

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 November 1, 2011

Waukesha, Wisconsin

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- 3 George Meyer, Executive Director
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- 5 WAUKESHA COUNTY CONSERVATION ALLIANCE, by
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1 ALJ BOLDT: Okay. We're back on the
2 record. Today is Tuesday. I believe it's
3 November 1st. Remind you you're still under oath
4 and we're continuing on with the
5 cross-examination of Mr. Hudak.
6 MR. GLEISNER: Thank you, Your Honor.
7 CROSS-EXAMINATION
8 BY MR. GLEISNER:
9 Q Now, when we stopped yesterday you had confirmed
10 you're not a hydrologist, correct sir?
11 A Correct.
12 Q You're also not an engineer, correct?
13 A Correct.
14 Q Do you have any training in flood flow analysis?
15 A Formal training, no.
16 Q Was a flood flow analysis done anywhere on the Krause
17 property?
18 A Not to my knowledge.
19 Q With regard to the riparian owners you didn't
20 participate in any studies with regard to the effect
21 of the Krause property on the people living on
22 Redland Road, did you?
23 A Can you be more specific with studies? I --
24 Q Sure.
25 MR. GLEISNER: If we could just remove that

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1 first exhibit. Thank you very much. I
2 appreciate -- I appreciate that very much.
3 Q With regard to the bottom green circle, we were
4 talking about yesterday whether or not there had been
5 any studies done on the effect of that navigable
6 wetland if it got surcharged with water on
7 Redland Road and my question is did you participate
8 in or do any studies with regard to that yourself?
9 MS. CORRELL: Objection again as to whether
10 or not such a study is required under the
11 regulatory framework that is actually at issue
12 in this proceeding. It's a continuing objection
13 to this line of questioning.
14 ALJ BOLDT: Okay.
15 MR. GLEISNER: Subject to that --
16 ALJ BOLDT: Yeah, subject to that
17 objection, go ahead.
18 A No, I have not.
19 Q Okay. Thank you. Now, let me clarify something you
20 also testified to yesterday. I believe you stated
21 that you had not done or that you're not aware of any
22 work being done on the access road to the west of the
23 green, the lower green, circle or as it turns east to
24 the northwest of the lower green circle? You're not
25 aware of any work being done on whether or not a

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1 Chapter 30 permit was needed for the fill in that
 2 area, are you?
 3 MS. CORRELL: Objection, clarification and
 4 foundation.
 5 MR. GLEISNER: Let's go -- let's cut to the
 6 chase.
 7 Q Was a Chapter 30 permit for the fill -- for the
 8 access road and any fill with respect to that access
 9 road obtained by the DNR?
 10 A The wetland fill was permitted under a water quality
 11 cert, but not under Chapter 30 for the access road.
 12 Q So the answer to the question is there was no Chapter
 13 30 permit acquired for any of the fill that's going
 14 to be needed with regard to the access road, is that
 15 correct?
 16 A None of the fill within the access road for wetland
 17 impact required a Chapter 30 permit.
 18 Q Okay. I'm sorry, I want to be very specific here.
 19 With regard to any fill that is going to be needed,
 20 whether it impacts wetland or not, with regard to any
 21 fill that is going to be needed for the access road,
 22 was a Chapter 30 permit acquired?
 23 MS. CORRELL: Objection, again, it's not a
 24 permit. I understand if you're referring
 25 loosely to permit.

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1 A That's not accurate. Basically, I -- we never -- I
 2 don't believe -- I don't -- I haven't -- I don't know
 3 if we've ever taken and developed a bank
 4 determination for North Lake and what portions of the
 5 site are grading on the bank of North Lake and what
 6 portions of the site are grading on the banks of
 7 these other additional waterways minus the wetland
 8 fill areas.
 9 Q So the answer is no?
 10 MS. CORRELL: Asked and answered.
 11 A I believe I stated my answer as what I just stated.
 12 Q Was there a Chapter 30 permit issued or the
 13 equivalent of a Chapter 30 permit issued --
 14 MS. CORRELL: Asked and answered.
 15 Q -- for the access road?
 16 ALJ BOLDT: Yeah, I think that has been
 17 asked and answered.
 18 MR. HARBECK: That's fine. He just said
 19 that was done pursuant to the Army Corps permit
 20 so therefore they didn't feel that they had to
 21 get a Chapter 30. That's their whole position
 22 in this case.
 23 Q So you didn't think you had to get a Chapter 30
 24 because of the Army Corps, is that correct?
 25 A I believe the manual code authorized grading on the

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1 MR. GLEISNER: And I apologize, Your Honor,
 2 I understand the distinction.
 3 Q Was the equivalent of a -- in the manual code you
 4 authored, was there the equivalent of a Chapter 30
 5 permit for the fill that will be needed under the
 6 access road?
 7 A Can you repeat -- rephrase that and be a little more
 8 specific with your question?
 9 Q I'll try very hard to.
 10 A Okay.
 11 Q With regard to the access road that is going to run
 12 from Redland Road north for about 1,500 feet I
 13 believe to where the proposed parking lot is going to
 14 be located was there the equivalent of a Chapter 30
 15 permit for the fill that will be needed in connection
 16 with that access road? Is that clear enough?
 17 A As far as the area of disturbance needed for the
 18 access road I do not believe the original manual code
 19 may have covered that under the grading on the banks
 20 of North Lake and so there may have been a -- besides
 21 grading, that would be the only authority I could see
 22 under Chapter 30 that would be regulated on the fill
 23 for that access road minus the areas of wetland
 24 impact.
 25 Q So the answer is no?

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1 banks of North Lake and associated wetland fill,
 2 culvert crossings, placement of a boat ramp and two
 3 outfall structures.
 4 Q Doesn't that conflict with what Mr. Wakeman testified
 5 to, sir?
 6 A Not to my knowledge.
 7 ALJ BOLDT: Is there any condition that
 8 would have been in a Chapter 30.19 grading
 9 permit that in retrospect you wish was in the
 10 manual code approval?
 11 THE WITNESS: When we reviewed the
 12 Chapter 30.19 permit for associated land
 13 disturbances it wasn't limited to just the
 14 parking lot area. We looked at the entire
 15 project and really, the grading disturbance on
 16 the bank, if we were to consider the entire
 17 access road on the bank we would have looked
 18 very similar -- we would have required proper
 19 erosion control techniques, storm water
 20 management, and basically those same and similar
 21 impacts were assessed by the resource managers
 22 when we were out on site and taken into
 23 consideration with this manual code decision.
 24 ALJ BOLDT: So the short answer is no?
 25 THE WITNESS: The short answer is no, that

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1 I wouldn't see any other additional conditions
2 with grading for the access road.

3 ALJ BOLDT: Okay.

4 MR. HARBECK: Could I just ask a couple
5 follow-up questions on this?

6 ALJ BOLDT: Sure, you bet.

7 CROSS-EXAMINATION

8 BY MR. HARBECK:

9 Q And I'm going back to what -- maybe you're not aware
10 of what Mr. Wakeman testified to at deposition, but
11 I'm going back to your testimony yesterday on this
12 and you talked about four areas for which the Chapter
13 30 permit equivalent had been issued and one was
14 grading, correct?

15 A Correct.

16 Q And when you talked about it yesterday you talked
17 about grading with respect to the parking lot,
18 correct? That's what you were talking about
19 yesterday and that's what Mr. Wakeman in his
20 deposition talked about so I want to make sure when
21 you were talking about the Chapter 30 equivalent
22 permit that related to grading, it related to grading
23 to the parking lot, correct?

24 A I can clarify. I don't want to say correct or not.
25 Grading on the banks of a waterway is required to be

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1 A As I can understand how I asserted jurisdiction when
2 I reviewed this permit, the wetland fill associated
3 for the access road was reviewed under a water
4 quality certification, not under Chapter 30.19
5 grading.

6 Q Fine. And therefore the manual code approval didn't
7 deal with -- under Chapter 30 did not deal with that
8 wetland fill because that was the jurisdiction that
9 you're saying was asserted in connection with the
10 Army Corps permit, correct?

11 A Can you repeat that again?

12 Q In other words, you just said that the DNR did not
13 assert jurisdiction over the wetland fill in
14 connection with the access road because that was
15 under the Army -- that was done pursuant to the Army
16 Corps of Engineer permit, correct?

17 A We asserted jurisdiction under the water quality cert
18 review process for DNR.

19 Q Okay. But it's only under that process that you
20 examined the wetland fill, correct?

21 A That'd be correct.

22 Q Okay. So at this point there is no Chapter 30 review
23 and analysis under the manual code for the wetland
24 fill in connection with the access road, correct?

25 A As I previously testified to, the standards needed to

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1 reviewed under 30.19 when it is disturbing in excess
2 of 10,000 square feet.

3 Q I understand that.

4 A So the extent of where that 10,000 square feet
5 extended to, we didn't develop that because we knew
6 that we were already disturbing over 10,000 square
7 feet so we review it under 30.19 as a grading permit.

8 Q But DNR's position here is that they did not need to
9 obtain a Chapter 30 equivalent permit for the fill
10 associated with the access road because that was fill
11 into a wetlands and therefore it was the Army Corps
12 permit that --

13 MS. CORRELL: Objection, speculative.

14 Q That was the --

15 MR. HARBECK: Please let me finish my
16 question.

17 Q That was the Army Corps permit that had jurisdiction
18 over that and DNR didn't have jurisdiction. That's
19 the whole jurisdictional argument we've been hearing
20 for the last couple days, correct?

21 MS. CORRELL: Objection, you're speculating
22 as to DNR's position and you're putting words in
23 the witness' mouth. It's argumentative.

24 ALJ BOLDT: I think it's cross-examination
25 and go ahead and answer it if you can.

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1 meet water quality certification for the fill
2 associated with a wetland are more restrictive and
3 all-inclusive of what I believe the standards that
4 need to be met for a Chapter 30 grading permit.

5 Q I understood you said that, but that wasn't my
6 question. Could -- do you understand my question?
7 The wetland fill was not -- you didn't issue a
8 Chapter 30 manual code equivalent for the wetland
9 fill, you did it under the water quality
10 certification process, is that correct?

11 A That's correct.

12 Q Thank you.

13 MR. HARBECK: That's all.

14 ALJ BOLDT: Anybody else want to voir dire?

15 Basically, that's a voir dire so anybody else
16 want to have a shot at it before we go back to
17 Mr. Gleisner? Any of the other lawyers I mean.
18 Okay. Back to Mr. Gleisner.

19 MR. GLEISNER: Thank you, Judge.

20 RE-CROSS-EXAMINATION

21 BY MR. GLEISNER:

22 Q I have called up Exhibit 1 on the screen and it's in
23 the white book. It's your manual code approval and
24 you're familiar with Paragraph 1 of the Findings of
25 Fact, are you not sir?

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1 A Yes, I am.
 2 Q You drafted them, correct?
 3 A Yes, I did.
 4 MR. GLEISNER: And we're looking at, just
 5 for the record, Exhibit 1-002, Judge.
 6 Q It says there -- am I correct, it says there that you
 7 have obtained approval to grade more than 10,000
 8 square feet on the bank of North Lake, is that
 9 correct sir?
 10 A That's what that states, yes.
 11 Q Can you help us understand what constitutes the bank
 12 of North Lake?
 13 A Bank definitions can be defined by two ways, whether
 14 or not it's a designated waterway or a non-designated
 15 waterway. North Lake is a designated waterway which
 16 means it has a 300-foot bank so 300 feet landward
 17 from the ordinary high water mark or if the slopes
 18 exceed ten percent at that 300-foot it would extend.
 19 There's also provisions if there would be a complete
 20 interruption that it could be shortened. And like I
 21 just testified to before, we had not done a complete
 22 bank determination because it was already determined
 23 that in excess of 10,000 square feet would be
 24 disturbed within easily 300 feet of North Lake so we
 25 reviewed Chapter 30.19 grading authority over the

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1 A I do not.
 2 Q Do you have a master's degree in anything?
 3 A I do not.
 4 Q And when did you graduate from the university?
 5 A In 2006.
 6 Q And when did you start working for the DNR?
 7 A Or, excuse me, in 2005. I started working for the
 8 Department in 2006.
 9 Q Thank you. Now --
 10 ALJ BOLDT: I think we may have a math
 11 error.
 12 MS. KAVANAUGH: Yes, that's more than two
 13 years.
 14 ALJ BOLDT: That's almost three years of
 15 between --
 16 MS. KAVANAUGH: January 10 -- almost three.
 17 It's November 2010.
 18 MR. GLEISNER: You're right, Your Honor.
 19 ALJ BOLDT: January 2009 would be one
 20 year --
 21 MR. GLEISNER: That's why I went to law
 22 school, Judge.
 23 ALJ BOLDT: -- January 2010 would be two
 24 years and then it's November 2010. Just so the
 25 record --

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1 project and we asserted Chapter 30.19 authority over
 2 the project.
 3 Q Thank you. You did not seek a permit under 30.19 for
 4 the access road, correct?
 5 A As I previously stated, we reviewed the entire
 6 project under 30.19.
 7 MR. MEYER: Objection, asked and answered.
 8 MS. CORRELL: Multiple times.
 9 ALJ BOLDT: Yeah, I think we need to move
 10 on. I think you've asked that question at least
 11 four times.
 12 MR. GLEISNER: All right.
 13 Q Now, you became a water quality specialist in 2008,
 14 is that correct?
 15 A My title in 2008 was water management specialist.
 16 Q And when in 2008 did you become a water management
 17 specialist?
 18 A It would have been January.
 19 Q And when did you -- you issued the manual code
 20 approval on November 4th, 2010, is that correct?
 21 A That'd be correct.
 22 Q So less than two years after you became a water
 23 management specialist, is that correct?
 24 A That'd be correct.
 25 Q And do you have a Ph.D. in anything?

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1 MR. GLEISNER: I apologize. It's three
 2 years, Judge, you're correct. I'm sorry.
 3 Q Did you -- yesterday you testified that you'd made
 4 nine site visits to the area, not including the visit
 5 that we made, is that correct?
 6 A Yeah, I had a list of -- and as I've looked at it
 7 again it may have been eight. I think I put the
 8 public notice as a -- or, I'm sorry, the public
 9 informational meeting as a site visit which was
 10 inaccurate, but roughly about eight or nine.
 11 Q But you testified in your deposition you'd made six
 12 visits?
 13 A That could have been. After reviewing my calendar
 14 more thoroughly I probably was able to identify
 15 exactly how many visits I made to the site.
 16 Q Thank you. Now, you stated yesterday that you had
 17 made -- I don't know if it was you personally or the
 18 DNR, made representations to the Army Corps of
 19 Engineers, correct, regarding wetland and wetland
 20 delineation?
 21 A I don't understand your question.
 22 Q Did you -- did you --
 23 MR. GLEISNER: Strike that.
 24 Q Did the DNR make representations to the Army Corps of
 25 Engineers regarding wetland delineation?

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1 A I was not involved with the wetland delineation
2 process.
3 Q I just want to be clear. You, yesterday, referenced
4 the water specialty book, the water law book I
5 believe, for a definition of marsh. Was that the
6 correct -- am I correct, is that the book you
7 referenced?
8 A No, that's incorrect.
9 Q Okay. I apologize. What was the book again that you
10 referenced?
11 A The book that I referenced was Wetland Plant
12 Communities of Minnesota and Wisconsin.
13 Q And you did testify at your deposition -- since you
14 raised it again yesterday, you did testify at your
15 deposition that a marsh has a bed and bank, correct?
16 A I don't recall that portion of testimony of saying
17 that a marsh has a bed and bank.
18 Q If you would go to Page 37 of your deposition. Is it
19 still in front of you? I'm sorry.
20 A Yes, it is.
21 Q At Line 16 the question was --
22 MS. CORRELL: Could you wait until we can
23 locate that?
24 MR. GLEISNER: I'm sorry, Counsel, I
25 apologize.

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1 between two different types of systems, whether it be
2 a system of a lake or a system of a stream, and
3 having in that situation a difficult bed and bank
4 determination because of the characteristic and
5 nature of the aquatic plants that would be growing in
6 that particular setting." Did you receive that
7 question and give that answer, sir?
8 MR. MEYER: I'm going to object. I mean I
9 think this is being used to impeach the witness
10 and the question you asked in the deposition is
11 not the same question you asked at this hearing.
12 MS. KAVANAUGH: Yes.
13 MR. GLEISNER: Well, I think it was,
14 Counsel.
15 MS. KAVANAUGH: You asked whether he
16 testified that a marsh had a bed and bank and
17 that's not what you asked --
18 MR. MEYER: This is a marsh outlet which is
19 a different question.
20 MS. KAVANAUGH: And he's not even saying in
21 his answer it has a bed and bank, what he's
22 saying is that the determination of a bed and
23 bank is difficult in those circumstances.
24 MR. GLEISNER: Your Honor, I think that
25 I -- I don't believe anybody has testified that

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1 MS. CORRELL: Which binder?
2 MS. KAVANAUGH: I think it's Binder 1, but
3 I'm not positive. Which exhibit is your
4 deposition?
5 MS. CORRELL: Can you give us an exhibit
6 number, please?
7 MS. KAVANAUGH: Here it is.
8 ALJ BOLDT: I don't think it is an exhibit.
9 MS. KAVANAUGH: It's Exhibit 111.
10 MR. GLEISNER: It's not an exhibit.
11 MS. KAVANAUGH: What page are you on?
12 MS. CORRELL: It's Exhibit 111 actually.
13 Thank you.
14 MR. HARBECK: Oh, that may be right.
15 MR. GLEISNER: I think Mr. Gallo marked it
16 as an exhibit now that I think about it. We
17 didn't.
18 MS. CORRELL: What page are you on?
19 MR. GLEISNER: I'm on Page 37, Counsel.
20 Thank you, Counsel.
21 Q At Line 16 you were asked the following question, "Do
22 you know as you're sitting here whether or not a
23 marsh outlet has a bed and bank?" And at Line 20 you
24 gave -- it is reported you gave the following answer,
25 "I would define a marsh outlet as a characteristic

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1 there's a difference between a marsh and a marsh
2 outlet so I stand by the reason for going to the
3 deposition.
4 MS. KAVANAUGH: But what you're doing is
5 characterizing the response he gave as different
6 from the response here and asking him to agree
7 that that's the -- he gave the response that's
8 in here.
9 MS. CORRELL: Sir, could I also object to
10 relevance please because I don't think anybody
11 opined that there is a marsh outlet. My
12 understanding of the grove of trees was --
13 MS. KAVANAUGH: It's a stream.
14 MS. CORRELL: -- your expert defined it as
15 a stream and I did not hear any testimony that
16 defined anything as a marsh outlet so I'm
17 confused as to the relevance.
18 MR. GLEISNER: Judge, this is
19 cross-examination. I asked a question about
20 marsh because he raised marsh yesterday. This
21 is not going back to the original reason we
22 called him adversely. All I'm doing is making
23 certain that the record is complete with regard
24 to the discussion of marsh, whether it be a
25 marsh outlet or otherwise. I just want to make

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1 sure the record is complete.
 2 ALJ BOLDT: So you're done?
 3 MR. GLEISNER: I'm done with that.
 4 ALJ BOLDT: All right. Let's move on then.
 5 MR. GLEISNER: Yes.
 6 ALJ BOLDT: The objection is overruled.
 7 MR. GLEISNER: Thank you, Your Honor.
 8 Q Would you take a look at Exhibit 211. That's DNR
 9 Exhibit 211, Mr. Hudak. Do you have that in front of
 10 you, sir?
 11 A Yes, I do.
 12 Q Thank you. Now, I don't have daily copies so I can't
 13 recall exactly what you said, but I thought your
 14 testimony, correct me if I'm wrong, yesterday was
 15 that there was a blockage caused by the berm or the
 16 ice cause berm between North Lake and the stream that
 17 is marked in blue in 2-002? Is that what you
 18 testified to yesterday?
 19 MS. KAVANAUGH: Sorry, could you repeat the
 20 question? I didn't hear it. I'm sorry.
 21 Q I recall yesterday that you stated that there was a
 22 blockage to the east of the blue line which appears
 23 on Exhibit 2-002 that impeded or blocked the flow of
 24 water out of the stream or out of the swale or
 25 whatever you want to call it into North Lake, do you

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1 A As I had testified, when I was at the site on 9/22,
 2 water in the lake -- and, again, in my opinion water
 3 in the lake had receded below that elevation and
 4 water was (inaudible) flowing over these two
 5 particular locations. The one probably on
 6 the -- this would be the -- the north was the greater
 7 of the two channels where water was -- again, it was
 8 trickling basically over is kind of a good way to
 9 describe it.
 10 Q Did you identify -- when you made your field visit
 11 did you identify the existence of a culvert
 12 underneath the berm or the high point?
 13 A I had not.
 14 Q Have you since?
 15 A I have not, but I had heard that there was a culvert
 16 located somewhere in that vicinity. Again, I haven't
 17 been able to look at it or been able to identify
 18 exactly where that's located.
 19 Q Okay. You don't disagree with testimony that there
 20 is such a culvert?
 21 A There may be, but its exact location, its
 22 functionality, direction, all that, I can't testify
 23 to.
 24 Q Now, you testified yesterday with regard to that
 25 grove of trees and you stated, as I recall, that you

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1 recall that?
 2 A I never defined it as a blockage, but --
 3 Q What would you define it as, sir?
 4 A Well, it really -- in the observations I made at that
 5 site was that it was just kind of a natural deposit
 6 of sand, gravel material, associated plant material
 7 that grew probably over many, many years, that had
 8 formed an edge I'll call it, an edge of North Lake,
 9 where you could really define the -- where the lake
 10 edge really existed. And I would classify that was
 11 within the approximate location of where the channel
 12 exited and entered the lake and that when water would
 13 actually get to a certain elevation within the swale
 14 or within the lake it would flow over in either
 15 direction once it waded above that elevation.
 16 Q Now -- thank you. Is that it? I didn't mean to
 17 interrupt you.
 18 A Yep.
 19 Q Now, directing your attention to Exhibit 211 and
 20 looking at the southwest quadrant of 211, you have an
 21 oval circle which you've identified as the high point
 22 between flow paths and then you've identified some
 23 vegetation that grows there and you have arrows going
 24 to either side of that high point. Does that
 25 indicate the flow of water?

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1 did not see any evidence of a -- that would indicate
 2 to you that there was an accumulation of water
 3 ordinarily in that grove of trees, is that correct?
 4 A I believe I testified that I didn't see any
 5 characteristics indicative of advantageous roots,
 6 water staining --
 7 Q Water staining. Thank you. And if there is
 8 photographic evidence of that water staining you
 9 haven't seen it, is that correct?
 10 A I had not observed any conditions where water
 11 staining had occurred on any of the plant species or
 12 any of the plants present in the grove of trees.
 13 Q Now, you're aware that there is a public access right
 14 now at Corey Oil, is that correct?
 15 A Yes, I am.
 16 Q And are you aware that there is a -- I don't recall
 17 your testimony yesterday so did you testify that
 18 there was not a permit for that?
 19 MS. KAVANAUGH: And I'd object, can you
 20 clarify what you mean by permit?
 21 MR. GLEISNER: It's pretty obvious.
 22 MS. KAVANAUGH: No, it's not. I mean you
 23 don't require a permit --
 24 MS. CORRELL: I think we can let him answer
 25 that.

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1 MR. GLEISNER: Your Honor, if they're going
2 to object they should object, otherwise let me
3 ask my questions, please.
4 MS. CORRELL: I think you asked Mr. Wakeman
5 some questions so I think you should go ahead.
6 MR. MEYER: I'll object to relevance.
7 Q Are you aware of any permit for the Corey Oil site?
8 MR. MEYER: Objection, relevance.
9 MR. GLEISNER: He just nodded his assent
10 yes, he is.
11 ALJ BOLDT: Well, I know, but what is the
12 relevance?
13 MR. GLEISNER: Your Honor, we want to
14 establish that there already is public access to
15 North Lake.
16 MR. HARBECK: I mean they talked about it.
17 ALJ BOLDT: Yeah, okay. Yeah, no, I think
18 that's right. The objection is overruled.
19 MR. GLEISNER: Thank you, Your Honor.
20 A I want to just touch back on the last question.
21 Q Sure.
22 A You asked if there was public -- there was a public
23 boat launch at the Corey Oil site. It's not a public
24 boat launch, it's a private boat launch, just to
25 clarify.

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1 ALJ BOLDT: Yeah, let's -- I mean let's get
2 back in form too where we have one lawyer for
3 each -- I mean I've allowed both sides a little
4 latitude there, but let's get back in form and,
5 I agree, let's keep this thing moving.
6 MR. GLEISNER: We're trying to, Your Honor.
7 We are trying to.
8 Q Did you talk to any neighbors --
9 MR. GLEISNER: I'm sorry, were you done,
10 Your Honor?
11 ALJ BOLDT: Uh-huh.
12 Q Did you talk to any neighbors about the Krause site?
13 A The only neighbors I had conversations with I believe
14 was actually Fritz Hanson when we were doing our tour
15 of the site back in September, with maybe some
16 occasional off-the-cuff type conversations at some of
17 the public informational meetings (inaudible), but
18 nothing that I can recall.
19 MR. MEYER: Can I ask for clarification?
20 The term neighbors is a very broad term. Is it
21 the neighbors on the Corey side -- Corey/83 site
22 or the neighbors --
23 MR. GLEISNER: That's a fair request for
24 clarification, Counsel. I would limit that to
25 the people who live contiguous to the Krause

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1 Q Okay.
2 A And, yes, I am aware of permits issued for that boat
3 launch.
4 Q Do you remember or do you know when the first permit
5 was issued?
6 A It was in the early '90s. I don't have the exact
7 date and time, but I've located that for a couple
8 different individuals over the last couple months
9 so --
10 Q Thank you very much. And that access point, does the
11 owner of Corey Oil charge for the opportunity to
12 launch boats there?
13 A Yes, they do.
14 Q And how much, do you know?
15 A Last I launched there it was \$3.
16 Q Okay. Thank you. That site at Corey Oil is
17 available to anyone who wishes to launch a boat
18 there, is that correct?
19 A To the best of my knowledge.
20 MS. CORRELL: I hope you're wrapping up
21 because this is all duplicative to his direct
22 testimony.
23 MS. KAVANAUGH: I mean if we're going to
24 get done today, going over the same stuff over
25 and over --

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1 site, Mr. Peters, Mr. Hanson, the people on
2 lower Redland Road.
3 MR. MEYER: Thank you. That helped a lot.
4 Thank you.
5 ALJ BOLDT: Was that your understanding
6 when --
7 THE WITNESS: That was my understanding,
8 but it was pretty broad. That's why I brought
9 in the meetings too because I'm sure I had
10 conversations there.
11 Q Did you see any swamp cabbage anywhere on the site?
12 MR. MEYER: Clarification again. Which
13 site, please?
14 MR. GLEISNER: I apologize. I'm referring
15 to the Krause site.
16 A I believe I identified one swamp cabbage or I believe
17 what you would be referring to as swamp cabbage on
18 the site.
19 Q And where was that located, sir?
20 A Within the grove of trees.
21 Q Thank you for that.
22 MR. GLEISNER: Your Honor, if I can just
23 have one moment?
24 ALJ BOLDT: Sure.
25 Q Could you go to 216?

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1 MR. GLEISNER: We have one more area, Your
 2 Honor, and then we're done.
 3 Q Do you recall yesterday or my recollection is
 4 yesterday that you were asked about this exhibit
 5 and -- on direct and the question related to whether
 6 or not there was hydrophytic vegetation found on the
 7 site by either the DNR or the Army Corps of
 8 Engineers. Do you recall that?
 9 MR. MEYER: And, once again, this is the
 10 Krause site?
 11 MS. KAVANAUGH: And which exhibit, sir?
 12 MR. GLEISNER: Exhibit 216.
 13 MS. CORRELL: 216. Can you just give me a
 14 moment, please? Okay. What's your question?
 15 A Can you repeat that please?
 16 Q Certainly. Just for the record, Exhibit 216 is
 17 entitled North Lake Boat Launch DNR Krause Site
 18 Wetland Delineations. Do you recall that being
 19 presented to you yesterday?
 20 A Yes.
 21 Q Okay. Go to the second page or, actually, Page 3,
 22 216, Page 3. You read into the record yesterday the
 23 sentence beginning, "However, hydrophytic vegetation
 24 has not established" -- has not. I imagine it means
 25 been established -- "in the approximate 50 years

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1 ALJ BOLDT: Okay. Go ahead and answer it
 2 if you can.
 3 A I was not aware of a mowing schedule on the site, but
 4 it's a DNR-maintained site so I'm aware mowing has
 5 occurred.
 6 Q At this time I am going to --
 7 MS. CORRELL: Is this a new exhibit?
 8 Q Who is --
 9 MR. GLEISNER: Yes, it is.
 10 Q Who is Pat Truckel (phonetic)?
 11 MS. CORRELL: I would object to additional
 12 exhibits being submitted at this date.
 13 MR. GLEISNER: This is cross-examination,
 14 Your Honor, and something came up yesterday that
 15 we would like to have the record clarified on.
 16 MS. CORRELL: Sir, the record speaks for
 17 itself in terms of what the Army Corps
 18 determination is. Arguments that were made to
 19 the Army Corps of Engineers and were not
 20 successfully determined by the Army Corps of
 21 Engineers cannot be redone without redress at
 22 the Army Corps of Engineers at the federal
 23 level. You're bringing in information that was
 24 presented to the Army Corps of Engineers with
 25 respect to wetland delineations and the

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1 following the placement of fill and associated
 2 hydrologic alteration." Do you recall reading that
 3 into the record yesterday?
 4 A Yes.
 5 Q Okay. I'm now going to show you --
 6 MR. GLEISNER: Get that over to Counsel.
 7 Q Are you aware that just before -- you are aware that
 8 the Army Corps of Engineers visited this site on
 9 May 5th of 2010, are you not?
 10 A I do not know the exact dates of their site visit,
 11 but I know that they had done multiple site visits.
 12 Q Take a look at the second paragraph up from the
 13 bottom on Page 2 of Exhibit 216 and it says there on
 14 May 4th the Corps of Engineers conducted an
 15 independent on-site review of the SEWRPC DNR water
 16 delineation and the information which has been
 17 submitted by the Corps. On May 5th the Corps of
 18 Engineers conducted a follow-up site visit. Do you
 19 see that, sir?
 20 A Yes.
 21 Q Are you aware that just before the site visit the
 22 area on the Krause site was mowed?
 23 MS. CORRELL: Objection, relevance.
 24 MR. GLEISNER: And we'll establish
 25 relevance in a moment.

