
- 25 A. No.

- Q. I believe you stated earlier that the Iowa Plan was intended for unpermitted facilities?
 - A. Yes; that's correct.
- Q. Now, at this point in time why was Mr. Vosallowed into the Iowa Plan since he already had an NPDES and failed to meet your requirements of that?
- A. It would have been oversight on the department's part.
- Q. But he was allowed to participate, nonetheless?
 - A. Yes.

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- Q. So when he was allowed to participate, did that grant him the benefits of being in the Iowa Plan, the five years' amnesty--excuse me--the five years to come into compliance and the benefit of the amnesty provided?
 - A. Yes, that was provided to him.
 - Q. If he met the requirements of the Iowa Plan?
- A. Yes.
- Q. Could you please turn to Complainant's
 Exhibit No. 13, Mr. Tinker. Please identify that for
 the Court and summarize its contents.
 - A. This is a May 15, 2001, letter from the department to Lowell Vos acknowledging that we--the department had received his registration for his

- facility, letting him know that an in-house assessment would be conducted and he would receive information on that.
- Q. So this is basically--to summarize, it's telling him that he's been allowed in the Iowa Plan?
 - A. Yes.

- Q. Now, please focus your attention on Complainant's Exhibit 14. Please summarize the contents of this letter for the Court.
- A. This is an October 16, 2001, letter from the Department of Natural Resources to Lowell Vos indicating that the in-house assessment for his feedlot has been conducted; that that assessment resulted in 132 points for his feedlot, meaning he would be in the medium priority group.
- Q. Did it establish a date for his on-site assessment pursuant to the plan?
- A. It stated that medium priority feedlots, should receive an on-site assessment sometime in 2003 or 2004.
- Q. Now, Mr. Prier is expected to testify to much of the requirements that—the steps in meeting the requirements of the Iowa Plan or in this case not meeting the Iowa Plan.
 - 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.
- A. This is a certified letter dated April 28,
 2005, from the Department of Natural Resources to
 Lowell Vos and Lowell Vos Feedlot.
 - Q. I'd like to focus your attention to the sentence in bold in the center of that. Could you please read that for the Court.
 - A. It states, "If your final engineering plan is not submitted within 30 days of your receipt of this letter, your facility will no longer be a participant in the Iowa Plan."
 - Q. So just to summarize, I know-- Are you familiar with the history of this facility?
 - A. Somewhat.

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- Q. Can you just perhaps summarize some of the events that might have led up to the issuance of this letter.
- A. Mr. Vos and his engineer submitted a plan of action by which he would submit final engineering plans so that those plans could be reviewed and a construction permit issued.

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

notice of violation for not meeting that deadline and indicating that if those documents were not received within 30 days, the applicant would no longer be a participant in the Iowa Plan.

- Q. Was there more than one or two-- Was there more than one notice of violation issued to this facility in the process of the Iowa Plan?
 - A. I'm not aware of any additional ones.
- Q. Okay. Mr. Tinker, are you aware of when the final plans were submitted by Mr. Vos?
- A. I know they were. The date doesn't come to my memory, but I know he did submit final plans.
- Q. Step back for a second. What were the results of--following the issuance of this letter?
- A. I am not aware that we received anything until the construction permit application was submitted.
- Q. So what is IDNR's determination so far as Mr. Vos' participation in the Iowa Plan?
- A. He did not submit an application within 30 days of his notice of violation; and, therefore, he was out of the Iowa Plan.
- Q. And so could you please -- The sentence following the bold in Complainant's Exhibit 22, could you please read that into the record.

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."

- Q. What is IDNR's position in regard to the amnesty provided to Mr. Vos pursuant to the Iowa Plan?
 - A. After this letter, he no longer had any.
- Q. Provided he didn't submit his plans within 30 days?
- 14 A. Correct; yes.
- Q. To your knowledge, did he submit those plans?
- 17 A. No.

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- Q. So is it IDNR's position that Mr. Vos was no longer to receive the benefit of the amnesty provided by the Iowa Plan?
 - A. That's correct.
 - Q. Therefore, IDNR could bring suit?
- 23 A. That's correct.
 - Q. Mr. Tinker, Respondent in his briefs has presented some arguments in regard to failure on the

part of IDNR to process permit applications timely in order to allow him to begin construction.

Could you please inform the Court as to the number of facilities that received their on-site assessments--in other words, established a time line for which they were supposed to come into compliance--that were able to meet those requirements and receive their permit, NPDES permit.

- A. Well, we had over a hundred facilities that did go through the Iowa Plan without any failures to meet the requirements. I guess--
- Q. Let me rephrase that. That was a long question. I apologize to you and the Court.

To be more specific, were there any facilities who received their on-site assessments after Mr. Vos, but were still able to timely get their permit application in and receive their NPDES permits?

A. Yes.

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- Q. How many of those-- Do you know how many?
- A. Not a specific number, no. I did do a short summary of some of the facilities that had submitted applications about the same time that Mr. Vos' application was, and they were all--they all had their on-site conducted well after Mr. Vos' on-site

1 had been conducted.

- Q. But they were able to meet the requirements of the Iowa Plan?
 - A. Yes.

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- Q. They were able to get their final plans in on time?
 - A. Yes.
- Q. And they were able to benefit from the amnesty provisions of the plan?
 - A. Yes.
- Q. Mr. Tinker, what is the current status of the Lowell Vos feedlot in regard to the NPDES permit and construction permitting?
- A. A construction permit was issued, I believe, in 2006 for the feedlot. It's my understanding that no construction was initiated. So that construction permit would no longer be valid.

There was also an NPDES permit issued in 2006. That permit would be a valid permit, but I don't believe the feedlot can meet the requirements of the permit without the associated control structures that needed to be built.

