

STATE OF WISCONSIN
DIVISION OF HEARINGS AND APPEALS

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 Ramp Structure and Two Outpost Structures
on the Bed of North Lake, Install Four Culvert Crossings
Over Wetlands, Fill Up To .16 Acres of Wetlands for
Construction of a Public Boat Launch on North Lake and
Adjacent Property Located in the Town of
Merton, Waukesha County

Case Nos. IP-SE-2009-68-05745 through 05750

Jeffrey Boldt
Administrative Law Judge, Presiding

Hearing held October 31, 2011

Waukesha, Wisconsin

LEGAL VIDEO SERVICES
(608) 279-5295 Prairie du Sac WI
1

- 1 APPEARANCES (Continued)
- 2 WISCONSIN WILDLIFE FEDERATION, by
- 3 George Meyer, Executive Director
- 4
- 5 WAUKESHA COUNTY CONSERVATION ALLIANCE, by
- 6 Ronald Gray, President

LEGAL VIDEO SERVICES
(608) 279-5295 Prairie du Sac WI

- 1 APPEARANCES
- 2 WISCONSIN DEPARTMENT OF NATURAL RESOURCES, by
- 3 Attorney Edwina C. Kavanaugh
- 4 Attorney Megan E. Correll
- 5 101 South Webster Street
- 6 Madison, WI 53707-7921
- 7
- 8 NORTH LAKE MANAGEMENT DISTRICT, by
- 9 Attorney Donald P. Gallo
- 10 Attorney Carolyn A. Sullivan
- 11 Reinhart Boerner Van Deuren, S.C.
- 12 N16 W23250 Stone Ridge Drive, Suite 1
- 13 Waukesha, WI 53187-2265
- 14
- 15 REDLAND ROAD NEIGHBORHOOD ASSOCIATION, INC., by
- 16 Attorney William C. Gleisner
- 17 Law Offices of William C. Gleisner
- 18 4230 North Oakland Avenue, Suite 333
- 19 Milwaukee, WI 53211-2042
- 20 and by
- 21 Attorney William H. Harbeck
- 22 Quarles & Brady, LLP
- 23 411 East Wisconsin Avenue, Suite 2040
- 24 Milwaukee, WI 53202-4426
- 25

LEGAL VIDEO SERVICES
(608) 279-5295 Prairie du Sac WI
2

INDEX		Page
2	Witnesses Examination by	
3	Robert Wakeman Attorney Correll-Direct.....	5
4	Robert Wakeman Attorney Meyer-Cross.....	48
5	Robert Wakeman Attorney Gleisner-Cross.....	56
6	Robert Wakeman Attorney Gallo-Cross.....	109
7	Robert Wakeman Attorney Correll-Redirect.....	118
8	Robert Wakeman Attorney Meyer-Recross.....	121
9	Robert Wakeman Attorney Gleisner-Recross.....	123
10	Andy Hudak Attorney Correll-Direct.....	128
11	Andy Hudak Attorney Meyer-Cross.....	225
12	Andy Hudak Attorney Correll-Redirect.....	233
13	Andy Hudak Attorney Gleisner-Cross.....	243
14		
15		

LEGAL VIDEO SERVICES
(608) 279-5295 Prairie du Sac WI

1 ALJ BOLDT: Okay. Good morning. We're
2 back on the record. Today is, I believe,
3 October 31st, Halloween. Happy Halloween to
4 all. Thank you all for making -- getting here
5 at 9:00. We really appreciate that. We know
6 the Village Green (phonetic) is hard to find,
7 and your GPS doesn't help you a whole lot.
8 Okay. I believe the appearances are pretty much
9 the same as in our last session. Mr. Meyer
10 returned, and we're continuing on with the
11 Department's case, I believe.

12 And anybody have any housekeeping matters
13 before we begin with testimony or -- okay.
14 Let's get right to it.

15 MS. CORRELL: The Department will call Bob
16 Wakeman.

17 ALJ BOLDT: And as I recall, you've been
18 previously sworn, so I'll remind you that you're
19 still under oath, Mr. Wakeman. If you get
20 claustrophobic behind all these exhibits, let me
21 know.

22 MR. WAKEMAN: Okay.

23 DIRECT EXAMINATION

24 BY MS. CORRELL:

25 Q I'm not exactly sure where we got cut off, so I'm

LEGAL VIDEO SERVICES
(608) 279-5295 Prairie du Sac WI

5

1 state of Wisconsin.
2 Q What does that position entail?
3 A I coordinate different aspects of the aquatic
4 invasive species program involves education
5 (inaudible) on the does and don'ts for transporting
6 aquatic invasive species around the state. It's a
7 lot of monitoring for aquatic invasive species as
8 well as outreach educational programs and research as
9 well.

10 Q Prior to your statewide policy position, what
11 position did you hold with the Department?

12 A I was the southeast regional aquatic habitat
13 coordinator for about nine, close to ten years.

14 Q And did you hold any other positions prior to that?

15 A Yes. I was the water resource manager, lake
16 management specialist for about ten years before that
17 and a water resource manager, kind of a generalist,
18 for a period of about five years before that.

19 Q What were your job responsibilities as the aquatic
20 habitat coordinator?

21 A I was responsible for a number of things. I was
22 one -- the liaison between the regional office and
23 central office on technical issues, involving policy
24 issues. I was also responsible for assisting in the
25 training of new water management specialists that

LEGAL VIDEO SERVICES
(608) 279-5295 Prairie du Sac WI

7

1 just going to start from the beginning. Could you
2 state your name and address for the record, please.
3 A Robert Wakeman. I live at 1315 North 63rd Street,
4 Wauwatosa, Wisconsin.
5 Q What's your educational background, Mr. Wakeman?
6 A I received a Bachelor of Science degree in limnology
7 from the University of Wisconsin-Stevens Point in
8 1980, went on to receive a Master's in Science degree
9 in biological sciences from the University of
10 Wisconsin-Milwaukee in 1985.

11 Q Do you have any training during your -- through your
12 employment or other relevant education?

13 A Yes. Received quite a bit of training through the
14 Department of Natural Resources when I became the
15 aquatic habitat coordinator for the southeast region.
16 I went through the new water management specialist
17 training, which all new water management specialists
18 are required to go through, as well as other
19 miscellaneous field training by other staff and other
20 coursework as well.

21 Q I'm sorry, I don't think you stated by whom you're
22 employed.

23 A Wisconsin Department of Natural Resources.

24 Q And what's your current position with the Department?

25 A I'm the aquatic invasive species coordinator for the

LEGAL VIDEO SERVICES
(608) 279-5295 Prairie du Sac WI

6

1 came to the region. I was involved in reviewing
2 applications, permits, actually have handled quite a
3 few of my own during my tenure there, made sure staff
4 were being consistent in their implementation of
5 statutes and codes, conducted field work, worked with
6 the public and provided general counsel, if you will,
7 to the southeast region administration on water
8 regulations on the issues.

9 Q And what geographical area were you responsible for
10 in that position?

11 A Southeast region covers Sheboygan County, Ozaukee,
12 Waukesha, Milwaukee, Washington, Kenosha, Racine and
13 Walworth Counties.

14 Q And what was the activity level like in Waukesha
15 County?

16 A Very high. Waukesha County is routinely one of the
17 highest workload areas in Wisconsin for water
18 regulation zoning permit activity.

19 Q How many water management specialists were assigned
20 to Waukesha County?

21 A It varied over the years because of vacancies.
22 Typically we would try to handle it with two water
23 management specialists, but at times there were three
24 working the area.

25 Q And would you ever be consulted on a particular case?

LEGAL VIDEO SERVICES
(608) 279-5295 Prairie du Sac WI

8

1 A All the time.
 2 Q Could you describe your experience, your personal
 3 experience in reviewing and approving or denying
 4 Chapter 30 and Water Quality Certification Permits?
 5 A Certainly. Over the years as staff was coming down,
 6 moved to different positions, I was asked to fill in
 7 for those vacancies, and was responsible for
 8 reviewing applications for waterway permits and
 9 approving, denying or modifying those applications.
 10 I would estimate on a monthly basis it ranged
 11 anywhere from, I don't know, maybe ten to twenty
 12 applications during that -- during those periods of
 13 times. It varied widely.
 14 Q Is it fair to say that you reviewed hundreds of
 15 applications under either Chapter 30 or water quality
 16 certifications?
 17 A I would say yes.
 18 Q In southeast region, and in Waukesha County in
 19 particular, did you have any projects that required
 20 analysis of dual jurisdiction under both of those --
 21 A Yes.
 22 Q -- regulatory (inaudible)? How frequent would you
 23 say dual jurisdiction was an issue in permitting,
 24 just a ballpark?
 25 A It was fairly common. Usually a lot of the work that

LEGAL VIDEO SERVICES
 (608) 279-5295 Prairie du Sac WI

9

1 experience, run into the question of whether DNR
 2 would review impacts to navigable wetlands as lakebed
 3 impacts?
 4 A Other than this particular case, I can't think of a
 5 situation where navigable wetland came into a
 6 picture. The only one that comes to mind is the
 7 Nagawicka Bay Sailing Club where we had the kettle,
 8 as it's referred to, at the north end of Nagawicka
 9 Lake, there was a navigable wetland adjacent to the
 10 kettle. It was below the ordinary high, but that was
 11 the only situation that I can think of where it was
 12 an issue.
 13 ALJ BOLDT: Is that the one in about 1990
 14 roughly?
 15 THE WITNESS: I didn't want to throw out a
 16 date, Judge, because you and I were both there.
 17 ALJ BOLDT: I'm not sure that I was and
 18 that's why I'm asking. I think there were two
 19 and I don't think I was involved in either of
 20 those so that's -- do you remember -- I guess
 21 you don't really.
 22 THE WITNESS: It would have been in the
 23 '90s.
 24 ALJ BOLDT: Okay.
 25 THE WITNESS: 1990'S.

LEGAL VIDEO SERVICES
 (608) 279-5295 Prairie du Sac WI

11

1 we would do would be to view a subdivision
 2 development, and very frequently there were wetlands
 3 on the property as well as waterways, and so having
 4 Chapter 30, as well as water quality cert authority
 5 was fairly common.
 6 Q And how did you navigate through the complexities of
 7 a dual jurisdiction site? What type of factors would
 8 you look at?
 9 A We would always work to determine our jurisdiction at
 10 a particular site. Wetland delineations were
 11 important, so we knew the boundaries of wetlands.
 12 Determining the ordinary high water mark of a
 13 waterway helped us identify which streams or ponds or
 14 lakes were navigable and the activity that was
 15 proposed for a particular site would then help us
 16 determine which authority we would operate under. To
 17 place fill in a wetland, we would authorize that
 18 under a water quality cert. Grading structures,
 19 things like that, would be under Chapter 30.
 20 Q Have you ever, in your extensive experience, run into
 21 the question of whether DNR would review impact to
 22 navigable wetlands as lakebed impacts?
 23 A Say that again, please?
 24 Q I will speak more slowly. I have a tendency to talk
 25 too fast. Have you ever, in your extensive

LEGAL VIDEO SERVICES
 (608) 279-5295 Prairie du Sac WI

10

1 Q And just to clarify your --
 2 MS. CORELL: Nobody is going to talk about
 3 age today, it's Halloween.
 4 Q So just to clarify your testimony, in that case, all
 5 the wetlands were located below the ordinary high
 6 water mark?
 7 A Yes.
 8 Q And what was the activity that was involved in that
 9 case, if you can recall?
 10 A It was actually a structure permit. It was placement
 11 of a boardwalk and a pier at the lake-ward edge of
 12 the wetland fringe.
 13 Q But to get at the question I guess I was trying to
 14 ask, maybe not very artfully, have you ever
 15 experienced a petitioner's argument that a wetland
 16 above the ordinary high water mark of a defined lake
 17 should be regulated under 30.12?
 18 A No.
 19 Q Okay. So let's walk through some of the basic
 20 regulatory framework. Based on your experience, how
 21 has DNR consistently implemented Chapter 30
 22 activities?
 23 A Consistency is important to this program, being a
 24 regulatory program. Training staff on which
 25 authorities to implement at which times is an

LEGAL VIDEO SERVICES
 (608) 279-5295 Prairie du Sac WI

12

1 important step in their training. We work not only
 2 through the New Water Management Specialist Training
 3 Program that the Department has developed, but also
 4 by mentoring new staff and -- I'm sorry, I'm losing
 5 my train of thought. Could you repeat the question?
 6 Q I was just going to have you discuss, for individual
 7 and general permit applications for Chapter 30 only
 8 at this time, what types of activities does the
 9 Department review in its permit review?
 10 A For individual and general permits under Chapter 30
 11 there's a variety of activities. There's everything
 12 from placement of culverts to piers, riprap, bridges,
 13 dredging. There's a variety of activities that are
 14 authorized under either an individual or a general
 15 permit. We review the applications in terms of the
 16 public interest, whether or not there are impacts to
 17 navigability, fish and wildlife habitat, water
 18 quality, natural scenic beauty, and if those -- if
 19 the impact is acceptable, those permits can be
 20 approved.
 21 Q Do Chapter 30 authorizations below the ordinary high
 22 water mark allow alterations of the bed of the lake
 23 or stream material?
 24 A Yes. Frequently, if you have, for example, a culvert
 25 installation, you would authorize that under a

LEGAL VIDEO SERVICES
 (608) 279-5295 Prairie du Sac WI
 13

1 of fill to support a roadway or to create upland
 2 aside from the bulkhead lines that you just
 3 described?
 4 A No, not in a public waterway or a navigable waterway.
 5 MR. GLEISNER: Sorry. Pardon me, Counsel,
 6 could you repeat the question and answer? I'm
 7 afraid I didn't quite catch that. I apologize.
 8 MS. CORRELL: Sure, I can restate the
 9 question.
 10 MR. GLEISNER: Thank you, Counsel.
 11 Q Under Chapter 30 authority, aside from bulkhead
 12 lines, does the Department permit placing fill in a
 13 water body to support a roadway or to create upland
 14 to place fill in a navigable lake or a navigable
 15 stream, for example?
 16 A To place fill in a navigable stream to create upland
 17 would not be a Chapter 30.
 18 Q Okay. You described a basic Chapter 30 process
 19 earlier with the example of a culvert. How would the
 20 process be different if wetlands were present at the
 21 site location where the Chapter 30 regulated activity
 22 was proposed?
 23 A Generally, if you're placing a structure in, let's
 24 say, a stream, for example, and there are some small
 25 amounts of wetland on either side of the stream, it's

LEGAL VIDEO SERVICES
 (608) 279-5295 Prairie du Sac WI
 15

1 Chapter 30 permit. In order to place the culvert
 2 correctly, you may have to bury the culvert into the
 3 substrate and so you may allow, through the permit
 4 process, the removal of some bed material to securely
 5 place the culvert in the bed of the stream or lake.
 6 Q What amount of material is allowed to be placed or
 7 removed for a structure permit such as your culvert
 8 example?
 9 A It's a fairly de minimus amount. There are other
 10 permits that I think allow up to two cubic yards of
 11 material, if memory serves me correctly, but it's a
 12 fairly small amount that is allowed in order to place
 13 a structure appropriately.
 14 Q Are you aware of DNR using any Chapter 30 authority
 15 for activities proposed to place a deposit or fill
 16 below the ordinary high water mark?
 17 A There are some for municipalities through the, it'll
 18 come to me, bulkhead line. Thank you.
 19 Municipalities are allowed to fill out to an
 20 established bulkhead line which is a way of
 21 standardizing or conforming a shoreline that's a
 22 little bit more less convoluted, if you will. That's
 23 one mechanism where fill can be placed below the
 24 ordinary high water mark of a navigable waterway.
 25 Q What about an activity that would involve placement

LEGAL VIDEO SERVICES
 (608) 279-5295 Prairie du Sac WI
 14

1 still authorized as a Chapter 30 permit. The water
 2 management specialist is trying to examine the
 3 wetland impacts, but it's still authorized under a
 4 Chapter 30. The wetland impacts will also be
 5 examined and NR103 does come into play. And the
 6 water management specialist will review NR103 for
 7 that particular project and if there is a wetland
 8 fill, then it's authorized under a Chapter 30 permit
 9 for the structure.
 10 Q What type of permit would be issued for the activity?
 11 A It'd be a Chapter 30. For a structure, it'd be
 12 Chapter 30.12 -- .12.
 13 Q Just to clarify, the NR103 analysis is done?
 14 A Yes.
 15 Q Okay. But we don't issue two permits?
 16 A Correct. It's -- if you read the permit, NR103 is
 17 identified as one of the authorities that the permit
 18 is issued, but it's a Chapter 30.12 permit.
 19 Q Okay. What about a proposal to place fill in a
 20 non-navigable wetland for a driveway or roadway?
 21 A We would authorize that under a water quality cert.
 22 Q What if the wetland were a navigable wetland, meaning
 23 an ordinary high water mark had been established in
 24 the wetland?
 25 A We would, again, authorize any fill placement as a

LEGAL VIDEO SERVICES
 (608) 279-5295 Prairie du Sac WI
 16

1 water quality certification.
 2 Q Is this an uncommon situation?
 3 A Is it uncommon. I don't think it's necessarily
 4 uncommon.
 5 Q So would it be fair to say that a lot of wetlands in
 6 this State are wet enough to have an ordinary high
 7 water mark?
 8 A Yes.
 9 Q So why doesn't the Department place ordinary high
 10 water marks on all those wetlands?
 11 A Well, we may place ordinary high water marks on the
 12 wetlands for zoning issues, things of that nature,
 13 but when it comes to the placement of fill, our
 14 authority for fill placement in a wetland is a water
 15 quality cert.
 16 Q So we already have jurisdiction?
 17 A Yes.
 18 Q Is that the rationale in terms of not placing an
 19 ordinary high water mark unless some of the other
 20 factors you described are present?
 21 A I'm not sure I understand.
 22 Q Let me rephrase. Is the rationale of not placing an
 23 ordinary high water mark because we already have
 24 jurisdiction under water quality certification?
 25 A Yes, we don't always have to do the water quality

LEGAL VIDEO SERVICES
 (608) 279-5295 Prairie du Sac WI
 17

1 A I've got it.
 2 MS. CORRELL: I'll give everyone else a
 3 minute to get there.
 4 MR. GLEISNER: Thank you, Counsel, we have
 5 it.
 6 Q Could you identify for the record what's contained in
 7 Exhibit 209?
 8 A Exhibit 209 is copies of my field book pages that I
 9 used in recording my observations at the North Lake
 10 site, as well as some photographs that I took during
 11 the ordinary high water mark examination.
 12 Q Could you please walk us through your observations as
 13 you recorded them on that day, and also what the date
 14 was?
 15 A The narrative part of the field book is dated
 16 8/14/09, identifies myself as the observer. The
 17 objective of the visit was to evaluate the ordinary
 18 high water mark at the Krause site. The weather was
 19 sunny and warm -- 87, breezy. I then drew a little
 20 picture, if you will, of the site with careful
 21 measurements from a benchmark that -- I used an old
 22 cottonwood tree there. There was a chain embedded in
 23 the cottonwood. I used that as a benchmark. Then I
 24 took measurements to various landmarks that I could
 25 then refer back to in describing the placement of the

LEGAL VIDEO SERVICES
 (608) 279-5295 Prairie du Sac WI
 19

1 cert for -- if you've got a navigable wetland. If
 2 you're placing fill it would be a water quality cert
 3 authority.
 4 Q So DNR's consistent practice for those wetlands
 5 containing navigable waters would be to require a
 6 wetland water quality certification to place fill in
 7 those wetlands when no other Chapter 30 regulated
 8 activity is associated with the fill, is that
 9 correct?
 10 A That's correct.
 11 Q And are you familiar with the project site that's at
 12 issue in this contested case hearing?
 13 A Yes, I am.
 14 Q What was your role in the application process for the
 15 Manual Code approval?
 16 A I was asked by my supervisor to determine the
 17 ordinary high water mark of North Lake and I also
 18 assisted the water management specialist and the
 19 other resource managers in some of their evaluations
 20 of the property and impacts, not only to the Krause
 21 site, but to the Highway 83 site.
 22 Q Could you identify for the record what has been
 23 marked Exhibit 209? And I know you have a lot of
 24 binders in front of you so I'll give you a minute to
 25 locate the DNR binder. It should be at Tab 9.

LEGAL VIDEO SERVICES
 (608) 279-5295 Prairie du Sac WI
 18

1 ordinary high water mark. The -- of pertinent
 2 importance is the average beach width which was about
 3 11 feet which I took at approximately five locations
 4 across the face of the property, the face being the
 5 eastern shore. I mentioned the cottonwood tree. I
 6 mentioned -- I noted here that there were tree roots
 7 exposed on the beach that were about two to
 8 two-and-a-half feet from the water's edge. I noted
 9 the placement of the old concrete ramp that was
 10 placed in the water, location of different trees, the
 11 drip line from the cottonwood, and the vegetation
 12 that was on the beach at the south end of the
 13 property, and then the location of the ordinary high
 14 which was about, it says here, 17.8 feet from the
 15 edge of the tree to the south and about 21 feet from
 16 the drip line of the cottonwood. The second page, or
 17 the next page, in the exhibit is a -- it's dated
 18 10/26/09. I accompanied Mr. Jim McNelly (phonetic),
 19 Tim Lazott (phonetic), Craig Helker (phonetic),
 20 Sue Byler (phonetic), Heidi Bunk (phonetic), and
 21 Andrew Hudak at a North Lake launch evaluation. The
 22 objectives were to evaluate public interest at the
 23 Kuchler and Krause sites and, again, we examined the
 24 ordinary high water mark -- weather, light rain, 50.
 25 The ordinary high water mark measured to be about a

LEGAL VIDEO SERVICES
 (608) 279-5295 Prairie du Sac WI
 20

1 foot above the current water level at that date. The
 2 next pages are photographs that I took of the site on
 3 August 14th of '09.
 4 Q If we could have you turn back to your initial
 5 ordinary high water mark determination on 8/14/09.
 6 Now, I understand that it's not surveyed in on this
 7 date, but you referred to your measurement of 17.8
 8 feet, is what it looks like, right?
 9 A Yes.
 10 Q Where was --
 11 MS. CORRELL: Strike that.
 12 Q Was the ordinary high water mark flag that you placed
 13 on that date at the same elevation as the surface
 14 water?
 15 A No, the ordinary high water mark is going to be -- or
 16 was above the existing water level on that date. I
 17 don't -- what I can tell you is that the beach width
 18 east of the ordinary high water mark was about eight
 19 feet, meaning that the water level was about eight
 20 feet away from the ordinary high water mark and there
 21 was a tree that was about 17.8 feet away from the
 22 ordinary high water mark west of the ordinary high.
 23 Q Okay. And you indicated on that day that it was
 24 breezy. Based on how you record notes, does that
 25 mean high wind or --

LEGAL VIDEO SERVICES
 (608) 279-5295 Prairie du Sac WI
 21

1 water, I knew that the location of the ordinary high
 2 at the -- where I placed it, was really the very best
 3 location that was most consistent with all the clues.
 4 And so I kept going back and making sure that I had
 5 placed the ordinary high water mark flag in the
 6 correct location.
 7 Q And just for purposes of foundation, you have how
 8 many years of experience in placing ordinary high
 9 water mark determinations
 10 A Nine or ten years.
 11 Q And when you went back to the site in October of '09
 12 and reexamined the ordinary high water mark, did you
 13 feel that you needed to move the flag on that date?
 14 A No, I felt the original location was the correct one.
 15 Q And on that day you measured the ordinary high water
 16 mark, and now we're talking elevation here, to be
 17 about one foot above the current water level?
 18 A Correct.
 19 Q And even though -- on the previous visit, even though
 20 you had indicated that there was about eight feet of
 21 beach, I don't see a note in particular regarding the
 22 elevation of the water?
 23 A Correct.
 24 Q Would you say the circumstances were similar, if you
 25 could based on your recollection, between August and

LEGAL VIDEO SERVICES
 (608) 279-5295 Prairie du Sac WI
 23

1 A No, it was a very -- if I remember correctly, it was
 2 a gorgeous day, a very light breeze, not enough to
 3 generate any significant wave action.
 4 Q So it looks like 87 degrees. It was a sunny August
 5 day?
 6 A Yes.
 7 Q And the location of the surface water was at least
 8 eight feet from the ordinary high water mark, if I'm
 9 understanding correctly?
 10 A Where I placed the flag, yes.
 11 Q Okay. And if we could turn to your field notes
 12 from -- on Exhibit 209, Page 3, from October 26th,
 13 '09 and it looks like you reconfirmed the ordinary
 14 high water mark?
 15 A Yes. The ordinary high water mark on North Lake was
 16 a bit of a challenge. There were different -- the
 17 ordinary high water mark was a little difficult at
 18 this site because there were some conflicting clues,
 19 if you will, that I used to examine and determine
 20 where the ordinary high water mark was. There were
 21 tree roots that were exposed on the beach. There was
 22 young willow vegetation growing up on the beach as
 23 well and some of those things are kind of misleading.
 24 Knowing North Lake like I do, knowing that the lake
 25 goes up and down quite a bit, it has frequently high

LEGAL VIDEO SERVICES
 (608) 279-5295 Prairie du Sac WI
 22

1 October or was there a difference in elevation?
 2 A I really don't feel comfortable. It was two years
 3 ago. The water level in August of '09 --
 4 Q That's okay. I can ask you a different question.
 5 A Okay.
 6 Q In terms of your experience and knowledge of
 7 North Lake, would it be fairly common for the
 8 ordinary high water mark to be at an elevation above
 9 the level of the surface water?
 10 A Yes.
 11 Q And could you explain why that is and, if it's
 12 relevant, the location in terms of easterly, westerly
 13 side of the lake?
 14 A Well, the development of the ordinary high water mark
 15 is based on the presence and action of water. This
 16 can be wind, it can be currents, wind-generated
 17 waves, I mean, or currents, and it's a point where
 18 water is at on a frequent enough basis to leave a
 19 distinguishing mark. And it can be an erosional
 20 mark, it can be a stain, it can be a change in
 21 vegetation. At this particular site, I felt the
 22 ordinary high was probably more a result of wind and
 23 wave action than anything else. Knowing that
 24 historically North Lake goes up well beyond this, I
 25 knew this wasn't the high water mark and felt that

LEGAL VIDEO SERVICES
 (608) 279-5295 Prairie du Sac WI
 24

1 the characteristics at this site really told me it
 2 was the ordinary high. That's all I have.
 3 Q And I know you testified it was a couple years ago,
 4 but do you know what that ordinary high water mark
 5 elevation was later surveyed in to be? I can also
 6 refer you to a document.
 7 A Yeah, I don't remember the elevation offhand.
 8 Actually, if I can go back to the photographs of '09?
 9 Q Oh, please.
 10 A Looking at the photographs of '09 and comparing that
 11 to my memory of --
 12 MR. GLEISNER: May Counsel approach, Your
 13 Honor.
 14 ALJ BOLDT: Sure, sure.
 15 A You asked about what the water level was like under
 16 the two different date scenarios and their
 17 similarity. I would have to say that the water level
 18 of August of '09 was fairly similar to the water
 19 level that I saw in October -- approximately. Maybe
 20 a little lower but, relatively speaking, very close.
 21 Q And you also recently conducted a site visit with all
 22 the parties to this hearing and I believe you pointed
 23 out the ordinary high water mark flag during that
 24 site visit?
 25 A Yes.

LEGAL VIDEO SERVICES
 (608) 279-5295 Prairie du Sac WI
 25

1 saying, sir.
 2 MR. GLEISNER: 897.76.
 3 MS. CORRELL: I think it's --
 4 MR. HARBECK: It's Exhibit 13.
 5 MS. KAVANAUGH: But I don't understand your
 6 question -- I mean your statement.
 7 MR. GLEISNER: I just want it to be
 8 understood that the ordinary high water mark has
 9 been established by Mr. Wakeman or with the
 10 assistance of Mr. Wakeman at 897.76.
 11 MS. KAVANAUGH: Right, but I don't
 12 understand what you said about sea level.
 13 MR. GLEISNER: Why don't you ask him? I'm
 14 not trying to testify --
 15 MS. KAVANAUGH: No, no, I'm trying to find
 16 out what you're reserving from the stipulation.
 17 I don't understand the objection. Are you
 18 saying that this isn't a number above sea -- I
 19 don't understand --
 20 MR. GLEISNER: Yeah, I'm saying
 21 that -- Counsel, that's right. I'm saying that
 22 the 17.8 feet that he references on Exhibit 209,
 23 Page 2, is not the ordinary high water mark.
 24 MS. KAVANAUGH: That's not elevation. He
 25 didn't say that was elevation.

LEGAL VIDEO SERVICES
 (608) 279-5295 Prairie du Sac WI
 27

1 Q Did you notice on that day, which was probably
 2 September 20th -- I think it was the second day of
 3 hearing. Did you notice any relationship between the
 4 level of the surface water and the ordinary high
 5 water mark on that day?
 6 A It was relatively the same. I don't remember it
 7 being significantly lower or higher so I would put it
 8 in the same ball park.
 9 ALJ BOLDT: As you found in 2009?
 10 THE WITNESS: Yeah.
 11 MS. CORRELL: And I'm not going to belabor
 12 all the points because I believe there's a
 13 stipulation that you're not challenging the
 14 ordinary high water mark, is that correct, so
 15 I'm not going to go through every single --
 16 MR. HARBECK: I mean if you want to
 17 introduce or talk about the one exhibit that you
 18 asked the measurement that's fine but no,
 19 there's not an issue --
 20 MR. GLEISNER: Just so we understand,
 21 Counsel, that's not in terms of above sea level?
 22 The ordinary high water mark has been defined
 23 differently by Mr. Wakeman and other testimony,
 24 that's all. Just so we understand that.
 25 MS. CORRELL: I'm not sure what you're

LEGAL VIDEO SERVICES
 (608) 279-5295 Prairie du Sac WI
 26

1 MR. GLEISNER: Right, I understand that
 2 MS. KAVANAUGH: Okay. We understand that.
 3 MR. GLEISNER: And that's the only thing I
 4 was saying, Counsel.
 5 MS. KAVANAUGH: Okay. We understand that.
 6 We're not saying --
 7 MR. GLEISNER: Thank you, Counsel.
 8 ALJ BOLDT: And what exhibit were you
 9 referencing there because it's not 13.
 10 MS. CORRELL: Yeah, I'm trying to get your
 11 exhibit. Your binder is falling apart here.
 12 MR. GLEISNER: It's not 13. I don't know
 13 why -- it was Exhibit 104 actually, Your Honor,
 14 and it was testified to by Mr. Wakeman.
 15 MR. HARBECK: Oh, I'm sorry.
 16 MR. GLEISNER: It was testified to by
 17 Mr. Wakeman at Page 5 of his August 26th
 18 deposition, Your Honor.
 19 ALJ BOLDT: Do I have that deposition?
 20 MR. GLEISNER: You do not, but you can
 21 have it in two seconds.
 22 ALJ BOLDT: Okay.
 23 MS. KAVANAUGH: Don't you have -- somebody
 24 has his deposition as an exhibit.
 25 MR. HARBECK: If you'd just -- should we go

LEGAL VIDEO SERVICES
 (608) 279-5295 Prairie du Sac WI
 28

1 off the record for a second?
 2 ALJ BOLDT: Yeah, let's go off the record.
 3 (Recess taken)
 4 ALJ BOLDT: Okay. We're back on the
 5 record. It's Exhibit 104 and do you want to put
 6 anything further in there?
 7 MR. GLEISNER: No, Your Honor, I just want
 8 to make sure that that still is noted, that it's
 9 897.76 per Exhibit 104. That's all I wanted to
 10 clarify, Your Honor.
 11 MS. KAVANAUGH: Yes, yes.
 12 ALJ BOLDT: Excellent. Okay.
 13 MR. GLEISNER: Thank you, Your Honor.
 14 MS. CORRELL: That's fine and I'll offer
 15 this exhibit and move it.
 16 ALJ BOLDT: 209?
 17 MS. CORRELL: 209, yes.
 18 MR. GLEISNER: No objection, Your Honor.
 19 ALJ BOLDT: Okay. 209 is received.
 20 Q In terms of --
 21 MS. CORRELL: Strike that.
 22 Q Have you attended the entire proceedings in this
 23 matter?
 24 A Most of it.
 25 Q Have you heard testimony regarding elevations in the

LEGAL VIDEO SERVICES
 (608) 279-5295 Prairie du Sac WI
 29

1 A Okay.
 2 Q And it's labeled Map 2, Location of the Project Area.
 3 MR. GLEISNER: I'm not finding it, Counsel,
 4 I'm sorry.
 5 MS. CORRELL: Do you want me to help you?
 6 MR. GLEISNER: Yes, actually that would be
 7 very helpful.
 8 MS. CORRELL: Okay.
 9 MR. GLEISNER: You can help the witness
 10 too. I'm just not finding it.
 11 MS. CORRELL: That's the same map --
 12 MR. GLEISNER: Okay. That's the same map?
 13 MS. CORRELL: Yep, it's the same.
 14 MR. GLEISNER: Thank you, Counsel, I just
 15 wanted to make sure we're on the same page.
 16 MS. CORRELL: Yeah, uh-huh.
 17 MR. GLEISNER: Did you paginate this --
 18 ALJ BOLDT: Well, it apparently has a 103
 19 at the bottom, yeah.
 20 MR. GLEISNER: Right. You paginated this I
 21 think?
 22 MS. KAVANAUGH: It's from another --
 23 MS. CORRELL: No, it's from another --
 24 MS. KAVANAUGH: Pagination to something
 25 else.

LEGAL VIDEO SERVICES
 (608) 279-5295 Prairie du Sac WI
 31

1 wetland, both in the area of the wetland swale and
 2 also further west where there is some ponding in the
 3 wetland that has been determined to be navigable?
 4 A Could we pull up a diagram so I make sure I know
 5 which ones you're referring to?
 6 Q Sure. I'll have you turn to DNR Exhibit 200. And,
 7 sorry, this is going to be a little -- it's a large
 8 exhibit. It's the application. Within that
 9 application is a delineation of the wetland complex.
 10 I would say it's about halfway through the exhibit.
 11 It's labeled Map 2 within the SEWRPC DNR delineation
 12 and it actually has a Bates number from another
 13 North Lake case at the bottom -- 103.
 14 MR. GLEISNER: I apologize, Counsel,
 15 I'm -- Exhibit 200 is not individually --
 16 MS. CORRELL: Correct.
 17 MR. GLEISNER: -- paginated so if you
 18 could just --
 19 MS. CORRELL: Yeah, it'll take a little
 20 while. It's around the middle of it and there's
 21 a large delineation document.
 22 A You said it's in the SEWRPC report -- wetland
 23 delineation?
 24 MS. KAVANAUGH: Why don't you show him?
 25 Q Yeah, it's in the SEWRPC delineation report.

