

1 on Complainant's Exhibit 54, I believe it is. On
2 that exhibit-- On Exhibit 54, could you please mark
3 with a black marker the place where the discharge is
4 emanating over the terrace.

5 A. Sure. It's coming out of the--approximately
6 the middle of the terrace right here, flowing through
7 the cornfield and entering the stream approximately
8 here. (Witness marks on exhibit.)

9 Q. Please let the record reflect Mr. Prier has
10 marked two marks on Complainant's Exhibit 54.

11 Mr. Prier, would you please mark a "D" and a
12 "T" next to the terrace for discharge terrace.

13 A. (Witness marks on exhibit.)

14 THE ADMINISTRATIVE LAW JUDGE: Is this a new
15 exhibit number, counsel?

16 MR. BREEDLOVE: Yes, Your Honor.

17 THE ADMINISTRATIVE LAW JUDGE: You probably
18 want to ask him first what this is since it's--we
19 don't have that on the record. I know we've seen it
20 before, but you still want to say, "Do you recognize
21 this, what it is?"

22 MR. BREEDLOVE: I'll lay a foundation, Your
23 Honor. Thank you.

24 BY MR. BREEDLOVE:

25 Q. Mr. Prier, Complainant's Exhibit 54 is in

1 front of you. Please identify Complainant's Exhibit
2 54.

3 A. This is an aerial photo of the Lowell Vos
4 feedlot.

5 Q. Now, Mr. Prier, would you please mark with a
6 "DP" for discharge point at the place where it was
7 running into the unnamed tributary.

8 A. (Witness marks on exhibit.)

9 Q. Thank you. Now, Mr. Prier, did you sample
10 any discharges from the facility that day?

11 A. Yes, we collected samples.

12 Q. Did you sample it at the point where it was
13 emanating from the terrace?

14 A. No.

15 Q. Why did you not do that?

16 A. We were there on an educational trip to
17 inform Mr. Vos of what he needed to do to bring his
18 feedlot into compliance. We were not building an
19 enforcement case during that visit.

20 Q. To clarify for the record, Mr. Prier, when
21 you say "we," who else was at the inspection with
22 you?

23 A. Ken Hassenius, the environmental supervisor
24 at that time, and Rick Martens from field office one
25 in Manchester. His duties were going to be

1 performing the assessments on these lots under a
2 thousand animal units.

3 Q. Those are both employees of the Iowa
4 Department of Natural Resources?

5 A. Yes.

6 Q. Mr. Prier, could you please identify on
7 Complainant's Exhibit 54 the location that you
8 sampled--

9 A. Yes.

10 Q. --the unnamed tributary.

11 A. Yes, approximately here. (Witness marks on
12 exhibit.)

13 Q. First, Mr. Prier, why did you sample so far
14 away from the discharge point?

15 A. Typically when we take a downstream sample
16 we look for the easiest point to take a sample, and
17 Ken was trying to educate Rick and I on how to take
18 the samples when we see them from feedlots and
19 familiarize ourselves with what we would typically
20 see coming from a feedlot.

21 Q. So just to reiterate, you were not looking
22 to build a case at this point?

23 A. No.

24 Q. Where would you have sampled if you were
25 trying to build a case?

1 A. If we were there on an enforcement case we
2 would typically sample upstream of the facility, if
3 we could, where the facility was discharging and then
4 somewhere downstream of the facility.

5 Q. Okay. Thank you, Mr. Prier. You can have a
6 seat. Thank you.

7 Mr. Prier, what were your sample results?
8 What did you sample for?

9 A. That day we sampled for ammonia and pH. And
10 the ammonia field result was 3 milligrams per liter
11 and the pH was 7.4.

12 Q. Mr. Prier, is that a particularly high
13 ammonia content?

14 A. Not really. We can find a background level
15 on Iowa streams anywhere from half a milligram per
16 liter to one part per--milligram per liter any time
17 of the year.

18 Q. How many field samples would you say you've
19 taken?

20 A. Hundreds.

21 Q. Now, based on the results of this field test
22 you did, would you say that that three parts per
23 liter is higher than background level?

24 A. Yes.

25 Q. Now, you also looked at pH. What was the pH

1 again?

2 A. The pH was 7.4.

3 Q. Now, does that--that pH reading, does that
4 tell you anything?

5 A. Typically from an open feedlot when manure
6 is entering a stream, the pH level will be lowered
7 from a normal background level of around 8 units.

8 Q. So based on the inspections that you
9 performed, what do you think is the most likely
10 source of this elevated ammonia level?

11 A. Manure is the most likely source.

12 Q. Mr. Prier, during your investigation of the
13 facility--I should say during your on-site
14 assessment, your educational visit at this point, did
15 you observe any solid settling structures at the
16 facility?

17 A. Not as defined in the Iowa Administrative
18 Code.

19 Q. How would that be defined?

20 A. That is defined by slowing effluent and
21 typically using a structure to slow that effluent to
22 a half a foot per second. The Iowa Code also says
23 that if topography will do it, then you can use
24 topography.

25 Q. During this assessment, did you identify any

1 topography that would meet the requirements of a
2 settling structure according to the Iowa Code?

3 A. No.

4 Q. During your assessment, did you identify
5 anything that would serve as a runoff control basin
6 at the facility?

7 A. No.

8 Q. During this assessment, did you find any
9 points around the facility that led you to the
10 conclusion that discharge would be occurring from
11 them?

12 A. Can you repeat that one, please.

13 Q. Did you identify any points of discharge
14 from the facility?

15 A. Yes.

16 Q. And where were those?

17 A. They were out the south side, and then the
18 northeast corner it would flow across the road and
19 back down around through to the same unnamed
20 tributary.

21 MR. BREEDLOVE: May I approach again, Your
22 Honor?

23 THE ADMINISTRATIVE LAW JUDGE: Yes.

24 BY MR. BREEDLOVE:

25 Q. Mr. Prier, could I ask you to come around to

1 the light pro.

2 A. Sure.

3 Q. Please mark the points at Mr. Vos' facility
4 where you identified runoff with discharge.

5 A. (Witness marks on exhibit.) This would be
6 the south area that it would discharge, and then the
7 northeast area would be across here where it would
8 continue flowing down through the facility--where a
9 facility used to be and into the same unnamed
10 tributary.

11 Q. Now, with your pen could you please note the
12 north discharge point as just that north discharge.

13 A. This area here. (Witness marks on exhibit.)

14 Q. Just draw a line off from it and identify
15 it.

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

17 Q. Would you write "discharge point," please.

18 A. (Witness marks on exhibit.)

19 Q. And then at the southern discharge point,
20 similarly, could you please put "south discharge
21 point.

22 A. Sure. (Witness marks on exhibit.)

23 Q. Thank you, Mr. Prier.

24 Mr. Prier, could I focus your attention
25 on--one moment, please. Could I focus your attention

1 on Complainant's Exhibit 16.

2 A. Yes.

3 Q. Could you please identify Complainant's
4 Exhibit 16 for the record.

5 A. That is the on-site open cattle feedlot
6 inspection for Lowell Vos that was dated July 2,
7 2003.

8 Q. Now, did you find that the in-house
9 assessment was accurate in regard to the medium
10 priority category?

11 A. Yes.

12 Q. Now, I note in the--in the central paragraph
13 on the first page of that exhibit you note a number
14 of details regarding the facility. Could you
15 summarize what those details are.

16 A. The details were basically the visual
17 observation that we saw at the facility that day and
18 are telling you where the discharge points are and
19 what we saw.

20 Q. Now, did Mr. Vos ever contact you to contest
21 any of these findings?

22 A. No.

23 Q. Further on in that letter, what was the
24 other purpose that this letter served?

25 A. The other purpose was as a follow-up to our

1 visit, and it established a time line when an
2 engineer had to be submitted to the DNR, and that was
3 on August 22, 2003. And it also established a
4 February 20, 2004, submittal date for a plan of
5 action that was required for all feedlots in this
6 program.

7 Q. Okay.

8 A. And that plan of action included a completed
9 operation permit application, a preliminary
10 conceptual design of the needed manure control
11 structures, and it also established a compliance
12 schedule that was to state when the final engineering
13 designs and construction permit applications were to
14 be submitted and the dates for initiation of
15 construction and completion of construction.

16 Q. Now, Mr. Prier, the August 22, 2003, date
17 and the February 20, 2004, are those deadlines that
18 were instituted pursuant to the Iowa Plan?

19 A. Yes.

20 Q. Did each facility you did an on-site
21 assessment at, did they include the same time lines?

22 A. Yes; the Iowa Plan had established 45 days
23 to retain an engineer and 6 months to establish a
24 plan of action.

25 Q. So upon their submission of a plan of

1 action, is that the time that the facility owner
2 would determine the appropriate schedule at that
3 point for completion of controls?

4 A. Yes.

5 Q. At that time IDNR would then adopt their
6 schedule if it was appropriate?

7 A. Yes.

8 Q. Mr. Prier, I asked you to turn to
9 Complainant's Exhibit 17. Please identify
10 Complainant's Exhibit 17 for the record.

11 A. This was a failure to submit requested
12 information letter that was also a notice of
13 violation to Mr. Lowell Vos dated February 23, 2004.

14 Q. Did you issue this notice of violation?

15 A. Yes.

16 Q. What was the violation noted?

17 A. The violation was he had failed to submit
18 the required information by the August 22, 2003,
19 deadline and the February 20, 2004, deadline.

20 Q. So Mr. Vos had failed to submit his
21 engineer's name at that point?

22 A. Yes.

23 Q. And he had also failed to submit the plan of
24 action?

25 A. Yes.

1 Q. So at this point in time was he
2 approximately six months late in submitting the
3 engineer's plan?

4 A. That would be correct.

5 Q. And how long late was he in submitting the
6 plan of action?

7 A. The plan of action was submitted on
8 approximately April 6th.

9 Q. So at this point in time how late was the
10 plan of action?

11 A. At least six months.

12 THE ADMINISTRATIVE LAW JUDGE: Six months?

13 MR. BREEDLOVE: I don't think that's
14 correct.

15 THE ADMINISTRATIVE LAW JUDGE: You can't
16 testify. But maybe what you can do is you can bring
17 him back to his previous letter, have him note what
18 that date was there, then bring him back to the
19 certified letter, have him compare the date and then
20 maybe he'll want to come up with a different
21 calculation, maybe.

22 MR. BREEDLOVE: Thank you, Your Honor.

23 BY MR. BREEDLOVE:

24 Q. Mr. Prier, please step back for a moment and
25 look at Complainant's Exhibit 16, Page 2.

1 A. Okay.

2 Q. What was the date whereby Mr. Vos was to
3 submit his plan of action?

4 A. February 20, 2004.

5 Q. And when was Complainant's Exhibit 17 sent
6 out to Mr. Vos?

7 A. That was February 23, 2004.

8 Q. So at this point in time how late was
9 Mr. Vos with his plan of action?

10 A. Three days.

11 Q. So is it a fair assessment that Mr. Vos was
12 provided prompt notification from IDNR when he hadn't
13 met that requirement?

14 A. Yes.

15 Q. Now, on the second page of Complainant's
16 Exhibit 17, the last sentence, it states if there's
17 any questions for Mr. Vos to contact you. Did he
18 ever call you in regard to the requirements?

19 A. Not that I remember.

20 Q. Mr. Prier, if you could jump ahead to
21 Complainant's Exhibit 19. Could you please identify
22 that for the record.

23 A. This is a failure to submit a complete plan
24 of action to Lowell Vos on April 27, 2004.

25 Q. And why was this notification issued?

1 A. We had not received a complete plan of
2 action as of that date.

3 Q. So could you please reference Complainant's
4 Exhibit 18.

5 A. Yes. Exhibit 18 was a letter sent from NRCS
6 stating that they were probably going to do the
7 engineering work.

8 Q. Now, did you give Mr. Vos credit for having
9 submitted a plan of action based on this letter?

10 A. No.

11 Q. Why not?

12 A. It was missing the plan of action.

13 Q. What was required to be in Complainant's
14 Exhibit 18 for it to meet the requirements of the
15 plan of action?

16 A. It was required to have a complete operation
17 permit application, the preliminary conceptual design
18 of the runoff control structures and then the
19 estimated time line for project completion.