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1 management of that site.
 2 MR. GLEISNER: I suggest not.
 3 MR. HARBECK: They raised this issue
 4 yesterday. They pointed out the sentence in
 5 this Army Corps wetland delineation where they,
 6 the Army Corps, delineation said there's an
 7 absence of hydrophytic vegetation. They brought
 8 that up. The site was mowed just prior to the
 9 Army Corps analysis and evaluation and the
 10 question is, is he aware of whether or not
 11 that's contrary to DNR guidance to mow a site
 12 before you do a wetlands delineation. All he's
 13 going to do is -- he's not aware it was mowed
 14 and just produce the guidance memo that says
 15 you're not supposed to mow a site and then we're
 16 done with that.
 17 MS. CORRELL: That exhibit isn't necessary
 18 to ask that question.
 19 MR. HARBECK: Well, we try, but --
 20 ALJ BOLDT: No, ask the question and that's
 21 fine.
 22 MS. CORRELL: Yeah, you can't produce that
 23 exhibit. You can ask those questions if that's
 24 all you're trying to establish.
 25 MR. GLEISNER: We would like these exhibits

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1 in the record, Your Honor.
 2 ALJ BOLDT: What's that?
 3 MR. GLEISNER: We would like these exhibits
 4 in the record because they relate to DNR policy.
 5 They were obtained in response to an open
 6 records request. They are highly germane to the
 7 question of -- or questions that were asked
 8 yesterday with respect to Exhibit 216.
 9 MS. CORRELL: Objection --
 10 MR. MEYER: Your Honor, I'm going to
 11 object --
 12 ALJ BOLDT: Wait, wait, hold on. What
 13 issue that I have to decide are they relevant
 14 to?
 15 MR. GLEISNER: Well, they're not. The DNR
 16 was forthcoming with the Army Corps of Engineers
 17 with respect to this property.
 18 ALJ BOLDT: Again, what am I going
 19 to -- I'm going to make a finding they were
 20 forthcoming, they weren't forthcoming? Come on,
 21 that's not relevant.
 22 MR. HARBECK: No but, Judge, if they're
 23 going to make an argument that the absence of
 24 hydrophytic vegetation means that the area does
 25 not on an intermittent basis have a lot of

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1 try and leave those fallowed to allow wetland
 2 plants or the native species or seed bank to
 3 grow and not be manipulated.
 4 ALJ BOLDT: So is it the same division? I
 5 know DNR is a big entity. Is it the same
 6 division that are the groundskeepers as are
 7 involved in a wetlands delineation process?
 8 THE WITNESS: Not to my knowledge.
 9 ALJ BOLDT: Okay. And subsequent to that
 10 have you seen any evidence of hydrophytic
 11 vegetation in that area? We were just out
 12 there.
 13 THE WITNESS: You know, there are varying
 14 degrees of hydrophytic vegetation and there are
 15 occurrences of when they grow in those
 16 conditions. To my knowledge there are various
 17 species (inaudible) that could be classified as
 18 somewhat wet but, again, when they're going
 19 through the delineation process they rank those
 20 on their occurrences within the area to be able
 21 to determine if the site qualified and meet
 22 wetland status.
 23 ALJ BOLDT: And we had a SEWRPC expert, we
 24 had a DNR expert, we had an expert for the North
 25 Lake Management District and I'm not sure if

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1 water, then this is to show that there could be
 2 vegetation there. I mean I don't know where
 3 they're going, what the point of that whole --
 4 ALJ BOLDT: I mean I agree you can ask the
 5 question, it's fair cross, but I don't see how
 6 that document is relevant to any issue that I
 7 have to decide apart from the fact that it
 8 hasn't been disclosed.
 9 MR. GLEISNER: Well, the only thing is
 10 it --
 11 ALJ BOLDT: If you want to put it in your
 12 rebuttal case that might be appropriate, but if
 13 you want to ask a question about it --
 14 MR. GLEISNER: Fair enough, Your Honor.
 15 MR. HARBECK: Ask him if he's aware of the
 16 DNR guidance.
 17 MR. GLEISNER: I will. Fair enough, Your
 18 Honor.
 19 ALJ BOLDT: And ask him if he is
 20 aware -- or I'll ask him. Are you aware of DNR
 21 guidance relative to the issue of mowing in
 22 anticipation of a wetlands delineation?
 23 THE WITNESS: Typically, when you have
 24 atypical or disturbed sites such as farmed
 25 wetlands or other disturbed sites, it's best to

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1 anybody else was involved in a wetlands
 2 delineation. That's settled and I had thought
 3 that we had a -- I thought we had a stipulation
 4 that those issues are not part of this hearing,
 5 that wetland issues are not part of the hearing.
 6 MR. HARBECK: It was only in response to
 7 their bringing this up and making a point of it.
 8 ALJ BOLDT: All right. Okay. So then I
 9 think we've covered it.
 10 MS. CORRELL: And I didn't refer to other
 11 parts of the memo that had to do with the
 12 wetland and the mowing was answered in this
 13 memo. I only referred to portions that had to
 14 do with navigability because that is the issue
 15 we're here to decide.
 16 MR. GLEISNER: May I please, Your Honor?
 17 ALJ BOLDT: Yeah.
 18 MR. GLEISNER: I'm done with the cross. If
 19 I just may make a record?
 20 ALJ BOLDT: Sure.
 21 MR. GLEISNER: We are -- and an offer of
 22 proof. We are going to establish in our
 23 rebuttal that the guidance says they shouldn't
 24 cut it and we're going to establish that it was
 25 cut by the direction of a very high level member

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1 of the DNR who is responsible for the site and
2 was cut again just a couple of days before our
3 on-site visit to this location. And my only
4 point in raising it isn't to show wetlands, Your
5 Honor, it's to show that the area of the grove
6 of trees is often saturated with water.

7 ALJ BOLDT: Okay. If you want to present
8 it as part of your rebuttal case then --

9 MR. GLEISNER: And that's it, Your Honor.

10 ALJ BOLDT: -- just on that discreet
11 point, I think that --

12 MR. GLEISNER: And we're done with our
13 cross, Your Honor.

14 MS. CORRELL: I would still object to
15 relevancy because this has been asked and
16 answered and the Division doesn't actually have
17 jurisdiction to undo a federal wetland permit.
18 So you can bring those arguments to circuit
19 court, but they're really not relevant to the
20 issues to be decided here.

21 MR. GLEISNER: I think we'll wait for our
22 rebuttal if it's all right, Judge.

23 ALJ BOLDT: Yeah, I agree. Let's take that
24 up then. Okay. Any other -- Mr. Gallo, cross?

25 MR. GALLO: Yes.

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1 MS. CORRELL: No, I'm confused. Are there
2 two -- there's two 108's.

3 MS. KAVANAUGH: The first B.

4 MS. CORRELL: The first B and the first
5 108, okay.

6 Q This is a public comment submitted to the DNR and the
7 first question is did you review this as part of the
8 process to evaluate your decision or come up with
9 your decision on the manual code permit?

10 A Yeah, if I -- well, I don't want to make any
11 assumptions, but if this was included in a packet
12 submitted by you to the -- for the public comment
13 period then I could stipulate that it may have been
14 part of that packet that I reviewed.

15 Q Okay. Turn to Page 9. One of many concerns that we
16 expressed on behalf of the North Lake Management
17 District was storm water drainage interference and
18 diversion with this project and its --

19 MS. CORRELL: Objection again to relevance,
20 not the issue for this hearing.

21 MS. KAVANAUGH: They've got a separate
22 judicial review going --

23 MR. GALLO: It goes to whether or not
24 there's -- the deposit for the access road
25 materially reduced the flood flow capacity of

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1 CROSS-EXAMINATION

2 BY MR. GALLO:

3 Q Mr. Hudak, I'm trying to clarify the extent of your
4 analysis of the Standard Number 3, the structure or
5 deposit would not materially reduce the flow -- flood
6 flow capacity of a stream. So if you'll bear with me
7 a little bit, I want to identify the hydraulic flow
8 regime flowing through the system. So we're looking
9 at -- going back to Exhibit 108B, this is a public
10 comment dated October 31st to Jim Ritchie.

11 A Can you just let me know what book that's in? Is it
12 in --

13 Q I'm sorry, it's a black book -- 108.

14 ALJ BOLDT: Right here.

15 A And 108?

16 Q The first page is dated October 31st. It's a letter
17 addressed to Jim Ritchie and I think it's public
18 comment on behalf of North Lake Management District.
19 Do you have it?

20 A Well, the 108 I have is December 10th, 2008.

21 Q Okay. Flip back to Appendix -- forward, I'm sorry.
22 No, I'm sorry, back. Appendix B. This one right
23 here.

24 A Oh, okay, sorry, I missed that B part.

25 MR. GALLO: Do you have it?

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1 the stream.

2 ALJ BOLDT: Okay. Well, keep it in that
3 context.

4 MS. CORRELL: What stream are we talking
5 about?

6 MR. GALLO: The swale that Andy is talking
7 about, the blue swale, and the stream that's
8 within the north wetlands.

9 MS. CORRELL: What activity is taking place
10 in that water body?

11 MR. GALLO: You're filling that --

12 MS. CORRELL: We're not touching that
13 swale.

14 MR. GALLO: No, you're -- the north
15 wetlands you're filling the stream area with the
16 access road.

17 MS. KAVANAUGH: What stream?

18 MR. GALLO: Let's go to another exhibit.

19 ALJ BOLDT: Yeah, I think we have to be
20 precise for that exact reason.

21 Q I'm referring to Exhibit 143 --

22 UNIDENTIFIED SPEAKER: Actually, he needs
23 to be near a microphone when he says this.

24 ALJ BOLDT: Yeah, I think we better have a
25 mic.

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1 Q I'm referring to Exhibit 143 --
 2 MR. GALLO: Thank you. Thank you.
 3 Q And if I'm correct, I'm just trying to point out this
 4 is the proposed route of the new access road and we
 5 have testimony in the record from Don Reinbold and
 6 Neal with regard to a depression in here that is what
 7 we're saying is the stream in the north wetlands. So
 8 that's impacting flood flow capacity?
 9 MS. CORRELL: Still objection to relevance.
 10 ALJ BOLDT: Okay. Are you saying assuming
 11 that's a stream does it affect the flood flow
 12 capacity of that stream? Is that basically what
 13 you're asking?
 14 MR. GALLO: No.
 15 ALJ BOLDT: Okay. I'm sorry.
 16 MR. GALLO: I'm just trying to establish
 17 the flow regime, first of all.
 18 ALJ BOLDT: Okay.
 19 MR. GALLO: And the question they asked was
 20 what relevance was this line of questioning with
 21 regard to flood flow capacity. Let me continue
 22 on the development of the flood -- or the flow
 23 regime.
 24 ALJ BOLDT: Okay.
 25 Q Now, if you'll look at the map in Exhibit E on -- in

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1 Q No, no, your own knowledge of the site.
 2 A Okay. My knowledge of the site and my opinion of how
 3 this waterway really is functioning is that you have
 4 any number of sources of water flowing to it. During
 5 localized events you would have inflow, that I would
 6 agree with, out of the -- similar to what is drawn on
 7 this map where you have watershed draining from the
 8 west to the east, but not solely confined to the
 9 south than to the north. I believe there's -- as
 10 this depicts too, there's adequate drainage to the
 11 northern wetland at the same time as to the southern
 12 portion of the wetland. Again, you know, I don't see
 13 any differences of water being trapped behind that
 14 road and flowing over that direction, but the general
 15 flow of this waterway is when it would come to the
 16 elevation of the area closest to the lake and fill up
 17 before it would discharge into the lake.
 18 Q Okay. When you reviewed the manual code approval and
 19 the Kapur design of this access road, you permitted
 20 four culverts and I'm going to refer to the DNR
 21 exhibits. I believe it's Exhibit 1, the application
 22 materials, and it's Bates Number 041.
 23 A What was the first exhibit again?
 24 Q It's the first exhibit in the DNR package.
 25 A 200?

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1 that book. This map --
 2 MS. CORRELL: Can you just give me a
 3 moment? Exhibit E to your first Exhibit 108?
 4 MR. GALLO: Yeah, it's this one right here.
 5 MS. KAVANAUGH: That one? Okay.
 6 MR. GALLO: Exactly. 108B, E.
 7 Q This map was submitted in support of our comment with
 8 regard to the flood drainage interference and
 9 diversion. Now, in your deposition, Mr. Hudak, you
 10 said that you were familiar with plans and drawings
 11 and contours, is that correct?
 12 A That's correct.
 13 Q So I'm presuming that when you evaluated the manual
 14 code approval that you reviewed this hydraulic
 15 regime?
 16 A I've seen it, yes.
 17 Q Okay. Now, I just want to do a little bit more
 18 follow-up with regard to Exhibit 2-002. If you look
 19 at this exhibit with regard -- and the map that has
 20 the flow drainage. Correct me if I'm incorrect here.
 21 The flow flows into this wetland and then it flows
 22 across the existing roadway into this north wetland,
 23 is that correct?
 24 A Would you like me to answer that related to how I'm
 25 reading this diagram or from my own opinion?

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1 Q 200.
 2 A Okay.
 3 Q Exhibit 200, and Kapur drawing, design drawing, 041.
 4 MR. GALLO: Does everybody have that?
 5 A So Bates stamp 041?
 6 MR. GLEISNER: So we can be clear on the
 7 record, it does not have a Bates stamp? Does it
 8 follow --
 9 MR. GALLO: It's 041 and it's C101-2 from
 10 the drawing.
 11 MR. GLEISNER: Thank you, Counsel.
 12 MR. GALLO: And just one more minute.
 13 MS. CORRELL: It's got to be around here.
 14 MR. GALLO: 041.
 15 MS. CORRELL: I know. 101 dash what?
 16 MR. GALLO: Let's see, what number is this
 17 one? That's the one. That's the right one.
 18 MS. CORRELL: It does have a Bates number
 19 of 041?
 20 MR. GALLO: Yes.
 21 Q Okay. Andy, I'm going to refer you to this drawing
 22 and from Station 20 plus 00 which is the east/west
 23 leg of the new proposed access road there are four
 24 eight-inch PVC cross-culverts identified between the
 25 top of the hill which is 20 plus 00 to the parking

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1 lot area. Are you --
 2 MS. CORRELL: Objection -- or not
 3 objection, really just a clarification that this
 4 is the 2008 plans. Do you need to be using -- I
 5 understand that these are in the application,
 6 but do you need to be using the plans from
 7 December that you submitted in your exhibits?
 8 Q Are these the plans that you reviewed for the manual
 9 code approval?
 10 MS. CORRELL: Because these are the
 11 original plans before the road alignment for
 12 Mr. Hanson's property and as you can see in his
 13 decision it refers to different plans that are
 14 more substantially similar to --
 15 Q Let me ask you a more basic question. Are these the
 16 four culverts that you referred to in your approval?
 17 A These would be the four culverts, yes.
 18 Q And the purpose of those culverts is to convey the
 19 water from the south wetlands to the north wetlands,
 20 is that correct?
 21 A And vice versa.
 22 Q And vice versa. So it flows both directions in these
 23 culverts?
 24 A Correct. That would be my understanding of how these
 25 culverts will function.

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1 of area and flow for a 100-year event in your
 2 analysis of the manual code approval?
 3 A No.
 4 Q So there's no written documentation in the DNR record
 5 with regard to projected water and rain event flow?
 6 A Not within any of my records I would have reviewed
 7 for this decision.
 8 Q And I'm not trying to ask this again, I'm just trying
 9 to be clear. So there's nothing in the manual code
 10 application or in the approval with regard to
 11 supporting documentation on the projection of flood
 12 flows in this defined hydraulic regime?
 13 A To my understanding, yes.
 14 Q Okay.
 15 MS. CORRELL: DNR just has, again, the same
 16 continuing objections to flood plain and storm
 17 water issues being addressed here when there are
 18 other matters that are addressing those issues.
 19 This is not what the case is about.
 20 MR. GALLO: I think it's relevant, Your
 21 Honor, with regard to --
 22 MS. CORRELL: To a degree.
 23 MR. GALLO: -- evaluation of flood
 24 flow -- impacts to flood flow capacity.
 25 MS. CORRELL: If there were a stream, yes.

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1 Q Did you ever calculate or do you have any written
 2 documents with regard to the drainage area that goes
 3 into this system -- this hydraulic system?
 4 MR. MEYER: Clarification of what hydraulic
 5 system?
 6 MR. GALLO: We just defined a hydraulic
 7 system by these maps and --
 8 MR. MEYER: Okay.
 9 MR. GALLO: -- and the two wetlands
 10 and --
 11 MR. MEYER: Okay.
 12 MR. GALLO: -- the swale going out to
 13 North Lake --
 14 MR. MEYER: Thank you.
 15 MR. GALLO: -- and we've been discussing
 16 flow back and forth.
 17 Q Did you do any area calculations as to flow quantity?
 18 A No.
 19 Q There's no documentation with regard to the area of
 20 drainage or the flow based on like a 100-year
 21 flow -- or storm event?
 22 A I don't know what calculations Kapur may have done to
 23 size those culverts. Again, that wasn't any material
 24 that I reviewed.
 25 Q So the question is did you rely on any calculations

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1 ALJ BOLDT: Okay. Objection is noted and
 2 the ruling stands. The testimony stands.
 3 Q Turn to the North Lake Management District
 4 Exhibit 106. It's a historical aerial photo.
 5 MR. GALLO: Is everybody there?
 6 MS. CORRELL: Yes, thank you, Don.
 7 Q Okay. 106 and also 107 which is the photo right
 8 behind it. Mr. Hudak, during your deposition I
 9 presented you with these two figures that I obtained
 10 from the Wisconsin Department of Transportation
 11 website. 106 is an aerial photo of the Krause
 12 property showing the north wetlands, the south
 13 wetlands, and the area that you called the swale in
 14 the winter of 1968 and Exhibit 107, again,
 15 from -- it's a Department of Transportation aerial
 16 photograph of the Krause property predevelopment
 17 dated 1937. During your deposition you indicated
 18 that you had not seen or reviewed these photographs
 19 with regard to stream history, is that correct?
 20 A That's correct. These were not air photos that I had
 21 access to or utilized.
 22 Q Okay. Thank you. With regard to this hydraulic
 23 regime, including the drainage area to the west on
 24 the hillside, the wetlands north and south and the
 25 swale, would you consider that a tributary to

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1 North Lake?

2 A I'll tell you a contributory source of North Lake. A

3 tributary, I would have difficulty classifying it as

4 that only as I don't -- I still have difficulty

5 classifying this as a stream and I really associate a

6 tributary as a flowing system into a stream, whether

7 it be intermittent or permanent.

8 Q In your testimony you have referred to the blue

9 segment as a swale and stated that has a defined bed

10 and bank, is that correct?

11 A I defined that it does have a defined bed and bank

12 and swale is a term loosely used, I'll call it.

13 Q Let's turn to Exhibit 129. This is a large fold-out

14 map that we produced prepared by Lake Country

15 Engineering.

16 A I need the second book.

17 Q Do you need help? I'm happy to help you.

18 A Is it in Book 2 or 3?

19 MS. CORRELL: I think it's the third, yeah.

20 A And 129?

21 Q Yes.

22 MS. CORRELL: Do you mind if I share your

23 copy. We gave ours back.

24 Q This document was a survey that was conducted on

25 September 2nd, 2011. Were you at that site visit?

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1 MR. GALLO: Well, what I'm looking for is

2 whether or not DNR and Secretary Meyer is taking

3 the position that there are no other practical

4 alternatives to this site.

5 MS. CORRELL: That's not an issue in this

6 hearing.

7 MR. GALLO: Okay, withdraw the question.

8 MS. CORRELL: That's why we didn't go

9 through that.

10 MR. GALLO: No further questions.

11 ALJ BOLDT: Thank you, Mr. Gallo.

12 Redirect?

13 MS. CORRELL: Yeah, just a couple of

14 questions.

15 REDIRECT EXAMINATION

16 BY MS. CORRELL:

17 Q Thank you for your patience, Mr. Hudak. You were

18 asked a lot of questions regarding flood studies and

19 various studies that you'd be conducted -- or you

20 would -- I guess the question would assume that you

21 would conduct flood studies in your review of

22 Chapter 30 or a water quality certification

23 application. In your experience, is that a required

24 analysis in order to reach a determination?

25 A It is not.

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1 A Yes, I was.

2 Q And did you observe Lake Country doing this survey

3 measurements? It was actually an elevation survey to

4 establish the bottom of the -- what we refer to as

5 the channel?

6 A I observed a few of the locations. I didn't observe

7 every single point that they made and sampled or

8 measured.

9 Q Okay. Thank you.

10 MR. GALLO: I'd like to go into another

11 area and I'm certainly willing to debate this

12 and if DNR wants to make a stipulation, that

13 would be fine. It would save time. But

14 Secretary Meyer raised an issue with regard to

15 the denial of the Highway 83 access site and I

16 would like to ask a few questions regarding that

17 because it goes to the availability of

18 alternative sites and to the alternative

19 analysis that was conducted. And, you know, I'm

20 sure --

21 ALJ BOLDT: The problem is we don't have

22 the wetlands issues in this case.

23 MS. KAVANAUGH: In front of us. You

24 stipulated wetlands were not part of this. You

25 stipulated navigability was the only issue.

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1 Q Are there occasions when a site has significant flood

2 plain or floodway issues such that you might consult

3 with the flood plain engineer at DNR?

4 A Yes.

5 Q And as I believe I -- or I asked you earlier, are you

6 aware of whether or not a flood plain analysis is

7 being done by a DNR employee for this site?

8 A I'm aware that our flood plain engineer is working

9 with Waukesha County to ensure that this project will

10 meet Waukesha County flood plain zoning requirements.

11 MR. GLEISNER: Objection, relevance. I'm

12 not sure where this is going.

13 MS. CORRELL: I'm responding to your

14 irrelevant questions.

15 MR. GLEISNER: My point is -- my point is

16 that the question is relating to zoning

17 ordinances, etcetera, not whether there was a

18 flood plain analysis done, Your Honor. I'm

19 having a little difficulty understanding. I got

20 shot down for zoning yesterday.

21 ALJ BOLDT: Yeah, it's exactly like --

22 MS. CORRELL: We're having trouble

23 understanding why you keep asking these

24 questions. I'm simply responding.

25 ALJ BOLDT: Yeah, he was shot down as he

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1 said or he was -- the objection was sustained
2 more precisely. We'd never think to shoot down
3 Mr. Gleisner, but -- particularly now in this
4 new era. People might be packing here. Okay,
5 go ahead. The objection was sustained.

6 MS. CORRELL: I'm sorry, my colleague was
7 talking to me and I didn't hear what you just
8 said.

9 ALJ BOLDT: The objection is sustained.

10 MS. CORRELL: So I don't need to do this?
11 We're already covered that none of those
12 questions are relevant?

13 ALJ BOLDT: Yeah, the objection was
14 sustained on that one.

15 MS. CORRELL: Okay.

16 Q You were asked a lot of questions about 30.19 grading
17 and whether or not DNR had assessed grading on the
18 entire site. Correct me if I'm wrong, but I
19 understood your testimony to mean --

20 MR. GLEISNER: Objection, leading.

21 Q Did you assert 30.19 grading for the approval of the
22 manual code decision in this project?

23 A We had asserted 30.19 grading authority over the
24 manual code.

25 Q And if your 30.19 grading authority were larger than

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1 Q And you were also asked about whether or not you had
2 conversations or otherwise alerted neighbors of the
3 project. Isn't it true that Chapter 30 requires
4 specific notice to some landowners and, if so, could
5 you describe who those landowners are?

6 A Typically, the notice requirements for the Chapter 30
7 individual permit process would require some notice
8 to the immediate riparian owners on either side of a
9 project of the waterway. I believe we even extended
10 this to a few of the other adjacent riparian owners
11 in close proximity to it as well as the North Lake
12 Management District, I believe some conservation
13 groups, U.S. Army Corps of Engineers, Waukesha County
14 and I believe the Town of Merton and Village of
15 Chenequa as the municipalities within the area.

16 Q And just to refresh your recollection on that, I'd
17 have you refer to Exhibit 213 and identify for the
18 record who was notified with respect to this notice?

19 A What was the --

20 Q Oh, Exhibit 213 in the DNR book.

21 A It was published -- I can go ahead and just state it
22 was published in this looks to be the -- I'm drawing
23 a blank here of where this -- what paper this was in
24 now. Oh, the Waukesha Freeman. The Waukesha Freeman
25 on 9/16/2010 and we had certified copies mailed to

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1 only those activities that are included on the
2 parking lot, would 30.19 require any additional
3 protections for the environment or the navigable
4 waters, any type of navigable waters including
5 wetlands, lakes, streams, any navigable waters, on
6 the site?

7 MR. GLEISNER: Objection, leading.

8 MS. CORRELL: I asked him whether or not
9 any additional conditions, I don't see that
10 that's leading, or requirements would be
11 necessary.

12 MR. GLEISNER: That's just my objection,
13 Your Honor. I will argue it if you want.

14 MS. KAVANAUGH: I think it's similar to the
15 question the Judge asked.

16 ALJ BOLDT: Go ahead and answer it.

17 Overruled.

18 A In this case there's no additional requirements that
19 we would have instilled upon the design, the
20 construction, of this -- of these activities based on
21 not reviewing it or not having reviewed it under
22 30.19. Basically, all of the -- all of the
23 requirements that were instilled within the
24 conditions of this manual code addressed the entire
25 site and the review under the 30.19 activity.

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1 Mr. Jerry Hein (phonetic) of the North Lake
2 Management District and Mr. Dale Feifel (phonetic)
3 from the U.S. Army Corps of Engineers, Sue Oman
4 (phonetic) who I believe is an adjacent property
5 owner I believe to the south. She may own -- she may
6 be (inaudible) of the larger portion of the wetland
7 waterway area.

8 Q Who received the certification just above the Army
9 Corps of Engineers' certification?

10 A I was skipping that one because I couldn't read the
11 handwriting of it.

12 Q But it's printed as well.

13 A Oh, sorry, Mr. William Gleisner. That's a lot easier
14 to read though. Thank you for pointing that out to
15 me. And Sue Oman was from the Town of Merton. Now I
16 can read those. Aletta Rush (phonetic) was another
17 one, the Village of Chenequa, Margo Hanson, the North
18 Lake Development Group, Thomas Krause, Waukesha
19 County Parks and Planning, Kurt and Patricia Freibel
20 (phonetic), Thomas and Anna Peters, Rosemary Wurst
21 (phonetic) and the Waukesha Environmental Action
22 League.

23 Q Thank you. And the non-certified copies, are those
24 listed in a copy -- I think maybe you went through
25 all of them.

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1 A Yeah, I think I went through --
 2 Q Sorry.
 3 MS. CORRELL: Strike that.
 4 Q So it appears to be both petitioners' position that
 5 the wetland, because it has a channel in the northern
 6 quadrant of the wetland and continuing easterly to
 7 the lake, constitutes a stream and therefore
 8 analysis -- that's the allegation and therefore the
 9 analysis would require that flood flow capacity would
 10 be addressed in this permit review. If I ask you to
 11 assume that as a fact, that this is a stream, have
 12 you considered any decrease in -- whether or not
 13 there is a decrease, a material decrease, in flood
 14 flow capacity of this navigable water body? Or since
 15 it's a hypothetical, I'm asking you to consider that
 16 now.
 17 A Yeah.
 18 MR. HARBECK: Object, Your Honor, there's
 19 no foundation, there's no expertise, he hasn't
 20 done it, so I think for him to now give an
 21 opinion that he's not either qualified for or
 22 that he hasn't looked at before is improper.
 23 MS. CORRELL: I think you have opened the
 24 door.
 25 MR. HARBECK: And the point is they haven't

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1 weigh that fill against the culverts that are being
 2 proposed in this project?
 3 A Currently there's about .14 acres of overall fill
 4 being placed in this waterway and there's been talk
 5 of two culverts. I'm aware of one that, again, I'm
 6 not positive of its functionality, but from
 7 everything I can observe it doesn't appear to be a
 8 highly functioning culvert and be replaced with four
 9 additional culverts spread along the road to try and
 10 convey flow to either side.
 11 MS. CORRELL: I don't have any further
 12 redirect. Thank you.
 13 ALJ BOLDT: Okay.
 14 MR. MEYER: Two very brief, if I may?
 15 RE-CROSS-EXAMINATION
 16 BY MR. MEYER:
 17 Q Mr. Hudak, Attorney Gleisner asked you the question
 18 can anyone use the Corey Oil boat site, boat access,
 19 on his cross-examination. Do you recall the
 20 question?
 21 A Yes.
 22 Q In this record, have you previously testified on the
 23 limitations of launching from that site?
 24 A Yes, I have.
 25 Q Okay. Then I will not pursue that further. There's

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1 done a flood flow analysis.
 2 ALJ BOLDT: The objection is noted but
 3 overruled. Go ahead.
 4 A Provided assuming that there was a defined channel
 5 with flow that is perceivable and we'd call it a
 6 stream, I don't believe there would be a material
 7 reduction of the flood flow capacity of that stream,
 8 given the nature that there is the higher elevation
 9 within that 15-foot area that I observed along the
 10 lakeshore. And the only -- I'm sure there may be
 11 certain conditions exist on a localized event that
 12 may cause these to fill up to that elevation to flow
 13 out. My opinion is the greater likelihood of the
 14 source of water for these waterways is actually the
 15 flooding of the lake system and the Oconomowoc River
 16 coming down and back-flowing into these systems.
 17 Again, there may be resident water that is there from
 18 spring rains or snow melts but, again, it needs to be
 19 I think a highly localized event that would cause
 20 water to discharge from this and not be higher than
 21 the lake -- or cause conditions where the discharge
 22 of this is higher than the lake elevations.
 23 Q And, again, in this hypothetical, apparently the
 24 structure would be the placement of fill in the
 25 wetland adjacent to the access road. How would you

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1 been this reference to I think it's been called an
 2 independent site visit by the Corps of Engineers to
 3 look at wetlands. Did you have knowledge of that
 4 independent visit before it occurred?
 5 A Yes, I knew that there was the dispute of the wetland
 6 areas and that the Corps requested a day to be out
 7 there without outside influences to evaluate the site
 8 prior to having I think a second day to bring the
 9 other scientists together to discuss their findings.
 10 That was what I thought the process was going to be.
 11 I can't testify that's exactly how it happened, but
 12 that was my understanding of what was going to occur.
 13 Q Did you know the date of that visit before it
 14 happened?
 15 A It may have been the day before. It may -- I think
 16 they may have been back-to-back days.
 17 Q Okay. So you heard about it -- I'm asking as -- for
 18 clarification. I'm not trying to put words --
 19 A Yeah.
 20 Q -- in your mouth. Heard about it one day, it
 21 happened the next. Is that your knowledge?
 22 A Well, I think I heard about it much sooner than that,
 23 you know.
 24 Q Okay.
 25 A I knew it was going to occur. Again, I was acting in

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1 the capacity of the water management specialist. I
2 wasn't reviewing the wetland delineation for any
3 concurrences. I was letting the scientists determine
4 what's the most appropriate wetland area to assert
5 jurisdiction over as far as the federal wetlands and
6 also for our water quality cert review and use that
7 for the permit decision.