LEGAL VIDEO SERVICES
 (608) 279-5295 Prairie du Sac WI
 30

1 MS. CORRELL: -- North Lake case --
 2 ALJ BOLDT: Sure, sure.
 3 MS. CORRELL: -- because I, in Madison,
 4 only had some documents.
 5 MR. GLEISNER: So Exhibit 2, Paginated Page
 6 103, would identify it?
 7 MS. CORRELL: That's what I refer to as a
 8 Bates number, but they're not necessarily in
 9 full order.
 10 MR. GLEISNER: Oh, okay.
 11 MS. CORRELL: There's a series of order
 12 and --
 13 MR. GLEISNER: Thank you very much.
 14 ALJ BOLDT: Actually, Exhibit 200. I think
 15 you said Exhibit 2.
 16 MR. GLEISNER: I meant 200. 200, yes, I
 17 apologize.
 18 ALJ BOLDT: I've got to get back in the
 19 game here.
 20 Q Yeah, so we're -- sorry for the --
 21 MR. HARBECK: It's Monday. Right, you're
 22 there now.
 23 ALJ BOLDT: After our layoff.
 24 MS. CORRELL: Believe me, it was hard to
 25 locate the entire application because it was

LEGAL VIDEO SERVICES
 (608) 279-5295 Prairie du Sac WI
 32

1 quite large. So now we're all at Exhibit 200 in
 2 a document located within the SEWRPC delineation
 3 report labeled Map 2, Location of the Project
 4 Area and it also contains a Bates stamp 103 in
 5 the lower right corner.
 6 Q So I think I asked you -- let me restate the question
 7 because it was some time ago. Have you heard
 8 testimony during this proceeding regarding elevation
 9 levels within the wetland swale to the lake side of
 10 the wetland delineated here on Map 2?
 11 A Are you referring to the wetland area that would be
 12 marked as -- that runs east/west --
 13 Q Yeah, let's --
 14 A -- toward the house or toward the lake?
 15 Q -- start with some foundation. Map 2 identifies
 16 wetlands in the large wetland complex, as well as the
 17 smaller Wetland Number 2 in light blue, is that
 18 correct?
 19 A Yes.
 20 Q Okay. And specifically I'm referring to the narrow
 21 portion of the wetlands that are on the northern
 22 portion of the DNR site.
 23 A Correct.
 24 Q Have you heard testimony in this proceeding regarding
 25 elevation points within that west -- the wetland

LEGAL VIDEO SERVICES
 (608) 279-5295 Prairie du Sac WI
 33

1 A It could potentially -- it's certainly higher than
 2 the ordinary high water mark.
 3 Q Okay.
 4 A It may or may not be on its way to the high water
 5 mark.
 6 Q What are factors you would look at in the watershed
 7 for that type of hydrology to occur?
 8 A Just the size of the watershed to the lake area, the
 9 amount of drainage that flows into North Lake. We
 10 also know that the outlet of North Lake -- there is a
 11 bit of constriction at the outlet which causes this
 12 increase in water elevation in North Lake and the
 13 subsequent flooding of these wetland lobes. So we
 14 know that because there's a lot of land that drains
 15 to North Lake, that lake is going to fill up quickly,
 16 and if it doesn't have a fast way of draining, it's
 17 going to overflow its banks.
 18 Q Could you identify for the record what's been marked
 19 Exhibit 202?
 20 A Did you say 202?
 21 Q Yeah. Actually, 203.
 22 ALJ BOLDT: Do you want to offer Exhibit
 23 200?
 24 MS. CORRELL: Oh, yes, I do. Oh, I think
 25 it's already been received, but --

LEGAL VIDEO SERVICES
 (608) 279-5295 Prairie du Sac WI
 35

1 channel as it approaches North Lake, meaning on the
 2 western portion?
 3 A Yes.
 4 Q Okay. And is there any significance in the elevation
 5 difference of the actual surface water and your
 6 placement of the ordinary high water mark in terms of
 7 how the hydrology on this site might work?
 8 A The testimony that I've heard indicates that as the
 9 water in North Lake rises it actually flows into that
 10 east/west stream and it has to get above the berm
 11 that has been created by ice push at the eastern
 12 extent of that -- the confluence of that stream and
 13 North Lake. And as the water level rises, gets over
 14 the berm, it flow into that stream channel, flows
 15 west into the north and south lobes of the large
 16 wetland complex and fills those up. As the lake
 17 level then recedes, water may start to flow back
 18 eastward again toward the lake, but may be prevented
 19 by that ice heave at the shoreline of North Lake.
 20 The ordinary high water mark on North Lake -- it may
 21 be that the water doesn't get into that stream
 22 channel until it exceeds the ordinary high water mark
 23 on North Lake.
 24 Q So would that be circumstances you discussed earlier
 25 where it would actually be the high water mark?

LEGAL VIDEO SERVICES
 (608) 279-5295 Prairie du Sac WI
 34

1 ALJ BOLDT: No, I don't think so.
 2 MS. CORRELL: You called these guys
 3 adversely and I thought you -- okay.
 4 ALJ BOLDT: Exhibit 200 -- I assume there's
 5 no objection if that's the application of
 6 jurisdictional --
 7 MR. GLEISNER: No, Your Honor.
 8 ALJ BOLDT: Then 200 is received.
 9 A Exhibit 203 is a document -- it's a Manual Code
 10 numbered 3565.1. Its subject matter is Department
 11 projects located in or adjacent to navigable waters.
 12 MR. GLEISNER: What exhibit are we on?
 13 MS. CORRELL: Exhibit 203. I mistakenly
 14 said 202 at first.
 15 MR. GLEISNER: Okay. I have -- is this the
 16 Manual Code approval?
 17 MS. CORRELL: This is the Manual Code
 18 authority document. It's an internal DNR
 19 document labeled Manual Code 3565.1.
 20 MR. GLEISNER: Okay. Is the subject
 21 Department projects located in or adjacent to
 22 navigable waters?
 23 MS. CORRELL: Yes, that's correct, sir.
 24 MR. GLEISNER: Thank you, Counsel. Okay.
 25 I've got it. Thank you.

LEGAL VIDEO SERVICES
 (608) 279-5295 Prairie du Sac WI
 36

1 Q And could you turn to Exhibit 203, Page 3?
 2 A Okay.
 3 Q And could you identify the date on this predecessor
 4 Manual Code authority?
 5 A It's dated 2/6/91.
 6 Q And for 203, Page 4?
 7 A Okay. That's dated November 24th, 1982.
 8 Q And is that basically the same type of authority for
 9 DNR to internally review Chapter 30, 31,
 10 Section 1.95, NR115 and 116 Admin. Code internally?
 11 A Yes.
 12 Q And could you turn to 203, Page 5?
 13 A Okay.
 14 Q And I'm not sure if I can read what -- who the
 15 Secretary was at that time, but could you identify
 16 what the date was?
 17 A Date is July 23rd, 1980.
 18 MR. MEYER: It's Anthony Earl (phonetic).
 19 MS. CORRELL: Oh.
 20 MS. KAVANAUGH: He's got a history.
 21 MS. CORRELL: I guess I'm showing my age.
 22 Q And could you turn to Exhibit 203, Page 6?
 23 A Okay.
 24 Q And, again, the Secretary's directive and the date of
 25 that Manual Code?

LEGAL VIDEO SERVICES
 (608) 279-5295 Prairie du Sac WI
 37

1 MR. MEYER: Secretary Voight.
 2 MR. GLEISNER: Oh, okay.
 3 MS. KAVANAUGH: Lester Voight.
 4 MS. CORRELL: Oh, please, let's --
 5 ALJ BOLDT: I felt I had to use the
 6 honorary or whatever the term.
 7 Q And Exhibit 203, Page 9, it looks like the same
 8 Secretary's signature?
 9 A Correct. It's again 3565.1, dated August 14th, 1974
 10 in reference to Chapter 30, 31, 115 and 116.
 11 Q And, finally -- not quite finally, sorry. And
 12 Secretary's directive at Exhibit 203, Page 10?
 13 A Again, 3565.1, same chapters and codes, dated
 14 September 3rd, 1970, Secretary Voight.
 15 Q And Exhibit 203, Page 11?
 16 A Again, Manual Code 3565.1, same codes and chapters,
 17 Secretary Voight, August 27th, 1970.
 18 Q And, finally, Page 12 of Exhibit 203?
 19 A Page 12 of 203 is, again, Manual Code 3565.1, dated
 20 August 27th, 1970, again initials LV.
 21 Q And I don't think I gave each of the Secretaries
 22 their proper authority. Turning back to the first
 23 page -- or, I'm sorry -- yeah, the first page, can
 24 you identify the Secretary's directive for
 25 Exhibit 203, Page 1?

LEGAL VIDEO SERVICES
 (608) 279-5295 Prairie du Sac WI
 39

1 A The Secretary's directive is ASE, I assume it's
 2 Anthony Earl, dated August 8th, 1979.
 3 Q And Page 203, Page 7? And, again, this is Manual
 4 Code 3565.1?
 5 A That's correct.
 6 Q For Chapter 30 and 31, as well as NR115 and NR116?
 7 A Correct.
 8 Q And did you already say what the date was for this?
 9 A This is dated November 2nd, 1977, again, ASE,
 10 initials under Secretary's directive.
 11 Q A couple more Manual Code -- Exhibit 203 at Page 8,
 12 Manual Code 3565.1 again?
 13 A Correct.
 14 Q Who's -- I can't read that Secretary's signature.
 15 A May 14th, 1975.
 16 MS. KAVANAUGH: It's probably
 17 Secretary Voight (phonetic). Lester Voight.
 18 THE WITNESS: That's before my time.
 19 MR. MEYER: Your Honor?
 20 ALJ BOLDT: Yes, Secretary Meyer?
 21 MR. MEYER: It was Secretary Voight at that
 22 time.
 23 ALJ BOLDT: Okay. Thank you.
 24 MR. GLEISNER: Secretary Meyer at that
 25 time?

LEGAL VIDEO SERVICES
 (608) 279-5295 Prairie du Sac WI
 38

1 A Initials GEM, George Meyer.
 2 Q Okay. In your 20 years of experience has the Manual
 3 Code process been the approval process for DNR
 4 projects impacting waterways or wetlands?
 5 A Yes.
 6 Q To your knowledge, does DNR consistently still apply
 7 for federal wetland water quality cert permits?
 8 A I believe so.
 9 Q To the extent of your personal knowledge, has there
 10 ever been a challenge to a DNR Manual Code 3565.1
 11 approval?
 12 A Not to my knowledge. We have received public
 13 comments on projects and worked to accommodate those
 14 public comments.
 15 Q So there's been no legal challenge in your 20 years
 16 of experience?
 17 A Not to my knowledge.
 18 Q Going back to the jurisdictional issues, did you
 19 reach an opinion within a reasonable degree of
 20 professional certainty regarding what jurisdiction
 21 DNR should assert for the fill placed for the access
 22 road and impacts resulting from widening that road?
 23 A For fill placed in wetlands it would be a water
 24 quality cert.
 25 Q So you're jumping ahead to what your opinion is?

LEGAL VIDEO SERVICES
 (608) 279-5295 Prairie du Sac WI
 40

1 A Yes, I did and it'd be a water quality cert.
 2 Q Did you reach a decision within a reasonable degree
 3 of professional certainty regarding whether placement
 4 of an ordinary high water mark changes DNR's
 5 decision?
 6 A Yes, I have.
 7 Q And what is that opinion?
 8 A It does not change it.
 9 Q Could you expand that a little bit? It does not
 10 change --
 11 A It does not change the fact that our authority for
 12 the placement of fill in wetlands is under a water
 13 quality certification process.
 14 Q Based on your personal knowledge, how long has DNR
 15 been looking for a public access site on North Lake?
 16 A A long time. I vaguely remember as a young water
 17 resource manager hearing discussions about getting
 18 access at North Lake. It's well over 20
 19 years -- 25 years.
 20 Q And have you been able to attend the entire hearing
 21 to date?
 22 A Today, yes.
 23 Q Oh, I'm sorry, I already asked you this question.
 24 You said you -- previously you said you were able to
 25 attend most of the proceedings in this matter?

LEGAL VIDEO SERVICES
 (608) 279-5295 Prairie du Sac WI
 41

1 he identify where the bed and bank were based on
 2 where your feet were located on the site?
 3 A Yeah, I stood at a location where he said this is the
 4 bank of the stream. It was slightly higher in
 5 elevation than where Attorney Edwina Kavanaugh stood
 6 and identified where she was standing as the bed of
 7 the stream.
 8 Q How far apart were those two locations?
 9 A A couple of feet. Maybe three or four feet -- five
 10 feet maybe.
 11 Q Was there any change in vegetation between the bed
 12 and the bank?
 13 A No.
 14 Q What type of vegetation was present?
 15 A Long grass.
 16 Q Were there any scour marks from the presence of
 17 water?
 18 A No.
 19 Q Was there any hydric vegetation?
 20 A I don't believe so.
 21 Q Was there any indication, based on your extensive
 22 experience in locating navigable waters, that
 23 indicated to you the regular presence of water in
 24 that location?
 25 A No.

LEGAL VIDEO SERVICES
 (608) 279-5295 Prairie du Sac WI
 43

1 A Yes, the previous days I was in the audience for most
 2 of the hearing.
 3 Q And I think you also testified that you did attend
 4 the site visit with all the parties --
 5 A Correct.
 6 Q -- for this proceeding?
 7 A Yes.
 8 Q Were you present when Dr. O'Reilly identified where
 9 the bed and bank of the stream in the -- what's been
 10 referred to as the grove of trees was located?
 11 A Yes.
 12 Q Did you ask him any questions to assist your
 13 understanding of the location of the bed and banks?
 14 A Yes, I asked him to clarify the location. He then
 15 proceeded to show me where the bank -- excuse me,
 16 the -- yeah, the bank of the stream was and the bed.
 17 ALJ BOLDT: And this is on our site visit
 18 that we --
 19 THE WITNESS: This was during our site
 20 visit, yes.
 21 Q How was he identifying it? I mean was there a marker
 22 or what was he using to identify the bed and the
 23 bank?
 24 A It was based solely upon topography.
 25 Q I guess I'm trying to get to a simpler detail. Did

LEGAL VIDEO SERVICES
 (608) 279-5295 Prairie du Sac WI
 42

1 Q Have you reached an opinion within a reasonable
 2 degree of professional certainty regarding whether a
 3 navigable water exists where Dr. O'Reilly indicated a
 4 water existed at that site?
 5 A I have.
 6 Q And what is that opinion?
 7 A There is no stream located there.
 8 Q And could you expand on your analysis of why there is
 9 no stream located there?
 10 A There is no change in vegetation. There is no bed,
 11 meaning it's not devoid of terrestrial vegetation.
 12 There's no bank, meaning there's no scouring or
 13 staining of presence of action of water. Yes, there
 14 is an elevation change, but other than that there's
 15 absolutely no characteristics that would lead you to
 16 believe that there's a stream running in that area.
 17 There's no ordinary high water mark. It's just a
 18 grassed area that has some elevation change.
 19 Q And I believe Dr. O'Reilly also testified that the
 20 stream then flowed towards the wetland complex to the
 21 east from that bed and bank area. Did you
 22 find -- oh, I'm sorry, west. My colleague reminds me
 23 that my --
 24 MS. KAVANAUGH: To the left is west.
 25 MS. CORRELL: Yes, it was west, away from

LEGAL VIDEO SERVICES
 (608) 279-5295 Prairie du Sac WI
 44

1 the lake.
 2 Q Did you find any indicators that would alter your
 3 opinion in that area?
 4 A No. We walked westward from there. There was tall
 5 grass covering all of the soil. There was no
 6 unvegetated areas between where we were and the
 7 wetland to the west. It was all very well-vegetated,
 8 long tall grass, so there was really nothing that
 9 indicated that there was a stream in that vicinity.
 10 Q Okay. Now, I'm switching back to navigability. In
 11 all of your years of experience, have you conducted
 12 any navigability tests?
 13 A Yes.
 14 Q How often have you done so?
 15 A Frequently. As the Aquatic Habitat Coordinator for
 16 the region, I was involved in determining
 17 navigability on probably hundreds of different sites
 18 and reviewing the navigability determinations of
 19 others just as frequently.
 20 Q Would that be the first step that you would conduct
 21 in determining navigability of a water body?
 22 A Yes.
 23 Q What if you had a lake that was listed in the lakes
 24 book or you could determine by aerials?
 25 A Yeah, there's certainly --

LEGAL VIDEO SERVICES
 (608) 279-5295 Prairie du Sac WI
 45

1 navigability in fact where we actually go out and
 2 navigate the waterway. I've been involved in a few
 3 of those in southeast region. That's typically when
 4 they're done, is to show that you can actually
 5 navigate a navigable waterway.
 6 Q Okay. So I think I was a little loose with my terms
 7 earlier and, just to clarify, when you said you had
 8 conducted hundreds of navigability tests, I guess I
 9 meant navigability in fact --
 10 A Okay.
 11 Q -- tests. So would it be fair to say that your
 12 testimony was that you'd been involved in hundreds of
 13 determinations of the presence of navigable waters?
 14 A Yes. Navigability in opinion means you -- well, you
 15 do the field checks, you do the office work, and you
 16 go out, but you don't actually float a watercraft.
 17 You're determining navigability in opinion.
 18 Navigability in fact is when you actually have
 19 someone in a watercraft that navigates the waterway.
 20 Q Okay. And is that a somewhat rare situation when you
 21 would actually conduct a navigability in fact test?
 22 A Yes, those are infrequent. Not uncommon, but not
 23 very frequent.
 24 Q Okay. And why is that again?
 25 A Most of the determinations that staff make, they're

LEGAL VIDEO SERVICES
 (608) 279-5295 Prairie du Sac WI
 47

1 Q Would it be necessary to float a kayak?
 2 A There are certainly things you can rely on in the
 3 office. You can look at the U.S. geological
 4 topographic maps for perennial intermittent
 5 tributaries. You can look at topography, you can
 6 look at soils, you can look at a variety of different
 7 things, air photographs, before you got out in the
 8 field. When you're in the field it boils down to
 9 whether or not you've got bed and bank with an
 10 ordinary high to determine whether or not you've got
 11 a navigable stream there or a navigable waterway.
 12 Q And so if there's a presence of a bed and bank, when
 13 would it be helpful to conduct a navigability test?
 14 A In order -- are you referring to a navigability in
 15 fact or are you --
 16 Q Yes, I'm sorry. In terms of if a field visit
 17 identifies a bed and bank of a watercourse, when
 18 would it be helpful to conduct a navigability in fact
 19 test?
 20 A Usually, a navigability in fact assessment is done
 21 when the client requests it. Frequently, sometimes
 22 these determinations can be contentious and so if we
 23 will determine a navigability in opinion, that is,
 24 without actually floating a watercraft, those may be
 25 challenged and someone may ask us to do a

LEGAL VIDEO SERVICES
 (608) 279-5295 Prairie du Sac WI
 46

1 not challenged, they're accepted for being the
 2 ordinary high.
 3 Q So if I'm understanding it correctly, you're saying
 4 that you would conduct a navigability in fact test in
 5 a circumstance where the owner would not agree that
 6 DNR had jurisdiction on that site?
 7 A Or disputed that it was a navigable waterway and
 8 wanted the Department to prove that it was.
 9 Q Because what are the implications if it is a
 10 navigable waterway?
 11 A There are zoning issues that come into play,
 12 setbacks, those types of things.
 13 MS. CORRELL: I think that's all. Thank
 14 you.
 15 THE WITNESS: You're welcome.
 16 ALJ BOLDT: Thank you.
 17 MR. GLEISNER: Can we take a break before
 18 we cross, Your Honor?
 19 ALJ BOLDT: Well, I was going to ask if
 20 Secretary Meyer has anything.
 21 MR. GLEISNER: Oh, I'm so sorry. I
 22 apologize, Mr. Meyer.
 23 CROSS-EXAMINATION
 24 BY MR. MEYER:
 25 Q Mr. Wakeman, you were asked several questions

LEGAL VIDEO SERVICES
 (608) 279-5295 Prairie du Sac WI
 48

1 regarding the search for public access on North Lake?
 2 A Yes.
 3 Q Has there been an effort in southeastern Wisconsin to
 4 provide more access on the lakes of southeastern
 5 Wisconsin?
 6 A I think southeast --
 7 MR. GLEISNER: Objection, Your Honor,
 8 relevance.
 9 MR. MEYER: I believe it is relevant to the
 10 presence of us being involved in this matter and
 11 the public interest of having a public access on
 12 North Lake.
 13 ALJ BOLDT: Okay. On that basis,
 14 overruled.
 15 A Southeast Region has been very active in seeking
 16 public access on waterways in the State. Southeast
 17 Region has about 40 percent of the State's
 18 population. There's a huge demand for outdoor
 19 recreation in the area, lake streams, rivers,
 20 wetlands, and I think the Department has been very
 21 active in seeking public access to lakes.
 22 Q Has it been successful in doing so?
 23 A I believe it has.
 24 Q Has there been support from groups and citizens in
 25 southeastern Wisconsin for this program of trying to

LEGAL VIDEO SERVICES
 (608) 279-5295 Prairie du Sac WI
 49

1 they need to go through in this particular case. If
 2 there's a Department project in and around water,
 3 this helps Department staff know exactly what they
 4 need to do in order to comply with the Department's
 5 policies and meet the intent of the administrative
 6 codes and natural resource chapters.
 7 Q And why is it signed by Secretaries?
 8 A It's a must do, not a should do. The Secretary is
 9 supportive of this process and wants to make sure
 10 staff understand that it's something that -- the way
 11 we're going to operate.
 12 Q Would it be fair to say it sort of sets the
 13 boundaries?
 14 A Yes.
 15 Q Does it also delegate authorities?
 16 A Yes, it does. It identifies who should be doing
 17 what. In this particular case, there's property
 18 managers identified, district water management
 19 supervisors identified in the Manual Code.
 20 Q Okay. There has been -- it has been testified to
 21 extensively and, in fact, heard testimony, another
 22 decision relative to public access on North Lake
 23 within the last couple years, hasn't there been?
 24 A Yes.
 25 Q And what decision was that -- what location was that

LEGAL VIDEO SERVICES
 (608) 279-5295 Prairie du Sac WI
 51

1 provide public access on lakes in southeastern
 2 Wisconsin?
 3 A Yes.
 4 Q Would that support have come from hunting and fishing
 5 organizations?
 6 A Yes.
 7 Q To your knowledge, would that have included
 8 organizations such as the Waukesha County
 9 Conservation Alliance?
 10 A Yes.
 11 Q What about state-wide organizations such as the
 12 Wisconsin Wildlife Federation?
 13 A Absolutely.
 14 Q To your knowledge, has there been support of such
 15 organizations for public access on to North Lake of
 16 those organizations?
 17 A Yes.
 18 Q There were a series of questions -- we went through
 19 the history of Secretaries of the Department of
 20 Natural Resources, I believe it was Exhibit
 21 Number 203, and the various Manual Codes. What is a
 22 Manual Code?
 23 A A Manual Code is essentially the way in which the
 24 Department will operate or implement the statutes and
 25 codes. It helps staff to understand the process that

LEGAL VIDEO SERVICES
 (608) 279-5295 Prairie du Sac WI
 50

1 decision relevant to?
 2 A I believe you're referring to the location on
 3 State Highway 83.
 4 Q Okay. Now, that wasn't a DNR project, was it?
 5 A No.
 6 Q Okay. So who was the applicant, if you can recall?
 7 A I believe it was the North Lake Management District.
 8 Q Okay. And were they applying formally for permits at
 9 that time?
 10 A I believe so.
 11 Q Are there similar Manual Codes that delegate from the
 12 Secretary to the region the authority to make
 13 decisions for private applicants as well as
 14 Department projects? How do you gain your authority
 15 in the region to make decisions of that nature, is
 16 maybe a better way?
 17 A We are -- we follow the statutes and codes, but I'm
 18 not sure that the Secretary gives us the authority to
 19 do that. Maybe I'm not understanding the question
 20 correctly.
 21 Q Can we refer to Exhibit Number 202?
 22 MR. MEYER: Is this in evidence, Your
 23 Honor?
 24 ALJ BOLDT: Not yet.
 25 MS. CORRELL: I think I may have also

LEGAL VIDEO SERVICES
 (608) 279-5295 Prairie du Sac WI
 52

1 forgotten to move 203.
 2 ALJ BOLDT: Any objection to --
 3 MR. GLEISNER: No objection.
 4 ALJ BOLDT: -- either 202 or 203? 202 and
 5 203 are received.
 6 MR. MEYER: 202 is also -- so it's in
 7 evidence?
 8 ALJ BOLDT: We've just received it now.
 9 MR. MEYER: Thank you.
 10 Q Mr. Wakeman, can you tell me what Exhibit 202,
 11 Pages 1, 2 and 3 are?
 12 A Yeah, they're copies of Manual Code 3506.1 which is
 13 entitled Permit And/Or Approval Procedure,
 14 Chapter 30, 31, (Physical Alterations to Navigable
 15 Waters).
 16 Q And if you go down the left column of the first page,
 17 it refers to District Director. What is -- and then
 18 that appears also on Pages 2 and 3. What does that
 19 refer to in context to this Manual Code? What
 20 is -- why is the District Director mentioned there?
 21 A The District Director is identified as the individual
 22 that will conduct initial screenings of applications
 23 for Chapter 30 and 31.
 24 Q And then on Page 2, what's the authority there for
 25 District Director?

LEGAL VIDEO SERVICES
 (608) 279-5295 Prairie du Sac WI
 53

1 MR. GLEISNER: K-U-C-H-L-E-R, Your Honor.
 2 ALJ BOLDT: Thank you.
 3 Q And just so it's clear for the record, Counsel, that
 4 decision which was made in the region was made
 5 pursuant to Manual Code -- your authority to make
 6 such decision for the Department was pursuant to
 7 Manual Code 3506.1?
 8 A That's correct.
 9 Q Okay. On behalf of the Secretary?
 10 A Yes.
 11 MR. MEYER: No further questions of this
 12 witness at this time.
 13 ALJ BOLDT: Okay.
 14 MR. GLEISNER: Now may we take a break,
 15 Your Honor.
 16 ALJ BOLDT: Sure. Let's go off the record.
 17 (Recess taken)
 18 ALJ BOLDT: Okay. We're back on the
 19 record. Ready to go with the cross-examination
 20 of Mr. Wakeman?
 21 MR. GLEISNER: We are, Your Honor. We have
 22 a point to make first. We objected as to
 23 relevancy and now a matter has been put on the
 24 record that we need to address and we'll address
 25 it with rebuttal witnesses, in all probability,

LEGAL VIDEO SERVICES
 (608) 279-5295 Prairie du Sac WI
 55

1 A There the authority refers to notice of appeal rights
 2 pursuant to Sections 227.42, 227.52 and 227.53 and
 3 Wisconsin Stats. 227.48(2).
 4 Q Can you read Paragraph 8 of the second page?
 5 A "After consultation with appropriate area, district
 6 and bureau staff prepares and issues permit approval
 7 or denial. The decision shall contain appropriate
 8 notice of appeals pursuant to Sections 227.42,
 9 227.52, 227.53, Wisconsin Stats., in accordance with
 10 227.48(2), Wisconsin Stats.
 11 Q When the decision was made on this alternative site
 12 that you've testified to, the decision was made by
 13 the region, was it made pursuant to that Manual Code?
 14 A I believe -- which site are you referring to?
 15 Q The Highway 83 site.
 16 A No. Oh, I'm sorry, yes, yes.
 17 Q Well, let's make sure it's clear on the record.
 18 A That's correct yes, it would have been.
 19 Q Okay.
 20 MR. GLEISNER: Clarification, Counsel?
 21 MR. MEYER: You surely can.
 22 MR. GLEISNER: Highway 83, we're referring
 23 to the Kuchler site?
 24 MR. MEYER: Yes, the Kuchler site off
 25 Highway 83 at Lake Street.

LEGAL VIDEO SERVICES
 (608) 279-5295 Prairie du Sac WI
 54

1 Mr. (inaudible) and Mr. Jerry Hein (phonetic).
 2 A point has been made about the Kuchler site and
 3 a suggestion has been made on the record that we
 4 are objecting to the Krause site because of the
 5 fact that we believe it is somehow a
 6 continuation of an alleged 25-year effort to
 7 prevent access to North Lake. We'll start now
 8 with cross-examination of Mr. Wakeman and go
 9 from there.
 10 CROSS-EXAMINATION
 11 BY MR. GLEISNER:
 12 Q First of all, let's start --
 13 ALJ BOLDT: Yeah, and my silence doesn't
 14 mean that I'm --
 15 MR. GLEISNER: Oh, no, I apologize, Your
 16 Honor.
 17 ALJ BOLDT: -- (inaudible) ruling on any
 18 rebuttal --
 19 MR. GLEISNER: No, no, no, no.
 20 ALJ BOLDT: -- efforts or -- you know,
 21 and --
 22 MR. GLEISNER: This is going to be where
 23 our cross-examination is going.
 24 ALJ BOLDT: -- I'm sure Counsel reserves
 25 the right to object as well.

LEGAL VIDEO SERVICES
 (608) 279-5295 Prairie du Sac WI
 56

1 MS. CORRELL: Yeah, and I would. This has
2 been a very lengthy hearing for what should have
3 been a very limited issue and DNR would
4 strenuously object to further delay and
5 additional witnesses that have not already been
6 presented. Each party was given one day and you
7 were to select the lay witnesses that were
8 necessary to prove your case. It's your burden
9 of proof. We do not need any additional days
10 and DNR will reserve its two days that it has
11 here.

12 ALJ BOLDT: Well, I mean -- yeah, I
13 mean -- go ahead Secretary -- Mr. Meyer.

14 MR. MEYER: Your Honor, I don't believe the
15 record reflects, based on any questions I have
16 heard or answers thereto, that there has been
17 any statement relative to the position of the
18 North Lake District or any other party to this
19 matter in opposition to public access on
20 North Lake so I would argue strenuously against
21 rebuttal witnesses to that. I surely did not
22 hear any such testimony, nor was I trying to
23 elicit such testimony.

24 ALJ BOLDT: I didn't hear that there was
25 some big conspiracy to keep out public access

LEGAL VIDEO SERVICES
(608) 279-5295 Prairie du Sac WI
57

1 A I believe that's true.
2 Q And was that turned down by Mr. Kuchler or by people
3 on North Lake?
4 A I don't know the history of -- or the details of the
5 attempted purchase so I really can't honestly say.
6 Q Did the Corey (phonetic) Oil site that you
7 mentioned -- actually, you said Murphy Oil, but did
8 you mean Corey Oil?

9 A That's probably correct.

10 Q That was permitted for public access in 1991,
11 correct?

12 A I honestly don't know.

13 Q Is it permitted now for public access?

14 A I don't know.

15 Q Do you disagree that sometimes 10 to 15 fishermen at
16 a time have access to North Lake via Corey Oil?

17 A I have no knowledge of that.

18 Q Do you disagree with it? Okay.

19 A Sorry.

20 Q Are you aware of how much the DNR was -- or had to
21 pay in order to acquire the Krause property?

22 MS. CORRELL: Objection, relevance.

23 MR. GLEISNER: It goes to motivation, Your
24 Honor. They -- we believe that the value of the
25 property, if it was --

LEGAL VIDEO SERVICES
(608) 279-5295 Prairie du Sac WI
59

1 either in any of the testimony I've heard so far
2 so --

3 MR. GLEISNER: You will allow us latitude
4 on cross at this point?

5 ALJ BOLDT: With this witness?

6 MR. GLEISNER: Yes.

7 ALJ BOLDT: Sure. And we are going to
8 complete the hearing tomorrow so if you have
9 somebody else, they better be here tomorrow.
10 And we'll apply the case law --

11 MS. CORRELL: If there's time at the end of
12 the day, but we're going to reserve our time.

13 ALJ BOLDT: Okay. All right.

14 MR. GLEISNER: Thank you, Your Honor.

15 ALJ BOLDT: Go ahead then.

16 MR. GLEISNER: Thank you, Judge.

17 Q You testified there is access available across the
18 lake at a place called the Kuchler site, is that
19 correct?

20 A There's access to North Lake at the -- I believe it's
21 called the Murphy Oil site off of 83 and there is a
22 site, although I don't know of its availability, at
23 the old Kuchler property.

24 Q Is it true that the DNR attempted to buy the Kuchler
25 site in the early '90s?

LEGAL VIDEO SERVICES
(608) 279-5295 Prairie du Sac WI
58

1 MS. KAVANAUGH: Motivation is irrelevant.
2 MS. CORRELL: Objection, motivation is not
3 the issue. It's a regulatory case.

4 MR. GLEISNER: -- higher than it should
5 have been would --

6 ALJ BOLDT: Okay. We need to just talk one
7 at a time. Right now, Mr. Gleisner has the --

8 MR. GLEISNER: Thank you, Your Honor. We
9 believe that the value of the property is twice
10 the fair market value and that's why they're
11 insisting on going ahead with the Krause
12 property as opposed to the Kuchler property.

13 MS. CORRELL: My objection to relevance
14 still stands. This is a contested case hearing
15 regarding approvals for Chapter 30-type approval
16 and water quality certification approval. It
17 was supposed to be limited to navigation or
18 navigable waters and you're bringing in
19 motivation. That is not relevant.

20 ALJ BOLDT: Yeah, the objection is
21 sustained. There's no standards that I
22 referenced at the opening of the hearing that
23 have anything to do with either property values
24 or motivation, other than public access as a
25 motivating -- you know, and part of the

LEGAL VIDEO SERVICES
(608) 279-5295 Prairie du Sac WI
60

1 balancing of the public interest.
 2 MR. GLEISNER: Thank you, Your Honor.
 3 Thank you, Judge.
 4 Q Do you agree that there have been negotiations going
 5 on for some time to obtain public access with the
 6 North Lake Management District?
 7 A I agree.
 8 Q And how many years would you say that has been going
 9 on?
 10 A I would say at least 20, 25 years perhaps.
 11 Q Okay. Mr. Wakeman, you testified the MC3565.1 Manual
 12 Code here has never been challenged before, is that
 13 correct?
 14 A To my knowledge, that's correct.
 15 Q That isn't to suggest that a Manual Code is
 16 infallible, however, correct?
 17 MS. CORRELL: Objection, calls for a legal
 18 conclusion.
 19 ALJ BOLDT: Overruled. I think it's fair
 20 cross.
 21 MR. GLEISNER: Thank you, Your Honor.
 22 A Are you saying it can be challenged?
 23 Q It can be challenged and could there be a possibility
 24 that it wouldn't be done correctly?
 25 A I honestly don't know.

LEGAL VIDEO SERVICES
 (608) 279-5295 Prairie du Sac WI
 61

1 the DNR, acknowledges the fact that it is bound by
 2 the standards in Chapter 30 -- although it is not
 3 necessarily bound by the mandate, it acknowledges
 4 it's bound by the standards, is that correct?
 5 A It is consistent with the standards of those statutes
 6 and codes, correct.
 7 Q Going back -- and I don't mean to -- we're going to
 8 go back to the white book in a moment, but I'm going
 9 to go to Exhibit 203 that you were testifying to a
 10 moment ago and ask you to take a look at Exhibit 203,
 11 Page 1.
 12 A Yes.
 13 Q And it says, "All Department projects" -- I'm reading
 14 now from the second full paragraph under the reason
 15 for change. "All Department projects for Chapter 30
 16 and 31 and NR103 through 118 Admin. Code would apply
 17 if built by a private individual must receive
 18 approval of the district office prior to construction
 19 decisions will be based on the standards and the
 20 appropriate statutes and administrative rules." So,
 21 in other words, the agency, pursuant to the
 22 directives of the director -- or, sorry, the
 23 Secretary, does recognize that it has to comply with
 24 the statutes as well as the Administrative Code
 25 provisions in force?

LEGAL VIDEO SERVICES
 (608) 279-5295 Prairie du Sac WI
 63

1 Q Okay. Let's take a look at Exhibit --
 2 MR. GLEISNER: In the white book, Your
 3 Honor.
 4 Q Let's take a look at Exhibit 011 -- or 001 which is
 5 the actual Manual Code approval that was granted
 6 here.
 7 MS. KAVANAUGH: I'm sorry, which exhibit,
 8 sir?
 9 MR. GLEISNER: It's Exhibit --
 10 MS. CORRELL: RRNA --
 11 MR. GLEISNER: RRNA001-001.
 12 MS. KAVANAUGH: Thank you.
 13 A Okay. I have it.
 14 Q Okay. Thank you very much. Now, we asked you this
 15 before at your deposition and so I guess it's
 16 important to get this on the record. At what point
 17 does this Manual Code approval discuss or talk about
 18 Chapter 30 approval?
 19 A In the paragraph under sponsor it talks about the
 20 project has been reviewed and found to be consistent
 21 with the standards of Chapter 30, 281 and Wisconsin
 22 Stats. and Chapters 102, 103, 150, 151, 216, 299,
 23 320, 329 and 341 of the Wisconsin Administrative
 24 Code.
 25 Q And so that means, in other words, that the agency,

LEGAL VIDEO SERVICES
 (608) 279-5295 Prairie du Sac WI
 62

1 A Yes.
 2 MS. CORRELL: Objection --
 3 MS. KAVANAUGH: Calls for a legal --
 4 MS. CORRELL: -- you called for a legal
 5 conclusion in your question. You may want to be
 6 more precise.
 7 MR. GLEISNER: I don't think that
 8 it's -- Your Honor, I don't think we called for
 9 a legal conclusion. We just followed-up on the
 10 testimony that he gave earlier with regard to
 11 203.
 12 ALJ BOLDT: And when you were answering,
 13 were you answering in the context of your duties
 14 as a regulator rather than giving a formal legal
 15 opinion of the Department?
 16 THE WITNESS: Yes.
 17 ALJ BOLDT: Okay. With that, it's fine.
 18 MR. GLEISNER: Thank you, Your Honor,
 19 that's much better phrased than I did.
 20 Q Mr. Wakeman, is there any finding of fact in
 21 Exhibit 1 that deals with a Chapter 30 issue?
 22 A You said Exhibit 1.
 23 Q Exhibit 1 in the white book, sir. I'm sorry, I
 24 apologize.
 25 MS. KAVANAUGH: 001-001?

