

BEFORE THE STATE OF WISCONSIN  
DIVISION OF HEARING AND APPEALS

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In the Matter of Manual Code 3565.1  
for the Approval Authorizing the  
Department of Natural Resources to  
Grade More Than 10,000 Square Feet  
On the Bank of North Lake, Install  
A Boat Launch Structure and Two Case No. IP-SE-2009-68  
Outfall Structures on the Bed of -05745, -05746, -0547,  
North Lake, Install Four Culvert -05748, -05749, -05750  
Crossings Over Wetlands, and Fill  
Up to 0.16 Acres of Wetland For  
Construction of a Public Boat  
Launch on North Lake and Adjacent  
Property Located in the Town of Merton,  
Waukesha County, Wisconsin  
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Examination of ROBERT S. WAKEMAN, taken at  
the instance of Reddelien Road Neighborhood Association,  
under and pursuant to all applicable rules, before  
JESSICA R. WAACK, Registered Merit Reporter, Certified  
Realtime Reporter, Registered Diplomate Reporter and  
Notary Public in and for the State of Wisconsin, at  
Quarles & Brady, 411 East Wisconsin Avenue, Milwaukee,  
Wisconsin, on Friday, August 26, 2011, commencing at  
2:03 p.m. and concluding at 3:40 p.m.

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A P P E A R A N C E S

MR. WILLIAM C. GLEISNER, III,  
ATTORNEY AT LAW,  
300 Cottonwood Avenue, Suite 3,  
Hartland, Wisconsin 53029,  
appeared on behalf of the Reddelien Road Neighborhood  
Association.

QUARLES & BRADY, LLP, by  
MR. WILLIAM H. HARBECK,  
411 East Wisconsin Avenue,  
Milwaukee, Wisconsin 53202,  
appeared on behalf of Reddelien Road Neighborhood  
Association.

REINHART, BOERNER, VAN DEUREN, S.C., by  
MR. DONALD P. GALLO,  
N16 W23250 Stone Ridge Drive, Suite 1,  
Waukesha, Wisconsin 53188,  
appeared on behalf of the North Lake Metropolitan  
District.

STATE OF WISCONSIN,  
DEPARTMENT OF NATURAL RESOURCES, by  
MS. EDWINA KAVANAUGH,  
101 South Webster Street,  
Madison, Wisconsin 53707-7921,  
appeared on behalf of the Department of Natural  
Resources.

A L S O P R E S E N T

DR. NEAL T. O'REILLY  
MR. DONALD E. REINBOLD  
MR. ROBERT MOEBIUS  
MS. DORIS LATTOS

\* \* \* \* \*  
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1                               TRANSCRIPT OF PROCEEDINGS

2                               ROBERT S. WAKEMAN, called as a  
3                               witness herein, having been first duly sworn on  
4                               oath, was examined and testified as follows:

5                                               EXAMINATION

6 BY MR. GLEISNER:

7 Q       Hi, Mr. Wakeman. I'm Attorney Bill Gleisman. I'm  
8       going to be asking you questions along with  
9       Mr. Gallo. I'm wondering, have you ever been  
10      deposed before, sir?

11 A      Yes.

12 Q      I'm going to show you what's been marked as  
13      Exhibit 1-A. And this is something that was  
14      prepared by your counsel. And you'll notice at  
15      the bottom she describes what you will testify to.

16                               We've been doing this with the other  
17      witnesses. Will you read that into the record so  
18      we have the parameters of your deposition?

19 A      The paragraph states that, "Mr. Wakeman, in his  
20      former role as DNR SCR aquatic habitat  
21      coordinator, determined the ordinary high water  
22      mark of North Lake at the DNR, former Kraus,  
23      property."

24                               "He may be called to testify to issues  
25      related to this matter of which he has knowledge

1 including the DNR OHWM determination of North Lake  
2 at the DNR property and DNR procedures, generally,  
3 to determine the extent and location of navigable  
4 waters of the State on and adjacent to  
5 properties."

6 Q Thank you very much. Is that the extent of what  
7 you understand you will be testifying to at the  
8 hearing beginning on September 19?

9 A Yes.

10 Q I'm going to show you what has been marked as NLMD  
11 Exhibit 104 and ask if you can identify that for  
12 the record. It purports to be something that you  
13 received a copy of.

14 A It's an email chain from a Mr. Jim Morrissey to a  
15 Dale Pfeiffle who works for the Army Corps of  
16 Engineers, CC'd Andy Hudak, myself, Jim McNelly  
17 and Lynette Check. "Subject 208-04314-DJP,  
18 North Lake." And it looks to be in regards to  
19 the ordinary high water mark elevation that was  
20 set.

21 The second email is from Dale Pfeiffle  
22 to Jim McNelly, Andy Hudak and myself dated  
23 November 19, 2009, subject, same identifier code,  
24 North Lake. And it appears to be a paragraph on  
25 the ordinary high water mark set on North Lake at

1 the boat launch site at the Kraus site.

2 Q Are you familiar with the high water mark that is  
3 referenced there? That would be in the top one  
4 actually, the top email.

5 (Pause in testimony.)

6 BY MR. GLEISNER:

7 Q Have you read that email, sir?

8 A I'm almost done.

9 (Pause in testimony.)

10 THE WITNESS: Yes, I have.

11 BY MR. GLEISNER:

12 Q I was actually referring to the very top email.  
13 Is that what -- the high water mark is referenced  
14 as 897.76, is that correct?

15 A The top email says it picks the ordinary high  
16 water mark on the sheet at 897.76, yes.

17 Q Did you have a hand in determining that high water  
18 mark?

19 A I was involved in setting the ordinary high water  
20 mark on North Lake. To be honest, I don't recall  
21 what that elevation was. So if this is the  
22 elevation that pertains to the flags that I set,  
23 if that's the case, then that's the one that I was  
24 involved in.

25 Q You don't have any recollection of that, is that

1           what you're --

2    A    I don't recall the elevation of the flag that I  
3        set.

4    Q    Okay.

5    A    So I -- it's hard for me to know whether this one  
6        pertains to my flag or any of the other three  
7        elevations that are identified in the second  
8        email.

9    Q    Do you know of your own knowledge or from the DNR  
10        whether that is the established high water mark at  
11        the present time on North Lake?

12   A    I don't know for sure.

13   Q    There's a graph appended to that. Does that help  
14        you in any way, appended to Exhibit 4?

15   A    The map that's attached to the emails in  
16        Exhibit 104 show an ordinary high water mark  
17        elevation of 897.76.

18   Q    Let me show you what's been marked as Exhibit 16.  
19        And this has been the subject of an earlier  
20        deposition.

21                   And I wonder if you could take a few  
22        moments to look through that and tell me if you  
23        had any hand in setting any of the elevations that  
24        are referenced in that document.