8 Q Thank you.

9 MR. MEYER: No further questions.

10 MR. GLEISNER: Very brief recross, Your
11 Honor, and I'll keep it as brief as I can.

12 RE-CROSS-EXAMINATION

13 BY MR. GLEISNER:

14 Q Mr. Hudak, did you testify at your deposition that
15 the blue line on Exhibit 2-002 was a stream?

16 A I believe I had referenced it to many things. I may
17 have at one time called it a stream or a waterway or
18 a swale. I might have used those terms many times,
19 with the uncertainty that there's not a good
20 definition of what that water body actually is.

21 Q Do I need to reference your attention to the part of
22 the deposition where you said it was a stream? I'll
23 be happy to do that.

24 MR. MEYER: Objection, he answered the
25 question.

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1 MS. CORRELL: No.

2 ALJ BOLDT: 111 is received as an exhibit
3 as part of the formal record.

4 Q And then the question was, using this light blue pen
5 and referring back to Exhibit 2, tell me, if you
6 would, the location of any stream on that property
7 and on the Krause property and then you drew that
8 blue line and initialed up there. Do you disagree
9 with that?

10 A As I just heard you read that, you referenced there's
11 a stream and I had not.

12 MS. CORRELL: Can you tell me what page
13 you're on?

14 MR. GLEISNER: I'm on Page 27 at Line 23.

15 Q Using this light blue pen --

16 MR. GLEISNER: I'm sorry, everyone there?

17 MS. CORRELL: Yes, thank you.

18 Q On Exhibit 2-002 the question was, "Using this light
19 blue pen and referring back now to Exhibit 2" -- that
20 exhibit right there was RRNA Exhibit 2 at the
21 deposition with the blue label. "If you would,
22 please note the location" -- I've messed that up.
23 "Using this light blue pen and referring back now to
24 Exhibit 2 tell me if you would the location of any
25 stream on that property, and I'm saying the Krause

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1 MS. KAVANAUGH: The deposition speaks for
2 itself. It's in the record.

3 MR. GLEISNER: Well, Page 27. It's not in
4 the record.

5 MS. KAVANAUGH: (Inaudible).

6 Q Page 27 of your deposition.

7 MS. CORRELL: And he also said there are
8 other areas referred to as different things so
9 what's the relevance?

10 MS. KAVANAUGH: The Judge can read the
11 deposition.

12 MR. GLEISNER: Well, actually, he can't
13 because it's not part of the record officially.

14 MS. KAVANAUGH: It is in our record.

15 MS. CORRELL: It is. It's an exhibit.

16 MR. GLEISNER: Judge, is it a part of the
17 record?

18 ALJ BOLDT: It hasn't been received yet,
19 but the deposition of a party can be used for
20 any purpose so --

21 MR. GLEISNER: Well, to be safe then, Your
22 Honor, I'll move the admission of the deposition
23 of Mr. Andrew Hudak -- the entire deposition.

24 ALJ BOLDT: 111? I assume there's no
25 objection?

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1 property", whereupon you drew that light blue line
2 and initialed it.

3 MS. KAVANAUGH: I think you need to read
4 all the rest of the next page to get an
5 accurate --

6 MR. HARBECK: Can he just answer the
7 question that was posed? Did he draw that blue
8 line in response to that question? That's the
9 question.

10 MS. KAVANAUGH: But that's not all the
11 questions he asked. He didn't draw the blue
12 line until you get to Page 29.

13 MR. HARBECK: If they want to recross they
14 can do that. He's entitled to ask a question
15 and have him answer it.

16 ALJ BOLDT: Yeah, go ahead.

17 A When you asked me to draw a blue line at the location
18 of any stream or waterway, the blue line was drawn on
19 that Exhibit 2-002.

20 Q Thank you. Now, you referenced Exhibit -- or, sorry,
21 Counsel for the DNR referenced Exhibit 213 and all of
22 the people who got copies of that particular notice.
23 Did you ever talk to those people personally?

24 A As I had stated previously, the only person that I
25 talked to on those list of people, one person I

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1 remember calling -- talking to at the hearings,
 2 another person, Fritz Hanson, I talked to at our site
 3 visit.
 4 Q And I have one last question. You -- or maybe two,
 5 I'm not sure. You don't have any experience in flood
 6 plain flow analysis, is that correct?
 7 A That's correct.
 8 Q Okay. Now, but you did testify in response to the
 9 question by Counsel for the DNR that when the water
 10 in North Lake gets high enough it will flow into the
 11 wetlands. Did I understand that testimony?
 12 A The testimony provided was that based on my
 13 observations and based on the elevations that I know
 14 exist for North Lake at that location, that that is
 15 an occurrence that happens.
 16 Q Does that constitute the wetlands therefore part of
 17 North Lake, if you know?
 18 A No, I would believe that the area in question in the
 19 wetlands would be a portion of the flood plain of
 20 North Lake.
 21 MR. GLEISNER: No further questions at this
 22 time, Your Honor.
 23 MS. CORRELL: I will have to ask one more
 24 redirect question.
 25 ALJ BOLDT: Mr. Gallo gets to go first.

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1 MS. CORRELL: Standing objection to
 2 relevance of this. It's the same thing.
 3 Q Of a flood flow capacity study?
 4 A Can you just ask the first part of that question?
 5 Q Yeah. Are you familiar with a flood flow capacity
 6 study and how that would be conducted?
 7 A I have limited knowledge regarding what goes into
 8 that. I have very small minor bits and pieces of
 9 what would go into it, but other than that I don't
 10 conduct those or review those.
 11 Q Thank you. You just stated that the northern
 12 wetlands and I believe the southern wetlands too are
 13 part of the flood plain?
 14 A Based on one of the exhibits that were produced the
 15 entire portion of I believe both of those are within
 16 the flood plain.
 17 Q And the fill for the access road which you granted
 18 approval for in the manual code is material fill
 19 within the flood plain, is that correct?
 20 A Yes, as I understand it.
 21 Q So that would have some effect, we don't know how
 22 much effect, but it would have some effect on flood
 23 flow capacity?
 24 A And I believe that's what our flood plain engineer is
 25 working through with Waukesha County.

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1 MS. CORRELL: Oh, I apologize. Sorry, Don.
 2 RE-CROSS-EXAMINATION
 3 BY MR. GALLO:
 4 Q Mr. Hudak, in response to Counsel for the DNR's
 5 question with regard to your knowledge regarding the
 6 conduct of a flood plain study by Waukesha County,
 7 Waukesha County did not offer an opinion and you did
 8 not solicit an opinion from Waukesha County prior to
 9 your final decision on the manual code, is that
 10 correct?
 11 A I don't believe I received any comments during the
 12 comment period from Waukesha County regarding the
 13 development of the site.
 14 Q So the flood plain study that's being conducted by
 15 Waukesha County is totally after-the-fact of your
 16 manual code decision?
 17 A I don't believe Waukesha County is doing a flood
 18 plain study. What I stated was that the DNR is
 19 reviewing the Waukesha County requirements for flood
 20 plain to make sure that our project will comply with
 21 their shore land -- or, excuse me, with their flood
 22 plain ordinances.
 23 Q Are you familiar with the conduct of a flood plain
 24 study?
 25 A Of the --

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1 Q When you responded to Counsel's questions regarding
 2 the hydraulic flow regime relating to the four
 3 culverts and I think you referred to that as four
 4 culverts. A hydraulic engineer would look at that
 5 somewhat differently. They would look at diameter
 6 and flow capacity of those culverts as opposed to the
 7 number of culverts, is that correct?
 8 A To my understanding yes, that's what would be
 9 assessed.
 10 MR. GALLO: No further questions.
 11 ALJ BOLDT: Okay. Now redirect.
 12 MS. CORRELL: Okay.
 13 REDIRECT EXAMINATION
 14 BY MS. CORRELL:
 15 Q Since Attorney Gallo was just asking you, again,
 16 about the flood plain analysis being conducted at
 17 this time, if there were any impact based on the
 18 engineering and County's assessment of the project
 19 design isn't it possible that the final design plans
 20 could be amended?
 21 A That is a typical occurrence with projects with I'll
 22 call it fluid designs until the project is actually
 23 constructed where amendments would be issued for plan
 24 changes or different design elements of it.
 25 Q So I guess you just anticipated my next question --

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1 A Sorry.
 2 Q -- which would have been what would the DNR do then
 3 if there were any changes to the design that required
 4 a -- or --
 5 MS. CORRELL: Strike that.
 6 Q What would the DNR do if those design changes altered
 7 the jurisdiction or created new impacts on the
 8 project site?
 9 MR. GLEISNER: Objection, foundation. Does
 10 he have the knowledge of what the DNR in this
 11 area would do I think is --
 12 MS. CORRELL: He does. He's the permit
 13 reviewer.
 14 MR. GLEISNER: Okay. All right.
 15 Withdrawn.
 16 A Typically, if there's no new associated activities
 17 and there's just plan changes or new impact areas,
 18 those type of things, we would review the plans, make
 19 sure they're still consistent with the original
 20 findings of our decision and then offer a permit or I
 21 guess a manual code amendment in this particular
 22 case.
 23 Q Okay. And is it --
 24 A Which would only -- sorry. Which would only specify
 25 probably a new change in the plans and date set,

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1 if you can taking this light blue pen, could you draw
 2 a line with that understanding where that", pause,
 3 "understanding it's going to be an approximation
 4 where the stream or that waterway was or is?" You
 5 asked, "On Exhibit 2? Yes, ma'am -- yes, sir. Sorry
 6 about that, yes." And then you answered after I'm
 7 assuming you drew the line, "That was a location
 8 where a defined waterway was present." Was that your
 9 testimony?
 10 A Yes, it was.
 11 Q And did you opine that legally and in your
 12 professional opinion that that area was a stream?
 13 A Based upon my deposition and what I've stated here
 14 today, I had not opined that that is a stream, only
 15 that it was a waterway that had navigable
 16 characteristics.
 17 Q And I believe you testified earlier that that blue
 18 area is included within the federal wetland
 19 delineation that the Army Corps of Engineers
 20 concurred with?
 21 A That is.
 22 MS. CORRELL: I have nothing further.
 23 MR. GLEISNER: One short question on
 24 recross, Your Honor.
 25 RECCROSS-EXAMINATION

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1 those type of things.
 2 Q And is it your understanding that the plans that you
 3 have to date are the last final plans that you'll
 4 see?
 5 A I anticipate there being additional plans to review
 6 and have to issue a different amendment (inaudible).
 7 Q And is that fairly typical in a lot of the projects
 8 you review?
 9 A It occurs. I wouldn't say it's a norm for every
 10 project, but it happens often.
 11 Q Okay. You were also asked to refer to your
 12 deposition and specifically where you had marked the
 13 blue line on the large Exhibit 2-002. I'm going to
 14 call you back to Page 28 of your deposition
 15 testimony. Mr. Gleisner had asked you to identify
 16 streams on the map, as I believe he just went through
 17 with you and you asked at Line 6, "Would you like me
 18 to identify streams or". Mr. Gleisner said, "I would
 19 like -- I'm sorry, I apologize. Go ahead", you said.
 20 Mr. Gleisner said, "I apologize. I would like to
 21 know first of all are there any streams on the Krause
 22 property. Let's start there." You answered, "An
 23 area identified as a waterway that had potential
 24 navigable characteristics was located on the northern
 25 portion of the property boundaries. Would you mind

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1 BY MR. GLEISNER:
 2 Q So you did not do or you're not aware that any flood
 3 flow analysis was done before you --
 4 MS. CORRELL: Asked and answered.
 5 MR. GLEISNER: Well, I'm just trying to
 6 clarify the timing.
 7 ALJ BOLDT: It's not totally asked yet, but
 8 go ahead.
 9 MR. GLEISNER: All right. I just wanted to
 10 get it on the record.
 11 Q When you issued the manual code approval there was no
 12 flood flow analysis, correct?
 13 MS. CORRELL: Again, asked and answered.
 14 ALJ BOLDT: Yeah, I think we've --
 15 MS. CORRELL: We've beat that horse.
 16 ALJ BOLDT: -- asked that question a
 17 number of times.
 18 MR. GLEISNER: Okay.
 19 ALJ BOLDT: One more for Mr. Gallo who
 20 doesn't repeat, so go ahead.
 21 MR. GALLO: My re-recross.
 22 RECCROSS-EXAMINATION
 23 BY MR. GALLO:
 24 Q Andy, I like where this is going. Attorneys for the
 25 DNR probed in questions with regard to new impacts

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1 that may occur during the construction process or
 2 during further evaluation and I believe their
 3 question was with regard to if the flood plain study
 4 indicates that there is impact for loss of storage
 5 for which you would have to then create new storage
 6 on this site. Couple that with additional wetland
 7 impacts that were testified to with regard to the
 8 road construction. At what point are you so
 9 committed to the project that during construction
 10 that you don't have any options but to renew the
 11 manual code approval despite the fact that the
 12 balancing test is in play and should be reconsidered?

13 MS. CORRELL: Objection as to relevance and
 14 foundation. Mr. Hudak is not the project
 15 proponent, he is the permit reviewer. This is a
 16 regulatory review permit hearing.

17 MR. GALLO: No, this is not a permit, it's
 18 an approval.

19 ALJ BOLDT: Yeah, overruled. Go ahead and
 20 answer it if you can.

21 THE WITNESS: I'll try to remember it all.

22 A In light of the question, in search of either
 23 the -- I guess if a flood plain study was done to
 24 show no impacts were associated or if, as you stated,
 25 compensatory storage would be offered, there's a

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1 under oath.

2 THE WITNESS: Yes.

3 DIRECT EXAMINATION

4 BY MR. GLEISNER:

5 Q Dr. O'Reilly, could you put up that Exhibit 10,
 6 please? Now, Dr. O'Reilly, you heard Mr. Wakeman
 7 testify yesterday, I believe I'm characterizing it
 8 properly, that there was no evidence of a bed and
 9 bank near or adjacent to the grove of trees, correct?

10 A Correct.

11 Q Do you agree or disagree with that statement?

12 A I disagree. I believe, as I testified several weeks
 13 ago, that there is a bed and bank in the area where
 14 the proposed parking lot is proposed.

15 Q Now, I'm going to direct your attention to Exhibit 10
 16 first of all which is an excerpt from the NRC report
 17 which I believe is -- I believe is part of the
 18 evidence that has been admitted.

19 MS. KAVANAUGH: Which exhibit? I'm sorry.

20 MS. CORRELL: Exhibit 10.

21 Q Exhibit 10 is an excerpt from the NRC report. Is
 22 there anything on Exhibit 10 which supports your
 23 belief?

24 A Yes. Mr. Wakeman testified yesterday that he noticed
 25 there was no change in vegetation to indicate that

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1 wide -- from my understanding, there's a wide array
 2 of options of where that can be located, whether it
 3 needs to be on the site or on adjacent properties, as
 4 long as it meets the requirements of providing that
 5 same storage of lost area. And, again, depending
 6 upon where that may occur, if there's additional
 7 permits needed for that, if it's again on the site,
 8 on a different site, we'd probably determine how
 9 extensive of a change is that and whether or not we
 10 need to, like you say, kind of scrap it and issue
 11 something new or if it's something that we can handle
 12 by a permit amendment. I believe that's how I
 13 tracked your question. I'm not sure if I touched on
 14 everything you asked there.

15 Q Thank you.

16 ALJ BOLDT: Okay. Any other questions of
 17 Mr. Hudak? Hearing none, thank you very much.
 18 Let's take a break now.

19 (Recess taken)

20 ALJ BOLDT: Okay. On the record and after
 21 our break Counsel has agreed to call a witness
 22 out of order so long as that witness can
 23 be -- the exam can be done in ten minutes or so.

24 So let's go ahead and do that and if it's
 25 Dr. O'Reilly I'll remind you that you're still

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1 there was a bank. I've had an opportunity to review
 2 the NRC report. I've had this reviewed by my senior
 3 ecologist who is a partner of mine. He has also been
 4 on the site twice, has done his own independent plant
 5 community delineation, and we concur with the NRC
 6 report. As you look at Exhibit 10, Your Honor,
 7 there's a green hatched area shown on there which the
 8 NRC and my experts have identified as a wetland plant
 9 community. It's been heavily disturbed because of
 10 the mowing, but they believe there's enough remnant
 11 of wetland plants there to indicate. And if you
 12 remember in our site visit in September when
 13 Mr. Wakeman asked me to point out where the bank was
 14 of that area, it's interesting that when I walked
 15 over, based on the topography, I pointed to the
 16 northern edge of that green line where there is a
 17 change in vegetation.

18 Q So can you just for the record -- and I don't think
 19 you need to mark on this because the green
 20 delineation is fairly clear on Exhibit 10. Can you
 21 for the record state where the boundary would be of
 22 the bed and bank precisely? Where is the bank?
 23 Let's put it that way.

24 A Sure. The bank would be represented by the northern
 25 edge of this green hatched area. The bed is going to

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1 be within this shaded area.
 2 Q And the shaded area is what? Is that grove of trees
 3 within that --
 4 A The grove of trees is within that green hatched area.
 5 Q Let the record show that Dr. O'Reilly has identified
 6 the green hatched area on Exhibit 10 as constituting,
 7 in his opinion and his ecologist's opinion, as
 8 wetland and that the boundary of that green line to
 9 the north and east is the bank of the stream that you
 10 identified previously, is that correct Doctor?
 11 A That's correct.
 12 Q Doctor, would you take a look at Exhibit 16-002? Is
 13 that the exhibit that you were referring to before?
 14 A That is an exhibit that Mr. Wood produced at his
 15 deposition showing a topographic depression based on
 16 a contour survey that DNR had done by Kapur and
 17 Associates. And I believe that that line, while
 18 there was some irregularities, matches reasonably
 19 close to the green line shown on the NRC
 20 Exhibit Number 10.
 21 Q So then having referenced to Exhibit 16-002, there is
 22 a red line that has been placed there by the DNR, is
 23 that correct?
 24 A Yes.
 25 Q And that red line, it's your testimony, is comparable

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1 that the bed and bank of this water body follows the
 2 green border with included hash areas in the middle
 3 as marked on Exhibit 10, is that correct?
 4 A That is correct.
 5 Q And it's your testimony, if I understand it
 6 correctly, that those are approximately the same
 7 areas?
 8 A Yes, if you overlaid -- if you would overlay those
 9 two drawings on top of each other, while there would
 10 be some slight irregularities along the boundary,
 11 those two areas overlay with each other.
 12 Q Okay. And is it -- am I understanding your testimony
 13 correct, now you're also testifying that the hashed
 14 area within Exhibit 10 is wetland?
 15 A I've always -- not on this record, but it's always
 16 been my position that that green area is wetland.
 17 Q Okay. And is it also your position and expert
 18 opinion that that green area also constitutes a
 19 stream?
 20 A It constitutes navigable waters based on the
 21 navigable in fact test that we saw, based on
 22 Page Hanson's navigation and Mr. Peters' testimony
 23 that he had navigated it.
 24 Q But you did not specifically opine during the
 25 proceeding during the case in chief of Redland Road

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1 to the green hash line on Exhibit 10, is that
 2 correct?
 3 A Correct.
 4 Q And the red line on Exhibit 16-002 would also be
 5 roughly comparable to the bank of the stream that
 6 you've identified?
 7 A That's correct.
 8 MR. GLEISNER: How'd I do, Your Honor? No
 9 further questions.
 10 ALJ BOLDT: Okay. And well within the
 11 10-minute grace period.
 12 MR. HARBECK: He's got some bonus minutes,
 13 I'll bet.
 14 MS. CORRELL: Oh, I don't think so. If I
 15 was a teacher I'm not going to give out gold
 16 stars right now.
 17 ALJ BOLDT: Okay. Mr. Gallo, any
 18 questions?
 19 MR. GALLO: No.
 20 ALJ BOLDT: Okay.
 21 CROSS-EXAMINATION
 22 BY MS. CORRELL:
 23 Q I just have a couple questions, Dr. O'Reilly. You
 24 testified earlier that the bed and bank followed the
 25 red line on Exhibit 16-002 and you just testified now

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1 Neighborhood Association that that water body was a
 2 stream?
 3 A Yes, I believe it acts at times of high water as a
 4 stream.
 5 Q It acts as a stream or it is a stream? I'm confused
 6 because I have a recollection of what your testimony
 7 was and I want to clarify what your testimony is
 8 today.
 9 A My testimony today is that area is a navigable
 10 wetland. Let me back up. I think it's improper for
 11 us to attach these terms. It is a wetland. It is a
 12 navigable body of water based on testimony of two
 13 previous witnesses who have navigated that area in
 14 fact. It was the testimony of Mr. Wood, based on
 15 Exhibit 16-002, that there is flow of water from that
 16 depressional area to the west to the main wetland
 17 area. The contour lines show that there is a
 18 gradient from the east to the west and that at times
 19 when you have high enough head of water in that area
 20 it is going to flow to the west. My opinion is that
 21 when you have flowing water that is a definition of a
 22 stream.
 23 Q Isn't it a fact of life that water tends to roll
 24 downhill or down gradient?
 25 A Yes.

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1 Q It doesn't take a hydrologist to figure that out,
2 does it?
3 A No.
4 Q Even though you are a very esteemed hydrologist. And
5 I also have some other questions in terms of your
6 determination of the green area as a wetland and you
7 testified that your ecologist concurred in that
8 opinion. So your testimony today is that you
9 disagree with the SEWRPC delineation which is located
10 within DNR Exhibit 200 from Bates Number 95 through I
11 believe it is 141 if I'm -- hold on. No, it doesn't
12 go that far. Oh, yes it does.
13 MR. GLEISNER: Counsel, can you wait while
14 he finds the exhibit?
15 MS. CORRELL: Uh-huh. I also have a
16 separate copy of it if that's easier.
17 MR. GLEISNER: That might be helpful.
18 A I have it in front of me.
19 Q And so you disagree with Dr. Don Reid?
20 A Yes.
21 Q Who is the chief biologist for SEWRPC,
22 Dr. Lawrence Litener (phonetic), principal biologist,
23 Mr. Christopher Yours (phonetic), biologist,
24 Ms. Jennifer Dietz (phonetic), research analyst, and
25 also the DNR staff, Ms. Joann Cline?

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1 streams.
2 Q Okay. But isn't it true that you haven't provided
3 any indicia of other probative factors in terms of
4 identifying a watercourse other than the navigability
5 in fact test?
6 A And Exhibit 16-002 which is a topographic map showing
7 that there is a gradient --
8 Q An elevation change?
9 A Yes.
10 Q Okay. Thank you for clarifying my understanding.
11 Where does the stream emanate from? What's the water
12 source? Are there springs present? I didn't hear
13 any testimony regarding any springs. Could you -- I
14 guess I'll just ask one question at a time.
15 A Okay.
16 Q Where does the stream emanate from?
17 A Depends on the water level. As we've heard testimony
18 by several witnesses already, water flows in and out
19 of that entire complex.
20 Q I don't think that's exactly the question I asked.
21 A Well, I'm trying to get there.
22 Q Okay.
23 A At times you have a large watershed to the west which
24 flows in, fills in this whole depressional area which
25 includes this large lobe which was marked in green on

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1 A Yes.
2 Q And is it also your knowledge that the Army Corps of
3 Engineers has already opined on the delineation
4 dispute between the green hashed area and the yellow
5 line existing on Exhibit 10?
6 A Yes.
7 Q Could you explain how a landscape feature --
8 MS. CORRELL: Strike that.
9 Q Are you opining that this sort of oblong feature is a
10 stream and also at the same time a wetland?
11 A Yes.
12 Q Okay. And that is based largely, if I understand
13 your testimony correctly, on the navigability in
14 fact --
15 A Yes.
16 Q -- test?
17 A No, I believe the navigability in fact test is
18 separate. It doesn't --
19 Q Separate from -- go ahead.
20 A What the definition of the water body is. I navigate
21 in fact, I've navigated, you know, I've complied
22 with -- well, I won't quote the case law. But you
23 can have a wetland that also will function as a
24 stream during right water level conditions. My point
25 is there is not a distinct line between wetlands and

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1 Exhibit 2-002. As this area fills with water and
2 drains to the west, this area shown on Exhibit 10
3 also fills with water. As that area drains down,
4 water is going to flow back out so it flows into here
5 and it flows back out of here depending on water
6 levels. We also have heard testimony that when
7 North Lake has high elevations water backs up this
8 channel into this whole complex and also can flood
9 this area. In fact, we've seen photographs where the
10 entire (inaudible) is under water. So where does it
11 emanate? It depends on elevations of North Lake,
12 depends on rainfall on the watershed to the west.
13 Q Can I ask you to turn to Exhibit 215. It's the back
14 of the Page 2. Not every page was marked with a page
15 number unfortunately.
16 A This is a jurisdictional determination form from the
17 U.S. Army Corps of Engineers.
18 Q That's the correct exhibit yeah, and I'm referring to
19 the back of Page 2 --
20 A Okay.
21 Q -- which is -- the original document is marked as a
22 4.
23 MR. GLEISNER: Pardon me, Your Honor, may I
24 go over to Counsel's table because I don't have
25 a complete copy?

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1 ALJ BOLDT: Sure.
 2 MS. CORRELL: Oh, that's right. I
 3 apologize. Everyone is at the right page,
 4 right?
 5 Q I'll refer you to within the Number 2,
 6 characteristics of wetlands adjacent to non-TNW's
 7 that flow directly or indirectly into TNW's. The
 8 Army Corps did an analysis probably required for
 9 their jurisdictional determination and part of that
 10 analysis in subsection (i)(b), general flow
 11 relationship with non-TNW, there are two factors I
 12 wanted you to acknowledge. Isn't it true that the
 13 general flow relationship is determined as an
 14 intermittent flow as identified by the Army Corps of
 15 Engineers?
 16 MR. GLEISNER: Counsel, brief
 17 clarification? What's TNW?
 18 MS. CORRELL: Traditional navigable waters.
 19 MR. GLEISNER: Thank you, Counsel.
 20 Q Is that the flow that is in bold listed under
 21 2(i)(b)?
 22 A You're on Page 2?
 23 Q The back of Page 2 as far as Exhibit 215. It does
 24 have a 4 on it.
 25 A Oh, okay, I'm sorry. Okay, I'm sorry, I was looking

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1 Engineers in terms of what this water presence is, is
 2 that correct?
 3 A Just let me clarify what is water -- what is
 4 Wetland 2?
 5 Q I can help you with that. On Exhibit 10,
 6 Wetland Number 2 is the yellow portion identified by
 7 the SEWRPC delineation.
 8 A Okay.
 9 MS. KAVANAUGH: But just for clarification,
 10 I think what they were looking at was that whole
 11 green hatched area based on statements from
 12 North Lake and assertions --
 13 MS. CORRELL: I think that's clear.
 14 A Could you repeat your question again now that I know
 15 the area we're discussing?
 16 Q Sure. Yep. I'm asking you if your opinion that the
 17 presence of water in the general area of the grove of
 18 trees is a water body, specifically you've opined
 19 it's a stream, is different from the Army Corps of
 20 Engineers' opinion here that it constitutes overland
 21 sheet flow and that surface water occasionally fills
 22 and eventually overflows Wetland 2 and flows
 23 overland?
 24 A I don't disagree with that. The real question is
 25 does it overland flow deep enough to be navigable.

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1 at Page 2.
 2 Q Right. Yeah, it has a 4 on it. The original
 3 document has a 4 on it.
 4 A I apologize. I -- the page number is confusing.
 5 Q No, it's confusing. It is confusing.
 6 A Okay.
 7 Q What I'm referring to --
 8 A 2(b) --
 9 Q Yep, so 2(i)(b).
 10 A Yep.
 11 Q And it identifies in bold the flow --
 12 A Yes.
 13 Q -- as --
 14 A Intermittent.
 15 Q -- intermittent flow?
 16 A Yes.
 17 Q And further down it refers to the surface flow and
 18 identifies what that surface flow is. Could you read
 19 that for the record -- the bold language?
 20 A Yes. It states, "Overland sheet flow."
 21 Q It's overland sheet flow. So it goes on to describe
 22 that surface water occasionally fills and eventually
 23 overflows Wetland 2 and flows overland into
 24 North Lake following heavy precipitation events. So
 25 your opinion also differs from the Army Corps of

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1 Q That's not what they --
 2 A But that's the issue at this hearing.
 3 Q -- provided here. They provided that it was
 4 overland flow.
 5 A Correct, but they're not looking at conformity with
 6 Chapter 30 of the Wisconsin State Statutes, they're
 7 looking at conformity to Section 404 of the Clean
 8 Water Act.
 9 Q That's not what this portion of the jurisdictional
 10 determination analyzes, it analyzes characteristics.
 11 MR. GLEISNER: Objection, argumentative.
 12 MS. CORRELL: How is that argumentative?
 13 I'm asking a question.
 14 Q When the Army Corps of Engineers identifies what the
 15 surface flow is they describe what the water presence
 16 is in and around the wetland being identified because
 17 they need to make a federal jurisdictional
 18 determination with respect to how the waters --
 19 ALJ BOLDT: Is that your understanding?
 20 Let's get to a question. Is that your
 21 understanding? Do you agree with Counsel's --
 22 THE WITNESS: Restate because there was too
 23 much -- too many discussions happening.
 24 MR. GALLO: I think Counsel is testifying
 25 for the Army Corps of Engineers as to what they

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1 are intending here.
 2 MS. CORRELL: I think the document speaks
 3 for itself and all I'm asking Dr. O'Reilly is
 4 his opinion different than the opinion that's
 5 recorded here.
 6 MR. HARBECK: And he already testified it's
 7 consistent and he explained why it's consistent,
 8 because they're apples and oranges.
 9 ALJ BOLDT: I don't think he said apples
 10 and oranges.
 11 MR. HARBECK: He didn't say that. I was
 12 trying to sum it up in just a five second versus
 13 a three hour.
 14 ALJ BOLDT: Okay.
 15 Q The section is entitled Characteristics of Wetlands
 16 Adjacent to Non-Traditional Navigable Waters that
 17 Flow Directly or Indirectly into Traditional
 18 Navigable Waters, is that correct?
 19 A That's what it states under Item 2, yes.
 20 Q And the title of subsection (b) is General Flow
 21 Relationship with Non-Traditional Navigable Waters,
 22 is that correct?
 23 MR. GLEISNER: Pardon me, I apologize,
 24 where are you reading now? No, I don't see that
 25 particular -- thank you, Counsel, you show me.