LEGAL VIDEO SERVICES
 (608) 279-5295 Prairie du Sac WI
 64

1 MR. GLEISNER: Yeah.
2 A Could you restate the question? Sorry.
3 Q Maybe we can do it this way. I direct your attention
4 to Finding of Fact Number 1 in Exhibit 1-002. Do you
5 see that Finding of Fact?
6 A Yes.
7 Q And is that in fact a statement that the DNR
8 acknowledges that it has a responsibility to comply
9 with the standards of Chapter 30 for a portion of the
10 boat launch at Krause?
11 MS. CORRELL: I apologize, where are you?
12 MR. GLEISNER: I'm on 001-002 --
13 MS. CORRELL: You said Finding of Fact 1?
14 MR. GLEISNER: Right, Finding of Facts
15 Number 1.
16 MR. HARBECK: Bill, it's not 001, it's 1.
17 MR. GLEISNER: It's Exhibit 1 of the RRNA,
18 Counsel, in the white book.
19 MS. CORRELL: Okay.
20 MR. MEYER: Counsel, could you repeat the
21 question, please?
22 MR. GLEISNER: Certainly, I'll be very
23 happy to, Counsel.
24 Q Finding of Fact Number 1, is that based on the
25 Department's efforts to comply with Section 30.12 of

LEGAL VIDEO SERVICES
(608) 279-5295 Prairie du Sac WI
65

1 placement of four culverts to be placed under the
2 access road leading to the launch.
3 Q And that would require a Section 30.12 permit, is
4 that correct?
5 A Chapter 30.12, yes.
6 Q And what is the significance of the statement that
7 the finding of fact states that you are to fill up to
8 .16 acres of wetland for the construction of a public
9 boat launch on North Lake?
10 A It means that placement of fill in wetlands will
11 occur as a result of the construction of this
12 project.
13 Q What is that fill subject to?
14 A We would review it under NR103.
15 Q Now, I would like to take a look or have you take a
16 look at Finding of Fact Number 5 on that same page,
17 Exhibit 1-002. Do you see it, sir?
18 A Yes.
19 Q And that fill is the same .16 that is referenced in
20 Finding of Fact Number 1, is that correct?
21 A I assume so.
22 Q So a Chapter 30 permit has been granted for the boat
23 launch itself into North Lake, is that correct?
24 A I believe so.
25 MS. KAVANAUGH: I guess I would object.

LEGAL VIDEO SERVICES
(608) 279-5295 Prairie du Sac WI
67

1 the Wisconsin Statutes?
2 MS. KAVANAUGH: The question is vague, I
3 guess. I object.
4 MR. MEYER: I'd object on your vagueness.
5 Counsel, what do you mean by comply?
6 MR. GLEISNER: Well, let me do it this way.
7 Q What is the basis for Finding of Fact 1, if you know,
8 Mr. Wakeman?
9 A Well, the Finding of Fact states that the Department
10 of Natural Resources has submitted materials under
11 its internal approval process, Manual Code 3565.1, to
12 obtain approval to grade more, install boat ramp,
13 outfall structures, culverts, for the boat launch.
14 So as it relates to 3565.1, it then refers back to
15 Chapter 30, 31, and all the other administrative
16 codes.
17 Q And what's the significance of 10,000 square feet,
18 Mr. Wakeman?
19 A That's the limit -- that's the threshold that, if
20 exceeded, would require a grading permit.
21 Q Under Section 30.19?
22 A I believe that's grading, Chapter 30.19.
23 Q And what's the significance of the four culverts that
24 is referenced in Finding of Fact 1?
25 A I believe the current proposal identifies the

LEGAL VIDEO SERVICES
(608) 279-5295 Prairie du Sac WI
66

1 The permit speaks for itself. Mr. Wakeman isn't
2 the permit writer. If he wants to cross
3 Andy Hudak who is the permit writer and the
4 regulatory person who made the decision --
5 ALJ BOLDT: I think he already did.
6 MS. CORRELL: Yeah, that's the other thing.
7 You called both of these witnesses adversely at
8 the start of the hearing and we're -- this is
9 duplicative.
10 MR. GLEISNER: I did not call Mr. -- no,
11 I've only called Mr. Hudak adversely.
12 MS. KAVANAUGH: Yeah, no, I don't think he
13 called him.
14 MS. CORRELL: Oh, okay. Well, again, he's
15 not the permit drafter and you've asked all
16 these questions.
17 MS. KAVANAUGH: So he can speculate to the
18 best of his recollection, but he didn't draft
19 the permit.
20 MR. GLEISNER: Well --
21 MS. KAVANAUGH: Actually, it's not -- the
22 approval I mean.
23 MR. GLEISNER: But he has testified at
24 length, Your Honor, about the fact that there's
25 a difference between a Chapter 30 permit and an

LEGAL VIDEO SERVICES
(608) 279-5295 Prairie du Sac WI
68

1 NR103 water quality certification and I'm simply
 2 trying to understand -- at the site that he's
 3 testified that he's been to a number of times
 4 and he's testified at deposition that he's
 5 reviewed this Manual Code authorization in the
 6 past. I'm simply trying to understand where the
 7 Chapter 30 begins and where the NR103 begins.
 8 ALJ BOLDT: Why don't you ask him that?
 9 MR. GLEISNER: Okay.
 10 Q At the site where does the Chapter 30 apply?
 11 A Chapter 30 applied to the grading on the bank, to the
 12 installation of the boat ramp structure, to the two
 13 outfall structures and to the four culverts. The
 14 wetland fill will be the water quality cert
 15 process -- the NR103.
 16 Q Do you have a Chapter 30 permit for any of the fill
 17 on the roadway -- on the access road?
 18 A I don't know if that was included in the grading or
 19 not.
 20 ALJ BOLDT: Would that depend on how far
 21 away from the stream it was -- I mean, or from
 22 the lake?
 23 THE WITNESS: Well, the wetland lobes, the
 24 north and south lobe, are navigable so --
 25 ALJ BOLDT: Okay.

LEGAL VIDEO SERVICES
 (608) 279-5295 Prairie du Sac WI
 69

1 MS. CORRELL: My understanding is it's not
 2 being utilized -- or it was not to be utilized.
 3 That's why I did not receive a copy of it and it
 4 was not going to be an exhibit?
 5 MR. GLEISNER: I never said that.
 6 MS. CORRELL: Mr. Harbeck, you were present
 7 as well. You said you would not utilize it and
 8 I therefore did not receive a copy of it.
 9 MR. HARBECK: No, the question was do we
 10 intend to introduce it as an exhibit.
 11 MS. CORRELL: Right.
 12 MR. HARBECK: My answer was no, we don't
 13 need to introduce it as an exhibit for
 14 impeachment purposes. It's not necessary for
 15 you to introduce a deposition as an exhibit.
 16 MR. GLEISNER: That was the only issue. We
 17 did not intend, nor do we have to, introduce a
 18 deposition as an exhibit.
 19 MS. CORRELL: I understand the rules of
 20 evidence, thank you, Gleisner.
 21 MR. GLEISNER: Uh-huh.
 22 ALJ BOLDT: And you're welcome to come and
 23 look at it as well, Counsel.
 24 MS. CORRELL: I think Bob can read it
 25 perfectly well.

LEGAL VIDEO SERVICES
 (608) 279-5295 Prairie du Sac WI
 71

1 THE WITNESS: -- not necessarily.
 2 ALJ BOLDT: Right. Okay. Thank you.
 3 MR. GLEISNER: I don't want to have to go
 4 through the bother of opening up the original
 5 exhibit or having you open it up, Your Honor.
 6 I'd like to just read to him from an exchange
 7 that he had at his deposition and see if he can
 8 confirm or not what was said.
 9 Q At Page 72 of your deposition were you asked the
 10 following question --
 11 MS. KAVANAUGH: And that is an exhibit,
 12 sir? Could you tell us --
 13 MR. GLEISNER: The deposition, I'm sorry,
 14 is the October 17th, 2011 deposition.
 15 MS. CORRELL: Well, we don't have an
 16 exhibit for that.
 17 MS. KAVANAUGH: The exhibit number. I
 18 think you entered all the exhibits, either you
 19 or Don, into evidence.
 20 MS. CORRELL: This is the second deposition
 21 and there's no exhibit.
 22 ALJ BOLDT: Yeah, I don't have that one.
 23 Why don't -- I think, in fairness, you should
 24 put it in front of the witness.
 25 MR. GLEISNER: Very good, Your Honor.

LEGAL VIDEO SERVICES
 (608) 279-5295 Prairie du Sac WI
 70

1 Q I'm going to reference your --
 2 MR. GLEISNER: Sorry, Your Honor, are we
 3 okay to --
 4 ALJ BOLDT: He's not on the right -- Page
 5 72, did you say?
 6 MR. GLEISNER: 72, yeah. I apologize.
 7 Q Are you there, sir?
 8 A Yes.
 9 Q At Line 19 you were asked the following question and
 10 at Line 25 you gave the following answer. Question,
 11 "The purpose of my question was to confirm with
 12 respect to the activities where you're going to be
 13 filling in the navigable wetlands in connection with
 14 widening or creating this access road. There's no
 15 Chapter 30 equivalent permit, there's only a water
 16 quality certification?" Answer, "Correct." Did you
 17 get that question and give that answer, sir?
 18 A Yes.
 19 MR. GLEISNER: I'm going to put with, of
 20 course, permission, with Your Honor's
 21 permission, three statutes in front of
 22 Mr. Wakeman. We're not going to be asking him
 23 legal questions, we're going to be asking him,
 24 as a regulator, some questions about those and
 25 there are going to be questions, I would submit

LEGAL VIDEO SERVICES
 (608) 279-5295 Prairie du Sac WI
 72

1 in advance, Your Honor -- yeah, would you get
2 that? Thank you very much, Mr. Wakeman. There
3 are going to be some questions that relate to
4 his duties as a regulator.
5 Q In Section 30.10(2) it states, "Except as provided in
6 sub. (4)(c) and (d) all streams, sloughs, bayous and
7 marsh outlets which are navigable in fact for any
8 purpose whatsoever are declared navigable to the
9 extent that no dam, bridge or other obstruction shall
10 be made in or over it the same." Has the Department
11 defined slough?
12 A Not to my knowledge.
13 Q Has the Department defined bayou?
14 A Not to my knowledge.
15 Q Has the Department defined marsh outlet?
16 A I'm not sure.
17 Q I'm now going to ask you to -- I think the next
18 document that you have in front of you is
19 Section 30.12, is that correct?
20 A Yes.
21 Q Let me just -- you don't have to change up, but with
22 regard to 30.10, the so-called navigable wetlands --
23 MR. GLEISNER: Would you turn that document
24 around right there? This has been moved and
25 introduced before, Your Honor. I'm just going

LEGAL VIDEO SERVICES
(608) 279-5295 Prairie du Sac WI
73

1 permit has been issued under this section or
2 authorization has been granted by the legislature, no
3 person may do any of the following: (a) deposit any
4 material or place any structure upon the bed of any
5 navigable water where no bulkhead line has been
6 established." I would ask you this, sir. I'm
7 referencing your attention just to material. How do
8 you define material as a regulator?
9 A I don't believe it is defined anywhere that I'm aware
10 of.
11 Q Is there any reason that you are aware of that
12 material could not encompass fill?
13 A No.
14 Q You believe that material could refer to fill?
15 A Yes.
16 MS. CORRELL: I'm going to object for the
17 same reason I objected at the deposition.
18 You're calling for a legal opinion regarding how
19 the Department has implemented a particular
20 approval process for 30 years, not as applied to
21 this particular approval in this case. It is a
22 legal argument and it is not relevant to this
23 proceeding.
24 MR. GLEISNER: May I please -- may it
25 please, Your Honor? Your Honor, we are not

LEGAL VIDEO SERVICES
(608) 279-5295 Prairie du Sac WI
75

1 to put this up here for the purposes of making a
2 clean record. This was introduced previously as
3 Exhibit 2-002 in this proceeding, Your Honor.
4 Q Do you recall that there's both a stipulation and
5 testimony that the two green circles, the area
6 encompassed by the two green circles, are what is
7 called navigable wetland, correct?
8 A Yes.
9 Q And referencing 30-10, is there any reason to -- are
10 you aware of any reason that the navigable wetlands
11 wouldn't be a slough, bayou or marsh outlet?
12 A Not having a definition of those, it's hard to say
13 yes or no.
14 Q But this was a -- I understand. I understand.
15 Section 30.10 is a statute, is that correct?
16 A Yes.
17 Q Now, referencing Section 30.12 of the statutes, I am
18 going to ask you, as a regulator, are you aware of
19 whether or not a bulkhead line has been established
20 with regard to any of the area that is referenced on
21 Exhibit 2-002 at any point?
22 A I don't believe so.
23 Q Therefore, I'm going to refer your attention to
24 Section 30.12(1)(a) and I'm going to read this to
25 you, if I may. "Unless an individual or a general

LEGAL VIDEO SERVICES
(608) 279-5295 Prairie du Sac WI
74

1 attempting him -- attempting to get Mr. Wakeman
2 to give any legal opinion at all. He has been
3 called here as a jurisdictional witness. We
4 just want to understand what he knows about
5 issues such as material. We're not trying to
6 get -- if he -- you know, it's what the
7 Department knows and what he knows.
8 MS. CORRELL: But what's
9 the -- Mr. Gleisner, what's the purpose of your
10 testimony? When are you going to get to the
11 point?
12 MR. HARBECK: You don't have to answer
13 that.
14 MR. GLEISNER: I don't have to -- I'm
15 getting there.
16 MS. CORRELL: You don't have to get to the
17 point? There's one issue, navigability, and
18 when are you going to get there?
19 MR. GLEISNER: Your Honor, I'm --
20 MS. CORRELL: Please tie it in at some
21 point.
22 ALJ BOLDT: Okay, yeah.
23 MR. GLEISNER: This is proper
24 cross-examination I think, Your Honor.
25 ALJ BOLDT: The objection is overruled. I

LEGAL VIDEO SERVICES
(608) 279-5295 Prairie du Sac WI
76

1 think it's germane obviously. I don't think
 2 it's calling for a legal opinion.
 3 MR. GLEISNER: Thank you, Your Honor.
 4 Q Did you give an answer, Mr. Wakeman? I think you
 5 did.
 6 A Yes.
 7 Q Now, there's another document in front of you called
 8 NR103. Do you have that in front of you?
 9 A Yes, I do.
 10 Q In your capacity as a regulator and only in your
 11 capacity as a regulator, are you familiar with the
 12 terms of NR103?
 13 A Generally, yes.
 14 Q Is there anyplace in NR103 that you are aware of that
 15 it says that Chapter 30 doesn't apply to navigable
 16 wetlands?
 17 A Not to my knowledge.
 18 Q Is there anyplace in NR103 that you are aware of that
 19 navigable wetlands are referenced?
 20 A Without having to read the whole document again and
 21 refresh my memory, I don't -- I don't believe so.
 22 Q Is there anyplace that you are aware of that
 23 navigable wetlands are defined by the Department?
 24 A The term navigable is defined and the term wetland is
 25 defined. I can't recall a definition that

LEGAL VIDEO SERVICES
 (608) 279-5295 Prairie du Sac WI

77

1 clarification to Your Honor's question --
 2 ALJ BOLDT: Sure.
 3 MR. GLEISNER: -- meaning no criticism of
 4 it.
 5 A There are some situations where if a project is water
 6 dependent that filling of the wetland in that
 7 vicinity is considered differently than if it's a
 8 non-water dependent activity such as a boat ramp. A
 9 boat ramp, by its nature, is dependent upon water
 10 being there, otherwise it's not a boat ramp, versus
 11 say a driveway which is a non-water dependent
 12 activity. So reviewing a NR103 application for a
 13 boat ramp that would cause some fill to be placed in
 14 a wetland would be viewed differently than, say, a
 15 driveway.
 16 Q Okay. Thank you very much, Mr. Wakeman. Let me ask
 17 you this. Is there ever a situation where the
 18 removal or grading of soil near a river, stream,
 19 creek or lake would require a permit?
 20 MR. GLEISNER: Strike that. That wasn't
 21 clear enough. I apologize. I apologize.
 22 Q A permit under Chapter 30 -- I apologize.
 23 MS. CORRELL: Could you rephrase the whole
 24 question because I think I missed it. I'm
 25 sorry.

LEGAL VIDEO SERVICES
 (608) 279-5295 Prairie du Sac WI

79

1 specifically identifies or defines a navigable
 2 wetland. It would have to be pieced together.
 3 Q Thank you for that, Mr. Wakeman. So then just so
 4 that I understand, I -- you have testified that
 5 navigable is defined in one place and wetland is
 6 defined in one place, but a term, quote, navigable
 7 wetlands, close quote, has not been defined, is that
 8 a fair statement?
 9 A I can't recall an instance where it is. It may be, I
 10 just don't -- can't think of it.
 11 MR. GLEISNER: May I have just a moment?
 12 ALJ BOLDT: Yeah, sure. While we're on
 13 this point, can I ask you, interpreting NR103 is
 14 there also a section that talks about water
 15 dependency of a project that references wetlands
 16 and surface waters --
 17 THE WITNESS: Yes.
 18 ALJ BOLDT: And is that the type of
 19 situation where you might have navigable
 20 wetlands treated under NR103 when you make the
 21 determination as to whether or not a project is
 22 a water dependent project?
 23 THE WITNESS: Yes.
 24 Q And why, Mr. Wakeman?
 25 MR. GLEISNER: And I'm asking for

LEGAL VIDEO SERVICES
 (608) 279-5295 Prairie du Sac WI

78

1 MR. GLEISNER: I'll be happy to, Counsel.
 2 It was inartfully phrased. I certainly will.
 3 Q Is there ever a situation where the grading,
 4 disturbing or removal of soil near a river, stream,
 5 creek or lake would require a Chapter 30 permit?
 6 A Yes.
 7 Q Can you describe that?
 8 A Grading on the bank of a navigable waterway requires
 9 a permit if it exceeds 10,000 square feet and I have,
 10 unfortunately, forgotten the -- how that is measured
 11 from the bank. I used to know that. I've forgotten
 12 how to measure it now. It used to be an unbroken
 13 slope. Now I think it's a distance. It's amazing
 14 what two years of inactivity in water reg and zoning
 15 will do for one's soul but, generally, if you're
 16 grading on the bank of a navigable waterway you'll
 17 need a Chapter 30 permit.
 18 THE WITNESS: Sorry, Judge.
 19 MR. GLEISNER: It went to the Judge.
 20 MR. HARBECK: Oh, I'm sorry, I'm missing
 21 exhibit books.
 22 ALJ BOLDT: If it's in Chapter 30, I've got
 23 a full set here.
 24 MR. GLEISNER: This is not in the exhibit
 25 books. This is not in the exhibit books.

LEGAL VIDEO SERVICES
 (608) 279-5295 Prairie du Sac WI

80

1 Q I am producing a new exhibit and it's Exhibit 47.
 2 MS. CORRELL: Can I see a copy perhaps?
 3 MR. GLEISNER: Certainly. I would have
 4 done this myself, Your Honor, but I'd have to
 5 pole vault the table here so I'm asking
 6 Mr. Harbeck to help.
 7 ALJ BOLDT: How did we get to 47 from 35?
 8 MR. GLEISNER: We had other exhibits, Your
 9 Honor, that we may not need because of the way
 10 in which the direct has gone in.
 11 ALJ BOLDT: Okay.
 12 MR. GLEISNER: So that is how, Your Honor,
 13 if that's okay with you.
 14 ALJ BOLDT: Okay, sure. I just want to
 15 make sure we're on the same page.
 16 MR. GLEISNER: I understand, Judge. That's
 17 good policy.
 18 Q Have you had a chance to look at that?
 19 A Yes.
 20 Q Does that refresh your recollection of when you might
 21 need a Chapter 30 permit to fill, remove, grade or
 22 disturb soil near a river, stream, creek or lake?
 23 A Yes.
 24 MR. GLEISNER: And I'm going to identify
 25 for the record, Your Honor, that this is a

LEGAL VIDEO SERVICES
 (608) 279-5295 Prairie du Sac WI
 81

1 entitled Permits Required. I'm going to read this
 2 first part to you -- well, I'll call it up so you can
 3 see it so you can follow along with me.
 4 ALJ BOLDT: I've got a copy up here anyway,
 5 Counsel.
 6 MR. GLEISNER: Thank you very much, Your
 7 Honor.
 8 Q "Unless an individual or general permit has been
 9 issued under this section or authorization", then it
 10 reads, "has been granted by the legislature, no
 11 person may do any of the following: (a) construct,
 12 dredge or enlarge any artificial water body that
 13 connects with a navigable water body and construct,
 14 dredge or enlarge any part of an artificial water
 15 body that is located within 500 feet of the ordinary
 16 high water mark of an existing navigable waterway
 17 including a storm water management pond that does not
 18 discharge into a navigable waterway except as a
 19 result of storm events and (c) grade or remove
 20 topsoil from the bank of any navigable waterway where
 21 the area exposed by the grading or removal will
 22 exceed 10,000 square feet." My question -- close
 23 quote. My question for you is this, Mr. Wakeman.
 24 The grading permit that you have testified was issued
 25 here, how far in from the ordinary high water mark of

LEGAL VIDEO SERVICES
 (608) 279-5295 Prairie du Sac WI
 83

1 document that is taken from the website of the
 2 DNR entitled Waterway and Wetland Permits
 3 Grading and it is located specifically
 4 at -- thank you, at
 5 DNR.wi.gov/waterways/construction/grading.html.
 6 I'm saying that for the record, Your Honor.
 7 Q Now, it says -- here's a question, obviously, from a
 8 private citizen that says, "I want to grade, fill,
 9 remove or disturb soil near a river, stream, creek or
 10 lake. Do I need to obtain a permit?" And the DNR
 11 gives the answer, "Generally, if you are grading or
 12 removing more than 10,000 square feet on the bank of
 13 a navigable or public waterway, you will need to
 14 obtain a grading permit." And if you go to Page 2
 15 which is 47-002 it says, "Laws, applicable statutes
 16 and codes," and it references Section 30.19, do you
 17 see that, sir?
 18 A Yes.
 19 Q Now, I understand completely that you don't have the
 20 statute books committed to memory. Even as a
 21 regulator, that would be asking a bit much. But I'm
 22 going to call up, I have called up, Section 30.19 to
 23 assist you on the TV here and I'm going to page down
 24 into that. At the bottom of that page in a section
 25 which is specifically identified as 30.19(1)(g), it's

LEGAL VIDEO SERVICES
 (608) 279-5295 Prairie du Sac WI
 82

1 North Lake does that grading permit cover?
 2 A I don't know.
 3 Q So you don't know whether or not a grading permit was
 4 required for or is required for the area where the
 5 football field-sized parking lot is to be located?
 6 MS. KAVANAUGH: I'd object to the
 7 characterization of it as a football field.
 8 MS. CORRELL: Objection. Yes, it's
 9 inflammatory, sir. Can you just ask a question?
 10 Q You're familiar with the parking lot, are you not,
 11 that's supposed to be built?
 12 A The proposed parking, yes.
 13 Q Okay.
 14 MR. GLEISNER: I don't want you to be in
 15 the dark, Counsel, so I am going to -- bear with
 16 me a moment, Your Honor.
 17 Q I'm going to call up what has been previously marked
 18 and introduced as Exhibit 2-006 and on this
 19 exhibit --
 20 MR. GLEISNER: Yes, Your Honor.
 21 ALJ BOLDT: Is that this one?
 22 MR. GLEISNER: That's this one yes, Your
 23 Honor. And actually, Your Honor, it's the other
 24 one. That's a blow -- that's a --
 25 Q Now --

LEGAL VIDEO SERVICES
 (608) 279-5295 Prairie du Sac WI
 84

1 MR. HARBECK: Are you going to mark it?
 2 ALJ BOLDT: Yeah, we'll mark it. Go
 3 ahead -- 206.
 4 MR. GLEISNER: Thank you. Actually, I
 5 think 2-006 has been marked and admitted.
 6 ALJ BOLDT: Oh, okay.
 7 MR. GLEISNER: Is that correct, Tim?
 8 UNIDENTIFIED SPEAKER: He just wants to
 9 mark the big one.
 10 MR. GLEISNER: Oh, I understand.
 11 Certainly, Your Honor.
 12 ALJ BOLDT: Just so that the record is
 13 clear what we're talking about.
 14 MR. GLEISNER: Absolutely, Your Honor.
 15 ALJ BOLDT: There's two that look exactly
 16 alike.
 17 MR. GLEISNER: Yes, Your Honor. And I'll
 18 be happy to leave it here too.
 19 ALJ BOLDT: I think we should.
 20 MR. GLEISNER: No problem. My pleasure.
 21 Q I'm going to blow this up for a moment here,
 22 Mr. Wakeman. Take a look. I'm zooming in. Ignore
 23 the green, ignore the blue. This is a drawing that I
 24 will represent -- C116 is from late 2010 drawings
 25 that were produced to us and purport to be the final

LEGAL VIDEO SERVICES
 (608) 279-5295 Prairie du Sac WI
 85

1 Q Let's get back to 30.19. If you know, is that entire
 2 parking lot within 500 feet of North Lake?
 3 A I don't know specifically.
 4 Q And you want to get up and take a look at that,
 5 please do, Mr. Wakeman.
 6 A I was just looking for a scale.
 7 ALJ BOLDT: We've got an engineer's scale
 8 if you want it.
 9 MS. CORRELL: So if you're going to go
 10 through all of these questions now, you're not
 11 going to need to duplicate them for Mr. Hudak,
 12 is that correct, who actually reviewed the
 13 permit?
 14 MR. GLEISNER: I don't know, I don't know.
 15 It depends on what he testifies to, Counsel.
 16 MS. CORRELL: And I'm also objecting to the
 17 relevance of this. Are we calculating the size
 18 of the parking lot and why is that relevant in
 19 terms of what's being regulated here?
 20 MR. GLEISNER: Cross-examination, Your
 21 Honor, at this point. I will state, since Your
 22 Honor looks concerned, we are attempting to
 23 establish that the parking lot is largely within
 24 500 feet of North Lake.
 25 MS. KAVANAUGH: So are you attempting to

LEGAL VIDEO SERVICES
 (608) 279-5295 Prairie du Sac WI
 87

1 drawings for the project on the Krause site.
 2 MS. CORRELL: Objection just as to your
 3 characterization of the testimony.
 4 MR. GLEISNER: I'm sorry?
 5 MS. CORRELL: Objection as to the
 6 characterization of the testimony.
 7 MR. GLEISNER: I haven't characterized any
 8 testimony.
 9 MS. CORRELL: I don't think there's been
 10 any testimony indicating that those are final
 11 designs.
 12 MR. GLEISNER: I think there was, but we
 13 were kind of handicapped because there's not a
 14 record here so --
 15 MS. CORRELL: Yep, just go forward.
 16 MR. GLEISNER: Okay. Thank you, Counsel.
 17 Q To your knowledge, Mr. Wakeman, as a regulator, is
 18 that a reasonable depiction of the parking lot that
 19 is going to be placed at the eastern end of the
 20 Krause property -- the Krause site?
 21 A Yes.
 22 Q And that parking lot purports to go 300 feet inland
 23 from end to end from southeast to northwest, do
 24 you -- are you aware of that?
 25 A No, I wasn't.

LEGAL VIDEO SERVICES
 (608) 279-5295 Prairie du Sac WI
 86

1 assert that the parking lot is subject to -- or
 2 would be subject to 30.19 jurisdiction if it was
 3 a private person applying?
 4 MR. GLEISNER: I am.
 5 MS. KAVANAUGH: Okay.
 6 MS. CORRELL: And we'll stipulate to that.
 7 Let's move on.
 8 MR. GLEISNER: No, I --
 9 ALJ BOLDT: Well, if there's a stipulation
 10 then what's the dispute?
 11 MR. GLEISNER: There's no dispute, Your
 12 Honor, I just am a little taken aback by
 13 Counsel. I'm attempting to make a point with
 14 regard to 30.19 and 30.19 appears to apply
 15 regardless of whether it's wetland or whether
 16 it's a hard surface area and I want to ask the
 17 question now, after we've gone over this, Your
 18 Honor.
 19 Q Was a permit granted for -- under 30.19 for the
 20 dredging?
 21 MR. HARBECK: The dredging?
 22 MS. KAVANAUGH: We'll stipulate --
 23 MS. CORRELL: He meant grading. We
 24 understood --
 25 MR. GLEISNER: Grading. I meant grading.

LEGAL VIDEO SERVICES
 (608) 279-5295 Prairie du Sac WI
 88

1 I meant grading.
 2 MS. CORRELL: Yeah.
 3 MS. KAVANAUGH: We'll stipulate that 30.19
 4 applies to grading on the bank --
 5 MR. GLEISNER: Of course, that's not what
 6 I'm asking, Your Honor.
 7 MS. KAVANAUGH: -- if DNR was subject to
 8 30.19 permits as opposed to just deciding to
 9 comply with the substantive requirements.
 10 MR. GLEISNER: I appreciate the help of
 11 Counsel, Your Honor, however what I was
 12 attempting to get at was the question I have
 13 just posed.
 14 Q And that question is, was a 30.19 permit for grading
 15 granted to the DNR or obtained by the DNR? That's
 16 all I'm asking right now, with respect to the parking
 17 lot, of course.
 18 A Yes.
 19 Q And where would that permit be located?
 20 A It's the Manual Code approval.
 21 Q Okay. Thank you for that. Now, let's go back to the
 22 Manual Code approval. We can call up Exhibit 1 again
 23 in the white book. Where is that located,
 24 Mr. Wakeman?
 25 A Under Findings of Fact it identifies --

LEGAL VIDEO SERVICES
 (608) 279-5295 Prairie du Sac WI
 89

1 to --
 2 ALJ BOLDT: Okay.
 3 MR. GLEISNER: You already have a copy of
 4 this, Counsel, and it will become obvious in a
 5 moment. Could you just take that up to the
 6 Judge? It's Exhibit 43. And, Counsel, it is
 7 the document that you produced by email.
 8 MS. CORRELL: Uh-huh.
 9 ALJ BOLDT: Let me also -- I forgot,
 10 frankly. Was the hearing request denied with
 11 respect to the grading permit?
 12 MS. CORRELL: The only issue -- and
 13 I -- there's been a lot of discussion about
 14 this, but the only issue that DNR granted the
 15 hearing, the intent was whether or not there
 16 were navigable waters that were present that DNR
 17 did not review. We specifically denied the
 18 hearing, I believe, for the Chapter 30
 19 activities for structures and grading, as well
 20 as very clearly the wetland issue, which
 21 everyone stipulated would not be an issue in
 22 this case. Everything has been brought in
 23 through the --
 24 MR. GLEISNER: If it please, Your Honor.
 25 MS. CORRELL: -- backdoor.

LEGAL VIDEO SERVICES
 (608) 279-5295 Prairie du Sac WI
 91

1 Q What number, Mr. Wakeman?
 2 A Number 1.
 3 Q Thank you.
 4 A "Wisconsin Department of Natural Resources has
 5 submitted materials under the internal approval
 6 process, Manual Code 3565.1, to obtain approval to
 7 grade more than 10,000 square feet on the bank of
 8 North Lake."
 9 Q And does it define in that Manual Code how far in
 10 it's going to go from North Lake?
 11 A No.
 12 Q Thank you.
 13 ALJ BOLDT: Is there anything else, any
 14 other condition, that you would want in a Manual
 15 Code approval relative to what might otherwise
 16 be in a Chapter 30.19 grading permit? I mean is
 17 there any condition that would typically be in a
 18 Chapter 30.19 permit that's not in the Manual
 19 Code approval?
 20 THE WITNESS: I'm not sure I'm the one to
 21 answer that question.
 22 ALJ BOLDT: Okay, sure, right. Okay.
 23 Thank you. That's a fair point.
 24 MR. GLEISNER: Your Honor, I'm going to
 25 produce another exhibit this time and I'm going

LEGAL VIDEO SERVICES
 (608) 279-5295 Prairie du Sac WI
 90

1 MR. GLEISNER: Your Honor, the DNR has
 2 suggested that -- unless I'm misunderstanding
 3 the testimony. The DNR has suggested that an
 4 area that is within a wetland, if it happens to
 5 be navigable, is subject to NR103 and not to
 6 Chapter 30.
 7 MS. KAVANAUGH: Is regulated under 103.
 8 MR. GLEISNER: And so what we're attempting
 9 to establish here is that Chapter 30 does apply
 10 to an area that is within the wetland location
 11 and we're doing that first with regard to
 12 Chapter 30.19. We're going to attempt to
 13 establish more in that regard, but the point is
 14 that -- the point is that Chapter 30 does apply
 15 and --
 16 ALJ BOLDT: But that issue was specifically
 17 denied at a hearing as part of your petition in
 18 terms of any issues related to the Chapter
 19 30.19.
 20 MR. GLEISNER: Well, the point though is,
 21 Your Honor, that navigability is what we're here
 22 about today and navigability is going to be, we
 23 submit, subject to Chapter 30 and what -- that
 24 would be our position.
 25 MS. CORRELL: Your position is not legally

LEGAL VIDEO SERVICES
 (608) 279-5295 Prairie du Sac WI
 92

1 how the DNR has regulated these features on the
2 landscape for 30 years. You're contesting the
3 legal -- if we have jurisdiction under both
4 30.12 and under water quality certification, you
5 are suggesting that DNR cannot incorporate and
6 that the wetland standards are more difficult to
7 meet such that issuance of a water quality
8 certification is not sufficient. You're saying
9 that we haven't met the public interest test.
10 That is not the case and that is not your
11 decision to make. We implement --

12 MR. GLEISNER: Oh, I'm getting there,
13 Counsel. I'm getting there.

14 MS. CORRELL: We implement -- if I could
15 finish my sentence? We implement, not you, so
16 it doesn't apply in this particular case for you
17 to change the entire law as it's been utilized
18 for the last 30 years by both the federal
19 government and the state government.

20 MR. GLEISNER: I disagree.

21 MS. CORRELL: I haven't seen one shred of
22 evidence in this case to date that the Army
23 Corps of Engineers regulates differently than we
24 do or that the State regulates differently in
25 wetlands.

LEGAL VIDEO SERVICES
(608) 279-5295 Prairie du Sac WI
93

1 We're not going to pursue that any further at
2 this point. We think we've got enough testimony
3 in to make the point we wanted to make in
4 briefing so we'll move on, if that's okay with
5 Your Honor.

6 ALJ BOLDT: It's quite okay.

7 MR. GLEISNER: Thank you, Your Honor.

8 Q I would like to call up -- were you present for
9 the -- you weren't present for the deposition of
10 Mr. Wood, were you?

11 A No.

12 Q Okay. While I'm looking for what I want to call up,
13 would you explain -- you referenced in your
14 deposition what has been put before you as Exhibit 43
15 and you testified that that was something that
16 impacted your decision to treat -- as I understood
17 it, to treat wetlands under NR103 differently than
18 navigable waters under Chapter 30 and this is a
19 document that your counsel produced. Can you explain
20 to us what the relevance of that is?

21 A Yes, this was a document, it's dated December
22 29th, 2006, from Todd Ames (phonetic), who was then
23 the assistant -- what was he back in '06? He might
24 have been the Water Division Administrator, I
25 believe. And it establishes state-wide procedures to

LEGAL VIDEO SERVICES
(608) 279-5295 Prairie du Sac WI
95

1 MR. HARBECK: Your Honor, this is the same
2 argument we've had now. This is probably the
3 seventh time in terms of the jurisdictional.
4 We'll make our arguments in the briefs. Our
5 point is that Chapter 30 applies to this
6 activity that relates to filling in of navigable
7 wetlands. Their position is legally it doesn't.
8 That's an argument we can brief and we'll
9 discuss. He's just getting relevant testimony
10 out with respect to that.

11 ALJ BOLDT: And so why is he asking about
12 Chapter 30.19 grading permits when that was
13 specifically denied as a hearing -- an
14 opportunity for review of that as a hearing?

15 MR. GLEISNER: Your Honor, we're attempting
16 to establish that Chapter 30 does apply where
17 there are wetlands.

18 MR. HARBECK: Can you give us five minutes
19 and maybe we can shorten this?

20 ALJ BOLDT: Yeah, we're not tracking here.

21 MR. HARBECK: Okay. Let's go talk.

22 ALJ BOLDT: Let's go off the record.

23 (Recess taken)

24 ALJ BOLDT: We're back on the record.

25 MR. GLEISNER: Thank you, Your Honor.

LEGAL VIDEO SERVICES
(608) 279-5295 Prairie du Sac WI
94

1 be used beginning January 2nd of '07 to maintain data
2 on waterway and wetland permit and approvals,
3 including exemption determinations. It was prepared
4 by the Waterway and Wetland Policy and Management
5 Team, of which I was a member of at this time, to aid
6 in the appropriate data entry and classification of
7 Chapter 30 and water quality certs. At that time, we
8 were going through -- the Department was going
9 through, I believe, an infusion of new staff. We
10 were migrating away from regional log-in of
11 applications and we thought it would be good, from a
12 consistency standpoint, to develop a document that
13 would assist new staff that was coming into the
14 program and being asked to log-in applications to
15 produce a document that would assist them in knowing
16 how to appropriately log-in application materials.

17 Q So it's basically an educational tool, is that
18 correct?

19 A Yes.

20 Q I'm going to show you now, I've found what I was
21 looking for, Exhibit 4030B in the white book, if you
22 could get that in front of you. I've got it up on
23 the screen.

24 MS. CORRELL: 403 what?

25 MR. GLEISNER: I'm sorry?

LEGAL VIDEO SERVICES
(608) 279-5295 Prairie du Sac WI
96

1 MS. KAVANAUGH: 4-0 what?
 2 MR. GLEISNER: 4- --
 3 MR. HARBECK: It looks like it's 14 though.
 4 MR. GLEISNER: Oh, wait a minute.
 5 MS. KAVANAUGH: It's sideways so I
 6 can't --
 7 MS. CORRELL: Oh, it's 14.0 --
 8 MR. GLEISNER: Yeah, I think it's --
 9 MS. KAVANAUGH: 14.
 10 MR. GLEISNER: I think it's 4, Your Honor,
 11 actually. It is a document that was produced by
 12 the DNR, Your Honor, in response to our
 13 interrogatories and it is located in Exhibit 4
 14 following --
 15 ALJ BOLDT: Yeah, I don't think it made it
 16 into our book.
 17 MS. CORRELL: Maybe it is 14.
 18 MR. GLEISNER: That was one that you
 19 emailed to us, Counsel. You emailed that to us,
 20 Counsel. Judge, that was emailed to us.
 21 MS. KAVANAUGH: I'm just trying to find it.
 22 It's probably under 30. 43030.
 23 MR. GLEISNER: That's why it didn't make it
 24 into our white book because --
 25 MS. KAVANAUGH: 030 so it's 030B.