25                   MS. KAVANAUGH: And I guess I'd ask

1           for -- do you mean surveying them?

2                       MR. GLEISNER:  Actually doing the --

3  BY MR. GLEISNER:

4  Q     Well, let's back up and ask it foundationally.  
5        What do you do in terms of setting high water  
6        marks?

7  A     There's a bucket of information that's gathered in  
8        setting an ordinary high water mark.  Upon  
9        investigation of a site, I place a flag -- flag  
10       attached to a wire at the point of the ordinary  
11       high water mark.

12                   And I label that flag usually with my  
13        initials, the date and the ordinary high water  
14        mark, OHWM, designation, and either one, two,  
15        three or four, whatever point it may be.

16                   So that's typically how I determine the  
17        ordinary high water mark or my role in setting the  
18        ordinary high water mark.

19  Q     So you don't actually shoot elevations?

20  A     No, I don't.

21  Q     Okay.  Then none of those on there would be, I  
22        assume, your authorship or of your knowledge, the  
23        elevations on Exhibit 16?

24  A     That would be correct.

25  Q     Now, your testimony is primarily -- according to

1 Exhibit 1-A, primarily for the purposes of  
2 determining the ordinary high water mark on North  
3 Lake. And who actually does the surveying of the  
4 flags then that you place?

5 A For the North Lake site, it was done by, I  
6 believe, Kapur & Associates.

7 Q Okay. So you just physically placed the flags?

8 A That's correct.

9 Q And you didn't actually have a part in determining  
10 the ordinary high water mark then other than by  
11 placing the flags?

12 A Correct.

13 Q Kapur & Associates would have shot the elevation  
14 to determine the ordinary high water mark?

15 A I believe they were the company that determined  
16 the elevation of the flag.

17 Q Okay. And even though this says you will be  
18 testifying to the determination of the ordinary  
19 high water mark, other than setting the flags, you  
20 really don't know what the ordinary high water  
21 mark is, is that correct, my understanding?

22 A The elevation of the ordinary high water mark I  
23 would say, yes.

24 Q Your only role was putting the flags in, and then  
25 Kapur & Associates would actually set the high



1 water mark, is that correct?

2 A They would determine the elevation of the ordinary  
3 high water mark at the flag that I set.

4 Q And as you sit here today, you don't know what is  
5 the ordinary high water mark?

6 MS. KAVANAUGH: I'm going to object.  
7 What do you mean "what is"? Are you asking the  
8 physical elevation?

9 MR. GLEISNER: Pretty clear, Counsel.

10 MS. KAVANAUGH: No.

11 MR. GLEISNER: Pretty clear, Counsel.

12 MS. KAVANAUGH: No, not clear.

13 BY MR. GLEISNER:

14 Q What is the ordinary high water mark on North  
15 Lake?

16 A I set the flag at the ordinary high water mark.

17 Q And what was the, in feet, the ordinary high water  
18 mark?

19 A I don't know the elevation of that flag.

20 Q It also states in Exhibit 1-A that you are going  
21 to be testifying as to the DNR procedures -- I'm  
22 quoting from 1-A. And I'd be happy to pass it  
23 back to you.

24 You'll be testifying as to the  
25 procedures generally to determine the extent and

1 location of navigable waters of the State on and  
2 adjacent to properties.

3 MS. KAVANAUGH: And to clarify, it says  
4 he may be called to testify to relate to these  
5 issues.

6 MR. GLEISNER: Thank you, Counsel.  
7 We're here today to determine what he can testify  
8 to.

9 MS. KAVANAUGH: Yes.

10 BY MR. GLEISNER:

11 Q What is -- I'll give this back to you, because I  
12 don't want you to be guessing. What is the  
13 meaning of that? What can you testify to as to  
14 the determination of navigable waters on the State  
15 property or adjacent properties?

16 A In my role as the aquatic habitat coordinator for  
17 the Southeastern region, I was trained and also  
18 trained others how to determine whether or not a  
19 water body was navigable or not as well as setting  
20 an ordinary high water mark. So I have expertise  
21 in those two activities.

22 Q That's very interesting. Can you, please, give me  
23 the -- first of all, you say you train people in  
24 how to determine the navigability of water. Did I  
25 phrase that correctly?

1 A Yes.

2 Q Can you please tell me what you train people to do  
3 in order to determine that?

4 A In determining if a water body is navigable, there  
5 are two ways to do it. You can do what is called  
6 navigability in opinion, and the other way is  
7 navigability in fact.

8 Navigability in fact is where you  
9 actually go out with a watercraft and have someone  
10 float that watercraft on that water body to show  
11 that they are actively navigating it. That's  
12 navigability in fact.

13 Navigability in opinion is where you're  
14 looking for a water body that meets the objectives  
15 of having a bed and bank, meaning the bed is not  
16 of terrestrial vegetation, it is devoid of  
17 terrestrial vegetation. And it can have either  
18 aquatic vegetation or it can have no vegetation.

19 And the bank, there is a point on the  
20 bank or shore where there is a separation between  
21 the terrestrial and the aquatic bank of that water  
22 body.

23 So you're looking for a point on the  
24 bank where it has an ordinary high water mark  
25 which is identified as a point on the bank or

1 shore that has a distinguishing mark or an erosion  
2 mark or other indicators that suggest that the  
3 presence and action of water is there at an  
4 ordinarily high frequency during the year.

5 Q Thank you. Let's take navigation in fact first.

6 A Sure.

7 Q You indicated a moment ago or you testified a  
8 moment ago, I don't want to -- I don't want to be  
9 inaccurate here. You testified that -- let me  
10 just get your language.

11 Quoting from the transcript,  
12 "Navigability in fact is where you actually go out  
13 with a watercraft and have someone float that  
14 watercraft on that water body to show that they  
15 are actively navigating it. That's navigability  
16 in fact."

17 A Uh-huh.

18 Q Let's talk about, first of all, what type of  
19 watercraft. How small can it be?

20 A We typically use either a small canoe or a kayak.

21 Q And when you say "and have someone float that  
22 watercraft," that could mean just sitting in it,  
23 that could mean using an oar to paddle it.

24 What does it mean to float? Your  
25 words were "to float a watercraft." How much do

1           you expect that watercraft to move or just sit  
2           there?

3       A     They must show that they're able to move down  
4           stream in that current of water or in the water  
5           body.  So typically we would use -- if we were  
6           using a small kayak, they would use a paddle that  
7           they would help to navigate down the stream.

8                         There would be cases where they would  
9           have to get out and portage, but that would not  
10          necessarily mean that the water body is not  
11          navigable.

12       Q     Thank you.  How far would they be required to  
13           paddle before you would say "this is navigable  
14           water"?