Q. Mr. Tinker, focusing back on Respondent's Exhibit 3, again, focusing on Page 3 of Respondent's Exhibit 3.

835 Is it in this book? Α. 1 MR. BREEDLOVE: May I approach, Your Honor? 2 THE ADMINISTRATIVE LAW JUDGE: Yes, you may. 3 Okav. I have it. Α. 4 5 BY MR. BREEDLOVE: Again, focus your attention on Page 3, 6 0. Paragraph 2, Subsection 3. 7 Α. Yes. 8 Now, you read into the record that producer 0. must maintain reasonable progress towards compliance 10 to receive the amnesty provisions. Did Mr. Vos make 11 reasonable progress to come into compliance? 12 13 Α. No. Focusing on Paragraph 6 on the next page, in 14 15

Q. Focusing on Paragraph 6 on the next page, in regard to timely submitting the documents and meeting the requirements of the Iowa Plan, what is the IDNR's position in regard to Mr. Vos' cooperation with IDNR to meet the requirements of the Iowa Plan?

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A. The construction permit application was not submitted in a timely fashion as provided in the plan of action that was submitted. And, therefore, the notice of violation was submitted giving the applicant another 30 days to get the construction permit application submitted. And when that requirement was not met within 30 days, he was

removed as a participant in the Iowa Plan.

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- Q. So would the amnesty provisions discussed in this document, would they apply?
- A. Not after the 30 days following the notice of violation.
- Q. Now, would that liability-- With the lifting of that amnesty, would liability go back to the entire period of the Iowa Plan?
 - A. I guess I'm not sure what you're asking.
- Q. What I'm asking, Mr. Tinker, is that once a facility was kicked out of the Iowa Plan, was the liability reinstated as though they had never been in the plan?
 - A. Oh, sure, yeah.
- Q. Now, during the process of implementing the Iowa Plan, were there any other facilities kicked out?
- A. I know there were additional letters or notices of violations that were sent, but I don't recall if any of the other facilities were actually removed from the plan.
- Q. Mr. Tinker, I'd like you to rethink that for a moment or two. Think about your answer for a second or two.

MR. McAFEE: Your Honor, I'm sorry, I have

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?

MR. McAFEE: Please. 1 THE ADMINISTRATIVE LAW JUDGE: Sure. 2 take a five-minute break. 3 (Short recess.) THE ADMINISTRATIVE LAW JUDGE: Let's go back 5 6 on the record. CROSS-EXAMINATION 7 8 BY MR. MCAFEE: Good morning, Mr. Tinker. I am Eldon 9 I guess you know who I am; right? 10 Yes, I do. 11 Α. As you're aware, I'm representing Lowell Vos. 12 today in this action, and I'm going to be asking you 13 a few questions regarding testimony primarily 14 regarding the Iowa Plan, and then we'll get into the 1.5 permitting process some. 16 I just want to start with--you testified to 17. this--you came to the department in your current 18 position--which is the position you're still in, 19 20 right? That's correct. 21 --you came to the department in April of 2.2 2003? .23 24 Α. Yes.

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Q. And the Iowa Plan actually began in March of

2001; is that right?

A. Yes.

- Q. So any of the discussions about--that would have occurred about implementing, beginning implementation of the Iowa Plan, developing the Iowa Plan, you were not at the Iowa Department of Natural Resources at that time?
- A. That's correct.
 - Q. I want you to turn to in the notebook-they're Respondent's exhibits--turn to Exhibit 2.
 And what do you see there? What is Exhibit 2?
 - A. This is a letter on Iowa DNR letterhead to--it's dated March 22, 2001. It's directed to Dale Hutton, Director of Water Wetlands and Pesticides at EPA in Kansas City, and it's cosigned by Jeff Vonk, Director of the Department of Natural Resources, and David Petty, past president of the Iowa Cattlemen's Association.
 - Q. And so going by the date on the letter, which was contemporaneous with the beginning of the Iowa Plan, but you were not at the department at that time?
 - A. That's correct.
- Q. And so you wouldn't have any individual knowledge regarding this letter and Mr. Vonk's

- signature to it and any discussions within the department regarding this letter; is that right?
- A. Not prior to the letter being signed; that's correct.
- Q. Okay. Have you since become aware of this letter?
 - A. Yes.

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- Q. And how have you become aware of it?
- A. When I came to the department it was part of the documents that we had accumulated pertaining to the Iowa Plan for registration.
- Q. And did you have reason to look at the letter for anything to do with your job responsibilities?
 - A. Yes.
 - Q. And what was that reason?
- A. To familiarize myself with the Iowa Plan and the interactions that had gone on between IDNR, ICA and EPA Region 7.
- Q. Okay. Would you look at the first page of Exhibit 2. There's a paragraph about two-thirds of the way down, the first paragraph following the bullet points.
- 24 A. Yes.
 - Q. Would you read that paragraph into the

record for us, please.

- A. "The plan has the goal of bringing open feedlots into compliance within five years. It recognizes the real world limitations of staffing and time for the DNR, time and money for cattlemen and infrastructure problems with existing engineering, cost share and contractors."
- Q. Now, it says quite a few things there.

 Let's take them a few at a time. First of all, the real world limitations of staffing time for the DNR.