20 Q. Would it be a fair assessment of that plan
21 of action that it did not include any of the
22 requirements that were necessary in the plan of
23 action?

24 A. Correct.

25 Q. So did you give Mr. Vos extra time to submit

1 that plan of action?

2 A. Yes.

3 Q. And how much time did you give him to submit
4 it?

5 A. I gave him 14 days to submit a complete plan
6 of action.

7 Q. Again, did Mr. Vos ever contact you with any
8 questions?

9 A. No.

10 Q. I ask you to turn to Complainant's Exhibit
11 20. Now, what is this document, Mr. Prier?

12 A. This would be the completed plan of action.

13 Q. And it was submitted when?

14 A. Approximately June 10 of 2004.

15 Q. Is that within the 14 days IDNR granted in
16 the last notice of violation?

17 A. No.

18 Q. But you still accepted it; is that correct?

19 A. Yes.

20 Q. Did you review it?

21 A. Yes.

22 Q. Did you approve it?

23 A. Yes.

24 Q. Are there any-- What were the significant
25 terms of the plan of action?

1 A. He said he would construct three sediment
2 detention basins and three waste storage ponds; that
3 the sediment basins would be designed into a 10-year,
4 24-hour storm and drain into the storage ponds. The
5 diversions would be designed to a 25-year, 24-hour
6 storm. And they used the NRCS technical manual for
7 developing those.

8 And it also established the estimated time
9 line. He said he would submit final plans and
10 permits by November 30, 2004, plans and permits would
11 be approved on January 15, 2005, construction would
12 begin on June 1, 2005, and construction would end on
13 November 30, 2005.

14 Q. So to reiterate, he provided a deadline that
15 his final plans would be in November 30, 2004; is
16 that correct?

17 A. That's correct.

18 Q. Now, having reviewed the plan of action,
19 were you given any indication as to where those
20 retention basins would be placed?

21 A. Yes, the preliminary design had shown that.

22 Q. And where would they be placed?

23 A. They were going to be placed northwest of
24 the facility, south and then northeast.

25 Q. Now, were those the places that you noted

1 during your on-site assessment as being locations of
2 discharges?

3 A. Pretty close.

4 Q. Now, Mr. Prier, I'll ask you to look a
5 little closer at that and to your best ability, can
6 you please assess whether those storage ponds would
7 address the discharge points you noted?

8 A. Do you have a cleaner copy of this at all?

9 MR. BREEDLOVE: I have some extra copies, if
10 I may.

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

13 (Off-the-record discussion.)

14 THE ADMINISTRATIVE LAW JUDGE: Okay. In an
15 off-the-record discussion, counsel for EPA,
16 Mr. Breedlove, is going to replace from the
17 Complainant's exhibit book from Complainant's Exhibit
18 20 the existing Page 9 with a color copy of Page 9
19 with the intention of having it be clearer.

20 Is that okay by you, Mr. McAfee?

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

22 THE ADMINISTRATIVE LAW JUDGE: All right.
23 I'm going to remove and hand back the original Page 9
24 to Mr. Breedlove.

25

1 BY MR. BREEDLOVE:

2 Q. Mr. Prier, now that we've provided you a
3 better copy to evaluate, based on the information you
4 gathered during your on-site assessment if storage
5 basins or retention ponds were placed in these
6 locations, do you believe they would address the
7 discharge points you identified at the facility?

8 A. Yes.

9 Q. Now, did you issue an approval for these
10 plans?

11 A. Yes, I did.

12 Q. And when did you do that?

13 A. On August 26, 2004.

14 Q. Are you looking at Complainant's Exhibit 21?

15 A. Yes.

16 Q. And what was that letter?

17 A. This was a plan of action approval for the
18 open feedlot manure control structures that was sent
19 to Mr. Vos on August 26, 2004, stating that his plan
20 of action had been approved and reminded him that his
21 estimated time line states that the final design will
22 be completed and submitted on November 30, 2004. And
23 once a final site design was submitted, a site survey
24 would be conducted and construction permit would be
25 issued.

1 Q. Now, did Mr. Vos meet that November 30,
2 2004, deadline?

3 A. No.

4 Q. Now, in the plan of action, was there any
5 mention of alternative technology or other forms of
6 containment?

7 A. No.

8 Q. Now, Mr. Prier, I'd like you to turn to
9 Complainant's Exhibit 22. Can you please identify
10 this Complainant's Exhibit 22.

11 A. This was an April 28, 2005, failure to meet
12 submittal deadline for final engineering plan, notice
13 of violation, imminent termination of participation
14 in the Iowa Plan sent to Lowell Vos.

15 Q. Now, at this point do you know approximately
16 how late Mr. Vos was in submitting his final plans?

17 A. He was past--well past six months.

18 Q. Now, had you since the submission--since you
19 had approved Mr. Vos' plan of action, in the time
20 between when you approved Mr. Vos' plan of action and
21 when IDNR issued this April 28, 2005, letter, did you
22 receive any contact from Mr. Vos regarding this
23 facility?

24 A. No.

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

1 apologize for interrupting. I didn't hear the
2 question or the answer to that.

3 THE ADMINISTRATIVE LAW JUDGE: What happened
4 was actually the witness answered the question before
5 Mr. Breedlove finished it.

6 And so you want to wait and make sure until
7 he finishes, and he's supposed to wait for the
8 answer.

9 Repeat that last question.

10 BY MR. BREEDLOVE:

11 Q. Mr. Prier, at any time when you issued the
12 approval of the plan of action and between when IDNR
13 issued this notice of violation, imminent termination
14 of participation in the Iowa Plan, did you receive
15 any contact from Mr. Vos in regard to his facility?

16 A. No.

17 Q. Now, Mr. Prier, I've got photo No. 2 from
18 Complainant's Exhibit 28.

19 MR. BREEDLOVE: May I approach, Your Honor?

20 THE ADMINISTRATIVE LAW JUDGE: Yes.

21 BY MR. BREEDLOVE:

22 Q. Could you please identify that photo for the
23 Court.

24 A. This is the unnamed tributary that flows
25 along the northwest side of the Lowell Vos feedlot.

1 Q. Now, is this approximately where you
2 observed the discharge on June 25, 2003?

3 A. Yes.

4 Q. Could you please come around to the light
5 pro.

6 MR. RYAN: May we go off the record for just
7 one moment, Your Honor?

8 THE ADMINISTRATIVE LAW JUDGE: Yes.

9 (Off-the-record discussion.)

10 THE ADMINISTRATIVE LAW JUDGE: Back on the
11 record.

12 MR. BREEDLOVE: Thank you, Your Honor.

13 BY MR. BREEDLOVE:

14 Q. Mr. Prier, could you please mark on this
15 photograph where you identified the discharge
16 occurring on June 25, 2003.

17 A. To get approximate will be tough with the
18 snowdrifts there, but probably in this area here.
19 (Witness marks on exhibit.)

20 Q. Could you please place the date when you saw
21 it.

22 A. (Witness marks on exhibit.)

23 Q. Now, Mr. Prier-- Thank you. You can take
24 your seat.

25 A. Okay.

1 MR. BREEDLOVE: Your Honor, at this time I
2 would like to move into evidence Complainant's
3 Exhibit 54, the aerial photograph that Mr. Prier
4 marked.

5 MR. McAFEE: I just want to make sure, we're
6 admitting not what we're looking at on the screen,
7 but--

8 MR. BREEDLOVE: The aerial photograph.

9 MR. McAFEE: I have no objection.

10 THE ADMINISTRATIVE LAW JUDGE: What was
11 previously offered for identification as
12 Complainant's Exhibit 54 without objection is
13 admitted. 54 is admitted.

14 (Complainant's Exhibit 54
15 was received in evidence.)

16 MR. BREEDLOVE: I also at this time would
17 like to make a motion to enter into evidence the
18 photograph marked by Mr. Prier as Complainant's
19 Exhibit 55.

20 MR. McAFEE: Your Honor, I'm going to object
21 to this exhibit. I just don't believe a proper
22 foundation has been laid for Mr. Prier's testimony
23 that that is where he was when he observed a June 25
24 of '03 event.

25 THE ADMINISTRATIVE LAW JUDGE: I agree with

1 you, so I'm sustaining the objection. You can try
2 and lay a better foundation. He didn't take this
3 photograph. The photograph was taken in March of
4 2008.

5 Frankly, I don't know how one could
6 determine how this looks different from hundreds,
7 maybe thousands of other sites in Iowa. So you need
8 to lay a better foundation.

9 MR. BREEDLOVE: I'll try, Your Honor, if I
10 can.

11 MR. RYAN: May we have just one minute, Your
12 Honor?

13 THE ADMINISTRATIVE LAW JUDGE: You're going
14 to counsel now? I'll let you do that. We'll go off
15 the record.

16 (Off-the-record discussion.)

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

19 BY MR. BREEDLOVE:

20 Q. Mr. Prier, could you come back around to the
21 light pro, please.

22 A. Yes.

23 Q. Mr. Prier, looking at the photograph in
24 front of you, is that a fair and accurate
25 representation of the location which you observed the

1 discharge on June 25, 2003?

2 A. Yes.

3 Q. Now, on Complainant's Exhibit 54 below it,
4 for the Court would you please identify on that
5 aerial photograph, Complainant's Exhibit 54, where
6 you were when you saw this discharge occurring on
7 June 25, 2003.

8 A. I was standing on the road approximately
9 right here where the dot is on the top of the P.
10 (Witness marks on exhibit.)

11 Q. Could you draw a line off of there to mark
12 that that's where you were standing.

13 A. Yes. (Witness marks on exhibit.)

14 Q. Now, if you would do us a favor and bring
15 the map a little bit lower so everybody can see it.

16 A. Sorry.

17 MR. BREEDLOVE: Your Honor, I make a motion
18 to enter into evidence Complainant's Exhibit 55.

19 MR. McAFEE: Your Honor, I--

20 THE ADMINISTRATIVE LAW JUDGE: We're not
21 looking at Complainant's Exhibit 55 right now; right?

22 MR. BREEDLOVE: We should be.

23 Mr. Prier, could you please move that up on
24 the light pro.

25 THE ADMINISTRATIVE LAW JUDGE: So you want

1 to admit Complainant's Exhibit 55.

2 You have an objection?

3 MR. McAFEE: Yes, I do, Your Honor. I
4 object that I don't believe a proper foundation has
5 been laid that the witness can recall correctly that
6 this is the place where he saw that.

7 THE ADMINISTRATIVE LAW JUDGE: I'm going to
8 sustain the objection. There are too many
9 infirmities with using this. Effectively, it seems
10 to me that you're attempting sort of a backdoor route
11 to, although it's not the same, to get in the
12 photographs which I denied.

13 Those photographs were the photographs that
14 I dealt with at the outset of the hearing; correct?
15 That's right, Mr. McAfee?

16 MR. McAFEE: Yes.

17 THE ADMINISTRATIVE LAW JUDGE: For a number
18 of reasons, this witness--

19 Mr. Prier, you didn't take photograph No. 2;
20 right?

21 THE WITNESS: No.

22 THE ADMINISTRATIVE LAW JUDGE: Were you at
23 the site on March 11, 2008?

24 THE WITNESS: No.

25 THE ADMINISTRATIVE LAW JUDGE: And you're

1 trying to relate back this picture--this picture that
2 you've marked, that relates to when you were there on
3 June 25, 2003?

4 THE WITNESS: Yes.

5 THE ADMINISTRATIVE LAW JUDGE: All right.
6 There would have been no snow in Iowa on June 25,
7 2003; correct?

8 THE WITNESS: Correct.

9 THE ADMINISTRATIVE LAW JUDGE: I'm
10 sustaining Mr. McAfee's objection, so I will not
11 allow in Complainant's Exhibit 55. I gave you a
12 second chance to try to do it, but I'm not--I'm not
13 saying you would have been successful. I just gave
14 you another opportunity. So you have to move on to
15 something else.