15       A     There is no standard or no requirement, that I  
16           recall, or a percentage of the water body.  If you  
17           are able to put your kayak in or your canoe in and  
18           go 10 feet and have to get out and walk five feet  
19           and get back in and navigate some more, that would  
20           be adequate to show its navigability.

21                         Even if you do a navigability in fact,  
22           you still must have the bed and bank  
23           characteristics.  So it's not -- it's not an  
24           either/or.

25       Q     Right.

1 A It's a -- you must have both situations.

2 Q Thank you, Mr. Wakeman.

3 MR. GLEISNER: Off the record.

4 (Discussion held off the record.)

5 MR. GLEISNER: On the record.

6 BY MR. GLEISNER:

7 Q My mistake. I'm going to show you what's been  
8 marked as Exhibit 1-B.

9 MR. GLEISNER: And you already have a  
10 copy of that, I believe, Counsel.

11 MS. KAVANAUGH: Yes.

12 BY MR. GLEISNER:

13 Q That purports to be, "Waterway and Wetland  
14 Handbook." Is that something that you have  
15 reference to you when you are either teaching or  
16 yourself determining navigability?

17 A Yes.

18 Q Okay. Now, I would like you to go, if you would,  
19 please, to pages 15 to 16 of that document. And,  
20 specifically, as you can see, that's in the  
21 beginning a memo.

22 And on page 16, could you read into the  
23 record the paragraph that begins, "The real issue  
24 to be considered"? and then I'll ask you some  
25 questions about it.

1 A The paragraph states: "The real issue to be  
2 considered when evaluating lakes and ponds,  
3 including wetlands, is whether they are navigable  
4 in fact by the above criteria."

5 "Although one might argue that there  
6 should be some minimum cutoff size for a body of  
7 water to be considered navigable, any body of  
8 water capable of floating a canoe is valuable and  
9 should be considered navigable."

10 "To support this conclusion, consider  
11 the resource value associated with even a tiny  
12 spring pond or isolated wetland pond. They have  
13 fishery and/or wildlife values, and preserving  
14 these values is in the public interest even if  
15 they are not readily accessible to the public."

16 Q Thank you very much, Mr. Wakeman. Now, do you  
17 agree or disagree with that statement?

18 A I would like a moment to read the entire document.

19 Q Absolutely. Please, please do.

20 (Pause in testimony.)

21 THE WITNESS: I would agree with the  
22 statement.

23 BY MR. GLEISNER:

24 Q Thank you very much, Mr. Wakeman. Now, if we  
25 could go back. And we're just trying to keep

1 track of our exhibits, so I apologize for taking  
2 that away from you. You can have it back if you  
3 need it.

4 Let's go back to the other criteria that  
5 you stated was possible to use in establishing  
6 navigability. You testified a few minutes ago,  
7 quote, navigability in opinion is where you're  
8 looking for a water body that meets the objectives  
9 of having a bed and bank, meaning the bed is not  
10 of terrestrial vegetation, it is devoid of  
11 terrestrial vegetation. And it can have either  
12 aquatic vegetation or it can have no vegetation.

13 And the bank, there is a point on the  
14 bank or shore where there is a separation between  
15 the terrestrial and the aquatic bank of that water  
16 body.

17 So you're looking for a point on the  
18 bank where it has an ordinary high water mark  
19 which is identified as a point on the bank or  
20 shore that has a distinguishing mark or an erosion  
21 mark or other indicators that suggest that the  
22 presence and action of water is there at an  
23 ordinarily high frequency during the year, closed  
24 quote.

25 Is that basically -- well, I'll rephrase



1 it. Does that capture what you said?

2 A That's what I said.

3 Q So I'd like to talk about bank and bed for a  
4 moment. I infer from what you've just said that  
5 there can be instances where a bank and a bed can  
6 almost be on the same level, I mean the same -- in  
7 other words, height? There's no -- let me  
8 rephrase it.

9 I think of a bank -- as a layman, I  
10 think of a bank as maybe being six inches, six  
11 feet above the water where the water is flowing --  
12 or the bed where the water might flow.

13 I infer from this there are times when  
14 the bank can almost be the same height as the bed  
15 where the water might flow. Am I correct in that?

16 A The bank will be a -- I'm trying to think if there  
17 is a situation where I have seen that the bank was  
18 at the same elevation as the bed of a waterway,  
19 and I would have to say no.

20 Q Conceptually, hypothetically, could there be a  
21 situation where the bank is the same height as the  
22 bed?

23 A I don't think so.

24 Q Have you examined the Kraus site?

25 A Yes.

1 Q These have been marked yesterday, the ones -- the  
2 exhibits I'm about to give you. And you can  
3 disregard the markings. Just take a look at them  
4 for a moment, if you would.

5 (Pause in testimony.)

6 BY MR. GLEISNER:

7 Q Have you had an opportunity to look at them,  
8 Mr. Wakeman?

9 A Yes.

10 Q Thank you very much. To orient you so that --  
11 before we talk about those photographs, I'm going  
12 to show you what has been marked previously as  
13 Exhibit 9.

14 MR. GLEISNER: And we're presupposing  
15 here, Madame Reporter, RRNA precedes that.

16 BY MR. GLEISNER:

17 Q This purports to be a drawing by Kapur, or similar  
18 drawing to this?

19 A I've seen similar drawings to this.

20 Q Thank you very much. I'm now going to reference  
21 your attention on that drawing to the -- I would  
22 say the eastern third to the eastern half of where  
23 the parking lot is located. Do you see where  
24 I'm -- let me point to it. I don't want to  
25 mislead you. That area.

1 A Okay.

2 Q That would be the area near the lake?

3 A Yes.

4 Q Have you examined or visited or been in any way on  
5 that portion of the proposed parking lot?

6 A I have visited this property and have been on that  
7 portion of the property, yes.

8 Q Did you see anything there when you visited it?

9 A Yes.

10 Q What did you see?

11 A Grass, trees, tree roots. There were some old, I  
12 think, chairs, miscellaneous materials.

13 Q I'm going to show you, again, Exhibit 102, the  
14 exhibits that I showed you a moment ago. Looking  
15 at that exhibit, and, again, for the moment  
16 disregarding the markings on it, do you see any  
17 trees that were located where the eastern third to  
18 half of the proposed parking lot will be?

19 A I will assume that this photograph is a picture of  
20 this property?

21 Q Previous testimony has established that.

22 A Okay. Yes, there are trees on the property.

23 Q And where would they be located?

24 A There are several trees, I would say, in the  
25 southern half of the photograph -- of the lower

1 half of the photograph.

2 Q Would you take a look at now -- now we're going to  
3 pay attention to the markings on Exhibit 102.

4 Would you take a look at the area where the green  
5 has -- circle has been drawn on or green line has  
6 been drawn around? Are those trees also located  
7 on or near where the eastern portion of the  
8 parking lot will be?