 I believe you've testified to that this morning, haven't you?
 - A. Yes.
- Q. And apparently at the time this letter was written that was already recognized to be a potential concern?
 - A. Yes.
- Q. Okay. And then it also refers to time and money for cattlemen. Tell me what that means for you.
- A. There are only so many engineering firms in the Midwest that producers could hire to develop plans for them, and those engineering firms only have so many staff and so much time.
 - So cattlemen are limited by the ability to

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

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

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

- Q. Gene, you used the term EQIP. Maybe we ought to provide some explanation for the record what that is. What does EQIP--is that E-Q-I-P?
 - A. Yes; that's correct.
 - Q. -- and what does that stand for?
- A. That's a USDA program that is implemented by the Natural Resources Conservation Service, which is cost share dollars made available to producers to implement programs that will protect the environment.
- Q. And as we sit here right now, do you know what the acronym stands for? I'm not sure I do.
 - A. Environmental Quality Incentive Program.
 - Q. Thank you. Continuing on with your

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

A. Yes.

- Q. Okay. And then the cost share, would that be EQIP?
 - A. Yes.
 - Q. And maybe any other cost share programs?
- A. That's correct. There may be others available, as well.
- Q. Were there any others available that you remember during the Iowa Plan?
- A. There may have been cost share available in individual watersheds as part of watershed improvement programs, but I'm not positive on that. So there may have been additional funds available, but I'm not sure.
- Q. And then the final item in that paragraph, referring to the real world limitations, cost share contractors, would you, if you can, explain that a little bit, what that means to you.
- A. Yes. There's-- You know, there's only so many businesses that are in the business of moving dirt and building such structures. And they have to have adequate work to properly finance their

operations.

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

- Q. Okay. And did you see -- During the period of the Iowa Plan, did you see these things come to bear, so to speak?
 - A. Yes, many of them.
- Q. Any of those you discussed that actually didn't turn out to be a concern?
- A. I cannot address the money issue because I don't know the financial status of the operators.
- Q. Would you turn to the next page, please, of Exhibit 27. The very last sentence says--and I'll just read it into the record--"The DNR and ICA are also requesting the USEPA to agree to inspect only unregistered, unpermitted lots when they resume inspections."

Do you see that?

- A. Yes.
- Q. And maybe I should have started a little earlier because it uses the term "resume

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

- A. There was a request made to EPA to discontinue inspections and compliance visits in Iowa feedlots to allow the state's producers to become compliant with adequate control structures.
- Q. So those inspections if a feedlot registered, they were--EPA was not to inspect someone who was registered when they started doing the inspections again; right?
- A. Could you be a little more definitive, please.
- Q. Sure. Let's go to the sentence above it, please. The sentence above it says, "The DNR and the ICA are requesting that the USEPA continue to suspend federal inspections until May 1, allowing time to publicize the program to open feedlot producers and give them time to sign up for the program."

Do you see that?

19 A. Yes.

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- Q. Now, that puts it in better context as to what is meant by "resume inspections."
 - A Yes.
- Q. Okay. Could you tell us again what that means to you when you were implementing the Iowa Plan.

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

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

- Q. And did that, in fact, occur, to your knowledge?
 - A. The resumption?

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- Q. Did-- When the Iowa Plan was put in place, did USEPA agree to inspect only unregistered and unpermitted lots when they resumed inspections?
- A. I'm not sure what EPA agreed to. I do know that they held off on some inspections, but I don't know if they had agreed--I wasn't a party to that, I'm sorry.
- Q. No, I understand. I guess I'm not asking you what you know they agreed to. I'm asking you during your experience with the Iowa Plan, did EPA not inspect—let me say it differently—did EPA only inspect unregistered, unpermitted lots during the period of the Iowa Plan?

- A. Yes, feedlots that were not in the Iowa Plan.
- Q. Okay. So again, I'm not asking you if you know what was agreed to, I'm asking you what actually did happen, and you were in your position from 2003 on, which would include the rest of the Iowa Plan.

 During that time it's your understanding and your experience that EPA did not inspect feedlots in Iowa unless they were not in the Iowa Plan?
 - A. Yes.

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

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

- A. I guess I haven't ever participated in any EPA inspections. I do know they get a follow-up letter. I'm not sure what's in those follow-up letters because I haven't seen them.
- Q. To your knowledge, does--following an EPA inspection if there is any noncompliance can a producer be subject to an enforcement action by EPA?
 - A. Yes, they can be.

- Okay. Now, let's go on to-- Well, let me 1 back up. To your knowledge--and again, you weren't 2 with the department at the time this letter was sent 3 in--to your knowledge, did EPA disagree with anything in this letter? I'm asking you to your knowledge. 5 The March 22nd letter? 6 Α. Yes. 7 Q. The question again? Α.
 - Q. The question is, to your knowledge did EPA disagree with anything in this letter regarding the Iowa Plan?
- 12 A. No, they did not.
 - Q. Okay. Let's go to Exhibit 3, which is the actual Iowa Plan. Down at the bottom of Page 1 of this document--and-- Well, let me back up a second. To your knowledge, was this document entered into rules anywhere, regulations?
 - A. Not to my knowledge.
 - Q. Okay. To your knowledge, it wasn't adopted into Iowa regulations?
 - A. No.

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

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

A. Yes.

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- Q. And you weren't with the department at that time, though; right?
 - A. That's correct.
- Q. Are you making that testimony based on what's in this Iowa Plan document?
- A. That and based upon what my supervisor told me when I was hired.
- Q. Okay. And there is a-- Well, so there was this at least understanding reflected in this document that maybe DNR wasn't enforcing the NPDES regulations as stringently as they should?
 - A. Yes.
- Q. And that maybe some feedlots that needed an NPDES permit didn't have one?
 - A. Yes.
- Q. Okay. And I just want to clarify this, and this is a legal issue, but Footnote 2--
- MR. BREEDLOVE: Objection, Your Honor. I think he's going to ask the witness for legal conclusions.

THE ADMINISTRATIVE LAW JUDGE: Why don't you

wait and see what his question is.