16 MR. BREEDLOVE: Just for the record, have we
17 moved Complainant's Exhibit 54 into evidence, the
18 aerial photograph?

19 THE ADMINISTRATIVE LAW JUDGE: I think
20 that's where you got mixed up. But Complainant's
21 Exhibit 54 is--at least now you're moving that into
22 evidence.

23 Do you have objection to that, Mr. McAfee?

24 MR. McAFEE: Can I make sure which one is
25 Exhibit 54? Is that what I'm looking at right now?

1 MR. BREEDLOVE: Yes, Mr. McAfee.

2 MR. McAFEE: I have no objection to that.

3 THE ADMINISTRATIVE LAW JUDGE: All right.

4 Of course, I don't have a copy of 54 as marked.

5 MR. BREEDLOVE: I will provide it for you.

6 THE ADMINISTRATIVE LAW JUDGE: Complainant's
7 Exhibit 54 is admitted.

8 (Complainant's Exhibit 54
9 was received in evidence.)

10 THE ADMINISTRATIVE LAW JUDGE: So the next
11 one, if there is a next one, would be 56 because we
12 didn't allow 55.

13 BY MR. BREEDLOVE:

14 Q. Mr. Prier, have you ever witnessed any other
15 discharges from Mr. Vos' facility?

16 A. Yes.

17 Q. When was that?

18 A. That was last Thursday.

19 Q. Why were you up near Mr. Vos' facility?

20 A. I drove by the facility to familiarize
21 myself with the geographic lay of the land and just
22 how the stream had flowed and just to refamiliarize
23 myself with it.

24 MR. McAFEE: Your Honor, I'm going to object
25 to this testimony as being after the date of

1 prehearing exchanges, and I was not made aware of
2 this testimony prior to right now.

3 MR. BREEDLOVE: Your Honor, I believe the
4 prehearing exchanges lay out that Mr. Prier will
5 testify to inspections he's done at the facility and
6 testify to his observations. And this would be an
7 observation of this facility, so I don't believe it's
8 outside of the range of what he's been notified he'll
9 testify to.

10 THE ADMINISTRATIVE LAW JUDGE: I want to
11 hear a little bit more because I'm still mulling over
12 my ruling on it.

13 Go ahead, Mr. McAfee.

14 MR. McAFEE: May I ask again when the
15 witness is saying he--

16 THE ADMINISTRATIVE LAW JUDGE: You want to
17 do a voir dire, in effect?

18 MR. McAFEE: Could the court reporter read
19 back to me the date that the witness just said he was
20 there, if that would be okay?

21 THE ADMINISTRATIVE LAW JUDGE: Please read
22 that question back.

23 (Record read by the reporter.)

24 THE ADMINISTRATIVE LAW JUDGE: My problem
25 with this is--and I want to hear from both sides--it

1 seems to me that--I don't get how that's material to
2 this proceeding because I thought everyone agreed
3 that at least as of now and at sometime in the not
4 too distant past, this facility is in compliance
5 because it's under a thousand head anyway. So I'm
6 not sure how that helps me figure out--so I'm
7 questioning the materiality of it.

8 Your objection is a different objection.
9 Your objection is to surprise. But I don't
10 understand. I'm surprised your objection isn't also
11 to materiality.

12 MR. McAFEE: Well, Your Honor, if I may, I
13 would object to materiality.

14 THE ADMINISTRATIVE LAW JUDGE: Are you just
15 saying that?

16 MR. McAFEE: No, no. Your Honor, there has
17 been-- As you'll see in the posthearing briefs, much
18 of what EPA has presented has been after the facility
19 has been below a thousand head. And so that part--
20 yeah, I agree, and we will be dealing with that in
21 the posthearing brief.

22 So I agree what he's testifying to is not a
23 compliance issue right now because my client is in
24 compliance, at least from what I can hear from the
25 witness' testimony thus far. It depends, I guess,

1 what the discharge was.

2 So, yeah, I have a problem with that, and I
3 just--it seems like, Your Honor, I'm getting--
4 starting yesterday and into today--and I don't mean
5 to do a narrative here--but I'm getting a lot of
6 testimony and evidence that is a surprise to me, and
7 I don't appreciate that.

8 And I--I've tried to have a free and open
9 exchange. And I don't agree with Mr. Breedlove's
10 explanation that I should have been aware of this.
11 This happened last Thursday, and I could have been
12 made aware that the witness was going to testify to
13 something like this before now.

14 And I would have probably still objected,
15 but I do not believe it's proper for the witness to
16 testify as to what I understand he is going to for
17 those reasons I have just stated.

18 THE ADMINISTRATIVE LAW JUDGE: Mr. Breedlove,
19 is it EPA's position that once Mr. Vos' feedlot was
20 at or below a thousand head there's no compliance
21 issues anymore?

22 MR. BREEDLOVE: Your Honor, the issue in
23 this case is the fact that Mr. Vos has alleged that
24 he's never discharged except for the event of a 25-
25 year, 24-hour storm.

1 THE ADMINISTRATIVE LAW JUDGE: My question
2 is-- Help me out with mine, then you can tell me
3 something else. But am I not correct--tell me if I'm
4 not understanding this--but once a feedlot owner,
5 such as Mr. Vos, has less than a thousand head, EPA
6 doesn't get involved in regulation of discharges if
7 it's less than a thousand head; is that correct?

8 MR. BREEDLOVE: There's some nuances to
9 that, but going below a thousand head of cattle gets
10 him under the definition of a large CAFO; that is
11 correct.

12 THE ADMINISTRATIVE LAW JUDGE: Does he need
13 an NPDES permit if he's below a thousand?

14 MR. BREEDLOVE: There are nuances to the
15 CAFO rules that do require permits if the discharge
16 is going through a manmade conveyance or if there's a
17 stream running through the facility.

18 THE ADMINISTRATIVE LAW JUDGE: We don't have
19 that here, do we?

20 MR. BREEDLOVE: We're not alleging that,
21 Your Honor.

22 THE ADMINISTRATIVE LAW JUDGE: I'm going to
23 sustain the objection on grounds of materiality as
24 opposed to surprise.

25 MR. BREEDLOVE: Your Honor, I'd like to make

1 an offer of proof in regard to why the information
2 Mr. Prier is presenting is material to the case that
3 the Government is presenting.

4 THE ADMINISTRATIVE LAW JUDGE: I'll allow
5 you to make an offer of proof. By the way, by an
6 offer of proof, so we're talking on the same grounds,
7 my understanding of that is that if I were to allow
8 this witness to testify to this, that the Government
9 would expect that he would state it, and then he
10 would say what it is; right? That's how it works for
11 me.

12 MR. BREEDLOVE: I can do that, Your Honor.

13 THE ADMINISTRATIVE LAW JUDGE: I don't know
14 of other ways that it works. Go ahead, so do that.

15 MR. BREEDLOVE: Your Honor, I would ask
16 Mr. Prier--

17 THE ADMINISTRATIVE LAW JUDGE: No, you're
18 going to just tell me, "If Mr. Prier were allowed to
19 answer that question, the Government expects that he
20 would testify"-- That's the offer of proof.

21 MR. BREEDLOVE: Mr. Prier would testify that
22 he drove by the facility last Thursday. He would
23 testify that he saw discharges coming from the berm
24 where he's seen discharges occur before.

25 He would also testify that he was able to

1 see pooling of water down by the road where the
2 unnamed tributary flows by, would also see black
3 water that's associated with feed water runoff.

4 He'll also testify that it wasn't raining at
5 the time he was there, that it had rained far less
6 than the 25-year, 24-hour storm the day before.

7 What this does is goes to the issue of
8 whether if the Respondent's facility has discharged
9 as a result of a storm other than--less than a 25-
10 year storm. The argument that his answer has
11 presented is that he may have discharged, but it was
12 never in any instance except for the 25-year, 24-hour
13 storm.

14 What we now have is two instances where, in
15 fact, it was less than a 25-year storm, so we believe
16 it goes to the heart of the liability issue here.

17 THE ADMINISTRATIVE LAW JUDGE: Okay. My
18 ruling stands. And you've made an offer of proof, so
19 you can move on to something else now.

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

22 BY MR. BREEDLOVE:

23 Q. Mr. Prier, on June 25, 2003, when you
24 performed your on-site assessment, you testified that
25 you observed the discharge during that time; is that

1 correct?

2 A. Yes.

3 Q. Was it raining at the time of that on-site
4 inspection?

5 A. No.

6 Q. Had it rained the day before?

7 A. I'd have to look at the precipitation
8 records to remember.

9 MR. BREEDLOVE: Your Honor, no further
10 questions.

11 THE ADMINISTRATIVE LAW JUDGE: Okay. Do you
12 need a few minutes, Mr. McAfee?

13 MR. McAFEE: Yes, if I could, Your Honor.
14 Yes, please.

15 THE ADMINISTRATIVE LAW JUDGE: So we'll have
16 a five-minute break here.

17 (Short recess.)

18 THE ADMINISTRATIVE LAW JUDGE: Please be
19 seated.

20 Mr. McAfee, we're on the record.

21 CROSS-EXAMINATION

22 BY MR. McAFEE:

23 Q. Good afternoon, Mr. Prier. I'm Eldon
24 McAfee, and I'm representing Lowell Vos.

25 A. Okay.

1 Q. And I have a few questions for you. I think
2 we'll start with the exhibit that is up in front of
3 you right now.

4 MR. McAFEE: May I approach, Your Honor?

5 THE ADMINISTRATIVE LAW JUDGE: Yes, you may.

6 MR. McAFEE: I'm not going to pretend to
7 know the number of this exhibit without looking at
8 it.

9 BY MR. McAFEE:

10 Q. Complainant's Exhibit 54. Now, as I
11 understand it, your testimony, Mr. Prier, related to
12 this exhibit is to an event that happened in what
13 year?

14 A. 2003.

15 Q. Okay. How many years ago was that?

16 A. Approximately five.

17 Q. And you're testifying here today based
18 on--that related to an inspection report; is that
19 right?

20 A. An on-site assessment report.

21 Q. Okay. Let's go to that. Along with looking
22 at that exhibit, let's go to the on-site assessment
23 report. That's Exhibit 15, if I remember correctly.

24 THE ADMINISTRATIVE LAW JUDGE: I take it you
25 agree?

1 THE WITNESS: Yes.

2 BY MR. McAFEE:

3 Q. Was that the only reason you were at the
4 site that day was to do an on-site inspection report?

5 A. I believe there was a complaint filed about
6 the facility also.

7 Q. And how do you recall that?

8 A. From reviewing the file when I went through
9 the papers to fax them to EPA whenever they started
10 their hearing.

11 Q. And do you recall the nature of the
12 complaint?

13 A. The nature of the complaint was the
14 neighbor, I believe, had stated that manure was
15 flowing out the northeast side of the facility and
16 was harming their property.

17 Q. Northeast side?

18 A. Yes.

19 Q. Okay. Not the side we're looking at here?

20 A. Correct.

21 Q. So you were responding to a complaint also,
22 as well as doing the on-site inspection report?

23 A. Yes.

24 Q. In responding to a complaint, would you--
25 Well, first of all, this inspection report does not

1 note that; is that correct?

2 A. That's correct.

3 Q. So in responding to that would you normally
4 have sample collection equipment or materials with
5 you?

6 A. Yes, every time we go out in our vehicles we
7 have field sampling equipment with us.

8 Q. What does that entail?

9 A. That entails an ammonia test kit for high
10 range and low range, dissolved oxygen test kit, a pH
11 meter, the calibration liquids for calibrating the pH
12 meter and a temperature.

13 Q. Do you also have sample bottles to take
14 samples that could be submitted for laboratory
15 analysis?

16 A. Yes.

17 Q. And did you have those with you that day?

18 A. Yes.

19 Q. Did you find any basis for the complaint
20 when you were there that day?

21 A. Under Iowa law, there is no basis for manure
22 flowing over property. We only have it dealing with
23 manure entering waters of the state. So we didn't
24 find a violation of the Iowa law for that complaint.