LEGAL VIDEO SERVICES
 (608) 279-5295 Prairie du Sac WI
 97

1 MR. GLEISNER: Yeah, let's go off the
 2 record for a minute.
 3 MR. HARBECK: If that's okay with the
 4 Judge.
 5 ALJ BOLDT: That's fine.
 6 (Recess taken)
 7 ALJ BOLDT: Okay. We're back on the
 8 record. Off the record -- are you convinced
 9 that Exhibit 212, Page 2, is the same as what
 10 you're driving at here, Counsel?
 11 MR. GLEISNER: It's exactly the same, Your
 12 Honor. Thank you very much.
 13 ALJ BOLDT: Okay.
 14 Q That was an exhibit that was used by Mr. Wood at his
 15 deposition, Mr. Wakeman. I'm going to represent to
 16 you that the green arrows -- there's a green arrow
 17 that's starting out approximately where the parking
 18 lot will be, runs southwest in broken lines, turns
 19 northeast and ends up coming out on what has been
 20 identified several times here as an unnamed stream.
 21 Do you see that green arrow?
 22 A Yes.
 23 MS. CORRELL: I'm just going to object to
 24 the classification of the water body, but go
 25 forward.

LEGAL VIDEO SERVICES
 (608) 279-5295 Prairie du Sac WI
 99

1 MR. GLEISNER: Right. Didn't I say that?
 2 MS. KAVANAUGH: That's why -- no.
 3 MR. GLEISNER: Sorry. 4-030B.
 4 MS. KAVANAUGH: Okay, we have it.
 5 ALJ BOLDT: We don't have it.
 6 MS. CORRELL: I think that we haven't
 7 located it.
 8 MS. KAVANAUGH: Oh, I thought we did.
 9 MS. CORRELL: It's not in here. It's 4030
 10 and then 4031.
 11 MS. KAVANAUGH: It's not a 3, it's 30 and
 12 it's not here.
 13 MS. CORRELL: Yeah, it's not here either
 14 so --
 15 MS. KAVANAUGH: I don't know.
 16 MS. CORRELL: -- can you just use a
 17 different exhibit or can you just --
 18 MR. GLEISNER: Well, we need this exhibit.
 19 ALJ BOLDT: We'll need a copy of it in the
 20 record.
 21 MR. GLEISNER: But it should be in the
 22 record, Your Honor. As I recall, DNR counsel
 23 emailed it to us. It was a --
 24 MR. HARBECK: Should we go off the record
 25 for a second?

LEGAL VIDEO SERVICES
 (608) 279-5295 Prairie du Sac WI
 98

1 MR. GLEISNER: You mean it's not
 2 North Lake?
 3 MR. GALLO: A main stream.
 4 MR. GLEISNER: Or main stream? Okay. I
 5 think that's what it's been testified as being,
 6 but anyway.
 7 Q You do see that green arrow, correct?
 8 A Yes, I do.
 9 Q Mr. Wood testified, as I believe the record will show
 10 and his deposition will show, that that's the
 11 direction of the flow of water from where the parking
 12 lot will be out to North Lake. Do you have any
 13 reason to doubt that?
 14 A None.
 15 Q Is there any reason to believe that the area where
 16 the green arrow begins is not the location of the
 17 parking lot -- or the approximate location?
 18 A Well, the green dot shows it at the very northwest
 19 corner of the adjacent property owners and I -- this
 20 is speculation and I don't think the parking lot
 21 would be that close to the property line.
 22 Q So, in other words, the area that is marked with a
 23 green arrow is a flowage? Is it a flowage?
 24 A No.
 25 Q What would you characterize it as?

LEGAL VIDEO SERVICES
 (608) 279-5295 Prairie du Sac WI
 100

1 MS. KAVANAUGH: It seems to me you should
2 address that question to Mr. Wood, you know,
3 since he prepared the document unless you can
4 show Mr. Wakeman conferred with him. Otherwise,
5 I'd object to foundation and --

6 MR. GLEISNER: We are only concerned, Your
7 Honor, about getting this done as quickly as
8 possible so we don't want to have to wait for
9 Mr. Wood to testify and then recall Mr. Wakeman.
10 If Mr. Wakeman knows, it would be helpful.

11 ALJ BOLDT: Can you answer it?

12 A Based on the field visit that we were all at, I can
13 say that there was a general slope, land surface
14 slope, in that direction.

15 Q Now, you heard the testimony of Dr. O'Reilly, did you
16 not? You were present for most of that or all of
17 that?

18 A Most of it I was.

19 Q Did you hear Dr. O'Reilly say that water will flow
20 both ways over that green arrow from North Lake and
21 to North Lake?

22 A I don't recall him stating that the dual direction
23 went as far as the green dot.

24 Q Do you recall Mr. Peters' testimony -- Tom Peters?

25 A Refresh my memory. Is he the adjacent property

LEGAL VIDEO SERVICES
(608) 279-5295 Prairie du Sac WI
101

1 A I believe the term is navigability in opinion versus
2 navigability in fact.

3 Q Now, I'm going to ask you to take a look at
4 Exhibit 1B-001 in the white book and I'll represent
5 that that is from the document entitled Chapter 30
6 Waterway and Wetland Handbook Navigability. Did you
7 find that, sir?

8 A Yes.

9 Q At the bottom it says that there is a procedure for
10 determining navigability and that procedure is by
11 utilizing a navigability test via floating a canoe or
12 a duck skiff, is that correct?

13 A Yes.

14 Q Does that procedure -- in this document 1B,
15 Exhibit 1B, is there any alternative procedure
16 referenced?

17 A On the next page there are other sources of
18 navigability determinations.

19 Q But those other sources do not involve tests, do
20 they, is that correct?

21 A It refers to previous determinations so in the
22 procedures and in the field it identifies the best
23 evidence of navigability is whether a lake or stream
24 is navigable in fact and then it talks about the test
25 of navigability and using a float, canoe or

LEGAL VIDEO SERVICES
(608) 279-5295 Prairie du Sac WI
103

1 owner?

2 Q He's the northern adjacent property owner. He's
3 north -- just north of the stream.

4 A Yes, I do recall his testimony.

5 MR. GLEISNER: Hopefully, I'll have better
6 luck with this one, Your Honor.

7 Q Exhibit 35-002 is one of the exhibits Mr. Peters
8 testified to. Do you recall that?

9 A Yes, I do.

10 Q Do you recall that he testified that the water in
11 that area is where the parking lot will be -- where
12 the proposed parking lot will be?

13 A Vaguely.

14 Q Do you recall him saying that he had paddled a canoe
15 across that water?

16 A I don't recall him saying he paddled.

17 Q Okay. And you've testified before that the test for
18 navigability in fact is by means of paddling a canoe
19 or a -- some kind of a floatation device, is that
20 correct?

21 A That is included in the test, correct.

22 Q And I believe you testified previously in your first
23 deposition that you thought there was another method
24 for determining navigability and that was by
25 observation, is that correct?

LEGAL VIDEO SERVICES
(608) 279-5295 Prairie du Sac WI
102

1 duck skiff in a stream.

2 Q Does it say anything about navigability by
3 observation or opinion?

4 A No, it does not.

5 Q And going forward in that same document to
6 Exhibit 1B-016, we've asked you about this in two of
7 your depositions. I'd like to get it on the record
8 before the Judge. That is a memo that was issued
9 back in 1987 and you've testified on two occasions
10 that you believe that's a correct statement of the
11 law. It says, quote, "The real issue to be
12 considered when evaluating lakes and ponds, including
13 wetlands, is whether they are navigable in fact by
14 the above criteria. Although one might argue that
15 there should be some minimum cutoff size for a body
16 of water, to be considered navigable any body of
17 water capable of floating canoe is valuable and
18 should be considered navigable. To support this
19 conclusion, consider the resource value associated
20 with even a tiny spring pond or isolated wetland
21 pond. The fishery and/or wildlife values and
22 preserving these values is in the public interest
23 even if they are not readily accessible to the
24 public", close quote. You've read that before,
25 correct?

LEGAL VIDEO SERVICES
(608) 279-5295 Prairie du Sac WI
104

1 A Yes.
 2 Q And you stated before that you agree with that
 3 statement?
 4 A Yes.
 5 Q Is this a federal wetland, the area, in other words,
 6 encompassed --
 7 MR. GLEISNER: Strike that.
 8 Q The area where the boat launch is going to be located
 9 is in fact part of a federal wetland, is that
 10 correct?
 11 A Can you be a little more specific?
 12 Q Did you have to get permission from the Army Corps of
 13 Engineers to proceed with the building of the project
 14 that you propose for the Krause site?
 15 A Yes.
 16 Q And why was that?
 17 A There are federal wetlands on the property and there
 18 was a proposal to fill a small portion of those
 19 wetlands.
 20 Q And having Exhibit 2-006 in front of you, which has
 21 now been marked, can you go to that board and just
 22 visually show us where those federal wetlands would
 23 be located, if you know?
 24 A I can make some inferences just based on knowledge of
 25 the site, but I don't have the Army Corps'

LEGAL VIDEO SERVICES
 (608) 279-5295 Prairie du Sac WI
 105

1 the one that you already have. This one was
 2 marked. If you want it, you can have it though,
 3 Judge.
 4 ALJ BOLDT: Exhibit 2-002 are you referring
 5 to?
 6 MR. GLEISNER: Uh-huh.
 7 ALJ BOLDT: Did we make any of those marks
 8 on the record?
 9 MR. GLEISNER: We did not.
 10 ALJ BOLDT: Not the blue one either?
 11 MR. GLEISNER: No.
 12 ALJ BOLDT: Okay.
 13 MR. GLEISNER: That was all done in
 14 deposition, Your Honor.
 15 ALJ BOLDT: Okay. Then we don't need it.
 16 Well, done in a deposition that I have?
 17 MR. GLEISNER: That was Mr. Hudak's
 18 deposition. I don't think you have that at this
 19 point, Your Honor. No, you do, Your Honor. No,
 20 you do. You have Mr. Hudak's --
 21 ALJ BOLDT: Okay. Then I want it --
 22 MR. GLEISNER: Then you want it?
 23 ALJ BOLDT: -- if it's referred to in the
 24 deposition. If you've given me the deposition.
 25 MR. GLEISNER: No problem, Judge, no

LEGAL VIDEO SERVICES
 (608) 279-5295 Prairie du Sac WI
 107

1 delineation of where the federal wetlands are.
 2 Generally, they are north and south of the east/west
 3 access road. There may be others, but I know that
 4 those two were -- those were identified as federal.
 5 There may be others.
 6 Q Okay.
 7 MR. GLEISNER: You may remove those two off
 8 our boards, Neal. Thank you very much.
 9 Q I'm going to refer your attention back to what has
 10 been marked previously and accepted into evidence as
 11 2-002.
 12 MR. GLEISNER: By the way, Your Honor, for
 13 the record I will move what you have marked as
 14 an additional 2-006 into evidence.
 15 ALJ BOLDT: Okay. It's received. The
 16 large -- yeah, the large one.
 17 MR. GLEISNER: Okay. The additional -- I
 18 wasn't sure if you were --
 19 ALJ BOLDT: Okay. Yeah, obviously, when we
 20 make marks on the big ones, we need those as
 21 well.
 22 MR. GLEISNER: Sure, of course.
 23 ALJ BOLDT: So I wasn't sure if you were
 24 going to make marks or not and if --
 25 MR. GLEISNER: Actually, that's a copy of

LEGAL VIDEO SERVICES
 (608) 279-5295 Prairie du Sac WI
 106

1 problem.
 2 ALJ BOLDT: Okay.
 3 MR. HARBECK: It's -- 2-002 has been
 4 admitted -- the small one.
 5 ALJ BOLDT: Right, understood.
 6 MS. KAVANAUGH: And I think the deposition
 7 is --
 8 ALJ BOLDT: I mean the marks though you say
 9 were made in the deposition?
 10 MR. GLEISNER: Yes, Your Honor.
 11 ALJ BOLDT: Then I'd like the large one
 12 because --
 13 MR. GLEISNER: You can have it, Judge.
 14 ALJ BOLDT: Okay.
 15 MR. GLEISNER: No problem.
 16 ALJ BOLDT: All right.
 17 Q Now, having reference to Exhibit 2-002, can you show
 18 us where the federal wetlands would be located,
 19 Mr. Wakeman, if you know?
 20 A I believe this and this are identified as federal
 21 wetlands. There may be others.
 22 Q So in other words --
 23 ALJ BOLDT: And when you pointed -- yeah,
 24 okay, go ahead.
 25 MR. GLEISNER: Yes, Your Honor, I'm going

LEGAL VIDEO SERVICES
 (608) 279-5295 Prairie du Sac WI
 108

1 to try and clarify.
 2 Q So, in other words, you were pointing to the two
 3 areas that are circled in green, what's been referred
 4 to as the large green circle to the south of the
 5 proposed access road --
 6 MS. KAVANAUGH: And we've already
 7 stipulated that those are wetlands.
 8 Q -- and the small green circle --
 9 MS. KAVANAUGH: He's just using up our
 10 time.
 11 MR. GLEISNER: Counsel, if I can finish.
 12 I'm just trying to clarify the record.
 13 Q And the small green circle to the north of the access
 14 road? You're testifying that both of those areas are
 15 federal wetland?
 16 A That's my understanding.
 17 MR. GLEISNER: One minute, Your Honor. We
 18 defer to Mr. Gallo at this point, Your Honor.
 19 ALJ BOLDT: Mr. Gallo?
 20 CROSS-EXAMINATION
 21 BY MR. GALLO:
 22 Q I'm going to refer you, Mr. Wakeman, to Exhibit 108
 23 and that -- it's actually 108B.
 24 MS. KAVANAUGH: Can you identify what it
 25 is, Don?

LEGAL VIDEO SERVICES
 (608) 279-5295 Prairie du Sac WI
 109

1 back there too.
 2 MR. GALLO: There were submittals during
 3 the comment period and so they're intact and
 4 this is just --
 5 ALJ BOLDT: Okay. I think we have the
 6 right one.
 7 Q Bob, you were -- you've been in -- just some
 8 foundation questions first. How long have you been
 9 involved in the North Lake evaluation of the Krause
 10 site?
 11 A Certainly '09 -- 2009. There may have been a site
 12 visit before that. Certainly, by 2009 I can be
 13 involved.
 14 Q In your testimony you referred to a couple site
 15 visits where you evaluated the ordinary high water
 16 mark. I believe it was August of '09 and October?
 17 A That's correct.
 18 Q And are you aware of any other site visits assisting
 19 Andy Hudak or other Department staff?
 20 A Yes.
 21 Q Okay. So you're reasonably familiar with the Krause
 22 site?
 23 A Yes.
 24 Q And you made a statement during your
 25 testimony -- this was referring first to Exhibit 200

LEGAL VIDEO SERVICES
 (608) 279-5295 Prairie du Sac WI
 111

1 MR. GALLO: It's a letter dated October
 2 31st --
 3 MS. KAVANAUGH: Okay, 2008.
 4 MR. GALLO: -- to Jim Richie (phonetic).
 5 I'm sorry, 2008.
 6 ALJ BOLDT: 108?
 7 MR. GALLO: 108B.
 8 ALJ BOLDT: Okay. Here we go.
 9 MR. GALLO: It's a letter dated
 10 October 31st, 2008.
 11 ALJ BOLDT: Okay. I think we might have
 12 some -- more than one A and B. I think that's
 13 part of the confusion here.
 14 MR. GALLO: Okay.
 15 MS. CORRELL: Yeah, there's two 108's,
 16 isn't there? It's the first 108B, right?
 17 MR. GALLO: Yes.
 18 ALJ BOLDT: Yeah, we have 108B as being a
 19 diagram, I believe, so --
 20 MR. GALLO: Okay. Let's go back --
 21 ALJ BOLDT: I think this is what you're
 22 referring to, but it's not in our book as 108B.
 23 MR. GALLO: So it's 108B and then I'll walk
 24 you through the --
 25 ALJ BOLDT: And another A and another B

LEGAL VIDEO SERVICES
 (608) 279-5295 Prairie du Sac WI
 110

1 which was the application, the Manual Code
 2 application, and then Exhibit 201 which was the
 3 decision, the Manual Code decision. And you
 4 indicated that during the testimony in this hearing
 5 on the prior dates that you were discussing how the
 6 lake level rises and falls and how that may influence
 7 the drainage system that flows through the Krause
 8 site. And there's some debate as to whether the, I'm
 9 going to refer to this exhibit right up here, the
 10 blue area? You made a statement that there's -- that
 11 drains a considerable area, is that a fair statement?
 12 A No, I was referring to the watershed to the lake, the
 13 amount of land that drains to North Lake as a whole.
 14 Q With regard to Exhibit 108B, are you familiar with
 15 this written comment?
 16 A I don't believe so.
 17 Q Okay.
 18 A Yes, I believe I have seen it before.
 19 Q Have you attended any of the public hearings with
 20 regard to the proposed project?
 21 A Yes.
 22 Q Okay. I want to refer you to Page 9 of 108B. At the
 23 bottom of the page there's a comment with regard to
 24 storm water drainage interference and diversion. And
 25 this comment relates to a figure, actually a map,

LEGAL VIDEO SERVICES
 (608) 279-5295 Prairie du Sac WI
 112

1 that's in the -- in the tabs behind this. It'd be
2 Tab E.

3 MS. CORRELL: Don, I'm going to object.
4 This is a category of your comments with respect
5 to the EA, I believe, that go to the storm water
6 permits?

7 MR. GALLO: That's correct.

8 MS. CORRELL: Are those at issue here? I
9 don't believe they are.

10 MR. GALLO: Just give me a little
11 latitude --

12 MS. CORRELL: Okay.

13 MR. GALLO: -- to connect this up.
14 Q Bob, if I can approach. I'm looking at a figure that
15 shows a green area.

16 A Yeah, I think I have it.

17 Q Oh, do you have it? Okay. Are you familiar with
18 this drainage area at all?

19 A Remotely. Not in any great detail.

20 Q In your evaluation of the 103 jurisdictional issues,
21 did -- are you aware that DNR -- whether or not DNR
22 conducted any flood studies -- floodway studies?

23 A I don't know.

24 MS. KAVANAUGH: And I guess I would object
25 to further questions on this line unless they

LEGAL VIDEO SERVICES
(608) 279-5295 Prairie du Sac WI
113

1 definition of flood flow -- of interfere with
2 flood flow capacity of a stream in -- and that
3 what we do is just require the project to comply
4 with flood plain zoning.

5 MS. CORRELL: Which we are doing in this
6 case. Again, you're asking a lot of questions
7 of a person who did not review the permit.

8 MR. GALLO: Can I respond?

9 ALJ BOLDT: Yeah, sure.

10 MR. GALLO: I'm going to cite to 30.12(1)
11 and this is where permits are required.
12 "Deposit of any material or place any structure
13 upon the bed of a navigable water." We've
14 already established this is a navigable water
15 and any material would be fill. And then --

16 MS. KAVANAUGH: Well, would establish where
17 is a navigable water? Which deposit are you
18 talking about? Where?

19 MR. GALLO: The access roadway --

20 MS. KAVANAUGH: Okay.

21 MR. GALLO: -- into the wetlands which you
22 said you permitted under wetland certification.

23 MS. KAVANAUGH: Okay. In terms of a
24 wetland, that's fine.

25 MR. GALLO: Okay.

LEGAL VIDEO SERVICES
(608) 279-5295 Prairie du Sac WI
115

1 can show why floodway studies have anything to
2 do with the issue of navigability. It seems
3 like they have to do with flood plains only.

4 MR. GALLO: Well, okay. Statute
5 Section 30.12 has the (inaudible) individual
6 permits -- has the three standards. One is
7 a --

8 MS. KAVANAUGH: Flood flow capacity --

9 MS. CORRELL: What structure are you
10 alleging has an issue with respect to flood flow
11 capacity of a stream, Don?

12 MR. GALLO: The fill -- the permitted fill
13 in the wetlands.

14 MS. CORRELL: Fill isn't a structure.

15 MR. GALLO: If you look at 30.12 --

16 MS. KAVANAUGH: And there's nothing to show
17 that flood flow -- that a flood plain study is
18 required or flood flow study to comply with this
19 requirement that a project comply -- meet this
20 standard that it not interfere with the flood
21 flow capacity of a stream. In fact, Judge, you
22 and I had a hearing years ago, (inaudible) for a
23 bridge and I think I've got the quote where
24 Dean Stitgen (phonetic), who was a water
25 resources engineer, testified that there is no

LEGAL VIDEO SERVICES
(608) 279-5295 Prairie du Sac WI
114

1 Q Then 30.12(3m), individual permits, there's three
2 standards, materially obstruct navigation, item one.
3 Item two is would not be detrimental to the public
4 interest and you have stated that you did evaluate
5 the public interest, and I'm just asking, item three,
6 the structure or deposit. Deposit would be the earth
7 and fill, will not materially reduce the flood flow
8 capacity of a stream. Now, there's been testimony,
9 and I believe you sat through, Bob, that with regard
10 to the amount of water that goes through this wetland
11 and in that blue channel. And so I ask the question,
12 are you aware of any flood capacity studies
13 evaluating this wetland fill, Chapter 30 lakebed
14 fill, on this project and you said you were not
15 aware, is that correct?

16 MS. KAVANAUGH: And I guess I'd object.
17 Has he shown foundation? He hasn't shown that
18 flood capacity studies are required for a 30.12
19 permit for anyone else?

20 MR. GALLO: It speaks for itself.

21 MS. KAVANAUGH: Well --

22 MS. CORRELL: No, it doesn't.

23 ALJ BOLDT: Flood flow capacity of a
24 stream, I think it says, right.

25 MR. GALLO: I'm sorry?

LEGAL VIDEO SERVICES
(608) 279-5295 Prairie du Sac WI
116

1 ALJ BOLDT: Flood flow capacity of a
2 stream.
3 MR. GALLO: Of a stream.
4 ALJ BOLDT: Okay. And I know you're
5 arguing that the wetland is a stream or is a
6 navigable waterway. Yeah, I think it's cross, I
7 mean, and you can on redirect address whether
8 it's common to have flood studies -- flood flow
9 capacity studies. Certainly, there are some
10 cases where they do and in my experience it's
11 not every case that has an engineer go out and
12 do a flood flow capacity, but go ahead and pose
13 the question to the witness.
14 MR. GALLO: I just did. I just did.
15 ALJ BOLDT: Can you answer it? Okay. Then
16 the objection is overruled. Go ahead and answer
17 it if you have it in mind.
18 A I'm not aware of any flood flow capacity study that
19 was done. I'd also like to clarify that I was not
20 the one that did the 103 evaluation. It was
21 Mr. Hudak that actually reviewed the materials and
22 made the decision.
23 Q Mr. Wakeman, are you aware of any elevations,
24 pre-Manual Code decision, that were conducted in the
25 north navigable wetlands with regard to lakebed

LEGAL VIDEO SERVICES
(608) 279-5295 Prairie du Sac WI
117

1 MS. KAVANAUGH: You had a photo
2 showing -- the one that Mr. Peters testified
3 about maybe?
4 MR. GLEISNER: The one Mr. Peters testified
5 I believe is 212, Your Honor.
6 MS. CORRELL: I don't believe so. That's
7 one of our exhibits.
8 MR. GLEISNER: Okay.
9 MS. KAVANAUGH: Yeah, 212 is ours.
10 MS. CORRELL: Let me just ask the question.
11 Q There are various photographs in the record that show
12 ponded water on the DNR Krause site. Where there's
13 ponded surface water such as on the lawn, would that
14 create, in and of itself, a water course?
15 A It would not create a navigable waterway. There is
16 diffuse surface flow which we probably have all seen
17 in our backyards during a torrential rain or a heavy
18 snow melt, but it doesn't generate bed and bank and
19 it doesn't create an ordinary high, doesn't create a
20 stream. It just diffuse surface flow.
21 Q And if there's --
22 MR. GLEISNER: Counsel?
23 MS. CORRELL: Excuse me?
24 MR. GLEISNER: I apologize. It was 35-002.
25 I apologize.

LEGAL VIDEO SERVICES
(608) 279-5295 Prairie du Sac WI
119

1 elevation -- conducted by DNR, I'm sorry?
2 A I'm not aware of any.
3 Q Thank you.
4 ALJ BOLDT: Okay. Redirect?
5 REDIRECT EXAMINATION
6 BY MS. CORRELL:
7 Q Bob, you were asked a number of questions where it
8 seemed that Mr. Gleisner would occasionally use the
9 word permit or was the DNR compelled to comply with
10 or required to. I just want to clarify for the
11 record that this is a DNR project and although DNR
12 does comply with the substantive standards of all of
13 the various jurisdictional requirements, it's an
14 internal approval that's the correct process, is it
15 not?
16 A I think we've been using the term permit loosely.
17 Q Okay. I just wanted to clarify that for the record.
18 A Yes.
19 Q You were asked about a photograph.
20 MS. CORRELL: Was it Exhibit 143 that
21 pictured some ponded water, Gleisner? What
22 exhibit was that, that you --
23 MR. GLEISNER: I'm -- I think 212. Is that
24 what you're -- I'm sorry, Counsel, I don't have
25 in mind what you're referring to. I apologize.

LEGAL VIDEO SERVICES
(608) 279-5295 Prairie du Sac WI
118

1 Q And there could also be diffuse surface water on a
2 road. For example, I think there has been testimony
3 by multiple parties that there is oftentimes flood
4 water or storm water that accumulates on Redland
5 Road. Did you hear testimony about that?
6 A Yes, I did.
7 Q And is that diffuse surface water? Would that create
8 a navigable stream that DNR could regulate?
9 A No, it would not.
10 Q So in that respect your opinion is different than
11 Dr. O'Reilly's. I don't want to put words in his
12 mouth, the record will speak for itself, but I
13 believe he testified that it could be a navigable
14 water body?
15 MS. KAVANAUGH: Redland Road.
16 Q Redland Road?
17 A That was my understanding.
18 Q And you would say that DNR would not regulate -- we
19 would not call into jurisdiction a flooded road as a
20 navigable water body?
21 A That's correct.
22 Q And, similarly, we would not call into jurisdiction a
23 flooded backyard?
24 A That's correct.
25 Q And with respect to both of those opinions, would

LEGAL VIDEO SERVICES
(608) 279-5295 Prairie du Sac WI
120

1 your opinion change if you could float a canoe or
 2 kayak in those diffuse surface water accumulations?
 3 A No, it would not.
 4 Q Thank you.
 5 MR. MEYER: Your Honor, could I have one
 6 follow-up?
 7 ALJ BOLDT: Yes sir, Mr. Meyer?
 8 RECCROSS-EXAMINATION
 9 BY MR. MEYER:
 10 MR. MEYER: Along the line of Attorney
 11 Correll (inaudible), Mr. Gleisner could you
 12 bring up -- and it was either 1B or 16 or 18 or
 13 16, that exhibit (inaudible).
 14 MR. GLEISNER: If you could help me a
 15 little more than that, Counsel, I'll be very
 16 happy to do that.
 17 MR. MEYER: (Inaudible) I couldn't tell if
 18 your B was an 8 or not. It was one of these
 19 two.
 20 MR. GLEISNER: I think I know what you
 21 mean. Just a minute, Counsel.
 22 MR. MEYER: (Inaudible).
 23 MR. GLEISNER: No, no, I understand, just
 24 give me a second here.
 25 MR. MEYER: Sure.

LEGAL VIDEO SERVICES
 (608) 279-5295 Prairie du Sac WI
 121

1 A It would have to have bed and bank and an ordinary
 2 high water mark.
 3 Q That's all.
 4 MR. MEYER: Thank you.
 5 MR. GLEISNER: Cross, Your Honor?
 6 ALJ BOLDT: Yes, go ahead.
 7 RECCROSS-EXAMINATION
 8 BY MR. GLEISNER:
 9 Q First of all, with regard to the ordinary high water
 10 mark, are you talking about the ordinary high water
 11 mark of the pond, the wetland, or the lake to which
 12 it is adjacent?
 13 A Are we referring to this paragraph?
 14 Q Which I just -- yes, right.
 15 A If it is a navigable water body it could be any of
 16 those.
 17 Q And if the ordinary high water mark is lower than the
 18 lake, any consequences there? If the ordinary high
 19 water mark of the pond --
 20 MS. KAVANAUGH: Of which one of
 21 (inaudible)?
 22 Q -- of the pond is lower than the lake to which it is
 23 adjacent?
 24 MR. MEYER: Objection, that's assuming --
 25 MS. CORRELL: Is that a question?

LEGAL VIDEO SERVICES
 (608) 279-5295 Prairie du Sac WI
 123

1 MR. GLEISNER: That's it, Counsel?
 2 MR. MEYER: Yes.
 3 Q And I think you brought up this paragraph and
 4 (inaudible). Could you read that for the record
 5 please, Mr. Wakeman?
 6 A "The real issue to be considered when evaluating
 7 lakes and ponds with wetlands is whether they are
 8 navigable in fact by the above criteria. Although
 9 one might argue that there should be some minimum
 10 cutoff size for a body of water to be considered
 11 navigable, any body of water capable of floating a
 12 canoe is valuable and should be considered navigable.
 13 To support this conclusion, consider the resource
 14 value associated with even a tiny spring pond or
 15 isolated wetland pond. They have fishery and/or
 16 wildlife values and preserving these values is in the
 17 public interest, even if they are not readily
 18 accessible to the public."
 19 Q Now, with that as a backdrop, along the line of
 20 questioning by Attorney Correll, (inaudible). Would
 21 there have to be another characteristic besides pure
 22 navigation (inaudible) navigable body of water under
 23 state law subject to regulation under Chapter 30?
 24 A Yes.
 25 Q And what would those characteristics (inaudible)?

LEGAL VIDEO SERVICES
 (608) 279-5295 Prairie du Sac WI
 122

1 MR. MEYER: -- it had an ordinary high
 2 water mark.
 3 MR. GLEISNER: Okay. I guess the point is,
 4 Your Honor, is there a difference if the pond or
 5 the wetland are lower than the ordinary high
 6 water mark of the lake.
 7 Q Do you understand the question?
 8 A I'm trying.
 9 MR. GALLO: And it's connected?
 10 ALJ BOLDT: Is there a difference in terms
 11 of how he would treat it as a regulator, that's
 12 the question?
 13 MR. GLEISNER: Yes, Your Honor, sorry.
 14 That was assumed. I apologize.
 15 A If the pond or the wetland have an ordinary high
 16 water mark they are navigable. If they have bed and
 17 bank and an ordinary high they're going to be
 18 navigable. If they are adjacent to a lake, their
 19 ordinary high water marks may be lower or higher than
 20 the adjacent lake or the same.
 21 Q Do you recall the video of the young lady paddling
 22 through the water near the sign? Do you need to see
 23 that again? Would that help?
 24 A No, I recall.
 25 Q Okay. Was there a bed and bank there?

LEGAL VIDEO SERVICES
 (608) 279-5295 Prairie du Sac WI
 124

1 A If you're referring to the grassed area and the grove
2 of trees --
3 Q No, I'm not. I apologize. I'm referring to when she
4 paddled past the sign.
5 A There would be an ordinary high there, or one that
6 could be drawn to that point.
7 Q You lost me there.
8 A There are situations where it may be difficult to
9 identify an ordinary high adjacent to a water body.
10 In those circumstances, you may take the elevation of
11 a spot where the ordinary high is very clearly
12 defined and draw that elevation across to the point
13 in question.
14 Q I guess what I'm trying to get at is, and I certainly
15 will be happy to bring this back up again because I
16 don't want to put you in a difficult position here,
17 but I guess what I'm trying to get at is where the
18 young girl was paddling and she paddled past the
19 sign, was there or was there not a bed and bank?
20 You've been out to that area so --
21 A There's bed and bank and an ordinary high water mark.
22 Q So that would be navigable water?
23 A Yes.
24 Q Thank you.
25 MR. GLEISNER: One housekeeping issue, Your

LEGAL VIDEO SERVICES
(608) 279-5295 Prairie du Sac WI
125

1 ALJ BOLDT: That's been received.
2 MR. GLEISNER: Okay, okay, right.
3 MR. HARBECK: The whole thing? Not just
4 the pages, it's the whole thing?
5 ALJ BOLDT: 01B navigability handbook has
6 previously been received and, if not, is
7 received now.
8 MR. HARBECK: Okay.
9 MR. GALLO: Your Honor, I'd like to move
10 108B.
11 ALJ BOLDT: 108. The full thing was
12 received earlier so it is in the record.
13 MR. GALLO: Thank you.
14 ALJ BOLDT: Any other questions of Mr.
15 Wakeman? Okay. Thank you. Let's go off the
16 record.
17 (Recess taken)
18 ALJ BOLDT: Okay. We're back on the
19 record. Are you ready to call your next
20 witness, Counsel?
21 MS. CORRELL: I am, Your Honor. Do we need
22 to address this issue and should we go off the
23 record?
24 MR. GLEISNER: It's your call, Counsel.
25 MR. HARBECK: Why don't we just do it at

LEGAL VIDEO SERVICES
(608) 279-5295 Prairie du Sac WI
127

1 Honor. Previously, I failed to move the
2 admission of Exhibit 1B. I would like to do
3 that at this time. We just had testimony on
4 that again today and I would like to move
5 admission of Exhibit 212. That's the DNR --
6 ALJ BOLDT: It's already in.
7 MR. GLEISNER: Good. Great. Thank you,
8 Your Honor.
9 ALJ BOLDT: Now, if it's the same, I think
10 we crossed it out. I'm pretty sure that we said
11 we weren't going to have duplicates.
12 MR. GLEISNER: That's fine, Your Honor,
13 just as long as it's in the record.
14 ALJ BOLDT: Oh, 1B?
15 MR. GLEISNER: 1B.
16 ALJ BOLDT: That's something different
17 then? Okay.
18 MR. HARBECK: I think at this point we have
19 1B-001. Andy Hudak testified and 1B-001 was
20 admitted. I don't know if we
21 admitted -- actually, I don't have that moved
22 and admitted. It might have been --
23 MR. GLEISNER: Right.
24 ALJ BOLDT: The navigability handbook?
25 MR. HARBECK: Yes.