BY MR. McAFEE:

- Q. Please read to us Footnote 2.
- A. "Under current federal law, livestock operations with more than 1,000 animal units are not required to have an NPDES permit if the operation discharges only in the event of a 25-year, 24-hour storm."
- Q. And are you aware of what that footnote means to you?
 - A. Yes.
 - Q. And what does it mean?
 - A. It means that if a large CAFO only discharges when there is at least a 25-year, 24-hour storm, that NPDES permit would not be needed.
 - Q. Okay. So based on that provision in Footnote 2 there, would that be that a feedlot in Iowa that was larger than a thousand head at that time and maybe had been for a number of years and didn't have an NPDES permit that they could still be in compliance with federal and state law if they complied with this requirement?
 - A. Yes.
 - Q. Okay. So the fact that there were feedlots larger than a thousand head out there that didn't

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

A. That's correct.

- Q. If you'd turn to the next page, please. There's a Footnote 4 at the bottom of that page that essentially, in my opinion anyway, says essentially the same thing, but I'd like to have you read that and maybe read that into the record, please.
- A. "Previously the Iowa DNR has not required operating permits for open feedlots with more than a thousand animal units if because of location, site topography or other factors no waste from the feedlot are discharged into a stream or other water of the state."
- Q. Thank you. Is that your understanding of the regulations also?
 - A. Yes; that would be correct.
- Q. Okay. So again, that goes back to why there were some feedlots out there with more than a thousand head that did not have NPDES permits. I'm not saying all, by any means, but some that were larger than that would not have been out of compliance with state and federal law?
 - A. Possibly.
 - Q. Okay. Gene, have you been to the Lowell Vos

| feedlot site?

- A. No, I have not.
- Q. In your work, do you visit quite a few feedlots?
- A. I did during implementation of the Iowa Plan. I have not visited nearly as many lately.
- Q. Okay. But you do get to a fair number of feedlots or did get to a fair number of feedlots?
 - A. Yes.
- Q. Okay. Are you familiar with a program or an alternative in the Iowa regulations for a feedlot to use what's called an alternative technology system for feedlot runoff control?
 - A. Yes.
- Q. Tell us what that means and a little bit about that program.
- MR. BREEDLOVE: Objection, Your Honor. This is beyond the scope of the direct. I mean, alternative programs, this isn't anything that was discussed during the direct examination.

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

hostile witness and ask him questions about that on 1 direct as opposed to on cross. 2 But do you want to respond to Mr. Breedlove's 3 objection that it's beyond the scope of direct? MR. McAFEE: Yes, I would, Your Honor. THE ADMINISTRATIVE LAW JUDGE: Okay. 6 MR. McAFEE: This witness is on our witness list, too, as--you've used the term "hostile 8 witness." I don't want Mr. Tinker to take it--9 THE ADMINISTRATIVE LAW JUDGE: That does not 10 mean literally. That's just the jargon that we use. 11 MR. McAFEE: --and I have been informed by 12 the Iowa Department of Natural Resources for him to 13 appear separately, other than when he's here right 14 now, I would need to subpoena him. And I would be 15 glad to do that, but I felt the best way to handle it 16 just for convenience of the witness is just to do it 17 1.8 all at once. So this is really a combination of direct 19 examination and cross-examination. 20 MR. BREEDLOVE: Your Honor, I don't have any 21 objections if that's what it's for. 22 THE ADMINISTRATIVE LAW JUDGE: 23 MR. BREEDLOVE: When he's done, he's done, 24 and he's not going to be called back later. 25

THE ADMINISTRATIVE LAW JUDGE: Well, he's 1 not closing the door on that. 2 MR. BREEDLOVE: I understand that, Your 3 Honor. THE ADMINISTRATIVE LAW JUDGE: He just might have to get a subpoena, apparently, to do that and 6 pay for the witness' travel fees, et cetera. 7 So I think I've made my ruling. All right. 8 Go ahead with your questions, Mr. McAfee. 9 MR. McAFEE: Thank you. 10 BY MR. MCAFEE: 11 Do you remember the question, Gene, or 12 should I--13 Α. You better rephrase. 14 I think I can come close to this. I was Q. 15 just asking you to explain your knowledge of what's 16 called the alternative technology systems, what they 17 are, let's start with that. 18 Alternative technology systems have been 19 utilized by the department for permitted feedlots 20 that did not choose to build a settled open feedlot 21 effluent basin, also known as a runoff control basin. 22 So that rather than retain that settled open 23 feedlot effluent and later land-apply it, it would 24 actually treat it in a vegetated area. So it would

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

- Q. And under the Iowa DNR regulations, are those systems recognized as a--as being in compliance with the requirements to control runoff from a feedlot of over a thousand head?
- A. If the monitoring results from those feedlots indicates equivalent performance to a standard system with a basin, they would be considered to be in compliance, yes.
- Q. Do you recall when the regulations authorizing the alternative technology system went into place?
 - A. Which regulations?

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

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

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

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

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

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

- A. I'm not sure if it was a House File or Senate File. But, yes, it was due to legislation from the Legislature.
- Q. That is the Iowa Legislature that you're referring to; right?
 - A. Yes.

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- Q. Okay. Now, do you know if Mr. Vos has an alternative technology system permit?
- A. He does not.
- Q. Okay. So what— The reason I'm asking you about this is—a little background here. You just testified as to when those regulations went into place, late 2005, so give me— How many years is that after the Iowa Plan went into effect?
- A. Well, it would have been--if the Iowa

 Code--if 805 would have gone into effect roughly four

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

- Q. Now, were-- Quite a few producers during this period of the Iowa Plan were--in your experience, there were producers interested in doing alternative technology systems?
- A. There was a lot of discussion. I don't know if there were a lot of producers interested in actually implementing a system.
 - Q. And why was there a lot of discussion?
- A. Because this was the first time such treatment systems would have been allowed for animal feeding operations. And since we had some feedlots in the State of Iowa that needed an NPDES permit, there was interest if they could use a treatment system like an alternative technology in place of the standard basin to hold and land apply.
- Q. And why would a producer want to use an alternative technology system instead of a traditional basin system?
- A. It could potentially be less expensive to build. They would not have a basin which would be containing liquid and they wouldn't have all of that settled open feedlot effluent that would need to be

land applied.