9 A It's difficult to say without the property  
10 boundaries on the photograph. I will use my  
11 personal knowledge of the site and the referenced  
12 buildings shown in the photograph.

13 Q By the way, approximations are what we're doing  
14 here.

15 A Yeah.

16 Q No one is expecting you to be exact.

17 A I would say a portion of the area outlined in  
18 green would line up with the parking area shown on  
19 Exhibit 9.

20 Q Thank you. Have you visited the trees that are  
21 surrounded by the green line?

22 A I've seen them. I've probably walked through them  
23 on the property during my visit.

24 Q Did you do any tests for navigability in that  
25 area?

1 A No.

2 Q Do you know if anybody has done any tests for  
3 navigability, anyone from the DNR, I should say,  
4 has done tests for navigability in that area?

5 A I don't know.

6 Q Thank you. I'll give this back to you for one  
7 more moment so you can see it as I ask the  
8 question. By the way, I'd be happy to share these  
9 others with you, if there's -- the other parts of  
10 the exhibits, 100 to 103, if it helps you.

11 Did you do any -- did you sight or did  
12 you locate or did you see any bank or bed within  
13 that trees -- within that group of trees  
14 surrounded by the green line shown in Exhibit 102?

15 A No, I did not.

16 Q I'd like to go to Exhibit 2 again, if I could.  
17 And I'm going to direct your attention to those  
18 two green circles that you see drawn there. And  
19 I'm going to ask you -- or I'm going to tell you  
20 to assume, based on previous -- do you need time  
21 to examine that? I'm sorry.

22 A I just wanted to make sure this is a survey of the  
23 same property.

24 Q I'll represent for the record that this was done  
25 by Welch Hanson, which is now part of Yaggy Colby,

1           which is the DNR's surveyor. And I will represent  
2           further for the record that the testimony  
3           yesterday established that this was an  
4           approximation of where the Kraus site and areas  
5           south are located.

6                    MS. KAVANAUGH: Can you clarify? Who  
7           did you say our surveyor -- I thought Kapur did  
8           the survey work.

9                    MR. GLEISNER: Yaggy Colby is also  
10          employed by you.

11                   MS. KAVANAUGH: Earlier?

12                   MR. GLEISNER: Yeah.

13                   MS. KAVANAUGH: But not on --

14                   MR. GLEISNER: Yeah.

15                   MS. KAVANAUGH: Okay.

16                   MR. GLEISNER: In fact, Madame -- I'm  
17          sorry. Edwina, this plat of survey was done for  
18          the DNR on January 3, 2005. It's one of the  
19          earlier ones.

20                   MS. KAVANAUGH: Okay.

21          BY MR. GLEISNER:

22          Q        And we're using this only for approximations. If  
23          you look up here, because it's easier to  
24          communicate -- you've got in front of you what's  
25          up here.

1                   And I'm just going to -- just for the  
2                   purposes of not having to lean over you and try to  
3                   make the point, on this drawing, there is a trail  
4                   path, road, whatever you want to call it, on the  
5                   drawing that you have in front of you. It's  
6                   called a gravel drive that runs from Reddelien  
7                   Road about 1500 feet to where the parking lot will  
8                   be.

9                   Now, I say all of that as preliminary.  
10                  I just want to ask you this question: Did you do  
11                  any tests for navigability at any point adjacent  
12                  to that -- where the access road will be?

13       A       No.

14       Q       Do you know if anyone at the DNR did?

15       A       I can't say for sure.

16       Q       That's a fine answer. I'm sorry. I'm going to  
17                  hand this back one more time. And I'm going to  
18                  ask you, there is a blue line there. And that  
19                  blue line, previous testimony has established that  
20                  that blue line is a stream, ditch, some kind of a  
21                  conveyance for water, however you want to call it.

22                  That blue line, not the green line now,  
23                  the blue line -- yeah, that one -- as identified,  
24                  runs from North Lake west for an undetermined  
25                  amount of distance.

1                   And testimony has established that at  
2                   various times in the year, there's sometimes a  
3                   little water, sometimes a great deal of water.  
4                   Did you do any tests for navigability at or near  
5                   that blue line?

6    A            Only at the -- during my assessment of the North  
7                   Lake ordinary high water mark, I looked at the  
8                   outlet area of that channel, if you will, as it  
9                   met with North Lake but did not make a  
10                  determination of an ordinary high or navigability  
11                  of that channel.

12   Q            Now I'm going to direct your attention to the  
13                  smaller green circle on Exhibit 2, and I'm going  
14                  to ask you a similar question. Did you do any  
15                  navigability tests within that green circle, that  
16                  smaller green circle to the north on Exhibit 2?

17   A            No, I did not.

18   Q            And I'm going to just direct your attention now to  
19                  the large green circle, which previous testimony  
20                  has established is wetland, and ask you if you've  
21                  done any navigability tests in that area, that  
22                  area of the large green circle on Exhibit 2.

23   A            I did not.

24   Q            Thank you for that. I'm going to now change  
25                  directions -- thank you for that very much. I'll



1 take this away from you hopefully for the last  
2 time.

3 And I'm going to ask you a couple more  
4 questions about -- you testified that you set  
5 flags for the high water mark. Could you tell us  
6 the process or what is actually done physically?

7 A In determining the ordinary high water mark, I use  
8 it as almost being a water detector and try to  
9 identify the physical, chemical and biological  
10 factors that would identify a bank and determine  
11 where the ordinary high water mark is on that  
12 bank. At this particular site, it wasn't an easy  
13 site to do an ordinary high water mark on.

14 Q I don't want to interrupt your flow of thought,  
15 but if you wouldn't mind just explaining why it  
16 wasn't an easy site.

17 A There were clues, if you will, that suggested  
18 different elevations. So I really had to rely on  
19 training and my experience and my knowledge of  
20 North Lake to determine which clues were really  
21 pointing to the most accurate ordinary high water  
22 mark.

23 When I visited the site, there is a  
24 gravel, sand, beach area where -- which is  
25 essentially the wash zone as waves break and wash

1 up on shore. That is gently sloped westward to a  
2 point where there is a very distinct, almost  
3 vertical rise in the topography and a grassed --  
4 grassed area west of that.

5 But there were other indicators on the  
6 beach. There were tree roots that were exposed on  
7 the beach. There were young willow trees, more  
8 saplings than trees at this point that were also  
9 present on the beach at the south and north ends  
10 of that property. And there were different wash  
11 marks on the beach as well.

12 So in looking at that, I also knew that  
13 the North Lake water elevation has historically  
14 gone up on a fairly regular basis and had been  
15 much higher than I would have expected to be the  
16 ordinary high water mark.

17 So based on the historical point of view  
18 or the historical information I had, I figured  
19 that when the very high water occurred, that was  
20 the high water mark, not the ordinary high water  
21 mark. The ordinary high would be less than that.