25 Q. Okay. So the complaint was resolved without

1 any violation attributed to Mr. Vos?

2 A. For that area, yes.

3 Q. Okay. I just want to say it again. Please
4 answer my question. The complaint that was
5 submitted, your investigation revealed there was no
6 violation of Iowa law; is that correct?

7 A. For the complaint, yes.

8 Q. Okay. Now, so you're there--had you planned
9 to be there on an on-site inspection anyway?

10 A. Since we were doing the complaint, we were
11 trying to do two things at one time and also complete
12 the on-site assessment since he registered for the
13 Iowa Plan.

14 Q. And there were three of you there that day?

15 A. Yes.

16 Q. Ken Hassenius?

17 A. Correct.

18 Q. Who is he?

19 A. He is the Spencer field office environmental
20 supervisor.

21 Q. For our court reporter, would you please
22 spell his last name.

23 A. H-E-S-S-E-N-I-U-S.

24 Q. And who else was with you?

25 A. Rick Martens, an environmental specialist

1 from the Manchester field office.

2 Q. I believe you testified he was in training?

3 A. Yes.

4 Q. And Ken-- Were you in training also?

5 A. Yes.

6 Q. And what were you in training for?

7 A. I was in training on how the department had
8 established the protocol to conduct these on-site
9 assessments.

10 Q. I believe in response to a question from
11 Mr. Breedlove, you testified that you had--this was
12 one of the first on-site inspections you conducted?

13 A. Yes.

14 Q. Had Ken Hassenius been doing them before?

15 A. Yes.

16 Q. So how many had Ken done; do you know?

17 A. I don't know off the top of my head.

18 Q. So when you testified that this was one of
19 the first ones you had done, that doesn't mean it was
20 one of the first ones the department had done under
21 the Iowa Plan; is that correct?

22 A. That's correct.

23 THE ADMINISTRATIVE LAW JUDGE: Let me just
24 stop you for a second.

25 (Off-the-record discussion.)

1 THE ADMINISTRATIVE LAW JUDGE: Back on the
2 record.

3 MR. McAFEE: Thank you.

4 Could the reporter read back my last
5 question.

6 (Record read by the reporter.)

7 BY MR. McAFEE:

8 Q. Now, back to your visit that day, looking at
9 Exhibit 15 does it tell us what time of day you were
10 there?

11 A. No.

12 Q. Do you recall what time of day you were
13 there?

14 A. I believe it was in the mid-morning.

15 Q. What did you do when you first got there?

16 A. I believe we met Mr. Vos at his residence, I
17 think, and then we went to the feedlot and sat in the
18 office that was there on site.

19 Q. So you had informed him you were coming--

20 A. Yes.

21 Q. --as part of the on-site inspection
22 procedures?

23 A. Yes.

24 Q. When during your visit did you notice what
25 you have testified to as a discharge occurring?

1 A. When we were driving to the office.

2 Q. So you noticed it before you got there?

3 A. It would have been after picking up Mr. Vos
4 at his house--meeting him at his house and then
5 driving to the facility because he lives at a
6 different location.

7 Q. Who was in the car with you?

8 A. Ken and Rick.

9 Q. And was Mr. Vos driving a separate vehicle?

10 A. I believe he was.

11 Q. So you noticed it from the road; is that
12 correct?

13 A. Yes.

14 Q. Did you take any steps to get any closer to
15 it?

16 A. No.

17 Q. So your entire observation is from the road?

18 A. Yes.

19 Q. Did you get out of the vehicle?

20 A. Yes, I got out and stood to get a better
21 angle for taking photographs.

22 MR. McAFEE: Your Honor, may we go off the
23 record?

24 THE ADMINISTRATIVE LAW JUDGE: Yes.

25 (Off-the-record discussion.)

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

3 MR. McAFEE: Your Honor, I would like an
4 admonition from the Court to the witness to not refer
5 to photographs on June 25, 2003, as those documents
6 have been excluded as evidence from this case.

7 THE ADMINISTRATIVE LAW JUDGE: Yes. And
8 you're so advised, okay. I made a determination
9 because--for important reasons that that evidence--I
10 won't rehash why, but I'm very confident about my
11 ruling that it was inappropriate to seek that
12 evidence to be admitted at this late date. So don't
13 make any reference to those photographs, please.

14 THE WITNESS: Okay.

15 BY MR. McAFEE:

16 Q. Mr. Prier, again you said you stopped the
17 car?

18 A. Yes.

19 Q. Are you the only one that got out?

20 A. Yes.

21 Q. So none of the other two with you moved any
22 closer to observe what you have described as the
23 discharge?

24 A. No.

25 Q. How close did you get?

1 A. I got to the shoulder of the road wherever
2 it was overflowing, which was approximately 75 yards
3 away.

4 Q. Seventy-five yards?

5 A. Yes.

6 Q. How did you observe this? Did you have any
7 device to help you observe it, such as field glasses
8 or anything like that?

9 A. No.

10 Q. So you observed it with the naked eye?

11 A. I wear contacts, but yes.

12 Q. Fair enough. What did you do after you
13 observed it from the road 75 yards away? What did
14 you do then?

15 A. We got back in the vehicle and went to
16 Mr. Vos' office and conducted the verbal on-site
17 assessment.

18 Q. Now, you have testified previously in answer
19 to Mr. Breedlove's question that what you observed
20 was-- Well, would you describe for me again what you
21 believe you observed that day.

22 A. That day I observed on the berm that's
23 northwest of the facility a cut channel in the back
24 side of--the northwest side of the berm where brown
25 water with foam flowing through that was cutting down

1 through that berm, flowing across the cornfield and
2 then coming down the unnamed tributary bank. And as
3 it cascaded down, it was creating a foaming sensation
4 to it before it was entering the stream.

5 Q. Okay. Let's take that a step at a time.
6 First of all, you've used the term "coming over the
7 berm" or however you described it. How far away
8 would that have been, the berm?

9 A. That would have been just to the southeast
10 of where it was entering the stream.

11 Q. Would that have been further than 75 yards
12 away?

13 A. That was a little further, yes, but it was
14 very visible with the naked eye.

15 Q. I understand. I'm just trying to get a
16 sense of direction and distance. If we're looking at
17 exhibit--

18 MR. McAFEE: May I approach, Your Honor?

19 THE ADMINISTRATIVE LAW JUDGE: Yes, you may.

20 BY MR. McAFEE:

21 Q. (Continuing) --Complainant's Exhibit 54,
22 you're standing on the road where you've marked it
23 with the term "standing Jeff here"?

24 A. Yes.

25 Q. Where is the berm you are referring to? Is

1 that where it is marked-- What is it marked with on
2 the exhibit?

3 A. There is a line through the berm and then
4 there is a "DT" for discharge terrace, I believe is
5 what I was instructed to write.

6 Q. And how far away are you testifying today
7 that that is from where you were standing?

8 A. From where I was standing that day,
9 approximately a hundred yards.

10 Q. Okay. Then you have marked a point with a
11 DP--is that correct?

12 A. Uh-huh.

13 Q. --where you are testifying--well, what are
14 you testifying as to that?

15 A. That's where the manure and effluent was
16 running into the unnamed tributary.

17 Q. And how far were you away from that?

18 A. Approximately 75 yards.

19 Q. Well, forgive me, Mr. Prier, but--and it's
20 your testimony--but from the exhibit you've testified
21 a hundred yards approximately to what you marked DT
22 and you've testified 75 yards to what you've marked
23 DP, and this exhibit is to scale; am I correct?

24 A. I believe.

25 Q. It sure appears to me that it's a lot

1 further to DT than it is to DP, more than 25 yards.
2 But it's your testimony, sir. Do you stand by your
3 testimony?

4 A. From my angle looking at the road, the
5 straight line shot, I estimated it at a hundred
6 yards.

7 Q. Okay. Did you use any sort of device to
8 measure that distance, such as a range finder?

9 A. No.

10 Q. Did you make any notations that day as to
11 what you have just testified to?

12 A. No.

13 Q. So you're going by a five-year-old memory;
14 is that correct?

15 A. That's why I drove back by there on Thursday
16 was to refamiliarize myself with the area.

17 Q. Okay. Did you take any distances that day?

18 A. No.

19 Q. All right. Now, you've described a brown
20 coloration; is that correct?

21 A. Yes.

22 Q. Where did you see the brown?

23 A. The brown was coming out the back side of
24 the terrace that's marked DT where the slash is and
25 then also where it's flowing down on the dash with

1 the DP.

2 Q. So you saw a brown color in both places?

3 A. Yes.

4 Q. You've also testified you saw manure. I
5 believe you just testified a little bit ago you saw
6 manure entering the stream; is that correct?

7 A. Yes.

8 Q. You saw-- What type of manure?

9 A. The effluent from the feedlot runs down to
10 the terrace area where the gray spot is on the aerial
11 photo and runs over the berm and then down over the
12 stream bank.

13 Q. When you're saying the term "manure," are
14 you talking about liquid?

15 A. Yes.

16 Q. All right. Is that different than what
17 you've testified to as effluent?

18 A. No, it's kind of the same term.

19 Q. And was that what you're describing as
20 brown?

21 A. Yes.

22 Q. Did you see any solid manure?

23 A. No.

24 Q. Okay. So when you-- Okay. You've
25 testified to manure and a liquid. That is one and

1 the same?

2 A. In some cases, yes.

3 Q. No, I'm asking what you're testifying to
4 now. Is that the same thing? When you're testifying
5 today as to manure and liquid, is that the same
6 substance you're talking about?

7 A. There's manure in the liquid.

8 Q. I mean, that's your testimony. I'm trying
9 to understand. Did you see something other than a
10 liquid?

11 A. No.

12 Q. Okay. And is that the brown color you're
13 talking about?

14 A. Yes.

15 Q. And that's what you saw from 75 yards away?

16 A. Yes.

17 Q. Now, in between what you've marked with a DT
18 and a DP, how far do you think that is?

19 A. It's hard to know for sure with the corn
20 crop that was growing on June 25th.

21 Q. How tall was the corn that day?

22 A. I would estimate knee high or shorter.

23 Q. June 25th?

24 A. Yep.

25 Q. Did you walk out in the corn?

1 A. Nope.

2 Q. Again, you're basing that testimony on what
3 you remember from five years ago?

4 A. Yeah.

5 Q. Could you see from point DT to point DP
6 the--could you see this liquid that you're testifying
7 to in the corn?

8 A. No.

9 Q. So from point DT to point DP you wouldn't
10 connect the two; is that correct?

11 A. No.

12 Q. Pardon me?

13 A. No, we could not connect it.

14 Q. All right. At point DP, tell me exactly
15 what you saw again.

16 THE ADMINISTRATIVE LAW JUDGE: At which
17 point now?

18 MR. McAFEE: DP, as in party.

19 THE ADMINISTRATIVE LAW JUDGE: Okay.

20 A. I saw brown water flowing down the stream
21 bank; and as it cascaded down, it created a foam.

22 BY MR. McAFEE:

23 Q. When you talk about cascading down, do you
24 mean flowing over the edge?

25 A. Flowing down the eroded stream bank.

1 Q. The eroded stream bank?

2 A. Yes.

3 Q. What do you mean by that?

4 A. It was bare dirt. It wasn't a nice waterway
5 or rock riffraff.

6 Q. On the stream bank or in the field?

7 A. On the stream bank.

8 Q. Okay. Did you see any tile lines present
9 anywhere there?

10 A. No. We had asked Mr. Vos during the
11 assessment, and he said there was no tile lines.

12 Q. Where?

13 A. In the runoff area where the liquid manure
14 would run.

15 Q. So you talked to Mr. Vos about this during
16 your assessment?

17 A. Yes. That was the question on the--our
18 manmade conduits, is there any subsurface tile line
19 present in the runoff area or intakes, and he
20 answered no.