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1 ALJ BOLDT: Sure. Can you show them,
 2 Dr. O'Reilly?
 3 MR. GLEISNER: We're on the same page now I
 4 think, Counsel.
 5 MS. CORRELL: I apologize for that copying
 6 error.
 7 Q So you just read -- or you just acknowledged my
 8 reading of the title of Section 2 on Exhibit 215
 9 which is on the fourth page of the original document,
 10 but is on the back page of the exhibit marked 215,
 11 Page 2, and we will get everyone that needs a copy a
 12 better copy.
 13 MR. GLEISNER: Thanks, Counsel, I
 14 appreciate that.
 15 Q And you just acknowledged that it reads
 16 Characteristics of Wetlands Adjacent to
 17 Non-Traditional Navigable Waters that Flow Directly
 18 or Indirectly into Traditional Navigable Waters?
 19 A Correct.
 20 Q And subsection (b) specifically deals with General
 21 Flow Relationship with Non-Traditional Navigable
 22 Waters?
 23 A That's correct.
 24 Q Do you understand that statement to mean that the
 25 Army Corps is identifying any flow and water

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1 MS. KAVANAUGH: He showed you.
 2 MR. GLEISNER: No, no, you show me because
 3 I'm not --
 4 MS. KAVANAUGH: Okay. She's looking
 5 at -- let's see (inaudible).
 6 MS. CORRELL: I can show you if you want.
 7 MR. GLEISNER: Thank you, Counsel. Thank
 8 you very much. I'm just not clear where you
 9 are.
 10 MS. CORRELL: Oh, you're not on the right
 11 page. That would help. I thought we'd been
 12 through that. Okay. Wait a minute here, both
 13 of these copies are wrong.
 14 MR. GLEISNER: Sorry about this.
 15 MS. CORRELL: No, don't apologize, this
 16 copy is not correct.
 17 ALJ BOLDT: Everybody can come up and
 18 approach Dr. O'Reilly. We've found it and --
 19 MR. GLEISNER: Thank you, Judge.
 20 ALJ BOLDT: -- we've got our fingers right
 21 on it.
 22 MS. CORRELL: Does his copy contain the
 23 portions I'm referring to? It seems to, right?
 24 MR. GLEISNER: If we're allowed to
 25 approach, Judge, that cures the problem for now.

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1 connection that might exist with a traditional
 2 navigable water and the wetland that they are
 3 reviewing?
 4 A Yes.
 5 Q And they identify again that the flow is
 6 intermittent, is that correct?
 7 A Correct.
 8 Q And in the second sentence of sub (b) under
 9 intermittent flow the report indicates, "The presence
 10 of a shallow subsurface hydrologic gradient that
 11 slopes from Wetland 2 to North Lake", is that
 12 correct?
 13 A That is correct.
 14 Q And further down it identifies the surface flow is
 15 overland sheet flow, is that correct?
 16 A That is correct.
 17 Q And it says the characteristics of that water
 18 connection is that the North Lake Management District
 19 provided photographs that indicate surface water
 20 occasionally fills and eventually overflows Wetland 2
 21 and flows overland into North Lake following heavy
 22 precipitation events, is that correct?
 23 A That is correct, depending on the level of water that
 24 has ponded on the site.
 25 Q Is that what is stated in this document?

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1 A That's what is stated in this document.
 2 Q And is it your understanding that surface water is
 3 the same thing as a stream?
 4 A Yes, that surface water is the same thing as a
 5 stream. My answer is yes.
 6 Q Okay.

7 MS. CORRELL: I guess I have no further
 8 questions.

9 ALJ BOLDT: Okay. Redirect? Oh, I'm
 10 sorry, Mr. Meyer?

CROSS-EXAMINATION

11 BY MR. MEYER:

12 Q I'm just trying to make sure I understand your
 13 testimony then, Dr. O'Reilly, and I do not want to
 14 put words in your mouth so if I'm misstating
 15 something please let me know. Is it your testimony
 16 that overland sheet flow, if it is sufficient depth
 17 to float a canoe with a person in it, is either a
 18 stream or a lake -- navigable lake or a stream?

19 A Yes.

20 Q Would that be true if it were --

21 MR. MEYER: Strike that.

22 Q Is that not the situation at times of the year, at
 23 least some years --

24 UNIDENTIFIED SPEAKER: Hang on a second,
 25

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1 question, is miles from any lake or stream, on an
 2 annual basis because of snow melt or rain can float
 3 my more than normal size body in a canoe, that would
 4 make my backyard a lake or stream under your
 5 definition?

6 A It possibly could based on not my definition, but the
 7 definitions that's come out of Wisconsin case law.

8 Q At least what you understand that law to be?

9 A Right, my understanding of Wisconsin case law, yes.

10 Q Let me -- and I'm not going to belabor the point
 11 because I understand we've covered this, but let me
 12 go to a different point.

13 MR. MEYER: May I approach Exhibit --

14 Q Dr. O'Reilly, I'm up looking at Exhibit --

15 MR. GLEISNER: 10.

16 Q -- 10 and if I heard your testimony correct, the
 17 green hatched area, and let's take the outer line of
 18 that green hatched area and the area generally has
 19 been referred to as the grove of trees. You've
 20 indicated the green line that circumscribes it is a
 21 change of vegetation?

22 A Correct.

23 Q What I didn't hear you say that it's an ordinary high
 24 water mark, is that true?

25 A No one asked me a question about ordinary high water

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1 she's covering the microphone.
 2 MS. CORRELL: Oh, I'm sorry.
 3 MR. MEYER: You could just object, Counsel.
 4 MS. CORRELL: I forgot we were sharing.
 5 Q Getting back to your immediate testimony that
 6 overland sheet flow if it's of a sufficient depth to
 7 float a canoe with a person in it would be either a
 8 navigable lake or a stream, would that not apply to
 9 Redland Road many years? Doesn't that occur on
 10 Redland Road many years?

11 A As I stated a month ago in this hearing, I don't
 12 know. I have done no navigability evaluation of
 13 Redland Road.

14 Q Could it -- but there is testimony on this record
 15 that in fact there has been a canoe floated over
 16 Redland Road?

17 MR. GLEISNER: Object, I think that's a
 18 mischaracterization.

19 MS. KAVANAUGH: Page Hanson testified --

20 MS. CORRELL: No, I think she said could.

21 MS. KAVANAUGH: No, I think she testified
 22 that when the water is high enough --

23 MR. MEYER: Strike the question. I just
 24 want to make sure the record is accurate.

25 Q So if my backyard which, for the sake of this

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1 mark.

2 Q So you have not defined that as an ordinary high
 3 water mark?

4 A No.

5 Q When you're dealing with navigable waters and the
 6 jurisdiction under 30.12 and there's a reference to a
 7 body of water needing a bed and bank, does that water
 8 to be subject to the jurisdiction, 30.12, also need
 9 an ordinary high water mark somewhere on that bank?

10 A There is likely -- there is an ordinary high water
 11 mark. I have not determined exactly where it is.

12 Q So you're not testifying there's an ordinary high
 13 water mark?

14 A No, I'm -- I will state there is an ordinary high
 15 water mark, but I have not drawn it on a map or
 16 delineated it in the field.

17 Q So there is no defined, for purposes of this
 18 proceeding, ordinary high water mark defined for the
 19 area known as the grove of trees?

20 A Correct.

21 MR. MEYER: No further questions.

22 ALJ BOLDT: Okay. Now redirect?

23 MR. GLEISNER: Your Honor, despite the
 24 lengthy cross I have a blessedly short one
 25 question.

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REDIRECT EXAMINATION

BY MR. GLEISNER:

Q All of the opinions that you've given today, are they to a reasonable degree of professional and scientific certainty?

A Yes.

MR. MEYER: Objection, and if there are scientific components I would agree that it's an appropriate question, but I believe there's been some legal statements testified to which I would strongly disagree that this witness has -- can testify to as an expert witness.

MR. GLEISNER: Your Honor, let it be understood that my question only relates to scientific issues.

ALJ BOLDT: Okay. With that, go ahead and answer it.

A Yes.

MR. GLEISNER: No further questions.

ALJ BOLDT: Okay. Thank you. Any other questions of this witness? Okay. Thank you very much. You're excused. Thank you for allowing him to testify out of order.

MR. GLEISNER: Thank you very much.

MS. CORRELL: You're welcome.

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the only one we've referenced of the subparts is 108B, but we'll receive 108A, B, C and D.

MS. CORRELL: And just make sure when you do that, that there's two 108's. So it's a little --

ALJ BOLDT: Correct.

MS. CORRELL: I think it's the first one.

MS. KAVANAUGH: When we get the transcript could we get a list of everything that's been -- the exhibit list too just to make sure we're covered because I'm not sure everything --

ALJ BOLDT: Well, we can do it before we're done. We'll tell you what's --

MS. KAVANAUGH: Okay. That would be really helpful.

ALJ BOLDT: I'm receiving all the 108's.

MR. GALLO: It's 108 and, you're right, A, B, C and D.

ALJ BOLDT: Correct.

MR. GALLO: Yeah.

MR. GLEISNER: Judge, as long as we're on housekeeping I'm going to very briefly state, I've asked Tim a couple of times if we can get color copies of the exhibits and I don't expect

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MR. GALLO: Your Honor, I need to move some exhibits.

ALJ BOLDT: Okay. Yes, we do have a few outstanding exhibits.

UNIDENTIFIED SPEAKER: You don't have to wait for me.

MR. GALLO: Okay. Exhibit 106 and 107. Are there any others that have not been admitted?

UNIDENTIFIED SPEAKER: Those are the only two you used.

ALJ BOLDT: Yeah, 105 was previously received and then 106 and 107 are received. And then just so it's clear, with this Exhibit 108 there's all these different subparts. Does anybody object to any of those subparts?

MR. GLEISNER: What exhibit, Your Honor.

ALJ BOLDT: 108. We've been talking a lot about 108B and the second B of 108.

MS. CORRELL: Yeah, public comments to an EA. Yeah, no, we have no objection. I haven't looked through all of them, but I'm sure we have no objection.

MR. GLEISNER: No objection, Your Honor.

ALJ BOLDT: Okay. We'll receive -- I think

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that to be answered now, but at some point we're going to have to resolve how we're going to get our hands on the ones that were annotated.

UNIDENTIFIED SPEAKER: We don't have equipment for that.

ALJ BOLDT: Yeah, sure, I mean we can certainly -- as an officer of the court we trust you all to take them out and copy them if copies are made for everyone.

MR. GLEISNER: That would be very satisfactory. In fact, Counsel and I have talked about --

ALJ BOLDT: Well, you can all go together.

MR. GLEISNER: Exactly what I --

MS. CORRELL: Yeah, we actually have discussed this. I think it only takes two attorneys to do that, but I could be wrong. It might take a few.

MR. HARBECK: I don't know if there's a light bulb involved in that too, then forget it.

MS. KAVANAUGH: First you have to argue about whether it's a light bulb.

ALJ BOLDT: All right. Let's go off the record.

(Recess taken)

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1 ALJ BOLDT: On the record. Okay. We're
2 just probably five or ten minutes later than we
3 said we were going to be and we're going to
4 convene. Mr. Meyer is not present, but we won't
5 get into the substance until he does arrive.

6 Do you swear to tell the truth, the whole
7 truth and nothing but the truth, so help you
8 God?

9 MR. FARRENKOPF: I do.

10 MR. GLEISNER: Your Honor, we have an
11 objection before we get started.

12 ALJ BOLDT: Okay. Go ahead.

13 MR. GLEISNER: We do not object to the
14 resume, we stipulate to the resume. That can be
15 admitted. We just want to reassert our
16 objection that we didn't know this witness was
17 going to testify today and that we didn't have a
18 chance to depose him and that's just for the
19 record, Your Honor.

20 ALJ BOLDT: Sure. Okay. Yeah, and I think
21 what may have been confusing was that the word
22 rebuttal was used. I think really the technical
23 term is responsive testimony so I was
24 anticipating that the witness would be called
25 and the ruling yesterday stands so go ahead,

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1 Transportation or other municipalities in a similar
2 capacity. I've also done work with the Division of
3 State Facilities for parking lots adjacent to
4 existing facilities, bike trails and ski trails so
5 some bike and pedestrian facilities as well.

6 Q And I think I forgot to clarify, are you a
7 professional engineer?

8 A Yes, I'm a registered professional engineer.

9 Q And how long have you been --

10 A In the State of Wisconsin.

11 Q Oh, excuse me. And how long have you been
12 practicing?

13 A As a professional engineer?

14 Q Uh-huh.

15 A I've been practicing 20 years.

16 Q You already stated that you're employed by Kapur and
17 Associates?

18 A Correct.

19 Q What's your current position with Kapur and
20 Associates?

21 A I am a project manager in the -- we call it the
22 Transportation Department of Kapur and Associates.

23 Q And I think you alluded to this, but what sector are
24 most of your clients from?

25 A Yeah, the majority of my clients are, you know,

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1 Counsel.

2 DIRECT EXAMINATION

3 BY MS. CORRELL:

4 Q Could you state your name and work address for the
5 record?

6 A My name is Kurt Farrenkopf and my work address is
7 7711 North Port Washington Road, Milwaukee, Wisconsin
8 and Kapur and Associates is the company.

9 Q What's your educational background?

10 A I have a BS degree in civil engineering from the
11 University of Wisconsin-Platteville.

12 Q And have you received any training or education
13 during your practice as an engineer?

14 A Yeah, I've been practicing as an engineer for 24
15 years and during that time I've taken numerous
16 continuing education credit courses in various areas
17 of engineering, areas of project management and
18 project development, you know, attended numerous
19 conferences and seminars in my area of professional
20 practice.

21 Q And what's the focus of your professional engineering
22 work?

23 A Probably 75 percent of my experience is in
24 transportation engineering, highway design, road
25 design, working for the Wisconsin Department of

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1 public agencies, the Wisconsin Department of
2 Transportation, Division of State Facilities, also do
3 work for counties and municipalities as well in the
4 area of civil engineering.

5 Q With respect to your State projects, could you
6 explain the public bidding process for the record?

7 A I guess could you clarify? The bidding on how Kapur
8 bids for the project or --

9 Q How Kapur would respond to a request for a proposal.

10 A Okay. In the case of, say, Department of
11 Transportation or Division of Facilities
12 Development -- or State Facilities, I'm sorry, they
13 send out a request for a proposal. It's a no cost
14 request. It's called a quality base selection
15 basically. We submit our project team and our
16 resumes and project experience and, you know,
17 different details of our knowledge of the project,
18 depending on the type of project, and typically,
19 depending on usually what the estimated construction
20 cost of that project is, they either make a direct
21 selection of a consulting firm or if the project
22 construction dollar amount is over a certain amount
23 they may go to what's called -- what they call a
24 short list of four or five individual consulting
25 firms or teams and then go through an interview

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1 process and select a firm based on -- after that
 2 interview process is completed. And then I guess to
 3 carry forward, once a firm -- if our firm is selected
 4 for a project we then sit down with the client and
 5 begin discussing the scope of the project. If it
 6 hasn't already been clearly identified, we clearly
 7 lay out what the scope is going to be for the -- for
 8 our project team, as well as what the owner will be
 9 doing as part of the project. And then after that
 10 scope is clarified we go -- we put together a
 11 contract in hours and dollars and negotiate the final
 12 contract amount for each project that we're awarded.
 13 Q Okay. So after you do that type of refinement of the
 14 initial bid for a particular project, is that sort of
 15 the final bid that governs the project going forward?
 16 A Well, usually the scope of the contract is pretty
 17 clear but, you know, many times during the design
 18 process of a project or the design development
 19 process there might be some scope changes. And that
 20 can be, you know, just looking at -- in the case of a
 21 roadway, looking at a different alignment alternative
 22 or a different width of the road called a typical
 23 section of the roadway, things like that. If they're
 24 not, you know, spelled out in the original contract
 25 then we discuss about possible scope changes and

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1 project manager from the owner's side and, you know,
 2 come to them and say we think we're going to
 3 require -- or we need extra reimbursement here, we
 4 think this is above and beyond the scope, the
 5 original scope, of the project and, you know, most
 6 times we're pretty good at identifying that kind of
 7 thing early on and it's not an issue, but
 8 sometimes -- you know, sometimes there's a problem
 9 where they think, and rightfully so, that no, we
 10 think that's part of the alternative analysis as part
 11 of the original contract so --
 12 Q So there's a dialogue then --
 13 A Yeah.
 14 Q -- if I'm understanding you correctly in terms of
 15 whether or not the increased costs would be born by,
 16 for example, like DOT in a DOT project or born by
 17 Kapur and Associates?
 18 A Right.
 19 Q Okay. So what does that mean in terms of Kapur in
 20 submitting its bid? How important is it to
 21 accurately foresee any work that might need to be
 22 done in terms of Kapur's profitability on a project?
 23 A Well, I guess from the Kapur standpoint obviously,
 24 you know, we're not a non-profit organization so it's
 25 important for us to scope the project and coordinate

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1 amendments to that contract. There's a reasonable
 2 amount of alternative analysis that is done though
 3 that is considered, you know, common practice as part
 4 of the original contract, but there are oftentimes
 5 scope changes.
 6 Q So I guess I'm familiar with the term sometimes in
 7 construction change order, but you're saying --
 8 A Yeah, I'm saying --
 9 Q You're saying that the term would typically be a
 10 scope change in terms of --
 11 A Yeah, as far as the -- I guess I'm speaking through
 12 the design and the things, not the construction end,
 13 but as far as a design contract goes there can be
 14 scope changes as well during the design development
 15 process.
 16 Q And what if the scope of the project was defined
 17 somewhat narrowly and at a later point there was need
 18 to amend that scope. What -- how does that process
 19 work?
 20 A Yeah, sometimes there's obviously gray areas as far
 21 as what's part of the original scope and what we
 22 would consider extra work, I guess, above and beyond
 23 what the contract spells out. So you try to identify
 24 that as early as possible during the design process.
 25 And if, you know, you come to an agreement with the

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1 with the client as far as what the scope of the
 2 project is going to be and make sure that if there is
 3 extra services and extra work on our part required
 4 that wasn't part of the original contract, we
 5 would -- you know, it behooves us to be compensated
 6 for that type of extra work. But, on the other hand,
 7 we want to make sure -- going into the original
 8 negotiation, we don't want to -- you know, we're not
 9 trying to purposefully miss -- you know, keep
 10 something out and come back later because if in the
 11 client's eyes we're a consulting firm that
 12 continually comes back and asks for amendments and,
 13 you know, (inaudible) catch on to something like that
 14 fairly quickly. So, you know, it's in the best
 15 interest of us to be open and honest up front in the
 16 original design contract so we try to minimize what
 17 we call amendments to our contract as much as
 18 possible.
 19 Q So you sort of alluded to the question I had
 20 about -- you said it would be in your -- in Kapur's
 21 best interest to anticipate those issues. What are
 22 the implications of, you know, inaccurately bidding
 23 low and then seeking additional compensation later?
 24 A Well, bidding low, you know, obviously you don't want
 25 to lose money on the project. We need to make profit

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1 as a company to continue growing and continuing our
 2 work, but if we're low bidder all the time and we
 3 come back and we're continually asking for extras and
 4 amendments, you know, the clients obviously know
 5 that. They remember that and that's not something
 6 you want to have -- you know, a label put on you as.
 7 Q So basically as a repeat customer you don't want DOT
 8 to --
 9 A Right.
 10 Q -- draw that type of conclusion, is that a correct
 11 understanding?
 12 A Yeah. Well, I think, like I said, you know, we've
 13 been doing this for a number of years and the people
 14 at the DOT that we work with have been doing this a
 15 number of years so I think we're pretty good working
 16 together and putting a pretty good scope together
 17 upfront. Sometimes things happen, but we try to
 18 avoid that.
 19 Q What are your job responsibilities as a project
 20 manager in the municipal design department and I
 21 think you said in particular in terms of
 22 transportation projects?
 23 A I guess my responsibility as a project manager on any
 24 individual project is first of all I'm the contact
 25 person. I would be the first person of contact

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1 A At this point in my career I'm primarily in what's
 2 called the southeast and northeast regions. The
 3 northeast region is kind of the Green Bay area. The
 4 southeast region is out of the Waukesha office. So
 5 I've got some projects in the northeast region as
 6 well as projects in the southeast region, but the
 7 bulk of it right now is in the southeast region.
 8 Over my career, earlier in my career, I was doing
 9 projects all around the State, in the La Crosse area,
 10 up near Hayward and Superior, up in those areas too.
 11 Q So based on your experience in the southeastern
 12 portion of the State, how would you say generally the
 13 soils are in this area of the State?
 14 A Well, in general as far as -- you know, they're
 15 mainly clay, silty clay, soils. I mean as we've
 16 heard earlier, there's a lot of poor soils in this
 17 part of the State. I've also worked on numerous
 18 projects with wetlands adjacent to them. A few
 19 projects I've actually had where we've had some good
 20 gravelly-type silty gravel soils in like the
 21 Kettle Moraine areas, southern and northern units of
 22 the Kettle Moraine. But I've done a lot of projects
 23 where we've had poor soils, clays soils, where we've
 24 had to do -- taking extra measures other than your
 25 normal roadway, pavement core, to build a proper

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1 between myself and the client. And then it's my job
 2 to make sure that I have the staff and resources
 3 available to meet the requirements of what the
 4 project entails as well as to make sure I can meet
 5 the schedule of the project. I'm also -- as project
 6 manager I do the majority of the coordination
 7 with -- the agency coordination, the utility
 8 coordination, public involvement with the owner. We
 9 spearhead the public involvement process, you know,
 10 depending on what that scope might be on any
 11 particular roadway project. We put together the
 12 final plans and estimates and I would do the
 13 specifications typically to go along with the plans.
 14 I would also be responsible for any reports that are
 15 required and, again, I've being doing a lot of DOT
 16 work so I'm talking about DOT projects. There's
 17 typically an environmental document, a design study
 18 report which talks about the geometric features and
 19 the safety and accident history of the project,
 20 pavement type selection reports, exceptions to
 21 standards reports, all other reports. I would be
 22 basically spearheading that with help, you know, from
 23 others within staff or with the sub-consultants on
 24 our team.
 25 Q What areas of the State do you primarily work in?

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1 roadway to handle the loading.
 2 Q Are you familiar with the site that's the subject of
 3 this appeal?
 4 A Yes, I am.
 5 Q And have you attended the majority of the proceedings
 6 in this matter?
 7 A I missed yesterday and I think most of the first day,
 8 but I think the majority of it otherwise.
 9 Q Were you present for the testimony of I believe it's
 10 Mr. Giese, if I'm pronouncing that correctly, from
 11 Giles?
 12 A Yes.
 13 Q And also for the testimony of Mr. Don Reinhold?
 14 A Yes, I was here for that.
 15 Q DOT. What's your opinion regarding the soils present
 16 on the site?
 17 ALJ BOLDT: Okay. Let me just stop. I'll
 18 note it's one o'clock. We were planning to
 19 reconvene at 12:30. I think it's appropriate to
 20 just continue in the absence of Mr. Meyer into
 21 the substance. So this is right where we're
 22 starting to get into it so I'll just note that
 23 he hasn't returned, but we can't -- obviously,
 24 everybody is -- well, a number of people are
 25 paying their counsel and we can't wait so --

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1 MR. GLEISNER: Thank you, Judge.
 2 MS. CORRELL: So noted.
 3 Q My pending question was what was your -- what is your
 4 opinion regarding the soils present on the DNR access
 5 site?
 6 A I guess in general there's some poor soils out here.
 7 We've got a little bit of variety. I'm comparing,
 8 you know, with the other projects I've had in the
 9 past. The north/south section of the access road is
 10 in fairly good shape from a soils standpoint
 11 according to my soils investigation report done
 12 by --
 13 MR. GLEISNER: Pardon me, Your Honor, just
 14 so we've got a good record here, could we have
 15 him referencing some maps or something so we've
 16 got some idea --
 17 MR. GALLO: Use that map right there.
 18 MR. GLEISNER: Either that or 2-002. Is
 19 that all right, Counsel?
 20 MS. CORRELL: Yeah.
 21 MR. GLEISNER: Just so the record is clear,
 22 Your Honor.
 23 ALJ BOLDT: Sure. No, thank you.
 24 A Well, I'm referring to Exhibit 2-002. The soils
 25 along the existing north/south roadway are I'd say

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1 Q Right. So I just wanted to clarify for the record
 2 the DNR application which is located at Exhibit 200
 3 contains plans from 2008 and I don't know if you need
 4 to take a look at them in order to answer this
 5 question, but we'll see. These -- is it your
 6 understanding that these plans have been altered in
 7 terms of the road alignment subsequent to the 2008
 8 plans? I can also give you some time to locate those
 9 documents. Unfortunately, Exhibit 200 is not tabbed.
 10 A Okay. I'm looking at -- I don't know what exhibit
 11 this is.
 12 MS. KAVANAUGH: It might have a Bates
 13 number, but they don't all.
 14 ALJ BOLDT: It's a part of 200 and it's got
 15 a Bates stamp of 032 on the side.
 16 MS. CORRELL: Okay.
 17 MR. GLEISNER: Thank you, Your Honor.
 18 ALJ BOLDT: It's a Kapur drawing.
 19 A C104 is our page number, I guess the Kapur page
 20 number, in the border.
 21 Q Yeah, the plan number. Okay.
 22 A Yeah, the plan number, and it appears that that is
 23 the alignment that we were working with and it looks
 24 like it hasn't been altered.
 25 Q Yeah, hold on a second. I guess maybe if you could

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1 average soils. I can't specifically remember what's
 2 in the report there, but as you had east through the
 3 wetland obviously those are some poor deep wetland
 4 soils and then as you enter onto the area where the
 5 proposed parking lot is going to be adjacent to the
 6 lake, again, those are some poor clay soils and
 7 there's some wetlands in there as well.
 8 MR. GLEISNER: There's some wetlands in
 9 there as well?
 10 THE WITNESS: Well, there's been wetlands
 11 identified within the area of I guess this
 12 region marked in brown or orange. There's a
 13 pocket of wetlands that's been identified in
 14 there as well.
 15 MR. GLEISNER: Thank you very much.
 16 THE WITNESS: Uh-huh.
 17 Q And just to clarify, you're talking right now about
 18 the soil types, is that --
 19 A Yes.
 20 Q -- correct, when you refer to --
 21 A When I say -- yeah, when I say wetlands I mean wet
 22 soils.
 23 Q -- wetlands in the area of -- because your expertise
 24 is not in identifying wetlands?
 25 A No.

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1 refer to Bates stamp 040 C100-2 because this one
 2 actually has some of the property boundaries I think.
 3 A Okay.
 4 MR. HARBECK: What page was that?
 5 MS. KAVANAUGH: The Bates stamp is 040 --
 6 MS. CORRELL: Exhibit 200 and it's just a
 7 few pages past what we were looking at.
 8 MR. GLEISNER: Thanks, Counsel.
 9 MS. CORRELL: Okay. C100-2, Bates stamp
 10 040.
 11 Q And I think you can see two lines after the road
 12 turns east/west that are DNR's recorded easement, is
 13 that right?
 14 A That's my understanding is that's the location of the
 15 easement, correct.
 16 Q Okay. And so this existing road as it has been
 17 sitting there since 1950 is a bit off of that
 18 recorded easement, is that right?
 19 A Yeah, as you head off this page actually the existing
 20 road --
 21 Q Yeah, it does go off the page, but -- at the corner
 22 there?
 23 A Uh-huh, yes.
 24 Q So I'll have you turn to another exhibit which
 25 contains a more recent -- it's in Don's set of plans

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1 from December of 2010, I believe, which are where.
 2 Bear with me.
 3 MS. CORRELL: Sorry I didn't locate this in
 4 advance. I thought I knew where they were.
 5 Don, can you help me locating your exhibits
 6 or -- there's three binders. It's taking me a
 7 long time.
 8 MR. GALLO: Are you referring to 2010?
 9 MS. CORRELL: Yeah, probably the
 10 12/23/2010. Somehow I've lost it in all the
 11 paper here. I apologize for the delay. Oh,
 12 here they are. No, that's not it. I thought
 13 they were in Don's, but maybe they're in Redland
 14 Road's.
 15 MR. GALLO: You know, they were -- I had a
 16 roll of the full size, but I didn't bring them.
 17 MS. CORRELL: Yeah, we have a roll too.
 18 Oh, this is what I was talking about.
 19 ALJ BOLDT: How about the full set?
 20 MS. CORRELL: I guess it fell out, yeah.
 21 Yeah, that full set is basically what I'm
 22 talking about. I believe those are the same as
 23 the exhibit you provided which is Exhibit
 24 Number 105, North Lake Management District? Is
 25 that the same?

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1 private property and that was in the area of the
 2 east/west access road.
 3 Q Do you have any understanding as to why the DNR
 4 requested that change in terms of -- you know, why
 5 they didn't initially request that?
 6 A I guess it's my understanding that the interpretation
 7 was the easement covered the existing roadway
 8 apparently and then it was later found out that that
 9 wasn't the case and we were asked to move the roadway
 10 into the current mapped easement -- the DNR easement.
 11 Q Do you have any general knowledge about litigation
 12 involving whether DNR could use the access road?
 13 A I'm aware that there was I guess the term is
 14 litigation. I'm aware that that was underway and
 15 initially when -- you know, that wasn't part of the
 16 equation when we initially started our survey and
 17 design work out here, but that came later in the
 18 project.
 19 MS. CORRELL: I would ask the Division to
 20 take judicial notice of two pieces of
 21 litigation. I'm not going to go into them, I'm
 22 just going to provide them to all the parties
 23 and (inaudible).
 24 MR. GLEISNER: Thank you, Counsel.
 25 MS. CORRELL: And I would just ask the

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1 MR. GALLO: Yes.
 2 MS. CORRELL: It should be -- oh, no, this
 3 is '08 also.
 4 ALJ BOLDT: These are December 2010 plans.
 5 MS. CORRELL: Yeah, no, that's what
 6 I'm -- I think these, at least part of them, is
 7 '08. Yeah, they look like all '08. Sorry.
 8 Q So do you have the 2010 plans?
 9 A Yes, uh-huh.
 10 MR. GLEISNER: It's all Tim's fault.
 11 UNIDENTIFIED SPEAKER: Step into my office,
 12 the windows are open.
 13 MS. CORRELL: I think we're -- let's see
 14 here. Let me just ask the question, how about
 15 that?
 16 Q Did DNR request at some point for the road to be
 17 realigned to avoid impacting another adjacent
 18 property owner?
 19 A Yes, once it was determined that a portion of the
 20 existing roadway that we wanted to center a new
 21 roadway on actually crossed out of the DNR easement
 22 and onto a private property, we were requested by the
 23 DNR to look at an alignment that -- and as you can
 24 see in the current exhibit, brought the roadway back
 25 into the -- wholly into the DNR easement and off the

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1 court to take judicial notice. I think the
 2 decisions speak for themselves in terms of the
 3 Rusch (phonetic) matter challenging DNR's right
 4 to use the north/south road and then also a
 5 challenge by Hansons against DNR's ability to
 6 use the easement for a public access.
 7 MR. GLEISNER: Your Honor, they speak
 8 themselves. We have no objection.
 9 MS. CORRELL: That's all I said, they speak
 10 for themselves.
 11 MR. GLEISNER: No, no, and I said no
 12 objection.
 13 MS. CORRELL: Okay.
 14 MS. KAVANAUGH: And they're all listed in
 15 that motion too, the various litigation.
 16 MS. CORRELL: He's not objecting.
 17 ALJ BOLDT: Okay. Officially noticed. I
 18 can't judicially notice because I'm not a real
 19 judge.
 20 MS. CORRELL: I apologize. Official notice
 21 is the proper term, you're right.
 22 ALJ BOLDT: That's all right.
 23 MS. CORRELL: I stand corrected.
 24 ALJ BOLDT: No, that's the term that the
 25 statute uses for --

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1 MS. CORRELL: Yes, you're correct.
 2 ALJ BOLDT: -- administrative law judges.
 3 MS. CORRELL: Yes, under 227. Okay. You
 4 threw me off my balance here.
 5 MS. KAVANAUGH: What's the right term?
 6 MS. CORRELL: Official notice.
 7 MS. KAVANAUGH: Official notice.
 8 MS. CORRELL: That's what 227 requires and
 9 I think NR2 too.
 10 Q Okay. Could you identify what has been
 11 marked -- okay, so portions of these plans are from
 12 December 22nd, 2010. So I guess what I wanted to
 13 clarify is the testimony of Mr. Hudak was that he
 14 made his determination based off two sets of plans,
 15 one for an earlier portion of 2009 and one from I
 16 believe September of 2009. Would those have included
 17 the proper road alignment?
 18 A I believe so. I believe the 2009 also incorporated
 19 the same roadway alignment that's currently being
 20 shown in the 2010 plans.
 21 Q Okay. So just for practical purposes, the 2010 or
 22 2009 road alignments for the impacts that have been
 23 discussed in this proceeding would be the same?
 24 A I believe so, yes.
 25 Q Okay.