22 So I walked back to -- I concentrated on  
23 the beach area. I took a look at the tree roots  
24 that were there. It was a large -- I believe it  
25 was a large cottonwood tree, which is very

1           tolerant of wet conditions.

2   Q    Hold on a minute.

3   A    Sure.

4                   MR. GLEISNER:  Can I have Exhibit 2, our  
5           old friend 2?

6  BY MR. GLEISNER:

7   Q    Just so we don't get too far off field in terms of  
8           where we're at, I'm going to direct your attention  
9           to Exhibit 2.

10                   And if you could just orient us as to  
11           where you were when you were -- when you were  
12           doing this -- when you were looking at the  
13           cottonwood, et cetera.  Where were you  
14           approximately?

15  A    If you'll let me place a mark on this exhibit?

16  Q    I certainly will.  In fact, I'll give you your  
17           very own color, a nice purple.  And go ahead and  
18           show us where you would have been looking at the  
19           cottonwood.

20  A    I'm just going to put a purple dot, if you will.

21  Q    Maybe an X so we can see it.

22  A    All right.  Counsel has requested an X.

23  Q    Thank you very much.  And could you just put your  
24           initials next to that?

25  A    (Witness complies.)

1 Q Thank you very much. You have now placed an X, if  
2 I may characterize it for the record, slightly  
3 to -- toward the southeast corner of what has been  
4 marked in orange previously on Exhibit 2. Would  
5 that be a correct statement?

6 A Yes.

7 Q Now go ahead with your explanation now that we  
8 have a little orientation. I just wanted to  
9 orient it for the record.

10 A So I took a look at the tree roots. Typically  
11 tree roots really try to avoid being under water.  
12 So I kept that in mind. I also took a look at the  
13 young willows that were on the beach, and they  
14 were very young. Diameter, probably maybe an inch  
15 or less.

16 And usually you don't see trees growing  
17 below the ordinary high water mark, but they were  
18 very young. We had been in a drought, and so I  
19 considered that evidence as well.

20 The most persuasive evidence at the site  
21 was the vertical lip or the bank at the western  
22 edge of the sand or gravel beach. It was  
23 prominent along the entire face of the property.  
24 It was a bank that probably had, I'll estimate,  
25 between four inches to a foot in elevation rise

1 along that entire -- along that frontage.

2 And it really represented the most  
3 permanent feature that would indicate the location  
4 of the ordinary high water mark.

5 So taking all those factors in  
6 consideration, I placed my flag at that vertical  
7 rise in the topography at the western edge of the  
8 beach.

9 Q Now, thank you for that. And what you've  
10 testified to leads to a question on my part. Did  
11 you go up -- now I'm going to orient you to the  
12 blue line, which is north of the orange circle on  
13 Exhibit 2.

14 And the blue line is -- seems to  
15 terminate almost 10 degrees off bubble northeast  
16 of where you determined the high water mark.

17 Did you ever go to the point where this  
18 stream or ditch or conveyance for water  
19 intersected with North Lake? Did you ever go to  
20 that point?

21 A Yes.

22 Q And what did you discover when you went to that  
23 point?

24 A Similar to the very southern end, there was a  
25 clump of young willows at that location and also a

1           fairly significant delta of sediment built up at  
2           that location.

3       Q     Sediment going which way?  Out into the lake?  
4           South from the point or...

5       A     Eastward.

6       Q     Thank you.  Now, how many times have you been on  
7           the property?

8       A     I would estimate half a dozen times.

9       Q     Were you ever there after a spring freshet?

10      A     Not to my knowledge.

11     Q     Were you ever there after a one- or two- or  
12           three-year storm?

13     A     Not to my knowledge.

14     Q     And when you were standing at the confluence of  
15           the stream or ditch or whatever in North Lake, did  
16           you ever see water flowing in or out of North Lake  
17           at that point?  Was that clear enough?

18     A     No, I do not remember seeing any water -- any  
19           water connection between the ditch and the lake  
20           during my visits.

21     Q     Now, the high water mark that you set, is that  
22           going to be the high water mark?  The 897.96, is  
23           that going to be the ordinary high water mark for  
24           the entire lake?

25     A     No.

1 Q Can you explain that? I mean...

2 A There are situations where the ordinary high water  
3 mark elevation may vary on a body of water due to  
4 topography, soils, orientation of the lake. So  
5 the ordinary high water mark at this location may  
6 not be representative. It may or may not be  
7 representative of the entire lake.

8 Q Thank you for that. Do you know if the 897.76 is,  
9 however, applicable to everything between the blue  
10 line on Exhibit 2 and your purple mark on  
11 Exhibit 2, in other words, the eastern end of what  
12 will be the proposed DNR parking lot?

13 A It's the ordinary high water mark elevation for  
14 the face of that -- for the eastern face of that  
15 property.

16 Q Thank you for that. That's very clear. Now, if I  
17 can just make sure that we haven't left anything  
18 out here. Have you now testified to everything  
19 that you might be able to say about the high water  
20 mark? I'm going to direct your attention to 1-A  
21 again.

22 MS. KAVANAUGH: You mean he answered the  
23 questions you asked?

24 MR. GLEISNER: Uh-huh. I want to know  
25 if there's anything else that he --

1 BY MR. GLEISNER:

2 Q Have you now said all that you have to say about  
3 high water mark? Is there anything that we've  
4 left out in terms of this property, of course, in  
5 terms of the proposed -- the Kraus property?

6 A I think it summarizes what I've done on that  
7 property.

8 Q Now, with regard to navigability and navigability  
9 tests -- let me just check really. Thank you so  
10 much.

11 The extent, location of navigable waters  
12 of the State and on adjacent properties, have you  
13 testified to everything that you did in terms of  
14 navigable tests on the Kraus property or on any of  
15 the adjacent properties?

16 A Pertaining to -- for point of -- point of --  
17 navigability?

18 Q Navigability. Yeah, just for navigability.  
19 Nothing else.

20 MS. KAVANAUGH: I don't think that he  
21 testified that he did anything for navigability.  
22 He testified that he set the ordinary high water  
23 mark.

24 MR. GLEISNER: Actually, Counsel, what I  
25 can do is go back, but what he testified to was



1           that he did not do.

2                       MS. KAVANAUGH: Right.

3                       MR. GLEISNER: So I want to know -- I  
4           consider doing or not doing navigability tests  
5           something that he has done with regard to  
6           navigability even if it's a negative.

7 BY MR. GLEISNER:

8 Q    Let me ask this question, though, and let me  
9    withdraw my previous question and go this way.  
10   Did you conduct any tests for navigability on the  
11   Kraus property?