LEGAL VIDEO SERVICES
(608) 279-5295 Prairie du Sac WI
126

1 the end of, you know, your next witness because
2 we've got an issue and we'll just deal with it
3 then.
4 ALJ BOLDT: Okay.
5 MS. CORRELL: Okay. Let me call
6 Andy Hudak.
7 ALJ BOLDT: I'll remind you that you were
8 previously sworn and you're still under oath.
9 DIRECT EXAMINATION
10 BY MS. CORRELL:
11 Q I believe you've already stated your name and address
12 for the record. What's your formal educational
13 background?
14 A I have a bachelor's degree from the University of
15 Wisconsin-Stevens Point in water resources hydrology
16 and management with minors in soil and chemistry.
17 Q In terms of on-the-job training did you receive any
18 training or mentoring while employed for the DNR?
19 A As a (inaudible), I went through various mentorships
20 and trainings with other water management specialists
21 as a means of mentorship and guidance as a way to
22 maintain consistency with the program.
23 Q And did you receive any training from Bob Wakeman?
24 A Yes, I have.
25 Q So I think it's been covered that you're currently

LEGAL VIDEO SERVICES
(608) 279-5295 Prairie du Sac WI
128

1 employed by the DNR?
 2 A Yes, I am.
 3 Q And what's your current position?
 4 A I'm a Water Resource Manager stationed out in the
 5 Green Bay Service Center in charge of managing and
 6 acting as a resource manager for the streams in that
 7 area.
 8 Q And do you have any role in water reg and zoning
 9 decisions in that capacity?
 10 A In that capacity I will act as a resource manager,
 11 I'll say consultant, as far as water regulation and
 12 zoning permits may be applicable to various water
 13 resources and their associated impacts as far as the
 14 streams or potentially lakes are concerned in that
 15 area.
 16 Q And what position did you hold at the DNR prior to
 17 that?
 18 A A Water Management Specialist.
 19 Q What were your job responsibilities as a Water
 20 Management Specialist?
 21 A As a Water Management Specialist I was entrusted to
 22 assert jurisdiction over various requests for
 23 Chapter 30 and water quality certification permits
 24 and also to do various jurisdiction determination
 25 requests associated with navigability, ordinary high

LEGAL VIDEO SERVICES
 (608) 279-5295 Prairie du Sac WI
 129

1 rivers, took a look for flow paths, water courses, to
 2 really be able to identify is there a discernible bed
 3 and bank, is there indicators of flow, are there
 4 other watershed indicators that may indicate the
 5 presence of enough hydrology to support a water
 6 course and that about sums it up.
 7 Q Did you regularly conduct a navigability in fact test
 8 in order to make those jurisdictional calls?
 9 A Very infrequently. As Bob testified before, there is
 10 navigability by opinion and navigability by -- I'm
 11 sorry, navigability in facts and navigability in
 12 facts of actually going out on the site and taking a
 13 watercraft to float. I'd only been a part of a few
 14 of those over the tenure at the Department.
 15 Q What geographical areas were you responsible for as a
 16 WMS?
 17 A The majority of my time as a WMS I handled the
 18 western half of Waukesha County, but I had various
 19 responsibilities throughout all of Waukesha County
 20 and portions in Winnebago.
 21 Q And could you describe your experience in terms of
 22 reviewing and approving or denying Chapter 30
 23 permits?
 24 A The basis for a review for approving or denying
 25 Chapter 30 permits were really dependent upon what

LEGAL VIDEO SERVICES
 (608) 279-5295 Prairie du Sac WI
 131

1 water mark determinations.
 2 Q And did you routinely address whether navigable
 3 waters existed in field visits?
 4 A Very, very often. That was the basis for the
 5 majority of our jurisdiction as far as permits are
 6 concerned.
 7 Q Could you explain the process you follow to determine
 8 whether a jurisdiction existed for Chapter 30?
 9 A Yes. Typically, I did a lot of work up front within
 10 the office to determine have previous determinations
 11 been conducted on this waterway or potential
 12 waterways on the site, did various map review to
 13 determine where some likely indicators of water
 14 courses or waterways to do further investigation when
 15 I'm actually out on the site and then would routinely
 16 follow-up with site investigations of those critical
 17 areas, I'll call them, to determine their
 18 navigability characteristics.
 19 Q And in terms of navigable characteristics or
 20 indicators, what type of indicators would you look
 21 for in the field to determine an ordinary high water
 22 mark?
 23 A Depending upon what type of waterway it was, lakes
 24 and ponds were very -- typically very easy. They're
 25 very -- a larger water body. As far as streams,

LEGAL VIDEO SERVICES
 (608) 279-5295 Prairie du Sac WI
 130

1 type of permit application it was, whether it was a
 2 general permit and met the general permit standards.
 3 That was a way that we would facilitate a faster
 4 review process for projects that were determined to
 5 meet those standards. The individual permit process
 6 was a little more in-depth where we'd take a look at
 7 what are the potential public interest impacts
 8 associated with navigation, recreation, fish and
 9 wildlife habitat, water quality and natural scenic
 10 beauty.
 11 Q Approximately how many Chapter 30 or water quality
 12 certification applications would you say you reviewed
 13 in terms of, you know, any type of duration, either
 14 monthly, yearly --
 15 A I believe approximation, between 150 to 200 permits a
 16 year.
 17 Q Have you reviewed other applications for Chapter 30
 18 or water quality certification projects in the
 19 Oconomowoc River corridor?
 20 A Yes, that was an area of my coverage.
 21 Q And are you familiar with North Lake in any other
 22 capacity besides permit review?
 23 A Yes, prior to receiving the Water Management
 24 Specialist position I worked as an assistant to the
 25 lakes biologist for the region and also for the

LEGAL VIDEO SERVICES
 (608) 279-5295 Prairie du Sac WI
 132

1 Aquatic Plant and Management Program, so both of
 2 those capacities actually had me out on the lake a
 3 number of times prior to obtaining the Water
 4 Management Specialist position.
 5 Q As a WMS did you routinely conduct field
 6 investigations in those areas?
 7 A Yes, I know the watershed very well.
 8 Q And you're familiar with North Lake?
 9 A Yes, I am.
 10 Q Could you describe the lake and its place in the
 11 watershed?
 12 A Sure. The Oconomowoc River watershed starts up in
 13 Washington County. It's a very undeveloped watershed
 14 in the upper stretches, a lot of natural area that
 15 flows through a -- actually, Department-owned
 16 property prior to entering Waukesha County where it
 17 goes through a series of impoundment and former
 18 impoundments prior to it entering into North Lake
 19 which is an approximately 430 acre drainage lake with
 20 no control structure on the outflow of the
 21 Oconomowoc River prior to it entering another series
 22 of chain of lakes further down in Waukesha County.
 23 Q Are you aware of whether or not there's currently
 24 public access on North Lake?
 25 A The only public access that I'm aware of is actually

LEGAL VIDEO SERVICES
 (608) 279-5295 Prairie du Sac WI
 133

1 able to launch there, particularly in the spring
 2 time, but it is not a very accessible launch for
 3 those with disabilities.
 4 Q Would someone be able to launch in the winter if they
 5 wanted to ice fish?
 6 A No. The river in that vicinity stays open, as far as
 7 I'm aware, except for some very, very cold spells
 8 when it'll actually freeze over, but definitely not,
 9 say, for access to walk out on the lake. I wouldn't
 10 walk out on the lake at that location.
 11 Q And have you been able to utilize this access point
 12 personally?
 13 A Yes, I've launched a small 12-foot rowboat, fishing
 14 boat, at that launch.
 15 Q And how did you launch it? I mean can you just back
 16 a trailer into this launch?
 17 A For the size boat that I was launching, again, you
 18 know, the 12-foot boat, you have to basically wade it
 19 out to get it off the trailer. Again, sometimes,
 20 depending upon the water level, you may need to drive
 21 out, actually out into the river, to even get the
 22 trailer out to a water depth you can actually
 23 get -- float a boat off of.
 24 Q Based on your understanding, has DNR attempted to
 25 provide greater public access to North Lake?

LEGAL VIDEO SERVICES
 (608) 279-5295 Prairie du Sac WI
 135

1 gained through a private launch that's actually
 2 located on the Oconomowoc River upstream of the
 3 actual lake itself. It's a shallow gravel ramp that
 4 allows boats and trailers to be launched and access
 5 gained by fishermen and boaters down into the lake.
 6 Q And is that referred to as the Corey Oil site?
 7 A That is the Corey Oil site.
 8 Q And so what's the significance of it being a private
 9 access? Could that be withdrawn at any time?
 10 A Yes, that's it exactly. The private riparian owner
 11 who owns that particular parcel can seek to close
 12 that at any time and further not allow launching of
 13 watercraft at that location. The fee, as I
 14 understand, right now is pretty -- actually generous.
 15 It's only about a \$3 fee I think to launch a boat,
 16 but that can be increased to any number of -- or any
 17 price really to accommodate the --
 18 Q Would that provide handicap access?
 19 A It's a very difficult launch right now. It's steep,
 20 it's narrow, there's really no very easy ingress,
 21 egress out of that launch. Smaller fishing boats,
 22 canoes, are probably the best way to go to actually
 23 launch on there, you know, small 12-foot, 14-foot,
 24 boats. During high water periods there's been
 25 occurrence that I'm aware of, of larger boats being

LEGAL VIDEO SERVICES
 (608) 279-5295 Prairie du Sac WI
 134

1 A My understanding we've been -- the DNR has been
 2 seeking to try and provide access on the lake for 25
 3 or so years.
 4 MR. GLEISNER: Objection, relevance, Your
 5 Honor. I mean if we're going to go down this
 6 path then --
 7 MS. CORRELL: The public interest test is
 8 relevant for Chapter 30 and people's ability to
 9 navigate on a public water body is relevant in
 10 the public interest test.
 11 ALJ BOLDT: It's part of the balancing of
 12 the public interest factors -- public access.
 13 The objection is overruled.
 14 A Can you repeat the question? Sorry.
 15 Q Let's see what I asked. I think you already answered
 16 the question.
 17 A Oh, that's right, I --
 18 Q I was going to ask you why is it that DNR is trying
 19 to provide greater public access and I was also going
 20 to refer you to a Code provision. Place before you
 21 NR1.90. Could you read the highlighted area under
 22 NR1.0 regarding the public access policy for
 23 waterways?
 24 A Sure. "It is a goal of the State of Wisconsin to
 25 provide, maintain and improve access to the State's

LEGAL VIDEO SERVICES
 (608) 279-5295 Prairie du Sac WI
 136

1 navigable lakes, rivers and streams for the public.
 2 Public access facilities shall allow for public
 3 rights of navigation, related incidental uses and
 4 other uses which are appropriate for the waterway.
 5 Waterway uses shall be equally available to all
 6 waterway users and include enjoyment of natural
 7 scenic beauty and serenity."
 8 Q And do you have knowledge of DNR attempting to
 9 purchase other properties before purchasing the
 10 former Krause site?
 11 A Yes. In a review of the NR103 alternatives analysis,
 12 I've been made aware of all of the past, present and
 13 future attempts to obtain suitable sites for a public
 14 access on North Lake.
 15 Q Okay. And turning to the DNR exhibit book in front
 16 of you, is it blue? Yours is blue. Refer you to the
 17 large Exhibit 200 which is the application for the
 18 approval in this case and I'm looking at Appendix 1.
 19 I know they're not tabulated very well, but
 20 Appendix 1 and there is a Bates stamp 023 at the
 21 bottom of that. It should be past the -- no, it's
 22 not.
 23 A Is it the North -- Appendix 1 North Lake Yacht Club?
 24 Q Yes. Actually, it's towards the beginning here.
 25 There's a table of contents.

LEGAL VIDEO SERVICES
 (608) 279-5295 Prairie du Sac WI
 137

1 access through the now currently North Lake Yacht
 2 Club property for purposes of establishing a public
 3 boat access.
 4 Q And what are the dates of those two letters? The
 5 November 22nd, 1989 letter is which letter?
 6 A That's the Tim Tyree letter indicating that the Board
 7 of Directors of the North Lake Yacht Club are voting
 8 to discontinue efforts to try and allow public access
 9 at the North Lake Yacht Club.
 10 Q Okay. And then could you also refer to the third
 11 page of Appendix 1 in Exhibit 200 which is also a
 12 letter and identify the date and purpose of that
 13 letter?
 14 A This is the September 26th, 2005 letter from
 15 John Meehan to Mr. Morrissey continuing to discuss
 16 the potential of public use for the site of actually
 17 in wintertime for access to North Lake. The -- just
 18 to kind of summarize it, regarding discussions that
 19 there's no longer a desire to have winter public
 20 access through the North Lake Yacht Club.
 21 Q When did the Department purchase the former Krause
 22 site?
 23 A (Inaudible), but I believe it was in 2005. Month and
 24 date I don't have off the top of my head.
 25 Q And when did you first receive the letter resources

LEGAL VIDEO SERVICES
 (608) 279-5295 Prairie du Sac WI
 139

1 MS. KAVANAUGH: We're in Exhibit 200,
 2 Appendix 1, Bates stamp 23. It's a
 3 correspondence --
 4 Q It's not very far into the permit application.
 5 MR. GALLO: I'm sorry, what was the Bates
 6 number?
 7 MR. GLEISNER: Does it have a Bates stamp
 8 number?
 9 MS. CORRELL: Yes, 023.
 10 MR. GLEISNER: Thank you, Counsel.
 11 MS. CORRELL: And I'll give everyone a
 12 minute to get there.
 13 MR. GLEISNER: Bear with us a moment, Your
 14 Honor.
 15 MS. CORRELL: Yep, it's after the practical
 16 alternatives analysis. There's a table of
 17 contents and then it's the next
 18 page -- Appendix 1.
 19 A Okay.
 20 MR. GLEISNER: Got it, Counsel. Thank you.
 21 Q Could you identify this for the record?
 22 A Sure. This is a letter written by Tim Tyree
 23 (phonetic) of the North Lake Yacht Club and also a
 24 letter written by John Meehan (phonetic) of the North
 25 Lake Yacht Club relating to the DNR's attempt to gain

LEGAL VIDEO SERVICES
 (608) 279-5295 Prairie du Sac WI
 138

1 application for the project permits?
 2 A I believe it was in the October of 2009 time period.
 3 Q Are you familiar with the DNR waterway permit
 4 application at issue here today?
 5 A Yes, I am.
 6 Q And I'll have you turn to the beginning of the
 7 application which is marked Exhibit 200. It's
 8 already in the record, but could you specifically
 9 turn the pages and identify what's contained in the
 10 application?
 11 A Sure.
 12 Q Just some of the highlights. Obviously, we're not
 13 going to sit here and read the entire thing.
 14 MR. GLEISNER: May we request Bates stamp
 15 page numbers as he goes through, Your Honor, so
 16 the record is clear?
 17 ALJ BOLDT: Sure. Are you familiar with
 18 those, sir?
 19 THE WITNESS: Yeah, those are the numbers
 20 on the left-hand --
 21 MS. CORRELL: Where available, yeah.
 22 THE WITNESS: Okay.
 23 A I'll just refer right to the Bates stamp Page 003.
 24 It lists a whole bunch of stuff that is included,
 25 bulleted, that are typical things that are always

LEGAL VIDEO SERVICES
 (608) 279-5295 Prairie du Sac WI
 140

1 included with any application for consideration under
 2 Chapter 30. And, again, by these bullet points, all
 3 these things would be included, but some of the most
 4 critical ones I'll probably just read from this list
 5 on 003 that we can confirm are included in here but,
 6 again, I review that they were. What they basically
 7 are, our project permit application page which gives
 8 all the information of who's applying for it, the
 9 location which would be one of these that doesn't
 10 have a Bates stamp, a further application for a water
 11 quality certification which would typically just
 12 include an alternatives analysis. We have screening
 13 for endangered threatened resources, different
 14 location maps and site photographs. We have a soils
 15 map and a wetland report that identifies all the
 16 wetlands on the site of where they may be impacted or
 17 not impacted and who conducted that delineation and a
 18 storm water report and associated site plans for the
 19 development and construction of the site.
 20 Q Okay. So as you're walking through the application
 21 here, could you just tell me which -- what's
 22 contained in the actual thick document?
 23 A What's actually contained in this thick document as
 24 we kind of page through it --
 25 Q Just some of the highlights.

LEGAL VIDEO SERVICES
 (608) 279-5295 Prairie du Sac WI
 141

1 that's fine.
 2 MR. GLEISNER: Okay.
 3 ALJ BOLDT: Objection overruled.
 4 A 045 is a comparison table that was developed to
 5 really show all the different alternatives and
 6 potential costs associated with them, impacts
 7 associated with them. We get to 095 which is a
 8 wetland delineation that was conducted by SEWRPC for
 9 the purposes of identifying wetlands on the site
 10 prior to development.
 11 Q And who prepared that document?
 12 A The document is prepared by the Southeastern
 13 Wisconsin Regional Planning Commission headed by
 14 Dr. Don Reid (phonetic) as the wetland scientist. He
 15 has a crew of a few others that work with him and
 16 under him.
 17 Q Does the delineation refer to who specifically did
 18 the field investigation in the introduction?
 19 A Yes, it identifies that actually Joann Cline
 20 (phonetic) from the DNR was also present at the time.
 21 I think that was the other person they identified.
 22 103 is actually their exhibit that shows
 23 the -- concurred with wetland areas or the wetland
 24 areas that were identified on the site by SEWRPC.
 25 Q You mean the map that's located at Bates stamp 103

LEGAL VIDEO SERVICES
 (608) 279-5295 Prairie du Sac WI
 143

1 A Just the highlights, yeah. The Bates stamp 8111 is a
 2 memo from Jim Morrissey to myself -- let me back up
 3 here. There's a revised memo from Jim Morrissey to
 4 myself with an updated alternatives analysis for the
 5 project which provides all of the (inaudible) and
 6 minimization alternatives that were reviewed prior to
 7 applying -- or developing a construction plan which
 8 takes into consideration all of the different site
 9 alternatives, different locations, for public access
 10 and also associated with different construction
 11 alternatives to minimize wetland impacts. And then
 12 following that, the next pages would be different
 13 design alternatives that we reviewed and assessed to
 14 try and, again, minimize the disturbance on the site.
 15 So as I continue on through 33, there's still -- 34
 16 are all different site alternatives. When we get to
 17 039, that's different road alignment alternatives of
 18 where we can actually construct the access road.
 19 There were three various ones assessed as major
 20 alternatives.
 21 MR. GLEISNER: Your Honor, objection,
 22 narrative and the document speaks for itself. I
 23 think we should move this along if possible.
 24 ALJ BOLDT: I think he's just hitting the
 25 highlights and telling me what's in there so

LEGAL VIDEO SERVICES
 (608) 279-5295 Prairie du Sac WI
 142

1 within Exhibit 200?
 2 A That's correct, yep.
 3 Q And so those areas in blue contain the federal
 4 wetlands, is that correct?
 5 A As I understand it, the blue areas were the areas
 6 that were under the jurisdiction of the Army Corps of
 7 Engineers as federal wetlands.
 8 Q Okay. Is this a complete and accurate set of -- does
 9 it appear to be a complete and accurate set of the
 10 permit application?
 11 A Yes.
 12 Q You're familiar with the project site that's the
 13 subject of this waterway wetland permit application?
 14 A Yes, I am.
 15 Q Could you refer to Exhibit 206 at Page 20, please,
 16 and identify that for the record? 206 at Page 10 I
 17 think I said.
 18 A Page -- or, sorry, Exhibit 206, Page 10, is a
 19 snapshot from the Waukesha County GIS web server
 20 indicting parcel numbers and approximate location of
 21 the DNR site -- DNR boat launch site.
 22 Q Okay. And could you refer to Exhibit 205, please.
 23 Could you identify this map for the record?
 24 A Exhibit 205 is the same Waukesha County GIS web
 25 server snapshot of the area showing parcel

LEGAL VIDEO SERVICES
 (608) 279-5295 Prairie du Sac WI
 144

1 boundaries. It has the air photo layer removed, but
 2 it has the 2008 regulated FEMA flood plain
 3 highlighted and identified within the property.
 4 Q And did you personally review the flood plain impacts
 5 for this project?
 6 A Partially, as in this -- the impacts to this flood
 7 plain were referred to Michelle Schneider (phonetic)
 8 who is the dam safety and flood plain engineer for
 9 Waukesha County and it's my understanding that she is
 10 working with Waukesha County to develop a plan for
 11 meeting county flood plain requirements.
 12 Q But with respect to Chapter 30, do you review flood
 13 plain standards per se?
 14 A Flood plain standards under Chapter 30, typically no.
 15 It's a -- this particular exhibit is showing the 2008
 16 regulated flood plain through Waukesha County and so
 17 it would be a requirement of Waukesha County to
 18 enforce their flood plain ordinance as far as site
 19 development is concerned.
 20 Q Did you create this map?
 21 A Yes.
 22 Q And are you aware of what the flood plain purpose is
 23 for the designation of flood plain on the DNR
 24 property?
 25 A It's my understanding in conversation with

LEGAL VIDEO SERVICES
 (608) 279-5295 Prairie du Sac WI
 145

1 A Yes.
 2 Q What were the various purposes for those site visits?
 3 A The early on ones within the 2009 timeframe right
 4 when the permit was applied for were utilized as an
 5 opportunity to assess impacts with the resource
 6 managers as a way of evaluating the DNR's application
 7 for utilizing all alternatives for a practical
 8 alternatives analysis and where the associated
 9 impacts associated with the construction or
 10 development of the Wisconsin DNR site and
 11 concurrently at that time with the Highway 83 site.
 12 Further, there's been a few site visits with legal
 13 staff and other various capacities more -- most
 14 recently following some new information regarding the
 15 litigation I guess we're going through here today.
 16 We further looked and tried to identify additional
 17 waterways on the site and identify potential ordinary
 18 high water marks of the designated waterways and the
 19 wetland complex.
 20 Q Could you refer to what's been marked Exhibit 204,
 21 please, and identify for the record what that exhibit
 22 is and what it entails?
 23 A Sure. 204 is a series -- sorry, 204 is a site plan
 24 map where three different series of site visit dates
 25 with associated photographs and their orientation so

LEGAL VIDEO SERVICES
 (608) 279-5295 Prairie du Sac WI
 147

1 Michelle Schneider is the flood plain contained
 2 within this site is actually a flood storage area for
 3 North Lake and for the Oconomowoc River.
 4 Q Have you conducted any site visits in this case?
 5 MS. CORRELL: Oh, I will -- I would move
 6 205 and I will be getting back to the rest of
 7 206 but I would move the one I've identified as
 8 this point.
 9 MR. GLEISNER: No objection, Your Honor.
 10 ALJ BOLDT: Any objection to any of 206?
 11 MR. GLEISNER: Just a minute, Your Honor.
 12 ALJ BOLDT: That's all right. Right now
 13 we'll take in 205 and the first part of 206.
 14 MR. GLEISNER: No objection, Your Honor.
 15 ALJ BOLDT: Okay. 206 in its entirety is
 16 received.
 17 Q And so you did say that you conducted site visits in
 18 this case?
 19 A Yes, I --
 20 Q How many times have you been to the site?
 21 A I'm pulling out my site visit info, if you don't
 22 mind. I have nine documented site visits minus the
 23 one we took here for the -- so ten if you include the
 24 one that we took together after the first two days.
 25 Q In this contested case hearing?

LEGAL VIDEO SERVICES
 (608) 279-5295 Prairie du Sac WI
 146

1 it's a way to help document what I observed at those
 2 couple site visits and their approximate location.
 3 Q So as you turn to Exhibit 204, Page 2, and proceed
 4 on, are all of these photographs that you took?
 5 A They are with the exception of Photographs 22, 23,
 6 24, 25 and I guess 204, Page 15. So Page 13 through
 7 15 were not my photographs, but they're photographs I
 8 had in my possession.
 9 Q Do you know who took those photographs?
 10 A Yes, Warden Drake provided me those photographs of
 11 times when he was on the site.
 12 Q Are they fair and accurate representations of what
 13 the site looks like?
 14 A Under variable weather conditions and time of year
 15 yes, they're fair and accurate depictions of the
 16 site.
 17 Q Is it typical for a project of this scale to conduct
 18 nine site visits?
 19 A Prior to permit issuance I'd say -- or permit
 20 approval of construction beginning, I would say
 21 highly unlikely. It's frequent that one, maybe a
 22 maximum of two visits would -- I'd have -- I'd be
 23 able to allow time to really go out to, but typically
 24 we make a lot of permit decisions with making no site
 25 visits so this one is -- gained a little bit of

LEGAL VIDEO SERVICES
 (608) 279-5295 Prairie du Sac WI
 148

1 special attention.
 2 Q And well, why did it merit the special attention?
 3 A Its controversial nature, its complex nature. Again,
 4 early on with the two site review and approach and
 5 the -- really to provide a great understanding and
 6 provide a great documentation for how the Department
 7 tracked its decision on impacts, authority and
 8 jurisdiction. It was a -- we did a lot of work to
 9 try and cover those bases.
 10 MS. CORRELL: I'd like to move Exhibit 204.
 11 ALJ BOLDT: Any objection there?
 12 MR. GLEISNER: No objection, Your Honor.
 13 ALJ BOLDT: 204 is received.
 14 Q For any of those site visits did anyone accompany
 15 you?
 16 A Yes. I believe I've been with various
 17 other -- various random other water management
 18 specialists for almost all of the site visits.
 19 Q What about resource managers?
 20 A And resource managers and upper level management.
 21 Q What was the purpose of bringing all of the resource
 22 managers to the site?
 23 A Again, those earlier visits, we really wanted to do a
 24 thorough review of what are the associated impacts
 25 with the development of this site and also associated

LEGAL VIDEO SERVICES
 (608) 279-5295 Prairie du Sac WI
 149

1 MS. CORRELL: Yeah.
 2 MR. HARBECK: Yeah.
 3 MR. GLEISNER: I think we have them.
 4 MS. CORRELL: They were sent on email.
 5 MR. GLEISNER: 222 is an elevation map?
 6 MS. CORRELL: Yes.
 7 Q Here, why don't I just provide you with --
 8 A Yeah, I think this is all --
 9 Q I'll just provide you with my --
 10 ALJ BOLDT: Is that all 220?
 11 THE WITNESS: I think this is all 220.
 12 ALJ BOLDT: Okay. Sorry.
 13 MS. CORRELL: Yeah, 220 is that huge public
 14 comment.
 15 THE WITNESS: No, that's okay.
 16 ALJ BOLDT: Oh, this is all your stuff?
 17 THE WITNESS: Yeah, that's stuff I brought
 18 up here.
 19 A Okay. So I have 221 and 222 in front of me here.
 20 Q And you referred to a site visit in which you
 21 attempted to, again, look at the site and I
 22 believe -- could you just explain for the record what
 23 those documents are?
 24 A Yes. Exhibit 221 is a memo with associated
 25 photographs that relate to a more recent site visit

LEGAL VIDEO SERVICES
 (608) 279-5295 Prairie du Sac WI
 151

1 impacts with the development of a site at the
 2 Highway 83 boat launch alternative. It was a way to
 3 really get everyone together on the same page, review
 4 all the information together and be able to come up
 5 with the best review possible for assessing those
 6 impacts.
 7 Q Was that review limited to just jurisdictional areas?
 8 A No, it was not. It was really an assessment of the
 9 overall site and all impacts with the construction
 10 and development of a launch.
 11 Q Could you identify what's been marked Exhibit 221 and
 12 222 for the record?
 13 A Is this in our --
 14 Q Yes, I'm sorry, in the DNR exhibits.
 15 A Okay. I think this one stops at 219. Is there a
 16 supplemental --
 17 Q 221 and 222. They were sent supplementally --
 18 A Yeah.
 19 Q -- so I can provide my copy if --
 20 ALJ BOLDT: I think we have them here.
 21 THE WITNESS: Okay.
 22 MS. CORRELL: You have it? Okay.
 23 MR. HARBECK: 221 I think she said and 222.
 24 MS. CORRELL: Do you have them?
 25 MR. HARBECK: 221 and 222?

LEGAL VIDEO SERVICES
 (608) 279-5295 Prairie du Sac WI
 150

1 where an attempt -- not an attempt, but a procedure
 2 was conducted to identify the most applicable
 3 ordinary high water mark for these wetland complexes.
 4 So 221 is, again, a memo that indicates or identifies
 5 all the biological and physical indicators that I
 6 observed and associated additional considerations
 7 with trying to establish an ordinary high water mark
 8 with these wetland complexes.
 9 Q Okay. And going back to site visits where resource
 10 managers were present along with you, did any of the
 11 resource managers identify any navigable water that
 12 was not considered by you in your review of the
 13 waterway permit?
 14 A No. The review of the resource manager comments
 15 really related to impacts to North Lake and impacts
 16 to the wetland complexes we have now declared
 17 navigable as -- we reviewed impacts of that area, but
 18 it was not really identified in 2009 as being a
 19 navigable waterway nor did they identify it as being
 20 a navigable waterway or did they identify any
 21 additional areas outside of the wetland that they
 22 felt were navigable areas.
 23 Q And upon the holistic approach of the site, did any
 24 of the resource managers identify any impacts to the
 25 site that you were not considering and evaluating in

LEGAL VIDEO SERVICES
 (608) 279-5295 Prairie du Sac WI
 152

1 reaching your decision?
 2 A No, all of the resource managers provided very
 3 detailed, very extensive, review and analysis of the
 4 overall entire site, not just one authority or
 5 jurisdiction here, one authority or jurisdiction
 6 there. It was a holistic review, a holistic
 7 approach, the entire site development and all the
 8 associated impacts. And all of those impacts and
 9 recommendations and discussion that was provided by
 10 the resource managers was taken into consideration by
 11 myself prior to making the manual code decision.
 12 Q I think you identified in your permit decision, but
 13 did you determine that there were navigable waters
 14 present on the project site?
 15 A That is correct.
 16 Q And what were those waters?
 17 A I don't have it in front of me so I can just
 18 paraphrase that North Lake was identified as a
 19 navigable waterway. So was the swale along the
 20 northern property boundary --
 21 MR. MEYER: Excuse me. Is it possible for
 22 the witness to use Exhibit 2000-002 as he's
 23 talking?
 24 MS. CORRELL: I think -- is it
 25 RRNA Exhibit 2-002?

LEGAL VIDEO SERVICES
 (608) 279-5295 Prairie du Sac WI
 153

1 Q And that is your deposition testimony of the closest
 2 approximation of where the federal wetlands are
 3 located, but they're -- are they --
 4 MS. CORRELL: Strike that.
 5 Q Is it fair to say that Exhibit 2-002 is an
 6 approximation of both -- the green areas and the blue
 7 area are an approximation of the federal wetland
 8 Number 1 in the SEWRPC delineation map?
 9 A Yes, a very broad approximation of the federal
 10 wetlands that were identified in the SEWRPC
 11 delineation contained both of the green wetland
 12 complexes and the blue swale on Exhibit 2-002, with
 13 the only exception I'd say would be the small pocket
 14 of wetlands within the blue circle that's on that
 15 map.
 16 MR. HARBECK: Did you say blue circle?
 17 A Or, sorry, red circle on that map. There
 18 is -- technically, there is a blue circle on there
 19 too, but --
 20 MR. MEYER: Could you repeat that, please?
 21 THE WITNESS: Sure.
 22 A The wetlands that the Corps took jurisdiction over
 23 contain -- or are in the approximation of the
 24 navigable waterways identified in green and in blue
 25 and the only one that's not depicted on this is the

LEGAL VIDEO SERVICES
 (608) 279-5295 Prairie du Sac WI
 155

1 MS. KAVANAUGH: Yes.
 2 MR. MEYER: Correct.
 3 A In reference to Findings of Fact in the manual code
 4 decision, North Lake was identified as a navigable
 5 waterway, as was a swale along the northern portion
 6 of the property and associated wetland complexes that
 7 are outlined in green on --
 8 Q And when you're referring to the swale, that is
 9 identified as a blue line. It's a little bit
 10 confusing. Could you clarify where the wetland is
 11 and what -- you know, part of it's green and part of
 12 it's blue. Could you clarify that for the record?
 13 A Yeah, this was done at deposition and it
 14 was -- again, they're really one and the same.
 15 They're all probably, in my estimation, all the same
 16 watercourse, but it was -- one had a really defined
 17 channel is what this was identified as in blue. It's
 18 still wetland, it's still associated with this
 19 complex, but it has much more of a defined bed and
 20 bank characteristics through that portion of the
 21 property.
 22 ALJ BOLDT: And that's the blue line on
 23 Exhibit 2-002?
 24 THE WITNESS: That is the blue line on
 25 2-002.

LEGAL VIDEO SERVICES
 (608) 279-5295 Prairie du Sac WI
 154

1 small pocket of wetlands identified in the SEWRPC
 2 delineation located in this general vicinity within
 3 the orange, red, circle.
 4 MR. MEYER: Can I just ask a clarifying
 5 question? So does that include the great
 6 majority of the red circle?
 7 THE WITNESS: Correct. The navigable
 8 waterways versus the Federal Corps delineation
 9 are separated and only the instance of the small
 10 wetland identified within the red circle here.
 11 So that's the only portion of federal wetland
 12 that was not identified to be a navigable
 13 waterway by the Department.
 14 MR. MEYER: And, once again, just so I'm
 15 clear, the great majority of that red, does that
 16 contain any wetlands except for a small pocket
 17 you've just referred to?
 18 THE WITNESS: That is correct based on the
 19 SEWRPC delineation.
 20 MR. MEYER: Based on the federal --
 21 THE WITNESS: Correct, the federal
 22 designation.
 23 MR. MEYER: Thank you.
 24 MS. CORRELL: I'd like to move Exhibit 221
 25 and 222.

LEGAL VIDEO SERVICES
 (608) 279-5295 Prairie du Sac WI
 156

1 Q And then, Mr. Hudak, I'd like you to refer to
2 Exhibit 211.
3 MR. GLEISNER: Could we just have a moment?
4 MR. HARBECK: Have we had any testimony on
5 222? I mean I'm not sure --
6 MR. GLEISNER: I don't think we've had any
7 testimony on 222, Your Honor.
8 MS. CORRELL: I apologize.
9 Q Could you identify 222?
10 A Sure. 222 is the site visit I conducted on
11 9/12/2011. I flagged ordinary high water mark
12 indicator locations that I wanted to have surveyed by
13 our surveyors from Kapur & Associates and subsequent
14 to my identification of those areas, Kapur &
15 Associates followed up and surveyed in those
16 elevations of my flags. And so Exhibit 222, Page 1,
17 2 and 3, indicate the location and elevation of those
18 ordinary high water mark flags.
19 ALJ BOLDT: Any objection to 222?
20 MR. GALLO: No objection, Your Honor.
21 MR. GLEISNER: No, Your Honor.
22 ALJ BOLDT: How about 221?
23 MR. GALLO: No objection.
24 ALJ BOLDT: 221 and 222 are received. Can
25 we keep these copies or are those yours?

LEGAL VIDEO SERVICES
(608) 279-5295 Prairie du Sac WI
157

1 And then you'll notice there's two divergence around
2 that oval which indicates a minor flow as observed
3 around that isolated high point within that 15-foot
4 stretch between the lake and the west.
5 Q Have you observed on any of your site visits a
6 perceptible flow through this wetland?
7 A Throughout the numerous site visits, the only
8 perceptible flow that I had observed was on this
9 9/22/2010 site visit, whereas this 15-foot area that
10 is identified, again, it was -- as you can see by my
11 field notes here, they are a width of four inches
12 with -- or four feet with two-and-a-half inches of
13 water on it and associated vegetation that's flowing
14 through. Another one is approximately 1.4 feet wide
15 with an inch-and-a-half of water flowing through it.
16 And, again, this area, this 15-foot area, I would
17 associate with a depositional area with wind, wave,
18 ice action that has, again, created kind of this
19 ridge of 15-foot width in that approximate location.
20 Q What jurisdiction did you review the manual code
21 approval under overall?
22 A What jurisdiction?
23 Q Uh-huh.
24 A If you refer back to my actual manual code decision,
25 I reviewed it under the authority of grading on the

LEGAL VIDEO SERVICES
(608) 279-5295 Prairie du Sac WI
159

1 MS. CORRELL: Yes.
2 ALJ BOLDT: Okay. Let's put them in the
3 book then.
4 Q Could you refer to Exhibit 211 and just identify what
5 this exhibit is for the record?
6 A Exhibit 211 is basically a summary of the field notes
7 that I had taken at the site visit from 9/22/2010
8 which where I attempted to identify connectivity of
9 the wetland complex, associated swale, to North Lake
10 and my field observations and a few measurements are
11 indicated within this document.
12 Q And this high point that you identify, is that the
13 area that there's been some testimony about I think
14 by multiple parties that there's an ice shove at the
15 end of the wetland swale?
16 MR. GLEISNER: Object, leading.
17 Q What is depicted by the ovular shaped item in between
18 the arrows on your site visit notes?
19 A According to my site visit notes there is a
20 measurement on the left-hand side that's 15 feet.
21 That's an approximate measurement from the lake edge
22 westward and within that 15-foot area I tried to
23 identify and characterize what I had observed and the
24 oval shape indicates the highest point where at the
25 time of site visit was above any water elevation.

LEGAL VIDEO SERVICES
(608) 279-5295 Prairie du Sac WI
158

1 banks in excess of 10,000 square feet, the
2 installation of two outfall structures over the
3 ordinary high of North Lake, the installation of four
4 culvert crossings and the installation -- or the
5 deposition of 0.16 acres of fill in wetland and --
6 Q And the boat launch --
7 A Oh, excuse me.
8 Q -- you regulated under --
9 A And also -- yes, also the actual placement of the
10 concrete ramp structure for launching watercraft.
11 Q So with respect to the fill in the access road, what
12 jurisdiction did you assert?
13 A Fill in the access road, I asserted jurisdiction
14 under wetland fill NR103 as far as a review of the
15 alternatives and the impacts associated with that
16 activity.
17 Q And turning back to Exhibit 200 within the SEWRPC
18 delineation document, could you find Map 2 that's
19 marked -- Bates marked 103?
20 A Yes.
21 MR. GLEISNER: Is that the one we were
22 looking at this morning, Counsel?
23 MS. CORRELL: Yes, I believe we were. Now,
24 if I can find it. Sorry, it's taking me a
25 moment here. I just lost it. Here it is, that

LEGAL VIDEO SERVICES
(608) 279-5295 Prairie du Sac WI
160

1 tab. Okay.
 2 Q And I think you identified this for the record, but
 3 the area marked in light blue that I was trying to
 4 have you correlate with Exhibit 2-002, is this a
 5 more -- is this Exhibit 200, Map 2, location of the
 6 project area and marked as Bates Number 103 a more
 7 accurate depiction of the wetlands at issue on this
 8 site?
 9 A Yes, Exhibit -- or Bates stamp 103 under that exhibit
 10 is a more accurate reflection of wetlands on the
 11 site.
 12 Q And is it your understanding that the Army Corps of
 13 Engineers concurred in this delineation?
 14 A Yes, they have, is my understanding.
 15 Q Is it possible for you to identify for the record by
 16 noting on Exhibit 200, Map 2, Bates stamped 103, the
 17 approximate location of the access road in this
 18 project?
 19 MR. GLEISNER: May we approach, Counsel, if
 20 he's going to mark on the exhibit?
 21 MS. CORRELL: You may.
 22 A I will use a black pen, a black marker, here.
 23 Q And we understand, you know, it's approximation
 24 so --
 25 A Yeah. It's an approximation, but it's fairly easy to

LEGAL VIDEO SERVICES
 (608) 279-5295 Prairie du Sac WI
 161

1 identify the impacts associated with the access road,
 2 is my understanding. I believe there is a portion of
 3 impacts along here and there's some minor ones also,
 4 but my guess is there's some right about in here and
 5 a few other de minimus ones that I don't really want
 6 to approximate on this map, but those are the main
 7 ones.
 8 Q I understand the map is not of the best scale to be
 9 doing this kind of thing.
 10 A Yeah, yeah.
 11 MR. GLEISNER: Counsel, may I ask a
 12 clarifying question at this point?
 13 MS. CORRELL: You may.
 14 MR. GLEISNER: Thank you. Is the second
 15 red mark that I'm pointing to here, is that the
 16 northwest corner of the Hanson property, if you
 17 know?
 18 THE WITNESS: The approximation of the
 19 second triangle of impacts is at a location
 20 where you have to go around the Hanson property
 21 to readjust it back onto the easement.
 22 MS. CORRELL: Right.
 23 Q So I think the answer to the question is no, it's not
 24 on the Hanson property, it's to go around the Hanson
 25 property, right?