21 Q. Would you please direct me to what you're
22 on.

23 A. Page 2, the second page of the on-site
24 assessment, it says "manmade conduits," and the
25 second item says "surface tile intakes present in

1 runoff area," and it says "no," and the one
2 immediately below that says "subsurface tile lines
3 present in runoff area," and it says "no."

4 Q. Okay. And what runoff area are you talking
5 about?

6 A. In all of them.

7 Q. Okay. And did Mr. Vos understand what you
8 were talking about as far as runoff area?

9 A. I can only assume.

10 Q. And I realize that's--I shouldn't ask you
11 what Mr. Vos understood, but did you explain to him
12 exactly what you meant by runoff area?

13 A. I don't remember if we explained exactly.
14 There was two of us asking questions that day.

15 Q. Did-- And the area we're talking about,
16 there's corn planted there; is that right?

17 A. During that visit, yes.

18 Q. That's what we're talking about, the day you
19 were there. This foam you observed, would that be
20 consistent with a foam you would see with water
21 running over the edge of a bank? Is that what you're
22 saying?

23 A. If it's high in organic matter, yes.

24 Q. Would you see a foam like that if it didn't
25 have organic matter in it?

1 A. Not typically.

2 Q. Have you seen foam like that when water runs
3 over the edge of a bank without organic matter in it?

4 A. Not as thick.

5 Q. But that wasn't my question. My question
6 was have you seen foam like that when water runs over
7 the edge of a bank without organic matter as you
8 testified to?

9 A. All water has organic matter in it.

10 Q. That's not my question, sir.

11 THE ADMINISTRATIVE LAW JUDGE: Try and--
12 Rather than trying to argue with counsel, the EPA
13 attorney will ask you questions if he feels that
14 there's been a slanted presentation. But his
15 question was pretty direct. Instead of just
16 answering him, you know, you sort of are battling
17 back. What I'd like to do-- It's a very simple
18 question. All right.

19 So do you want to have it reread, the
20 question?

21 MR. McAFEE: Yes, please.

22 (Last question read by the reporter.)

23 A. Yes.

24 THE ADMINISTRATIVE LAW JUDGE: Thank you.

25

1 BY MR. McAFEE:

2 Q. Now, you've testified after seeing this
3 that, of course, you did not move closer?

4 A. Yes.

5 Q. So you didn't get a close-up look at what
6 you were observing?

7 A. Yes.

8 Q. Did you get a closer-up look?

9 A. No.

10 Q. Did you consider taking a sample of that
11 material that you observed?

12 A. Not at that location.

13 Q. Why did you not consider taking a sample?

14 A. We were not building an enforcement case.
15 We were there as an educational visit for the Iowa
16 Plan.

17 Q. But you're here testifying today in this
18 action of what you observed; is that correct?

19 A. Yes.

20 Q. Would a sample-- Let's start with a field
21 sample. Would a field sample have helped you
22 determine if there were any pollutants in that
23 runoff?

24 A. For certain parameters, yes, it would.

25 Q. My question was would a field sample have

1 helped you determine if there were pollutants in that
2 runoff?

3 A. Yes.

4 Q. But you did not take one at that point?

5 A. Not at that location.

6 Q. Would a sample bottle that you could have
7 then sent to a lab, would that have done a better job
8 of helping you determine if there were pollutants in
9 that runoff?

10 A. Yes.

11 Q. But you did not do that?

12 A. No.

13 Q. You did, however, then take the initiative
14 to take a field sample at the location marked
15 "sample" on the map; is that correct?

16 A. Yes.

17 Q. And tell me again why you did that.

18 A. That was so Ken could refamiliarize Rick
19 Martens and myself with the test kits and what
20 typically happens when effluent and manure and runoff
21 is in a stream from an open feedlot versus a
22 confinement. Because Rick had not worked with any
23 open feedlot runoff yet.

24 Q. And again, did you-- Well, you remember
25 this discussion from five years ago?

1 A. Well, not an exact discussion, but that's
2 why we took it.

3 Q. How do you remember that now?

4 A. Because Ken was training Rick and I to do
5 that.

6 Q. So you took a field test kit; is that right?

7 A. Yes.

8 Q. In your experience, does the department
9 bring enforcement actions based upon a field test kit
10 sample?

11 A. Not all the time.

12 Q. Okay. Have they ever in your experience?

13 A. No.

14 Q. So why did you answer my first question with
15 not all the time?

16 A. Well, if we collect more samples, we will.

17 Q. But based-- My question was based on a
18 field test kit sample does the department bring an
19 enforcement action?

20 A. Not that I know of.

21 Q. Okay. You would follow up with a water
22 sample?

23 A. Typically, yes.

24 Q. For lab analysis?

25 A. Yes.

- 1 Q. And you did not do that in this case either?
- 2 A. No.
- 3 Q. Did you observe anything else at the point
4 where you took the sample--
- 5 A. No.
- 6 Q. --related to the condition of the unnamed
7 tributary?
- 8 A. The stream was brown in color, the unnamed
9 tributary.
- 10 Q. Okay. And what do you attribute that to?
- 11 A. Feedlot runoff.
- 12 Q. Anything else that it could be attributed
13 to?
- 14 A. It could be due to sediment if we had heavy
15 rains.
- 16 Q. Okay. Did you see sediment?
- 17 A. We didn't sample for sediment.
- 18 Q. Could you see any sediment?
- 19 A. Not that I remember.
- 20 Q. Why didn't you sample for sediment?
- 21 A. We don't have any way to sample for
22 sediment.
- 23 Q. Okay. In response to my question you said
24 "if we would have sampled for sediment," I believe is
25 what you said. I'm sorry. Would you like to answer

1 that question?

2 A. I don't remember saying we'd sample for
3 sediment.

4 Q. At this location you've testified that you
5 were looking for sediment also; is that what you
6 testified to?

7 A. I don't think so.

8 Q. Okay. Were you looking for sediment from
9 the Lowell Vos feedlot at this location?

10 A. Not sediment.

11 Q. Okay. What were you looking for when you
12 stopped to take the sample?

13 A. We were looking to conduct a water quality
14 sample for ammonia and pH.

15 Q. And I believe I asked you if you observed
16 any other conditions that led you to believe that
17 there was runoff occurring from the Lowell Vos
18 feedlot or something similar to that. Did you
19 observe anything else?

20 A. From running off the other fields--

21 Q. Yes.

22 A. --or from his facility? The only place we
23 saw--observed a discharge or runoff was from the
24 terrace area up by the road.

25 Q. What did you observe at the sample location?

1 A. We observed brown water.

2 Q. Okay. And what do you attribute the brown
3 water to?

4 A. We attribute it to the feedlot runoff.
5 That's why we collected a sample.

6 Q. Okay. And my question was, could it be
7 attributed to anything else?

8 A. I said yes.

9 Q. Okay. And is that where you mentioned the
10 sediment?

11 A. I said it could be from sediment.

12 Q. Okay. Do you attribute the sediment to the
13 Lowell Vos feedlot?

14 A. It could have come from anywhere.

15 Q. Okay. That's what I wanted to make sure I
16 understood.

17 A. Okay.

18 Q. What did you do after that?

19 A. We packed up and headed home.

20 Q. Okay. And in between there you had
21 conducted the on-site assessment; is that correct?

22 A. Yes.

23 Q. And you came to the conclusion that it was a
24 medium priority feedlot; is that correct?

25 A. Yes.

1 Q. Okay. I'd like to go back to Exhibit 15 for
2 a minute.

3 A. That's the on-site assessment form?

4 Q. Yes.

5 A. Yep.

6 Q. This is where you noted the--under "runoff"
7 you noted the evidence of liquid runoff reaching
8 state waters; correct?

9 A. Yes.

10 Q. And you circled "yes"?

11 A. Yes.

12 Q. Is there anywhere here where you note--

13 THE ADMINISTRATIVE LAW JUDGE: Excuse me.

14 Did he circle "yes"? We're looking at Page 11 of 27,
15 Complainant's Exhibit 15?

16 MR. McAFEE: Yes, Your Honor.

17 THE ADMINISTRATIVE LAW JUDGE: Is the
18 question solids reaching state waters, is that what
19 you're referring to?

20 MR. McAFEE: It's the next question.

21 THE ADMINISTRATIVE LAW JUDGE: I see. It's
22 the next one. I'm sorry.

23 That does indicate, is that right,
24 Mr. Prier, that you circled "yes" for that question
25 which asks evidence of liquid runoff reaching state

1 waters, and you did circle "yes"?

2 THE WITNESS: That's correct.

3 THE ADMINISTRATIVE LAW JUDGE: I'm sorry.

4 Go ahead, counsel.

5 BY MR. McAFEE:

6 Q. In the margin on the left-hand side of the
7 page someone has written in a--some letters and a
8 number. Could you read that to us.

9 A. It looks like A, maybe a U or a V and
10 then--mine's kind of blurry--and a G or a Q, maybe,
11 and then a 22 after that.

12 Q. Did you write that on there?

13 A. No.

14 Q. Did you fill this form out?

15 A. I believe Ken filled this form out because
16 that's not my handwriting.

17 Q. Okay. So Ken Hassenius would have been the
18 one who would have made the comments here?

19 A. Yes.

20 Q. Does that-- Those letters and numbers,
21 could that be average 22?

22 A. It could be.

23 Q. And that doesn't mean anything to you?

24 A. No, it doesn't.

25 Q. And so you did not write in there "3.0 MG/L"?

1 A. No, that is not my handwriting.

2 Q. And you did not write in "ammonia 7.4 pH"?

3 A. That's correct.

4 Q. Those are the readings you got from your
5 field test kit; is that correct?

6 A. Yes.

7 Q. I'd then like to go to the next page of the
8 form. This is on a different subject, but something
9 that has come up during this testimony or during this
10 case. About two-thirds of the way down there is a
11 heading that states "manure handling methods." Do
12 you see that?

13 A. Yes.

14 Q. And it says "manure solid scraping" and the
15 "yes" is circled?

16 A. Yes.

17 Q. And then "frequency of removal," and there's
18 something written in the blank. Did you write that
19 in there?

20 A. No, I did not.

21 Q. Do you know what that means?

22 A. I assume it's one week.

23 Q. Okay. What would that mean to you?

24 A. That would mean to me on average after
25 visiting other feedlots that's when the frequency of

1 scraping would be.

2 Q. Would that mean once per week?

3 A. One per week, yes.

4 Q. And is that your understanding of what
5 Lowell Vos was doing?

6 A. I believe typically the feedlot producer
7 would answer on average they get out there once a
8 week, sometimes in the summer more, sometimes in the
9 tougher times of the year they get out there less.

10 Q. But what did Lowell Vos say?

11 A. He said one week on average.

12 Q. He said on average?

13 A. I don't remember for sure.

14 Q. But you just testified to that.

15 A. Okay.

16 Q. What did Lowell Vos say?

17 A. One week.

18 Q. Okay. I'd now like to go through--

19 Mr. Breedlove went through with you some of the
20 documents related to Mr. Vos' participation in the
21 Iowa Plan. And I don't believe I need to go back
22 through all of those with you, but in general you
23 testified that Mr. Vos missed several deadlines; is
24 that correct?

25 A. Yes.

1 Q. Did you ever have any conversations with his
2 engineer?

3 A. Not his engineer.

4 Q. Okay. Who did you have conversations with?

5 A. The district conservationist, I believe.

6 Q. And who do you mean, district
7 conservationist?

8 A. Jerry Sindt.

9 Q. And what is his position?

10 A. He is with the, I believe, Woodbury County
11 Natural Resources Conservation Service.

12 Q. And was NRCS acting as Mr. Vos' engineer?

13 A. Later in the program, yes.

14 Q. What were your conversations with Mr. Sindt
15 in general, if you can tell me?

16 A. From what I could remember, there was a
17 couple discussions about what had to be in the plan
18 of action and what they had to do to meet the
19 compliance schedule.

20 Q. Did you get any indication from NRCS that
21 they were having trouble meeting the deadlines
22 because of their workload?

