STATE OF NORTH CAROLINA IN THE OFFICE OF

COUNTY OF BLADEN ADMINISTRATIVE HEARINGS

WILLIAM BARRY FREEDMAN, Petitioner, vs. NC DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES, DIVISION OF WATER QUALITY, Respondent.	Case No. 05 EHR 0905

Elizabethtown, North Carolina
July 25, 2008
9:05 a.m.
Volume II - Pages 252-367

ADMINISTRATIVE HEARING
TRANSCRIBED FROM AN OPEN-MICROPHONE RECORDING

The above-entitled matter came on for hearing before The Honorable Donald W. Overby, Administrative Law Judge Presiding, on the 25th day of July, 2008, in Room 223 of the Bladen County Courthouse, Elizabethtown, North Carolina, commencing at 9:05 a.m.

1 APPEARANCES

2

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22 Reporter's Note: Quoted material is reproduced as read or

23 quoted by the speaker. Proper names are spelled

24 phonetically unless spelled into the record.

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1 (Thereupon, the proceeding continued.)
2 THE COURT: This is a resumption of the
3 hearing in Freedman Farms versus North
4 Carolina Department of Environment and
5 Natural Resources, the Division of Water
6 Quality, 05 EHR 0905. Present for the
7 Petitioner is Mr. Grady. Present for the
8 Respondent is Ms. Oliver. And the Petitioner
9 is here as well.
10 And, Ms. Oliver, I believe you're
11 calling your next witness, is that correct?
12 MS. OLIVER: That's right, Your Honor.
13 We would call Larry Baxley. And I'll hand up
14 an exhibit book. Would you please state
15 your---
16 THE COURT: Let me swear him in first.
17 MS. OLIVER: I'm sorry. I'm sorry.
18 THE COURT: I'm about to forget one of
19 the main things. If you would please place
20 your left hand on the Bible and raise your
21 right hand.
22 - - - - - - - -
23
24
25

1 LARRY CLAYTON BAXLEY,
2 a witness called on behalf of the Respondent, being
3 first duly sworn in the above-entitled matter, was
4 examined and testified on his oath as follows:
5 THE COURT: Thank you, sir. And if you
6 would, for the record, please state your name
7 and spell your last name.
8 THE WITNESS: My name is Larry Clayton
9 Baxley. The spelling is B-a-x-l-e-y.
10 THE COURT: Thank you, sir.
11 THE WITNESS: You're welcome.
12 **DIRECT EXAMINATION**
13 **BY MS. OLIVER:**
14 Q. Mr. Baxley, what is your current occupation?
15 A. I'm currently employed by Progress Energy
16 Carolinas. I'm an environmental specialist at the
17 W. H. Weatherspoon Plant in Lumberton.
18 Q. Okay. And did you work for DWQ?
19 A. Yes, ma'am.
20 Q. Division of Water Quality?
21 A. Yes, ma'am. I worked for the Division of Water
22 Quality and DENR from 2003 to 2005.
23 Q. All right. And what section did you work in?
24 A. The Concentrated Animal Farming Operation Section,
25 CAFO Unit, Aquifer Protection.

1 Q. CAFO?
2 A. Concentrated Animal Farming Operations.
3 Q. All right. And when did you start working for the
4 Aquifer Protection Section?
5 A. It would have been, I believe, in May of 2003.
6 Q. All right. What was your position?
7 A. I was the inspector - animal inspector.
8 Q. The animal inspector. What does that mean? What
9 were your job responsibilities?
10 A. Job responsibilities included the inspection of
11 swine farms, poultry farms, those kinds of
12 operations that have a large number of animals in
13 them. We were mainly looking to see that they
14 were following their permits and the licensing
15 that they had agreed to follow, and the protection
16 of manning the environment was, you know, our
17 utmost mandate. We were also involved heavily in
18 outreach, trying to make sure that people are in
19 compliance and do what we can to get them there.
20 Q. How long were you in this position at DWQ?
21 A. Approximately three years.
22 Q. And where did you work out of? Did you work out
23 of Raleigh?
24 A. No, ma'am. We worked out of the Fayetteville
25 Regional Office. There are several regional

1 offices throughout the state. I was stationed in
2 the Fayetteville Regional Office and had the
3 counties in the southeastern part of North
4 Carolina to cover. A lot of times, we actually
5 would work out of our homes as well.
6 Q. And what counties does the Fayetteville Regional
7 Office cover? Do you recall?
8 A. Yes, ma'am. There are several. Union, Anson,
9 Hoke, Cumberland, Bladen, Robeson - I think that's
10 the majority of them.
11 Q. Okay. Was the Ronald Davis farm within your
12 territory?
13 A. Yes, ma'am.
14 Q. And can you tell us briefly about your educational
15 background?
16 A. I have a BS in biology from the University of
17 North Carolina at Pembroke.
18 Q. Okay. And can you just briefly explain to the
19 Court - give a little short overview of how hog
20 farms are permitted in North Carolina?
21 A. Some of the hog farms in North Carolina have been
22 grandfathered in, and by that, I mean, generally,
23 you have what's called an NPDES permit. That's on
24 a federal level, and then the state adopted that
25 and it basically - they mostly operate underneath

1 what's known as a general permit. And they're
2 allowed to apply their hog waste from their - the
3 building itself, all the piping, the lagoon, and
4 then the application equipment are all considered
5 a waste treatment system, and that has to be under
6 a permit for you to apply - land apply it in North
7 Carolina.
8 Q. Okay. And when you say "land apply," how is it
9 applied?
10 A. There are a variety of different ways, but the
11 most simple explanation can be that you move it
12 from the lagoon after it has been sampled within a
13 certain time frame, and then you apply it through
14 equipment, be it a traveling gun or some other
15 conveyance, to your agricultural sites to be - for
16 the nutrients. The whole idea is to use the
17 nutrients that are in the waste in the crops to
18 reuse that material again so we're not loading
19 them into our streams - nutrient loading our
20 streams or the land, for that matter.
21 MS. OLIVER: Are you-all [inaudible]?
22 Excuse me. Are you-all [inaudible]?
23 Q. Would you turn to Exhibit 1 in that book?
24 MR. GRADY: Can we go off the record?
25 MS. OLIVER: Uh-huh.

1 MR. GRADY: This is going to get pretty
2 loud. They've got court here today.
3 THE COURT: As bad as it is, I think
4 we're going to need to shut the door
5 because - to ensure it's being picked up
6 as---
7 (Thereupon, there was a pause in the
8 proceeding.)
9 Q. Do you recognize that document?
10 A. If you're referring to the NPDES swine waste
11 management general permit, yes, ma'am.
12 Q. And is that the general permit you were referring
13 to when we started?
14 A. Yes, ma'am. The majority of the farms in North
15 Carolina will operate under a document like this
16 or very similar to this.
17 Q. Okay.
18 MR. GRADY: Your Honor, I'd object
19 solely for the purpose I haven't seen the
20 document unless - unless it's in the notebook
21 that you gave me in September. Is that
22 document in here?
23 MS. OLIVER: Look at Exhibit 1.
24 MR. GRADY: Okay. Okay. Withdraw the
25 objection.

1 THE COURT: Okay.
2 Q. And would you turn to Exhibit 2? It's already
3 been admitted as well. Do you recognize that
4 document?
5 A. Yes, ma'am. It's the documents - certificate of
6 coverage for the Ronald Davis farm.
7 Q. Okay. And what do you mean - what is a
8 certificate of coverage for?
9 A. Certificate of coverage is the next step in having
10 a farm permitted. It - basically, it outlines how
11 many animals you can have on that farm and allows
12 you to continue to operate under the permit. It
13 sets the guidelines for the number of animals that
14 you've got to look for and have a waste management
15 plan and those kinds of items in place.
16 Q. Okay.
17 A. It is required to have a certificate of coverage
18 to operate a hog farm in North Carolina, to the
19 best of my knowledge.
20 Q. All right. And Exhibit 3, do you recognize that
21 document?
22 A. Yes, ma'am. It's a nutrient management plan. As
23 we follow through that same train of thought, this
24 is the document that he would use to take the
25 number of animals, the approximate waste they

1 would generate that's going to be placed in your
2 lagoon, and then it will spell out how you can
3 take that liquid waste and apply it to what crops,
4 your soil types on that particular amount of land,
5 the amount of land that's there and where. It is
6 the blueprint for being in compliance with a
7 certificate of coverage and your - and your
8 permit.
9 Q. Under the permit and certificate of coverage and
10 the animal or the nutrient management plan, are
11 discharges of hog waste on the property of a
12 farm permitted?
13 A. No, ma'am. Everything has to be applied to the
14 lands that are spelled out within the permit and
15 also within the nutrient management plan. At no
16 time - it also spells out several other
17 restrictions, that in no time can you let it allow
18 it to get in the surface waters, waters of the
19 State, or apply on frozen ground or hydraulically
20 overload. There are a number of restrictions that
21 it will spell out for you.
22 Q. Okay. And what kind of records are hog farmers
23 required to maintain?
24 A. There are a number of records that a hog operation
25 will have to maintain such as the number of

1 animals that are on that facility, mortality
2 rates. You'll have to - specifically to what
3 you're asking about, though, you have to document
4 when you apply the waste, where you applied it,
5 the amounts, and you have to do that sufficiently
6 in order that you can calculate how much you're
7 applying in a certain window of time to make sure
8 you're not hydraulically overloading the soils at
9 that period of time.
10 There are some other documents that you have
11 to maintain as well, but those are the main ones
12 that we're dealing with here. It also has the
13 method - you have to maintain like a piece of
14 equipment - you have to have it certified each
15 year so that you know the application rates the
16 piece of equipment is applying, and you can show
17 that as well. So it's pretty complex.
18 Q. All right. And who is responsible for ensuring
19 that no discharges occur?
20 A. That would be the permittee, the person permitted
21 to operate that farm.
22 Q. All right. And are you familiar with the system
23 that Mr. Freedman operated for his animal waste
24 disposal at the Ronald Davis farm?
25 A. Yes, ma'am. He had a very common type system,

1 which is, you know, you have your house and you
2 have the lagoon behind it and the piping. You'll
3 have a pump located near the lagoon to bring it up
4 out of the lagoon and then transfer it through the
5 piping to an irrigation - inlaid irrigation system
6 that goes to a hydrant head. From there---
7 Q. I'm sorry. I didn't - hydrant head?
8 A. Hydrant head. It's a place where you can couple
9 to, and then you run your equipment that actually
10 moves in the field. And he had a - what's called
11 a reel gun with a spray cart. The reel has a
12 motor on it that will slowly turn, and then it has
13 a long hose that you extend out. On the end of
14 that is a cart where a gun or a fire hose end
15 almost with an orifice on it, and it will - as it
16 pulls in, it will make the application back and
17 forth slowly bringing that spray cart in.
18 Q. Okay. And did you say hydrant or hydro?
19 A. It's a hydrant. I mean that's just my terminology
20 for it.
21 Q. Okay.
22 A. It's a point where you can tap into the waste
23 that's being moved and put it into hoses for
24 transfer to the field application.
25 Q. Okay. Could you draw a simple diagram of what you

1 just described?
2 A. Yes, ma'am, if you'd like.
3 (Thereupon, there was a pause in the
4 proceeding.)
5 A. (Tape begins mid sentence.) ---what we're
6 speaking of for the Ronald Davis farm
7 particularly?
8 Q. Yes. Definitely, yes.
9 A. All right.
10 (Thereupon, there was a pause in the
11 proceeding.)
12 A. (Tape begins mid sentence.) ---mostly you would
13 have is, these are the hog houses with their
14 accompanying pits and pipes that would bring it
15 all to a central area and deposit it into the
16 lagoon in some manner. The pump would have a long
17 extension on the end that you would use to prime
18 the pump and then to extract the waste material
19 from the lagoon---
20 Q. Is the pump in the lagoon?
21 A. No, ma'am. It's on the outer bank of the lagoon.
22 Q. Okay.
23 A. It's to the side in some configuration. In this
24 particular case, it was, if I remember correctly,
25 sitting almost on the crest or just off the crest

1 of the lagoon. And then you have pipes that have
2 already been in place. They would dig them prior
3 and put them in the ground, and it would run to a
4 hydrant location or somewhere that you could move
5 that material.
6 And then the reel and the motor would be
7 hooked to that hydrant through a coupling, and
8 then from that you extend - the reel house of
9 several hundred feet of hose on it. You'd extend
10 it and the spray cart on the desired pull, and a
11 pull is one particular area. It's a designated
12 area in a field for the width of that spray gun
13 that has been certified through the calibration we
14 spoke of earlier. So this should be a known
15 distance that this material is going to cover when
16 you do this.
17 And this particular spray cart - it's not
18 very large, but it's metal. It will have wheels
19 on it. It will have a motor here with a gas
20 engine on it. That gas engine, as it runs - there
21 are different settings. You set it for the speed
22 that you would like, so many inches a minutes,
23 something along those lines. And then, as it
24 turns, it pulls this cart down this application
25 pull in part of that field, and it will apply the

1 waste and bring it in.
2 Q. So at a certain timing rate?
3 A. Yes, that you can set because---
4 Q. If you have several fields, are there different
5 hydrants or---
6 A. Yes, ma'am. This was just one part of a pretty
7 elaborate system. Probably - some farms will have
8 one hydrant that they can make pulls in these
9 directions depending on the field. A lot of it,
10 though, is set up fairly square where you can
11 make, you know, one pull and then maybe another
12 pull off of the hydrant, and that's it. But it's
13 going to vary from farm to farm.
14 Q. And will you show on that diagram where the road
15 was? We see the hog houses, the lagoon.
16 A. The highway?
17 Q. The highway.
18 A. Yes, ma'am. The access road to the houses is
19 right here. Then just before - there was a kill
20 box or a dead box that sits in this area, and then
21 you turn and you'll go approximately nine hundred
22 feet to the highway. The highway is here. And it
23 may be further than that, but there is where the
24 road is located.
25 Q. And would you just write "highway"---