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1 decision was made on?
 2 MS. CORRELL: Right, because he wouldn't
 3 have had the December 23rd, 2010 so I was asking
 4 whether or not there's been any realignment or
 5 change in that roadway such that we could use
 6 the same documents you've already been using.
 7 MR. GALLO: Yeah, so for --
 8 MS. CORRELL: That's all I'm trying to
 9 establish.
 10 MR. GALLO: For our purposes --
 11 ALJ BOLDT: Does everybody stipulate to
 12 that? I know Mr. Gallo does. Do you guys
 13 stipulate to it?
 14 MR. GLEISNER: Well, first of all, Your
 15 Honor, what exhibit number is in front of the
 16 witness right now? I'm assuming that's marked?
 17 ALJ BOLDT: I don't think it's marked at
 18 this particular time.
 19 MR. GLEISNER: Maybe that would be a good
 20 idea, Judge, I don't know.
 21 MS. CORRELL: A large exhibit was provided
 22 by you guys. We didn't actually have that.
 23 MR. GALLO: We provided it I think.
 24 MS. CORRELL: Okay. So I didn't get a
 25 number with it. I don't know what it is. We

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1 MR. HARBECK: Can I just ask one question
 2 because before I thought you said 2008. Did you
 3 mean --
 4 MS. CORRELL: Oh, that was a mistake if I
 5 did say that.
 6 MR. HARBECK: Okay. When you identified
 7 Exhibit 200 I thought you said 2008 and maybe I
 8 got it wrong. Was that --
 9 MS. KAVANAUGH: Exhibit 200 was 2008
 10 because that was --
 11 MS. CORRELL: Yes, that was 2008. It was
 12 prior to the realignment.
 13 MR. HARBECK: Right.
 14 MS. CORRELL: And that's why I'm just
 15 trying to clarify is the decision document
 16 references and I can go back and refer to that
 17 if you'd like to. I'm just trying to move
 18 along.
 19 MR. HARBECK: No, I just want to make sure
 20 that I understood what you were talking about
 21 when you were talking about which plans.
 22 MR. GALLO: Let me see if I can clarify.
 23 You're saying that there's a 2009 version that's
 24 not in the record that was -- with the new
 25 alignment the same as 2010 and that was what the

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1 just got a big roll --
 2 MR. GLEISNER: Just so the record is clear,
 3 Judge.
 4 ALJ BOLDT: Yeah, I mean we can mark it.
 5 MS. CORRELL: Yeah.
 6 MR. HARBECK: Is it -- let me ask, is it
 7 the same as Exhibit 3?
 8 MR. GALLO: Yes. It was in the earlier
 9 deposition.
 10 MS. CORRELL: That's what I was searching
 11 for, I think.
 12 MR. HARBECK: Okay. I just --
 13 MR. GLEISNER: Oh, okay.
 14 MR. GALLO: It is Exhibit 3.
 15 MR. GLEISNER: Maybe we could just put 3 on
 16 that?
 17 ALJ BOLDT: It's a smaller version of -- I
 18 mean this is a larger version of Exhibit 3?
 19 MS. CORRELL: Yes, exactly. That's what I
 20 was trying to find in all these binders and --
 21 ALJ BOLDT: Let's have the witness confirm
 22 that and then we're golden.
 23 MR. GALLO: Your Honor, I can provide it.
 24 MS. CORRELL: I think it's in his -- it was
 25 in the RNA. I didn't find it.

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1 ALJ BOLDT: Are those the same plans as far
2 as you can tell?
3 THE WITNESS: Exhibit 3?
4 ALJ BOLDT: Yeah, Exhibit 3, yes.
5 THE WITNESS: And, again, these are 2010
6 for the date.
7 ALJ BOLDT: Right. And that's what this
8 large one was too, right?
9 THE WITNESS: Yep, yep, it looks
10 like -- yeah, the date is the same, the
11 alignment is the same as the full size.
12 ALJ BOLDT: Okay.
13 MR. GLEISNER: The witness is
14 testifying -- just so we have a basis for a
15 stipulation. The witness is testifying that
16 prior to the manual code approval there were
17 2009 plans available to Mr. Hudak that were the
18 same as the 2010, Your Honor?
19 ALJ BOLDT: Is that what you're saying,
20 Mr. Farrenkopf?
21 MR. HARBECK: Or doesn't he -- I don't know
22 if he knows.
23 MR. MEYER: In terms of the alignment.
24 MS. CORRELL: With respect to the alignment
25 is all I was asking him. I'm sure there was a

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1 look at, some vertical profile of the road that wound
2 its way through the east/west section and, you know,
3 we had to adjust our quantities to reflect that.
4 Q I'm going to have you turn to what's been marked
5 Exhibit 700.
6 MR. GLEISNER: 700?
7 Q I'm sorry, 7-001.
8 MR. GLEISNER: Okay. I know this has been
9 a long hearing, but --
10 MS. CORRELL: Well, you have some
11 interesting numbering skills.
12 Q So I think it actually starts with 7A-001 and then
13 7A-002 and then it goes to just plain 7-001.
14 A Okay.
15 Q Would you identify this for the record? I think it
16 is already moved into the record.
17 A Yeah, this is the geotechnical report done by GESTRA
18 Engineering for the project that they provided to us.
19 Q And you stated that you were present for the
20 testimonies of Mr. Giese and Mr. Reinbold and were
21 you present when they spoke about the soils present
22 on the access road from Points 20 to 20.3 as well as
23 20.3 to 24.75 which compromised the Houghton muck as
24 well as the Roland muck?
25 A Yes, I was here for that.

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1 reason for a new plan, some minor adjustment,
2 but that's --
3 MR. GLEISNER: No, no, I understand that. I
4 understand you're limiting your question to the
5 alignment of the road --
6 MS. CORRELL: Right.
7 MR. GLEISNER: -- around the northwest
8 corner of the Hanson property, correct?
9 MS. CORRELL: Uh-huh.
10 THE WITNESS: That is my understanding,
11 that that is the same alignment, same --
12 MR. GLEISNER: We'll stipulate to that,
13 Your Honor.
14 MS. CORRELL: Okay. Thank you.
15 ALJ BOLDT: Okay. And we'll take these
16 back. We'll have them if you need them.
17 Q What did the switch in access road alignment mean for
18 Kapur in terms of design engineering that was
19 necessary?
20 A Well, it means, you know, we had to introduce more
21 horizontal curves for a roadway alignment. We had to
22 look -- it also obviously meant more wetland impacts
23 as part of the footprint of the roadway compared to
24 keeping it on the existing roadbed that goes through
25 there. Some profile adjustments I suppose we had to

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1 Q Are you -- have you previously worked with other
2 projects involving these type of soils?
3 A Yeah, I've been on other projects with -- I don't
4 know if they're the exact same, the Houghton, but as
5 far as from a roadway design standpoint they were
6 similar I guess in their design parameters and
7 conditions.
8 Q Have you also consulted with Mr. Doug Bath from
9 GESTRA Geotechnical regarding issues raised during
10 these proceedings?
11 A Yes, I have.
12 Q Do you know why only one sample was taken along the
13 stretch that included the muck soils?
14 A Well --
15 MR. GLEISNER: I hate to keep interrupting,
16 but I want to make sure the record is clear
17 here. Could you identify what soil boring
18 you're referring to, Counsel?
19 MS. CORRELL: Certainly.
20 Q I'll refer you specifically to the soil boring map at
21 Appendix 1 which is marked Exhibit 7-009, boring
22 location map, and 7-010 that depicts the actual map.
23 A Okay. I'm there.
24 Q And there's a boring Number 4 identified on that map?
25 A Yes.

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1 Q Could you explain what your understanding of what the
2 map provides in terms of what the soil types are
3 adjacent to the B4 boring?
4 A Well, they have what they call the boring log which
5 describes the soils they encounter during their test
6 boring and that's specifically for B4. That is on
7 Exhibit 7-016.
8 Q Yes.
9 A I'm sorry, is that B4?
10 Q And so --
11 A Yes.
12 Q -- what types of soils indicated on the soil map are
13 present in the same section as boring B4?
14 A It looks like the Houghton on that --
15 Q And then adjacent to that --
16 MR. GLEISNER: Wait, wait, can he finish
17 the answer?
18 A I'm looking for the definitions here. Well, the
19 general soils map in Exhibit 7-010 is in the areas of
20 B4 kind of on the border between the HDA zone and the
21 RU zone.
22 Q Right. And then on Exhibit 7-004 there's the
23 identification of unit symbols for those.
24 A Right. So the HDA is the Houghton muck and the RU is
25 the Roland muck.

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1 soils out in this area. And then trying to get more
2 detailed borings out beyond the existing roadway core
3 and out into the wetland would be difficult because
4 to get the proper piece of equipment out there it
5 might be -- the soil might be unable to hold it and
6 they'd have trouble operating a piece of equipment
7 out there. So he did take what we call hand probes
8 where a person can walk out into that material and
9 push a -- if you can push a hand probe down without
10 refusal, you know, you'd be able to determine that
11 that too is also wet soils or soft soils I guess.
12 Q What's a standard non-manual way of taking a soil
13 boring?
14 A With a drill -- a vehicle -- a drill mounted on a
15 vehicle typically.
16 Q Okay. And would it be practical to try and take a
17 drill rig vehicle into the wetland?
18 A I guess in discussions with my -- with GESTRA
19 Engineering, they felt, again, they're pretty
20 confident what the material was, you know, what the
21 design issues are related to that soil and they
22 thought it would be difficult to get a piece of -- a
23 larger piece of equipment out there.
24 Q Could you refer to Section 3.3 of Exhibit 7-001? I'm
25 sorry, that must be wrong. It's actually

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1 Q And also looking at Exhibit 7-004 there are assigned
2 soil values for the Wisconsin Department of
3 Transportation. Both of those soils are indicated as
4 poor support value, is that correct?
5 A Correct.
6 Q So assuming that you have poor soils in the area is
7 there a necessity to do a plethora of soil borings to
8 identify that the soils are poor in that stretch?
9 A I guess based on the discussions with my geotechnical
10 engineer, he felt that there were consistent soils in
11 that corridor and he felt comfortable with the boring
12 that he took, that it would be representative of that
13 stretch of roadway.
14 Q And there was also some testimony regarding the
15 method that he had used in terms of trying to access
16 the wetland itself and I believe -- I don't know what
17 the proper term is, but hand-holding a rod and trying
18 to drive that rod down --
19 A Right.
20 Q -- in the soils. There was critique of that method.
21 Do you have an understanding of why some other boring
22 methods might not have been used in that area?
23 A Well, I guess part of it is, again, based on what he
24 found with his soil boring in B4. He was fairly
25 confident I guess that it's consistent as far as the

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1 Exhibit 7-006 where Section 3.3 is located.
2 A Okay.
3 Q And could you explain what the subgrade improvement
4 section and particularly 3.3(1) identifies and also
5 located on Exhibit 2-002 for the record, but what
6 that area generally is?
7 MR. GLEISNER: I believe -- I guess I'm
8 going to object because is that two questions?
9 MS. CORRELL: It is compound. I can break
10 them out.
11 MR. GLEISNER: Thank you.
12 Q Could you identify the east -- the portion of the
13 access road that is east of Station 20 on --
14 A On which exhibit?
15 Q Yeah, Exhibit 2-002 is fine since that's up here.
16 A I guess Station 20 (inaudible) --
17 UNIDENTIFIED SPEAKER: Hang on, take a
18 microphone please.
19 THE WITNESS: Oh, I'm sorry. Okay. Sorry.
20 A Station 20 is in the area basically where the roadway
21 turns to the east -- the access roadway turns to the
22 east.
23 Q And then extending east so --
24 A And then it extends east approximately 500 feet.
25 Q Okay. And so you're pointing to Exhibit 2-002

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1 identifying Station 20 more or less at the turn from
 2 the north/south road to the east/west road and
 3 extending east towards the lake?
 4 A Correct.
 5 MS. KAVANAUGH: (Inaudible)?
 6 THE WITNESS: Yeah, this says (inaudible).
 7 MS. CORRELL: Oh, okay. You can refer
 8 to -- I can't read the exhibit number.
 9 MR. GLEISNER: 143, Counsel.
 10 MS. CORRELL: Thank you.
 11 Q So extending east to Station 24.75?
 12 A All right. That's about the limits of the east/west
 13 portion of the road.
 14 Q So it extends not quite as far as to the parking lot,
 15 but a fair distance down the access road -- the
 16 east/west access road?
 17 A Are we talking with the wetland area or the area
 18 of -- I mean the east/west road basically runs from
 19 Station 20 plus 00 to 25 plus 00, about 500 feet.
 20 Q Okay.
 21 A And then at that point it opens up into where the
 22 proposed parking lot would be located east of that.
 23 Q Okay. So that identifies the location and then I'm
 24 going to have you refer back to the GESTRA report.
 25 A Okay.

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1 our -- what we call usable excavated material, either
 2 good granular fill or good excavated material and
 3 then on top of that we would place our gravel base
 4 for the new roadway. And then, finally, after
 5 observing any settlement we would put the asphalt or
 6 pavement on top of that. That's kind of a general
 7 (inaudible) in that area.
 8 MR. GLEISNER: Counsel, clarification. Did
 9 the witness say snowshoe?
 10 MS. KAVANAUGH: Like a snowshoe, yes.
 11 MS. CORRELL: Yes.
 12 THE WITNESS: Yeah, it kind of -- it's
 13 a -- they called it a snowshoe effect in the
 14 report. It spreads the load of the fill
 15 material.
 16 MR. GLEISNER: Thank you.
 17 Q And a guess another clarification, you said good
 18 material so if you could just explain. I think as a
 19 professional engineer you have a better understanding
 20 of what that means in this context.
 21 A I guess it's material suitable for compaction of our
 22 roadway embankment to minimize settlement and
 23 movement of the roadway once it's completed and once
 24 it starts carrying the load of the traffic. So
 25 some -- you know, on a larger road project sometimes

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1 Q Thank you. Could you describe your understanding of
 2 the recommendations included in 3.3.1 of the GESTRA
 3 report?
 4 A Uh-huh. Basically, in this area that we're talking
 5 about, this 500-foot stretch, what they're
 6 recommending is that we excavate down below the
 7 existing ground to the north of the existing roadway
 8 core about three to four feet. There's a thin layer
 9 of what's called peat material that they have the
 10 most concern with from a settlement standpoint and
 11 that is at about three to four feet deep according to
 12 the boring they took, to excavate down to remove that
 13 portion of the wetland area, the marsh, the poor
 14 marsh soils, to place a grid -- a filter fabric down
 15 or a geotextile fabric down to separate the remaining
 16 existing marsh soils from our new roadway bed so that
 17 we don't have contamination of any marsh soils into
 18 our new roadway bed. Then placing a granular fill
 19 layer varying from three feet to one foot on top of
 20 that grid and then -- or, I'm sorry, and adding the
 21 (inaudible) grid on top of that which will help
 22 to -- it kind of acts as a snowshoe basically for the
 23 road and to spread the load and control the
 24 settlement of the roadway -- the vertical settlement.
 25 And then on top of that grid we would place

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1 you can take that material from other areas of the
 2 roadway that you're excavating and in some cases, and
 3 maybe in this case, you have to obtain that material
 4 from another location, what we call a borrow site, to
 5 get proper material for compaction.
 6 Q Okay. Thank you. And I think you -- just a moment.
 7 I think you referred to some recommendations that are
 8 beyond those specifically mentioned in 3.3.1. I was
 9 also going to refer you to Exhibit 7-007. I'll give
 10 you a moment to look over the additional comments in
 11 3.4, specifically the final paragraph on that page.
 12 A Okay. Okay.
 13 Q Did you -- are some of the recommendations here
 14 repeating the recommendations of 3.3.1 or are they
 15 more specific than what's identified in both sections
 16 together?
 17 A Well, I guess it gives a little more detail as far as
 18 what they're expecting as far as settlement issues
 19 go, depending on how -- you know, what treatments are
 20 used for excavation and (inaudible) and it talks
 21 about length of time that the settlement could be
 22 expected.
 23 Q And could you provide more specificity in terms of
 24 the amount of time in which Mr. Bath opined
 25 settlement would be completed?

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1 A As far as length of time, he talks about
2 consideration to be given to allow for settlement
3 prior to the asphalt being placed and his opinion is
4 much of the compressible soil would experience a
5 majority of the settlement over a few months and then
6 he talks about as opposed to a clay-type soil which
7 could take longer, but he doesn't say specifically
8 how long. But that's depending -- he's looking at
9 assuming an approximate two-foot fill on top of that
10 soil.

11 Q And he's assuming a two-foot -- I'm sorry, if he's
12 assuming a two-foot raise to the roadway, what is the
13 roadway elevation plan to be for this project site?

14 A The proposed elevation?

15 Q Yes, thank you.

16 A I would say in general it's probably in the range of
17 two to three feet, some places less than two, some
18 places a little more than two.

19 Q How does that compare to the existing grade? It's
20 just --

21 A Well, basically, I think what we're trying to do is
22 match the existing grade of the existing roadway and
23 then keep it to that -- pretty much the same
24 elevation, but just widening it out into the wetland
25 area. So the existing roadway is in the same general

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1 and parking lot building projects as well. We'd
2 proof roll the grade once the gravel is placed,
3 sometimes prior to gravel but usually when the gravel
4 is placed on, to see if there's any -- and the proof
5 rolling consists of taking a loaded dump truck and
6 rolling it over the newly-graded area and seeing if
7 there's any settlement or soft spots, areas that
8 would need new excavation, undercutting, and then
9 some sort of reinforcement, whether it be adding some
10 more fabric or if you have an area where you didn't
11 do any undercutting perhaps along a roadway core and
12 you encounter a soft spot, you can cut down
13 and -- you could maybe cut down two feet or, you
14 know, some depth and introduce some granular backfill
15 or some -- like brick or rock stone which is just
16 bare rock, to help carry that load. You remove those
17 soft soils and bring in some better material and then
18 put your new gravel and asphalt on top of that. So
19 that's the purpose of the proof roll.

20 MR. GLEISNER: Judge, without interrupting,
21 may I just confer quietly with Mr. Gallo for one
22 minute?

23 ALJ BOLDT: Sure.

24 MR. GLEISNER: Go ahead, Counsel. Thank
25 you, Judge.

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1 fill height I guess you would say as far as what the
2 fill material is on the existing roadway.

3 Q Am I understanding correctly then the existing
4 roadway isn't exactly even?

5 A As far as fill height?

6 Q As far as road elevation?

7 A Well, it's pretty flat but yeah, there's some changes
8 in grade on it, but it's fairly flat.

9 Q Okay. And what if there's some vertical settlement?
10 What type of maintenance could be provided prior to
11 placement of the asphalt -- the final layer?

12 A Well, yeah, then that's what he's recommending here
13 is to wait some amount of time period, a few months,
14 to see what kind of settlement takes place and he's
15 showing it to be two to four inches. So we can place
16 the gravel down, not pave it, wait a few months,
17 check the grade and if there has been settlement they
18 could bring in gravel and raise that -- those areas
19 that settled up to the plan elevations and then bring
20 in the pavement after that.

21 Q Okay. And backing up a little bit, after placement
22 of the fill what's recommended in terms of a proof
23 roll test? I'm referring again back to 7-006 in the
24 3.3.1 recommendations in the GESTRA report exhibit.

25 A Yeah, we would proof roll like we do most of our road

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1 Q So is my understanding correct then that the proof
2 roll is to ferret out whether or not the various
3 layers of material work for all areas of the access
4 road?

5 A Right, we would do the entire roadway, access
6 roadway, and the parking lot area. We would require
7 a proof roll.

8 Q So depending on soil suitability and the various load
9 layers that are placed, you could make adjustments in
10 specific areas that didn't pass, basically pass, the
11 proof roll test?

12 A Right, because oftentimes you don't know if an area
13 is soft until you do this proof roll. You know,
14 normal construction equipment may or may not show you
15 that there's some bad spots in there so that's why
16 you have to conduct a proof roll and then you can
17 take some measures to improve those areas that are
18 soft.

19 Q So it doesn't mean you have to tear up the entire
20 access road?

21 A No. No, you would probably have to excavate back
22 down a certain depth and, you know, we would work
23 with the geotechnical expert on that, depending how
24 bad the situation is, and you could do several
25 different things. There's different alternatives to

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1 fix the settlement or the poor soil issue.
 2 Q And what would happen if you didn't pass the proof
 3 roll test and is there going to be huge chunks of
 4 roadway that will fall laterally into adjacent areas?
 5 A Well, in this specific instance we're going to
 6 utilize the recommendations of the -- of my
 7 geotechnical engineer and by the use of the
 8 geotextile grid I'm confident with his expertise that
 9 that won't be an issue.
 10 Q Have you consulted with him further in preparation
 11 for this litigation regarding whether or not there
 12 would be any failure associated with the access road
 13 designed with his recommendations incorporated?
 14 MR. GLEISNER: Objection, we think that
 15 Mr. Bath should be here to testify to that.
 16 MS. KAVANAUGH: An expert is allowed to
 17 consult with other experts in forming his
 18 opinion.
 19 MS. CORRELL: Yes, and he's allowed to
 20 testify to that consultation.
 21 ALJ BOLDT: Yeah, that's the law so go
 22 ahead and answer it if you can.
 23 A Okay. I have consulted with Mr. Bath. He's seen the
 24 plans, he knows what type of facilities we built, he
 25 knows what soils are out there and he feels that the

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1 projects -- usually on a DOT project I am not out
 2 there, there's a construction manager that's out
 3 there, but they do do proof rolls so I don't
 4 necessarily witness those proof rolls, but on my
 5 projects with the Division of State Facilities,
 6 whether it be a parking lot or access road, I've been
 7 out there or a representative from our company has
 8 been out there to, you know, observe the proof roll
 9 that's being -- and we do do a proof roll on our
 10 projects.
 11 Q For those projects and then for the DOT projects you
 12 presume that the design would require and someone
 13 would conduct a proof roll?
 14 A Yes.
 15 Q But if I'm understanding your clarification
 16 correctly, that would be a DOT project manager that
 17 would conduct that proof roll?
 18 A Yeah, typically it's the DOT or another consultant
 19 project manager.
 20 Q But it's a pretty standard practice?
 21 A Yes.
 22 Q And you've referred to partial --
 23 MS. CORRELL: Pardon me, I've got another
 24 question to ask him along these lines.
 25 Q Could you indicate for the record how Kapur's final

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1 treatment that he's recommended that we intend in
 2 following, that there should not be an issue with
 3 lateral movement of the roadway.
 4 Q And are some of the recommendations of Mr. Bath and
 5 some of the other steps that you plan to incorporate
 6 the best practices that you have utilized in the
 7 past?
 8 A Yeah, I guess pertaining to what I call a partial
 9 depth excavation instead of a full depth excavation,
 10 we have used this in other projects in the past.
 11 MR. GLEISNER: I'm sorry, Your Honor, I
 12 didn't understand the words. What was that?
 13 A As far as this type of, I guess, technique of roadway
 14 embankment, placing of a roadway on these types of
 15 soils, we have used this approach or I have been
 16 recommended this approach by other geotechnical
 17 experts on past projects.
 18 MR. GLEISNER: Sorry, Your Honor, I didn't
 19 understand. Thank you.
 20 THE WITNESS: I'm sorry it wasn't clear.
 21 MR. GLEISNER: I just -- bad hearing.
 22 Q I think you also testified, but I just wanted to
 23 clarify, is the proof roll something out of the
 24 ordinary to conduct on a roadway?
 25 A No, we normally always do a proof roll. On my

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1 plans will incorporate these recommendations?
 2 A Well, we'll have construction details, additional
 3 construction details, and specifications addressing
 4 all aspects of the project from the drainage
 5 structures to the embankment techniques being
 6 utilized to the specifications that also require the
 7 proof rolling as well. I hope I'm getting too
 8 general for you or --
 9 Q No, that's fine. Would you say -- how far along in
 10 the design are you? Is this getting close to a final
 11 design or, again, going back to the bidding process,
 12 I don't -- I'm not aware of what's the timeline for
 13 submitting final projects and meeting those
 14 qualifications. If you could explain that for the
 15 record?
 16 A Well, I guess at this point we're in the preliminary
 17 design process which is typical I guess. Once we get
 18 into -- we'll start -- once I get the go ahead, I
 19 guess, to begin the final design then we'll start
 20 preparing the final design plans which will have all
 21 the details and, again, the specifications relating
 22 to that and those will be submitted to Division of
 23 State Facility and to the owner in this case, the
 24 Department of Natural Resources, for their review as
 25 well.

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1 Q Okay. So you haven't been given that approval at
2 this point yet?
3 A To produce final plans no, we have not.
4 Q And within all the measures that you identified, are
5 there grades or various materials that could be
6 utilized for, for example, the geotechnical grid or
7 the geotechnical fabric?
8 A Are there grades? I guess I'm not --
9 Q Let me rephrase the question. It wasn't very good.
10 When you get to final design phase will there be a
11 particular grade in terms of quality or strength of
12 geotechnical fabric separation qualities or grid in
13 terms of what specifically, what product, will be
14 utilized as well as, you know, the granular material,
15 etcetera?
16 A Yeah, we'll have to call that out specifically in our
17 construction details that'll be finalized for
18 the -- depending on what portion of the roadway we're
19 at. If we're putting in geotextile fabric, GESTRA
20 will supply me with the strength requirements of that
21 fabric and then that'll be incorporated into the
22 construction details, as well as the specifications.
23 Q Okay. So, again, there was a lot of testimony about
24 massive failures of roadways or significant
25 settlements of roadways.