12 A   No.

13 Q   Did you conduct any tests for navigability in the  
14   large green circle to the south on Exhibit 2?

15 A   No.

16 Q   Did you conduct any tests for navigability on the  
17   small green circle to the north on Exhibit 2?

18 A   No.

19 Q   Did you conduct any tests for navigability within  
20   the orange circle on Exhibit 2?

21 A   In reference to North Lake, yes.

22 Q   Explain that, please.

23 A   North Lake shares a boundary with the orange  
24   circle -- oh, navigability. I did not.

25 Q   Thank you.

1 A Sorry.

2 Q And did you conduct any tests for navigability on  
3 the blue line to the north of the orange circle on  
4 Exhibit 2?

5 A No.

6 Q Did you conduct navigability tests on any of the  
7 adjoining terra firma land around the large green  
8 lines?

9 A No.

10 Q Now, the same question put a little differently.  
11 Did you do anything to determine the extent and  
12 location of navigable waters on -- I'm just going  
13 to make a group question so we can speed this  
14 along.

15 Did you do anything to determine the  
16 extent and location of navigable waters around the  
17 blue line or along the blue line and the orange  
18 circle, the northern green circle, or the southern  
19 green circle?

20 A State that again, please.

21 Q Did you do anything to determine the extent and  
22 location of navigable waters in the orange circle,  
23 the northern green circle, the southern green  
24 circle or next to the blue line?

25 A No.

1 Q For clarification, I just want to make sure we got  
2 this down. You set the flags. You determined  
3 where the high water mark is going to be located,  
4 but Kapur & Associates would actually shoot the  
5 elevation, is that correct?

6 A Correct.

7 MR. GLEISNER: Counsel, before Mr. Gallo  
8 goes, we're going to need to take a break to talk  
9 to judge --

10 MS. KAVANAUGH: Okay.

11 (A brief recess is taken.)

12 EXAMINATION

13 BY MR. GALLO:

14 Q Bob, can you state for the record your date of  
15 birth?

16 A 6/19/1958.

17 Q And can you just briefly explain for the record  
18 your professional education, college, you know,  
19 forward.

20 A Graduated from the University of Wisconsin-Stevens  
21 Point in 1980 with a bachelor of science degree in  
22 limnology, L-I-M-N-O-L-O-G-Y. Went on to obtain a  
23 master's degree in biological sciences from the  
24 University of Wisconsin-Milwaukee.

25 Q And how many years have you -- let's discuss your

1 work experience. Did you start with the DNR out  
2 of college?

3 A Yes.

4 Q And how many years have you been with the  
5 DNR?

6 A Twenty-six years.

7 Q You testified earlier that you established the  
8 point on the eastern bank or elevation of the  
9 ordinary high water mark. Is it your  
10 understanding that anything -- any elevation  
11 that's below the ordinary high water mark is in  
12 the public trust?

13 A If it is waterward of that elevation, correct.

14 Q Okay. I handed you a document. I think it's  
15 RRNA 1.

16 MR. GLEISNER: Off the record.

17 (Discussion held off the record.)

18 MR. GALLO: On the record.

19 BY MR. GALLO:

20 Q Let's clarify your answer. If it's a navigable  
21 waterway and the land is below the ordinary high  
22 water mark, would it be within the public trust,  
23 the navigable waterway?

24 A Anything below the ordinary high water mark that's  
25 continuous below the ordinary high would be on the

1 bed of a navigable waterway and held in public  
2 trust by the State of Wisconsin. If you're --

3 Q Whether it's a stream or lake or any water body?

4 A Correct. If there is an island in that waterway,  
5 for example, and that island has a bank on it and  
6 you can determine the ordinary high water mark,  
7 then that island, the upland portion of that  
8 island obviously is not.

9 Q Let's clarify that. The portion of the island  
10 that's above the ordinary high water mark would be  
11 out of the public trust arguably. But that  
12 land -- let's say the entire island was below the  
13 ordinary high water mark. That would be within  
14 the public trust?

15 A Yes.

16 Q It would be actually --

17 A It would actually be bed.

18 Q Bed, exactly. A stream bed or a lake bed,  
19 correct?

20 A Correct.

21 Q With regard to the document, Exhibit RRNA 1, I  
22 think that's a memorandum prepared by Andy Hudak.  
23 And could you read the date on that document? I  
24 don't have it.

25 A The date is November 4, 2010.

1 Q November 4, 2010. And as I understand this, and  
2 correct me if I'm wrong, this is Andy's  
3 determination of the manual code approval for this  
4 WDNR project?

5 A I would agree.

6 Q Did you have any involvement or input in the  
7 information supporting and leading up to this  
8 manual code approval?

9 A Yes.

10 Q I understand that there may have been several  
11 people that -- what we call DNR specialists. Can  
12 you best describe for me what kind of involvement  
13 you had in this approval?

14 A I was asked by our regional water leader, Mr. Jim  
15 McNelly, and my supervisor at the time to  
16 determine the ordinary high water mark of North  
17 Lake and to be a technical source for regional  
18 staff in the development of this property for a  
19 public boat launch.

20 Q Did that include determinations of navigability  
21 with regard to the site, any part of the site?

22 A No.

23 Q Okay. With regard to the project site, there are  
24 a number of elements, and there's -- covers a  
25 large area, but one area that I'm particularly

1           concerned about is the unnamed tributary on the  
2           north side of the DNR property. Are you familiar  
3           with that?

4    A    Yes.

5    Q    It's sometimes referred to as a ditch, sometimes  
6           referred to as a stream or an unnamed tributary?

7    A    Yes.

8    Q    Were you involved in any way with any of the  
9           surveying of that?

10   A    Elevation -- just point of clarification.  
11           Surveying in the classical sense? In the  
12           elevation? Or...

13   Q    Elevation surveys.

14   A    No.

15   Q    Okay. And boundary surveys were you involved?

16   A    No.

17   Q    Any surveys at all with regard to that ditch?

18   A    Surveys from the standpoint of assessment, yes.

19   Q    Were you familiar at all with a Kapur survey of  
20           that ditch?

21   A    Elevational survey?

22   Q    Correct.

23   A    I knew they were doing it, because it was an issue  
24           in the handling of storm water on the site.

25   Q    Okay. Did you confer or work with Pete Wood with

1 regard to surface water drainage relating to this  
2 ditch?

3 A Yes.

4 Q Okay. Any other part of the site, like the  
5 parking -- let me break that down and make it more  
6 clear. Like the proposed parking lot area?

7 A Again, with Mr. Wood or...

8 Q Mr. Wood or otherwise.

9 A Not specifically.

10 Q And I'm referring to specifically surface water  
11 drainage.

12 A Yeah.

13 Q Okay. With regard to -- it may help for me to  
14 refer to this new exhibit. And I think it is  
15 Exhibit 110. It's a Bing photo of the -- roughly  
16 the DNR site.