1 A. Highway, yes, ma'am.
2 Q. And---
3 THE COURT: Also, if you would, write
4 "access path" on that.
5 THE WITNESS: All right.
6 Q. Can you explain how - what it takes to start that
7 system, to get it working properly?
8 A. The pump that he has - I don't remember the
9 particular brand name, but it's one where you
10 would have to go out to it, and of course, you'd,
11 I think, switch it on. But then you have to
12 physically prime the pump, and that involves
13 moving a lever just like what you'd see on an old
14 well pump for a number of strokes.
15 I don't want to really give an estimate
16 because it varies depending on the - how much the
17 [inaudible] and what the packing's like, but it
18 takes an effort. It's not something you can do
19 very easily most of the time.
20 Q. Okay. And so you prime the pump, and what does
21 that do?
22 A. Well, it allows the pump to create the vacuum and
23 pressure to move - to start pull the liquid itself
24 because you're going to be moving that waste up at
25 least ten feet of pipe into the pump, and then, of

1 course, the pump will move it on out into the
2 fields. And it's going to have to move it at an
3 extremely long distance, you know, there's a head
4 there, is the term. So---
5 Q. Okay. And is there anything else? Do you just
6 prime the pump?
7 A. Well, no, ma'am. You'd also have to configure it
8 to where you want it to go. So that system that's
9 laid in the ground will also have a system of
10 butterfly valves or some type of valves that would
11 have to be aligned for where you want it to go,
12 and then - because if you don't do it correctly,
13 you can run the risk of having your hydrant come
14 up out of the ground because, you know, water
15 hammer and different kinds of pressures in that
16 system if your pump is strong enough.
17 But with this particular incident, you'd have
18 to line it up to that hydrant, and then, of
19 course, you would have to start the reel that's on
20 the hydrant and begin that process of reeling it
21 in. If not, it's just going to sit in one place
22 and continue to pump.
23 Q. So is the reel near the hydrant?
24 A. Yes, ma'am. Generally, it's going to be within
25 fifty feet of the hydrant because it has a hookup

1 coupling to it and the hose.
2 Q. Okay. So can you give us an approximate time of
3 how long it takes to start a system?
4 A. I would estimate - depending on how much you would
5 have to do, a minimum of five minutes and as much
6 as thirty minutes, depending on all the items that
7 you would have to do.
8 Q. Okay.
9 A. In this particular incident, it probably wouldn't
10 have taken very long.
11 Q. Okay. And what about pulling--- I forget what
12 you call it.
13 A. Spray cart?
14 Q. Yes. ---out to the field?
15 A. You would have to hook up to it with a tractor,
16 truck, some other kind of conveyance and then pull
17 it to the other end of the field.
18 Q. Oh, okay. So you don't just pull it out manually?
19 A. I don't think you could do it manually. You would
20 have to be a fairly stout individual. That's a
21 lot of - several hundred feet of hose, and then
22 the cart itself would probably weigh several
23 hundred pounds or a hundred pounds at least.
24 Q. Okay. And this case is primarily about a
25 discharge that occurred on January 28th, 2005.

1 Prior to that date, when was the last time you had
2 seen the Ronald Davis farm?
3 A. We had seen it the day before. Very recently, you
4 know, we had seen it.
5 Q. Okay. And how did you come to see it? What were
6 you doing?
7 A. 210 is a highway that travels across Sampson
8 County and Bladen County. It's a artery that the
9 inspectors - we used to get to areas - there are a
10 number of hog farms onto the other side of that
11 farm in Bladen County as well as Sampson County.
12 And, of course, traveling back to Fayetteville,
13 it's one of the easiest routes to get back to our
14 office so we can go home in the afternoons.
15 Q. Okay. And so how did - what time did you see the
16 Ronald Davis farm? What were the circumstances?
17 A. Are you talking about the morning or the day
18 before?
19 Q. The day before the discharge.
20 A. They day before we were working in the area, and
21 as we traveled by, we looked at the farm. We had
22 a habit - we would look quite often because Mark
23 and I both had - we had never seen an application
24 occurring on the farm prior to that morning. Now
25 the cart generally was in the same location that

1 it was in at that time on that same pull, and we
2 found it curious, to be honest with you, as
3 inspectors.
4 Q. Did you ever ask Mr. Freedman for records of this
5 application?
6 A. We had been to the farm on a couple of occasions,
7 and had looked. I know Mark had been there. I
8 had gone with Mark on a later appointment in an
9 outreach mode because the records were lacking in
10 several respects when we would go there, and we
11 did try to work with Mr. Freedman to improve that
12 situation.
13 Q. What do you mean "the records were lacking"?
14 A. The requirements that were there - he would have
15 some of the information written on notebook paper,
16 and it would be incomplete or hadn't been
17 transferred and then calculated out completely for
18 your application rates and things of that nature.
19 Q. What time did you pass the farm on the 27th? Do
20 you recall?
21 A. We passed it, I believe, twice on that day, once
22 was around eleven - ten-thirty, eleven o'clock and
23 then again in the afternoon. I'm going to say
24 sometime around four. It was still daylight for
25 that time of year.

1 Q. All right. And who was with you that day? You
2 said we.
3 A. Mr. Mark Brantley was with me.
4 Q. Was waste being applied to the field on that
5 afternoon?
6 A. No, ma'am.
7 Q. And tell us about the morning of January 28th.
8 A. I was out very early. We had had another
9 incident, another farm that I had gone to check on
10 prior to going to the Fayetteville office. It was
11 in that same general location in the White Lake
12 area. I had gone there, had seen that particular
13 area. I was on 210, I believe, heading north
14 toward Fayetteville. It was very early. It was
15 probably seven-fifteen, seven-thirty, that time
16 frame. It was very cold. I remember the radio
17 said it was twenty-six, twenty-eight degrees,
18 WKML.
19 And as I - the farm was located - would be
20 located on your left as you go toward
21 Fayetteville. You will come over a little rise
22 and then there's a dip and you come back up, and
23 the farm is on your left after you come around a
24 small curve. And when I came over the top of that
25 hill, I saw the spray cart was in operation. It

1 was spraying. And, of course, that struck me as
2 extremely odd, given the time that it was, and
3 there's no prohibition against spraying at any
4 time as long as you monitor every hundred and
5 twenty minutes and you're not having any kind of a
6 discharge, but you can't spray on frozen ground.
7 And, as I came over, I saw the gun and I
8 immediately pulled off on the road and sat there
9 and looked at it for a few minutes to make sure
10 what I was looking at was what I was looking at,
11 and I noticed it didn't appear to be moving. I
12 tried to call Mr. Freedman with my cell phone,
13 could not reach him at that time. Pulled back on
14 the side of the road and went down the side of the
15 road, and as I did, I got to the access way of the
16 farm and noticed some material moving in the
17 ditch - a volume of material moving in the ditch.
18 Q. What material?
19 A. It appeared to be hog waste to me. So I pulled
20 back on the highway and went down - there's a
21 small church down on the left. I thought maybe
22 the reception would be better there. I again
23 tried to call Mr. Freedman, did not get him.
24 Tried - I called my office and got Mark. Asked
25 Mark to please call Mr. Freedman and let him know

1 of the events that I had seen that were taking
2 place on his farm and then also told Mark that I
3 thought we would probably need a state vehicle
4 with our equipment in it, to please come to that
5 location and help me if he didn't mind.
6 Q. Okay. And when you said the gun was not moving,
7 what do you mean?
8 A. The spray cart that the reel was supposed to
9 retract in at a certain speed appeared to be
10 stationary, and it was applying waste in one spot.
11 Q. Okay. So the waste was all going in one spot; is
12 that what you---
13 A. At that time.
14 Q. Okay. And are the spray guns - do they normally
15 oscillate?
16 A. They do move back and forth.
17 Q. Okay. And what did you do after you made your
18 phone call?
19 A. After I made the phone calls, I returned to the
20 farm to try to see if there was anyone at the farm
21 at that location, to try to ascertain what was
22 going on. So I pulled down the access road and
23 went to the houses, and I called out to try to see
24 if anybody was working the hogs that morning or
25 was on the facility. They were not or at least I

1 didn't see anyone.
2 Of course, I had a closer look of what was
3 going on, and I walked around back and looked at
4 the pump, and it was leaking in several places and
5 there was also a lot of foam and some ice. The
6 ground was hard. I walked out to the field.
7 There were icicles on the cart. There was a
8 foam - a white foam all over the fields. It was
9 almost a moonscape - kind of a brown and white
10 foam in this one area with sun on it.
11 I walked across the edge of the field that
12 was - even though it was twenty-six degrees, I
13 walked on across the field and found where the
14 waste was going into the ditch and then I followed
15 the ditch around the side of the farm as the waste
16 material moved behind a small pond - not in the
17 pond but behind the pond - came back to the ditch
18 that was beside the access road, continued in that
19 several hundred feet to the highway, made a left
20 turn, went down a side field on the road there for
21 another several hundred feet, went underneath the
22 road, and then to the ditch to the woods. So
23 quite an extensive distance with material moving.
24 Q. Could you draw what you just described - you said
25 a pond, a ditch---

1 A. Right. Okay.
2 Q. I mean, can you do it on that map you just had or
3 not?
4 A. No, ma'am, I can't do it there. But if this is
5 the application field, there was a ditch that ran
6 here, came around. Okay. And this is not to
7 scale by any means, but - and actually it's
8 further over here, and then it comes around like
9 this, and there's a pond that sits right here.
10 And I wanted to make sure that none of that
11 material was getting into that pond.
12 Q. So where did you walk to?
13 A. Where did I walk to? The houses are over here.
14 Then I came across. I walked out to the spray
15 cart and took some photographs and some pictures,
16 and then I walked back and got on this edge and
17 walked down this edge looking - and this material
18 was moving into a ditch that was right here, and
19 then it intersected another ditch at this point.
20 Then the conveyance of the ditch moved
21 through kind of a wood line. There were woods on
22 one side, and then you would come around the pond
23 back into the main ditch, which this is the access
24 road that we discussed earlier. This would be 210
25 here. The material was moving down in the

1 roadside ditch at that time in this manner. It
2 ran underneath the culvert underneath the road,
3 and then these are - this is a field area here.
4 There are some houses in this location here, and
5 then there's a ditch that travels to the woods
6 here, and it was traveling down that.
7 Q. And how far did you walk down there?
8 A. At that time?
9 Q. Well---
10 A. At that time, I did not walk down there.
11 Q. How far at that time did you walk?
12 A. I walked a little ways down the roadside ditch,
13 and then I returned. As I was - as I was at this
14 edge of the pond, a white Cadillac came down the
15 road and went over to the houses and a gentleman
16 got out and went and shut the gun - shut the pump
17 off - excuse me - at that time, and I didn't know
18 if he was someone who worked for the farm or what
19 his affiliation with the farm was, but he
20 certainly seemed to be comfortable and familiar
21 with being on that property.
22 So then I - I was up there beside the road.
23 I came back and I was taking some photographs at
24 the access way here, and that same gentleman
25 crossed the highway and walked over here behind

1 me.
2 Q. And what is the approximate distance between where
3 the spray gun was in the field and the travel down
4 to the road and as far as you could see here?
5 A. I would say if you combined all those distances,
6 it would be well over half a mile - a quarter
7 mile, half a mile at least.
8 Q. And how deep was the waste in the ditch?
9 A. As an estimate?
10 Q. Yes.
11 A. I would say at least eight inches by probably a
12 foot wide traveling. There was a significant
13 amount of liquid volume going down that ditch.
14 Q. Okay. So do you know whether the man who drove up
15 and cut off the pump was an employee?
16 A. I asked the gentleman if he was affiliated with
17 the farm, and at that time he said no, he was not.
18 He did not identify himself to me in any manner at
19 that point other than that. I thanked him for
20 cutting the pump off because we are not allowed to
21 take those kinds of steps as an inspector with the
22 State, but I thanked him for cutting the pump off
23 and asked him if he was an employee on the farm in
24 any way, and he said no.
25 Q. I know this seems like an odd question, but what

1 color was the waste?
2 A. Waste would range in color from black, brown, to
3 pink like Pepto-Bismol. This was more of a - to
4 my recollection, a darker brandywine type of
5 color - red color almost - red and purple.
6 Q. Okay. And why is - can you tell us why hog waste
7 might have that hue to it?
8 A. Depending on the efficiency of your lagoon and the
9 microbes that you have working in the lagoon. To
10 give you exactly why it's that color in the color
11 spectrum, I cannot, but I just know that a lot of
12 times you can look at waste and kind of judge the
13 health of the lagoon by the colors that you have.
14 But, no, I can't tell you exactly why it was that
15 color.
16 Q. Okay. And you testified earlier that you're not
17 supposed to apply waste on ground that's saturated
18 or frozen. Why is that?
19 A. Because it will move - it has more potential to
20 move to groundwater or surface waters and once you
21 have this nutrient loading that occurs inside
22 surface waters, the biological life or
23 microorganisms, other things that live in those
24 areas, cannot handle that kind of nitrification,
25 and it will - it's very detrimental to the entire