- Q. And the concern of the producer to have all of that settled open feedlot effluent to land apply, is that a cost issue also?
 - A. Yes, it would cost to apply that.
- Q. Okay. Do you still work-- As a regulator with the Iowa Department of Natural Resources, do you still work with feedlots that do have alternative technology systems in place?
- A. I work with those feedlots, but not as a regulator.
 - Q. Okay.
- A. I am not on the enforcement part of the division.
 - Q. How do you work with them?
 - A. I share with them what the department's requirements are and what they need to do to meet those requirements. I try to assist those producers in making sure that they're aware of the standards that must be met.
 - Q. Okay. Now, I want to get back to the Iowa Plan here and some of these real world limitations we talked about. Let's talk about Lowell Vos' feedlot here.

First of all, do you know when Lowell

registered for the Iowa Plan?

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- A. I believe it was in April of '01.
- Q. Yeah. And I think that was one of the exhibits that Mr. Breedlove went through with you.

MR. BREEDLOVE: I think it's 12.

MR. McAFEE: Thank you.

- Q. I believe it's Exhibit 12. Do you have a date there on that, Mr. Tinker?
 - A. Yes, it's April 4 of 2001.
- Q. And I know you weren't with the department at the time, but would you consider that, based on what you know, to be fairly soon after registration was available?
 - A. Yes.
- Q. Then I believe in the record, then, that Mr. Breedlove went through with you you talked about the in-house assessment that was performed. And then I don't believe Mr. Breedlove went through this with you, which I would like to.

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

- A. This is the on-site feedlot inspection form for the Lowell Vos feedlot dated June 25 of 2003.
 - Q. And you didn't conduct this; is that right?
 - A. That's correct.

But this is the next step in the process 1 Q. that I think you talked about with Mr. Breedlove; 2 3 would that be right? This would follow the in-house assessment, 5 yes. And again, you just testified to the date as June 25 of 2003. So that is -- is that approximately 7 two years after Mr. Vos registered? 8 Α. Yes. Okay. During that two-year time period, 10 Q. would Mr. Vos have been able to do anything to 11 proceed with compliance with the Iowa Plan as far as 1.2 getting engineering work or anything done? 13 He could have called the department and 14 asked for an on-site visit sooner, which was part of 15 the Iowa Plan that, if requested, the department 16 17 would visit sooner to start the process. And did the department do that? 18 They were not requested to. 19 Α. 20 Q. Okay. Did they do that in some cases? I can't respond to that. I'm not aware. 21 Α. Okay. And so how do you know a producer 22 could have done that? 23

me--that visits would not be made unless there were

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Because it states so that compliance -- excuse

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

- Q. And your testimony is that was not done in this case; is that right?
 - A. Not to my knowledge.

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- Q. Okay. As a result of the in-house assessment, Mr. Vos' lot was given a medium priority; is that right?
 - A. That's correct.
- Q. And, do you know, as a result of the on-site assessment, did he receive the same--or was that priority confirmed?
- A. It does not state so on the form, but my understanding was he retained his medium ranking.
- Q. What does a medium ranking, in your words, mean?
- A. It means that of all feedlots registered in the program that needed to be assessed they would fall into the group that would have somewhat of a medium risk for environmental contamination and, therefore, would move through the process with a medium ranking.
- Q. Now, I believe in your testimony from questions from Mr. Breedlove he focused on the in-house assessment, and there was some testimony

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

A. That's correct.

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

MR. BREEDLOVE: Objection, Your Honor.

We're going to have a witness who was on-site to specifically testify to this issue. Mr. Tinker has already said that he hasn't been to the facility. He really isn't in a position to speak to this. We will have a witness to discuss this.

THE ADMINISTRATIVE LAW JUDGE: Mr. McAfee.

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

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

THE WITNESS: Can you restate it, please. 1 (Last question read by the reporter.) 2 Yes; that would be correct. 3 Α. BY MR. MCAFEE: 4 Okay. Again, he remained in the medium risk 5 Q. 6 category? Yes; that's my understanding. Α. Okay. I now want to go to the thin notebook 8 Q. up there of the exhibits, which would be Respondent's 9 exhibits. Would you go to tab 4, which would be 10 Exhibit 4. Do you see that? 11 Α. Yes, I do. 12 Okay. Is this the-- What is this form? 13 This is the priority assessment form that 14 was used during the in-house assessment. 15 And, of course, this is in the record and 16 Q. you testified to some of this, I believe, but is this 17 the form and are these the factors that was used by 18 the DNR to determine the in-house assessment for 19 environmental risk for the Iowa Plan? 20 Yes. 21 Α. And some of the-- Could you just read the 22 headings of the factors there that were looked at. 23 Animal units, topography, distance to 24 Α.

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.

BY MR. McAFEE: 1 Gene, could you please go to Complainant's 2 Exhibit 16. 3 Α. Okay. Would you take a look at the second 5 Q. paragraph of Exhibit 16. And does that paragraph 6 give the number of points for the Lowell Vos feedlot 7 as a result of the in-house assessment? 8 Yes, it does. And what were those points? 10 One-hundred-thirty-two. 11 Α. And then, again, is it your understanding 12 Q. that the on-site assessment confirmed those points? 13 Yes, it was given the correct priority 14 15 rating. MR. McAFEE: Okay. Your Honor, may we go 16 off the record? 17 THE ADMINISTRATIVE LAW JUDGE: Sure. We'll 18 go off the record. 19 (Off-the-record discussion.) 20 THE ADMINISTRATIVE LAW JUDGE: We'll see you 21 all at 2 o'clock. 22 (Recess at 12:55 p.m., until 2 o'clock p.m. 23 of the same day.) 24

2:10 p.m.