17 And so there's an existing access road  
18 to the property. Are you familiar with that  
19 access road?

20 A Yes.

21 Q And did you walk that access road and just  
22 visually observe the area around that access road?

23 A Yes.

24 Q Can you describe, in general terms, the land  
25 surrounding that access road? And, more



1 particularly, from the bluff down to the lake.

2 A As you enter the access road from Reddelien Road,  
3 it's a gradual decline in elevation. There is a  
4 steep hill to the west of the access road. The  
5 slope continues to the east of the access road  
6 until it encounters a large wetland complex, which  
7 is east of the access road, which runs north and  
8 south.

9 As you progress further north -- I  
10 can't recall the elevation west of the road very  
11 well. East of the road remains in the wetland  
12 complex. As you continue to go north past the  
13 east-west portion of the access road, it's very  
14 well wooded. There is some significant slope west  
15 of that road.

16 I didn't continue to walk the full  
17 length of that road. The east-west portion of the  
18 access road beginning at the western end and  
19 moving eastward, again, it is a very wooded -- a  
20 lot of trees in the area.

21 There is a continuation of the large  
22 wetland complex on both the north and the south  
23 side of the access road. As you continue to go  
24 east, there is a brief area which is upland --  
25 relatively short upland area.

1                   As you continue to go east from there,  
2                   it, again, drops into a wetland complex north and  
3                   south of the access road continuing east.

4       Q       Bob, can I stop you right there?

5       A       I'm having so much fun.

6       Q       That's the approximate location -- you're right on  
7                   here. That's the approximate location of an  
8                   existing culvert that, I think, connects the two  
9                   wetlands and goes under the existing driveway.

10       A       Are you familiar with that?

11       A       I do remember some culverts going underneath the  
12                  access, the east-west portion of the access road.

13       Q       Do you -- let's see. Do we have RRNA 1? 4, I'm  
14                  sorry, 4.

15                               MR. GLEISNER: Off the record.

16                               (Discussion held off the record.)

17       BY MR. GALLO:

18       Q       So I'm referring to RRNA 4 and Exhibit J, which is  
19                  a series of two emails, the top being from Lynette  
20                  Check to Andy Hudak, copy to Jim Ritchie, the  
21                  bottom being an email from Pete Wood to Jim  
22                  McNelly, Jim Ritchie, Lynette Check and Jim  
23                  Morrissey. And there's an attachment.

24                               And this is a discussion of flow path,  
25                  and it's a depiction. It's not tremendously

1 accurate, but it's a depiction of rough flow  
2 paths. And if you could look at -- I'll give you  
3 a minute.

4 (Pause in testimony.)

5 BY MR. GALLO:

6 Q I believe this was prepared by Pete Wood, and what  
7 he is referring to is the flow path from the DNR  
8 proposed development site through the wetlands and  
9 through this existing culvert.

10 The question I have for you is: Do you  
11 have an opinion as to navigability of these  
12 wetlands and this flow path with regard to the  
13 tributary?

14 A I did not conduct a navigability determination on  
15 the property.

16 Q Okay.

17 A So I don't have --

18 Q An opinion?

19 A -- firsthand knowledge or an opinion of that  
20 status.

21 Q Okay. That's fine. So you did not offer, support  
22 an opinion to Andy, who -- when he was making his  
23 manual code approval?

24 A Correct.

25 Q Okay. Thank you. The other document that I'd

1           like you to look at is Exhibit 16, RRNA  
2           Exhibit 16. This is --

3                       MR. GLEISNER: Off the record.

4                       (Discussion held off the record.)

5 BY MR. GALLO:

6 Q       Take a minute to look at this. It's a document  
7       prepared by Kapur & Associates, and it has a  
8       number of survey elevations. Some have referred  
9       to it as a topographical survey. Have you ever  
10       seen this document before?

11 A       No.

12 Q       And you could say that you've never worked with  
13       this document or this information?

14 A       Correct.

15 Q       I'm going to hand you another document. It's  
16       RRNA 3. This document that you're about to  
17       receive is a set of construction plans for the DNR  
18       project, and it's dated 12/22/2010.

19                       And if you could flip to page C116,  
20       about halfway down. Bob, are you familiar with  
21       this set of drawings or -- I would include even  
22       prior versions of these drawings.

23 A       Generally, yes.

24 Q       Okay. So did you work with Kapur on their  
25       development of these construction drawings?

1 A Yes.

2 Q What did you -- what things were you involved  
3 with?

4 A Making recommendations on site development, issues  
5 of concern, more providing feedback on their  
6 plans. We discussed the east-west access road and  
7 the nature of that road as it would be developed  
8 for the access site.

9 Q So it's fair to say that you were somewhat of a  
10 senior reviewer as to technical issues --

11 A Yes.

12 Q -- on behalf of the DNR?

13 A Yes.

14 Q Yeah. So you mentioned the -- issues, probably  
15 design and environmental issues, with regard to  
16 the east-west road. Is that a fair statement?

17 A Yes.

18 Q And I'm gonna probe that a little bit. Were you  
19 involved in navigability determinations or surface  
20 water runoff issues with regard to the  
21 construction of this road?

22 A Not navigability.

23 Q Okay.

24 A Surface water from the standpoint of how storm  
25 water was handled.

1 Q Okay. In terms of treatment and/or volume?

2 A Treatment.

3 Q Treatment. Were you involved with regard to  
4 wetland impacts on the construction of this road?

5 A It was certainly an issue discussed at these  
6 meetings.

7 Q And what kind of discussions did you have with  
8 regard to the wetland impacts? For example, were  
9 you discussing how to minimize wetland impacts?

10 A Yes.

11 Q And what kind of -- can you elaborate on that? In  
12 other words, were you evaluating the elevation of  
13 the road so that it would affect the amount of  
14 side slope or fill?

15 A We discussed that along with other options to  
16 avoid wetland impact and to minimize wetland  
17 impact.

18 Q Are you familiar with the Gestra report, which was  
19 a soil boring --

20 MS. KAVANAUGH: And, I guess, again,  
21 wetlands -- surface water and storm water is  
22 important in terms of how it determines  
23 navigability. But the wetland determination in  
24 terms of the delineation and the approval and  
25 everything isn't part of this hearing.

1 MR. GALLO: I understand. But  
2 navigability will be affected by the amount of  
3 fill, and that's what I'm trying to get to.

4 MS. KAVANAUGH: Assuming that the  
5 culverts aren't sufficient?

6 MR. GALLO: Culvert size and  
7 navigability of the width of that road. Because  
8 both sides of that road are navigable.

9 MS. KAVANAUGH: Right. Well, you  
10 understand that we do agree that the wetland and  
11 the creek is navigable?

12 MR. GALLO: Yeah, I do.

13 MS. KAVANAUGH: I know I'm hearing a lot  
14 of questions about them, and I'm not quite sure,  
15 because we agree they're navigable.