23 A. They were trying to go through the EQIP
24 program.

25 Q. Who is "they"?

1 A. Lowell Vos and NRCS were working through the
2 EQIP program.

3 Q. And what do you mean? Explain what you
4 mean--how that pertains to the question I asked you.

5 A. You asked me if they were working together
6 towards getting compliance.

7 Q. I believe I asked you if they were serving
8 as his engineering firm and whether they were having
9 trouble meeting the deadlines.

10 A. Yeah, you asked me if they had trouble
11 meeting the deadlines. And that's why they were
12 having trouble meeting the deadlines because
13 Mr. Sindt had said they were working through the EQIP
14 program, and it was taking longer.

15 Q. Did he say anything about their workload in
16 getting work done for producers in the Iowa Plan?

17 A. If I look at some letters, that might
18 refresh my memory. But I don't remember on the phone
19 calls.

20 Q. Okay. You don't remember, as we sit here
21 today, whether he told you anything like that?

22 A. No.

23 Q. Okay. And you've testified-- At least at
24 one point you testified that you had not talked to
25 Mr. Vos, I believe, in between two of your letters

1 you said you were never contacted by him?

2 A. Not that I remember.

3 Q. Were you contacted by NRCS?

4 A. Mr. Sindt.

5 Q. And I believe on Exhibit 15 at the bottom,
6 in fact, at the time of the on-site assessment
7 somebody wrote on here "talked to NRCS," is that
8 correct?

9 A. That's correct.

10 Q. Okay. Is that your handwriting?

11 A. No.

12 Q. Mr. Prier, is it a correct statement of Iowa
13 law to say that Mr. Vos could not start on any of his
14 feedlot controls until he had a construction permit
15 from the department?

16 A. For permitted structures, yes.

17 Q. Okay. So until he had a construction
18 permit, he couldn't take any steps towards
19 constructing structures that require permits such as
20 runoff control basins; is that correct?

21 A. Yes.

22 Q. Would you please turn to Complainant's
23 Exhibit 18.

24 A. Okay.

25 Q. And is this a letter from Jerry Sindt of

1 NRCS to Mr. Vos?

2 A. Yes.

3 Q. Could you read the first sentence, please.

4 A. It says, "It is high time I provide you with
5 a follow-up as to the status of your waste management
6 project."

7 Q. And could you please read the last sentence,
8 please.

9 A. "As this process goes forward I will try to
10 keep you updated. I am also learning as we go."

11 Q. What does that mean to you?

12 A. That means Mr. Sindt was potentially unaware
13 of how the Iowa Plan was set up.

14 Q. That's what you ascertained from reading
15 this?

16 A. Yes, and what he needed to do to meet the
17 plan of action.

18 Q. Okay. At some point did Mr. Vos secure the
19 services of a different engineer?

20 A. At some point I believe he did.

21 Q. And do you know who that was?

22 A. If I think back to the file review, it was
23 Eisenpraun, I believe. E-I-S-E-N-P-R-A-U-N I think
24 is how they spell it.

25 Q. And is that a person or a firm?

1 A. It's an engineering firm in Yankton, South
2 Dakota, I believe.

3 Q. And do you know why they became involved?

4 A. Typically, if NRCS and EQIP programs got
5 involved, they would contract out to a private
6 engineer.

7 Q. Ultimately, was a construction permit
8 application submitted?

9 A. Yes.

10 Q. And, ultimately, was that approved?

11 A. Yes.

12 Q. Do you remember how long it took for that to
13 be approved?

14 A. No, I don't.

15 Q. What does Iowa law require for the DNR--
16 How long does the DNR have to approve a construction
17 permit application?

18 A. For a confinement or open lot?

19 Q. I believe it's the same, but tell me--we're
20 dealing with an open lot here.

21 A. Prior to 2005 there was no time line for
22 open feedlots. After 2005 it was 60 days.

23 Q. As you recall, did the department approve
24 Mr. Vos' permit application within the 60-day time
25 period?

1 A. I don't think so.

2 Q. Earlier in this case a representative of EPA
3 testified as to making the inspection of Mr. Vos'
4 feedlot on May 31st of 2006. Were you involved in
5 that?

6 A. No.

7 Q. Were you involved in preparing any documents
8 for that representative of EPA and providing those
9 documents to the representative of EPA?

10 A. I don't remember. If I did, I faxed what
11 was out of the file for what they requested.

12 Q. You would have faxed those to him?

13 A. Or mailed them.

14 Q. Okay. But you don't recall--

15 A. Sometimes when they request it, I'll earmark
16 what they want and then hand it off to our
17 administrative assistant to do the mailing or the
18 faxing.

19 Q. Mr. Prier, you're involved in investigating
20 possible enforcement actions; is that correct?

21 A. Yes.

22 Q. How long have you been doing that?

23 A. Since October of '98.

24 Q. And that would involve feedlots?

25 A. Feedlots, yes.

1 Q. How many would you guess you've been
2 involved in?

3 A. Close to 300. Enforcement cases or visits?

4 Q. Let's talk enforcement cases.

5 A. Maybe a half a dozen, or so.

6 Q. Okay. And do you watch or stay informed on
7 any other enforcement cases that are going on in your
8 field office?

9 A. There's usually e-mails that come out from
10 the attorneys or the field office supervisor about
11 what cases are being referred for administrative
12 action. But I may not necessarily document or keep
13 tabs on what's going on for each site.

14 Q. And you're in the Spencer field office; is
15 that correct?

16 A. Yes.

17 Q. And does the Spencer field office--which is
18 the northwest corner of the state; is that right?

19 A. Yes.

20 Q. How many counties?

21 A. Sixteen.

22 Q. It has quite a few cattle feedlots in that
23 district; right?

24 A. Yes.

25 Q. Do you have any idea of the number?

1 A. Not off the top of my head, but a lot.

2 Q. Okay. In your experience, either in cases
3 you've been involved in directly or ones that you're
4 aware of either from your field office or from
5 anywhere else in Iowa, are you aware of the
6 Department of Natural Resources ever bringing an
7 enforcement action against a feedlot using a computer
8 model to prove a discharge to a water of the state?

9 A. Not that I'm aware of.

10 MR. McAFEE: No further questions, Your
11 Honor.

12 THE ADMINISTRATIVE LAW JUDGE: Okay. Before
13 we have redirect, I just want to ask you a couple of
14 questions. This is really just for the clarification
15 of the record.

16 THE WITNESS: Sure.

17 THE ADMINISTRATIVE LAW JUDGE: Yes. If you
18 would just bring up Complainant's Exhibit 15.

19 THE WITNESS: Okay.

20 THE ADMINISTRATIVE LAW JUDGE: And you see
21 the second page of that it has headings such as wells
22 located on site and it has in bold manmade conduits.
23 Are you on that page?

24 THE WITNESS: Yep.

25 THE ADMINISTRATIVE LAW JUDGE: There is a

1 reference on the manmade conduits of surface tile
2 intakes present. Do you see that?

3 THE WITNESS: Yes.

4 THE ADMINISTRATIVE LAW JUDGE: Do you know
5 what a surface tile intake is?

6 THE WITNESS: Yes.

7 THE ADMINISTRATIVE LAW JUDGE: Would you
8 tell me what that is.

9 THE WITNESS: It's a corrugated piece of
10 plastic pipe that can be anywhere from a foot high to
11 three foot high that is connected to the subsurface
12 tile that helps with getting the pooled surface water
13 down into the tile collection system faster.

14 THE ADMINISTRATIVE LAW JUDGE: Okay. So you
15 referenced then the subsurface tile lines. Do you
16 want to tell me a little bit about what that looks
17 like.

18 THE WITNESS: That is corrugated plastic
19 pipe that are either perforated or nonperforated that
20 they typically put in about six foot below the
21 surface to assist in dewatering the soil.

22 THE ADMINISTRATIVE LAW JUDGE: Okay. I
23 don't know if it was of any moment, but I wanted to
24 have that description in there.

25 All right. Redirect.

1 MR. McAFEE: Your Honor, first I would like
2 to make an offer of proof.

3 THE ADMINISTRATIVE LAW JUDGE: Go ahead.

4 MR. McAFEE: What I would like to offer up
5 is Mr. Prier has been instructed not to mention the
6 photographs, and I think he has dutifully obeyed that
7 order. But I think if he was asked whether he was
8 able to view the discharge occurring through a
9 telephoto lens on a camera he would say, yes, he did.
10 So, therefore, with the distance from the stream he
11 was able to use some sort of device to see it clearer.

12 THE ADMINISTRATIVE LAW JUDGE: Mr. McAfee,
13 do you have a response to this offer of proof? I
14 guess the offer of proof can go in. It's not
15 evidence. But do you have any comment on that?

16 MR. McAFEE: I would object to that, Your
17 Honor. Again, the photograph itself has been
18 excluded, and his means of viewing that was not for
19 purposes of viewing it closer, it was to take a
20 photograph. And I would not consider that a means of
21 viewing it closer for personal observation.

22 THE ADMINISTRATIVE LAW JUDGE: I have real
23 problems with trying to--in fact, I did note with
24 some surprise that someone supposedly could tell from
25 three-quarters of a football field away that certain

1 effluent was manure. And I don't know that even--I
2 think there would be evidentiary problems saying by
3 having a telephoto lens that one can tell that.

4 But you've made your offer of proof, and I
5 stand by my ruling that I'm not going to allow
6 testimony about that.

7 MR. BREEDLOVE: Okay.

8 THE ADMINISTRATIVE LAW JUDGE: Now, are you
9 ready for any redirect, or is that the extent of your
10 redirect? Do you have anything else? So you have no
11 redirect?

12 MR. BREEDLOVE: No, I am ready for redirect.

13 THE ADMINISTRATIVE LAW JUDGE: Go ahead.

14 REDIRECT EXAMINATION

15 BY MR. BREEDLOVE:

16 Q. Mr. Prier, how many feedlots have you been
17 involved with?

18 A. Close to 300.

19 Q. Is there any doubt in your mind that the
20 material--that the liquid you saw entering the
21 unnamed tributary was feedlot runoff?

22 A. No.

23 Q. Any doubt in your mind that it contained
24 pollutants associated with a feedlot?

25 A. No.

1 Q. Mr. Prier, when you were at the facility on
2 June 25, 2003, did you notice what the condition of
3 the lots were? Did it appear as though it had been
4 recently scraped?

5 A. I don't remember that.

6 Q. Okay. Thank you. Mr. McAfee asked you
7 about Respondent's ability to begin to build
8 containment structures, and I believe you commented
9 that he was not allowed to begin building permitted
10 structures. Were there other structures he was able
11 to build under Iowa law?

12 A. We would allow temporary measures to stop
13 discharges from entering the water of the state until
14 they got their construction permits approved.

15 Q. Would he have been able to initiate
16 construction on the sedimentation basins?

17 A. Yes.

18 Q. The only thing was the actual containment
19 structures because those required engineering and
20 permitting?

21 A. Correct.

22 MR. BREEDLOVE: No further questions, Your
23 Honor.

24 THE ADMINISTRATIVE LAW JUDGE: Okay.
25 Anything on recross?

1 MR. McAFEE: Just very quickly.

2 RE CROSS EXAMINATION

3 BY MR. McAFEE:

4 Q. On the sedimentation basins you just talked
5 about, what is their purpose?

6 A. Their purpose is to settle the solids out
7 before the effluent or liquid manure is released into
8 the proper runoff control basin.