AFTERNOON SESSION 1 THE ADMINISTRATIVE LAW JUDGE: Please be 2 3 seated.

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

EUGENE D. TINKER,

resumed his testimony as follows: 6

CROSS-EXAMINATION (RESUMED)

BY MR. McAFEE:

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

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

- They were observed during the discussions to Α. develop the program.
- And, of course, you weren't present during 0. those discussions, though; right?
 - A. That's correct.
- Q. Okay. I think Mr. Breedlove asked you if EPA waived any rights of enforcement. Do you recall

that question?

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- A. Yes.
 - Q. And do you recall your answer?
 - A. Not specifically.
 - Q. Okay. Do you believe EPA waived any rights of enforcement under the Iowa Plan?
 - A. I don't believe they waived any rights.
 - Q. Okay.
 - A. I believe they delayed some inspections or did not conduct some inspections, but I don't believe they waived any rights.
 - Q. And you're making that--that's your understanding of the process; is that correct?
 - A. Yes.
 - Q. Have you-- Well, that's fine. You've clarified that for me based on--I know you and I had--I asked you questions regarding the--whether inspections had occurred during the Iowa Plan, et cetera.

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

A. Yes; that would be correct.

I now want to talk about the Q. Okay. 1 questions Mr. Breedlove had for you regarding--it's 2 the 1991 permit, is the way I describe it, and that's 3 Exhibit 10. THE ADMINISTRATIVE LAW JUDGE: Do you mean 5 EPA Exhibit 10? 6 MR. McAFEE: Yes, Your Honor, Complainant's 7 8 Exhibit 10. THE ADMINISTRATIVE LAW JUDGE: All right. MR. McAFEE: Excuse me. I was looking at 10 the letter. I'm sorry, it's Complainant's Exhibit 9. 11 THE ADMINISTRATIVE LAW JUDGE: Okay. 12 BY MR. McAFEE: 13 Mr. Breedlove had some questions for you 14 0. about this permit. Have you looked at this before 15 today or before preparing for this hearing? 16 Yes. 17 Α. And what opportunity or what reason would 18 Q. you have had to look at this, other than for this 19 20 hearing? That was the reason. 21 Okay. And you testified, as I understand it 22 and recall, that this is a determination by DNR that 23 Mr. Vos did not have significant controls, or 24 something to that effect I think was your testimony;

is that correct?

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- A. Mr. Vos applied for a permit--
- Q. Yes.
- A. --which to me would indicate that he knew he needed controls on the feedlot. Otherwise, he would not have applied for a permit.
 - Q. And you're basing that conclusion on what?
- A. On the fact that I don't believe he would have applied for a permit if he didn't know that he needed controls on his feedlot.
 - Q. But do you know that for a fact?
- 12 A. No, I do not.
 - Q. So that would be your opinion or your--I may use the word "speculation." If you don't agree with that word, please feel free to disagree. But you are speculating that's why he applied for the permit?
 - A. I'm basing that on my conversations with cattle producers.
 - Q. What cattle producers?
 - A. Cattle producers in the State of Iowa that I've worked with since I've been with the Iowa DNR.
 - Q. But it's not based on a conversation with Lowell Vos, is it?
 - A. That's correct.
 - Q. That's correct that it's not based on a

conversation with him?

A. Yes.

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- Q. Okay. So let's make sure we're clear there. You did not have a conversation with Lowell Vos about whether--about why he applied for the 1991 permit?
- A. That's correct; I did not have a conversation with him.
- Q. Now, you have testified as to what you believe this represents, and if you look at that, you know, I think you testified also that the permit created a duty to construct; is that right?
 - A. That's my opinion, yes.
- Q. And that the NPDES permit, which is part of Exhibit 9, created a duty to contain runoff?
 - A. Yes; that would be correct.
- Q. Let's take a look at the letter that is the first page of Exhibit 9. And the first sentence says, "Enclosed are the construction and operation permits issued for the runoff control system to serve your 2,000 head open feedlot."

Do you know if that runoff control system

22 was built?

- A. I personally don't know. I've been told that it was not.
 - Q. Okay. So if the runoff control system were

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

- A. The construction permit was not acted upon, nothing was built based upon the permit that was issued.
- Q. And so couldn't it be that if the runoff control system were not built, no duty was created under this construction permit because he didn't build it; that the construction permit only applies if you build a runoff control system, and you have to do it pursuant to this construction permit? Is that correct?
 - A. I'm not exactly sure what you're asking.
- Q. Well, again, Gene, you testified that this permit created a duty upon Mr. Vos to construct something. My point is, is it not--the duty under the construction permit was if he built something, not that he had to build something?
- A. The construction permit works in conjunction with the NPDES permit, and he could not implement his NPDES permit without implementing his construction permit because there would not be adequate controls to abide by the requirements of the NPDES permit.
- Q. Okay. I'm not sure you answered my question, but let's go that direction. Let's look at

the NPDES permit.

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

- A. I'm not aware of anything.
- Q. So you're not aware that he was told in any way, shape or form by the department, "You have to get a construction permit"?
- A. I personally do not have knowledge of that.
- Q. Okay. And so we look then at the NPDES
 permit that you've referred to. Would you flip back
 to that.
 - A. Uh-huh. Yes, I see it.
 - Q. Okay. The first page of the NPDES permit, which for purposes of the record is the fourth page of Exhibit 9--
 - A. Yes.
 - Q. --there's some headings there, but the first paragraph of the body, I'll call it, the last sentence, would you read that into the record.
 - A. In the body?
 - Q. The body of--the first paragraph in the body of that page is what I would call it, anyway. Do you

see what I'm referring to? 1 The last sentence of the first paragraph? Α. 2 Yes, please. Q. 3 "You are authorized to operate the runoff Α. 4 control system and to discharge the pollutants 5 specified in this permit in accordance with the 6 effluent limitations, monitoring requirements and 7 other terms set forth in this permit." 8 9 10 11

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- Okay. My question is if he does not build the feedlot runoff control system that is mentioned here and if he does not discharge pollutants as specified in this permit, is there any duty created by this permit?
- A. He does have an active permit, and he is to--he is to perform the duties of that permit, which includes all the monitoring and such.
- But it's only if he has the runoff control system, isn't it?