LEGAL VIDEO SERVICES
 (608) 279-5295 Prairie du Sac WI
 163

1 recognize on 103. There's a break in their wetland
 2 delineation lines and there's shaded areas that would
 3 indicate the location of the east/west portion of the
 4 access road as it enters the site. Would you like me
 5 to indicate the western extent of the north/south
 6 portion?
 7 Q Why not, sure.
 8 A Okay. And this gives my knowledge of approximation
 9 of this.
 10 Q So you're marking with a black marker on Exhibit 200,
 11 Map 2, with a Bates stamp 103, your approximation of
 12 the access road and that would be from where we all
 13 entered the site --
 14 A Redland Road, yes.
 15 Q -- walking down to the lake?
 16 A Correct.
 17 Q And you've identified a curve in the road. And could
 18 you also approximate where the wetland impacts occur
 19 on this site?
 20 A Yes.
 21 Q Probably, yeah, a different color would be a good
 22 idea. And now I'm just asking with respect to
 23 Wetland Number 1. The Corps had referred to it as
 24 Wetland Number 1.
 25 A Okay. Within Wetland 1, Wetland Number 1, I'll

LEGAL VIDEO SERVICES
 (608) 279-5295 Prairie du Sac WI
 162

1 A My understanding, yes.
 2 Q Okay. Did you determine what the project purpose
 3 was?
 4 A The project purpose was public access.
 5 Q And what was the particular need for the project?
 6 A The stated need I believe in the application
 7 materials was to construct a public access to meet
 8 the public access standards of 1.91, Administrative
 9 Code.
 10 Q So you should have still in front of you a section of
 11 Administrative Code and you have read previously from
 12 NR1.90. There's also some highlighted areas in
 13 NR1.91(4) and (5). Could you identify those
 14 highlighted areas for the record and also read some
 15 portions of them in terms of establishing minimum and
 16 maximum standards?
 17 A Sure. Under 1.91(4), minimum public boating access
 18 to qualify waters for resource management enhancement
 19 services. That's really the title of it, but as you
 20 move down into that subsection under par. (4),
 21 par. (d) it states, "A waterway has reasonable public
 22 boating access and is eligible for natural resource
 23 enhancement services when public boating access meets
 24 the following standards." And under the inland lakes
 25 category of lakes between 100 and 499 acres it

LEGAL VIDEO SERVICES
 (608) 279-5295 Prairie du Sac WI
 164

1 provides that the minimum one or more access sites
2 which in total provide one car trailer per 30 open
3 water acres, but no less than five units for lakes of
4 50 to 150 open water acres."

5 MS. CORRELL: Can I approach the
6 witness --

7 ALJ BOLDT: Sure.

8 MS. CORRELL: -- in case he might need a
9 calculator?

10 Q So what's the acreage for North Lake?

11 A I believe it's 437.

12 Q And so where does the project proposal fall within
13 these minimum and maximum standards?

14 A If you were to take 437 acres and divide it by the
15 minimum which would be one car trailer for 30 open
16 access -- or for 30 open water acres, you'd come up
17 with fourteen-and-a-half car trailer stalls which
18 would be -- I don't know if they run up or down when
19 they calculate that so maybe 15 and then one -- so
20 it'd be 15 basically for I believe that standard.

21 Q And is there also a standard for providing additional
22 parking for handicapped individuals?

23 A Yes. As you come down, read further, under I guess
24 this would be 2, the standards also require for
25 additional parking for handicapped individuals for

LEGAL VIDEO SERVICES
(608) 279-5295 Prairie du Sac WI
165

1 assessment using basically a rapid assessment form
2 for Department use.

3 Q What's the overall size of the wetland complex
4 Number 1, the large wetland complex, at issue in this
5 case?

6 A I probably did a rough acreage calculation or I took
7 it from the delineation, but I have identified it as
8 14.57 acres in this document.

9 Q And what functions and values did you rate as high
10 for this wetland complex?

11 A I rated wildlife habitat, flood and storm water
12 attenuation, ground water, functional values and
13 aesthetic recreation and education as having high
14 significance in this wetland complex.

15 Q What is the wetland, the direct wetland, impact
16 for -- to create the access road for the boat launch?

17 A What is the direct wetland access?

18 Q Or what's the amount of acreage impacted by the
19 access road?

20 A Okay. The two areas of wetland impact of the access
21 road constitutes 1.4 acres of placement of fill to
22 expand the road within our easement.

23 Q And did you reach an opinion within a reasonable
24 degree of professional certainty whether there was
25 reasonable assurance that wetland water quality

LEGAL VIDEO SERVICES
(608) 279-5295 Prairie du Sac WI
167

1 lakes greater than 50 open water acres so this lake
2 would be required to have a handicapped accessible
3 parking stall.

4 Q And what would the maximum public boating access
5 standard allow?

6 A The maximum would allow --

7 Q For a 437-acre lake like North Lake?

8 A It would allow 29 boats per that access.

9 Q And this project requests how many?

10 A To the best of my knowledge, 15 regular car trailer
11 stalls, one handicapped car trailer stall and I think
12 there might have been room for a couple of car only
13 stalls so it -- based upon my knowledge of how they
14 designed this, this was to meet the minimum standards
15 of this Administrative Code.

16 Q With respect to the fill in the access road did you
17 conduct a functional values assessment?

18 A Yes, as a procedure with the resource managers at the
19 initial site visits in October that was something
20 that was done at that time really to take into
21 consideration all of their comments and to complete a
22 thorough functional value assessment for the impacts
23 associated to the wetland complexes.

24 Q Could you identify what's been marked Exhibit 214?

25 A 214 would be my collaboration of the functional value

LEGAL VIDEO SERVICES
(608) 279-5295 Prairie du Sac WI
166

1 standards would be met prior to issuing your decision
2 in November 2009 -- I'm sorry, 2010?

3 A Yes, I did.

4 Q And what was that opinion?

5 A That the placement of fill, albeit having impacts,
6 was not a significant adverse impact and that the
7 standards under NR103 were met for the placement of
8 fill at this location.

9 Q This is a strange question, but I'm going to ask you
10 to assume that, hypothetically speaking, DNR were to
11 regulate placement of fill in a wetland that is a
12 navigable wetland under 30.12. Would your opinion
13 within a reasonable degree of professional certainty
14 be different in terms of meeting the standards --

15 MR. GLEISNER: Objection, speculation.

16 MS. KAVANAUGH: You're the one who's been
17 the issue --

18 ALJ BOLDT: I think it's responsive to your
19 theory of the case so the objection is
20 overruled.

21 MR. GLEISNER: The problem that we're
22 having here, Your Honor, is he's giving opinions
23 that he didn't testify to at his deposition.
24 This is brand new.

25 MS. CORRELL: You've brought this in. You

LEGAL VIDEO SERVICES
(608) 279-5295 Prairie du Sac WI
168

1 opened the door.
 2 ALJ BOLDT: It's responsive to your case in
 3 chief so it's appropriate. Overruled.
 4 A In reviewing the access road and if we were to
 5 regulate the placement of that fill in the structure
 6 and not take in associated wetland functional value
 7 impacts, I believe we would have come up with the
 8 same conclusions that there would not be significant
 9 public interest impacts associated with the access
 10 road and the placement of fill in that navigable
 11 waterway.
 12 Q Would it materially obstruct navigation in the
 13 navigable waterway and I guess that would be the
 14 navigable wetland?
 15 A The placement of fill would not materially reduce
 16 navigation in that location.
 17 Q What are the current navigational uses of that
 18 navigable wetland?
 19 A As far as I'm aware the only navigation that has
 20 occurred in that wetland to date has been the in fact
 21 navigability test done by the Redland Road
 22 Neighborhood Association.
 23 Q By Page Hanson?
 24 A By Page Hanson, I'm sorry, yes.
 25 Q Yeah, you're probably not remembering every name.

LEGAL VIDEO SERVICES
 (608) 279-5295 Prairie du Sac WI
 169

1 capacity will be increased as a result of the
 2 placement of the four culverts or will it be
 3 neutral or will it -- you've said it wouldn't
 4 decrease?
 5 THE WITNESS: Yeah, I actually think it
 6 might improve the situation out there. My
 7 understanding of how this waterway works, and
 8 Bob touched on it a little bit, but I really
 9 have formulated the opinion that the main source
 10 of hydrology for this waterway is the flood
 11 flows coming down the Oconomowoc River, entering
 12 North Lake, and then entering the flood plain
 13 within North Lake itself. So the flood flows,
 14 when they get high enough above the ordinary
 15 high of North Lake, will overtop that area of
 16 ice push and looking at the elevations I don't
 17 have any reason to dispute that and basically
 18 inundate and fill that flood plain. Then the
 19 North Lake will decrease in elevation and the
 20 water will start exiting the system and water
 21 will become perched or trapped basically behind
 22 that ice push ridge. It would appear it's
 23 flowing because, again, that water is leaving
 24 that wetland complex, that storage area, to that
 25 elevation of where that ice push ridge is

LEGAL VIDEO SERVICES
 (608) 279-5295 Prairie du Sac WI
 171

1 What about whether or not the fill would -- the fill
 2 and the entire project including the culverts
 3 would -- I'm sorry, what's the exact language, would
 4 increase or decrease the flood flow capacity of a
 5 stream?
 6 A I don't believe it would. As it exists right now
 7 there's two culverts with limited functionality.
 8 Q Can you explain what you mean by limited
 9 functionality?
 10 A Sure. To the extent that I was able, I was not able
 11 to identify that those culverts are even open. There
 12 may be limited, little to no passage of flow actually
 13 occurring through those culverts. When you attempt
 14 to look in the ground to look through them, you don't
 15 see the other side. They're black inside so they may
 16 not serve to convey water very much at all, if any.
 17 So the installation of four additional culverts, new
 18 culverts, would continue to provide movement of water
 19 across that roadway segment and the addition of fill,
 20 again, in my opinion would not materially reduce the
 21 flood flow capacity of that navigable waterway.
 22 ALJ BOLDT: Can I ask you on that discreet
 23 point?
 24 THE WITNESS: Uh-huh.
 25 ALJ BOLDT: Do you think the flood flow

LEGAL VIDEO SERVICES
 (608) 279-5295 Prairie du Sac WI
 170

1 established and then following that it's
 2 basically an isolated pond scenario where that
 3 water evaporates, is evapotranspired or
 4 infiltrates into the ground. So to get back to
 5 that point, those culverts would aid I guess in
 6 the movement of the water as it enters into
 7 those systems for both sides of those -- for
 8 both sides of the roadway. I don't have any
 9 degree of scientific certainty that's the only
 10 way that those waterways fill up, but that's my
 11 best impression and best observation and I guess
 12 best way to really try and explain how that
 13 system really operates.
 14 ALJ BOLDT: And does the Department of
 15 Natural Resources maintain culverts that it
 16 places in terms of keeping them free of debris
 17 and --
 18 THE WITNESS: It's my understanding that
 19 with all Department sites they're -- just as we
 20 mow the lawn they would maintain the drainage of
 21 those culverts, the passage of those culverts,
 22 and any other associated maintenance activities
 23 that would be required. If one were to fail or
 24 be crushed we'd seek to attempt to replace that
 25 or do what's necessary to maintain that.

LEGAL VIDEO SERVICES
 (608) 279-5295 Prairie du Sac WI
 172

1 ALJ BOLDT: So relative to the fill and the
2 potential benefit of the culverts, you see it
3 how?

4 THE WITNESS: I really see it as kind of a
5 tradeoff. You know, you're not gaining a whole
6 lot, you're not losing a whole lot, with that
7 de minimus amount of fill that's placed.

8 ALJ BOLDT: Okay. Thanks.

9 MS. CORRELL: If I can approach, I believe
10 there's a copy of NR103 in the record
11 (inaudible) and also 30.12(3m) which is also in
12 one of the other exhibits (inaudible).

13 Q So, Andy -- or, I'm sorry, Mr. Hudak, you had
14 extensive experience with regulating projects under
15 Chapter 30.12. I just placed before you the
16 standards for 30.12(3m) and they've been alluded to
17 earlier in this proceeding. There are three
18 standards, "The structure or deposit may not
19 materially obstruct navigation, the structure or
20 deposit will not be detrimental to the public
21 interest, and then three, finally, the structure or
22 deposit will not materially reduce flood flow
23 capacity of a stream." In your opinion, which of
24 those standards is usually the hardest to meet?

25 A The detrimental to the public interest by far.

LEGAL VIDEO SERVICES
(608) 279-5295 Prairie du Sac WI
173

1 navigation?

2 A Yeah, those are the three that can easily be picked
3 out as having overlying similarities between the two
4 standards -- sets of standards.

5 Q Okay. Thank you. As you're aware, the approval
6 that's at issue today was a reconsideration of a
7 withdrawn manual code approval, is that your
8 understanding?

9 A That's correct.

10 Q And did you process the pending application between
11 the withdrawal of the approval decision in January
12 20th, 2010 and when the approval was issued in
13 November of 2010 or was there some downtime during
14 that period?

15 A I'll try and track that question.

16 Q I'm sorry, it was a long question. Should I --

17 A So let me see if I can hit what I believe you're
18 asking. I processed both versions of the manual
19 code, both the original and the reconsidered version,
20 and the downtime that was associated with those two
21 had to deal with I believe the approval of the -- or
22 I should say the concurrence of the wetland
23 delineation with the U.S. Army Corps of Engineers and
24 also to ensure that we adequately addressed in as
25 great of detail possible all of the alternatives that

LEGAL VIDEO SERVICES
(608) 279-5295 Prairie du Sac WI
175

1 Q Okay. And then I'd also like you to take a look at
2 what I've been placed before you is a portion of
3 NR103.03 which is the wetland water quality standards
4 under subsection (1) and then it goes from (a)
5 through (g). Are any of those functional values
6 included within your understanding of what's required
7 to meet the public interest test under Chapter 30?

8 A Yes. It's really my understanding and opinion that
9 throughout the wetland water quality standards the
10 test for the public interest is contained in a lot of
11 these standards in a similar fashion, basically
12 discussing things like water quality impacts,
13 recreational impacts which can really in my
14 understanding include navigation and all incidents of
15 navigation and fish and wildlife habitat are all
16 fundamentally contained within these wetland water
17 quality standards at NR103.03.

18 Q And just to clarify for the record, you referred
19 specifically to some of the language in NR103.03(c)
20 in terms of water quality, NR103.03(f) for habitat,
21 for wildlife species, birds, reptiles, amphibians. I
22 think you said fisheries, but I'm not sure exactly
23 what you said, and then you referred specifically to
24 NR103.03(g), recreational values of those wetlands in
25 terms of navigation and all the incidents of

LEGAL VIDEO SERVICES
(608) 279-5295 Prairie du Sac WI
174

1 we had previously identified but made sure that there
2 was subsequent information to support those
3 alternatives.

4 Q Could you identify for the record what's been marked
5 Exhibit 215?

6 A 215 is an approved jurisdictional form from the
7 U.S. Army Corps of Engineers.

8 Q And which wetland does this relate to?

9 A This would relate to -- I'm not sure the SEWRPC
10 delineation page, but all of the areas contained
11 within blue on the SEWRPC delineation report so
12 basically referring back up to this diagram here,
13 both of the two green shaded areas --

14 Q Oh, I'm sorry Andy, this particular -- I only
15 included one of the jurisdictional determinations.

16 A Oh, I'm sorry. Okay.

17 MS. CORRELL: It's my understanding is that
18 all the parties stipulated that the green areas
19 of the large Wetland Number 1 were not
20 contested. They were also not contested I would
21 state, I believe as accurate for the record, and
22 I think Don can concur, that there was no
23 dispute as to large Wetland Complex Number 1.
24 Is that correct, Don?

25 MR. GLEISNER: Well, we're in on the

LEGAL VIDEO SERVICES
(608) 279-5295 Prairie du Sac WI
176

1 stipulation too, Counsel, and --
 2 MS. CORRELL: Oh, I know, but North Lake
 3 Management District was involved when there was
 4 a dispute with respect to wetlands and it was
 5 only as to Wetland Number 2, is that accurate?
 6 The large wetland complex was not disputed?
 7 MR. GALLO: That's correct.
 8 MS. CORRELL: Okay. That's all I was
 9 trying to --
 10 A So, I apologize, I thought they were both contained
 11 in here. As I read this a little closer, this is the
 12 approved jurisdictional determination form for the
 13 Wetland 2.
 14 Q And I think that's clarified under -- in the bottom
 15 of Section C, Project Location and Background
 16 Information that the Corps completed a separate
 17 approved jurisdictional determination. What I would
 18 like you to do though is if you could turn to Page 4
 19 of the jurisdictional determination located at
 20 Exhibit 215 and identify for the record the
 21 characteristics of the wetland as they're articulated
 22 under the physical characteristics and following down
 23 to the general flow.
 24 MR. GLEISNER: What numbers are you
 25 referring to, Counsel? I'm --

LEGAL VIDEO SERVICES
 (608) 279-5295 Prairie du Sac WI
 177

1 the page that's marked Exhibit 215, Page 2.
 2 MR. HARBECK: I don't think we have it.
 3 MS. CORRELL: The back of Page 2 on 215.
 4 MS. KAVANAUGH: Which should be -- you
 5 don't have it. She didn't copy it right. Oh,
 6 geez.
 7 MS. CORRELL: Well, let's see here. Don,
 8 do you want to --
 9 ALJ BOLDT: Do you want to look at this
 10 one? We can make a quick one too if you want.
 11 MR. GLEISNER: No, that's okay. For right
 12 now that's okay, Judge.
 13 MS. CORRELL: Yeah, do you want to share
 14 with Mr. Gallo? Is that possible?
 15 MS. KAVANAUGH: She must have run it
 16 through the copier wrong.
 17 MS. CORRELL: That's okay.
 18 A Okay. This is basically -- you want me to read the
 19 last paragraph on Page 4?
 20 Q No, actually -- sorry. I'm starting up a little
 21 higher.
 22 A Okay.
 23 Q I'm under the two characteristics of the wetland.
 24 A Okay.
 25 Q Wetland size?

LEGAL VIDEO SERVICES
 (608) 279-5295 Prairie du Sac WI
 179

1 MS. CORRELL: Exhibit -- the same exhibit.
 2 MR. GLEISNER: Right.
 3 MS. CORRELL: 215.
 4 MR. GLEISNER: Right, we're there.
 5 MS. CORRELL: Page 4.
 6 MR. GLEISNER: Right.
 7 MS. CORRELL: And there's a numeral -- or,
 8 I'm sorry, Number 2, characteristics of wetland
 9 adjacent to non --
 10 MR. GLEISNER: I'm sorry, Counsel, on
 11 Page 4 of 215 we have -- it starts with
 12 Number 3. I'm sorry.
 13 MS. CORRELL: I don't know what you -- are
 14 you sure -- I'm sorry, I'm talking about the 4
 15 in the actual exhibit, not the exhibit sticker
 16 so that would actually be --
 17 MR. GLEISNER: Oh, okay.
 18 MS. CORRELL: Because I think these are
 19 double-sided and our assistant only marked every
 20 other page. She didn't mark the back pages. So
 21 215 -- I'm actually talking about a 4 that's on
 22 the original exhibit.
 23 MR. GLEISNER: I apologize, Counsel, we're
 24 having trouble here.
 25 MS. KAVANAUGH: Okay. It's on the back of

LEGAL VIDEO SERVICES
 (608) 279-5295 Prairie du Sac WI
 178

1 A All right. So the physio-characteristics has been
 2 identified by the Army Corps of Engineers as -- the
 3 wetland size is 0.05 acres. They've identified it as
 4 a fresh wet meadow. Wetland 2 was identified to be
 5 used as a mowed lawn for approximately 50 years.
 6 Current and past land use of the area has degraded
 7 wetland functions in Wetland 2 and the overall
 8 quality of Wetland 2 is low.
 9 Q Okay. And what's the general flow relationship with
 10 the non-TNW? And TNW for the record stands for
 11 traditional navigable water.
 12 A Under the general --
 13 MR. GLEISNER: May I just --
 14 THE WITNESS: Yes.
 15 MR. GLEISNER: I'm a little confused. Are
 16 you saying that -- and I'm not -- is the large
 17 green area that we're talking about or the
 18 orange area that we're talking about?
 19 MS. CORRELL: No, we're talking about
 20 Wetland Number 2 which is depicted -- let me
 21 show you where it is. Let's look at Exhibit 200
 22 again, that same Map 2. There's a small wetland
 23 that's indicated as a 2 on that map.
 24 MS. KAVANAUGH: It's the (inaudible) of
 25 wetland that's in the parking lot --

LEGAL VIDEO SERVICES
 (608) 279-5295 Prairie du Sac WI
 180

1 MS. CORRELL: Yeah, there it is.
 2 MS. KAVANAUGH: -- just west of the grove
 3 of trees.
 4 MS. CORRELL: Right. So we're talking
 5 about the smaller wetland which --
 6 MR. MEYER: Is that the one in red?
 7 MS. CORRELL: No, that red is the entire
 8 parking lot. It's a small area.
 9 MR. MEYER: (Inaudible).
 10 MS. CORRELL: Yes. Oh, that's another
 11 exhibit that -- okay. So that's Exhibit 2-002.
 12 MR. GLEISNER: No, no, that's not.
 13 MR. HARBECK: No, it's not.
 14 MS. CORRELL: I'm sorry, what is it? It
 15 says 2-002.
 16 MR. GLEISNER: Just a minute.
 17 MS. CORRELL: What is that exhibit? Okay.
 18 Well, let's just use that for purposes. We've
 19 got a large NRC map that shows --
 20 MR. GLEISNER: I think that's Exhibit 10
 21 we're talking about.
 22 MS. CORRELL: Okay. If you say it is.
 23 MR. GLEISNER: Exhibit 10.
 24 MS. CORRELL: Okay.
 25 MR. GLEISNER: But not the large one, Your

LEGAL VIDEO SERVICES
 (608) 279-5295 Prairie du Sac WI
 181

1 conducted on the neighboring property near the
 2 southern boundary of the review area. The report
 3 indicated the presence of a shallow subsurface
 4 hydrologic gradient that slopes from Wetland 2 to
 5 North Lake. This report indicates that the
 6 subsurface connection is generally within 12 inches
 7 of the surface with occasional inundation during
 8 heavy precipitation events. The general water level
 9 elevations near Wetland 2 range from 0.58 feet to
 10 1.22 feet higher than the surface water levels in
 11 North Lake.
 12 Q And, importantly, could you provide what the Army
 13 Corps of Engineers identified as the surface flow of
 14 this water?
 15 A They identified it as overland cheek flow.
 16 Q And what are the characteristics of that flow?
 17 A That photographs provided by the North Lake
 18 Management District -- it indicated that surface
 19 water occasionally fills and eventually overflows
 20 Wetland 2 and flows overland to North Lake following
 21 heavy precipitation events.
 22 Q And then the Army Corps has to do an adjacency
 23 determination. They have to go through more steps
 24 than we do in terms of identifying jurisdiction.
 25 Could you read the last paragraph explaining whether

LEGAL VIDEO SERVICES
 (608) 279-5295 Prairie du Sac WI
 183

1 Honor, but we have a smaller one marked as
 2 Exhibit 10.
 3 MS. CORRELL: Okay. So this yellow wetland
 4 area is the delineation submitted by SEWRPC.
 5 This green larger hashed area was the
 6 delineation submitted by NRC on behalf of North
 7 Lake Management District to the Army Corps of
 8 Engineers. There was a dispute about the
 9 delineation so I'm asking him about Wetland
 10 Number 2 as the court called it. The larger one
 11 is Wetland 1.
 12 MR. GLEISNER: And just so I'm clear, when
 13 you say the Wetland 2 you're referring to that
 14 which is marked in yellow?
 15 MS. CORRELL: In yellow on Exhibit 10, yes.
 16 MR. GLEISNER: Thank you very much,
 17 Counsel.
 18 A So I can continue reading the general flow
 19 relationship with the yellow identified wetland area,
 20 Wetland 2?
 21 Q Yes.
 22 A The flow has been characterized as intermittent flow.
 23 It goes further and explain that natural resources
 24 consulting NRC on behalf of the North Lake Management
 25 District submitted a hydrologic evaluation which was

LEGAL VIDEO SERVICES
 (608) 279-5295 Prairie du Sac WI
 182

1 or not adjacency was present?
 2 A Yes. They've identified that it was not directly
 3 abutting and that it was separated by a berm or a
 4 barrier and that the eastern portions of the review
 5 area, including areas between Wetland 2 and North
 6 Lake, have been subject to historic filling
 7 activities which occurred prior to Section 404 of the
 8 Clean Water Act. Wetland 2 may have historically
 9 been contiguous with North Lake, however past filling
 10 on the property resulted in Wetland 2 being separated
 11 from North Lake. The definition of adjacent per
 12 Corps of Engineers regulations at 33 Code of Federal
 13 Regulations, 328.3(c), states that "Wetlands
 14 separated from other waters of the U.S. by manmade
 15 dikes or barriers, natural river berms, beach dunes
 16 and the like, are adjacent wetlands. Although
 17 Wetland 2 is separate from North Lake by historical
 18 fill areas, by definition it is an adjacent wetland."
 19 Q So is it your understanding then that Wetland
 20 Number 2 was also regulated as a federal wetland?
 21 A Yes, it is.
 22 MR. GLEISNER: Wait a minute, Counsel.
 23 Again, Wetland 2 is the yellow area, correct?
 24 MS. CORRELL: Correct. Wetland Number 2 is
 25 the yellow area on Exhibit 10. It is also the

LEGAL VIDEO SERVICES
 (608) 279-5295 Prairie du Sac WI
 184

1 smaller blue area on Exhibit 200 at Map 2 marked
2 with Bates Number 103.
3 MR. GLEISNER: Thank you.
4 MR. MEYER: Your Honor, I can mark that as
5 an exhibit for your use (inaudible).
6 ALJ BOLDT: He's got it all ready to go.
7 MS. CORRELL: I'd like to move Exhibit 215.
8 Q And then I'd like to ask the witness to identify
9 what's been marked Exhibit 216.
10 ALJ BOLDT: Any objection to 215 first of
11 all?
12 MR. GLEISNER: No, Your Honor.
13 ALJ BOLDT: 215 is received. 216?
14 MS. CORRELL: I hope everybody has 216.
15 I'll give everyone a minute to get there and I'd
16 like to have you refer to Page 2. Is everyone
17 ready?
18 Q Can you read the second-to-last paragraph of Page 2,
19 Exhibit 216, please, beginning with on May 4th?
20 A "On May 4th, 2010, the Corps of Engineers conducted
21 an independent on-site review. The SEWRPC/Wisconsin
22 DNR wetland delineation, the information which had
23 been submitted by the North Lake Management District,
24 was also considered. On May 5th, 2010, the Corps of
25 Engineers conducted a follow-up site review that was

LEGAL VIDEO SERVICES
(608) 279-5295 Prairie du Sac WI
185

1 the presence of a navigable water in the general
2 vicinity of the parking lot.
3 MR. GLEISNER: May it please the court,
4 learned treatises, I mean this is an
5 administrative hearing, but the rules of civil
6 procedure do apply to the extent that there
7 isn't a conflict. If there were learned
8 treatises, we could have been given notice of
9 them before they're used here.
10 MS. CORRELL: And why is that?
11 MR. GLEISNER: That's what the code of
12 civil procedure requires.
13 MS. CORRELL: You've provided definitions
14 that we had no notice of and they were not even
15 relied upon by any source that I was aware of.
16 ALJ BOLDT: If he relied on them in
17 making -- you're not offering them as exhibits,
18 are you?
19 MS. CORRELL: No, it's not an exhibit, it's
20 just a learned treatise.
21 ALJ BOLDT: Did you rely any -- in --
22 MS. CORRELL: He can --
23 ALJ BOLDT: Did you rely on any sources in
24 reaching your opinions that you've rendered here
25 today?

LEGAL VIDEO SERVICES
(608) 279-5295 Prairie du Sac WI
187

1 attended by Wisconsin DNR, SEWRPC, Natural Resources
2 Consulting and Charlie Newing (phonetic), a
3 consulting representing North Lake Management
4 District. The work plan for the site visits, brief
5 trip reports and responses from parties involved are
6 attached."
7 Q Okay. And if you could turn to Page 3 of Exhibit 216
8 and if you could read for the record the second
9 paragraph beginning with the disputed area?
10 A "The disputed area" -- oh, sorry, excuse me. "The
11 disputed area is an anomaly as field indicators of
12 hydrology and hydric soils would suggest that
13 wetlands may be present at the site. However, hydric
14 vegetation has not established in the approximately
15 50 years following the placement of fill and
16 associated hydrologic alteration. The existing
17 vegetation has sorted out relative wetness and
18 represents the normal vegetative condition. This
19 sorting is demonstrated by a marked increase in
20 density of hydrophytes and decrease of
21 non-hydrophytes in the more concave and wetter
22 portions of the site that have been delineated as
23 wetland by SEWRPC and Wisconsin DNR."
24 Q And I believe you've brought along some learned
25 treatises. There's been a lot of conversation about

LEGAL VIDEO SERVICES
(608) 279-5295 Prairie du Sac WI
186

1 THE WITNESS: Yes, I have.
2 ALJ BOLDT: Yeah, I think that's --
3 MS. CORRELL: I think he can testify as to
4 his knowledge of what a diffuse surface water is
5 and if he relies upon a learned treatise in
6 corroborating his opinion, that's perfectly
7 acceptable.
8 MR. HARBECK: I think the point is that the
9 rules require you -- if you're going to have a
10 witness rely on learned treatises, the rules
11 require that you give advance notice to the
12 other side and you didn't do that.
13 MS. CORRELL: And we haven't been provided
14 any literature to which any of the definitions
15 were provided.
16 MR. GLEISNER: What are you talking about?
17 MR. HARBECK: We haven't admitted or tried
18 to reference to learned treatises. We haven't
19 done this, what you're trying to do now. That's
20 the point.
21 ALJ BOLDT: All right. Let's take a five
22 minute break.
23 (Recess taken)
24 ALJ BOLDT: Okay. We'll go back on the
25 record. The objection is overruled. I took a

LEGAL VIDEO SERVICES
(608) 279-5295 Prairie du Sac WI
188

1 minute to look at the statute. The section
 2 relating to learned treatises is in 908.03(18)
 3 and the requirement to give notice is if you
 4 want to introduce it as evidence. That's
 5 specifically, no published treatise, periodical
 6 or pamphlet constituting a reliable authority in
 7 this case rebutting publishing treatise which is
 8 under 908.03(18)(b) shall be received into
 9 evidence unless the party proposing to offer the
 10 same shall not later than 20 days after service
 11 of the notice serve notice upon counsel who has
 12 served the notice or 40 days in the case of an
 13 original published treatise. And that's when
 14 you want to put it into evidence. I think it's
 15 appropriate and even that one does give some
 16 discretion -- the final provision of that. It
 17 says, "The court may for cause shown prior to or
 18 at the trial relieve the party from the
 19 requirements of this section that would prevent
 20 a manifest injustice." So there's some
 21 discretion even within that when you're trying
 22 to put it into evidence, but I think this is
 23 more like 907.03, basis of opinion testimony by
 24 experts, that if it's of the type reasonably
 25 relied upon by an expert in a particular field

LEGAL VIDEO SERVICES
 (608) 279-5295 Prairie du Sac WI
 189

1 Law, is really an occurrence of natural water
 2 sources, whether it be snow melt, rainfall, flooding,
 3 that's spread over the ground and not confined in any
 4 form of a watercourse, areas that are typically
 5 depressions on the landscape or just areas of
 6 topographical differences where this diffuse water
 7 can collect.
 8 Q And if an area receives diffuse surface water over
 9 time that does not drain hydrologically, what could
 10 occur?
 11 A The accumulation of diffuse water over, say, any
 12 period of time could eventually establish an ordinary
 13 high water mark, a bed and bank, differences of
 14 vegetative cover types.
 15 Q And what's more likely to occur first?
 16 A Probably the loss of vegetation. Typically -- or an
 17 alteration of vegetation. You'd lose upland plant
 18 species changing back over to more wetland-type plant
 19 species and then if it's there long enough they may
 20 disappear.
 21 Q And as opposed to a diffuse surface water, what's a
 22 natural stream?
 23 A A natural stream is a defined watercourse that has a
 24 directional flow or a current. The key
 25 characteristic is that it is within a defined bed and

LEGAL VIDEO SERVICES
 (608) 279-5295 Prairie du Sac WI
 191

1 in forming opinions or inferences, they need not
 2 be admissible in evidence in order for the
 3 opinion or reference to it to be admitted and I
 4 think the expert can rely on these types of
 5 works in preparing his testimony. So the
 6 objection is overruled. I don't think the
 7 notice provision necessarily pertains,
 8 particularly this 20-day notice here.
 9 Chapter 227 notice requirements are 10 days
 10 notice of hearing so there would be an inherent
 11 conflict with the 20-day notice or the 40-day
 12 notice of a learned treatise if you're having a
 13 hearing within 10 days under Chapter 227. But,
 14 in any event, the objection is overruled so go
 15 ahead.
 16 MR. GLEISNER: Your Honor, they won't come
 17 into evidence though?
 18 ALJ BOLDT: No.
 19 MS. CORRELL: No, that wasn't being offered
 20 to be in evidence.
 21 Q Mr. Hudak, what's your understanding of what a
 22 diffuse surface water is?
 23 A A diffuse surface water, it's my understanding and
 24 I'll kind of reference it to the information that
 25 deals with a publication here in Wisconsin, Water

LEGAL VIDEO SERVICES
 (608) 279-5295 Prairie du Sac WI
 190

1 bank. Furthermore, I guess the -- oh, the
 2 watercourse, it's distinct from the diffuse surface
 3 water flow is added as -- the diffuse water surface
 4 flow may have no bed or bank or will likely have no
 5 bed or bank and it's only present on a (inaudible)
 6 basis.
 7 Q So after the Department received its 404 water
 8 quality certification permit from the Army Corps of
 9 Engineers in July of 2010, did you determine the
 10 application to be complete at that time or did you
 11 need to receive any additional information?
 12 A Can you repeat the timeframes there again? Sorry,
 13 I --
 14 Q Oh, okay, sorry. The Army Corps of Engineers issued
 15 its water quality certification on July 30th, 2010
 16 and did you at that time conclude that the DNR
 17 approval for the boat access project was complete or
 18 were you still waiting for additional information?
 19 A It was after the Army Corps concurrence that we
 20 determined the application to be complete. I guess I
 21 don't recall if there was a time in there where I was
 22 still waiting for information or exactly the
 23 timeframe of when we issued that complete
 24 notice -- completeness notice.
 25 Q Okay. And towards the beginning of the Exhibit 200,

LEGAL VIDEO SERVICES
 (608) 279-5295 Prairie du Sac WI
 192

1 the -- let's see here. Following the permit
2 application there's a memo to you dated September
3 16th, 2010 and it also has a Bates mark 811 on the
4 bottom of it. You referred to this earlier. It's a
5 memo from Jim Morrissey and included I guess
6 additional information --

7 MR. GLEISNER: Counsel, where is this at?

8 MS. CORRELL: Exhibit 200 --

9 MR. GLEISNER: Uh-huh.

10 MS. CORRELL: -- towards the beginning
11 right after the permit application itself and
12 it's marked -- it's dated September 16th, 2010.
13 It's a memo.

14 MR. GLEISNER: Does it have a Bates stamp,
15 Counsel?

16 MS. CORRELL: 811.

17 MR. GLEISNER: Say again?

18 MR. HARBECK: 811.

19 MS. CORRELL: 811.

20 MR. GLEISNER: Okay. Okay. We've got it,
21 Counsel.

22 Q Would this refresh your recollection in terms of when
23 the permit approximately was deemed to be complete?

24 A Yes, it helps out. Again, this -- we received
25 additional information on September 16th so between

LEGAL VIDEO SERVICES
(608) 279-5295 Prairie du Sac WI
193

1 binder, a large stack of documents that are marked
2 Exhibit 220?