16 MR. GALLO: And I appreciate that. I'm  
17 just looking at the impact on navigability.

18 MS. KAVANAUGH: I guess I don't  
19 understand still how it impacts. I guess I would  
20 object in terms of its relevance, but go ahead.

21 BY MR. GALLO:

22 Q Bob, are you familiar with the Gestra report?  
23 It's dated February 2, 2009, and it's labeled  
24 Exhibit RRNA 7.

25 A No.

1 Q Not at all?

2 A Not at all.

3 Q No?

4 A No.

5 Q So you've never read it?

6 A I don't recognize it.

7 Q Were you familiar with the fact that they  
8 conducted some borings throughout the whole DNR  
9 site?

10 A I was aware of that.

11 Q Okay. And there are a number of borings, but you  
12 were not involved with the analysis of that  
13 information?

14 A Correct.

15 Q Or the -- you know, the effect on design?

16 A Correct.

17 Q Okay. But you were involved with Kapur when they  
18 were designing the east-west road?

19 A Yes.

20 Q And that had to -- let me -- I'm just trying to  
21 make sure I understand it. And that had to do  
22 with wetland impacts in terms of minimizing the  
23 area of wetland impact?

24 A Yes.

25 Q You mentioned other issues. Are there any other



1 issues? We talked about storm water, wetland  
2 impact, navigability. Were there any other issues  
3 that would relate to the discussions that you had  
4 or the review that you had on this east-west  
5 access road through the wetlands?

6 For example, part of the design has a  
7 curve in it to move onto the easement on the  
8 Hanson property. Was that discussed?

9 A There were multiple paths or routes. There were  
10 easement issues in play during our discussions.

11 Q Okay. Thank you. Are you familiar with this set  
12 of drawings? I'm going to direct you to another  
13 few pages. I'm looking at stations 2150  
14 through --

15 MS. KAVANAUGH: You're on Exhibit 3?

16 MR. GALLO: I'm on Exhibit 3.

17 MS. KAVANAUGH: Okay.

18 MR. GALLO: And I'm on page 127.

19 MS. KAVANAUGH: Okay.

20 BY MR. GALLO:

21 Q 127 and we'll look at 128 as well. On page 127,  
22 this is a -- the title of this page is,  
23 "Cross-Sections." And these are cross-sections at  
24 stations 21 plus 50, 22 and 22 plus 50. Do you  
25 want to take a minute just to look at those?

1 A I understand.

2 Q Okay. And as I recall, if you coordinate this  
3 drawing with 116, the plan sheet, then you can see  
4 these cross-sections. And they correlate, these  
5 cross-sections correlate to the -- what I call  
6 like an S-turn in the access road.

7 And the purpose of this S-turn is to  
8 move the access road onto the easement -- the  
9 easement relating to the Hanson property.

10 MS. KAVANAUGH: Move it off.

11 MR. GALLO: Pardon?

12 MS. KAVANAUGH: Move it off.

13 MR. GALLO: Off of the easement but onto  
14 the existing road.

15 MS. KAVANAUGH: Off of the Hanson --

16 MR. GALLO: It would be off of the  
17 Hanson --

18 MS. KAVANAUGH: Isn't this piece off?

19 MR. GALLO: Well, this is semantics.

20 Excuse me.

21 MS. KAVANAUGH: No, no. I mean, if  
22 you're talking about this being the S-curve --

23 MR. GALLO: Yes.

24 MS. KAVANAUGH: -- where's the property  
25 line then? I guess that's what I'm not --

1 MR. GLEISNER: They're not on there.

2 MR. GALLO: Yeah, the property lines are  
3 not there. You're right, we're trying -- let's  
4 agree to this. It's a shift to the north.

5 MS. KAVANAUGH: Yes.

6 MR. GALLO: Okay.

7 BY MR. GALLO:

8 Q And if I read these cross-sections correctly, the  
9 access road, the new proposed access road is to  
10 the north of the existing driveway?

11 For example, this may help clarify. If  
12 you are looking at section -- cross-section at 22  
13 plus 00, the proposed roadway is to the north of  
14 the existing driveway and in the navigable  
15 wetland?

16 A I'm trying, Don.

17 Q No, that's okay. I'm willing to work with you to  
18 understand this, because I haven't asked the  
19 question yet.

20 The question I'm gonna ask you is that:  
21 Is this the area where you were trying -- where  
22 you were working with Kapur to try to minimize the  
23 impact on wetlands? Because you had essentially  
24 two criteria you were trying to meet. One was  
25 getting it onto --

1 MS. KAVANAUGH: The easement.

2 BY MR. GALLO:

3 Q -- essentially around the Hanson property, and  
4 that caused you to go into the navigable wetland  
5 to the north.

6 And what you were trying then to do is  
7 minimize the amount of impact of this roadway to  
8 minimize total wetland impacts. Is that a fair  
9 statement?

10 A Of all of the possible routes --

11 Q Right.

12 A -- our objective was to avoid and minimize wetland  
13 impacts.

14 Q Okay. That's fair, and I appreciate that. I  
15 think that's all I have. Oh, one more thing. One  
16 more question.

17 You testified that you had looked at the  
18 outlet of an unnamed tributary to the lake. And  
19 we were just thinking to ask the question: For  
20 what purpose were you looking at that outlet? Was  
21 it for purposes of setting the ordinary high water  
22 mark?

23 A Yes.

24 Q Okay. And what did you see there? Was there  
25 anything that stands out in your mind in terms of

1           what you saw?

2    A       No.

3    Q       Okay. Thank you.

4    A       You're welcome.

5                       MR. GLEISNER: Thank you, Mr. Wakeman.

6                       THE WITNESS: You're welcome.

7                       (Proceedings concluded at 3:40 p.m.)

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1 STATE OF WISCONSIN )  
 ) SS:  
2 COUNTY OF MILWAUKEE )  
3  
4

5 I, JESSICA R. WAACK, a Registered Merit  
6 Reporter, Certified Realtime Reporter, Registered  
7 Diplomate Reporter and Notary Public in and for the  
8 State of Wisconsin, do hereby certify that the above  
9 examination of ROBERT S. WAKEMAN was recorded by me on  
10 August 26, 2011, and reduced to writing under my  
11 personal direction.

12 I further certify that I am not a  
13 relative or employee or attorney or counsel of any of  
14 the parties, or a relative or employee of such attorney  
15 or counsel, or financially interested directly or  
16 indirectly in this action.

17 In witness whereof I have hereunder set  
18 my hand and affixed my seal of office at Milwaukee,  
19 Wisconsin, on September 3, 2011.  
20

21 \_\_\_\_\_  
22 Notary Public  
23 In and for the State of Wisconsin

24 My Commission Expires: September 1, 2013.  
25

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