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

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

THE ADMINISTRATIVE LAW JUDGE: You don't 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.

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

THE ADMINISTRATIVE LAW JUDGE: Okay.

(Last question read by the reporter.)

A. In my opinion is that the--

BY MR. McAFEE:

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- Q. I don't like to interrupt, but could you please answer that yes or no. And then you're more than welcome to explain what you want, but I would like a yes or no answer to that question.
 - A. No.
 - Q. Okay. Did you want to add anything?
- 16 A. No.
 - Q. You also testified this morning that it was oversight on the DNR's part that Mr. Vos was allowed into the Iowa Plan?
 - A. Yes.
 - Q. Were you-- You weren't with the department at that time?
 - A. That's correct.
 - Q. So what are you basing that statement on?
 - A. The actions of the department do not match

1 | the purpose of the Iowa Plan.

- Q. And again, that's in your opinion?
- A. That's correct.

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- Q. Has anyone in the department that was there at that time that would have made the decision to allow Mr. Vos to participate in the Iowa Plan talked with you about that?
 - A. No, they have not.
- Q. I'd like to turn to Exhibit 22. This is the letter that you testified to in response to Mr. Breedlove's questions this morning about Mr. Vos' status under the Iowa Plan; is that right?
 - A. Yes, it is.
- Q. And I believe you testified that as a result of this letter if he didn't do what he was supposed to do under this letter that he would have been kicked out, or whatever word you used, out of the Iowa Plan.
- A. He would no longer be a participant in the Iowa Plan, yes.
- Q. And did you testify-- Do you know for sure if that is, in fact, what happened?
- A. That he was removed from the Iowa Plan? Yes, he was.
 - Q. And how do you know that?

- A. Because that's what was agreed to was that if he did not submit his engineering plans within 30 days, he would be out of the Iowa Plan. That was agreed to within the department.
 - Q. Specifically as to Mr. Vos?
- A. To all producers that were receiving such a letter.
- 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.

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- 13 | Q. And how do you know that?
- A. Because he did not submit within 30 days and by the letter he was told if he did not submit within 30 days, he would be out of the Iowa Plan.
- Q. Okay. You're basing that on Exhibit 22?
- 18 A. Yes.
- Q. And is your testimony specifically to
 Mr. Vos? Do you know, is there anything else in the
 record to show that he actually was removed from the
 Iowa Plan?
 - A. No, this is it.
- Q. Okay. Have you-- Do you have any knowledge, in talking with the field office, did they

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

A. Not to my knowledge.

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- Q. Do you know if the department took any action against Mr. Vos as in your opinion you've stated he was no longer in the Iowa Plan? Did they take any action against him?
 - A. Not to my knowledge.
- Q. You also testified that Mr. Vos received a construction permit; is that correct? I'm not talking about the 1991 permit, but subsequently he did, in fact, receive a construction permit to construct controls; is that correct?
 - A. Yes; that's correct.
- Q. And I think you testified that in your opinion, now, that permit has expired?
- A. If no construction started based upon the issuance of that construction permit, which is my understanding.
- Q. And that's based on your understanding of the law?
 - A. Yes.
- Q. Has any determination been made specifically as to-or any notification sent to Mr. Vos that his

construction permit has expired?

- A. Not to my knowledge.
- Q. Is there also a provision in the law that allows for the department to grant an extension for good cause?
 - A. Yes, there is.
 - Q. And do you know, has that been done?
 - A. No, I do not.

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- Q. Mr. Tinker, are you aware of how many feedlots in Iowa received a construction permit and an NPDES permit after June 1 of 2006?
 - A. I do not have that number.
 - Q. If it were 37, would that surprise you?
- A. No, that would not.
 - Q. And that would be permits received after the completion or the end of the five-year period under the Iowa Plan; is that right?
- 18 A. Yes.
- Q. Now, I'm going to shift gears a little bit.

 I'll just ask you up front, Mr. Tinker, you're not in

 the enforcement part of DNR; is that correct?
 - A That's correct.
 - Q. But do you keep an eye on or are you aware of enforcement actions that are brought against feedlots or animal feeding operations?

1 A. Yes.

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- Q. Is that part of your duties as an animal feeding operation coordinator?
 - A. No.
 - Q. And how do you keep track of them?
- A. When the documents are sent from the field office to the legal bureau, I'm often carboned on those documents so I can see what's proceeding. And when the legal bureau chief assigns the case to an attorney, I'm often carboned on that so I can see the documents at that time, as well.
- Q. Okay. So I just want to ask you, based on your knowledge are you aware of the DNR using a computer model or anything—a model, I'll say a computer model, as evidence of a discharge to a water of the state for a DNR enforcement action?
 - A. No, I'm not.
- MR. McAFEE: I have no further questions, Your Honor.
- THE ADMINISTRATIVE LAW JUDGE: Okay. Before
 we have redirect, let me just ask you one question,

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

1 THE WITNESS: Yes.

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THE ADMINISTRATIVE LAW JUDGE: --it says

"Notice of Violation." Then it says--there's a

slash--"imminent termination of participation." Do

you see that?

THE WITNESS: Yes.