3 A (Inaudible), but yes. 220?

4 Q Could you identify what those documents are for the
5 record?

6 MR. GLEISNER: Do we have copies of those,
7 Counsel?

8 MS. KAVANAUGH: Yes.

9 MS. CORRELL: No, we don't --

10 MS. KAVANAUGH: I'm sorry.

11 MS. CORRELL: -- they're too large. We
12 brought the original if you'd like to look at it
13 and you can also look at that.

14 MR. GLEISNER: You didn't give us a copy,
15 Counsel?

16 MS. CORRELL: It was identified when I
17 submitted them that they were all the copies and
18 I wasn't going to copy --

19 MS. KAVANAUGH: They're copies of the
20 public comments at the hearing.

21 MS. CORRELL: -- all of the public
22 comments.

23 MS. KAVANAUGH: Many from you all so --

24 MS. CORRELL: If you'd like to take a look
25 at them --

LEGAL VIDEO SERVICES
(608) 279-5295 Prairie du Sac WI
195

1 July and September that time I would assume is to
2 address this additional information that was
3 subsequently submitted on the 16th of September.

4 Q Or it was formalized on that date?

5 A Correct.

6 Q Could you refer to what's been marked Exhibit 213,
7 please? Can you identify what this exhibit is for
8 the record?

9 A Yes, this is a standardized notice of public
10 informational hearing and complete application for
11 the North Lake public access at the DNR site so it
12 would be a notice that was published in the paper and
13 sent out to members of the public noticing them of a
14 date, time and place for a hearing to provide comment
15 on the application.

16 Q And what's included in Exhibit 213, Page 4, 5, 6 and
17 I guess I'm assuming 7 but it's not marked as such?
18 Exhibit 213, 7, would be the last page.

19 A That's correct. These last four pages identify the
20 affidavit of publication in the newspaper and the
21 interested parties that the notice was mailed to.

22 Q Is that the same process you would follow for any
23 Chapter 30 application submitted by any applicant?

24 A Yes, it is.

25 Q And could you turn to, it's not going to be in your

LEGAL VIDEO SERVICES
(608) 279-5295 Prairie du Sac WI
194

1 MR. HARBECK: Well, it would be very
2 convenient to actually have a copy of the
3 exhibits that you're introducing.

4 MS. CORRELL: Yeah, we're not going to
5 waste three trees to copy that many documents.
6 You've known this since --

7 MR. GLEISNER: This is an adversary
8 proceeding, Counsel. You need to give us copies
9 of all of the exhibits.

10 MS. CORRELL: Well, you know what, if you
11 have a dispute you could have raised that when
12 the exhibits were exchanged and this is the
13 first I've heard of that. If you wanted to pay
14 for all of those copies, DNR would have gladly
15 given you a copy.

16 MR. HARBECK: I've never heard anyone say
17 that before.

18 MR. GLEISNER: I have never heard that in
19 40 years of litigation.

20 MS. CORRELL: Well, have you had comments
21 as large as those that you have received as an
22 exhibit?

23 MR. GLEISNER: Counsel, if you're going to
24 use an exhibit, the Judge entered an order
25 requiring that exhibits be exchanged by the 2nd

LEGAL VIDEO SERVICES
(608) 279-5295 Prairie du Sac WI
196

1 of September, I believe.
 2 MS. CORRELL: I'll let the Judge rule. If
 3 you need to have a copy that would be two
 4 binders worth for each party.
 5 ALJ BOLDT: If you can -- do you want to
 6 look at these while he looks at his own
 7 original?
 8 MR. GLEISNER: Yeah, just at some point --
 9 ALJ BOLDT: And it's the public comment. I
 10 don't think it's even relevant evidence frankly.
 11 I mean --
 12 MS. KAVANAUGH: It's just to show that the
 13 public --
 14 MR. GLEISNER: If you ruled it's not
 15 relevant evidence, Your Honor, we would lose
 16 interest in it immediately.
 17 ALJ BOLDT: I mean if it's public comments
 18 it's probably not something I can rely on in
 19 making my decision. That's the -- I mean
 20 that's --
 21 MS. KAVANAUGH: It's relevant to the issue
 22 that we -- that the public had an opportunity to
 23 (inaudible) and come in and, you know, input.
 24 MS. CORRELL: Right.
 25 ALJ BOLDT: Is there a dispute on that?

LEGAL VIDEO SERVICES
 (608) 279-5295 Prairie du Sac WI
 197

1 MS. CORRELL: This is getting laborious.
 2 Q So you've identified that those are the public
 3 comments that you received in response to the 30.208
 4 public notice and comment period?
 5 A Yeah, I'll take a quick look.
 6 Q And also for the public informational hearing that
 7 was held?
 8 A As it appears, Exhibit 220 is a compilation of the
 9 public comments that were received at the public
 10 informational meeting and by the required date ten
 11 days preceding that hearing for that public
 12 informational meeting so yes, that's what these are.
 13 Q And, overall, your analysis was -- what were the
 14 primary concerns regarding the project?
 15 MR. GLEISNER: Your Honor, objection,
 16 relevance, but also they're attempting to get
 17 into evidence what is in that packet of
 18 materials. Now, we didn't get a copy of it,
 19 we're going to object to that, we're going to
 20 object to its admissibility.
 21 ALJ BOLDT: You were given notice that you
 22 were not going to get a copy. I mean I know
 23 there's a lot of emails flying around here,
 24 but --
 25 MS. CORRELL: About six weeks ago.

LEGAL VIDEO SERVICES
 (608) 279-5295 Prairie du Sac WI
 199

1 MS. KAVANAUGH: Which I believe Don was
 2 probably at those hearings and I'm assuming at
 3 least some members of your --
 4 ALJ BOLDT: Is there a dispute on that
 5 point? I mean --
 6 MS. KAVANAUGH: You were probably there
 7 too.
 8 MR. MEYER: So I just want to clarify.
 9 It's for the purpose of showing the public had
 10 input into the decision-making?
 11 MS. CORRELL: That is one of the purposes.
 12 The other purpose is that North Lake Management
 13 District submitted significant comments and
 14 those comments didn't necessarily jive with all
 15 of the comments that are -- all of the concerns
 16 that are being raised today in this proceeding.
 17 MR. GLEISNER: Well, Counsel is then, Your
 18 Honor, I would respectfully submitting
 19 these -- this exhibit as more than just evidence
 20 of public input. They're going to rely on it to
 21 argue that there are different points of view
 22 available and in that case --
 23 MS. CORRELL: We'll just skip it and move
 24 on.
 25 MR. GLEISNER: Okay, Counsel.

LEGAL VIDEO SERVICES
 (608) 279-5295 Prairie du Sac WI
 198

1 ALJ BOLDT: So it's kind of a gray area.
 2 If you want --
 3 MR. MEYER: Your Honor, I think --
 4 ALJ BOLDT: -- to take a minute to look
 5 through them and/or copy them, I think at this
 6 point we'd probably have to charge somebody. I
 7 don't know. I'd have to talk to our
 8 administrator, but I don't know who or what, but
 9 you know it's a lot to copy right now.
 10 MR. MEYER: Your Honor, could I comment on
 11 this?
 12 ALJ BOLDT: Sure.
 13 MR. MEYER: What I also heard is the
 14 question didn't refer to those comments. He was
 15 asked independently of what is in that stack of
 16 papers, what this witness -- if he took into
 17 account public input and various aspects of it
 18 which I think are independent of the documents
 19 themselves.
 20 MR. GLEISNER: I guess our concern is this,
 21 Your Honor. If it's going to be part of the
 22 record we need a copy of it. That's --
 23 ALJ BOLDT: No, I think that's probably
 24 fair and it's not -- let's see. If we -- are
 25 you going to come back tomorrow one way or the

LEGAL VIDEO SERVICES
 (608) 279-5295 Prairie du Sac WI
 200

1 other?
 2 THE WITNESS: Yes.
 3 ALJ BOLDT: Is somebody willing to take on
 4 making copies of this?
 5 MS. KAVANAUGH: Do we have to include
 6 copies of the comments that they submitted,
 7 because those are probably the most number of
 8 pages in there.
 9 ALJ BOLDT: Just so that everybody has the
 10 same stack.
 11 MR. GLEISNER: Yeah, yeah.
 12 MS. KAVANAUGH: But they should have that.
 13 I mean you created it.
 14 ALJ BOLDT: They don't want to go fishing
 15 around through their stuff right now either, you
 16 know.
 17 MS. KAVANAUGH: Oh, I know, trust me.
 18 MS. CORRELL: Well, I thought Don had
 19 submitted -- I'm just checking. This is the
 20 wrong book.
 21 ALJ BOLDT: I mean I think frankly it
 22 really is kind of a secondary issue.
 23 MS. CORRELL: Yeah, I think we can move on.
 24 ALJ BOLDT: What went on before that is
 25 technically not relevant. Public comment one

LEGAL VIDEO SERVICES
 (608) 279-5295 Prairie du Sac WI
 201

1 for petitions. If a group of people puts
 2 together a petition that I think is the Code
 3 provision but, yeah, I don't think it -- I don't
 4 have that with me and I don't think it's worth
 5 it right now so let's go ahead. I guess I do
 6 have it with me.
 7 MS. CORRELL: Can I proceed or do you want
 8 a minute?
 9 ALJ BOLDT: Yes, go ahead, go ahead,
 10 please.
 11 Q Did you reach a decision within a reasonable degree
 12 of professional certainty regarding whether wetland
 13 water quality certification could be granted for the
 14 .02 acre fill necessitated by the parking lot? And
 15 specifically when I'm referring to the .02 fill, I'm
 16 looking at Exhibit 10 and the area identified in
 17 yellow.
 18 A Yes, the --
 19 Q And what's that opinion?
 20 A The opinion that was developed was that the impacted
 21 .02 acres of wetland fill in that area would not have
 22 significant adverse impacts to wetland functional
 23 values.
 24 Q I'm sorry, 0.02?
 25 A 0.02, correct.

LEGAL VIDEO SERVICES
 (608) 279-5295 Prairie du Sac WI
 203

1 way or the other is not something that I can
 2 rely on for making a finding of fact and
 3 that's --
 4 MR. GLEISNER: We appreciate that, Your
 5 Honor. We just really --
 6 ALJ BOLDT: No, I agree with your overall
 7 point so let's go off the record.
 8 (Recess taken)
 9 ALJ BOLDT: We're back on the record. I
 10 don't think we have any specific agreement about
 11 Exhibit 220. If it's going to come into the
 12 record you need to make a copy for both Counsel.
 13 And it's a gray area because I think you were
 14 alerted that you weren't getting a copy,
 15 but -- so there's no real -- nobody's really at
 16 fault or to blame here because there's a little
 17 bit on each side here.
 18 MS. KAVANAUGH: Isn't there a provision in
 19 227 though that documents can go into the file
 20 and not be submitted as part of the record? I
 21 believe there is.
 22 ALJ BOLDT: Yes. Well, no there is
 23 in -- in NR2 there is.
 24 MS. KAVANAUGH: NR2. Okay.
 25 ALJ BOLDT: Yes, and that's usually used

LEGAL VIDEO SERVICES
 (608) 279-5295 Prairie du Sac WI
 202

1 Q Was there any orientation of the parking lot that
 2 would have completely avoided impact to this low
 3 quality wetland?
 4 A I believe through the alternatives analysis process
 5 they formulated that there was no alternative
 6 identified that could accommodate the required
 7 numbers of stalls to provide adequate access in a
 8 configuration that would avoid those wetland impacts.
 9 Q And did you reach an opinion within a reasonable
 10 degree of professional certainty regarding whether
 11 the grading on the bank of North Lake would be
 12 detrimental to the public interest and the navigable
 13 waters of North Lake?
 14 A Yes.
 15 Q And what is that opinion?
 16 A The opinion developed for reviewing impacts
 17 associated with grading on the banks of North Lake
 18 was that there was not a significant detrimental
 19 impact to the public interest of North Lake.
 20 Q And how did your analysis account for the impervious
 21 surface that would be added for the parking lot?
 22 A The water quality element that was assessed was -- or
 23 took into consideration the storm water treatment
 24 that was proposed for the impervious areas with the
 25 inclusion of a bio-swale along the northern portion

LEGAL VIDEO SERVICES
 (608) 279-5295 Prairie du Sac WI
 204

1 of the site.
 2 Q Were there any other storm water features?
 3 A There were some storm water features throughout the
 4 access road (inaudible) as well.
 5 Q And what about on the south of the parking lot?
 6 A The south of the parking lot was a drain, under
 7 drain, drain tile, I guess kind of however you want
 8 to try and classify that, as a means of alleviating
 9 any standing water on the southern portion of the
 10 grading and basically have a way to transport that
 11 water to North Lake.
 12 Q And would you take into account balancing of the
 13 public's interest in accessing the lake in terms of
 14 what the public interest requires?
 15 A Yes. There was the balancing approach of what are
 16 the benefits gained and the improvements to public
 17 access and the public's enjoyment and use of
 18 North Lake in or versus the impacts associated with
 19 the project in and of itself.
 20 Q Have you reached an opinion within a reasonable
 21 degree of professional certainty regarding whether a
 22 material injury will result to adjacent riparian
 23 rights of any riparian owners on North Lake?
 24 A Yes, I have.
 25 Q And what is that opinion?

LEGAL VIDEO SERVICES
 (608) 279-5295 Prairie du Sac WI
 205

1 (inaudible) barrier at that -- on the bed of
 2 North Lake.
 3 Q Did you reach an opinion within a reasonable degree
 4 of professional certainty regarding whether the
 5 project was detrimental to the public interest in
 6 navigable waters of North Lake?
 7 A Yes, we have.
 8 Q And what is that opinion?
 9 A That there will be no significant public interest
 10 impacts to the bed of North Lake for those
 11 activities.
 12 Q Did you reach an opinion within a reasonable degree
 13 of professional certainty that the structures placed
 14 in North Lake would materially obstruct navigation on
 15 North Lake?
 16 A Yes.
 17 Q And what is that opinion?
 18 A The structures and associated boat launch
 19 construction will not materially reduce navigation in
 20 that location, but have a beneficial element
 21 associated with providing improved access to
 22 riparians of North Lake and the general public.
 23 Q Now I'm turning to the culverts that you've
 24 described, the four culverts that are going to be
 25 placed under the access road. Did you reach an

LEGAL VIDEO SERVICES
 (608) 279-5295 Prairie du Sac WI
 207

1 A The opinion is that the construction and design of
 2 the boat launch takes into a great deal the
 3 considerations of the riparian -- adjacent riparian
 4 rights of those owners and the location of the launch
 5 and the pad structure and the associated launching
 6 pier. All are not infringing upon the adjacent
 7 riparian rights for the boat launch.
 8 Q So can you clarify? Meaning there would be no -- it
 9 was your assessment that the boat launch project as a
 10 whole would not -- and the grading of the parking lot
 11 in particular would not impact a riparian's right to
 12 access water or place a pier?
 13 A That's correct. All of the impacts associated with
 14 the development of the launch are impacts within the
 15 riparian right zone of the Department and the
 16 Department-owned property and there are no associated
 17 adverse impacts to the adjacent riparian owners or
 18 their rights.
 19 Q And did you consider impacts to the bed of
 20 North Lake?
 21 A Yes, we have.
 22 Q What activities result in impacts to North Lake's
 23 bed?
 24 A The placement of the launch pad and associated
 25 material and also the temporary installation of a

LEGAL VIDEO SERVICES
 (608) 279-5295 Prairie du Sac WI
 206

1 opinion within a reasonable degree of professional
 2 certainty regarding whether the replacement of two
 3 culverts with four culverts will be detrimental to
 4 the public interest?
 5 A Yes.
 6 Q And what's that opinion?
 7 A That the review of those installation practices of
 8 those four culverts will not have a detrimental
 9 impact to the public interest of those navigable
 10 waters.
 11 Q Did you reach -- I think you already testified to
 12 this, but did you reach an opinion within a
 13 reasonable degree of professional certainty regarding
 14 whether or not placing the culverts would reduce
 15 flood flow capacity?
 16 A Yes, I have testified to that previously that I
 17 believe the culverts would not materially reduce the
 18 capacity of that waterway. What actually --
 19 Q And that's -- oh, pardon me.
 20 A And that would serve as almost an improvement or not
 21 a significant impact to the public interest or flood
 22 flow capacity of that waterway.
 23 Q And that's assuming that that factor even applies
 24 outside of a stream, is that correct?
 25 A That is correct.

LEGAL VIDEO SERVICES
 (608) 279-5295 Prairie du Sac WI
 208

1 Q And did you reach an opinion within a reasonable
 2 degree of professional certainty regarding whether or
 3 not replacing the culverts would result in a
 4 significant adverse impact to wetland functional
 5 values?
 6 A Yes.
 7 Q And what is that opinion?
 8 A The opinion that those culverts would not have a
 9 significant adverse impact to the functional values
 10 of those wetlands.
 11 Q And I don't think that this is a contested issue, but
 12 did you reach an opinion within a reasonable degree
 13 of professional certainty regarding whether or not
 14 the outfall structures for the two storm water
 15 features would be detrimental to the public interest
 16 in North Lake?
 17 A Yes.
 18 Q And what's that opinion.
 19 A The opinion is that the placement of those two
 20 structures would not have a significant impact to the
 21 public interest of North Lake.
 22 Q And, again, within a reasonable degree of
 23 professional certainty, did you reach an opinion
 24 regarding whether or not there would be a material
 25 obstruction to navigation by the placement of those

LEGAL VIDEO SERVICES
 (608) 279-5295 Prairie du Sac WI
 209

1 visits have you identified a perceptible flow in that
 2 area?
 3 A In one site visit that I can recall where there was
 4 standing diffuse water in that location I was not
 5 able to identify a perceptible flow.
 6 Q Okay. And could I refer you back to Exhibit 208. I
 7 believe it's already in the record. At what's marked
 8 208, Page 2, that's actually the third page in, how
 9 to locate and document the ordinary high water mark?
 10 A Found it.
 11 Q And what does roman numeral V, alpha numeral 1,
 12 identify?
 13 A It identifies that the ordinary high water mark
 14 determinations should be made according to the
 15 definition in (Inaudible) Shooting Club v. Husting in
 16 156 Wis. 261 (1914).
 17 Q And if you could page back further in Exhibit 208 to
 18 Page -- what's marked Exhibit 208, Page 5 and
 19 identify for the record what's the definition of
 20 ordinary high water mark?
 21 A The definition of ordinary high water mark is the
 22 point on the bank or shore up to which the presence
 23 and action of the water is so continuous as to leave
 24 a distinct mark either by erosion, destruction of
 25 terrestrial vegetation or other easily recognizable

LEGAL VIDEO SERVICES
 (608) 279-5295 Prairie du Sac WI
 211

1 two structures?
 2 A Yes, I have and the placement of those two structures
 3 will not have a material impact to navigation.
 4 Q You've attended the entire proceeding in this matter
 5 to date, haven't you?
 6 A Yes, I have.
 7 Q And you've heard the testimony regarding the presence
 8 of a navigable water in the area of the parking lot?
 9 A Yes, I have.
 10 Q Could you identify on Exhibit 10 what you understand
 11 to be approximately the parking lot?
 12 A Yes, on Exhibit 10 the approximate location of the
 13 parking lot would be probably starting around
 14 Point P2, although that's probably a little bit too
 15 far to the west and extending along the southern
 16 property boundary to North Lake to the north
 17 approximately to the boundary of the parcel and then
 18 approximately back over to Point P6 on this
 19 diagram -- Exhibit 10.
 20 Q And is it your understanding that the video that
 21 showed Ms. Hanson kayaking in the quote, unquote,
 22 grove of trees was located within that parking lot
 23 area?
 24 A Yes, that is my understanding.
 25 Q As you identified on Exhibit 10. On any of your site

LEGAL VIDEO SERVICES
 (608) 279-5295 Prairie du Sac WI
 210

1 characteristics.
 2 Q Did you identify any ordinary high water mark present
 3 in the grove of trees as it's been testified to and
 4 also as it had been identified during the site visit
 5 in this proceeding?
 6 A I've thoroughly investigated the grove of trees
 7 location and associated portions of the site that
 8 were identified as navigable waterways and I do not
 9 and have not observed any recognizable
 10 characteristics of the establishment of an ordinary
 11 high water mark outside of the area that I have
 12 identified as navigable waterways on the site.
 13 Q And did you identify any characteristics of the
 14 watercourse in the vicinity of the grove of trees as
 15 it's been referred to in this proceeding?
 16 A I have not identified a watercourse nor were there
 17 any distinguishing characteristics of a watercourse
 18 in the grove of trees and associated location.
 19 Q And what would those distinguishing characteristics
 20 be?
 21 A A defined bed and bank with a perceivable flow at
 22 some given point of the year.
 23 Q Have you reached an opinion within a reasonable
 24 degree of professional certainty regarding what the
 25 water in the grove of trees constitutes?

LEGAL VIDEO SERVICES
 (608) 279-5295 Prairie du Sac WI
 212

1 A Yes, I have.
 2 Q And what is that opinion?
 3 A My -- excuse me, my opinion is that the grove of
 4 trees constitutes an area of diffuse water flow
 5 originating from spring snow melts, rainfall events
 6 or flooding events from North Lake.
 7 Q You were present earlier when our esteemed colleague
 8 referred to 30.10 in regard to navigability. In your
 9 experience as a water management specialist in the
 10 southeast region have you ever identified a slough or
 11 bayou in any of the permits that you've reviewed?
 12 A In all the permits I reviewed I have not come across
 13 a navigable waterway that could be defined as a
 14 slough or a bayou.
 15 Q To your knowledge have any of the other water
 16 management specialists in the southeast region
 17 identified any sloughs or bayous in this area of the
 18 State?
 19 A To my knowledge I do not believe any water management
 20 specialists in southeast region have.
 21 Q What about your colleagues in the Mississippi area?
 22 A I believe that is an area where they have identified
 23 some sloughs or bayous that they would regulate as
 24 navigable waterways.
 25 Q And there's been a lot of questions about these three

LEGAL VIDEO SERVICES
 (608) 279-5295 Prairie du Sac WI
 213

1 MS. KAVANAUGH: Yeah.
 2 ALJ BOLDT: -- when Dr. O'Reilly --
 3 MS. CORRELL: The American Heritage
 4 Dictionary, I believe, is where Neal in part got
 5 his definition.
 6 MR. GLEISNER: And all I was saying, Your
 7 Honor, is I just want to know where he's going
 8 to get his definitions from, that's all.
 9 MS. CORRELL: And I think that if you'll
 10 allow him to testify he might actually answer
 11 that question.
 12 ALJ BOLDT: All right. Let's try to keep
 13 down the back and forth here. Let's just ask
 14 questions and object and I'll rule.
 15 MS. CORRELL: Let me strike that question.
 16 Do you want me to rephrase it? Does anybody
 17 need me to rephrase it? There's no objection to
 18 the question?
 19 MR. GLEISNER: Proceed, Counsel.
 20 A If I remember the question it was inferring have I
 21 formulated a new opinion regarding an understanding
 22 of a definition of a marsh outlet and based on
 23 various literature that I've come across, one of the
 24 ones that really kind of stuck out in my mind, was
 25 Wetland Plants and Plant Communities of Minnesota and

LEGAL VIDEO SERVICES
 (608) 279-5295 Prairie du Sac WI
 215

1 terms. I know you were asked previously in
 2 deposition and also in this proceeding whether there
 3 was a definition of marsh outlet and I believe you
 4 testified that there was not a definition you were
 5 aware of, is that correct?
 6 A There's not a statutory definition I'm aware of.
 7 Q Did you do any additional preparation for this
 8 hearing in terms of consulting literature that you
 9 might normally consult in your job just to see if you
 10 could get close to a definition?
 11 A Yes.
 12 Q Do you have any thought of what is contemplated with
 13 a marsh outlet because I know that Dr. O'Reilly
 14 provided a definition and I wanted your opinion of
 15 whether or not that definition would be an accurate
 16 assessment of what your analysis of a marsh outlet
 17 might be?
 18 MR. GLEISNER: Objection, if he's going to
 19 hold forth now with a definition I'd like to
 20 know the source of it.
 21 MS. KAVANAUGH: We didn't have one for
 22 Neal, he made it up.
 23 MS. CORRELL: Okay. Let's --
 24 ALJ BOLDT: I think there was reference to
 25 a dictionary, wasn't there --

LEGAL VIDEO SERVICES
 (608) 279-5295 Prairie du Sac WI
 214

1 Wisconsin, Second Edition, which was actually
 2 authored by Steve Eggers (phonetic) from the Army
 3 Corps and Dr. Donald Reid from SEWRPC. And the
 4 reason why I referenced back to this is that it gives
 5 good definitions of what a marsh actually is and the
 6 type of community you would expect to locate there.
 7 And based upon the definitions that are within these
 8 as for a deep marsh and a shallow marsh, they aren't
 9 exactly consistent with the conditions that are
 10 observed on the DNR parcel. Plant communities are
 11 obviously degraded and have shifted, but there is
 12 some characteristics that are not conducive of
 13 classifying it as a marsh, a deep or shallow marsh.
 14 It's more likely a fresh wet meadow changing over to
 15 shrub car, forested-type wetland, which by definition
 16 of not being a marsh may not constitute a definition
 17 of a marsh outlet.
 18 Q Would there be woody vegetation in a marsh based on
 19 your understanding of wetland hydrology?
 20 A No. Marshes are typically devoid of woody
 21 vegetation. Woody vegetation is contained within
 22 swamps.
 23 Q Prior to your November 4th, 2010 manual code approval
 24 were any of those nine site visits you referenced
 25 specifically for the purpose of evaluating whether a

LEGAL VIDEO SERVICES
 (608) 279-5295 Prairie du Sac WI
 216

1 navigable water had been overlooked by DNR?
 2 A I'm sorry, can you repeat the question?
 3 Q Prior to issuing your decision on the manual code
 4 approval were any of your site visits specifically
 5 for the purpose of evaluating whether a navigable
 6 water had been overlooked by DNR?
 7 A Prior to issuing the second decision, I'd have to
 8 check the dates but I do not believe so.
 9 Q And why would that have been?
 10 A I believe the question of additional navigable
 11 waterways was really formulated following the
 12 litigation we're in today, the approximate locations,
 13 exact locations, of where additional navigable
 14 waterways may be. So as a preparatory or
 15 investigatory approach for preparing for these
 16 proceedings it was -- further investigation was taken
 17 to document site conditions.
 18 Q Is it your understanding that either of the
 19 petitioners had previously characterized the area
 20 of -- just roughly part of the area where the parking
 21 lot is to be located as something other than a
 22 navigable water?
 23 A Yes. Based on even just this exhibit here, the large
 24 portion shaded in green was highly disputed as a
 25 wetland.

LEGAL VIDEO SERVICES
 (608) 279-5295 Prairie du Sac WI
 217

1 that what we're talking about?
 2 MS. CORRELL: Yes.
 3 MR. GLEISNER: That has been admitted
 4 as --
 5 MS. CORRELL: Yeah, so ours is a duplicate.
 6 We don't need that one then. And the grant of
 7 the contested case hearing, do I need to
 8 identify that or can we just move that -- the
 9 jurisdictional documents?
 10 MR. GLEISNER: I apologize, what are we
 11 talking about?
 12 MS. CORRELL: I'm wondering if I need to
 13 move the petitions and the grant of
 14 the -- limited grant of the contested case
 15 hearings to each of the parties?
 16 MR. HARBECK: Those aren't exhibits, are
 17 they?
 18 MS. CORRELL: They should just be
 19 jurisdictional and --
 20 MR. HARBECK: I think they're probably part
 21 of the record.
 22 MR. GLEISNER: Part of the record I think.
 23 MS. CORRELL: Yes.
 24 ALJ BOLDT: Part of the record and
 25 they're -- yeah, they are, they go to our

LEGAL VIDEO SERVICES
 (608) 279-5295 Prairie du Sac WI
 219

1 MS. CORRELL: And do I need to move any of
 2 the jurisdictional documents or are we
 3 already -- I mean the manual code decision is
 4 in, correct?
 5 MR. GLEISNER: I think it is in.
 6 MS. CORRELL: 201? It's just housekeeping
 7 here.
 8 MR. GLEISNER: I don't think it's 201.
 9 MS. CORRELL: Oh, it's R201. I think
 10 you're right. I think the one we said we
 11 wouldn't duplicate, right, so it's --
 12 MR. GLEISNER: I think it was 1, wasn't
 13 it --
 14 MS. CORRELL: Whatever yours is.
 15 MR. GLEISNER: Manual code.
 16 ALJ BOLDT: So 201 was withdrawn, is that
 17 correct?
 18 MS. CORRELL: I think we said we wouldn't
 19 have duplicates.
 20 ALJ BOLDT: Right, that's our usual --
 21 MR. GLEISNER: The manual code I believe,
 22 Your Honor, is Exhibit 1.
 23 MS. CORRELL: But the decision --
 24 MR. GLEISNER: Your Honor, yes,
 25 Exhibit 1-001 is the manual code approval, is

LEGAL VIDEO SERVICES
 (608) 279-5295 Prairie du Sac WI
 218

1 jurisdiction.
 2 MS. CORRELL: I normally go through all of
 3 that. I'm just trying to save time.
 4 MR. GLEISNER: No, I understand. I think,
 5 Your Honor, that in fact those are the subject
 6 of the briefing just before the hearing so I
 7 believe they're part of the record, Your Honor.
 8 MS. CORRELL: Okay. So I just want to
 9 check if I need to move any other exhibits that
 10 we just talked about. Exhibit 208 --
 11 ALJ BOLDT: Yeah, we had 211 and 218 I had,
 12 but -- 211 -- okay. 216 --
 13 MS. CORRELL: Yeah, I thought those were
 14 received. 215 and 16?
 15 UNIDENTIFIED SPEAKER: 15 is, 16 is not.
 16 MS. CORRELL: Oh, okay.
 17 ALJ BOLDT: Any objection to, first of all,
 18 211?
 19 MR. GLEISNER: We'll just take a quick
 20 gander, Your Honor. No, no objection, Your
 21 Honor.
 22 ALJ BOLDT: 211 is received. And then what
 23 about 216?
 24 MR. GLEISNER: Just real quick. No
 25 objection.

LEGAL VIDEO SERVICES
 (608) 279-5295 Prairie du Sac WI
 220

1 ALJ BOLDT: 216 is received. You had a
2 couple more?
3 UNIDENTIFIED SPEAKER: 214.
4 ALJ BOLDT: 214?
5 MR. GLEISNER: No objection.
6 ALJ BOLDT: 214 is received. 215 and 216
7 have been received.
8 UNIDENTIFIED SPEAKER: 208.
9 ALJ BOLDT: 208 was received previously.
10 MR. GLEISNER: So long as we're on
11 housekeeping, Your Honor, may I ask a question?
12 ALJ BOLDT: Yeah, let's finish up this task
13 first. Oh, okay. What about 209? I have it
14 checked that it was received. Do you have it
15 received?
16 UNIDENTIFIED SPEAKER: I don't have that.
17 ALJ BOLDT: I don't have it as received
18 either.
19 MR. GLEISNER: Yeah, these are the Wakeman
20 notes I believe, Your Honor. Those are -- we
21 agreed that those could be received.
22 ALJ BOLDT: Okay. 209 is received then if
23 it wasn't previously. Okay. So any
24 other -- you had another housekeeping --
25 MR. GLEISNER: Yes, thank you. Thank you,

LEGAL VIDEO SERVICES
(608) 279-5295 Prairie du Sac WI
221

1 ALJ BOLDT: So you want to put in -- what
2 was that one again, 8?
3 MR. GLEISNER: Exhibit 8 and we would move
4 the admission of that at this time.
5 ALJ BOLDT: It was definitely referenced.
6 Any objection on 8?
7 MS. CORRELL: I guess not. This was back
8 at the hearing --
9 MR. GLEISNER: Right.
10 MS. CORRELL: -- last time in September?
11 MR. GLEISNER: Yes. Yes, ma'am.
12 MS. CORRELL: I don't think there's an
13 objection then.
14 ALJ BOLDT: 8 is received.
15 MR. GLEISNER: Thank you, Your Honor.
16 ALJ BOLDT: Okay. Mr. Meyer, questions --
17 MS. CORRELL: Oh, I'm sorry, I had one
18 other question real quick here.
19 ALJ BOLDT: Oh, I'm sorry.
20 Q I'll have you refer back to Exhibit 204, please, and
21 I'm looking at some of your photos and particularly,
22 for example, Photo Number 1, 2 and 4 seem to be
23 approximately in the area that's been referred to as
24 the grove of trees.
25 A Okay.

LEGAL VIDEO SERVICES
(608) 279-5295 Prairie du Sac WI
223

1 Judge.
2 UNIDENTIFIED SPEAKER: I actually don't
3 think 213 was --
4 MS. CORRELL: Oh, right. I don't know if
5 that's --
6 ALJ BOLDT: 213 was received.
7 MS. CORRELL: It was? Okay.
8 MR. GLEISNER: We can do this tomorrow, but
9 I just want to ask Tim, Exhibit 8, was that
10 moved and received? I mean our notes say no.
11 UNIDENTIFIED SPEAKER: I have a question
12 mark next to it.
13 ALJ BOLDT: No, it was not received.
14 UNIDENTIFIED SPEAKER: I have a note that
15 says same as 109. Do you -- maybe you've got it
16 received as 109? I have a question mark next to
17 it so I don't know if it was. I don't think it
18 was.
19 ALJ BOLDT: I don't show it as being
20 received.
21 MS. CORRELL: What is that? That must have
22 been during --
23 ALJ BOLDT: I don't have 109 as being
24 received.
25 UNIDENTIFIED SPEAKER: Neither do I.

LEGAL VIDEO SERVICES
(608) 279-5295 Prairie du Sac WI
222

1 Q Did you find any evidence of adventitious roots or
2 any other features in those areas that you
3 documented?
4 MR. GLEISNER: What kind of roots, Counsel?
5 MS. CORRELL: Adventitious.
6 A Within the grove of trees none of the trees exhibited
7 any characteristics that would lead me to believe
8 there would be any establishment of an ordinary high
9 water mark such as adventitious roots, water
10 staining, etcetera.
11 Q For example, your Picture 24 also seems to be sort of
12 in the middle of the area that's been identified as
13 the grove of trees.
14 MR. GLEISNER: 204, Counsel?
15 MS. CORRELL: All still in Exhibit 204 --
16 MR. GLEISNER: Thank you.
17 MS. CORRELL: -- Picture Number --
18 MR. GLEISNER: 24?
19 MS. CORRELL: Oh, I'm sorry, 20 -- yeah,
20 24.
21 MR. GLEISNER: Thank you.
22 A That appears to be a picture in the same grove of
23 trees location.
24 MR. GLEISNER: I hate to say this, but we
25 don't have -- if it's Page --

LEGAL VIDEO SERVICES
(608) 279-5295 Prairie du Sac WI
224

1 MS. KAVANAUGH: You should have photos
2 attached to that.
3 MS. CORRELL: Page 14 of Exhibit 24 --
4 MR. GLEISNER: 14, sorry, I apologize.
5 MS. CORRELL: And Photograph 24 marked on
6 the left-hand side.
7 MR. GLEISNER: Thank you, Counsel, I see
8 what you're saying.
9 Q Did you identify any change in vegetation or lack of
10 vegetation in the approximate location where
11 Picture 24 was taken in the grove of trees?
12 A Well, Picture 24, the evidence I can see from here is
13 that it's all a consistent vegetative growth. There
14 is some standing water at the time of that photograph
15 that you can see at the base of the one tree that's
16 easily identifiable.
17 Q Thank you.
18 MS. CORRELL: I don't have anything
19 further.
20 ALJ BOLDT: Okay. Now to Mr. Meyer.
21 MR. MEYER: Just a very few clarifying
22 questions.
23 CROSS-EXAMINATION
24 BY MR. MEYER:
25 Q If I have the numbers right, you've spent about a

LEGAL VIDEO SERVICES
(608) 279-5295 Prairie du Sac WI
225

1 MR. GLEISNER: Sure, but that's not
2 what -- he's asking what he thinks of the
3 qualifications of Mr. -- or Dr. Reid who's not
4 here.
5 MS. KAVANAUGH: It's probably a
6 foundational question to ask.
7 ALJ BOLDT: Yeah, I mean Don Reid is
8 well-known to me in terms of testifying at
9 hearings, but do you have any response to the
10 question? The objection is overruled.
11 A Yes, I've worked with Don on a lot of projects and
12 he's very knowledgeable, very thorough, with the work
13 that he conducts for --
14 Q And you've worked with him on delineation of wetlands
15 in the past?
16 A Yes, I have.
17 Q Is he a highly qualified (inaudible)?
18 A In my opinion he is highly qualified, one of the
19 foremost experts in wetlands in the Midwest.
20 Q I just want to (inaudible) and this is really to make
21 sure I understand. There's been a lot of different
22 variations of the descriptions of what's out there on
23 the ground and I just want to make sure I understand
24 and hopefully it will clarify the record also.
25 Did -- his study didn't get at the navigability of

LEGAL VIDEO SERVICES
(608) 279-5295 Prairie du Sac WI
227

1 dozen years in southeastern Wisconsin in various
2 aspects of water resource management of some type?
3 A Since 2006.
4 Q Okay. Well, how long were you a water management
5 specialist?
6 A Since 2008.
7 Q Okay. During that time --
8 MR. MEYER: Strike that.
9 Q Exhibit I believe it's 200 which is the application
10 as I understand, (inaudible) as part of that there
11 was a delineation study done by Southeastern
12 Wisconsin Regional Planning Commission?
13 A That's correct.
14 Q And that was done by -- in conjunction with and done
15 by Dr. Donald Reid?
16 A That's correct.
17 Q During your tenure in southeastern Wisconsin have you
18 formulated an opinion of the qualifications and
19 experience of Donald Reid as an aquatic ecologist?
20 MR. GLEISNER: Objection, Your Honor, I
21 don't understand. He's being asked to comment
22 on the credibility of a witness who's not here.
23 I don't think that's --
24 MS. KAVANAUGH: Experts can rely on
25 experts, the opinions of other experts.