9 Q. Is that-- He did have a sedimentation basin
10 at the time you had visited; is that correct?

11 A. There was a terrace there.

12 Q. Okay. And does a terrace serve as a
13 sedimentation basin?

14 A. In certain cases it can.

15 Q. And he also has within that terrace the
16 sedimentation basin, does he not?

17 A. Yes.

18 MR. McAFEE: No further questions.

19 MR. BREEDLOVE: One more, Your Honor.

20 THE ADMINISTRATIVE LAW JUDGE: Sure.

21 FURTHER REDIRECT EXAMINATION

22 BY MR. BREEDLOVE:

23 Q. When you were there were there sedimentation
24 basins present at the north and south discharge
25 points?

1 A. No.

2 MR. BREEDLOVE: I'm done, Your Honor.

3 THE ADMINISTRATIVE LAW JUDGE: Mr. McAfee.

4 FURTHER RECROSS EXAMINATION

5 BY MR. McAFEE:

6 Q. What are you referring to as the north
7 discharge point?

8 A. The one that goes out to the north across
9 the gravel road.

10 Q. To the northeast?

11 A. To the northeast.

12 Q. And there is a gravel road there with grass
13 in the ditch, et cetera; right?

14 A. Correct.

15 Q. And vegetation, natural features such as
16 grass and corn rows, et cetera, can serve as
17 sedimentation--the purpose of settling solids; is
18 that correct?

19 A. Yes.

20 MR. McAFEE: No further questions.

21 MR. BREEDLOVE: No more questions, Your
22 Honor.

23 THE ADMINISTRATIVE LAW JUDGE: Mr. Prier,
24 thank you for your testimony, sir. Why don't we go
25 off the record.

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(Witness excused.)

(Off-the-record discussion.)

THE ADMINISTRATIVE LAW JUDGE: Back on the record. Now, does that conclude EPA's case at least on direct? I'm not talking about any rebuttal that may occur, but, Mr. Breedlove--

MR. BREEDLOVE: I believe EPA is finished presenting evidence, Your Honor.

THE ADMINISTRATIVE LAW JUDGE: Okay.

MR. BREEDLOVE: We rest.

THE ADMINISTRATIVE LAW JUDGE: All right. Now, it's 4:30, are you ready to begin?

MR. McAFEE: Yes, Your Honor. I think we have two that I think would be relatively short witnesses that we would like to present today, if we could do it.

THE ADMINISTRATIVE LAW JUDGE: Sure.

Good afternoon.

MICHAEL BEAVERS,

called as a witness by counsel for the Respondent, being first duly sworn by the Administrative Law Judge, was examined and testified as follows:

THE ADMINISTRATIVE LAW JUDGE: The convention we practice is you just state your name as you would anyway, and then spell your name, at least

1 your last name for us, okay.

2 THE WITNESS: Michael Beavers,

3 B-E-A-V-E-R-S.

4 DIRECT EXAMINATION

5 BY MR. McAFEE:

6 Q. Good afternoon, Mr. Beavers.

7 A. Good afternoon.

8 Q. I'm going to put up an exhibit that you'll
9 be able to see on the screen that is just going to
10 be--well, it's Complainant's Exhibit 1. Well, let me
11 check that. There might be a better one for us to
12 use.

13 THE ADMINISTRATIVE LAW JUDGE: I assume
14 you're going to ask him a few questions about who he
15 is and where he lives; right? You're not just going
16 right to the exhibit, are you?

17 MR. McAFEE: I have to admit, I have to get
18 out of cross-examination mode and into direct
19 examination mode. So hopefully I can do that. Thank
20 you. May I approach?

21 THE ADMINISTRATIVE LAW JUDGE: Yes.

22 BY MR. McAFEE:

23 Q. Mr. Beavers, where do you live?

24 A. I live at 1037 Franklin Avenue, Kingsley,
25 Iowa.

1 Q. And what I will have up on the screen here
2 in a minute will be an aerial photo so we can show
3 the Court where you live.

4 A. Okay.

5 MR. RYAN: What exhibit number are we
6 looking at, counsel?

7 MR. McAFEE: Complainant's Exhibit 6.

8 MR. RYAN: Thank you.

9 BY MR. McAFEE:

10 Q. Okay. Can you--I believe we need--excuse
11 me. I need to shut the lights off.

12 THE ADMINISTRATIVE LAW JUDGE: Thank you,
13 counsel.

14 BY MR. McAFEE:

15 Q. Mr. Beavers, do you recognize your
16 neighborhood from that photo?

17 A. Yeah.

18 Q. And can you-- Maybe you could come around
19 here, if you would, please, and show the Court where
20 you live in relation to the Lowell Vos feedlot.

21 A. Okay.

22 Q. You can just point to it if you would like.

23 A. I live right here (indicating).

24 Q. Okay. And is that your farm place on--could
25 you just point to your farm place, your farmstead.

1 A. Right there (indicating).

2 Q. So it's on the west side of that road?

3 A. Yes.

4 Q. Okay. Thank you.

5 A. You're welcome.

6 Q. How long have you lived at that location,

7 Mr. Beavers?

8 A. Twenty-two years.

9 Q. What is your occupation?

10 A. I'm a construction worker.

11 Q. And have you been a construction worker for
12 all those 22 years?

13 A. No.

14 Q. What did you--

15 A. I was at John Morrell Meat Packing for 10
16 years, and then I went into construction.

17 Q. And how long have you been in construction?

18 A. I've been with the company I'm with now for
19 15 years.

20 Q. As part of your job are you gone for
21 extended periods of time or anything like that?

22 A. No.

23 Q. So you're home pretty much every night?

24 A. I'm home every night.

25 Q. Okay. Mr. Beavers, I'll kind of get right

1 to the chase here. Your farm place there is pretty
2 close to a creek; is that correct?

3 A. Very close.

4 Q. Okay. How close?

5 A. Probably within a hundred yards.

6 Q. All right. And that is-- What do you call
7 that creek?

8 A. I call that my creek.

9 Q. Okay. And here we've been calling it the
10 unnamed tributary this whole time. So it's your
11 creek. But at any rate, you've been around
12 there--well, you've lived at that location within a
13 hundred yards of what we've been calling for purposes
14 of this proceeding--I think we'll probably continue
15 to do that so our record is clear--the unnamed
16 tributary of Elliot Creek?

17 A. Yes.

18 Q. What do you-- Well, do you fish?

19 A. Oh, yes. My boy and I both fish.

20 Q. What's your boy's name?

21 A. Michael.

22 Q. How old is Michael?

23 A. He just turned 18.

24 Q. So for the four years before he was born and
25 then the 18 years since he's been around, you and he

1 have been fishing?

2 A. Yes.

3 MR. RYAN: Objection, leading.

4 THE ADMINISTRATIVE LAW JUDGE: That's okay
5 to ask that as a preliminary matter. It's
6 not--that's well within the exceptions to leading
7 questions.

8 Go ahead.

9 MR. McAFEE: I have to get out of
10 cross-examination mode.

11 THE ADMINISTRATIVE LAW JUDGE: That's an
12 appropriate question.

13 MR. McAFEE: Okay.

14 THE ADMINISTRATIVE LAW JUDGE: There are a
15 number of questions that are leading that are
16 permissible. Go ahead.

17 MR. McAFEE: Thank you, Your Honor.

18 BY MR. McAFEE:

19 Q. How does your activity-- How do your
20 activities with the creek relate to your fishing?

21 A. Well, my boy and I for the last 15, 16
22 years, we get our own bait as far as Minnows, Chubs,
23 Crawdads, and we get most of them right out of that
24 crick.

25 Q. How many are there?

1 A. We have pretty good luck.

2 Q. Okay. How do you get them out of that
3 creek?

4 A. Minnow trap.

5 Q. Briefly, could you tell the Court what a
6 Minnow trap is.

7 A. Basically a Minnow trap is a round wire
8 basket about this big around (indicating), maybe a
9 foot long, or so, that's got a funnel on each end.
10 And the Minnows swim into it, and the funnel is small
11 at the end so they can't get back out.

12 Q. What kind of Minnows do you trap?

13 A. Fatheads, Shiners, Big Chubs, you know.
14 There's quite a variety in there.

15 Q. And how do you recognize the differences?

16 A. Just by doing it for years. When I was a
17 kid, I did cricks over in another part of town, and I
18 sold them to bait shops and stuff. And that's
19 basically how I learned the difference.

20 Q. During your 22 years of doing this have you
21 ever noticed a problem in this creek with finding
22 Minnows, et cetera?

23 A. The only time I ever found a problem, and we
24 found out later as we walked further down the creek,
25 is there was some--I call them spillways where

1 somebody had put rock or something in there. And if
2 the water is too low, then the Minnows can't get up
3 past it. Otherwise, we've never had a problem
4 getting Chubs and Minnows out of there.

5 Q. Have you noticed a problem with those
6 spillways this year?

7 A. Not so much this year because it's my boy's
8 senior year, and we haven't really spent a lot of
9 time in the crick this year.

10 Q. But have you in years past?

11 A. Absolutely.

12 Q. And again, what do those--are they
13 obstructions?

14 A. Obstructions. I call them spillways. If
15 somebody had dumped--a lot of it's busted concrete or
16 rocks. I don't know if they put them in there to
17 keep it from washing out, or what. But sometimes
18 it's a downed tree limb that forms kind of a dam.
19 Unless the water is real high, the Minnows and Chubs
20 can't get past it. They can't jump above it.

21 Q. Okay. And these would be located to the
22 west of your property or which direction?

23 A. They're west of me.

24 Q. You mentioned finding Shiners?

25 A. Uh-huh.

1 Q. I'm not a fisherman. Help me out here.

2 A. Well, I call them Shiners. They're just the
3 real bright silvery color.

4 Q. Do some people refer to them as Sand Shiners
5 maybe?

6 A. I'm not sure.

7 Q. Do you find White Suckers?

8 A. Yes.

9 Q. What about aquatic life, I'll use that term,
10 other than fish?

11 A. Well, on my place there I have a brome field
12 right next to the crick, and I use it for hay, I mow
13 it and bale it. And just this year alone when I was
14 mowing the frogs were unbelievable. There's a lot of
15 frogs down there, and we use them for Catfish bait,
16 too.

17 Q. Do you ever find Crawdads?

18 A. I have.

19 Q. And have you had other wildlife show up on
20 that creek?

21 A. Oh, yeah.

22 Q. What have you had show up, in my words?

23 A. As of right now, just east of me across the
24 Franklin Avenue--just on the other side of Franklin
25 off that little tree grove there there's a family of

1 beaver in there building a dam. And they've got it
2 backed up pretty good now where I'm sure they're
3 going to have to open it up or it won't be good for
4 the road.

5 Q. When you say "they," who are you referring
6 to?

7 A. I think the county does it. The beaver were
8 in there a couple years ago, and they backed that
9 water up to where it comes right up to the gravel
10 road. And if the road gets too wet, they'll come
11 down with a machine and reach over the bridge and
12 pick the dam out. And my boy and I just were out
13 there last night with a spotlight watching the
14 beavers work.

15 Q. Do you see raccoons?

16 A. Oh, yeah, way too many raccoons. I don't
17 like them.

18 Q. And along the creek?

19 A. Yeah. We've seen them in the crick, and,
20 actually, a lot of times I've got to trap them. I
21 use live traps. And then I relocate them because we
22 raise exotic birds, and coons and birds don't get
23 along.

24 Q. What do raccoons eat besides your birds?

25 A. Eggs, fish, Crawdads.

1 Q. All right. Do you or your son fish?

2 A. Yes.

3 Q. I think you've testified to that. Do you or
4 your son fish in Elliot Creek?

5 A. I've never fished there, but my boy does.

6 Q. And has he caught any fish?

7 MR. RYAN: Objection, hearsay. His son is
8 not here for me to cross-examine him. This is the
9 exact same testimony that he objected to earlier with
10 one of our witnesses testifying about what another
11 person has said or done.

12 THE ADMINISTRATIVE LAW JUDGE: Okay.
13 Rephrase the question.

14 BY MR. McAFEE:

15 Q. Have you ever seen your-- Or has your son
16 ever told you he has caught any fish in Elliot Creek?

17 MR. RYAN: Objection, hearsay. This witness
18 has testified he's never personally fished Elliot
19 Creek. He's asking what another person's experience
20 is in that creek, and that person is not here to
21 testify today.

22 THE ADMINISTRATIVE LAW JUDGE: The problem
23 is that, first of all, as I've noted, hearsay is
24 generally admissible. But I noted that even there
25 are some limits as to that.