1 ecosystem. They are the building blocks of the
2 web of life, and if you take them out, then
3 everything above them in the food pyramid suffers.
4 And, obviously, you have groundwater concerns
5 as well for people. We do have consumption of
6 water by our towns and our citizenry, and it's
7 eventually going to get to them one way or
8 another.
9 Q. So at that point, you sort of, I believe, walked
10 to where your spray gun was and then down sort of
11 to the access road, I believe. What happened
12 after that?
13 A. Well, after that point, Mr. Freedman showed up
14 with his father. We had a discussion. He
15 called - or after that he called Murphy-Brown, I
16 believe, and had some folks - he and I basically
17 started trying to dam the waste to hold it as much
18 as we could maybe on the property with shovels.
19 And this was - he had got permission from a person
20 at that time, who I later found out was Ronald
21 Davis, who is the gentleman who came and went to
22 the pump and shut it off, to go on his property
23 and let us try to mitigate this problem - help
24 mitigate this problem.
25 Q. Okay. And was that by building dams to keep it -

1 try to contain it?
2 A. We were trying to - we were trying to construct
3 those to contain it, but the flow was hampering
4 our efforts because there was a volume there of
5 flow.
6 Q. And then what else? Just sort of describe the
7 events of the morning, if you would.
8 A. Well, Mark - he came and we started trying to do
9 our job, which was, of course, to document the
10 circumstances that are there. And we went back
11 and we began to take samples and take some more
12 photographs, and as the day warmed up, we went
13 back to the area where they were - where the waste
14 was being applied.
15 And we had on rubber boots, and it was very
16 difficult at around eleven o'clock or so in the
17 morning to move across that field because it had a
18 consistency - in the morning when we first
19 started, there was ice and we were breaking ice.
20 Later on in the day it was like Jell-O, and you
21 were trying to struggle through. It was saturated
22 to the point that it was difficult to move through
23 it.
24 And just as a point so I don't lose it, we
25 continued to visit the farm for approximately two

1 weeks after that, and we continued to see waste
2 come out of that field for at least a week in the
3 ground. Now Mr. Freedman did contact Murphy-
4 Brown, and they brought a crew out to pump waste
5 out of the ditch and were very actively trying to
6 do that. We also knew to try to find where the
7 material in that ditch finally made confluence
8 with surface waters distinctly.
9 Q. I'm sorry. Would you repeat that, please.
10 A. Well, I probably - there was water in the ditch to
11 begin with, and then we were adding hog waste to
12 it. Mark and I followed that flow of water into
13 the woods on Mr. Ronald Davis' property to try to
14 see where it would go. We were trying to see the
15 extent of it, for one thing, and also trying to
16 formulate some kind of a plan to mitigate this
17 occurrence.
18 And so after we went in there, we found where
19 it was - it was flattening out over a large area.
20 It was running into an area of standing water, and
21 then we got with Mr. Freedman and Mr. Davis, and
22 they made some efforts to remove some trees. And
23 we had kind of, in conjunction with them, talked
24 about we needed to dig a pit in this area, and let
25 the material flow to that pit so that we could

1 remove it and try to protect that environment as
2 much as we possibly could.
3 Q. Okay. Was it a wooded environment, or was it on
4 somebody's property?
5 A. It was on Mr. Davis' property. It was later
6 delineated as a wetland area by the Corps of
7 Engineers, and it's an area of catbriers, shrubs,
8 trees that like very saturated soils, that kind of
9 area. It was pretty thick. The photographs will
10 bear that out if you look at those.
11 Q. Okay. Would you turn to the exhibit behind Tab 9
12 in that book in front of you - the exhibit book?
13 (RESPONDENT'S EXHIBIT NO. 9
14 (MARKED FOR IDENTIFICATION
15 A. Yes, ma'am.
16 Q. Do you recognize that document?
17 A. Yes, ma'am. It's an inspection form or the form
18 that I wrote out to document this event.
19 Q. Okay. And did you complete this form on the day
20 of the discharge?
21 A. To the best of my memory, I think I did.
22 Q. Okay. Does the form indicate that the date of
23 visit or the time you---
24 A. Yes, ma'am. It indicates that I visited on
25 1/28/05. It has the arrival time at seven-fifty.

1 Q. Okay. And is that your signature on the second
2 page of the document at the bottom?
3 A. Yes, ma'am, it is.
4 Q. Okay. And could you walk us through the document
5 and tell us what - you know, below the basic
6 information about the farm---
7 A. Okay. It does give you the farm ID number, by
8 county and number. It will state the name of the
9 farm, the owner, permittee. It gives the physical
10 location of the farm. As you go through it, it
11 will tell you how many animals are on that farm.
12 Q. Is that feeder to finish?
13 A. Yes, ma'am. And then, as you come down, it
14 describes the circumstances of that day, and we
15 did observe a discharge at that location in the
16 application field area. "Was conveyance manmade?"
17 "Yes." You're talking about the ditches and those
18 kinds of areas that it flowed through. "Did the
19 discharge reach waters of the State?" And there
20 again, it would be yes. Waters in the ditches
21 originally and then where it - eventually the
22 confluence and the flat waters which were a
23 tributary into the South River, is where they
24 would eventually end up.
25 So it says, "What is the estimated volume

1 that reached the waters of the State in gallons?"
2 I put greater than a thousand gallons. It was
3 much, much more than that, but at that time, you
4 don't have an opportunity to calculate the
5 approximate amount so that's why that was placed
6 like that. "Does discharge bypass the waste
7 management system?" And that's answered yes as
8 well because any time that it goes out of what is
9 permitted as a waste treatment system, which is
10 going to be the houses, the pipes, the application
11 fields, the application equipment, then it's
12 outside of - it's bypassed that system, and so
13 that was the case here.
14 As you go further, it says, "Is there
15 evidence of past discharge?" That didn't play
16 into this. You can look at the history of the
17 farm if you care to see anymore so far as that.
18 "Were there any adverse impacts or potential
19 impacts to waters of the State?" It can't be
20 determined at that time, and so you can't make
21 that statement at that time.
22 If you look on the back side, "Is the storage
23 capacity plus - storage plus heavy rainfall less
24 than adequate?" No, there didn't appear to be any
25 reason why you to be applying, I think, at that

1 time. If you look down, it will tell you that the
2 design freeboard for that lagoon is nineteen
3 inches, which is pretty much, you know, standard.
4 It will be somewhere between nineteen and
5 twenty-three, depending on the dimensions of the
6 lagoon. It can be more than that. Again, it
7 depends on how the lagoon is built. Observed
8 freeboard on that morning was twenty-six inches.
9 And then as you---
10 Q. I want to ask a question about that. That was
11 after the--- Explain what the freeboard is.
12 A. Well, freeboard is literally the amount of
13 security you kind of have that's designed into the
14 lagoon. A lagoon is normally designed on a three-
15 to-one slope, and so as you increase the amount of
16 volume you have in it, you increase the hydraulic
17 pressure on the walls of that lagoon structure.
18 And so the State has mandated that if you operate
19 these farms, you have to have, in most cases,
20 twenty-four inches or a certain number of inches -
21 twelve inches is basically what we call in the
22 red.
23 THE WITNESS: And, Mark, it's been three
24 years, so please correct me if I misstate
25 something.

1 A. (continuing) But twelve inches is considered in
2 the red. It's at a point where it's designed in
3 so it's safe still, but you're getting to a point
4 of real concern where you could have a problem.
5 So farmers are asked and advised very strongly to
6 try to manage their farms where they don't get
7 into that area, and if they do, they're supposed
8 to notify the State and devise a plan to come out
9 of the red or to come back into a safe zone as
10 quickly as possible.
11 Q. Okay. And the twenty-six inches, was that after -
12 you know, while the discharge - after---
13 A. That's correct. That's correct.
14 Q. Okay. All right.
15 A. I do not know what it was prior to the event.
16 Q. And then under "Waste Application," could you
17 explain what those---
18 A. This basically tells you if the application was
19 done within the standards of the permit, and here
20 I've checked excessive ponding. We had standing
21 waste in the field. You're not allowed to have
22 excessive ponding. Hydraulic overload, that's
23 checked as well. Again, any application is only
24 supposed to be done at a rate that the soil can
25 absorb it and not exceed that. What we look for

1 or what the rule is, you have four hours after an
2 application is ended for that material to be
3 soaked into the soil. So if you applied or if
4 there is so much liquid there that it can't go
5 into the ground, you've hydraulically overloaded.
6 And the next one is applying on a frozen
7 ground. It was twenty-six degrees. There were
8 icicles everywhere. The ground was extremely hard
9 as the photographs bear out, and that's why that
10 is checked as well.
11 If you continue through, I didn't put crop
12 type or soil type. Given the situation that we
13 were in at that time, I was trying to focus on the
14 emergency event that we were trying to handle.
15 And then I put my comments at the bottom, and it
16 basically just restates what I have said here.
17 Q. Okay. And not to - the third page is also part of
18 your---
19 A. Oh, yes, ma'am. I'm sorry.
20 Q. Well, I just wanted to make sure - the document
21 pretty much speaks for itself beyond that - your
22 description of the incident. I think you've
23 already testified to that.
24 MS. OLIVER: Your Honor, I would move to
25 admit Respondent's Exhibit 9.

1 (RESPONDENT'S EXHIBIT NO. 9
2 (OFFERED INTO EVIDENCE
3 MR. GRADY: No objection.
4 THE COURT: All right. Admitted.
5 (RESPONDENT'S EXHIBIT NO. 9
6 (RECEIVED INTO EVIDENCE
7 MS. OLIVER: All right. Thank you, Your
8 Honor.
9 Q. Now you testified that you took photographs.
10 MS. OLIVER: Your Honor, may I approach
11 the witness?
12 THE COURT: Yes, ma'am.
13 Q. Do you recognize--- If you could look through at
14 what's been marked 19A to 19O. Do you recognize
15 these documents?
16 (RESPONDENT'S EXHIBIT NOS. 19A-19O
17 (MARKED FOR IDENTIFICATION
18 A. Yes, ma'am.
19 Q. Okay. And when did - did you take these
20 documents - these pictures?
21 A. Yes, ma'am, I took these.
22 Q. Okay. And when did you take them?
23 A. On the morning of January 28th, 2005. You can
24 tell it's me on the third page. There's a shadow.
25 It's much thicker than anyone else's shadow would

1 have been.
2 Q. Oh, okay. All right. And are the pictures in
3 front of you a fair and accurate representation of
4 what you observed at the farm on the morning of
5 January 28th?
6 A. Yes, ma'am. That's what was occurring when I was
7 there.
8 Q. And could you go through the pictures and would
9 they help illustrate your testimony---
10 A. Yes, ma'am.
11 Q. ---you've given already, and can you explain - go
12 through the pictures and explain what we're
13 looking at?
14 A. The first two are pictures of the spray cart as it
15 was extended out in a stopped position. You can
16 look at - the second photograph on the bottom, you
17 can see the ice that we were looking at. On the
18 picture on the bottom as well - and on the top -
19 the brown area that you see on the other side of
20 the spray cart, that's the foam that I spoke of
21 that looked almost like a moonscape.
22 If you go to the next page, you can see that
23 the foam that I again spoke of. That's my car in
24 the background at the corner. The kill box is
25 immediately to the left in front of that tree, as

1 I spoke of, and then again that's the gun. The
2 lower photograph is a picture of the reel and the
3 motor that would be used to pull in the spray
4 cart. The hose coming off to the right would be
5 going to the hydrant that we talked about. The
6 hose to the left is going to the spray cart.
7 On the next page is---
8 Q. Can I ask a question about that picture?
9 A. Yes, ma'am.
10 Q. It looks wet around the reel?
11 A. Yes, ma'am.
12 Q. And what is the wetness from?
13 A. That wetness is hog waste.
14 Q. Okay. Is the reel leaking?
15 A. It may have been leaking a small amount in some
16 places, but I believe that that is a result of
17 that gun sitting there and continuing to run and
18 spray for a number of hours.
19 Q. Okay.
20 A. On the next page is a picture of the corner of
21 that same field. If you'll look to the right,
22 you'll see that row. It looks like weeds. That
23 is the edge of the field. There's a ditch there
24 that this material is running to. The next
25 photograph shows to the left of what the upper

1 photograph shows, and you can see there's some
2 material along that edge as well. So I was trying
3 to get a panoramic view of the field.
4 Q. I have a question about these. Is this waste
5 ponding that we're seeing in these pictures?
6 A. Yes, ma'am. All of the liquid that you see in the
7 ice is waste, and I would like to make one point.
8 Any time you have a material, you can have water,
9 and if you add a drop of waste to it, it's all
10 considered waste. You know, there is a dilution
11 factor that comes into play, but this is waste out
12 of the lagoon. I don't believe there was any
13 water standing there prior.
14 Q. Do you recall whether it rained the night before?
15 A. No, ma'am, I don't believe it rained the night
16 before, my recollection.
17 The next page is a picture from that grassy
18 area looking back towards the spray cart as well
19 as the field as you come to the right across the
20 field. This was moving toward probably the lower
21 portion of that field, so all of the material
22 would gravitate toward that end from the
23 topography of that field. And so that's what
24 you're seeing here.
25 The bottom photograph there is from the other