LEGAL VIDEO SERVICES
(608) 279-5295 Prairie du Sac WI
226

1 any of those wetlands, he was delineating (inaudible)
2 wetland, especially under the federal standards of
3 the Army Corps of Engineers, is that correct?
4 A Correct. He had conducted the delineation to meet
5 the Corps' manual for identifying and delineating
6 wetlands.
7 Q Now, for the purposes of (inaudible) there ought to
8 be a further characterization of what was navigable
9 waters, is that correct?
10 A That's correct because, again, navigable waterways
11 consist of areas that may or may not be contained or
12 delineated within wetlands so --
13 Q But it was important to get navigability for
14 jurisdictional reasons?
15 A That's correct.
16 Q And, once again, just trying to make sure I
17 understand, the testimony, and I think it was
18 Exhibit -- you defined certain navigable wetlands
19 (inaudible) and there was those two large wetlands.
20 And I forget the exhibit, but there --
21 MR. GLEISNER: 2-002, Counsel.
22 Q 2-002.
23 MR. GLEISNER: Thank you, Judge.
24 Q And it would be those two lobes separated by the
25 (inaudible), is that correct?

LEGAL VIDEO SERVICES
(608) 279-5295 Prairie du Sac WI
228

1 A That is correct.
 2 Q And then we had the wetlands associated with the
 3 waterway coming in from -- or the -- that area
 4 designated blue which has had many designations as a
 5 swale and whatever and that's a wetland that was also
 6 designated navigable. Now, if we could go back to
 7 the --
 8 MR. MEYER: May I approach?
 9 ALJ BOLDT: I'm sorry? Oh, you want to go
 10 back to the other one?
 11 MR. MEYER: Yes, please.
 12 Q And then as I recall, and this was the exhibit that
 13 had the Bates stamp 103, that map, and this is very
 14 similar to it.
 15 A Uh-huh.
 16 Q There was a federally designated wetland in the
 17 parking lot area and as I recall your testimony it's
 18 this yellow area?
 19 A To my understanding yes, that's what we described.
 20 Q Now, that has not been determined by the Department
 21 of Natural Resources staff, including yourself, as
 22 being navigable, right?
 23 MR. GLEISNER: Leading.
 24 MR. MEYER: I'm just trying to clarify to
 25 see what the record is.

LEGAL VIDEO SERVICES
 (608) 279-5295 Prairie du Sac WI
 229

1 waterway that needs to be identified as navigable and
 2 protected under the public trust.
 3 Q Okay. Now I'll ask a leading question and, once
 4 again, it's for clarification and that is it's my
 5 understanding you've estimated that area in yellow to
 6 be about .02 acres?
 7 MR. GLEISNER: I don't think he -- Counsel,
 8 I don't think he identified it, am I correct?
 9 MS. KAVANAUGH: I think the feds identified
 10 the whole thing as .05 but only .02 is going to
 11 be filled, is that right?
 12 Q There was testimony as to how much area that was.
 13 Were you here and what is your understanding of what
 14 the testimony was?
 15 A Per the application materials, .02 acres of this .05
 16 acre wetland complex will be impacted and filled for
 17 the DNR parking lot.
 18 Q Okay. Now, this is getting back to the hypothetical
 19 which was opened up by the theory of the petitioners.
 20 Let's assume you're wrong, that that is a -- that
 21 two-tenths of an acre, 2.02, is actually a navigable
 22 body of water. In that hypothetical situation would
 23 or would not Section 30.12, or was that (3m), apply?
 24 A If we would weigh the standards in that --
 25 Q No, no, I'm not asking you to weigh any standards.

LEGAL VIDEO SERVICES
 (608) 279-5295 Prairie du Sac WI
 231

1 MR. GLEISNER: Okay. I withdraw the
 2 objection.
 3 MR. MEYER: I just want to make sure I
 4 understand what the --
 5 A Yes, the small portion of wetland identified in
 6 yellow on Exhibit 10 has not been identified as a
 7 navigable waterway by --
 8 Q As I understand your testimony that's going to be in
 9 a parking lot if this is ultimately done, right?
 10 A There will be a parking lot in that location, yep.
 11 Q Now, I'll ask a non-leading question. Why was that
 12 not considered to be a navigable wetland?
 13 A In all of the review I've conducted with air photos,
 14 historic air photos, historic (inaudible) surveys and
 15 even conferring with Lois Simon (phonetic) who is our
 16 kind of state-wide expert in doing historical reviews
 17 of documentation, she assisted in that capacity to
 18 say there weren't any navigable waterways identified
 19 historically in this location. So that was really
 20 the upfront basis of the office work that was
 21 conducted to determine whether or not there was
 22 watercourses that needed to be investigated. Further
 23 investigation on site on the ground (inaudible)
 24 formulate the opinion there's really no
 25 characteristics of a watercourse or any type of

LEGAL VIDEO SERVICES
 (608) 279-5295 Prairie du Sac WI
 230

1 A Okay.
 2 Q Would it apply if that was in fact a navigable body
 3 of water -- public navigable body of water? If
 4 you're wrong (inaudible) premise that you're right,
 5 but let's say for sake of discussion, because the
 6 ultimate decision might go the other way, that that
 7 is within the jurisdiction, that it is a natural
 8 navigable body of water, that .02, okay? 30.12 would
 9 apply, would it not?
 10 A Yes, it would.
 11 Q Now, then now taking the standards of 30.12(3m) like
 12 you did in the other area, the other yellow area,
 13 would you apply those same standards and what would
 14 your decision be on that .02 body -- navigable body
 15 of water if it is such.
 16 A Under the hypothetical situation if we were to apply
 17 the 30.12 standards for the placement of a structure
 18 in that navigable body of water I believe I would
 19 formulate the same conclusion that there are no
 20 significant public interest impacts associated with
 21 the placement of that structure.
 22 Q You'd be balancing what to reach that conclusion?
 23 A Be balancing the benefits gain with providing a
 24 public access to North Lake versus the public
 25 interest impacts associated with the placement of

LEGAL VIDEO SERVICES
 (608) 279-5295 Prairie du Sac WI
 232

1 that structure in that smaller body of water.
 2 Q What about the standard relative to flood flow
 3 events?
 4 A I would still have a difficulty classifying that as a
 5 stream. That would have to be -- meet that standard.
 6 MR. MEYER: No further questions of this
 7 witness.
 8 ALJ BOLDT: Okay. Thank you.
 9 MR. GLEISNER: Your Honor, would it be
 10 appropriate to take a short break?
 11 MS. CORRELL: Can I just quickly before the
 12 break -- checking through my exhibits, there's
 13 two exhibits that I didn't --
 14 MR. GLEISNER: Sure.
 15 MS. CORRELL: -- move or --
 16 MR. GLEISNER: Absolutely, Counsel.
 17 MS. CORRELL: -- he didn't identify?
 18 MR. GLEISNER: Sure.
 19 MS. CORRELL: I believe we only identified
 20 the aerial map in Exhibit 206 at Page 10 and I
 21 meant to have the witness identify all of the
 22 aerial maps from 1941 to 2010.
 23 MR. GLEISNER: No objection, Counsel.
 24 MS. CORRELL: Okay.
 25 REDIRECT EXAMINATION

LEGAL VIDEO SERVICES
 (608) 279-5295 Prairie du Sac WI
 233

1 our cross before or after that.
 2 ALJ BOLDT: Well, let's do it while Counsel
 3 is here if we have an issue to discuss.
 4 MS. CORRELL: Yeah, because I do have to
 5 get going.
 6 MR. GLEISNER: Fair enough, Counsel. They
 7 have now surprised us with two witnesses for
 8 tomorrow, Judge.
 9 MS. KAVANAUGH: We deny that, Judge.
 10 There's an amended witness list we submitted on
 11 September 13th showing that we're going to call
 12 Kurt Kruger and Kurt Farrenkopf and they're
 13 saying that -- I don't know whether they're
 14 saying they didn't get that or whether they're
 15 saying we changed our mind. It's not really
 16 clear what allegation Mr. Gleisner is making
 17 here --
 18 MR. GLEISNER: Well, they're saying --
 19 MS. KAVANAUGH: -- but you should have a
 20 copy of that amended witness list.
 21 MR. GLEISNER: We're saying, Your Honor,
 22 that there was email exchanged and they said on
 23 a September 13th email the Kapur witnesses are
 24 being called primarily as rebuttal witnesses
 25 because we presume you, RRNA and Don MLND will

LEGAL VIDEO SERVICES
 (608) 279-5295 Prairie du Sac WI
 235

1 BY MS. CORRELL:
 2 Q And that you reviewed these aerial maps in order to
 3 evaluate whether or not there was a navigable water
 4 present?
 5 A Yes, I reviewed these sequence of air photos.
 6 Q And you also inquired of Lois Simon in Exhibit 207?
 7 I think it may have been referred to in Petitioner's
 8 direct case in chief, but just in case it hasn't been
 9 received could you identify what Exhibit 207 is?
 10 A 207 is the email sequence chain that I started with
 11 Lois Simon to have her review any historical
 12 documents that would indicate a presence of a
 13 navigable waterway.
 14 Q Okay.
 15 MS. CORRELL: I'd like to move the rest of
 16 Exhibit 206 and 207 as well.
 17 MR. GLEISNER: No objection, Judge.
 18 ALJ BOLDT: 207 is received.
 19 MS. CORRELL: Thank you.
 20 ALJ BOLDT: Okay. I'm not sure that I
 21 really want to take a break if we're going to
 22 stop around 5:00 anyway. Let's just -- can we
 23 keep going -- just get started with the cross?
 24 MR. GLEISNER: We have another issue to
 25 discuss. I don't know if we want to start with

LEGAL VIDEO SERVICES
 (608) 279-5295 Prairie du Sac WI
 234

1 be attacking the accuracy of surveys and
 2 topographic maps produced by Kapur & Associates
 3 Engineering. We never raised that.
 4 MS. KAVANAUGH: Well, that's not exactly
 5 true.
 6 MR. GLEISNER: Well, but that's what it
 7 says right there. That's your email.
 8 MS. KAVANAUGH: Well, that's -- yes, and
 9 that's what we intended to call them for until
 10 we heard your testimony and then you attacked,
 11 you know, the amount of fill that was placed and
 12 you attacked the adequacy of the engineering
 13 done on the road and your engineer and your
 14 surveyor I believe made comments about maybe
 15 there weren't enough points in the survey and
 16 (inaudible) in the depressed area that, you
 17 know, they would -- and then they talked about
 18 locating low points but not channels so you did
 19 maybe not directly attack the adequacy of the
 20 surveying and the adequacy of the -- you
 21 directly attacked the adequacy of the
 22 engineering --
 23 MS. CORRELL: Your Honor, if I may because
 24 I do have to go in a short period of time. This
 25 is the subject that -- the jurisdictional

LEGAL VIDEO SERVICES
 (608) 279-5295 Prairie du Sac WI
 236

1 argument that DNR was making. Quite frankly, we
 2 thought that we were putting in a clarification
 3 of your notice that this hearing would be
 4 limited to the navigability issue and whether or
 5 not there were navigable waters that DNR did not
 6 identify. That is what we intended in our
 7 jurisdictional call in granting the hearing and
 8 that is what we prepared as far as a case. When
 9 we received motions countering our motions that
 10 made it clear that there was going to be impacts
 11 that were being characterized as navigable
 12 waters impacts but were in fact in the wetlands,
 13 we felt that we would have to -- and we had to
 14 go through several steps in order to get
 15 approval to bring witnesses in from DOA in order
 16 to counter that type of testimony that was not
 17 anticipated or granted in terms of wetland
 18 impacts and that has been a part of this
 19 proceeding and so I don't think there's any
 20 surprise. There were supplemental witness lists
 21 back in September which was at least six weeks
 22 ago.

23 MR. GLEISNER: May I please, Your Honor --

24 MS. CORRELL: We haven't received any
 25 objection prior today.

LEGAL VIDEO SERVICES
 (608) 279-5295 Prairie du Sac WI
 237

1 here too.

2 MR. HARBECK: I just want to remind you,
 3 this was the issue, the big issue, that we had
 4 at the end of the last hearing where they had
 5 submitted additional witnesses and we said those
 6 witnesses aren't proper. First of all, we're
 7 not attacking what they say they need to name
 8 them for, but if they're going to insist on
 9 bringing them then we want to take the
 10 depositions of those people so we're not
 11 sandbagged. This letter was we thought the
 12 resolution of that. We're not calling an
 13 additional witness so we thought that we were
 14 done with that and now those people -- if the
 15 people sat here during the hearing that we heard
 16 all the testimony and then we had this -- with
 17 this argument about whether or not they would be
 18 entitled to call additional witnesses not
 19 initially named but named late. That's what we
 20 were arguing about. They then told us that they
 21 weren't calling additional witnesses so the only
 22 person we deposed was Mr. Wakeman, as we agreed,
 23 and now they're telling us yes, we are going to
 24 call these additional witnesses.

25 MR. GLEISNER: And we find out about it

LEGAL VIDEO SERVICES
 (608) 279-5295 Prairie du Sac WI
 239

1 MR. GLEISNER: Your Honor, on the 23rd of
 2 September Ms. Correll wrote to you saying I'm
 3 notifying Your Honor and by copy of this email
 4 petitioners that DNR does not intend to call any
 5 additional witnesses, thus petitioners cannot
 6 name any new witnesses. Had we been aware
 7 that --

8 MS. KAVANAUGH: This was ten days after we
 9 submitted the amended witness list.

10 MR. GLEISNER: Counsel, I have the floor.
 11 If I -- if we had been aware that the Kapur
 12 witnesses were going to be called, we would have
 13 certainly called other rebuttal witnesses
 14 perhaps and we certainly would have deposed them
 15 for sure as we deposed the other witnesses that
 16 they have produced. So I guess the point is,
 17 Your Honor, this is clearly not rebuttal and
 18 it's something that is being brand new being
 19 introduced in here at the last minute.

20 MR. HARBECK: If I could -- Judge, if I
 21 could just say something too because I want to
 22 remind --

23 MS. CORRELL: Excuse me --

24 ALJ BOLDT: And there's two -- there's two
 25 who have talked over here so two can talk over

LEGAL VIDEO SERVICES
 (608) 279-5295 Prairie du Sac WI
 238

1 this afternoon, Your Honor, so it's --

2 MS. CORRELL: Mr. Gleisner and Mr.
 3 Harbeck --

4 MR. GLEISNER: No, I'm sorry, that's
 5 exactly when we found out about it.

6 MS. CORRELL: -- if I may respond because
 7 you're taking my email out of context.

8 MR. GLEISNER: Oh, I see.

9 MS. CORRELL: At the end of the hearing we
 10 discussed whether or not Doug Bath (phonetic)
 11 would be a rebuttal witness for soils only. You
 12 did not object to our supplemental witness list.
 13 You knew, and I asked you multiple times
 14 throughout the hearing, to not cause DNR
 15 expense. I talked about it during the Friday
 16 motion hearing. I also asked you multiple times
 17 during the hearing if you could respectfully let
 18 me know which day your engineer was going to
 19 testify so as to save the State some money. You
 20 would not do that, you said it was your
 21 strategy, so our engineer sat there the entire
 22 time and you knew that. I asked you repeatedly
 23 to please provide that information. And today
 24 when you asked me for a courtesy to tell you
 25 when the engineer would be -- or what the rest

LEGAL VIDEO SERVICES
 (608) 279-5295 Prairie du Sac WI
 240

1 of our witnesses were, I told you who they were.
 2 MR. GLEISNER: That's not true. I said to
 3 you what other witnesses do you intend to call
 4 and that's when you brought up the Kapur
 5 witnesses. We agreed and Mr. Gallo agreed that
 6 the requested Kapur witnesses could be called as
 7 rebuttal witnesses limited to responding to the
 8 NMLB challenges re the accuracy of the survey
 9 and the topographic maps produced by Kapur. We
 10 don't challenge the accuracy of those. We
 11 haven't attacked the topographic maps.

12 ALJ BOLDT: You spent a fair amount of time
 13 on it.

14 MS. KAVANAUGH: Mr. Gallo submitted late
 15 expert lists too, you know.

16 MR. GLEISNER: But we didn't attack the
 17 maps. We actually think the maps' topographic
 18 features are pretty accurate.

19 MS. KAVANAUGH: Mr. Gallo amended his list
 20 twice after the deadline for submitting a
 21 witness list.

22 ALJ BOLDT: I don't -- I mean I don't think
 23 it's a surprise, just -- I wasn't surprised,
 24 given that that other witness -- supplemental
 25 witness list was received. That's what -- I was

LEGAL VIDEO SERVICES
 (608) 279-5295 Prairie du Sac WI
 241

1 there's not an automatic right to any discovery
 2 and you've been allowed -- I even reconvened the
 3 hearing to allow you to take the deposition of
 4 Mr. Wakeman --

5 MS. KAVANAUGH: Who had been previously
 6 deposed.

7 ALJ BOLDT: -- but it's not open-ended and
 8 there are limits and so let's get on with the
 9 cross-examination of this witness.

10 CROSS-EXAMINATION

11 BY MR. GLEISNER:

12 Q Mr. Hudak, could you do me the favor of putting
 13 Exhibit 2-002 back up, please? Thank you for doing
 14 that. I appreciate that. Now, Mr. Hudak, if I could
 15 call your attention to the two green areas, you had
 16 characterized those as navigable wetland I believe,
 17 is that correct?

18 A That's a correct assumption.

19 Q And in fact there's a stipulation on the record that
 20 those are navigable wetlands, correct?

21 A There's stipulation that they're navigable.

22 Q Now, what is directly to the east of these -- of this
 23 large green circle right here?

24 A Portions of Redland Road and residence I believe, a
 25 few probably garages, sheds and those type of things.

LEGAL VIDEO SERVICES
 (608) 279-5295 Prairie du Sac WI
 243

1 under the understanding they were going to
 2 testify, given that I gave you such latitude in
 3 going into that.

4 MR. GLEISNER: Well, can we depose them?

5 ALJ BOLDT: No. You know, there's some
 6 reasonable limitation on discovery and NR2
 7 plainly gives me that discretion and it's a
 8 rare -- frankly, it's a rare permit application
 9 these days where there's any discovery involved
 10 and this is not even strictly speaking a permit
 11 application. I mean I've been extremely fair in
 12 terms of trying to balance all of these --

13 MR. GLEISNER: You have been, Your Honor.

14 ALJ BOLDT: -- Counsels' various concerns,
 15 but I don't think there's -- there's not an
 16 unlimited right to take everybody's deposition.

17 That's -- NR2 was specifically, specifically,
 18 amended to bring that point home and it
 19 references in Class 2 proceedings there is an
 20 automatic right which means cases where the
 21 Department is enforcing an order against
 22 somebody, then that person is subject to the
 23 sort of full weight of the government and
 24 they're entitled to take depositions and they
 25 have discovery rights. In a Class 1 proceeding

LEGAL VIDEO SERVICES
 (608) 279-5295 Prairie du Sac WI
 242

1 Q Twenty or so homes?

2 A I can't approximate, but sure. Yes, if you say so.

3 Q Now, there were no studies done as to what would
 4 happen if this area here, the large green circle, was
 5 surcharged. There were no studies done by DNR as to
 6 what effect that might have on the homes along
 7 Redland Road, is that correct?

8 MS. KAVANAUGH: And I guess I'll object,
 9 Judge, because what is the relevance of that
 10 unless that's part of the statutory requirements
 11 or (inaudible) requirements for issuing these
 12 permits?

13 MR. GLEISNER: I'll get there, Your Honor.

14 ALJ BOLDT: Okay. Go ahead.

15 MR. GLEISNER: I'm going to get there, Your
 16 Honor.

17 Q There were no studies done, is that correct?

18 A Studies relating -- just repeat the question.

19 Studies relating to what?

20 Q Certainly. There were no studies done as to what
 21 would happen if the large green circle wetlands were
 22 surcharged -- there were no studies done on what
 23 effect that would have on the homes along Redland
 24 Road, is that correct?

25 A There was no study conducted to my knowledge that

LEGAL VIDEO SERVICES
 (608) 279-5295 Prairie du Sac WI
 244

1 would address that.
 2 Q Okay. Now, you've been asked to read a number of
 3 things today so I'm going to return the favor. I'm
 4 going to call up 281.31 which is known as the
 5 Navigable Waters Protection Act.
 6 MS. KAVANAUGH: 281.31 is shoreline zoning.
 7 Q "To aid in the fulfillment of the State's role as
 8 trustee of its navigable waters and to promote public
 9 health, safety, convenience and general welfare is
 10 declared to be in the public interest to make
 11 studies, establish policies" --
 12 MS. CORRELL: Objection, are you
 13 testifying?
 14 MR. GLEISNER: I'm just reading the
 15 introductory part.
 16 MS. CORRELL: Wait, but this is
 17 cross-examination.
 18 MR. GLEISNER: I totally understand that,
 19 Counsel.
 20 MS. KAVANAUGH: This is shoreline zoning,
 21 Judge. This is the authorization statute for
 22 shoreline zoning.
 23 MR. GLEISNER: Your Honor --
 24 MR. MEYER: Objection, relevance --
 25 MR. GLEISNER: Your Honor --

LEGAL VIDEO SERVICES
 (608) 279-5295 Prairie du Sac WI
 245

1 ALJ BOLDT: I mean I don't think the
 2 statute is directly relevant to this proceeding,
 3 but go ahead if you're going to go through it
 4 quickly. Let's --
 5 MR. GLEISNER: Very quickly, Your Honor.
 6 ALJ BOLDT: I hope there's not a number of
 7 irrelevant statutes that you're going to
 8 cross-examine him on.
 9 MR. GLEISNER: No, I don't think I'm going
 10 to do that at all, Your Honor.
 11 ALJ BOLDT: Okay. All right, then go
 12 ahead.
 13 Q It says in Section B6 of this statute -- can you read
 14 that, Mr. Hudak?
 15 A "Within the purposes of subdivision 1, the Department
 16 shall prepare and provide to municipalities general
 17 recommended standards and criteria for navigable
 18 water protection studies --
 19 MS. KAVANAUGH: It's NR115.
 20 MS. CORRELL: I know.
 21 Q -- and planning and for navigable water protection
 22 regulations and administration. Such standards and
 23 criteria shall give particular attention to safe" --
 24 MR. MEYER: Mr. Examiner, continue our
 25 objection.

LEGAL VIDEO SERVICES
 (608) 279-5295 Prairie du Sac WI
 247

1 MR. MEYER: -- and materiality.
 2 MR. GLEISNER: -- it is called the
 3 Navigable Waters Protection law. That's what
 4 the legislature denominated, that's what it has
 5 been identified as for many, many years going
 6 back to an opinion of the Attorney General
 7 issued in 1974. It's the law --
 8 MS. CORRELL: Objection --
 9 MR. GLEISNER: So what, you're objecting to
 10 the navigable protection law?
 11 MS. CORRELL: I'm objecting to the
 12 relevance for this proceeding.
 13 MR. MEYER: It's my understanding, Counsel
 14 and Your Honor, that the approval was not issued
 15 per Section 281.31.
 16 MS. KAVANAUGH: There is no approval under
 17 that. All that is, is an authorizing statute.
 18 MR. GLEISNER: Well, actually, it does say
 19 in the manual code approval that 281 was taken
 20 into consideration, Your Honor.
 21 MS. KAVANAUGH: Not 281.31.
 22 MS. CORRELL: 281 is the --
 23 ALJ BOLDT: Okay. All right. Let's --
 24 MS. CORRELL: -- statute for wetlands,
 25 sir, generally.

LEGAL VIDEO SERVICES
 (608) 279-5295 Prairie du Sac WI
 246

1 ALJ BOLDT: Yeah, no, I mean that's clearly
 2 not relevant, Counsel. You're off base here.
 3 MS. KAVANAUGH: That's the authorization to
 4 create rules for shoreline zoning -- NR115.
 5 ALJ BOLDT: It's really got nothing to do
 6 with this decision.
 7 MR. GLEISNER: I respectfully disagree,
 8 Your Honor, but I understand.
 9 ALJ BOLDT: I think we're talking
 10 about -- I mean -- you're trying to say that
 11 they should have done studies for the
 12 municipality in connection with --
 13 MR. GLEISNER: No, I'm saying that
 14 the -- 281.31 says that the Department and
 15 municipalities, in conforming with Department
 16 regulations, should take into consideration
 17 issues such as septic system protection and the
 18 rights of the citizens who live near navigable
 19 waters.
 20 ALJ BOLDT: Yeah, for shoreline zoning
 21 purposes. This is not a shoreline zoning case.
 22 MR. GLEISNER: Okay.
 23 ALJ BOLDT: And there's no municipality
 24 involved.
 25 Q Now, did you conduct any hydrology studies yourself,

LEGAL VIDEO SERVICES
 (608) 279-5295 Prairie du Sac WI
 248

1 Mr. Hudak?
 2 A No, I have not.
 3 Q Are you aware of any hydrology studies that were
 4 conducted by the Department?
 5 MS. KAVANAUGH: And, again, I continue to
 6 object that, you know, there's no requirement to
 7 conduct a hydrology study under 30.12 or under
 8 wetland --
 9 MR. HARBECK: Do we get a speech on every
 10 question? I mean --
 11 MS. KAVANAUGH: Only when you ask a silly
 12 one.
 13 ALJ BOLDT: No, hydrology studies -- now
 14 we're in a more generic zone. We're not talking
 15 about statutes that don't obtain to this
 16 proceeding, we're talking about something more
 17 generic so that's -- that is fair
 18 cross-examination. So go ahead, the objection
 19 is overruled.
 20 MR. GLEISNER: Thank you, Your Honor. I
 21 would say for the record that my understanding
 22 was that he was testifying previously about
 23 hydrology studies.
 24 Q And so I would ask you the question is that correct,
 25 sir?

LEGAL VIDEO SERVICES
 (608) 279-5295 Prairie du Sac WI
 249

1 Exhibit 212?
 2 A Yes, it is.
 3 Q Okay. Now, let me ask you this. Were any -- when
 4 you did the manual code approval, prior to it,
 5 concentrate just now prior to it, were there any
 6 Chapter 30 studies done with regard to whether or not
 7 the fill that would be required along that access
 8 road might require a Chapter 30 permit?
 9 A I guess can you clarify studies?
 10 Q Okay. You're right.
 11 MR. GLEISNER: I withdraw that question and
 12 I'll ask this one.
 13 Q Was Chapter 30 ever applied with regard to fill that
 14 would be put in on the access road that we just
 15 identified?
 16 A I guess the honest approach was the initial assertion
 17 of jurisdiction did not include grading along the
 18 roadways of the proposed access road as we had drawn
 19 it.
 20 Q And is there -- is diffuse surface water defined
 21 under State law other than what you referenced to in
 22 the water law book that you quoted from or that you
 23 read from or relied on -- sorry, relied on?
 24 A I guess to the best of my knowledge I don't know all
 25 the locations where it would be defined as. It may

LEGAL VIDEO SERVICES
 (608) 279-5295 Prairie du Sac WI
 251

1 MR. HARBECK: Ask the question again.
 2 MR. GLEISNER: Right.
 3 A Can you re-ask the entire question?
 4 Q Were you testifying earlier about hydrology?
 5 A I was testifying as to my understanding of the
 6 hydrology of the waterways as they exist and my
 7 professional judgment opinion of that.
 8 Q Are you a hydrologist?
 9 A No, I'm not.
 10 Q And so I just want the record to be clear. Were
 11 there any hydrology studies done anywhere on either
 12 the north or south green portions or any other
 13 portion of the -- I guess I would call it the project
 14 area where they're going to put the Krause site?
 15 A Confined to the exact project area no, but the -- to
 16 my understanding the Oconomowoc River and North Lake
 17 has been a highly studied area in previous years.
 18 There probably are a few documents out there that
 19 have some hydrology report for the area that probably
 20 encompass this project site.
 21 Q Earlier you were dealing with Exhibit 212 which has
 22 been admitted into evidence and you drew a black line
 23 as to where the access road was and I'm now just
 24 highlighting that with my pointer. Is that the
 25 approximate location where you drew the black line on

LEGAL VIDEO SERVICES
 (608) 279-5295 Prairie du Sac WI
 250

1 be defined in statutes or case law, but I -- the only
 2 one I took it from would be the water law book.
 3 Q Okay. Thank you.
 4 MR. GLEISNER: Now, I think I misspoke
 5 before, Your Honor. I think I meant Exhibit 2
 6 at Page 103 is where he drew the black lines and
 7 I apologize for that so I'm correcting the
 8 record.
 9 Q Exhibit 212 is another matter and could you take a
 10 look at that? That would be in the DNR book, I
 11 believe. Do you have that in front of you?
 12 A Yes, sir.
 13 Q Okay. Now, the green arrows you've heard testified
 14 about before, is that correct? What is your
 15 understanding of what those green arrows and the
 16 broken green line represent?
 17 A My understanding is that this is a document that
 18 Pete Wood developed after review of topographical
 19 survey data and tried to determine the most
 20 appropriate low path I guess if you'd call it from
 21 the point through the wetland complex back over to
 22 North Lake.
 23 Q And do you know if there were any studies done or any
 24 evaluation done of that path by anyone at DNR other
 25 than by Mr. Wood?

LEGAL VIDEO SERVICES
 (608) 279-5295 Prairie du Sac WI
 252

1 A Yes, I've walked that path.
 2 Q And do you have an opinion of that path in terms of
 3 navigability?
 4 A Yes. As far as navigability is concerned, I would
 5 say the navigable portions of that extend close to
 6 the approximate location of that dot, but probably
 7 further to the southwest where the edge of the
 8 waterway would be established or would -- has
 9 established itself. And, again, this is a very
 10 definite low path that was identified. I believe
 11 it's probably much more -- in a broad sense that this
 12 is a very, very generalized analysis of the direction
 13 of flow of water to the lake.
 14 Q I understand. I'm calling it up here. Just so that
 15 we're clear, the -- and I just want to be sure that
 16 I'm certain what you're saying. You're saying that
 17 from the point at which this --
 18 MR. GLEISNER: Let me get out of the way so
 19 everyone (inaudible). Counsel can see, right?
 20 Q From the point at which this green arrow starts and
 21 then turns southwest, comes back around and comes out
 22 at North Lake, you're saying that that is a defined
 23 pathway or flow way for water?
 24 A No, it's not defined.
 25 Q It's not defined?

LEGAL VIDEO SERVICES
 (608) 279-5295 Prairie du Sac WI
 253

1 characteristics?
 2 A As I had stated previously, a defined bed and bank
 3 with the indicators of ordinary high water mark.
 4 Q And have you previously testified that the green
 5 areas to the south and north encircled with the green
 6 circles on Exhibit 2-002 have those characteristics?
 7 A Characteristics of those -- navigability
 8 characteristics do exist within those areas.
 9 Q And the bed and bank?
 10 A Not well-defined throughout, but for the majority of
 11 it, yes.
 12 MR. GLEISNER: Judge, do you happen to have
 13 his deposition transcript that we gave you
 14 before because I don't --
 15 ALJ BOLDT: I'm sure I do, yes. Yes, I do
 16 have it somewhere.
 17 Q Do you have it in front of you?
 18 A Yes.
 19 Q Thank you very much. Go to Page 41, please.
 20 Beginning at Line 10, "Would you please show me where
 21 the northern portion" -- question -- did you get a
 22 question, "Would you please show me where the
 23 northern portion, where the area on the north to the
 24 north of the gravel trail has navigability
 25 characteristics? Can you show me where that is

LEGAL VIDEO SERVICES
 (608) 279-5295 Prairie du Sac WI
 255

1 A No.
 2 Q And how would you characterize it then if it's not a
 3 defined flow way?
 4 A There is defined bed and bank throughout both
 5 portions of the two green wetland areas and the blue
 6 area. There's no defined channel within -- there's
 7 no defined channel depicted on this generalized flow
 8 path diagram. The flow does go -- again, as I had
 9 stated previously, when these waterways are inundated
 10 they flow to the north and then once they reach the
 11 swale to the east towards the lake. That is the
 12 generalized flow path of these waterways as I
 13 understand it.
 14 Q Now, I'm going to ask you some questions just to make
 15 certain. I'm not going to repeat what we've already
 16 done on our -- certainly I don't intend to repeat
 17 anything that we've done on our -- when we called
 18 Mr. Hudak adversely, but I want to make sure these
 19 things are in the record. You never did a
 20 navigability in fact test on the property --
 21 MS. KAVANAUGH: That's been asked and
 22 answered.
 23 Q -- identified as the Krause site, is that correct?
 24 A That's correct.
 25 Q Now, would you explain what you mean by navigability

LEGAL VIDEO SERVICES
 (608) 279-5295 Prairie du Sac WI
 254

1 located? Again, this is an approximation." Answer,
 2 "The green has navigability characteristics."
 3 Question, "All of it?" Answer, "All of it." And
 4 then at Line 21 to 24, "And before the decision
 5 date", and that would be the decision date of the
 6 manual code approval, "was anything done to test
 7 those areas that had navigability characteristics?"
 8 Answer, "The green areas, no." Did you get those
 9 questions and receive -- make those answers?
 10 A Yes.
 11 MS. KAVANAUGH: What page are you on?
 12 MR. GLEISNER: That was Page 41, Counsel.
 13 Q And the person who have done navigability tests on
 14 the Krause site would have been you, is that correct?
 15 A I was (inaudible) in charge of that area, yes.
 16 MS. CORRELL: Objection, we've already
 17 stipulated to this. Is this necessary?
 18 MR. GLEISNER: No, no, I just want to --
 19 MS. KAVANAUGH: And why (inaudible) when he
 20 was called as an adverse witness. I'm not sure.
 21 That seems so long ago, but it seems like these
 22 were questions that have been asked and answered
 23 already.
 24 MR. GLEISNER: I don't think that one was,
 25 Your Honor.

LEGAL VIDEO SERVICES
 (608) 279-5295 Prairie du Sac WI
 256

1 ALJ BOLDT: Okay. I think we've had a good
 2 day's work. Why don't we break here. We've
 3 started the cross-examination. I know even
 4 those who don't have little kids enjoy Halloween
 5 so enjoy seeing the kids come to your door. And
 6 I know a lot of people have traveled from
 7 Milwaukee, and as we traveled, why don't we
 8 break here and we'll reconvene -- was
 9 it -- everybody -- not easy, but was it okay,
 10 nine o'clock start time?
 11 MR. GLEISNER: That's good.
 12 MS. KAVANAUGH: Yeah.
 13 ALJ BOLDT: Okay. All right. So let's
 14 reconvene tomorrow at nine o'clock.
 15 (Hearing Adjourned)

LEGAL VIDEO SERVICES
 (608) 279-5295 Prairie du Sac WI
 257

1 STATE OF WISCONSIN
 2 DIVISION OF HEARINGS AND APPEALS
 3
 4
 5
 6 In the Matter of Manual Code 3565.1 for the Approval
 7 Authorizing the Department of Natural Resources to Grade
 8 More Than 10,000 Square Feet on the Bank of North Lake,
 9 Install a Boat Ramp Structure and Two Outpost Structures
 10 on the Bed of North Lake, Install Four Culvert Crossings
 11 Over Wetlands, Fill Up To .16 Acres of Wetlands for
 12 Construction of a Public Boat Launch on North Lake and
 13 Adjacent Property Located in the Town of
 14 Merton, Waukesha County
 15
 16 Case Nos. IP-SE-2009-68-05745 through 05750
 17
 18
 19
 20
 21 I, KRISTINE K. MCCARVILLE, do hereby certify that as
 22 the duly-appointed transcriptionist, I transcribed the
 23 proceedings held in the above-entitled matter on the 31st
 24 day of October, 2011, and that the attached is a true and
 25 correct transcription of the proceedings so taken.
 26 Dated this 1st day of January, 2012.
 27
 28
 29
 30 _____
 31 Kristine K. McCarville
 32 Notary Public, State of Wisconsin
 My Commission Expires: 11/22/15

LEGAL VIDEO SERVICES
 (608) 279-5295 Prairie du Sac WI
 258