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1 truck you're looking to see how much -- basically,
2 it's a visual inspection of how much that soil moves
3 or how much that gravel moves. Depths of the ruts
4 from the tires are taken into consideration. You
5 know, if that machine or that truck sinks in, you
6 know you've got a soft spot. The area is marked off,
7 the basic limits of those areas that need to be
8 addressed are marked off, and then the remedies are
9 done. So, basically, you're looking for sponginess
10 in the soil, if it's bouncing a lot when the truck
11 rolls over it, or sometimes I've seen where, you
12 know, there's just deep ruts from that truck going
13 through there.
14 Q Okay. And I think you alluded to -- yeah, I think
15 you alluded to earlier other projects that have
16 utilized a partial excavation in areas of poor soils
17 or wetlands. Could you describe your experience with
18 another partial excavation project?
19 A Yeah, I've had a couple projects I guess where we've
20 had a similar issue where the wetland area or the
21 poor soil depths were fairly deep, you know, over 20
22 feet. In one instance, this was a State highway
23 north of Hayward, I guess it's Sawyer County, where
24 we had to move the road over to a marshy area because
25 of some geometric issues in proximity to a sensitive

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1 A Uh-huh.
2 Q What types of factors do you look at to determine
3 whether a road will experience settlement, either
4 vertically or laterally?
5 A Well, we typically -- on any project we work with our
6 geotechnical expert to determine what the existing
7 soil conditions are and what our proposed
8 facility -- how that will act on those soils and what
9 remedies need to be taken, whether the soils are
10 adequate for the loading, you know, the amount of
11 weight of material and the traffic loading that are
12 going to be expected to be on that facility and then
13 they'll also make recommendations as they have here
14 as to whether those soils are not proper or not
15 adequate and what type of techniques we need to
16 utilize to either remove those soils or to strengthen
17 those soils below and in our roadway bed. So we look
18 at, you know, the types of soils, the amount of fill
19 being required and the type of traffic loading
20 typically.
21 Q And if the roadway access didn't experience sort of a
22 massive failure or any slumpage, what types of minor
23 indications of movement would you be looking for at
24 the proof roll stage?
25 A Well, when you do a proof roll with a loaded dump

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1 environmental area -- more sensitive than a wetland
2 area actually. It was a cranberry bog is what it
3 was.
4 Q Oh, boy.
5 A And in that case we didn't even use a -- utilize
6 a -- and this came again working with the Department
7 of Transportation and the recommendations from their
8 soils engineers. They didn't do much excavation at
9 all. They basically stripped the vegetation below
10 the roadway core and put some reinforcing geotextile
11 fabric down and then built the roadway on top of
12 that. And then another instance --
13 Q Before you move on to the next --
14 A Sure.
15 Q -- can I ask you a question? So you said they
16 excavated out to remove basically the vegetation
17 level. Do you have any recollection or idea how deep
18 that was?
19 A No, I don't. You know, the way --
20 Q I guess as compared to the 20 feet of depth of the
21 wetland, was it a majority or was it --
22 A No, it was probably in the order of two to three feet
23 maybe maximum that they removed --
24 Q Okay.
25 A -- to get the roots out and, you know, any brush and

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1 trees and things like that. And then they put the
 2 geotextile fabric right on top of that or the
 3 reinforcing grid right on top of that.
 4 Q And this was for a State highway realignment, is that
 5 correct?
 6 A Yeah, we had to move -- there was an existing road
 7 there and we had to move the new road over to the
 8 west of the existing road and build the road on top
 9 of that wetland.
 10 Q And we don't want to hear about that because we're
 11 the DNR, but -- sorry, no, I'm just kidding. But is
 12 that a State highway that's still in existence today?
 13 A Yes. I believe so, yeah. I'm sure. It's the main
 14 highway coming out of the north side of Hayward.
 15 Q Okay.
 16 MR. HARBECK: You only want to hear about
 17 it when it's your own site, right?
 18 MR. MEYER: Would that be Highway 63?
 19 THE WITNESS: Highway 27 it was.
 20 MR. MEYER: 27.
 21 MS. CORRELL: Highway 27. Okay.
 22 THE WITNESS: This was a long time ago.
 23 Q And you alluded to another project, perhaps more
 24 recent?
 25 A This was more recent, yes. Another one where we did

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1 conducted involved less various layers of either load
 2 carrying or stability material than what's being
 3 proposed for the DNR access site?
 4 MR. HARBECK: Objection, Your Honor, he
 5 already testified he didn't know how far they
 6 went down, he was guessing, so for him to
 7 now --
 8 MS. CORRELL: On one of them.
 9 MR. HARBECK: -- make a
 10 comparison -- well, he said both sites. For her
 11 to make a comparison --
 12 MS. CORRELL: I'll break it out.
 13 MR. HARBECK: -- when he said he didn't
 14 know how deep they went I think is not a fair
 15 question.
 16 ALJ BOLDT: The objection is sustained as
 17 presently formed.
 18 Q With respect to the State Highway 27 project that you
 19 just described indicating a wetland depth of
 20 approximately 20 feet, were there less steps in terms
 21 of layers of various replacement materials provided
 22 than what is going to be provided for the DNR access
 23 site design?
 24 A From my recollection there was -- they didn't do
 25 the -- on that specific 27 project, they didn't

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1 partial depth excavation where we -- again, I can't
 2 remember the depth of the marshy soil or the softer
 3 soil, but it was too deep for us to do a full
 4 excavation and too cost prohibitive so, again, we
 5 went down -- I'm thinking we might have gone down six
 6 feet on that. There was a range. Again, I don't
 7 know the specifics, but four to six feet, put some
 8 geotextile fabric back down in that and some granular
 9 backfill. And it was similar to this where we were
 10 widening on the existing roadway core and widening
 11 out into the wetlands which were on both sides of the
 12 road.
 13 MR. GLEISNER: For the record can you
 14 identify that somewhere?
 15 THE WITNESS: Oh, the name of the road?
 16 MR. GLEISNER: Yeah.
 17 THE WITNESS: It's County Highway ES in
 18 Waukesha County and I would say it's --
 19 MR. GLEISNER: That's enough. I just
 20 wanted to get an idea.
 21 THE WITNESS: Yeah, it's west of -- I'm
 22 sorry, east of Mukwonago.
 23 MR. GLEISNER: Thank you.
 24 Q If I understand your testimony correctly, is it fair
 25 to say that those two partial excavations that you've

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1 excavate down, you know, other than to remove the
 2 vegetation and they placed the reinforcing grid right
 3 on top of that poor soil and utilized that material
 4 to spread the load of the new roadway fill on top of
 5 that and that roadway fill was at least as thick as
 6 what we're proposing here. And then the traffic
 7 loading -- it's a State highway, so the traffic
 8 loading would carry trucks, you know, a lot more
 9 vehicles.
 10 Q And that gets into I guess some of my other questions
 11 which is you do a lot of jobs where the DOT standards
 12 are the guiding standards. I would assume you don't
 13 do a huge quantity of public boat access projects,
 14 but you do do some other projects that are less
 15 impacting than a transportation -- a State
 16 transportation highway. What are some of the factors
 17 that would be different in terms of speeds, weight
 18 and number of cars that you would expect to pass the
 19 area in terms of your engineering expertise?
 20 A Well, certainly in all of my highway, whether it be
 21 State highway or county highway or even municipal
 22 roadway projects, the loadings and the number of
 23 traffic would be much greater than what I would
 24 anticipate for a boat launch-type facility.
 25 Q And what about the speed that people would be

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1 traveling? Is that a factor in terms of engineering?
 2 A I guess speed isn't necessarily a factor other than
 3 maybe at intersections where you're looking at
 4 potential rutting of vehicles as they're approaching
 5 a stop or something like that. But we're typically
 6 looking at what I call in our pavement analysis,
 7 pavement design, the loading of trucks and a number
 8 of vehicles per day and a percent of vehicles that
 9 are trucks or classified as trucks.
 10 Q Okay. And what kind of loading capacity is utilized
 11 for, for example, a typical pick-up truck with an
 12 average size boat trailer and boat versus, I don't
 13 know, all the other trucks that travel on State
 14 highway?
 15 A You mean as far as what their weight is combined?
 16 Q I'm not saying exact weights, but if you could
 17 describe what the loading might be in terms of
 18 differential between those two types of vehicles?
 19 A Oh, boy, I can't -- I could only speculate, but
 20 obviously a semi trailer truck has a much heavier
 21 loading than a pick-up truck hauling a trailer. That
 22 would be considered a car, you know, basically a car,
 23 in our pavement design analysis for highway projects
 24 versus a truck which has a much heavier loading.
 25 Q And when you do a loading analysis for a State

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1 MR. MEYER: No questions, Your Honor.
 2 ALJ BOLDT: Okay.
 3 MR. GLEISNER: If I could take a break,
 4 Your Honor, so we can discuss this with our
 5 experts before we cross-examine?
 6 MS. CORRELL: How about a five-minute
 7 bathroom break?
 8 MR. GLEISNER: We didn't have a chance to
 9 do any discovery. Bathroom break.
 10 MS. CORRELL: I mean I'd say five minutes
 11 is plenty?
 12 MR. GLEISNER: Yeah, sure.
 13 ALJ BOLDT: Okay. That's fine.
 14 (Recess taken)
 15 ALJ BOLDT: Now we're back on the record.
 16 CROSS-EXAMINATION
 17 BY MR. GLEISNER:
 18 Q Good afternoon, Mr. Farrenkopf. Let me just begin by
 19 getting in mind what the limitations are of your
 20 responsibilities. You have no opinion about the
 21 extent or the delineation of the wetlands on this
 22 property, is that correct?
 23 A Correct, those are delineated by experts --
 24 Q I understand.
 25 A -- and then we did the survey.

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1 highway do you take into account how many car and
 2 traffic studies that would identify how many cars
 3 would be passing along --
 4 A Yeah.
 5 Q -- that State or county highway?
 6 A Basically, we design a roadway on a State highway
 7 project or any county highway -- we design our
 8 projects for the 20-year design life of a roadway.
 9 And typically the DOT, the Wisconsin Department of
 10 Transportation, will provide us with traffic
 11 projections as far as what that facility is going to
 12 be carrying, what percent trucks are going to be
 13 carried and those are the numbers we use as part of
 14 our pavement design report, along with the
 15 engineering properties given to us in the soils by
 16 the geotechnical engineer.
 17 Q And are you anticipating a significant amount of
 18 traffic on the DNR access?
 19 A I mean compared to a highway no, obviously not.
 20 There will be much less traffic, much less truck
 21 loading, if any.
 22 Q Okay.
 23 MS. CORRELL: I have no further questions
 24 for you. Thank you, Mr. Farrenkopf.
 25 ALJ BOLDT: Okay. Mr. Meyer?

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1 Q I'm just trying to understand.
 2 A Uh-huh, right.
 3 Q And you have no opinion or any expertise with regard
 4 to the delineation of or the identification of
 5 navigable waters, is that correct?
 6 A No, you know, we rely upon others to delineate those.
 7 Q And you yourself are not a geotechnical engineer, is
 8 that correct?
 9 A No, I'm not.
 10 Q And so you may have consulted with Mr. Bath, but
 11 you're not in a position to provide any information
 12 from your own knowledge or expertise concerning
 13 geotechnical matters, is that correct?
 14 A Right, we rely upon the geotechnical's
 15 recommendations for all of our roadway projects.
 16 Q Thank you. Now, let me begin by some preliminary
 17 matters here that -- and I apologize, but I haven't
 18 had a chance to depose you or meet you before so I
 19 need to get a little background on how Kapur works
 20 and what Kapur is about, if you don't mind. You
 21 testified to a contract selection process, is that
 22 correct?
 23 A That's one way, yeah.
 24 Q Now, was this contract that you have -- you have a
 25 contract with DNR, is that correct?

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1 A Correct.
 2 Q The contract that you have, was that the result of a
 3 bidding process or the result of a contract
 4 negotiation process?
 5 A It was the two-step process I guess I was talking
 6 about where it's called quality base selection where
 7 they -- the Division of State Facilities sent out a
 8 request for a proposal and then we submitted the
 9 proposal for this project as well as a number of
 10 other firms and then once they selected us we sat
 11 down and negotiated a contract with the Division of
 12 State Facilities, and the DNR was involved in that as
 13 well.
 14 Q Thank you very much. Now, let me understand, if you
 15 know, most of what you do for DNR is public, is that
 16 correct? I mean it's of public record?
 17 A Yeah, I guess the end result, you know, the plans and
 18 specifications and everything that we produce are a
 19 matter of public record -- and the contract that we
 20 have as well.
 21 Q So if one wanted to get your file one could access it
 22 by an open records request, for example, would that
 23 be correct?
 24 MS. KAVANAUGH: He's calling for a legal
 25 opinion.

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1 was an amendment. I know that it covered more
 2 geotechnical investigation, but from a design
 3 standpoint I can't be certain if that was part of an
 4 amendment on that specific --
 5 Q The reason I'm going there is I recall from your
 6 testimony, I believe I recall from your testimony,
 7 that because of the alteration of the roadway or the
 8 realignment of the roadway near the Hanson property
 9 more wetland impact and profile changes and other
 10 changes occurred, am I correct on that?
 11 A Compared to the alignment that was on the existing
 12 roadway?
 13 Q Right.
 14 A Correct, there were more -- obviously more wetland
 15 impacts took place because of the new alignment.
 16 Q Now, when that alignment took place did it take the
 17 roadway off from the existing roadway?
 18 A The alignment shift?
 19 Q Yes.
 20 A A short portion is off the existing roadway, correct,
 21 to match -- to fit into DNR's mapped easement.
 22 Q Okay. I'd like to direct your attention to
 23 Exhibit 7-003 and I am specifically addressing the
 24 second paragraph and the second-to-last sentence. It
 25 says, "The roadway will generally follow an existing

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1 MS. CORRELL: Objection --
 2 MR. GLEISNER: Well, no, I'm not, I'm
 3 trying to avoid, Your Honor, saying produce your
 4 file.
 5 ALJ BOLDT: What's the point? We're not in
 6 discovery now --
 7 MR. GLEISNER: No, no --
 8 ALJ BOLDT: -- and discovery is
 9 limited -- let's just get to the point today,
 10 okay?
 11 MR. GLEISNER: I'm trying, Your Honor.
 12 Q Was a budget set with regard to this work?
 13 A A design budget?
 14 Q Yes.
 15 A Yeah, we negotiated a design contract.
 16 Q And with regard to the amendments, you mentioned that
 17 there are amendments from time to time. Were there
 18 any amendments made in the contract that you have
 19 with DNR?
 20 A There are some amendments, correct.
 21 Q And do any of them relate to the design at the point
 22 of Station 20?
 23 A I guess I can't say for certain if it specifically
 24 addressed the alignment change or if that was part of
 25 our, you know, original alternative analysis. There

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1 access trail that is cleared but not paved." Was the
 2 GESTRA report actually done before the 2009 report
 3 that we've stipulated to was completed?
 4 A I guess I'm not sure of the timing of when their
 5 field work was done versus the current project
 6 location.
 7 MR. GLEISNER: That would be relevant, Your
 8 Honor, because we are concerned that the GESTRA
 9 report --
 10 MS. CORRELL: Are you
 11 testifying -- objection.
 12 MR. GLEISNER: No, I'm not testifying at
 13 all.
 14 ALJ BOLDT: No, just keep asking questions.
 15 Let's go.
 16 MR. GLEISNER: Okay.
 17 ALJ BOLDT: There wasn't an objection.
 18 MR. GLEISNER: All right.
 19 Q I'm going to direct your attention to Exhibit 7-004.
 20 Now, there are two types of soils referenced in the
 21 second graph, correct, Houghton muck and I think it's
 22 Roland muck, is that correct?
 23 A Correct.
 24 Q There are a number of variables that relate to those
 25 soils, including design group, frost index, soil

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1 support value, drainage factor. All of those have
 2 none written into them except for one. Why is that?
 3 A My guess is that they didn't conduct the testing on
 4 the soil samples in those areas.
 5 Q Well, I apologize, but isn't that simply an
 6 expression of what the soils are able to support in
 7 that graph?
 8 A They're -- right there, they're -- these are what
 9 they call the petrological (phonetic) method and
 10 these are different soil carrying capacity values I
 11 guess you'd call them and what their soil parameters
 12 are.
 13 Q So, in other words, if I'm reading this graph
 14 correctly, the soil support value for Houghton soil
 15 and the Roland soil, or muck as they call it, is
 16 none, is that correct?
 17 A Correct, that's what they have here, uh-huh.
 18 Q And do you attach any significance to that?
 19 A Well, I guess I recognize it from -- from a roadway
 20 building standpoint, those are poor soils that a
 21 roadway would be built on.
 22 Q I'm going to direct your attention to 7-010 and I'm
 23 specifically referring to B4 -- boring 4?
 24 A Uh-huh.
 25 Q That appears to be located on the border between the

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1 A Uh-huh.
 2 Q Isn't that boring actually in the existing access
 3 trail or road?
 4 A In the existing road?
 5 Q If you look at the map itself?
 6 A Yeah. I guess I'm not specifically sure where they
 7 put the boring with respect to the roadway core. We
 8 gave them basically this symbol here or a map saying,
 9 you know, let's take a boring at this location. I'm
 10 not sure if he took it in the center of the road.
 11 Usually what they try to do is get as close to the
 12 edge of the road as they can in this location so he
 13 went -- probably the first couple feet are through
 14 the existing roadway core or the fill embankment and
 15 then he continued on down, down below that.
 16 Q Now, is the existing roadway, trail, whatever it is,
 17 is that already compacted?
 18 A I guess I don't know how long it's been out there,
 19 but my guess would be it has settled to a significant
 20 point, I don't know.
 21 Q And -- I understand. Thank you.
 22 A I'm not an expert on settlement issues, I guess,
 23 but --
 24 Q Okay. Fair enough. On the north and south portion,
 25 the portion to the north of the access road and the

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1 Houghton muck and the Roland muck, is that correct?
 2 A Correct.
 3 Q But there were no borings done anywhere along
 4 the -- any other place along the east/west access
 5 road, is that correct?
 6 A No drill rig borings, correct.
 7 Q And how many -- I mean I'm assuming that this is a
 8 complete rendition of the borings that were done.
 9 Were there other borings done along the access road?
 10 A Yeah, we did two on the north/south portion of the
 11 roadway and we did two in the parking lot area.
 12 Q Thank you. So then my -- the answer to my question
 13 is B4 is the only soil boring that was done on the
 14 access road going east and west, is that correct?
 15 A Correct.
 16 Q How can you be certain that the rest of the east/west
 17 access road is capable of -- or what the soil is like
 18 in the rest of the east/west access road? Sorry.
 19 A Again, I base that on the recommendations from my
 20 geotechnical engineer and if he was uncomfortable
 21 with his recommendations I would imagine he would,
 22 you know, recommend more borings be taken, more
 23 information be taken, in that stretch of roadway.
 24 Q I would direct your attention again to the map on B4
 25 on 7-010.

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1 portion to the south of the access road, would you
 2 agree that's wetland?
 3 A Oh, north and west? The east/west portion of the
 4 access road?
 5 Q Yeah, I apologize --
 6 A Yeah.
 7 Q -- the east/west portion of the road.
 8 A Yeah, based on, you know, the delineations the DNR
 9 did and what the geotechnical reports tell me yeah,
 10 those -- they're wetlands, soft soils, poor soils.
 11 Q And was it your testimony -- did I understand your
 12 testimony correctly that you couldn't get a truck out
 13 there, a boring truck out there, into those wetland
 14 areas?
 15 A I don't know if they have a piece of equipment that
 16 could do it, but I would imagine the standard drill
 17 rig could not get out there to conduct those borings.
 18 Q Now, how much familiarity do you have personally with
 19 wetlands?
 20 A I guess from a design standpoint, you know, in this
 21 part of the State we encounter them on most of our
 22 roadway projects. We work with the DNR on the
 23 delineation of wetlands, vegetation types, things
 24 like that and we look at ways to avoid or minimize
 25 our impacts on those wetlands and, if we can't avoid

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1 it, we look at, you know, mitigation measures or
 2 other things on all of our DOT projects.
 3 Q Now, there's a bio-filter contemplated for this
 4 project, is there not?
 5 A Yes.
 6 Q If you could just remove -- if you wouldn't mind
 7 removing Exhibit 143 for a moment. Put it down on
 8 the ground. It's just fine. Can you, with reference
 9 to Exhibit 2-002, describe for the Judge
 10 approximately where the bio-filter will be located?
 11 A The bio-filter will be located to the north of the
 12 proposed new parking lot and then south of the area
 13 marked in dark blue between the parking lot and that
 14 swale --
 15 Q So it'd be safe -- would it be fair to say that on
 16 2-002 -- I'm sorry. On 2-002 the bio-filter would be
 17 on the borderline between the north orange line and
 18 the south portion of the blue line approximately?
 19 A Approximately, in general, it would be in that
 20 region, correct.
 21 Q Why is the bio-filter below the elevation of the
 22 lake?
 23 MS. CORRELL: Objection --
 24 A I don't know that it is I guess.
 25 MS. KAVANAUGH: Assumes facts not in

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1 alternate analysis. It has to do with the --
 2 MS. KAVANAUGH: I don't think the
 3 bio-filter --
 4 ALJ BOLDT: Okay. Alternatives analysis is
 5 not part of this hearing.
 6 MS. CORRELL: Another thing is, your
 7 engineer only testified as to impacts to the
 8 access road and we're providing responsive
 9 testimony with respect to the engineering.
 10 We're not going to go over every inch of this
 11 property again and every issue.
 12 MR. GLEISNER: And I'm not trying to,
 13 Counsel. I'm not trying to.
 14 ALJ BOLDT: The objection is sustained.
 15 MR. GLEISNER: Okay.
 16 Q You are going to be putting eight-inch culverts into
 17 this area, is that correct?
 18 MR. MEYER: (Inaudible).
 19 MS. CORRELL: Objection --
 20 MR. GLEISNER: Well, that's a fair --
 21 Q Are there culverts intended for any location where
 22 you're going to be building the access road or the
 23 parking lot?
 24 A Yes, there are.
 25 Q And where would those be located? And you can use

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1 evidence.
 2 MS. CORRELL: There's no foundation laid
 3 for that question.
 4 ALJ BOLDT: The answer came in. He said I
 5 don't know that it is so --
 6 Q Do you have any knowledge yourself personally as to
 7 the elevation of the bio-filter?
 8 A Yes, we put those elevations in our plans.
 9 Q And you have the plans in front of you I believe at
 10 Exhibit 3 in the white book in front of you.
 11 A Yes.
 12 Q Can you tell me the elevation of the bio-filter?
 13 MS. CORRELL: I'm going to object again.
 14 This has to do with storm water and not as to
 15 navigability which, again, is the subject of the
 16 proceeding.
 17 MR. GLEISNER: It is the subject of the
 18 proceeding, Your Honor. We want to understand
 19 the relationship of the parking lot and the
 20 parking lot location to North Lake and we're
 21 confused by where they put the bio-filter and
 22 why they put the bio-filter where they did.
 23 MS. KAVANAUGH: But what does the
 24 bio-filter have to do with the parking lot?
 25 MR. GLEISNER: It has to do with the

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1 Exhibit 2-002 if you wish.
 2 A Well, they're not shown on that.
 3 MS. CORRELL: That's not a good exhibit if
 4 you're trying to show where culverts are
 5 located.
 6 MR. GLEISNER: Fair enough. Okay. Sure.
 7 Q You're bringing up Exhibit 143 at this point?
 8 A 143. Okay. Well, we have several different types of
 9 pipe out here. So you're referring specifically to
 10 cross-culverts or --
 11 Q Okay. First of all, what type of culverts are there
 12 going to be on this project?
 13 A Well, there's going to be cross-culverts under the
 14 roadway. I guess specifically along the east/west
 15 portion between Station 20 and 25 there's going to be
 16 I believe -- and it's hard to see on this exhibit,
 17 but I believe there's going to be four eight-inch
 18 cross-culvert pipes.
 19 Q And the cross-culverts will connect what has
 20 been -- you've been here for most of the testimony?
 21 A Yes.
 22 Q What has been described on Exhibit 2-002, behind that
 23 Exhibit 143, as the north and south wetland areas.
 24 Those four culverts will connect them, is that
 25 correct?

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1 A Correct.
 2 Q The other culverts on the site will be where? Or
 3 what are they, first of all?
 4 A Well, I guess they're storm sewer pipe --
 5 Q I don't care about the storm water sewer pipe.
 6 A There's some pipes in the bio-filter that we talked
 7 about.
 8 Q I don't care about those either. So there's only
 9 four culverts that are responsible for connecting the
 10 north and south navigable wetlands as it's been
 11 testified to, is that correct?
 12 A Between here and here, correct, four culvert pipes.
 13 Q And you're referring to between Station 20 and
 14 Station 25 --
 15 A Yes.
 16 Q -- on the east/west access road, is that correct?
 17 A Correct.
 18 Q You testified earlier with regard to two areas that
 19 you had done work on, Highway 27 and County ES and
 20 with regard to County ES you said that, if I recall
 21 correctly, the partial depth excavation was too cost
 22 prohibitive and that you put the geotech right over
 23 the vegetation, am I correct on that?
 24 MS. CORRELL: Objection, I don't think
 25 that -- I think the record speaks for itself and

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1 you're there.
 2 A I'm there.
 3 MS. CORRELL: I'm just a little behind
 4 here.
 5 MR. GALLO: That's okay.
 6 MS. CORRELL: Okay. And you're on
 7 Boring 4, right?
 8 MR. GALLO: Boring 4, Page 16 and 17.
 9 We'll start on 16.
 10 MS. CORRELL: Got it. Thank you.
 11 Q 16. There's a drill date under the drilling
 12 information. Can you see that date?
 13 A I see that.
 14 Q What is the date?
 15 A Well, on 7-016 it's October 3rd of 2007.
 16 Q Okay. And the depth of the boring is ten feet, is
 17 that correct?
 18 A Correct.
 19 Q Okay. On 17, Page 17, this is again Test Boring 4?
 20 A Uh-huh.
 21 Q And the drilling date?
 22 A It's October 3rd, 2007 and September 16th, 2008.
 23 Q Okay. And the depth of this boring is 20 feet?
 24 A Correct.
 25 Q So the drilling date for the 20-foot depth is

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1 I don't think he said that.
 2 MR. GLEISNER: Well, I'm just trying
 3 to -- I'm trying to cross and I'm trying to make
 4 sure that I have the right foundation.
 5 ALJ BOLDT: Is that what you testified to?
 6 MS. KAVANAUGH: Don't you think maybe you
 7 should ask him what he testified to?
 8 ALJ BOLDT: Wait.
 9 THE WITNESS: I think what I said was that
 10 the full depth excavation would have been too
 11 cost prohibitive and also would impact wetlands
 12 obviously more greatly and that we did -- and
 13 that's one of the reasons we went to the partial
 14 depth excavation on those.
 15 MR. GLEISNER: I'll defer to Mr. Meyer.
 16 MR. HARBECK: No, Mr. Gallo.
 17 MR. GLEISNER: Mr. Gallo.
 18 MS. CORRELL: Mr. Gallo gets a turn.
 19 MR. GALLO: Okay.
 20 CROSS-EXAMINATION
 21 BY MR. GALLO:
 22 Q Back to the GESTRA report which was Exhibit 7, I'm
 23 referring you to Soil Boring 4 and that's on Page 16
 24 and 17 -- 7-016 and 7-017. At the bottom of the page
 25 there's a drill date. I'm sorry, I'll wait until

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1 September 16th, is that correct, 2008?
 2 A Yes.
 3 Q Okay. Back to Mr. Gleisner's question on Page 3,
 4 it's actually Page 2 of the report, it's
 5 Exhibit 7-003, the date of this report is at the top
 6 of the page. Can you cite that date?
 7 A January 29th, 2009.
 8 Q Okay. With these dates in mind and the second
 9 paragraph down in Section 1.0, Introduction, second
 10 paragraph down, the second sentence from the bottom.
 11 I'm just going to read this again. "The roadway will
 12 generally follow an existing access trail that is
 13 cleared but not paved." This report, if I'm not
 14 mistaken, was prepared under the old alignment, is
 15 that correct, or do you know?
 16 A I guess I'm not certain.
 17 Q Okay.
 18 A It might have started that way, but then when we knew
 19 the alignment was going to be shifted, you know,
 20 obviously they went out and extended their boring
 21 deeper at a later date.
 22 Q Let's go to 7-017 again. You're familiar with
 23 reading boring logs?
 24 A I know enough to be dangerous, I guess.
 25 Q Okay. Like the rest of us.

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1 A But I utilize these on all of our projects.
 2 Q If you look at the top three feet and I think you
 3 responded to Mr. Gleisner's comment -- his question
 4 was, was this boring located in the existing
 5 driveway. If you look at the zero to three foot in
 6 the description of soil, that's a description that
 7 would -- is it correct to say that that's a
 8 description that would reflect the existing driveway
 9 or do you have an opinion?
 10 A I would believe it's in at least a portion of the
 11 roadway or the existing driveway, yeah.
 12 Q You're not aware of any borings that were conducted
 13 out in the wetland area?
 14 A Just hand probes that were done, no -- nothing with
 15 large equipment.
 16 Q Okay. Are you aware -- and if you're not, that's
 17 okay. Are you aware of any compression test or
 18 triaxial tests that were run on soil samples taken
 19 from this Boring 4?
 20 A I am not aware of any, no.
 21 Q Okay. And if you were designing a road into the
 22 wetland, as you most likely will be doing, would you
 23 want to do some additional borings in the wetland
 24 area?
 25 A I guess I need to leave that up to my geotechnical

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1 will eliminate settlement" and then about the center
 2 of the paragraph it says, "If the roadway is raised
 3 two feet it is likely to result in settlement that
 4 would be on the order of two to four inches." The
 5 concern that I have, and I'm asking if you have an
 6 opinion with regard to this, is this analysis based
 7 upon the alignment over the existing driveway as
 8 opposed to in the wetland?
 9 A I guess I can't speak to the opinion of this
 10 paragraph.
 11 Q I understand.
 12 A All I know is, you know, I've had discussions about
 13 what we're doing out there under this current
 14 scenario and he has addressed both the existing
 15 roadway and what we're doing with that versus the
 16 additional fill that we'll be incorporating over the
 17 wetland area.
 18 Q Do you have anything in writing to document that?
 19 A I probably have some notes.
 20 Q There's no addendum though to this report?
 21 A Well, there is an addendum, but I don't think it was
 22 for this area so, correct, there's no addendum for
 23 this specific --
 24 Q Mr. Farrenkopf, were you present for the testimony of
 25 Don Reinbold and Paul Giese?

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1 expert. He knows what I'm building out there and --
 2 Q Okay. That's fair. Thank you.
 3 A You know, if it was a, you know, a heavier volume
 4 roadway, perhaps he would have said that we need to
 5 take -- or, you know, heavier loading.
 6 Q The concern I have is that in his conclusions in the
 7 GESTRA report on Page 6, Exhibit Number 7-007, if you
 8 can turn to that page --
 9 A Okay.
 10 Q -- at the -- the paragraph at the bottom, the second
 11 sentence, he says, "Neither approach shown will
 12 eliminate settlement." And then he estimates, "If
 13 the roadway is raised two feet the settlement will be
 14 on the order of two to four inches."
 15 MS. CORRELL: I'm sorry, what page?
 16 MR. GALLO: I'm sorry, Page 7-007.
 17 MS. CORRELL: Oh, not 6. Okay.
 18 MS. KAVANAUGH: Yeah, he said 6.
 19 Q Okay. Let me repeat that.
 20 MS. CORRELL: You said 6 I think -- 7-006.
 21 Okay.
 22 Q The bottom paragraph --
 23 MS. CORRELL: Got it now.
 24 Q -- second sentence, there's some conclusions. These
 25 are additional comments. "Neither approach shown

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1 A Yes.
 2 Q Okay. Do you have any dispute with their expertise?
 3 A As far as their experience, no.
 4 Q Their expertise and qualifications?
 5 A No, none at all.
 6 Q Thank you. When you're talking about the proof
 7 rolling test, what do you do if you have a
 8 significant failure with these geotextiles even in
 9 limited areas?
 10 MS. KAVANAUGH: Can you clarify significant
 11 failure?
 12 MR. GALLO: Okay.
 13 Q Can you describe for me -- you did mention that you
 14 would look at the degree of rutting. What happens
 15 when the dump truck gets stuck and it's really
 16 failing through more than rutting? Is that a
 17 failure? Would you consider that to be a failure?
 18 A Correct. Yeah, as part of the proof rolling I'd
 19 consider that an area that we need to fix.
 20 Q And does that on occasion happen?
 21 A Oh, sure.
 22 Q Okay. And when you're -- you know, with the
 23 geotextile, that certainly complicates the repair to
 24 some degree, is that correct?
 25 A I would think say.

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1 Q Yeah. Okay.
 2 A I guess I've never had an area fail where they've
 3 placed the geotextile fabric. The areas of failure
 4 are prior to that.
 5 Q Are you familiar with the difference between a truck
 6 loading, which is -- my understanding is that would
 7 drive the pavement design in the top courses and the
 8 surcharge loading?
 9 A I have limited experience in surcharge loading.
 10 Q Surcharge loading, as I'm referring to it, it would
 11 be the depth of fill that they're talking about in
 12 the GESTRA report that's two to three feet of
 13 (inaudible) or suitable compactable materials, is
 14 that your understanding as well?
 15 A Okay. Yeah, I'm not -- like --
 16 MS. CORRELL: Are you providing testimony
 17 of what some surcharge loading -- I don't recall
 18 testimony from your expert regarding this.
 19 MR. HARBECK: He's just asking a question.
 20 MR. GALLO: Yeah, we have testimony --
 21 MS. KAVANAUGH: Well, he's asking him to
 22 assume that or asking him to agree that that's
 23 what it is.
 24 MR. GALLO: No, no --
 25 ALJ BOLDT: No, the objection is overruled.

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1 A Yes, I would imagine.
 2 MR. GALLO: No further questions.
 3 ALJ BOLDT: Thank you. Redirect?
 4 MS. CORRELL: Yes, just a couple questions.
 5 REDIRECT EXAMINATION
 6 BY MS. CORRELL:
 7 Q I believe that we already covered this on direct, but
 8 since you were asked several questions on
 9 cross-examination regarding the soil boring B4 --
 10 A Uh-huh.
 11 Q -- in your conversations with Doug Bath regarding
 12 the soil carrying capacity, was it your -- what was
 13 your understanding of why Mr. Bath did not recommend
 14 additional borings be done beyond that Boring B4?
 15 A Well, he indicated that he expects the soils through
 16 that portion of roadway between Station 20 and 25 to
 17 operate similarly as what he found in Boring B4. Our
 18 roadway fill heights and widening beyond the existing
 19 embankment would be consistent throughout that
 20 portion. He felt that the information he obtained in
 21 that boring was adequate considering the type of
 22 facility we're building and how that roadway is
 23 physically going to be placed out in that structure
 24 of the east/west section of the roadway.
 25 Q And you discussed with Mr. Bath that some of the

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1 Is there a question pending?
 2 MR. GALLO: Yeah, let me restate the
 3 question. I want it to be clear.
 4 Q Part of the recommendation on how to construct this
 5 roadway from the GESTRA report is to do a limited
 6 excavation and backfill with suitable compacted
 7 granular material. You know, I think your steps were
 8 you do the limited excavation, do a geotextile so
 9 that you wouldn't have contamination of the fill,
 10 then you'd have two to three feet of suitable
 11 granular compacted material, and that's what I'm
 12 defining as the surcharge loading. Are you aware
 13 that the surcharge loading drives the settlement
 14 analysis?
 15 A I'm assuming that GESTRA took the surcharge loading
 16 into consideration for their settlement.
 17 Q Okay. But would it make a difference between the
 18 surcharge loading in the wetlands of the new
 19 alignment which does not have any timeframe of
 20 compaction versus the existing driveway which I
 21 believe is part of the GESTRA report that had many
 22 years, 30 to 50 years, of surcharge loading?
 23 A So your question is the settlements could be
 24 different or --
 25 Q Yes.