1 side back toward where the houses and the pump
2 itself was located. I'd ask you to note the grass
3 right there at the bottom of the photograph. If
4 you'll notice, it's covered in ice.
5 The next page---
6 Q. I have a question. The spray gun appears to still
7 be working?
8 A. That's correct.
9 Q. Had Mr. Davis come at that time---
10 A. Not at that time, no. These were the photographs
11 I talked about that I went and I took near the
12 spray cart, and then I went to the other end, and
13 as I went around behind the pond moving toward the
14 road, the white Cadillac came down the access
15 road.
16 The next page is a picture of that near the
17 wood line of that same field, and then also at the
18 bottom, you can see it's out in the field at some
19 distance, and the grass there is covered in ice.
20 The next photograph is - are photographs taken
21 from the edge of the ditch that runs along the
22 edge of that field.
23 If you'll notice here, there's still ice
24 there, so the ice forms even with water moving,
25 and then you have a lot of foam. Foam is

1 generated from turbidity, and----
2 Q. Turbidity?
3 A. Yeah. Material mixed in with the water volume
4 moving and from flow. It's a combination, so
5 you'll quite often get, you know, foam - a large
6 amount of foam generated.
7 On the next page, there are some pictures of
8 the ditch in one area of that field, and then you
9 will also see, you know, again, a photograph of a
10 ditch with material in the bottom of it.
11 THE COURT: 19G, is that foam or is that
12 ice?
13 THE WITNESS: A combination. The white
14 portion here, I believe, is foam, but really,
15 on this particular photograph, I can't see it
16 in enough detail. I know there was ice
17 there, sir, but that, I think, is foam that
18 you're seeing mainly there.
19 THE COURT: Okay.
20 A. (continuing) This photograph---
21 Q. And when you say, "this photograph---"
22 A. It is 19H, the top photograph. This is the larger
23 ditch that the field ditch ran into. This is the
24 ditch that traveled around behind the pond, and
25 this one is of interest because there was an

1 amount - there was an amount of water that was in
2 the ditch moving but not a very large amount, if
3 any. But there was some water coming in from
4 there, so I knew it had a confluence with waters
5 of the State at that point. And you can see the
6 material is going under this rather large log and
7 moving on towards the road.
8 The bottom photograph is taken in the field.
9 It's a photograph of ice - webbed ice mixed in
10 with grass that is frozen as well.
11 19I---
12 Q. And is that waste that's frozen in that field?
13 A. I believe so, ma'am. 19I is more of a closeup of
14 that. You can see the kind of brown material with
15 a - it will have a different hue depending on what
16 light it's in. But this is ice and the grass is
17 covered with ice, and this was taken in the field
18 where the application occurred.
19 The bottom photograph, although somewhat
20 distorted, is a photograph of the foam that was in
21 the field near the spray cart where the
22 application was taking place.
23 19J is that same area. That is foam. The
24 light and the brown with the red tint to it, and
25 it's, you know, frozen grass underneath and then,

1 of course, you can see waste standing. I believe,
2 if the foam was removed, you would see nothing but
3 liquid under there, but the foam was standing on
4 top of that ponded area.
5 The bottom photograph on that page is the
6 cover crop material that was in the field that the
7 waste was being applied to, and it's frozen again.
8 19K, the upper photograph, is a photograph of
9 the spray cart reel. You can see the material in
10 the ruts, and it's frozen.
11 The lower photograph is a picture of the pump
12 next to the lagoon. You can see the foam and
13 icicles hanging off of that pump. If you look to
14 the left---
15 Q. Where are the icicles?
16 A. If you'll look where the coupling is at the bottom
17 of the pump and where the hose comes in and
18 couples with the pump itself, there are icicles
19 hanging off of that piece of equipment.
20 Q. Okay. And you mentioned earlier that he likely -
21 or whoever did this likely pulled out the - this
22 is the--- I'm sorry. What are we looking at?
23 The pump?
24 A. Yeah, this is the pump.
25 Q. Okay. There's a tractor hooked to it?

1 A. Yes, ma'am. If you were to move that, you would
2 have to have a tractor to move it or some other
3 form of heavy equipment.
4 Q. Okay. So this is near the lagoon?
5 A. Yes, ma'am.
6 Q. Okay. And that's the lagoon in the background?
7 A. Yes, ma'am. If you'll look, the other pipe that
8 comes directly off of the back, there is a handle
9 that you can see sticking out. That would be the
10 handle you would have to use to prime that pump
11 with to pull material of that rather large hose
12 that you see into that pump and prime it and then
13 the material will come out the other side and hook
14 to the application equipment for the fields.
15 19L is a better picture of the pump,
16 actually, and that shows the ice that's on the -
17 itself. It shows foam. If you look back, the
18 upper right is the handle that I'm talking about
19 that you use to prime that with.
20 The lower photograph is a picture of a
21 lagoon - the lagoon stake, and that pipe is the
22 material that you would have to draw the waste up
23 in order to prime that pump, and you can see that
24 it's very long and it's probably a four-inch piece
25 of pipe.

1 Going - moving on to 19M, 19M is a photograph
2 of the material moving out of the field and into
3 the ditch that was beside the field. You can see
4 a tint of the brandywine type color that we were
5 discussing earlier in this photograph very well.
6 You can also see the brown and white foam, you
7 know, from the volume of the liquid and also the
8 turbidity that's involved.
9 The lower photograph is a picture of the - if
10 my memory serves me right, I believe this is part
11 of the ditch that runs beside the access road or
12 beside that field, one of the two, and you can see
13 the flow there. I believe it was beside the road.
14 The next one is definitely - 19N is a picture
15 of the ditch. To the left will be the access
16 road. To the right is an application field, and
17 you can see the amount of material that's in that
18 ditch.
19 It is a - the lower photograph is the ditch
20 that we're talking about. You can see the barns
21 off to the left. If you look in the center of the
22 photograph, there is a green object. That is in
23 the general area of where the gun and the reel
24 were located. This head of woods - the pond is
25 behind them - that head of woods, and that's where

1 the ditch comes around and then comes down beside
2 the access road and the application field to the
3 highway.
4 19O, after you had gone all the way to 210
5 and made a left and went down a couple of hundred
6 feet and then went underneath the road, this is a
7 picture of the ditch that ran from 210 down into
8 the woods on the other side of the highway, and
9 that's the material that we tried to dam together.
10 That is essentially waste - all waste, and that's
11 Mr. Ronald Davis' property there.
12 Q. Okay.
13 MS. OLIVER: Your Honor, I'd like to
14 admit Respondent's Exhibit 19A through 19O.
15 (RESPONDENT'S EXHIBIT NOS. 19A-19O
16 (OFFERED INTO EVIDENCE
17 THE COURT: Any objections?
18 MR. GRADY: No objections for
19 illustrative purposes.
20 THE COURT: All right. Admitted.
21 (RESPONDENT'S EXHIBIT NOS. 19A-19O
22 (RECEIVED INTO EVIDENCE
23 Q. And what happened - I mean you said you helped dam
24 up - try to dam up and mitigate. Describe what
25 you did for the rest of the morning.

1 A. Well, the rest of the morning activities basically
2 were, we were trying to document what was there,
3 and we also were trying to work in conjunction
4 with Mr. Freedman and the resources that they had
5 brought to bear to try to mitigate the situation
6 as much as possible - as much as we could with
7 advice, and also, we did talk - letting him know
8 we needed to try to get the records, you know,
9 from - recent records of the farm and a number of
10 other things. It was kind of an ongoing process
11 of us trying to work together.
12 We went into the woods, and of course, we
13 looked at the flat water. We took more
14 photographs of that general area. Just tried to
15 help where we could, to be honest with you. I
16 don't know how detailed you want me to be other
17 than to say there were a number of personnel out
18 there who were trying to contain this as much as
19 we could. We would have loved to have been able
20 to have kept it on the farm proper, but it was
21 past that point.
22 Q. Okay. And what, if anything, did Mr. Freedman say
23 about the discharge?
24 A. He had made statements that there had been
25 conflict in neighborhood between - I guess he

1 alluded to that there may have been some jealousy
2 with him purchasing the farm and other family
3 members of Mr. Davis not agreeing with that or
4 neighbors not agreeing with that, and that he had
5 possibly had some problems, you know, with - he
6 thought with maybe somebody coming onto the farm
7 in the past. I don't know. He said that he
8 thought it was vandalism.
9 Q. Okay. And did you see anything that suggested to
10 you vandalism?
11 A. When I arrived at the farm, the equipment was
12 operating, that - I did not see anything that
13 suggested vandalism to me, but that's a matter of
14 opinion. The equipment was operating at the time
15 I was there. The permittee is responsible for the
16 security of his farm.
17 Q. Okay. And was the equipment operating pretty much
18 as it's supposed to operate? Was it set up as
19 it's supposed to operate in ordinary conditions?
20 A. As far as I can recall, yes, ma'am. If you're
21 going to make an application on that particular
22 pull, that's probably the way you would do it---
23 Q. Okay.
24 A. ---minus the fact of the cart not moving. And the
25 reason the cart was in one location was, the

1 gasoline - and, again, this is an opinion, which I
2 know - but those carts will move in as long as
3 that motor is running. That wheel will traverse
4 or try to pull that car in. It appeared that an
5 application had been taking place and then
6 possibly the motor had run out of gas, and so the
7 cart stayed in one location.
8 Q. Okay. And did you ever see any other workers on -
9 who had worked on the farm other than Mr. Freedman
10 and his father?
11 A. On that particular day? No, ma'am. The only
12 workers we had ever seen on the farm were
13 probably - there would be a van or a truck there
14 who was working - people that he had contracted to
15 work the hogs, but they were not there that day.
16 Q. Okay.
17 MS. OLIVER: I have no other questions.
18 THE COURT: All right. Before we move
19 into cross-examination, we're going to take
20 about a ten-minute break.
21 (Thereupon, a brief recess was taken.)
22 THE COURT: All right. We're back on.
23 Questions?
24 MR. GRADY: Yes, Your Honor.
25 - - - - - - - -

1 CROSS-EXAMINATION

2 BY MR. BAXLEY:

3 Q. How are you, Mr. Baxley?

4 A. I'm getting through this.

5 Q. I represent Mr. Freedman. I'll try not to take

6 too long.

7 As I understand the permitting process, the

8 permittee, like you said, is responsible to make

9 sure the waste is not applied to frozen ground or

10 not applied to the surface waters of the State, is

11 that correct?

12 A. That's right.

13 Q. And those are two of the violations that it's the

14 assertion of the Department that Mr. Freedman

15 violated? In other words, he or his agents

16 applied this wastewater to frozen ground and to

17 surface waters of the State?

18 A. I would say that the actions happened on the

19 permittee's property, and he is held responsible

20 to that degree, yes, sir.

21 Q. For actions that happened improperly?

22 A. He is held accountable for applications and other

23 activities on that farm.

24 Q. You said something about he's responsible for

25 security on his farm. Would you show me a

1 regulation that says that?
2 A. I'm not sure if it specifically states that, sir,
3 but it is the intent as you read through it.
4 Q. So that is your opinion, then?
5 A. Give me a little time and I can show it to you,
6 but I can't at this moment.
7 Q. Now you indicated - look at Exhibit 9. I'm going
8 to come back to this exhibit, but for now looking
9 down at the subparagraph under "Discharge and
10 Stream Impacts," there are three blocks or four
11 blocks: Yes, No, NA--- I assume that means no
12 answer.
13 A. Not applicable.
14 Q. Not applicable. What does NE mean?
15 A. Not evaluated at that time for purposes of this
16 inspection form.
17 Q. Uh-huh. Well, one of the questions was, "Is there
18 any evidence of a past discharge from any part of
19 the operation," and it says, "Not evaluated," is
20 that correct? I'm looking at question number 2
21 under "Discharge and Stream Impacts."
22 A. That's correct.
23 Q. Okay. And you had testified, I believe, that you
24 go by this farm on a regular basis?
25 A. That's correct.

1 Q. How many times have you been by the farm?
2 A. I would estimate probably in the time I worked
3 there, you know, a hundred, maybe more.
4 Q. So in a hundred - on a hundred different times
5 you've been by this farm, you've never seen spray
6 being sprayed over the fields?
7 A. That's correct.
8 Q. Out of a hundred times, this was the only time
9 that you saw---
10 A. An actual application occurring.
11 Q. Okay. And that was unusual in your mind?
12 A. Yes, sir, it was.
13 Q. And when - I believe you've estimated - there's
14 an estimate someplace in all this stuff that there
15 was about fifteen thousand gallons of effluent
16 that was discharged, is that correct?
17 A. That was given at a time before we could actually
18 do calculations on it. I think the accurate
19 number was more between a hundred and fifty to two
20 hundred thousand gallons.
21 Q. So - and this pump will pump how many gallons per
22 minute?
23 A. I'm not familiar with the specifications on that
24 pump, sir. I could not tell you.
25 Q. Do you think it's about three hundred?

1 A. Three hundred is probably an average figure. You
2 can set it for less or more.
3 Q. So for every three minutes - four minutes - three
4 and a half minutes, that's roughly a thousand
5 gallons - every three and half minutes?
6 A. Using your numbers, yes, sir.
7 Q. And so every thirty minutes would be - I'm trying
8 to make sure that I'm right - would be roughly ten
9 thousand gallons or about twenty thousand gallons
10 an hour, is that fair?
11 A. Not unless I have the opportunity to do the
12 figuring for myself.
13 Q. Uh-huh. But assuming those figures are right,
14 the - at twenty thousand gallons an hour, you say
15 a hundred and fifty thousand gallons - then this
16 would have been pumping somewhere around six to
17 seven hours?
18 A. I think that's probably an accurate statement,
19 yes, sir.
20 Q. So when you saw this, you saw it at what time?
21 A. As my recollection - again, it's been three and a
22 half years - I'd say seven-thirty, in that time
23 frame, early in the morning.
24 Q. What time did it stop pumping? What time did
25 Mr. Davis cut it off?