1 But it seems to me like you could ask,
2 counsel-- There is a way around this. You could ask
3 him if he observed his son come home with fish. Then
4 again there is the problem of saying, "Where did you
5 get the fish from?"

6 Make an attempt, but I don't think this is
7 such a big deal. So I'm probably going to sustain
8 the objection. If you want to make one other run at
9 it, you can.

10 MR. McAFEE: I'll take another shot.

11 THE ADMINISTRATIVE LAW JUDGE: Why not.

12 BY MR. McAFEE:

13 Q. Has your son ever brought any fish home that
14 he has caught in Elliot Creek?

15 A. Yes, he has.

16 Q. What was that fish?

17 A. They were Catfish.

18 Q. Do you know where your son caught that
19 Catfish in Elliot Creek?

20 A. Closer to the Town of Lawton.

21 Q. Which is about how far downstream from you?

22 A. I would say probably four-and-a-half miles.

23 THE ADMINISTRATIVE LAW JUDGE: Let me just
24 ask you just for clarification of the record,
25 Mr. Beavers. By the way, because I got confused as

1 the court reporter did, your name is the same
2 spelling as the creatures that are building a dam; is
3 that right?

4 THE WITNESS: Yes.

5 THE ADMINISTRATIVE LAW JUDGE: It's not
6 Beaver, it's Beavers?

7 THE WITNESS: Yes.

8 THE ADMINISTRATIVE LAW JUDGE: Just for
9 clarification of the record, when you're looking at
10 this Complainant's Exhibit 6, which is up on
11 something they call the light pro, your property is
12 on the left side of this road that is called Franklin
13 Avenue; is that right?

14 THE WITNESS: Yes.

15 THE ADMINISTRATIVE LAW JUDGE: And on this
16 exhibit--in fact, along Franklin Avenue, at least on
17 this part of the exhibit, that's the only house on
18 that road; right?

19 THE WITNESS: Right.

20 THE ADMINISTRATIVE LAW JUDGE: Between 110th
21 Avenue and 340th Street?

22 THE WITNESS: Yes, it is.

23 THE ADMINISTRATIVE LAW JUDGE: That's the
24 only property there; right?

25 THE WITNESS: Yes.

1 THE ADMINISTRATIVE LAW JUDGE: And just in
2 terms of location, it looks to me like--you tell me--
3 if you walked this, you seem to be--actually, your
4 property is about halfway between, maybe even a
5 little closer to the Lowell Vos feedlot as opposed to
6 where this--your creek, as you called it, meets
7 Elliot Creek; is that fair?

8 THE WITNESS: Yes.

9 THE ADMINISTRATIVE LAW JUDGE: I just wanted
10 to make sure that anyone that looks at the record can
11 absolutely orient themselves and not be confused as
12 to where Mr. Beavers lives.

13 Go ahead, counsel. Any other questions?

14 MR. McAFEE: Yes, Your Honor. If it would
15 be helpful for the record, I could have the witness
16 circle his house and make this a separate exhibit.

17 THE ADMINISTRATIVE LAW JUDGE: I think it's
18 clear enough. But it's not my call, it's your call.

19 MR. McAFEE: I understand.

20 THE ADMINISTRATIVE LAW JUDGE: There's no
21 other property between those two streets I mentioned.

22 MR. McAFEE: I'm trying to keep the number
23 of those type of exhibits to a minimum.

24 BY MR. McAFEE:

25 Q. Just a few more questions, Mr. Beavers.

1 Other than what you've testified to, trapping
2 Minnows, et cetera, do you have any other activities
3 that lead you to be right by the creek on a regular
4 basis?

5 A. Well, like I said, the lower part I have
6 brome grass down there which I run for hay, so I run
7 my tractor up there along the creek quite often. And
8 my boy and I both hunt, so we travel that crick for
9 three months during hunting season up and down. We
10 walk that crick when we're pheasant hunting.

11 Q. During that time and whenever you're around
12 the creek, have you ever noticed a problem with any
13 manure or any other contaminants in the creek?

14 A. No, I haven't.

15 Q. Again, you've lived there for 22 years; is
16 that correct?

17 A. Twenty-two years, yes.

18 Q. Recently did anyone from DNR stop by your
19 place?

20 A. I had two gentlemen stop. They said they
21 were going to be running some tests on the crick,
22 wanted to know if they could set up like a little pup
23 tent down in my bottom pasture where they could get
24 closer to the crick, and I told them that wasn't a
25 problem. And I asked them when they thought they

1 were going to be there, and they said two, three
2 weeks.

3 The only reason I asked is I was hoping to
4 have the brome mowed and baled out of there. I
5 didn't want them driving over it because I use it for
6 hay. I didn't want them driving over it. But I told
7 them if it wasn't mowed, go ahead and go down there
8 anyway.

9 MR. RYAN: Your Honor, I object to this line
10 of questioning. This witness appeared for the first
11 time in the supplemental prehearing exchange filed on
12 August 20 of this year, and there is no mention here
13 of any visits with DNR or discussions of that. We
14 were put on no notice.

15 I would say what's good for the goose is
16 good for the gander here. We've been warned we
17 cannot go beyond the prehearing exchange, and we have
18 testimony here clearly not disclosed in the
19 prehearing exchange that was supplemented last month.

20 MR. McAFEE: Your Honor, I just learned of
21 this in talking to the witness.

22 THE ADMINISTRATIVE LAW JUDGE: I'm going to
23 go along with Mr. Ryan, and then he won't be able to
24 complain either because I am applying the same
25 standard, the goose/gander analogy.

1 I also want to alert you that it's 10
2 minutes before 5, and there has been no
3 cross-examination of Mr. Beavers. I don't mind
4 Mr. Beavers coming back tomorrow, but he might mind.
5 So you might bear that in mind.

6 MR. McAFEE: That was my last question, Your
7 Honor.

8 THE ADMINISTRATIVE LAW JUDGE: Okay.
9 Cross-examination.

10 MR. RYAN: Yes, Your Honor, I'll be very
11 brief. I'm confident we can finish before 5.

12 May I approach the witness, Your Honor?

13 THE ADMINISTRATIVE LAW JUDGE: Yes.

14 CROSS-EXAMINATION

15 BY MR. RYAN:

16 Q. Mr. Beavers, I'm Mr. Ryan. I'm with the
17 EPA.

18 A. Okay.

19 Q. We're looking now at Complainant's Exhibit
20 6, which is up on the light pro right now,
21 Mr. Beavers. Can you see where my finger is
22 pointing?

23 A. Yes.

24 Q. I believe you testified that you live
25 approximately here at the--where the unnamed

1 tributary passes underneath Franklin Avenue. Is that
2 your house immediately to the left?

3 A. Yes, it is.

4 Q. And this line we see that proceeds up north
5 and east from your house towards Mr. Vos' feedlot,
6 that's what we've been calling the unnamed tributary.
7 I think you testified it's your creek.

8 A. Yeah.

9 Q. And then going down the opposite direction,
10 southeast from Franklin Road is what appears to be
11 another creek. Is that another creek there? Is that
12 another unnamed tributary?

13 A. Actually, what that is is there's some fresh
14 water springs up in there, and that's basically where
15 it starts is right there.

16 Q. Okay.

17 A. I wouldn't really call it a creek because
18 it's just more of a swamp-type deal.

19 Q. Is there flow coming out?

20 A. Yes, there's some flow coming out of there.

21 Q. So just for the record, this area that
22 appears to be from an aerial photo a water body
23 heading south and east from your house at Franklin
24 Road with what appears to be bushes or trees along
25 it--

1 A. Trees.

2 Q. --that has flow in it. Is the confluence of
3 what we call the unnamed tributary and this other
4 water body, which for purposes of right now we'll
5 call it the swamp, is the confluence right pretty
6 much where your house is?

7 A. Right.

8 Q. Now, Mr. Beavers, you live--I believe you
9 said you've lived there for 22 years in this place;
10 is that correct?

11 A. Yes.

12 Q. And you're a neighbor of Mr. Vos'?

13 A. Yes.

14 Q. You know him pretty well?

15 A. Yes.

16 Q. Okay. Would you say you're friends?

17 A. Oh, yeah.

18 Q. How often do you trap Minnows?

19 A. Just about every year.

20 Q. Every year about once a year?

21 A. Well, it's for several months during the
22 summer.

23 Q. Okay. So you trap them in the summer?

24 A. Yes.

25 Q. And how often would that be; once a month--

1 A. Well--

2 Q. --on average?

3 A. Well, it's just about every weekend when
4 we're trapping them. If we've got traps out, we
5 check them every three days.

6 Q. That would be in the summer months only?

7 A. Yes.

8 Q. So in the winter months you're not looking
9 for fish down there?

10 A. No.

11 Q. You talked about the Catfish that your son
12 brought home. When was that?

13 A. That was two to three weeks prior--just a
14 couple weeks ago.

15 Q. Okay. That was from about four-and-a-half
16 miles downstream on Elliot Creek?

17 A. Yes.

18 Q. Has he ever brought a fish home from that
19 part of Elliot Creek before, from that part of Elliot
20 Creek?

21 A. Before?

22 Q. Yes.

23 A. Oh, yeah. There's actually some pretty good
24 fish in there for as small as the creek is. It's
25 pretty good fish in there.

1 Q. Is that down near Lawton?

2 A. Yes.

3 Q. Now, the last thing you were asked about was
4 manure or contaminants in the creek.

5 A. Right.

6 Q. Now, you said you work in the construction
7 business?

8 A. Yes.

9 Q. And before that I recall-- I'm sorry, what
10 was your profession before construction?

11 A. I worked at John Morrell Meat Packing.

12 Q. Okay. And you've never been a feedlot
13 operator?

14 A. No.

15 Q. So are you-- Do you have any training in
16 biology or natural resources?

17 A. No.

18 Q. Have you ever-- You've never actually
19 tested the waters going by your house before?

20 A. All I ever tested was my well.

21 Q. And the-- Would you say that you would know
22 what feedlot runoff necessarily would look like if
23 you saw it?

24 A. I would say so. I grew up on a farm. I've
25 lived on a farm my whole life. I worked hog

1 confinement for two years.

2 Q. I'm sorry, what?

3 A. Hog confinement. So I've been around it
4 pretty much my whole life. I'm pretty sure I think
5 I'd know what it was.

6 Q. But in terms of-- You testified this is
7 what you saw right near your house?

8 A. Right.

9 Q. Not up the stream, the unnamed tributary
10 near Mr. Vos' facility?

11 A. No, I haven't been up there.

12 MR. RYAN: I have no further questions, Your
13 Honor.

14 MR. McAFEE: I have no further questions,
15 Your Honor.

16 THE ADMINISTRATIVE LAW JUDGE: Okay. We're
17 going to let you go, and we're going to call the day
18 to an end. I just have to ask you, though, because
19 I'm curious, what kind of exotic birds do you raise
20 there?

21 THE WITNESS: Well, we've got--raise
22 pigeons, and we raise quail, pheasants and a lot of--
23 like Bobwhites. Well, I raise them and we turn them
24 loose on the crick.

25 THE ADMINISTRATIVE LAW JUDGE: Thank you

1 very much. We're done with your testimony. You're
2 excused.

3 (Witness excused.)

4 THE ADMINISTRATIVE LAW JUDGE: We're done
5 for the day, and we're off the record.

6 (Recess at 5 o'clock p.m., until 9:30 a.m.,
7 Friday, September 19, 2008.)

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C E R T I F I C A T E

I, the undersigned, a Certified Shorthand Reporter of the State of Iowa, do hereby certify that I acted as the official court reporter at the hearing in the above-entitled matter at the time and place indicated;

That I took in shorthand all of the proceedings had at the said time and place and that said shorthand notes were reduced to typewriting under my direction and supervision, and that the foregoing typewritten pages are a full and complete transcript of the shorthand notes so taken.

Dated at Des Moines, Iowa, this 22nd day of September, 2008.


CERTIFIED SHORTHAND REPORTER