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

THE WITNESS: Yes.

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

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 fromthis 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

services bureau doesn't then send the final notice 1 that the time has now lapsed and you are--because it 2 strikes me there is some degree of vagueness to this, maybe not in this case, but it says "within 30 days of receipt of this letter," whatever date that would 5 be, there are certain presumptions that operate. But as far as you know, the legal department has not ever and it was not their practice to send 8 someone the final notice indicating that -- of course, 9 this was sent certified, I see. 10 THE WITNESS: Yes. 11 THE ADMINISTRATIVE LAW JUDGE: --you don't 12 get another notice, you don't get the notice 13 announcing that the time has now passed and you're 14 out? 15 THE WITNESS: That's correct. Our attorneys 16 discussed that and decided this one letter would be 17 18 adequate. THE ADMINISTRATIVE LAW JUDGE: Okay. All 19 20 right. Mr. Breedlove. 21 If you have questions, you'll have an 22

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(515) 243-6596

MR. BREEDLOVE: Your Honor, I have no

opportunity, Mr. McAfee.

further questions.

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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.

THE WITNESS: Jeffrey Francis Prier, 1 J-E-F-F-R-E-Y F-R-A-N-C-I-S P-R-I-E-R. THE ADMINISTRATIVE LAW JUDGE: Go ahead, 3 Mr. Breedlove. DIRECT EXAMINATION 5 BY MR. BREEDLOVE: Tell us a little bit about your educational background. I have a Bachelor of Science from Iowa Α. 9 State University in fisheries and wildlife biology. 1Ó For whom do you work? Q. 11 Iowa Department of Natural Resources. 12 And what is your current position? 1.3 Q. I'm an environmental specialist. Α. 14 How long have you been in that position? 0. 15 Since October of 1998. Α. 16 Did you have any positions with IDNR before 17 0. 18 that? Yes. I worked as a park aide, a natural 19 Α. resources technician and currently as environmental 20 specialist. 21 What do your current duties entail? 0. 22 I inspect air quality from industrial .23 facilities, storm water from construction sites. I 24 do manure management plan reviews for animal feeding

- operations, mainly confinements. And I do open feedlot inspections under the Iowa Plan and for NPDES permits.
 - Q. Approximately how many feedlots have you been to?
 - A. Approximately 300.
 - Q. During your tenure at Iowa Department of Natural Resources, have you been involved with compliance efforts at Mr. Vos' feedlot?
 - A. Yes.

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- Q. What was your initial involvement at the Lowell Vos feedlot?
- A. My initial involvement was to conduct an on-site assessment through the Iowa Plan that Mr. Vos had registered for for open feedlots.
- Q. So that on-site assessment involved a facility inspection?
- A. Yes.
 - Q. Did you generate an inspection form associated with that inspection?
 - A. Yes, we completed an on-site assessment form.
 - Q. Can you please turn to Complainant's Exhibit

 15. Mr. Prier, is Complainant's Exhibit 15, is that

 form associated with the inspection you performed at

1 | the facility?

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- A. Yes, this is the on-site assessment form.
- Q. And what date did you perform that inspection?
 - A. June 25, 2003.
- Q. And how many cattle did Mr. Vos have at the facility at the time?
 - A. During that visit he said he had 1,500 head.
 - Q. And what was the capacity?
 - A. He stated 2,700 head.
- 11 Q. So what was the purpose of this on-site 12 inspection?
 - A. The purpose of this on-site was to verify the in-house ranking for the Iowa Plan that rated facilities in high, medium and low categories. And then it was also to evaluate any existing manure control structures at the site and to educate Mr. Vos and other producers on the compliance schedule and what they would need to do to bring their facility into compliance with current laws.
- Q. Did you meet with Mr. Vos while you were there?
- 23 A. Yes.
- Q. Did you make an assessment of the accuracy of the in-house assessment?

Yes. After completing our form, we deemed Α. 1 that a medium ranking was an appropriate ranking. 2 Now, June 25, 2003, was the date that you 3 0. performed this on-site assessment; is that correct? 4 Yes. Α. Where did this on-site assessment rank in 0. 6 regard to-- Let me rephrase that. Where did this 7 on-site assessment fall in the number of on-site 8 assessments you performed? Was it beginning, end? 9 This was one of the very first ones that I 10 Α. went to. 11 Now, pursuant to the Iowa Plan, when were 12 the on-site assessments to take place for the medium 13 14 category? In 2003 and 2004. 15 So this inspection was done relatively early 16 in the Iowa Plan for medium facilities? 17 Yes. Α. 18 Now, let's talk a little bit about what you Q. 19 found while you were there. Mr. Prier, did you find 20 any evidence of discharges occurring from the 21 22 facility? Yes, we did that day. The facility was 23 discharging from the northwest corner of the feedlot 24 through a terrace, and it was going down through the

crop field and into the stream bank and then into the 1 unnamed tributary that was there. And were you able to observe this discharge? 0. 3 Yes, we observed it from the road. Α. Could you please describe that discharge. 5 The discharge was brown in color; and as it 6 Α. cascaded down the steam bank, it caused a foaming 7 sensation in the liquid. 8 Now, stream bank. What stream bank would 0. that be? 10 For the unnamed tributary. 11 Α. Unnamed tributary. Did you sample this? Q. 12 We conducted a field sample of ammonia and 13 Α. 14 рH. Now, Mr. Prier--15 Q. MR. BREEDLOVE: Can we go off the record one 16 moment, Your Honor? 17 THE ADMINISTRATIVE LAW JUDGE: Yes. 18 (Off-the-record discussion.) 19 THE ADMINISTRATIVE LAW JUDGE: Let's go on 20 the record. 21 BY MR. BREEDLOVE: 22 Mr. Prier, could you please come around on 23 the witness stand.

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

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