1 A. I'd say a good estimate would be ten to eight -
2 fifteen to eight, something like that.
3 Q. Somewhere around eight o'clock; is that fair to
4 say?
5 A. Approximately.
6 Q. Whoever turned this on, then, for it to pump that
7 amount, it had to have been done - turned on at
8 one or two in the morning?
9 A. Depending on the pump rates.
10 Q. And that's an average pump rate, three hundred
11 gallons?
12 A. I guess so.
13 Q. Okay. And then you say that this pump was not -
14 that spray part was, in fact, working properly?
15 A. The gun itself was not oscillating or traveling
16 back and forth to disperse the materials, but
17 other than that, it appeared to be set up for a
18 typical application.
19 Q. Okay. Well, there's a timer on on that spray
20 cart, isn't there?
21 A. On the spray cart?
22 Q. On the pump. Excuse me. On the pump.
23 A. There are several different configurations on
24 that. I did not look at that particular pump that
25 closely. That pump will shut off automatically on

1 its own under certain circumstances. A
2 fluctuation in pressure or if the cart comes all
3 the way in, there's a trigger mechanism where it's
4 supposed to shut off.
5 Q. So you don't know, then, whether or not this pump
6 had a timing mechanism?
7 A. I cannot state that for sure.
8 Q. Do some pumps have timing mechanisms?
9 A. I would say so.
10 Q. Have you seen them on some pumps?
11 A. Yes, sir.
12 Q. Were you aware that the timing mechanism on this
13 pump had been bypassed?
14 A. No, sir.
15 Q. Did anybody made that statement to you?
16 A. Not to my recollection.
17 Q. Is it possible that they did?
18 A. I would say that it was possible that they did.
19 Q. Now you testified that you believe that this pump
20 stopped reeling - excuse me - the reel stopped
21 reeling in because it was out of gas?
22 A. I think that's a plausible explanation.
23 Q. So you checked the gas level?
24 A. The gas tank was looked into, not by me. Okay.
25 The gas tank. Excuse me.

1 Q. Well, how much was in it?
2 A. Again, I said I did not - I was not the one that
3 looked at it, and I gave you one possible
4 explanation.
5 Q. Well, it's that easy to tell, isn't it? All
6 you've got to do is look in there and see if
7 there's gas?
8 A. It's not my responsibility to look in there and
9 check the gas, sir.
10 Q. But, yet, you've given an opinion today, haven't
11 you, that it was out of gas?
12 A. We've got a lot of different opinions as you have
13 given.
14 Q. So it's fair to say that you really didn't do the
15 due diligence, I guess, to give that opinion, in
16 other words, to make sure that it was not out of
17 gas?
18 A. You earlier stated I've been by that farm hundreds
19 of times. That farm is very extensive in land.
20 You may have been alluding to the fact that why I
21 never saw an application there or a past
22 discharge. I've never been to all parts of that
23 property in the past. It's the same principle.
24 You gave an opinion or supposition that I had not
25 seen a past discharge possible.

1 Q. Well, there is only one gas tank, isn't there?
2 There is only one gas tank on that pump?
3 A. No, sir. Actually, there are two. On that pump?
4 On that reel?
5 Q. On that pump there is only one?
6 A. Yes, sir.
7 Q. That's not hard to check, is it?
8 A. No, sir.
9 Q. How many feet had the reel reeled in?
10 A. I'd say it was pulled out completely.
11 Q. I'm asking you how many feet do you think it
12 worked before it shut off?
13 A. I would estimate that it probably traveled three
14 hundred feet, four hundred feet.
15 Q. How did you estimate that?
16 A. Because when I traveled by there the day before,
17 the gun was pulled all the way to the end of the
18 woods.
19 Q. Well, the fact is there weren't any tracks, were
20 there? You'd see tracks if it had pulled in,
21 wouldn't you?
22 A. Not if it was on frozen ground, sir.
23 Q. You would not. Okay. So you didn't see any
24 tracks?
25 A. Not that I can recollect so far as where you are

1 talking about. There are definitely tracks behind
2 the gun itself---
3 MR. GRADY: May I approach the witness?
4 A. (continuing) ---and then you have - then you have
5 foam and other things that would disguise that
6 area.
7 MR. GRADY: May I approach the witness?
8 THE COURT: Yes, sir.
9 Q. 19D. I'm going to show you what's been marked
10 19D. Do you recognize this?
11 A. Yes, sir, I do.
12 Q. Do you see the lower photograph?
13 A. Yes, sir, I do.
14 Q. And are those tracks?
15 A. Depressions in the ground would indicate tracks,
16 at some point in time the past, had been made
17 there, yes, sir.
18 Q. Does it appear to be motor vehicle tracks, or can
19 you tell?
20 THE COURT: Is that B?
21 MR. GRADY: D is what I see, Your Honor.
22 THE COURT: Oh. I see it.
23 A. If I had to make a conclusion, I'd say probably
24 so.
25 Q. So those tracks clearly show [inaudible]?

1 A. I can see the impressions in the ground that are
2 indicative of tracks, yes, sir.
3 Q. Now you had indicated that, in fact, there had
4 been some reporting problems with Mr. Freedman?
5 A. That's correct.
6 Q. Are you aware that after you-all began working
7 with him on those problems that they were
8 improving and he was getting a lot of better on
9 them?
10 MS. OLIVER: Objection. Counsel's
11 testifying.
12 THE COURT: Overruled. You may answer
13 that question.
14 A. They did not improve in several trips that we had
15 been there, but he was trying to make efforts, I
16 felt.
17 Q. So if Mr. Brantley testified that they were
18 improving, then that's not true?
19 A. No, not at all. That's Mr. Brantley's opinion.
20 You asked me for mine. I just delivered it.
21 Q. Okay. Now when you got there, the first thing you
22 did was to call Mr. Brantley?
23 A. No. I tried - originally tried to find
24 Mr. Freedman. He was the permittee.
25 Q. Okay. The first person you talked to about it was

1 Mr. Brantley?
2 A. That's correct.
3 Q. And he was going to try to call Mr. Freedman?
4 A. Yes, sir.
5 Q. Did you later learn that when Mr. Freedman found
6 out about it, he called Mr. Davis to go shut---
7 MS. OLIVER: Objection. Objection.
8 He's testifying.
9 MR. GRADY: I asked him if he learned
10 this information. That's not testifying.
11 MS. OLIVER: If he learned - it is
12 testifying. You're giving specific
13 information.
14 THE COURT: Overruled.
15 A. I don't recall that on particular issue.
16 Q. But, ultimately, Mr. Freedman got to the site?
17 A. Correct.
18 Q. Do you know what time that was?
19 A. I can give you an approximate time.
20 Q. What's the approximate time?
21 A. I would say he probably got there sometime between
22 eight-thirty and nine.
23 Q. And do you know of your own personal knowledge
24 where Mr. Freedman lived?
25 A. Yes, sir, I do.

1 Q. And where was that?
2 A. He lived in Columbus County.
3 Q. So it's a good distance between where he lived and
4 this farm?
5 A. That depends on what's relative for travel for an
6 individual.
7 Q. Well, how far was it?
8 A. I would estimate that he probably lives forty-five
9 minutes away.
10 Q. The afternoon - you testified that you traveled by
11 there in the afternoon at what time?
12 A. Probably around four o'clock. It was still
13 daylight.
14 Q. And that pump wasn't pumping at that time?
15 A. The pump was not in operation at that time. The
16 spray cart was pulled out to the end of the field.
17 Q. Now---
18 A. And Mr. Freedman was probably preparing to come to
19 Fayetteville anyway. We had a meeting with him
20 that morning scheduled at ten o'clock to discuss
21 issues at the farm.
22 Q. Yeah, I think---
23 A. And the records were a part of that that we were
24 going to discuss because of what we felt were
25 deficiencies, and we, again, were trying to help

1 direct him in a more productive manner with his
2 records.
3 Q. If you'd look at Exhibit Number 9, please.
4 A. Okay.
5 Q. And if you would look on the second page under the
6 section dealing with freeboards. That section has
7 a design freeboard of nineteen inches, is that
8 correct?
9 A. That's correct.
10 Q. Does that mean that this lagoon is to be within
11 nineteen inches of the top - no less than nineteen
12 inches from the top - that's what it's designed
13 for?
14 A. No. I look at it the opposite way. You want your
15 level to be - to have open volume of, you know,
16 more than nineteen inches from the top.
17 Q. I think we're saying the same thing.
18 A. Well, I guess we're approaching it from a
19 different perspective.
20 Q. Nineteen inches clearance is what you want?
21 A. Yes, sir.
22 Q. But when this lagoon was measured, it had
23 twenty-six inches of clearance?
24 A. Yes, sir. That would be my estimation on that
25 morning. The farm also has seven hundred and ten

1 pounds of nutrient levels.
2 MR. GRADY: Objection, Your Honor. He's
3 not---
4 THE COURT: Sustained.
5 THE WITNESS: I'm just performing my due
6 diligence and giving you all the information,
7 sir, or trying to.
8 Q. How many cases have you investigated where there
9 was vandalism?
10 A. None, to my knowledge.
11 Q. So in the time that you worked - the three years
12 that you worked for the Department, you never
13 investigated a vandalism case?
14 A. I have heard of alleged vandalism cases, but never
15 been directed that I know of on a vandalism case.
16 Q. Okay. So you've never set a fine for pure
17 vandalism?
18 A. I don't do the assessment of fines, sir. I
19 strictly write up and document of what's there and
20 pass that information on to someone else, and
21 ultimately, it will go before a board and a lot of
22 times they decide.
23 Q. And Mr. Freedman, when he got there, told you that
24 he didn't turn the pump on?
25 A. When he got there. I do not remember him stating

1 that when he got there. Later on in the morning,
2 he did.
3 Q. What time, if you know?
4 A. Well, you're asking for an approximation and
5 you're also questioning my integrity and due
6 diligence. I'm trying to be precise. We had done
7 all the work and we got together in Mr. Davis'
8 backyard, and you were talking it over with your
9 father - all the discussions about what we thought
10 would be the best action. I'd say eleven, maybe a
11 little later than eleven.
12 Q. And, basically, he told you about this problem
13 that he had with his neighbor and that he felt
14 like it was vandalism, is that correct?
15 A. He did mention the fact that there were problems
16 in the neighborhood and that vandalism was a
17 possibility that I recall.
18 MR. GRADY: That's all.
19 **REDIRECT EXAMINATION**
20 **BY MS. OLIVER:**
21 Q. Just going back to that point, what time did he
22 make that comment that vandalism was a
23 possibility?
24 A. I would say during that discussion around eleven
25 o'clock or a little later.

1 Q. All right. And what was Mr. Freedman's demeanor
2 when he arrived?
3 A. I would say he was nervous, excited, you know, a
4 heightened sense of excitement, not in a terrible
5 way, but you know, he was nervous.
6 Q. Okay. And what makes you think he was nervous?
7 A. Well, speech, you know, when you're talking to
8 someone, his ideas were coming very quickly and
9 going in different directions, in different
10 tangents when we were talking. I mean, typically,
11 a person who is excited and nervous, that's---
12 MR. GRADY: Objection.
13 THE COURT: Sustained.
14 A. (continuing) That's what I have noticed in folks
15 that are that way.
16 Q. Okay. And---
17 A. And I have been trained in that extent, so---
18 Q. All right. And so you've been by the farm at
19 least a hundred times, maybe more?
20 A. Yes, ma'am.
21 Q. And was that during the day?
22 A. Yes, ma'am.
23 Q. Okay. And you've never seen a land application or
24 spray irrigation during the day?
25 A. I have not seen any application of hog waste on

1 that farm during the day. I had seen the gun cart
2 on that same pull be pull it out to the woods, and
3 then it would be up next to the gun and then at a
4 later time, it would be back at the woods again,
5 so - but I've never seen an application, no,
6 ma'am.
7 Q. Okay. Would you turn to Respondent's Exhibit 9 -
8 excuse me - 13 in the book and look through the
9 document?
10 A. You're referencing---
11 Q. And it's several pages.
12 A. Okay. Yes, ma'am.
13 Q. Okay. Do you recognize that document?
14 A. You're speaking of the very first document?
15 Q. The package.
16 A. Yes, ma'am. I'm familiar with this information or
17 the forms that are structured like this.
18 Q. What is it?
19 A. Well, the first one was the reply that's required
20 to come back into our office whenever you have a
21 situation like this occur. It's generally
22 required within five days, and it has certain
23 components it's supposed to contain. This next
24 document is the lagoon irrigation field record.
25 It, basically, is your pumping record. It's going

1 to tell what pull within that nutrient management
2 plan the gun was on. It's going to tell what crop
3 that - you have to have - each crop has a certain
4 amount of nitrogen or phosphorus - generally, it's
5 nitrogen that's the determining factor - that it's
6 allowed to be applied on. And it will tell that
7 crop. It's supposed to give the date of the
8 application.
9 It will tell your start time, finish time,
10 the gallons per minute that you pump, and then
11 you'll use that information to later calculate the
12 amount of gallons so that the amount of gallons is
13 within the constraints of how much an hour you're
14 allowed to put down in your irrigation.
15 Q. Okay. And the next - so---
16 A. One other item - when you initial it, every
17 hundred and twenty minutes, you're supposed to
18 check the application that's occurring, and that
19 responsible person, you know, needs to initial it
20 to verify those inspections occurred or his agent.
21 Q. Okay. And the next page?
22 A. The next page is a lagoon pumping record. Again,
23 each one of these is supposed to be specific to a
24 pull or a field, and this one shows a lagoon. It
25 gives the date of an application that occurred in