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1 impacts would be located further into the wetland
 2 during your conversations?
 3 MR. HARBECK: Objection, leading
 4 Q Did you discuss with Mr. Bath any locational concerns
 5 in terms of where the impacts would be?
 6 A Right. We showed him our proposed cross-sections
 7 showing where the road would be with respect to the
 8 existing roadway, with respect to the wetland, the
 9 heights of our new roadway fill, and the offset
 10 distances throughout the entire -- well, you know,
 11 throughout the entire roadway, including the parking
 12 lot as well.
 13 Q Okay.
 14 A But specifically he has seen our proposed plans and
 15 the widening that would take place out there.
 16 Q So Mr. Bath has had an opportunity to review
 17 subsequent design plans?
 18 A Correct.
 19 MR. HARBECK: Objection, leading.
 20 ALJ BOLDT: Sustained.
 21 Q Has Mr. Bath altered his recommendations upon
 22 reviewing any subsequent plan designs?
 23 A I don't recall any alterations other than, you know,
 24 he said that there are other ways of handling these
 25 types of situations as well, that there's more than

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1 one alternative that can be -- or one technique that
 2 can be used, but as far as ways, you know,
 3 recommended in his report, he hasn't altered that.
 4 Q And as you're --
 5 MS. CORRELL: Strike that.
 6 Q Are your design plans identifying additional tools
 7 that will be implemented beyond the surcharge loading
 8 that Mr. Gallo just asked you about?
 9 A Well --
 10 Q Which he defined as simply the excavation and the
 11 placement of the geotextile fabric?
 12 A We'll also be incorporating the structural grid or
 13 the uni-axial and biaxial grid as part of -- to help
 14 carry the load of the roadway through that stretch.
 15 MR. MEYER: I have a clarification
 16 question. Is that what you referred to as the
 17 snowshoes?
 18 THE WITNESS: Yeah, the biaxial membrane or
 19 grid would create that snowshoe effect to help
 20 spread the load to control the settlement.
 21 MR. MEYER: Thank you for that
 22 clarification.
 23 ALJ BOLDT: Can I ask you a question? When
 24 we were looking at the soil boring and analysis
 25 of the soil types, there's not a category of

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1 MS. KAVANAUGH: Okay. Let me just ask one
 2 question then if it's okay, Judge. The one soil
 3 boring showed no (inaudible) zero or none,
 4 right, so -- and the Judge asked if there's
 5 anything worse or lower than none, correct?
 6 THE WITNESS: Not that I'm --
 7 MS. KAVANAUGH: So if he's assuming that
 8 all the other soil is as bad as that soil would
 9 there be a purpose to doing any more borings
 10 just to establish that that soil was as bad as
 11 all the rest of the soil?
 12 MR. HARBECK: I object both on leading and
 13 foundation. She's asking what someone else may
 14 or may not be assuming so --
 15 MS. KAVANAUGH: Okay. Well --
 16 MS. CORRELL: However --
 17 ALJ BOLDT: I think he already answered the
 18 question.
 19 MS. KAVANAUGH: Okay.
 20 ALJ BOLDT: Any other questions? We do
 21 have a number of other witnesses.
 22 MS. CORRELL: Just quickly.
 23 I'll -- Mr. Meyer?
 24 MR. MEYER: I don't want to muck this up
 25 anymore.

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1 less than none in terms of carrying capacity, is
 2 there?
 3 THE WITNESS: Not that I'm aware of.
 4 ALJ BOLDT: So if he was operating on the
 5 assumption that that same soil type of no
 6 carrying capacity continued on, would that be a
 7 reasonable judgment to make from an engineering
 8 standpoint?
 9 THE WITNESS: You know, again, I'm
 10 deferring to his expertise and he has the
 11 mapping available as well as the boring he took
 12 so I'm assuming that's a safe judgment.
 13 ALJ BOLDT: Okay. Any other questions of
 14 this witness?
 15 MS. CORRELL: Yeah.
 16 Q Along those lines, is it your understanding in
 17 conversations with Mr. Bath --
 18 MS. CORRELL: Strike that.
 19 Q In your conversations with Mr. Bath in preparation
 20 for hearing today that he assumed worst case scenario
 21 in terms of not conducting additional soil
 22 borings --
 23 MR. HARBECK: Objection, leading.
 24 MS. KAVANAUGH: Can I ask --
 25 MS. CORRELL: Sure.

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1 MR. HARBECK: Pun intended?
 2 CROSS-EXAMINATION
 3 BY MR. MEYER:
 4 Q There was -- in the east/west stretch there are going
 5 to be four culverts placed and they're eight-inch
 6 culverts?
 7 A Correct.
 8 Q To your knowledge, how many culverts are there now
 9 and what is their diameter?
 10 A In the east/west stretch to my knowledge there is one
 11 and I believe it's about an 18-inch culvert, but it's
 12 partially buried too. So it may not be acting as an
 13 18-inch culvert but I believe it's an 18-inch
 14 culvert.
 15 Q Thank you.
 16 MR. MEYER: That's all.
 17 ALJ BOLDT: Does anybody else have any
 18 questions?
 19 MR. GALLO: One quick one.
 20 ALJ BOLDT: Mr. Gallo.
 21 RE-CROSS-EXAMINATION
 22 BY MR. GALLO:
 23 Q I'm going to ask --
 24 MR. HARBECK: Before you ask that, can we
 25 just have 30 seconds?

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1 ALJ BOLDT: Sure.
 2 Q Two quick questions.
 3 A Okay.
 4 Q Do you have any experience and were you on the drill
 5 rig when they did the drilling and sampling and do
 6 you have any personal experience with the analysis of
 7 soils?
 8 A Typically, I'm never out there when the drillers are
 9 out there. It's not -- it's not in my area of
 10 expertise, absolutely.
 11 Q You're relying entirely upon the expertise of the
 12 geotechnical engineer?
 13 MS. CORRELL: Objection.
 14 Q Is that correct?
 15 ALJ BOLDT: She didn't state an objection
 16 other than saying objection so go ahead and
 17 answer it.
 18 A Yeah, on all my projects as far as the design
 19 parameters and what type of roadway section is built,
 20 I base my soils-related functions on the geotechnical
 21 report that's submitted to me. I mean, obviously,
 22 I've done this for 24 years and I'm familiar with the
 23 soil reports and the variety of soils that are out
 24 there, but when it comes to designing the roadway and
 25 what I use to design it, I rely on what's given to me

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1 ALJ BOLDT: Overruled. If you can answer
 2 it, answer it.
 3 A Well, I thought we talked about this, but I might be
 4 mixing it up.
 5 ALJ BOLDT: Maybe Mr. Gallo does repeat
 6 himself.
 7 A I think what we talked about is I guess settlement on
 8 the existing roadway versus settlement of a new
 9 roadway further into the wetland and those -- there
 10 would be differences in the settlement, but with my
 11 discussions with Mr. Bath, that's why we're
 12 introducing the geo-grid, the reinforcement grid, for
 13 the area that's filled into the wetland or the
 14 portion of the roadway that's filled in the wetland.
 15 MR. MEYER: And can I clarify? That's the
 16 difference --
 17 ALJ BOLDT: So whatever the soil type, it
 18 would have the same engineering solution in
 19 terms of building a roadway, is that a fair
 20 understanding of what you just said? I mean the
 21 potential difference between the existing
 22 roadway and the wetland area?
 23 THE WITNESS: As far as adding the
 24 reinforcing grid, we would -- we're going to be
 25 excavating that existing roadway base or the

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1 in the geotechnical report.
 2 Q Okay. From your knowledge and experience as a civil
 3 engineer, there's been discussion and questions
 4 regarding this Boring B4 and one of the DNR attorneys
 5 asked whether or not if Boring 4 would be essentially
 6 the same as a boring out in the wetlands. She was
 7 making a point that there would be no need to do
 8 additional borings. My question to you is that
 9 Boring 4, with the surcharge loading for a number of
 10 years, is that significantly different than a boring
 11 that would be located in the wetland without any
 12 surcharge?
 13 MS. KAVANAUGH: It's sort of vague. I
 14 guess I'd object. You know, different in what
 15 way and I don't think -- I think the question
 16 was, you know, if the soil was as bad or
 17 something and it wasn't answered because it was
 18 objected to.
 19 Q With the surcharge in Boring 4, the lower soils, the
 20 muck, would experience compression over time. Would
 21 the soil characteristics be different in a boring
 22 located within the wetlands that did not experience
 23 any surcharge?
 24 MS. CORRELL: Objection, calls for
 25 speculation.

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1 existing core down to at least our subgrade
 2 because we have to introduce the new gravel and
 3 asphalt and then -- so we would most likely be
 4 running that geotextile reinforcing grid right
 5 across that existing roadway core as well.
 6 ALJ BOLDT: Okay. Was there another
 7 question?
 8 MR. MEYER: I just want to clarify. This
 9 geotechnical cloth (inaudible) geotechnical
 10 grid, those are two different steps and two
 11 different components, is that correct?
 12 THE WITNESS: Yeah -- yes.
 13 MR. MEYER: Thank you.
 14 MR. GLEISNER: Your Honor?
 15 ALJ BOLDT: Yes.
 16 MR. GLEISNER: I just have a couple
 17 questions based on what has just been testified
 18 to.
 19 RE-CROSS-EXAMINATION
 20 BY MR. GLEISNER:
 21 Q What's a land bridge, sir?
 22 A A land bridge?
 23 Q Yes.
 24 MS. CORRELL: Objection, relevance.
 25 MR. GLEISNER: Okay. Let's do a

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1 foundation.
 2 Q If the geotechnical --
 3 MR. GLEISNER: Strike that.
 4 Q Could the geotechnical fail if the soil was
 5 sufficiently lacking in support capabilities?
 6 MR. MEYER: Well, we just clarified there's
 7 two geotechnicals. Counsel, which one are you
 8 referring to?
 9 MR. GLEISNER: I guess I'm going to ask
 10 with regard to both of them.
 11 Q Is there a potential for either of them to fail if
 12 the soil support is sufficiently lacking? Do you
 13 understand the question?
 14 A I suppose there is always that potential. You know,
 15 it's happened. I don't know if there was geo-grid
 16 involved or not, but I know there's been failures.
 17 Q And if there were a failure would a land bridge
 18 become an option?
 19 A Are you talking something structural --
 20 Q Yes.
 21 A -- on piers? That's an option, you know, not from a
 22 cost standpoint, but obviously --
 23 MR. GLEISNER: No other questions, Your
 24 Honor.
 25 A -- there's still some wetland impacts associated

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1 order for the road to not fail, did he?
 2 A I don't recall seeing anything.
 3 Q And did you reach an opinion within a reasonable
 4 degree of professional certainty regarding the design
 5 characteristics that will be incorporated in the
 6 final plans that you will be able to build a sound
 7 road for the DNR public boating access site?
 8 HARBECK: Objection to the form of the
 9 question, it's leading and he hasn't ever said
 10 exactly the words that she just tried to put in
 11 his mouth.
 12 MS. CORRELL: I asked a question, does he
 13 have an opinion.
 14 ALJ BOLDT: No, no, she's asking if he had
 15 a -- the objection is overruled. Does he have
 16 an opinion I think --
 17 Q And what is that opinion?
 18 ALJ BOLDT: Well, he didn't -- did you say
 19 you have an opinion?
 20 MS. CORRELL: Oh, sorry.
 21 ALJ BOLDT: Do you have an opinion on that
 22 question that she just asked you?
 23 MS. CORRELL: I can restate the question.
 24 THE WITNESS: Could you restate the
 25 question? I'm sorry.

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1 with that if we were to build it in this same
 2 alignment.
 3 MR. GLEISNER: Thank you, Judge.
 4 MS. CORRELL: I have two other questions
 5 elicited from these questions.
 6 REDIRECT EXAMINATION
 7 BY MS. CORRELL:
 8 Q Number one is have you reviewed or received any
 9 competing recommendations in terms of the soils
 10 analysis and recommendations that should be followed
 11 for this project site competing to the GESTRA report?
 12 A I guess what I've heard during the hearing.
 13 Q So I guess just take that one step further. I
 14 believe Don Reinbold testified that you need to tear
 15 out the entire existing road and take various other
 16 measures. Do you believe that that's cost effective
 17 or necessary for this project?
 18 A No, based on the type of facility we're building and,
 19 again, the recommendations from my geotechnical
 20 engineer, that would be, you know, best case scenario
 21 I guess from a roadway standpoint but, like I said,
 22 it's not necessary based on recommendations from my
 23 geotechnical engineer.
 24 Q And Mr. Giese didn't provide you an alternate soils
 25 analysis with recommendations of must do items in

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1 Q Have you formed an opinion within a reasonable degree
 2 of professional certainty whether the public access
 3 road as designed in its final plans will meet sound
 4 engineering practices?
 5 A I believe it will and also based on the
 6 recommendations from the geotechnical expert.
 7 ALJ BOLDT: I'm sorry, so you do have an
 8 opinion and your opinion is that yes, you can?
 9 THE WITNESS: I'm sorry.
 10 ALJ BOLDT: Is that -- you said believe and
 11 that's not a standard for expert testimony.
 12 THE WITNESS: Okay. Yes, it is my opinion
 13 that we can build a reasonable roadway facility
 14 safe for the public use in this instance.
 15 Q And in worse case scenario if there is any movement
 16 subsequent to the as-built proof roll and prior to
 17 placement of asphalt, do you have engineering tools
 18 available to address those concerns?
 19 A Yes, in conversations with my geotechnical expert
 20 there's other options that can be done.
 21 Q Thank you.
 22 ALJ BOLDT: Any other questions of this
 23 witness.
 24 MR. HARBECK: Judge, I have a couple just
 25 based upon those questions right there.

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CROSS-EXAMINATION

1
2 BY MR. HARBECK:
3 Q I'd like to just point you to Exhibit 143.
4 A Uh-huh.
5 Q And you were here for the testimony when both
6 Mr. Giese and Mr. Reinbold testified as to the
7 calculations reflected in here -- in this exhibit?
8 Were you here?
9 A The wetland calculations?
10 Q Yes.
11 A Yes.
12 Q The wetlands impacts calculations?
13 A Yes.
14 MS. KAVANAUGH: Their wetland impact
15 calculations?
16 Q The calculations they made on Exhibit 143 which show
17 additional wetlands impacts?
18 A Right.
19 Q My question to you initially is have you personally
20 done any calculations of wetlands impacts from the
21 construction of this road?
22 A Working my project engineer we created the areas of
23 our wetland impacts for the roadway that's portrayed
24 right here.
25 Q Right, but my question to you -- let me ask it a

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1 question then for the record.

REDIRECT EXAMINATION

2
3 BY MS. CORRELL:
4 Q What's just been referred to on Exhibit 143 presumes
5 additional wetland impacts beyond those contemplated
6 by the design -- I'm sorry, by the design that Kapur
7 created, is that correct?
8 A I believe so. I think all the numbers on here were
9 not generated by Kapur.
10 Q Right. So that's a hypothetical situation that
11 includes failure of the access road, is that correct?
12 MR. HARBECK: That's -- I object to the
13 form of the question, that's not what they
14 testified to.
15 MS. CORRELL: Right.
16 ALJ BOLDT: The objection is sustained just
17 for the record. I think she's rephrasing it.
18 Q Does the hand-drawn I guess trapezoidal and
19 various -- do the hand-drawn areas shown on
20 Exhibit 143 indicate following the design standards
21 and design implementation that Kapur intends to
22 follow?
23 A No, those do not.
24 Q What do they assume?
25 A They assume, from the testimony, a larger excavation

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1 little different way. Have you personally analyzed
2 the conclusions personally, yourself, analyzed the
3 conclusions and opinions that they testified to with
4 respect to the additional wetlands impact from the
5 construction of this road? Have you done those
6 calculations personally yourself?
7 A I haven't verified those calculations, no.
8 Q Okay. At this point, you don't have any personal
9 ability to dispute the calculations reflected on
10 Exhibit 143, correct?
11 A No, I don't.
12 Q You don't have the ability to do that, correct?
13 A Well, I --
14 Q You haven't done it?
15 A I haven't done it.
16 Q Okay. So sitting here today, you don't personally
17 have -- you can't personally say you've done
18 calculations within which you can dispute that
19 additional wetlands impact from the construction of
20 this road as testified to by Mr. Giese and
21 Mr. Reinbold, correct?
22 A I can't dispute utilizing the excavation methods they
23 discussed. I can't dispute those numbers, no.
24 Q Okay. Thank you.
25 MS. CORRELL: And I guess I have to ask a

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1 of wetland to build the roadway. Larger meaning
2 further impacts to the north in this case.
3 Q And I believe you've already testified to this, but
4 in your professional opinion, within a reasonable
5 degree of professional certainty, do you believe that
6 amount of excavation is necessary for this site?
7 MR. HARBECK: Object, Your Honor,
8 foundation, he's already testified he hasn't
9 done his own calculation on this. He hasn't
10 personally analyzed it.
11 MS. CORRELL: I didn't ask that question.
12 MS. KAVANAUGH: She didn't ask that, she
13 asked whether he thought --
14 ALJ BOLDT: The objection is overruled.
15 Answer it if you can.
16 A No, the wetland impacts we calculated were based on
17 the recommendations from our geotechnical GESTRA
18 engineering in this instance.
19 Q And do you believe that the type of more complete
20 excavation that Mr. Reinbold testified to is
21 necessary in your professional opinion to complete
22 this access road?
23 A No, I believe the recommendation that GESTRA put
24 forth is adequate and will provide the proper
25 roadway.

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1 Q Would it be a different situation if you were
2 designing a public highway?
3 A Well, it might be but, like I said, we've done other
4 roadways where we haven't done the full depth
5 excavation as well so, you know, it's kind of a
6 case-by-case basis on the project and our
7 constraints.

8 Q All right. Thank you.

9 MR. MEYER: Just for the record,
10 Mr. Examiner, can I just make the suggestion
11 that the recent comments about -- what is that
12 exhibit number?

13 MR. GLEISNER: 143, Counsel.

14 MR. MEYER: 143 were relevant where related
15 to the calculations in green that appear thereon
16 and (inaudible) additional lines. Just so it's
17 clear for the record.

18 ALJ BOLDT: I think that's right. I think
19 that was understood wasn't it, Mr. Harbeck?

20 MR. GLEISNER: I think so, Your Honor.

21 MR. GALLO: No objection.

22 ALJ BOLDT: And the same for the witness,
23 that's what you understood?

24 THE WITNESS: Yes.

25 ALJ BOLDT: Okay.

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1 there was that objection that certainly these
2 witnesses were disclosed. The confusion,
3 insomuch as there was any confusion, was related
4 to the use of the word rebuttal rather than
5 responsive, is the way I interpreted it.

6 MR. HARBECK: Your Honor, if I could just
7 for the record also say they were disclosed
8 after the deadline for disclosure of witnesses.
9 And there's more to it which we've already put
10 on the record so I don't want to belabor the
11 point, but that was part of it so --

12 MS. KAVANAUGH: And I'd like to put on the
13 record that some of Mr. Gallo's witnesses were
14 disclosed after the deadline for exchanging
15 witness lists as well -- for the record two
16 twice.

17 MR. HARBECK: The only other difference is
18 ours -- any witnesses disclosed by Mr. Gallo
19 before the discovery deadline, we would have
20 made them available for deposition. Yours came
21 after the discovery deadline so that was it part
22 and parcel.

23 MS. CORRELL: Well, you deposed Mr. Wakeman
24 after that deadline as well so --

25 ALJ BOLDT: Okay. I mean certainly if the

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1 MS. CORRELL: And I guess I would mark and
2 move the resume. I'm not sure what number we're
3 at.

4 ALJ BOLDT: 223 is received. Okay. Thank
5 you very much. And just since that was the one
6 where you objected about the depositions I'll
7 just note that NR211 talks about discovery and
8 Class 1 and Class 3 proceedings and it reads as
9 follows. NR211(2) for good cause shown the
10 Department or Administrative Law Judge may allow
11 pre-hearing discovery and the preservation of
12 evidence in any Class 1 proceeding or Class 3
13 proceeding as provided under Chapter 804 Stats.
14 Any order allowing discovery or the preservation
15 of evidence may include any reasonable
16 limitations on the scope and extent of discovery
17 as the Department or Administrative Law Judge
18 deems appropriate under the circumstances. In
19 Class 1 and Class 3 proceedings they give some
20 factors to determine when you can preserve
21 evidence for the purposes of using -- I think
22 that's for the purpose of using a deposition at
23 hearing in place of live testimony.

24 Okay. With that, the witness is excused
25 and I would also note just for the record since

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1 issue of the depositions came up I obviously
2 used my discretion to allow a lot of discovery,
3 including multiple depositions of some witnesses
4 from the Department.

5 MS. KAVANAUGH: Without you having to show
6 good cause.

7 ALJ BOLDT: I certainly would have been
8 inclined to allow you to take those depositions
9 if you'd raised the issue or if you had a
10 question about those supplemental witnesses so
11 that's -- we don't want to get into that again,
12 but that's -- I just thought it was important to
13 make the record complete.

14 Okay. Let's move on to the next witness.

15 MS. KAVANAUGH: Can we take a two-minute
16 bathroom break? Just a glass of water and --

17 MS. CORRELL: We're going to be calling
18 Mr. Kruger so we can start getting that ready.

19 ALJ BOLDT: Okay. We'll go off the record.
20 Let's keep it real close though.

21 (Recess taken)

22 ALJ BOLDT: Okay. Now we are on the record
23 and can I ask you to raise your right hand. Do
24 you swear to tell the truth, the whole truth and
25 nothing but the truth, so help you God?

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1 MR. KRUGER: Yes.
 2 DIRECT EXAMINATION
 3 BY MS. KAVANAUGH:
 4 Q Okay. Can you state and spell your full name and
 5 work address for the record?
 6 A Kurt Kruger, K-U-R-T, K-R-U-G-E-R and my work address
 7 is 7711 North Port Washington Road, Milwaukee.
 8 Q And your current employer, sir?
 9 A Kapur and Associates.
 10 Q And your current position?
 11 A I'm a survey project manager.
 12 Q Okay. And are you a registered land surveyor?
 13 A Yes.
 14 Q Okay. If you take a look at the first exhibit and I
 15 haven't marked the number because I wasn't
 16 sure -- the one that says A. Can you identify what
 17 that packet of documents is?
 18 A Yes, it's my resume and some of my other work
 19 experience.
 20 UNIDENTIFIED SPEAKER: It's 224.
 21 MS. KAVANAUGH: 224? Okay.
 22 Q And can you go through that packet and just briefly
 23 identify each document you provided in regard to your
 24 work experience and educational training?
 25 A The first page is my actual one-page resume. The

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1 it's a job that we're doing a survey for a design on
 2 and get the job set up (inaudible) get the right
 3 datum, get the right methods picked for the right end
 4 result that we're desiring. And then we watch the
 5 data as it's collected and keep track of it through
 6 the process and then a final check at the end to make
 7 sure that it's what we needed to get while we were
 8 out there.
 9 Q Okay. Are you familiar with the surveying work that
 10 Kapur and Associates performed for DNR in regard to
 11 the boat launch site that's the subject of this
 12 hearing?
 13 A Yes.
 14 Q Did you have a role in performing or overseeing that
 15 work?
 16 A Yes, I did.
 17 Q And what was your role?
 18 A Again, pretty much what I've just stated,
 19 we -- my -- you know, talked with Kurt because he was
 20 going to be designing it, ascertained what he needed
 21 to do his job and got him the right datum and used
 22 the right methods and the right equipment to get to
 23 that end result that was desirable of Kurt.
 24 Q Okay. So you performed the functions you just
 25 mentioned for this particular site?

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1 second page which is now marked Exhibit B is my
 2 license from the State. The third page, C --
 3 Q As a registered land surveyor?
 4 A As a registered land surveyor. The third page is my
 5 current registration. Exhibit D is a certificate of
 6 membership in the Wisconsin Society of Land Surveyors
 7 that I've been a member of since 1988. Exhibit E is
 8 an award that I received working on the Marquette
 9 Interchange Project in Milwaukee. Exhibit F is
 10 another award of appreciation for work that I did on
 11 the Marquette Interchange.
 12 Q Okay. So referring to those exhibits can you just
 13 briefly highlight your professional education
 14 experience and accreditation for us? Just kind of
 15 hit the highlights.
 16 MR. GLEISNER: We'll stipulate to his
 17 credentials, Your Honor.
 18 MS. KAVANAUGH: As a registered land
 19 surveyor and as an expert surveyor?
 20 MR. GLEISNER: Yes, we'll stipulate to
 21 that.
 22 MS. KAVANAUGH: Okay.
 23 Q What are your duties in your current job as a survey
 24 project manager for Kapur and Associates?
 25 A Well, additionally I'll work with the designers if

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1 A Yes.
 2 Q Okay. Have you visited the DNR site?
 3 A Yes.
 4 Q How often?
 5 A Once.
 6 Q Okay. And who performed the actual survey and field
 7 work at the DNR site?
 8 A We had a number of different party chiefs out there.
 9 Probably the guy that was out there the most was
 10 Chris Morazik (phonetic).
 11 Q Okay. And in the packet of information provided, I
 12 believe there's a resume for Mr. Morazik. Hopefully
 13 there is. And then were there any other surveying
 14 techs that had visited the site and done work out
 15 there?
 16 MR. GLEISNER: Wait. Counsel, wait a
 17 minute. Did you say that there's another resume
 18 here?
 19 MS. KAVANAUGH: I thought there was one for
 20 Chris unless I stuck them all in the wrong
 21 place. I thought I put it in Number 2 for Chris
 22 Morazik. Maybe I stuck them all in the wrong
 23 one. Let me see.
 24 MR. HARBECK: No, no, we have this. Are
 25 you just simply asking has he included it in the

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1 packet, the resumes of other people that were
2 involved?
3 MS. KAVANAUGH: Yes, yes, and who they are,
4 identify them for you, so that we have the
5 credentials of the folks who did the field work
6 available.
7 MR. GLEISNER: Well, we aren't going to
8 stipulate to that, Your Honor. I mean we'll
9 stipulate to his credentials, but -- you know,
10 and he can testify as to people he's relied on,
11 but we're not going to stipulate to other
12 people's credentials.
13 MS. KAVANAUGH: We're not asking you to
14 stipulate to them, I'm asking him to identify
15 the resumes and then I'll ask his opinion of
16 their training and their qualifications as their
17 supervisor.
18 ALJ BOLDT: Okay. Go ahead.
19 A So the question was?
20 Q The question was have you -- is there provided there
21 a resume for Chris Morazik?
22 A Yes.
23 Q Okay.
24 MS. KAVANAUGH: And is that 225 Tim then?
25 UNIDENTIFIED SPEAKER: Yeah.

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1 and reliability of their field work?
2 A Yes.
3 Q Does Kapur have certain protocols and standards that
4 its survey techs use in the field when they're
5 selecting points to survey, carrying out the survey,
6 and recording the results?
7 A Yes, they do.
8 Q And does Kapur train its survey crews in their
9 protocols and standards?
10 A Yes.
11 Q Was anyone from DNR on site with the surveying crews
12 when surveying was being performed?
13 A Yes, they were.
14 Q And do you know who that was?
15 A (Inaudible) was out there, Pete Wood was out there,
16 Andy Hudak was out there.
17 Q Okay. And so Kapur -- let's discuss the surveying
18 they did do in relation to the DNR project. Did they
19 do any surveying outside of the DNR property?
20 A No.
21 Q Okay. Did they do any surveying in the large wetland
22 west of the DNR property?
23 A No, with a couple of exceptions. We went into that
24 wetland a little bit to locate the flags that were
25 set for us delineating the wetlands.

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1 A Exhibit 225.
2 MS. KAVANAUGH: And is there a resume for
3 someone else in that packet?
4 UNIDENTIFIED SPEAKER: A single page loose
5 one.
6 MS. KAVANAUGH: Oh, I thought there were
7 more than one. Anthony Batchter (phonetic)?
8 UNIDENTIFIED SPEAKER: 226.
9 MS. KAVANAUGH: Should be one in both of
10 those. Thank you.
11 UNIDENTIFIED SPEAKER: That's the last one.
12 MS. KAVANAUGH: Okay.
13 Q Were these survey technicians and survey chiefs part
14 of the team that did work on the DNR project?
15 A Yes.
16 Q Okay. And Chris' resume shows he's a surveying crew
17 chief for Kapur and Associates, correct?
18 A Yes.
19 Q Okay. And Tony's shows that he has an AD in
20 surveying from Nicolet Technical College, correct?
21 A Yes.
22 Q Okay. Have you worked with them before?
23 A Yes, I've worked with each of them for more than ten
24 years.
25 Q Okay. And have you been satisfied with the quality

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1 Q The ordinary high water mark?
2 A Yeah, the ordinary high water mark.
3 Q Okay. And so the two exceptions are you delineated
4 the ordinary high water mark and the flags were set.
5 Do you know who set the flags?
6 A I believe that Andy set them.
7 Q And I think that's what he testified. And then you
8 helped -- you did the surveying for the delineation
9 that had been performed on the wetland?
10 A Yes.
11 Q Okay. Can you briefly explain the surveying that
12 Kapur did for the DNR project?
13 A Well, we located the access road horizontally and
14 vertically and we located the areas along -- in
15 between the two residences. We also spent a little
16 bit of time in the depressed area, the channel where
17 water goes in and out along the north edge of the
18 property, and the ordinary high water mark of the
19 lake itself. We also located some elevations in the
20 water, you know (inaudible) --
21 Q Of North Lake?
22 A Yeah.
23 Q Okay. And what about that small tongue of wetland
24 that they talked about, did you guys survey that, the
25 one that's in the parking lot area?