1 November of '04. The total minutes that the pump
2 ran, two hundred and ten. Number of sprinklers is
3 one. That's, I guess, in reference to the gun
4 cart. The flow rate per minute, one ninety-three.
5 That's important for doing some of the
6 calculations like the exercise we were doing a few
7 minutes ago with the number of hours and the total
8 volume.
9 Then you also have the total volume of
10 gallons that are sprayed, and then volume per acre
11 is calculated. This pan - that's the amount of
12 nitrogen - your available nitrogen. You have a
13 certain amount again for each one of those fields
14 and each one of those crops. You calculate that
15 and then deduct that from your total, and you can
16 use that until your pan is zero. After that point
17 in time, you can't apply anymore because you'd be
18 overloading from a nutrient standpoint.
19 It shows a nutrient balance. Hours
20 remaining, that's calculating how long you can
21 apply on that pull, left on that season or in that
22 crop-growing season, and then the inches per acre
23 remaining. Of course, you can calculate it out as
24 the amount of rate you have and how many inches
25 you can apply and how many hours, and that's what

1 that refers to. He has two hours remaining that
2 he can go out and run that gun by his
3 calculations.
4 Q. Okay. And other than this document, have you ever
5 received documentation of an irrigation event by
6 Mr. Freedman at the Ronald Davis farm?
7 A. Well, the inspections that we had done prior, I
8 mean---
9 Q. This is the only---
10 A. That I can recall. You're asking me what I can
11 recall at this time three and a half years later.
12 Q. All right. And turn to the first page of that
13 document. This has already been admitted, and
14 it's been - Mr. Freedman acknowledged that this is
15 his signature. Did you ever receive a report from
16 the Bladen County Sheriff's Department about an
17 investigation?
18 A. No, ma'am.
19 Q. Were you ever contacted about an investigation?
20 A. No, ma'am.
21 Q. And what were your priorities on the - when you
22 saw the discharge and the amount of the discharge
23 on the morning of the 28th, what were your main
24 concerns?
25 A. Well, once I realized that we didn't have anybody

1 at the farm site, our main concerns are to protect
2 man and the environment. I mean that's your
3 mandate. I'm a servant of the people of North
4 Carolina in that capacity. I'm trying to protect
5 groundwater interests because, as I've said, the
6 water belongs to everybody. People will use it to
7 drink. They use it for agriculture. They'll use
8 it for a number of - it's a resource.
9 My main concern at that time was how can I -
10 because you really aren't allowed to cut that
11 source of this hog waste off - how can I invest
12 and most efficiently try to mitigate the problem
13 that we have so it causes the least amount of
14 impact. And, of course, I wanted to get that pump
15 cut off. That was a key factor in that - try and
16 contact someone so we could get that pump cut off
17 as quickly as possible.
18 Q. Okay. So is it fair to say to contain the
19 discharge or the damage---
20 A. The damage - or the discharge. Excuse me. I
21 should say discharge.
22 Q. Okay. And not to check the fuel content and the
23 tank for the---
24 A. To be honest with you, at that point, I would
25 think that's relatively - an irrelevant point.

1 I'm supposed to be safeguarding man and the
2 environment. Whether the gas is in there or not
3 is not going to change the fact that the gun is
4 continuing to run and it's in the field continuing
5 to discharge.
6 Q. Okay. And is it part of your job to investigate
7 reports of vandalism?
8 A. No, ma'am. It's the sheriff's department's
9 responsibility and also the permittee.
10 Q. And when there's been a discharge at an animal
11 operation such as this, is there any
12 responsibility on the part of the permittee to
13 provide information to you so that you know - have
14 an idea of why and how things happened the way
15 they did?
16 A. Yes, ma'am, I would say so.
17 Q. Okay. And did - other than what's been marked
18 Respondent's Exhibit 13, has Mr. Freedman ever
19 provided you with any information about this
20 discharge?
21 A. In the context that you're asking, we normally
22 send out a request for information, and the
23 permittee is obligated to try to answer that
24 information back to our office within a given
25 length of time. And that had been a problem with

1 this farm in some circumstances in the past with a
2 request for information being put out and us not
3 receiving it for whatever reason.
4 Q. Okay. You mentioned something about [inaudible].
5 Could you explain what that meant?
6 A. As we talked about earlier, we were talking about,
7 you know, someone's motivation possibly for
8 doing - for applying. If you look at your NPDEs
9 permit, your COC, and then also your nutrient
10 management plan, if you'll turn to the third page
11 in, page 3, and look at the top, you'll see a
12 chart. That chart is a reflection of everything
13 we've talked about so far as soil types. It will
14 give the acres that are available to be applied
15 on.
16 Q. Are you looking at Exhibit 3?
17 A. Yes, ma'am. Sorry. Exhibit 3.
18 Q. Okay. I'm sorry. Where are you now?
19 A. Page 3 in the nutrient management plan. And if
20 you'll just look, it will say - there's a column
21 on the far right that says, "Pounds required,"
22 you'll see eight thousand sixty-one fifty-two
23 minus seventy-three sixty 0, 0, which is - that's
24 the amount - the total amount and then the amount
25 he can apply. And the difference is a negative

1 number, which means that on that farm he has more
2 available land and he can - with the proper
3 stewardship, he should not have any hardship as
4 far as applying as needed and maintaining that
5 farm.
6 Most farms that you would see typically -
7 it's not uncommon to see - a vast majority of
8 farms have zero, one pound, two pounds, and that
9 puts that particular manager under a lot of
10 pressure to apply when and however he can. In
11 this case, he has the luxury of a lot more land a
12 lot more availability of pulls and places to apply
13 that waste.
14 Q. Okay. So Mr. Freedman was at the farm from
15 approximately eight-thirty to at least eleven a.m.
16 before he mentioned vandalism?
17 A. As I recall right now, ma'am.
18 MS. OLIVER: Okay. I have no further---
19 A. (continuing) I don't want to, you know, disparage
20 him, but that's what I remember.
21 Q. Okay.
22 MS. OLIVER: I have no further
23 questions.
24 THE COURT: Further questions?
25 MR. GRADY: Just a couple, Your Honor.

1 RECROSS-EXAMINATION

2 BY MR. GRADY:

3 Q. I believe you stated that the primary focus
4 initially was to get the pump cut off and to do
5 whatever you could to stop the flow into surface
6 waters, is that fair?
7 A. Physically reasonable with the circumstances that
8 we were under, yes, sir.
9 Q. And when Mr. Freedman got there, he was trying to
10 dam up the ditch?
11 A. Yes, sir. We were working together.
12 Q. Working together?
13 A. Yes, sir.
14 Q. He was contacting Mr. Davis and getting permission
15 to go on his property?
16 A. He basically said we could go. I don't know if he
17 actually asked for permission or not, but I do
18 know that, later on, he said he got permission
19 because that was one of my concerns because
20 Mr. Davis later - I don't know. That would be
21 hearsay.
22 Q. Ultimately, he contacted the cleanup crew to get
23 the cleanup crew out there - Murphy-Brown? I
24 believe you testified to that.
25 A. It was a cleanup service. I believe it was

1 Murphy-Brown or some subcontractor to them.
2 Q. And do you know if that contractor ultimately came
3 there?
4 A. We saw workers on the farm that morning doing
5 activities to try to mitigate as much as possible
6 including pumping some back into a tanker truck,
7 you know, to take it back to the lagoon as it
8 should have been, and I think they also were doing
9 some minor pumping and application in that front
10 field with some smaller guns that oscillate in
11 place.
12 Q. And you said earlier that it is not your
13 responsibility to conduct an investigation in
14 terms of causation, is that correct?
15 A. Of vandalism.
16 Q. Of vandalism. But it - so when you give an
17 opinion as to what happened, namely the pump
18 cutting off and running out of gas, that really
19 doesn't come under your field, does it?
20 A. No, sir.
21 MR. GRADY: All right. That's all.
22 THE COURT: Let me ask a few questions.
23 Kind of following up on that last thought, do
24 you recall whether or not that reel motor was
25 running when you got there?

1 THE WITNESS: It was not running. The
2 only pump that was running at the time was
3 the pump that was at the lagoon. In my
4 oversight, I did check that. I didn't check
5 the gas, but I did check that.
6 THE COURT: To see whether it was
7 running?
8 THE WITNESS: Yes, sir.
9 THE COURT: Okay. And in order to set
10 this process into motion, there has to be a
11 manual starting of two motors, right - the
12 pump and the reel?
13 THE WITNESS: Unless the cart was
14 already in that position when they started
15 the pump at the lagoon.
16 THE COURT: Okay. Maybe I'm not
17 understanding. Once you set the pump, does
18 that somehow then automatically start the
19 cart being pulled in? There's a separate
20 motor, is there not---
21 THE WITNESS: Yes, sir.
22 THE COURT: ---on the reel---
23 THE WITNESS: Yes, sir.
24 THE COURT: ---to pull that cart back
25 toward---

1 THE WITNESS: Yes, sir.
2 THE COURT: ---the origination point?
3 So there are basically two motors?
4 THE WITNESS: Yes, sir.
5 THE COURT: And, again, on this
6 instance, the pump at the lagoon itself was
7 still running when you got there but the one
8 on the reel was not?
9 THE WITNESS: Yes, sir, that's correct.
10 THE COURT: And the process is, you run
11 that thing out just as far as it will go, cut
12 everything on, the reel pulls it back in
13 slowly in a direct path from wherever the
14 thing is laid out until it gets back to the
15 reel and stops?
16 THE WITNESS: Yes, sir.
17 THE COURT: Now in order to start these
18 engines typically, or if you remember
19 specifically to these, is there a key that
20 you have to turn or is it just a push start
21 or do you know?
22 THE WITNESS: You have several different
23 configurations depending on make and model.
24 THE COURT: Okay. Do you recall whether
25 or not there was a key necessary for---

1 THE WITNESS: I do not, sir. I'm sorry.
2 THE COURT: Is there a way to lock these
3 anywhere on the engine so that somebody off
4 the street couldn't just walk up and crank
5 those boys up and take off?
6 THE WITNESS: Most of them have a
7 key-type system, and of course, if you don't
8 have a key, that makes it much more
9 difficult. That would be the only constraint
10 that I would think, you know, that you would
11 have in some circumstances.
12 THE COURT: Also, when you got there,
13 the gun was not oscillating?
14 THE WITNESS: No, sir. It was
15 stationary.
16 THE COURT: Is it - is there - I'm
17 assuming - so correct me if I'm wrong - that
18 there is a setting somewhere on the
19 equipment - probably right there at the gun -
20 that allows you to set it as to whether or
21 not it's going to oscillate or whether it's
22 just going to be stationary, or does it
23 always oscillate?
24 THE WITNESS: My little expertise with
25 that particular piece of equipment, I would

1 imagine there are those that have an
2 adjustment on them, but most of the ones I
3 see, you want that oscillating pattern to
4 create that spray pattern for the most width
5 you can get in that pull.
6 THE COURT: Yeah. Because it's
7 stationary, it's just going to shoot in one
8 place, and so the whole idea of this
9 operation is for it to oscillate---
10 THE WITNESS: A uniform application of
11 waste, yes, sir, for your crops to benefit
12 from it.
13 THE COURT: Right. Looking at the
14 photographs in 19 - looking at 19A, the
15 picture at the top, there appears to be
16 tracks kind of all over the place.
17 THE WITNESS: Yes, sir.
18 THE COURT: And, in fact, some of them
19 appear to be running - the ones that or most
20 prominent coursing from the bottom left-hand
21 corner toward - more toward the middle of the
22 other side appears to go almost straight up
23 to where the hose is, is that correct?
24 THE WITNESS: It looks that way, sir.
25 THE COURT: And it does not appear to go

1 past it, and then there are other series of
2 tracks. The bottom picture, you can see the
3 cart with the gun shooting in just one
4 direction, and it appears that it is stuck in
5 the position to the far right, is that right?
6 THE WITNESS: Yes, sir.
7 THE COURT: And there also appears to be
8 tracks that lead straight up that would
9 configure with the placement of the wheels on
10 that cart so that perhaps the track of the
11 cart itself would follow that - the deep
12 tracks there. Am I making any sense at all
13 in my question? In other words, the tracks
14 that go from the bottom of the page up to
15 where the tires are located on that cart
16 would seem to be the path that it would
17 travel---
18 THE WITNESS: Yes, sir.
19 THE COURT: ---when it was pulled out
20 and then it's rolled back in?
21 THE WITNESS: Yes, sir.
22 THE COURT: And then the hose is laying
23 right in between those tracks. And your
24 recollection from the day before was that it
25 was stretched out completely?

1 THE WITNESS: It was down to near that
2 wood line - it was near that wood line in the
3 distance.
4 THE COURT: Okay. So it was almost all
5 the way to the wood line at the far side of
6 that picture?
7 THE WITNESS: It is fair to say that we
8 looked at that farm every time we went by due
9 to some suspicions we had.
10 MR. GRADY: Well, objection. Move to
11 strike "suspicions."
12 THE COURT: Overruled. And 19B, it
13 appears that the reel itself is relatively
14 full with the hose. So do you have any
15 estimation of roughly how much of the hose
16 would have been reeled in? Half of it?
17 Three-quarters of it?
18 THE WITNESS: I would say three-
19 quarters---
20 THE COURT: Okay.
21 THE WITNESS: ---or more.
22 THE COURT: And Mr. Grady was asking you
23 some questions about the tracks that come in
24 on 19D. Those tracks would be coming in
25 perpendicular to where the gun is, is that

1 correct?
2 THE WITNESS: Yes, sir, from that angle.
3 THE COURT: In other words, they would
4 be coming in toward the side of the gun?
5 THE WITNESS: Yes, sir.
6 THE COURT: So any tracks that the gun
7 itself would have made would have been
8 directly in front of it?
9 THE WITNESS: Should have been, yes,
10 sir.
11 THE COURT: And probably covered by the
12 discharge?
13 THE WITNESS: Yes, sir. That photograph
14 that you were asking about with those - it
15 was taken from this view at the lagoon facing
16 back towards the - where the spray cart was
17 at, at that time.
18 THE COURT: In 19D?
19 THE WITNESS: Yes, sir, the bottom
20 photograph.
21 THE COURT: Okay. So you're actually at
22 the lagoon?
23 THE WITNESS: I'm in that general area
24 toward that side, is what I'm saying. I
25 can't say that I was actually on the lagoon.

1 THE COURT: Okay. 19C - in reference to
2 where the gun would have been, especially on
3 the bottom of page---
4 THE WITNESS: Yes, sir.
5 THE COURT: ---where would this be?
6 THE WITNESS: In the upper photograph,
7 I'm looking directly down the - into the
8 field across the end the field. The gun
9 would have been to my nine o'clock.
10 THE COURT: Okay.
11 THE WITNESS: Maybe a little further -
12 my eight-thirty. And the bottom picture, in
13 close to this same area, again, and the gun
14 would again be to my seven-thirty, eight
15 o'clock.
16 THE COURT: Were you directly in front
17 of it, or was it a little behind you?
18 THE WITNESS: I think it was more behind
19 me, sir.
20 THE COURT: Okay. And the reason I'm
21 asking is because the bottom picture there
22 also, again, appears to be some tracks in
23 there, but that would not have been made by
24 the gun cart?
25 THE WITNESS: No, sir, not at that

1 location.
2 THE COURT: 19L. I'm assuming that
3 the - and correct me if I'm wrong - but the
4 mass of whiteness kind of under the front end
5 of the cart down to the tongue is foam?
6 THE WITNESS: Yes, sir.
7 THE COURT: And the ice is what's on top
8 of the bed of the pump trailer?
9 THE WITNESS: Yes, sir. Yes, sir, there
10 was ice on that as well. I just want to make
11 a note that hog waste is - has a lot of salts
12 in it, and we know what everyone uses salts
13 during icy conditions. It makes it more
14 difficult for liquid to freeze. I just want
15 to make that point.
16 THE COURT: You said when Mr. Freedman
17 showed up that he was nervous and kind of
18 excited. Was he anxious to try to correct
19 the problems that he saw when he got to the
20 barn?
21 THE WITNESS: He worked with us to try
22 to mitigate the situation. Whether anxious
23 in that sense can be interpreted several
24 ways, but yes, he did work with us to try to
25 mitigate the situation we had.

1 THE COURT: Was he showing - I mean he
2 was concerned about what was going on, right?
3 THE WITNESS: He certainly seemed to be.
4 He was not belligerent toward us in any way,
5 and again, we did work together to try to
6 bring out the best possible outcome, given
7 the circumstances.
8 THE COURT: Okay. And I think you
9 answered Mr. Grady's question as well that at
10 times when you would go by the farm,
11 sometimes you would see the cart pulled all
12 the way out, and maybe a day or two later or
13 sometime later, you would see it reeled back
14 in so it could be reasonably inferred that
15 during that time sometime there had been some
16 pumping possibly?
17 THE WITNESS: Yes, sir.
18 THE COURT: Just that you did not see
19 it?
20 THE WITNESS: And we had no records to
21 indicate that it was occurring.
22 THE COURT: and he had a records
23 problem, but he never produced any records
24 that showed when he was pumping if, in fact,
25 he had been?

1 THE WITNESS: He would have - he would
2 have records, but they would be piecemealed.
3 They may be written down in a notebook
4 somewhere, and it would be not complete---
5 THE COURT: Right.
6 THE WITNESS: ---as we discussed on this
7 form. He had an individual contracted that
8 he would give that information to, and then
9 they would produce a cleaner, prettier
10 document for him for that farm, but there
11 were lots of times when that individual had
12 no records of applications being applied on
13 that particular pull that that cart stayed on
14 for a significant amount of time.
15 THE COURT: Okay. Based on the
16 questions that I've asked, Ms. Oliver, do you
17 have further questions?
18 MS. OLIVER: I do.
19 **FURTHER REDIRECT EXAMINATION**
20 **BY MS. OLIVER:**
21 Q. When you went out into the field where the spray
22 gun was located, could you - could you tell
23 whether the spray gun had traveled before it got
24 to that spot, or did it appear to have started
25 spraying from that spot?

1 A. In the circumstances of that morning, given the
2 material that's in there, there were tracks that
3 had been there from previous pulls, I'm stating.
4 Now this gentleman says he sees no tracks on those
5 photographs. With the resolution of the camera
6 and the angle, you really can't tell.
7 There were tracks from where that cart had
8 been on there prior. You can't see them from the
9 foam and material in one area, and then you can
10 see the extent of the ruts behind from that gun
11 cart traveling that particular path, I'm
12 asserting, more than once. So I'm saying there
13 were tracks there.
14 Q. Okay. And I believe you testified earlier that to
15 pull out that spray gun, you would typically use a
16 tractor, is that correct?
17 A. I think that would be the most common method,
18 would be a tractor - a smaller type tractor.
19 Q. Okay. And in Exhibit 19D at the bottom, can you
20 tell me whether those tracks were made by a car or
21 a tractor? Can you distinguish between the two?
22 A. Not without examining them further. I cannot at
23 that point. I'd be giving an opinion which I
24 don't think I should give.
25 Q. Okay. When you observed the field, could you tell

1 whether the gun had been oscillating during that
2 land application or had it - from the pattern of
3 the spray?
4 A. Not at the point that I came into this event, I
5 could not. I mean it was stuck in one position,
6 and without really examining the waste material
7 flow, I can't say that.
8 Q. Okay. But there was--- Okay. And looking at - I
9 don't know if this will help, but looking at
10 Photographs 19K and 19L, could you tell whether
11 that system used a key for operation or not? I
12 mean I don't know---
13 A. I would say typically that kind of piece of
14 equipment, I've seen keys associated with them
15 numerous times in the past.
16 Q. Okay. And with the waste that we see around -
17 you've mentioned the foam, the icicles, and the
18 amount of waste on the ground - is that proper
19 operation of a - does that indicate proper
20 operation of a---
21 A. No, ma'am. If I saw that, typically, that would
22 be considered a condition that was unacceptable on
23 a farm.
24 Q. Okay. Is the pump supposed to leak?
25 A. No, ma'am, not to an excessive amount.

1 Q. Okay. All right. And you described the pipe that
2 comes from the lagoon to the pump, and there's a -
3 I believe you said there's also the pipe that goes
4 to - from the pump to the hydrant and that there's
5 a coupling there.
6 Is that a place that could have been - could
7 you discharge? Can you disconnect there?
8 A. Yes, ma'am. You can disconnect at any point on
9 the outer flow of that pump and discharge at
10 whatever that pump rate - whatever it was flowing,
11 you could have discharged there.
12 Q. Okay. So if someone knew how to start the pump,
13 they could disconnect at the pump, is that
14 correct?
15 A. Yes, ma'am.
16 Q. And not have bothered with spraying the irrigation
17 field?
18 A. Yes, ma'am. And you probably would have gone a
19 lot more flow rate if you had done that instead of
20 connecting it to a riser or with it being
21 connected to a riser. A riser is a hydrant - the
22 same.
23 Q. Okay.
24 A. And there are photographs of some of them in the
25 distance in some of these photographs. The white

1 pedestals you see in the distance, those are, you
2 know, risers or connection points.
3 Q. I don't know what a riser or connection point---
4 Oh. That's where you can reconnect - you can
5 connect it for a particular field?
6 A. For your pulls, yes, for a particular field.
7 Q. Okay. All right. So you can disconnect at the
8 pump itself. Where would the next place be down
9 the line?
10 A. It would be at that riser or any other subsequent
11 riser that was in that flow path for that liquid.
12 You could take the cap off, open the valve, and it
13 would just boil out at that point unrestricted.
14 Q. And can you take the spray gun off the line, or is
15 that one solid piece?
16 A. It's going to vary on the manufacturer, I mean,
17 but you could conceivably - if you had time and
18 wanted to do that, you could. You could remove
19 them.
20 Q. Okay. So you could disconnect this?
21 A. The flow rate is controlled at that point by the
22 orifice at the end of the nozzle, how big the hole
23 is basically, and then amount of pressure settings
24 at the pump. So if I wanted more flow, I'd take
25 the end of the gun off and just let it - just

1 sling material, without it being restricted to
2 that orifice.
3 Q. So that's like a sprayer on a hose; you can either
4 spray it or have it come out in one---
5 A. That's a good analogy, I mean, [inaudible], yes,
6 ma'am.
7 Q. Okay.
8 MS. OLIVER: All right. I have no
9 further questions.
10 THE COURT: Further questions?
11 MR. GRADY: Yes, Your Honor.
12 **FURTHER RECROSS-EXAMINATION**
13 **BY MR. GRADY:**
14 Q. Because the motor on the cart was not working, the
15 sprayer was not oscillating, is that true?
16 A. No, sir, that's not true.
17 Q. So was this sprayer not locked into position?
18 A. I have no idea. I didn't perform my due diligence
19 in going out there. I actually saw it stay in
20 place. I'm sorry for that. I apologize. I'm
21 being rude. Actually, if you look at that - when
22 you have pressures on that piece of equipment, and
23 the motor on the reel itself has nothing to do, as
24 far as I know, with the movements of the gun.
25 It's off of the hydraulic pressure.

1 Q. But this gun was locked in position?
2 A. I cannot say it was locked in position. It was
3 staying in that position.
4 Q. Okay. But it was spraying in one direction?
5 A. That's a fair statement.
6 Q. And that's the direction you show in the pictures?
7 A. That's a fair statement, yes, sir.
8 Q. It was not spraying out in front of the cart?
9 A. No, sir. But there was wind blowing that morning.
10 Q. And did you take any pictures of the front of the
11 cart?
12 A. Without reviewing all the photographs I took, I
13 cannot say that.
14 Q. You've got them in front of you. Look at those
15 photographs and tell me if you took any pictures
16 of the front of - down the front of the cart.
17 A. If you'll look at 19J, you'll see the sun is to my
18 back. You'll see the wheel of the cart in the
19 lower right-hand corner. You'll see the brown
20 moonscape. And if you'll look, you'll see ruts.
21 That's in front of the cart.
22 Q. Well, where is the cart on J?
23 A. It's to the right. You'll see the tire of the
24 cart there.
25 Q. Okay. Where is the spray?

1 A. The spray, over to the right-hand side or that is
2 where it did spray that morning.
3 Q. Well, that picture is not taken directly going
4 down the line of the cart, is it - from the cart
5 to the woods line?
6 A. No, sir, it is not.
7 Q. Okay.
8 A. But it does show the area immediately in front of
9 the cart.
10 Q. Why didn't you get one all the way to the woods
11 line?
12 A. Well, probably, at that particular time, between
13 taking samples, taking photographs, trying to get
14 the pump shut off, and doing all the things I'm
15 supposed to do, I didn't take that photograph.
16 Q. Well, you didn't take these photographs?
17 A. I didn't say that. I said I didn't take the
18 photograph that you're requesting that I took---
19 Q. Okay.
20 A. ---which is one in front of the cart to the wood
21 line.
22 Q. Okay. And the fact is that if you had taken the
23 one from the wood line - if it's your position
24 that this cart was properly oscillating---
25 A. I did not say that either, sir.

1 Q. Okay. You don't think that?
2 A. I can't state that either way.
3 Q. Okay. You don't know?
4 A. I didn't say that. I said the gun was only in one
5 position on that particular pull. I don't know
6 whether the - if it was moving. For a proper
7 application, you would want it to oscillate. It
8 was not oscillating on that morning when I saw it.
9 Q. Well, at the tree line where you saw it the day
10 before - you say you saw it at the tree line the
11 day before, is that correct?
12 A. Closer to the wood line.
13 Q. Was there waste on the ground there?
14 A. You're talking probably an extreme distance. I
15 cannot say.
16 Q. You didn't check that?
17 A. No, sir, I did not.
18 Q. And if you'd have checked that, I mean we could
19 have determined whether or not there were
20 tracks---
21 A. I had no - I had no reason to go at that time - to
22 go check.
23 Q. Okay. Okay.
24 MR. GRADY: That's all.
25 THE COURT: Thank you, sir. You can

1 step down.
2 THE WITNESS: Thank you. I apologize if
3 I seemed a little tense with you.
4 MR. GRADY: That's okay. You're not the
5 first one.
6 THE WITNESS: I understand. You're
7 doing your job. I'm trying to mine.
8 MS. OLIVER: Your Honor, I would like to
9 admit just for illustrative purposes the
10 little diagram that he showed, and I get it
11 copied.
12 MR. GRADY: That's fine.
13 MS. OLIVER: We can mark this---
14 THE COURT: Okay. Let's mark that 23, I
15 think.
16 MS. OLIVER: Exhibit 23?
17 THE COURT: That's what I have. I'm not
18 sure that's correct, but that's what I've
19 got.
20 MS. OLIVER: I can live with 23.
21 (RESPONDENT'S EXHIBIT NO. 23
22 (IDENTIFIED, OFFERED, AND
23 (RECEIVED INTO EVIDENCE
24 THE COURT: Any further evidence,
25 Ms. Oliver?

1 MS. OLIVER: No, Your Honor.
2 THE COURT: Further evidence, Mr. Grady?
3 MR. GRADY: No, Your Honor.
4 THE COURT: Pardon me?
5 MS. OLIVER: I'd like to make a closing
6 argument.
7 THE COURT: All right. Any objections
8 to him being released so he can go back to
9 his real job?
10 MR. GRADY: No objection.
11 THE COURT: Thank you, sir.
12 **CLOSING ARGUMENT BY MS. OLIVER**
13 MS. OLIVER: Your Honor, I think the
14 evidence shows that in order to operate an
15 animal waste management system in North
16 Carolina, you have to do so under a permit,
17 and the permit has been admitted as
18 Exhibit 1.
19 Petitioner was authorized to operate his
20 animal waste management system pursuant to
21 that permit, and the permit requires - it's
22 in the permit that all animal waste
23 management systems be designed, constructed,
24 and operated so that the animal operation
25 causes no pollution of waters of the State.

1 And any discharge - it's in the general
2 permit - constitutes a violation of the
3 permit and of both state and federal water
4 quality statutes. There is only one
5 exception, and that is when the discharge is
6 the result of a twenty-five-year, twenty-
7 four-hour storm. That's the only discharge
8 that does not constitute a violation.
9 The Petitioner's permit explicitly
10 provided that waste not be applied to land
11 that's flooded, saturated, or frozen. It
12 provided that the permittee is required to
13 consider weather conditions in making
14 decisions to land apply or spray and to
15 document the weather conditions at the time
16 of application.
17 The permittee is responsible for
18 supervising all spray events, and the
19 undisputed evidence shows that on July 28th
20 [sic], a substantial amount of waste was
21 discharged from the Ronald Davis farm which
22 was owned and operated by Petitioner. The
23 calculations show between a hundred and fifty
24 thousand to two hundred thousand gallons, and
25 some of it reached waters of the State.

1 The temperature on the night of the -
2 before the discharge was twenty-six to
3 twenty-eight degrees. When Larry Baxley
4 arrived at the farm around seven-thirty, this
5 waste had saturated the fields. It had
6 filled the ditches on the farm. It then
7 flowed into a ditch on the highway, across
8 the highway, into a ditch on someone else's
9 property, and into wetlands and a stream.
10 The waste, which has a high salt
11 content, was frozen which indicates how cold
12 it was. There was no one at the farm to
13 supervise the pumping. There was no one
14 there to recognize that there had been a
15 problem. The day before, the pump was pulled
16 out as if it was being set up for a regular
17 land application. It was pulled out to the
18 end of - from the reel.
19 In Petitioner's appeal, he really only
20 challenged the part of the civil penalty that
21 results from the discharge itself, and during
22 the course of this proceeding, Mr. Freedman
23 has offered several reasons for the
24 discharge. His testimony and his petition, I
25 believe, say unauthorized tampering. The

1 prehearing statement states unauthorized
2 tampering or malfunctioning of equipment. He
3 signed that prehearing statement, and as
4 operator-in-charge, he was responsible for
5 the proper maintenance and operation of that
6 equipment.
7 We've heard testimony that if it were an
8 act of vandalism, it could have been set up
9 to do a lot more damage than actually
10 occurred. You could just turn the pump on
11 and let it run straight from the pump.
12 Petitioner's contention that there is
13 vandalism is unsubstantiated and contrary to
14 the evidence that's been presented. There is
15 no evidence of vandalism. To start the
16 system, you must have a working knowledge
17 about how the system works, and it's really
18 too complicated to set up unless you know
19 what you're doing. It takes time and it
20 takes some effort to make it work.
21 As I said before, there is nothing
22 irregular about how it was set up on the
23 morning of June - January 28th, and the only
24 thing that was wrong was that the - it was
25 so - it was very cold. There was no one

1 there to supervise to identify the problem,
2 and the spray gun got stuck.
3 And on that very morning, Mr. Freedman
4 happened to have a meeting in the
5 Fayetteville Regional Office with the DWQ
6 staff to talk about his problem with the
7 records. So I think it's fair to assume that
8 he could reasonably predict that the
9 inspectors wouldn't be in the field in Bladen
10 County on that day.
11 And I think the more plausible
12 explanation is that Mr. Freedman or someone
13 he delegated the authority to set up the
14 system for spraying on the night of 1/27,
15 they started the system. They failed to
16 supervise, and the system broke down and was
17 never fixed. There is evidence in the record
18 that the timer was broken during one of the
19 inspections, and I can point that out in a
20 proposed decision, and that Mr. Freedman
21 promised to get it fixed.
22 I think that Mr. Freedman and his
23 failure to keep accurate records and document
24 properly spray events - there is evidence
25 that, you know, his equipment was in bad

1 shape and was leaking. I think it just shows
2 a pattern of disregard for proper operation
3 of that farm and operating it within the
4 specified conditions and requirements and
5 limitations of the permit.
6 The record is ripe with inconsistent
7 statements made by Mr. Freedman. There is a
8 lot of evidence to support a finding that
9 he's not a credible witness. He first said
10 at the November - I don't know if you
11 recall - but the November '04 inspection,
12 there was no ponding.
13 But when I presented a letter that he
14 had written that said there was ponding, he
15 said, "Oh. I was just trying to be easy to
16 get along with." He also said in that
17 letter, "Oh. My employees," who he also said
18 he did not have, "they must not have been
19 paying attention, and I'll get on them for
20 that. They were spraying and they weren't
21 paying much attention." Well, he's also said
22 he didn't have employees. He didn't
23 authorize anybody else to do it, but
24 apparently he did.
25 The only consistent statement that's

1 been made by Mr. Freedman during the whole
2 proceeding is, "It's not my fault." When it
3 was ponding, it was the personnel's fault.
4 When it was the records' problem, it was Gino
5 Kennedy's fault. When it was the discharge,
6 he didn't do it and he didn't authorize
7 anybody to do it.
8 And, finally, it's Petitioner's burden
9 to prove the facts required by 150B-23(a),
10 and he must prove those facts by a
11 preponderance of the evidence. In his
12 petition, Petitioner simply alleged that the
13 agency acted erroneously in assessing the
14 civil penalty, and there's been no evidence
15 presented that the agency acted in any way
16 erroneously.
17 And, therefore, we contend Petitioner
18 has failed to meet its burden, and the State
19 respectfully submits that the Court should
20 uphold the civil penalty assessment.
21 THE COURT: Thank you, ma'am.
22 Mr. Grady?
23 **CLOSING ARGUMENT BY MR. GRADY**
24 MR. GRADY: Your Honor, first of all, I
25 ask the Court to go back and review the

1 testimony of Mr. Freedman. I don't believe
2 there is any inconsistencies in his
3 testimony. I'm sitting here looking at my
4 notes right now. She says that he's
5 testified that he had no employees, but yet,
6 his testimony was that he always had someone
7 on-site when he was spraying. He always had
8 someone there. He would be one of - he would
9 supervise. He was one hundred percent
10 responsible. That's just not consistent with
11 what Ms. Oliver is saying.
12 Now, you know, the testimony in this
13 case is that there has been no prior - out of
14 a hundred visits, they've never seen a spray.
15 Other than this 2004 instance where there was
16 some ponding on - I don't know if it was this
17 farm or another farm - there's no evidence of
18 improper spraying, other than that, by
19 Mr. Freedman. There's no evidence of a
20 criminal record.
21 By the testimony of Mr. Baxley, someone
22 would have had to get out there at one
23 o'clock in the morning and cut on the
24 sprayer. There's no evidence as to - really,
25 as to whether or not this - it's their

1 contention that it was pulled from the tree
2 line to the point they found it the next day.
3 We don't know how far he is from that cart
4 when he's looking at it and passing by the
5 cart.
6 We don't really know where it was in
7 relation to the tree line. One thing we do
8 know is that if that is their contention, why
9 didn't they give us a picture of all those
10 pictures of paths around the tree line to the
11 cart. There's - you know, he testified that,
12 well, it's his opinion that the reason the
13 motor went off on the cart - that it ran out
14 of gas, but nobody even checked the gas.
15 The bottom line is, Your Honor, when
16 Mr. Freedman got there, the first focus - the
17 first focus was cleaning up this site. They
18 began damming up ditches. He was calling
19 Murphy-Brown. He was contacting Ronald Davis
20 to get permission to dam up that ditch. That
21 was the focus. Once the focus shifted and
22 they could talk about what happened, that's
23 when he says, "I didn't do it. You know,
24 it's got to be vandalism." He talks about
25 the neighbor he had a problem with. He

1 believes that's the one that did it. He
2 reports it to the sheriff's department.
3 Now what they're asking you to do - I
4 mean we've got direct evidence that he didn't
5 do it, he's not responsible, that it was
6 vandalism. What they're asking you to do is,
7 basically, discredit his testimony by
8 speculative evidence. They have no direct
9 evidence that he did it, that it was
10 vandalism. They have pure speculation just
11 as this man speculated that it ran out of gas
12 or it may or may not have a key.
13 There has been no evidence as to where
14 they were lacking in security. I mean if
15 they say he failed to properly provide
16 security - of course, they failed to show
17 that any regulation says he required to do
18 that. Where is the evidence? There's none.
19 You know, at the end of the day, we feel
20 like we have shown that this is vandalism.
21 Now at that point, what can the Court do?
22 Well, first of all, if you look at the
23 permit, if you look at the statute, I don't
24 believe it's a strict liability statute.
25 I believe it contemplates that either

1 the permittee or his agents or those acting
2 on his or her behalf shall not improperly
3 apply waste. I don't believe that
4 contemplation vandalism by a third party that
5 he has no responsibility for, no control over
6 it, and they didn't even consider it. So I
7 think if we find that we've shown the
8 evidence of vandalism that that part of the
9 assessment is improper.
10 You know, even if the Court finds that
11 it is a strict liability statute - which,
12 again, I don't believe that it is - but even
13 if the Court finds that it is, I believe it
14 was Mr. Barnhardt that testified that he did
15 not consider Mr. Freedman's claim, that it
16 was vandalism in assessing the fine.
17 That's - you know, and I think that's
18 improper for them to fail to consider that.
19 So, ultimately, we feel like the four-
20 thousand-dollar fine for applying waters -
21 making an outlet to the waters of the State
22 without a permit, the thousand-dollar fine
23 for applying waste to land that was frozen
24 are improper. We would ask the Court to set
25 those portions of the fine aside.

1 As relates to the failure to report,
2 Your Honor, I just don't know that I can
3 really argue that. I mean I think that - I
4 think Barry gave a reason as to why he didn't
5 do it, but there was some delay. I can't
6 deny that, and I'll leave it in the Court's
7 discretion on that issue as well as, of
8 course, all issues.
9 But, Your Honor, this man's a farmer.
10 He's doing the best he can. I do believe
11 there's evidence of vandalism here, and I
12 hope that the Court would grant the request
13 in the petition.
14 THE COURT: Thank you, sir. Do you-all
15 want transcripts or do you want to rely on
16 the tapes or do you want to just take a shot
17 at proposals?
18 MS. OLIVER: I'd like to get a
19 transcript.
20 THE COURT: Okay. Four weeks from the
21 transcript---
22 MS. OLIVER: Okay.
23 THE COURT: ---proposed findings of fact
24 and conclusions of law. All right.
25 MS. OLIVER: Thank you, Your Honor.

1 THE COURT: Anything else?
2 MR. GRADY: That's all. Thank you, Your
3 Honor.
4 THE COURT: Let me go over my list of
5 exhibits just to make sure we're all on the
6 same page. I have 1 through 9, skip 10, 11A
7 through D---
8 MS. OLIVER: Excuse me. Skip 10? Okay.
9 THE COURT: Starting with 11 and go
10 through 16, skip 17, go 18 through 23, and 23
11 was the sketch.
12 MS. OLIVER: Skip? I'm sorry, Your
13 Honor. Could you go through that one more
14 time? I have 1 through 9---
15 THE COURT: Excluding 10 and 17, really,
16 is what it amounts to.
17 MS. OLIVER: Okay.
18 THE COURT: Everything else is admitted
19 through 23.
20 MS. OLIVER: Thank you, Your Honor.
21 THE COURT: All right. Anything else?
22 MS. OLIVER: That's concludes the
23 evidence of this case.
24 THE COURT: All right.
25 (Thereupon, at 12:05 p.m., the

1 proceeding was adjourned.)

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1 **CERTIFICATE**

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3 I, REBECCA P. SCOTT, State-Certified
4 Verbatim Reporter, do hereby certify that the
5 foregoing pages numbered two hundred fifty-two (252)
6 through three hundred sixty-six (366), inclusive,
7 constitute a transcript of Volume II of a hearing that
8 was tape-recorded; that I was not in the courtroom at
9 the time of the hearing; that I did listen to the tape
10 recording with diligence; and that the transcript
11 produced is a verbatim record of what is on the tape
12 recording, to the best of my knowledge and belief.
13 I further certify that I am not of
14 counsel for, or in the employment of, either of the
15 parties in this action, nor am I interested in the
16 results of this action.
17 Certified this 19th day of August, 2008.
18
19
20
21 _____
22 REBECCA P. SCOTT
23 STATE-CERTIFIED VERBATIM REPORTER
24
25