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1 A Yes, we did --
 2 Q Okay.
 3 A -- as Andy had located it.
 4 Q Okay. And did you survey the mass points to create
 5 the topo maps that show the contour lines of the
 6 site?
 7 A Yes.
 8 Q Okay. And did you survey and locate the property
 9 lines and the easement?
 10 A No, we had the data, but it had already been surveyed
 11 and we did not disagree with what had -- was in
 12 place.
 13 Q Okay. In fact, I think it might have been a survey
 14 admitted into evidence in one of their things. Okay.
 15 Can you tell us a bit, you know, for we
 16 non-scientists, when you're surveying, what are you
 17 trying to do when you survey to create a topo map or
 18 determine the elevations of ordinary high water marks
 19 and points and contour lines? What's the theory
 20 here?
 21 A Very simply stated, the surveying is really the
 22 relative position of one object against another
 23 object and, in this case, our starting points that
 24 were chosen were 29 data benchmarks that were set by
 25 SEWPRC. They have those in the seven counties at

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1 benchmark near the monument that's a lot more
 2 vertically stable and so that's what we used as the
 3 more vertically stable marks out there and on this
 4 particular job they're very reliable. We've gone
 5 through projects where we've tied into 400 of these
 6 and then one was out of bounds, but so we also
 7 checked the second one and ran between the two to
 8 check and make sure that the elevations matched each
 9 other and that one of the benchmarks was not
 10 disturbed. And so horizontally and vertically these
 11 are all of our -- the basis for our values.
 12 Q Control points? Okay. So before you -- what you're
 13 trying to do in surveying is determine, like you
 14 said, the relative positions of things and this is
 15 horizontal and vertical so we're talking 3D right?
 16 A Yes.
 17 Q And these points you just measured are where the
 18 control points where you start from to figure out
 19 what's a good number or --
 20 A Yes, these were the starting -- these values were
 21 what we based our values on.
 22 Q Okay.
 23 A We transferred these values into the site.
 24 Q Okay. So the fact that they're good stable confirmed
 25 values enhances the reliability of what you've done

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1 about half mile intervals, depending upon where the
 2 USBLS land quarters are.
 3 Q Okay. Let me interrupt you just a sec.
 4 MS. KAVANAUGH: There's another exhibit and
 5 I think I might have marked it A again by
 6 accident so you'll have to re-number it Tim
 7 maybe. Would that be 227 maybe?
 8 Q Can you identify this one that says at the bottom
 9 Control Summary Survey Diagram Section Surveys Town
 10 of Merton?
 11 A Yes.
 12 Q Is that the control points you're talking about?
 13 A Yeah, these are the control points that -- well, we
 14 found these monuments and we used them for horizontal
 15 positions.
 16 Q Okay. And can you go through this exhibit
 17 pretty -- fairly briefly and just identify, so it'd
 18 be 227A, the first page and the different pages here?
 19 A 227A is -- well, it's a summary of the six actions
 20 that are in the area there with all the associated
 21 coordinates and elevations on the section corner
 22 monuments themselves. Exhibit B is a more detailed
 23 look at one of the section corner monuments and along
 24 with that the elevation of the monument is on here,
 25 but there's also an elevation of a reference

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1 because --
 2 A Yes.
 3 Q -- you're starting with something that's good?
 4 A Yes.
 5 Q Okay. So what -- and once you have your control
 6 points here and your benchmarks, is the purpose -- I
 7 know you go out into field and then you start
 8 shooting points. Is the purpose for which you're
 9 locating various features on the land relevant as far
 10 as deciding how many points you need to shoot in the
 11 field?
 12 A Yes, absolutely.
 13 Q Okay. And why is that?
 14 A You can spend a lot of time gathering information
 15 that won't be used.
 16 Q Okay. So what you're trying to do is figure out what
 17 you need to be pretty sure about what you need to
 18 know?
 19 A Yeah.
 20 Q Okay. And anything past that, any surveying past
 21 that, is just wasted time and money, is that --
 22 A Yes.
 23 Q Okay. Now, some of the earlier witnesses testified
 24 that Kapur should have surveyed the bed of the
 25 adjacent wetland to determine if there were any

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1 channels on the bed, etcetera. For the purpose
 2 that -- was any of that information needed to ensure
 3 this survey was accurate for the purpose for which
 4 you were asked to survey?
 5 A The purpose for which we were asked to survey was for
 6 constructability of the access road and the boat
 7 launch and, you know, parking lot facilities. It was
 8 not for the purpose of determining any channels out
 9 in the wetlands.
 10 Q Okay. Now, you did establish elevations for certain
 11 regulatory things though I think you testified like
 12 the ordinary high water mark and things like that?
 13 A Yes, things that would affect -- we specifically
 14 located things that would affect construction.
 15 Q Okay. And that would be the -- so you measured like
 16 the access road elevations?
 17 A Yes.
 18 Q And the culverts, the inverts and --
 19 A Uh-huh.
 20 Q -- heights, and all of that in locations --
 21 A Yes.
 22 Q -- and -- okay. Now, can you explain to us how
 23 points are shot in the field nowadays from what
 24 I -- the protocol?
 25 A There's different types of equipment and the

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1 MS. KAVANAUGH: But you're contesting what
 2 should have been done, the scope yes, so we've
 3 got to talk about what they did do and why it
 4 was adequate for the scope --
 5 MR. GALLO: I would stipulate to the
 6 accuracy.
 7 MS. CORRELL: But you won't stipulate to
 8 surveying that needed to be done?
 9 MS. KAVANAUGH: For a construction project.
 10 MS. CORRELL: Your allegation that --
 11 MR. HARBECK: If you want to just go on,
 12 just go on and do what you want to do.
 13 MS. KAVANAUGH: Okay. I'll finish. It's
 14 pretty quick.
 15 Q Okay. Can you explain the equipment you mentioned,
 16 the equipment that's robotic total stations? How
 17 does that work?
 18 A Well, it follows the man in the field. It's just a
 19 one-man operation and so it takes out all human error
 20 of the observation and his task then is to be able to
 21 generate enough data to generate a surface model.
 22 Q Okay. And so that means like the lay of the land,
 23 the topography, and that kind of thing, you know?
 24 A Yeah.
 25 Q And how accurate is all the observations, the shots

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1 equipment that was used out here was robotic total
 2 stations and --
 3 Q I'm sorry, can you spell that?
 4 A Robotic, R-O-B-O-T-I-C. Total station is T-O-T-A-L
 5 and station, S-T-A-T-I-O-N.
 6 Q Oh, okay, gotcha.
 7 A And it's a tool that measures horizontal and vertical
 8 angles. The ones that we had out here are capable of
 9 three-second measurements -- three-second angular
 10 measurements.
 11 MR. GALLO: Excuse me, I don't think we're
 12 contesting anything they did.
 13 MS. KAVANAUGH: Well, you are contesting
 14 that -- there have been at least hints about
 15 they should have shot here, they should have
 16 done this, there should have been more shots,
 17 points in the grove of trees, they may have
 18 missed some of the elevations in the grove of
 19 trees, blah, blah, blah. You know, so what I'm
 20 establishing here is what they did here to show
 21 that the surveying was adequate for what they
 22 did and that it was top of the line.
 23 MR. GALLO: Well, we're not contesting any
 24 of the accuracy so what you're talking about is
 25 the scope.

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1 they make here, in terms of tolerance and --
 2 A Well, it depends a little bit on how far away they
 3 are from the instrument, but we always check how
 4 accurate they actually are. That's -- you know, it's
 5 based on a positional tolerance of where the gun is
 6 and the positional tolerance of what they viewed to
 7 orient and the distance that they are from it and all
 8 of those accuracies were about a quarter of an inch
 9 or three-eighths of an inch at the worst.
 10 Q Okay. And does it shoot just one observation at each
 11 point shot -- the machine?
 12 A You can set it to take multiple observations. We
 13 usually set it to take five. It goes pretty quick
 14 and it's a pretty easy check and if there's --
 15 Q Like -- yeah.
 16 A -- any kind of obstruction that would influence the
 17 distance, one of those five measurements will be
 18 reflected --
 19 Q Will show it.
 20 A -- and it will warn us that your distance is no
 21 good.
 22 Q Okay. And in terms of -- let's talk about those
 23 obstructions that would influence it. The purpose of
 24 making these shots -- they're called -- these sample
 25 points are mass points, is that the right term?

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1 A Yes.
 2 Q Okay. And you're shooting a bunch of them. How do
 3 they decide where to go and shoot on the property
 4 where a shot needs to be taken?
 5 A Well, originally before this technical was available
 6 we would take at individual stations that would be
 7 specified to us or individual intervals, maybe they'd
 8 be 100 feet or 50 feet, and walk sideways from that
 9 and try to establish the elevation of each break in
 10 the ground. And they can tend to kind of follow that
 11 now, but where it becomes very flat additional points
 12 just aren't necessary because the computer will use
 13 the information that they do collect and cut the
 14 sections itself.
 15 Q Okay. Okay. So -- and can you explain to the Judge
 16 what a break point is -- a break line, I think
 17 you --
 18 A Yeah. We induce break lines in the field and the
 19 purpose of that is because the computer is a computer
 20 and at random it can connect like say one top of
 21 ditch to the adjacent top of ditch and not realize
 22 that there's a ditch in the middle unless there's a
 23 point directly --
 24 Q Yeah, because it's making lines --
 25 A -- or it can connect a culvert up underneath a

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1 of thing? Do they record their -- do they do a
 2 notebook, do they have, you know --
 3 A Well, they do do a notebook and they make sure that
 4 what they're starting from that day, every day, and
 5 what they're getting oriented to, hasn't moved from
 6 the day before and they record that by hand outside
 7 of the electronic recording and also inside the
 8 electronic recording is the first shot and the last
 9 shot in any one individual setup so that we know
 10 everything in between was good.
 11 Q Okay. And Exhibit 228 in front of you, is that one
 12 of those field notebooks?
 13 MR. HARBECK: I'm sorry, which exhibit?
 14 MR. GLEISNER: 228?
 15 MS. KAVANAUGH: Exhibit 228. Well, it's
 16 not marked yet, I'm sorry. It shows a bunch of
 17 numbers. The one that looks like this.
 18 MR. HARBECK: This one?
 19 MS. KAVANAUGH: Yes.
 20 A I see one over here, yes.
 21 MS. KAVANAUGH: And, forgive me, I'm asking
 22 a couple of little semi-leading questions to
 23 speed things along, but you can object if you've
 24 got a problem.
 25 MR. HARBECK: You've noticed I've

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1 roadway and the profile of the roadway will go down
 2 the elevation of the culvert and back up again. So
 3 we induce break lines and the instruction into the
 4 computer is they can't connect any points that cross
 5 this line.
 6 Q So it's basically telling the computer say if there's
 7 a ridge here or if there's a --
 8 A Yes, a top of a bank or a --
 9 Q -- a culvert or a depression, when you're drawing
 10 your line you can't just go straight across from
 11 dot-to-dot --
 12 A Exactly.
 13 Q -- you know, when you're doing that triangle? Okay.
 14 A Yep.
 15 Q Okay. And then when you -- so they're looking for
 16 interruptions -- your folks out there?
 17 A Yes.
 18 Q And then the machine, when you take those five
 19 observations, at least one of those observations, if
 20 there is one, is going to catch it, right?
 21 A Yes.
 22 Q Okay. So then you once you get all that information
 23 how do you -- what type of controls do you have like
 24 the work they're doing in the field to make sure that
 25 they're properly recording break lines and that type

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1 refrained.
 2 MS. KAVANAUGH: I'm sorry?
 3 MR. HARBECK: You've noticed I've
 4 refrained.
 5 MS. KAVANAUGH: Yes, you've been a dear.
 6 MR. GLEISNER: We're trying to speed this
 7 along.
 8 MS. KAVANAUGH: Okay.
 9 Q So they do these field notebooks and then that shows
 10 the breaks and then that should corroborate what the
 11 machine is recording as well?
 12 A Well, there's -- this is -- there's just a few of the
 13 days of the hand notes that they took out there and
 14 it's kind of their diary --
 15 Q A sample?
 16 A -- and it's a hand documentation of the checks that
 17 they performed to make sure that they're where they
 18 think they are.
 19 Q Okay. So sort of similar to the field notes
 20 (inaudible) -- well, you weren't here, but where they
 21 go out and you take field notes and then you might
 22 put it into a better -- the computer has it in a
 23 better format?
 24 A Yeah, yeah.
 25 Q Okay. So once they get all this information, they've

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1 done their field notes, they've gone out and they've
 2 looked for their break lines to make sure that
 3 they're not extending lines in directions that they
 4 haven't. All of this information goes where -- all
 5 of these observations?
 6 A Well, it comes back in as an electronic data file and
 7 it's brought into Auto Desk's Civil 3D program.
 8 Auto Desk is a worldwide company, well-respected for
 9 their (inaudible) packages and drafting programs.
 10 Q And is that pretty accepted as a, you know,
 11 professionally adequate, as a good program, superior
 12 program, in the surveying field?
 13 A Yes, very much so.
 14 Q And well-used, I mean?
 15 A Well-used.
 16 Q Okay. And then the computer does what with that
 17 information?
 18 A Well, the computer will take the mass points or the
 19 random shots that are out there and use the break
 20 lines that were developed in the field and develop
 21 they call it a triangular or irregular network where
 22 three points are connected together and it's assumed
 23 to be a flat plain in between those three points and
 24 that is a surface model. And then once that's
 25 completed it will display contours at whatever

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1 A On the cover there's just a graphic depiction of
 2 where the points were that they shot that day.
 3 Q Okay.
 4 A And on the inside are the actual coordinates that
 5 were developed, the codes for what they were, and the
 6 standard deviation to each one of those points
 7 (inaudible) elevation.
 8 Q Okay. So you can set what the standard deviation is
 9 that's acceptable?
 10 A Yes. And then as an additional check we usually sort
 11 all the points for that day based on the worst
 12 standard deviation and see how bad the worst shots
 13 are.
 14 Q Okay. So then once you get all of that you said
 15 that, you know, you generate these triangles and I
 16 guess they sort of fit together almost like if you
 17 were putting together a model except it's in the
 18 computer like, you know, you've got this one at this
 19 elevation, a triangle, and the elevation is like this
 20 or this other one, the elevation is like that, and
 21 they sort of all fit together and you've got a 3D
 22 picture, is --
 23 A Yes, all the triangles have common sides, you know,
 24 and -- but they're all tipped in the direction that
 25 the data that they shot in the field told -- you

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1 interval as long as we're -- you can be a half -- by
 2 foot or (inaudible) standards you can be a half a
 3 contour interval off and still be okay. Obviously,
 4 most of our shots are three-eighths of an inch.
 5 You're not going to make a contour of a half an inch
 6 out there. Everything would be black. So we'll
 7 create a contour map with whatever density that we
 8 need to, to be able to show to the man that was in
 9 the field this is what your data created and they'll
 10 back check it and make sure that, you know, what he
 11 thought he was doing out there was actually done.
 12 Q So to make sure that it sort of looks -- that what
 13 they were working on out there --
 14 A Yes, right.
 15 Q You know, if you come up with a mountain and there
 16 isn't a mountain --
 17 A Right.
 18 Q -- then you've got a problem? Okay.
 19 Q There's an exhibit and I guess I don't have a sticker
 20 on it so I guess this will be 220 --
 21 MS. KAVANAUGH: Is it 228, Tim?
 22 Q No, 229, the one with the points?
 23 A Yeah, that's a different day, but it's the same
 24 concept.
 25 Q Okay. Can you identify what that is?

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1 know, ascertained.
 2 Q And the break lines have to be a side of one of
 3 those?
 4 A The break lines have to be the side of the triangles,
 5 yeah.
 6 Q Because otherwise the lines would be crossing?
 7 A Right, exactly.
 8 Q And making an improper -- an incorrect picture of
 9 what's out there?
 10 A Right.
 11 Q Okay. So once you've got all of that then -- the
 12 contour lines, how do they come up with those because
 13 we've looked at some exhibits that have, you know,
 14 contour lines on the maps and they'll show, you know,
 15 the elevations. Are those prepared from the 3D
 16 computer models or how does that work? How do you
 17 get from A to B?
 18 A Yeah, the contour is one way to display the surface
 19 model in a way that a human can understand.
 20 Q Okay.
 21 A And so if there's a triangle out there that has a
 22 line that starts out at an elevation of say 100 and
 23 ends up at an elevation of 102, well, the 101 contour
 24 would run halfway across that line and it just keeps
 25 following that elevation based on the interpretation

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1 of the elevations of the points of the triangles
 2 until it gets out of sight.
 3 Q So it is sort of fair to say it's kind of like the 3D
 4 map that's been generated by the computer squashed
 5 down into two dimensions, is that -- and then the
 6 lines indicate the up and down instead of actually
 7 having a 3D model?
 8 A It's one way to visualize the elevations from a top
 9 down viewpoint. We also can look at cross-sections
 10 from a sideways viewpoint instead of a top down
 11 viewpoint and those can be expanded to enhance your
 12 ability to understand the site.
 13 Q Okay. The sideways ones, is that what you all were
 14 talking about as the cross-sections or is that
 15 something different?
 16 A No, cross-sections are -- I think there was an
 17 exhibit up here that had a profile in it that
 18 followed the line of those triangles.
 19 Q Okay. But is that the sideways ones you're talking
 20 about?
 21 A Yes.
 22 Q Okay. Gotcha. So if your surveying techs were out
 23 there and they noticed --
 24 MS. KAVANAUGH: No. Okay, let me withdraw
 25 that.

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1 grove of trees and I probably would have done the
 2 same thing that they did.
 3 Q It's pretty flat?
 4 A Yeah.
 5 Q Okay. Regard the complaint that -- and I think
 6 someone testified well, they didn't even locate the
 7 grove of trees or show it on the survey map. Would
 8 it have cost more to locate and draw that grove of
 9 trees? I think their expert did. He had this big
 10 green area showing the drip lines -- their surveyor.
 11 Would that have cost more to locate and draw that
 12 grove of trees on the plan?
 13 A It would have cost more to spend the time to walk out
 14 all the drip lines out there. You know, there's a
 15 lot of different trees out there and so the emphasis
 16 was on the larger trees that would affect the cost
 17 the most.
 18 Q Okay. And would drawing that grove of trees have
 19 provided any useful information for the construction
 20 project?
 21 A I don't believe it would have.
 22 Q Okay. So the computer program, I think you mentioned
 23 the name of it already. Is the data stored directly
 24 into the surveying equipment and I think you said
 25 that it takes the shots and stores the data there, is

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1 Q The survey techs, are they trained in how to
 2 recognize these discontinuities and designate break
 3 lines?
 4 A Yes.
 5 Q Okay. And some of the witnesses, earlier witnesses,
 6 testified Kapur should have shot more points in the
 7 grove of trees that is at issue in this hearing and
 8 should have drawn the trees onto the survey map so
 9 maybe they were thinking more mass points in that
 10 vicinity would have revealed better topography? I
 11 don't know, but they were, you know, saying well,
 12 there should have been more points here, there should
 13 have been -- you know, they should have surveyed more
 14 in there. Now, if your surveying techs that have
 15 been trained to recognize these discontinuities, if
 16 they were out in the field and they noticed an
 17 interruption of slope in the grove of trees, if they
 18 noticed a deep dip, a steep line, a bank, would they
 19 have recorded those areas as break lines?
 20 A Yes, and to the extent that would have affected
 21 constructability and --
 22 Q So the fact that there aren't many survey points in
 23 that area, that doesn't mean the techs just ignored
 24 or missed that area, does it?
 25 A No. And when I was on the site I looked through the

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1 that correct?
 2 A Yes, that's correct. They store it on board.
 3 Q Okay. And then is that input manually into the
 4 computer or do they just connect and --
 5 A Yes, they take the information out of the data
 6 collectors and put them directly in the computer.
 7 Q Okay. And then once the data is transferred is it
 8 available? I think you were talking about standard
 9 deviations and looking for the first ones. You guys
 10 get to do a check of the data?
 11 A Yes, all of the raw data is not --
 12 Q Okay.
 13 A We always store all of the raw data so that we know
 14 what we've got instead of the coordinates just at the
 15 end of it.
 16 Q Okay. And you said you looked for the (inaudible)
 17 when you were doing that, like the worst -- the worst
 18 standard --
 19 A Yeah, we try to sort them by -- no, we don't try to,
 20 we always sort them by their positional qualities and
 21 then look to see which the worst ones are. And if we
 22 have one that we think is starting to approach a
 23 problem, we'll look and see where it is and how it's
 24 going to be used and we'll take it out of the data
 25 set and reshoot it again if it's necessary to have a

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1 point at that location.
 2 Q Okay.
 3 MS. KAVANAUGH: And I think I've only got
 4 one copy of these so we don't have to enter it
 5 if you object.
 6 Q But, basically, can you identify what these are for
 7 the Judge and then I'll show it --
 8 MR. GLEISNER: Do we have copies of that?
 9 MS. KAVANAUGH: No, I have one copy.
 10 That's what I just finished saying so I was
 11 showing it to him to identify and I'll show it
 12 to you. We don't have to put it in as an
 13 exhibit if you object, but we're using it to
 14 explain to the Judge --
 15 MR. GLEISNER: Okay.
 16 UNIDENTIFIED SPEAKER: This probably
 17 causing havoc with the mic.
 18 ALJ BOLDT: Okay.
 19 MR. GLEISNER: May we approach, Your Honor,
 20 as he testifies --
 21 ALJ BOLDT: Sure. Yeah, yeah, that's an
 22 efficient way to do it. Good suggestion.
 23 Q And just basically -- you don't have to show where it
 24 is, I'm just asking, you know, what type of
 25 map -- what type of document is this?

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1 all the way to the intersection, but it'd be
 2 close, yeah, and the lake is down here.
 3 MR. GLEISNER: To speed things along, Your
 4 Honor, may I ask a question?
 5 ALJ BOLDT: Go ahead.
 6 MR. GLEISNER: Take a look at Exhibit 16 in
 7 the white book, would you sir, and compare it
 8 with what we've got here. I am very sorry, I
 9 think I -- no, that's all right, this drawing is
 10 different than in my book. I'm sorry, Your
 11 Honor.
 12 MS. KAVANAUGH: Okay. And what's the
 13 question?
 14 MR. GLEISNER: The question is, is that the
 15 same as this?
 16 THE WITNESS: Well, it is -- it's from the
 17 same data, but these contours are at a bigger
 18 interval and it's a small area. There's a small
 19 window of the site and this profile that you see
 20 up on the top is the tipped up view of this line
 21 looking at it from a slightly down angle.
 22 MR. GLEISNER: We'd like to get copies of
 23 this.
 24 MS. KAVANAUGH: Yeah, we can get you a
 25 copy.

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1 MR. GALLO: This is the north/south road
 2 from Redland Road.
 3 A Yeah, this is the intersection, if you want to call
 4 it that.
 5 Q Okay. And this is showing like the lines and the
 6 triangles?
 7 MR. GLEISNER: And this is like the
 8 east/west road, is that right?
 9 A Yeah.
 10 MR. GLEISNER: Thank you.
 11 Q Okay.
 12 MR. GLEISNER: Oh, yeah, I see it now.
 13 Q So this is sort of what the computer kicks out?
 14 A Yes.
 15 Q Okay.
 16 A And then these are the triangles that are used to
 17 connect and then this elevation is known, this
 18 elevation is known, all of the elevations in between
 19 there are developed.
 20 Q At a computer, right.
 21 A That's actually a copy of (inaudible).
 22 Q Oh, okay, so maybe I do have a copy.
 23 MR. GALLO: This is the east/west. This is
 24 the intersection and there's the lake?
 25 THE WITNESS: I don't know if that makes it

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1 MR. GLEISNER: Pardon?
 2 MR. GALLO: How do you track this line on
 3 this map?
 4 THE WITNESS: Well, zero here and then the
 5 different stations. This would be 100 feet away
 6 from zero and then here is zero on the map and
 7 this is 100 feet away from zero.
 8 UNIDENTIFIED SPEAKER: Hang on a second.
 9 Stop with the paper while he's talking, please.
 10 MS. KAVANAUGH: Sorry.
 11 THE WITNESS: Okay. So zero here, 100,
 12 zero, that's on a sideways view, zero here and
 13 100 on the top down view. And so as you follow
 14 that line the computer is going to follow that
 15 line and follow each one of the faces of the
 16 triangles as it's doing it and raise and lower
 17 this line accordingly. This line can be
 18 exaggerated.
 19 MR. GALLO: I understand, but is this the
 20 street line or is this a line --
 21 ALJ BOLDT: Okay. We're not really
 22 indicating what this is and --
 23 THE WITNESS: Yeah, this is a line --
 24 Q This being the zero plus 00 --
 25 UNIDENTIFIED SPEAKER: We're on 16-001,

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1 correct sir?
 2 THE WITNESS: Yes, it's a line that was
 3 developed to follow the low elevations here.
 4 It's not straight. It comes up into (inaudible)
 5 and there's different intersection points I
 6 guess.
 7 Q Okay. So we can get --
 8 THE WITNESS: And it's based on the shots
 9 on both sides.
 10 MR. GALLO: Thank you.
 11 Q So once you're satisfied that you've got this good
 12 data and you probably input it and it creates these
 13 maps I think you said that your folks do -- once you
 14 generate the 3D document, the 3D visual, they ground
 15 proofed it by going out and comparing it, right?
 16 A Yeah, they can go back out again to the site, but if
 17 they've spent a week out there already, most of the
 18 time they can look at it and say yeah, that's what we
 19 saw. If something becomes a question for them, then
 20 they go back out.
 21 Q Now, the maps you generated for this, do you know
 22 what the contour intervals are for those maps -- the
 23 ones that you generated for this project or do you
 24 have to look at one?
 25 A Well, we had the ability to generate very tight

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1 someone might have testified about some of the
 2 Waukesha County or other maps having two foot or ten
 3 foot intervals. Is it fair to say that a 2.4 inch
 4 interval is going to give you a much more precise
 5 picture of what's really out there?
 6 A Well, if you look at the amateur standards for how
 7 the contour maps were developed at Waukesha County
 8 provides even if there GIS, those were flown from an
 9 airplane and the company that flew those was
 10 restricted to follow the standards for their scope,
 11 for their contract, in two-foot contour intervals
 12 respect. That meant that they could fly higher and
 13 have a different focal length on their camera and
 14 their control could be a little bit looser, but they
 15 had to stay within -- so that each contour itself was
 16 within a foot of the truth on the ground. And they
 17 get checked after they fly it, but you can only
 18 really rely on them to the nearest foot if it's a
 19 two-foot contour.
 20 Q Okay. And so if it's a 2.4 inch contour, what can
 21 you rely on it -- to what extent?
 22 A Well, because of our methodology here, we could rely
 23 on them to the -- easily to the nearest half inch.
 24 Q Okay.
 25 A And we can just keep making them denser by the

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1 contours, you know, into the tenth of a foot, but I
 2 think that the ones on the plans that we have are
 3 probably one foot intervals. I don't know that, I'd
 4 have to look.
 5 Q Okay. I think there are some that show two-tenths of
 6 a foot.
 7 A This one that we just looked at now --
 8 Q Right.
 9 A -- is two-tenths of a foot.
 10 Q Right.
 11 A You can see it's very dense.
 12 Q That's the ones I'm talking about. Okay. And so
 13 basically that means that the elevation of the ground
 14 between one contour line and another rises or falls
 15 by about 2.4 inches? Is that one-tenth -- two-tenths
 16 of a foot? I'm thinking one-tenth is 1.2?
 17 A Yeah, about -- yeah, two-and-three-eighths inches,
 18 yeah.
 19 Q Okay. Okay. Are contour intervals that precise in
 20 all maps?
 21 A No.
 22 Q Okay. And so is it fair to say that if you got this
 23 type of equipment, it sounds like (inaudible)
 24 equipment and mapping that shows these lines, as
 25 opposed -- I think there is -- I think Andy or

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1 visualization.
 2 Q Okay. So based on the information we've reviewed,
 3 your testimony, your personal knowledge, your
 4 experience as a registered land surveyor, the work
 5 you performed in overseeing the surveying on this
 6 project, have you formed a professional opinion to a
 7 reasonable degree of professional certainty as to
 8 whether the maps and the diagrams generated by Kapur
 9 for this project adequately and accurately represent
 10 the site?
 11 MR. HARBECK: You mean with respect to the
 12 survey elevations?
 13 MS. KAVANAUGH: Yes, with respect to the
 14 survey elevations.
 15 MR. HARBECK: Okay.
 16 MR. GALLO: And with respect to the areas
 17 being surveyed?
 18 MS. KAVANAUGH: Yeah, in respect
 19 to -- yeah, well, of course, they can't
 20 represent what they didn't survey. Is that what
 21 you're saying?
 22 MR. GALLO: Yes.
 23 MS. KAVANAUGH: Yes.
 24 A And then I'd like to add and for the purpose of the
 25 survey.

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1 Q Right. Okay.
 2 A Yes.
 3 Q Okay. Is there anything else you want to add to your
 4 testimony at this point?
 5 A No, and I guess other than the fact that I walked out
 6 to the site after the mapping was done and I didn't
 7 see anything that I would have changed.
 8 Q Okay.
 9 MS. KAVANAUGH: I've got no further
 10 questions. I'd like to move those into evidence
 11 if --
 12 ALJ BOLDT: Do you want to mark one of
 13 these really cool ones?
 14 MR. GLEISNER: Yes, Your Honor.
 15 MS. KAVANAUGH: Yes.
 16 ALJ BOLDT: I guess I've been doing this
 17 too long when I think these are really cool,
 18 but --
 19 MS. KAVANAUGH: No, they are. I thought
 20 they were pretty cool too.
 21 MR. GLEISNER: I think, Your Honor, we
 22 would like to have all of these marked.
 23 ALJ BOLDT: Okay. Yeah, let's go off the
 24 record.
 25 (Recess taken)

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1 BY MR. GALLO:
 2 Q What time of the night were you out there?
 3 A Four o'clock to probably well after 5:00.
 4 UNIDENTIFIED SPEAKER: Oh, you must have
 5 disturbed a bow hunter.
 6 THE WITNESS: I believe I did. As we left,
 7 a buck was running his way down the (inaudible)
 8 so I hope he stuck around.
 9 ALJ BOLDT: Any other questions, gentlemen?
 10 Okay. Thank you very much. You're excused.
 11 Are you ready to call your next witness?
 12 MS. KAVANAUGH: Yes, I'd call Pete Wood as
 13 soon as I can find his stuff.
 14 ALJ BOLDT: Do you swear to tell the truth,
 15 the whole truth and nothing but the truth, so
 16 help you God?
 17 MR. WOOD: I do.
 18 ALJ BOLDT: All right. We're on the
 19 record. We need to keep order. We need to keep
 20 order. We're all getting tired and punchy.
 21 All right. Let's go off the record here
 22 while we're --
 23 (Recess taken)
 24 ALJ BOLDT: Okay. We're back on the record
 25 and we've sworn in the witness. Any objection

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1 ALJ BOLDT: We're back on the record and
 2 we've marked 230 and then there's 230A through F
 3 which are all the big printouts that we were
 4 talking about earlier. Okay. Any questions,
 5 Mr. Meyer?
 6 MR. MEYER: Very briefly.
 7 CROSS-EXAMINATION
 8 BY MR. MEYER:
 9 Q Mr. Kruger, you said you were out on the site a long
 10 time?
 11 A Yes.
 12 Q Can you tell us when that was, if you recall?
 13 A Just recently.
 14 Q And what does that mean?
 15 A I stopped out there last night on the way home.
 16 Q So it's fresh in your mind?
 17 A It is fresh in my mind, yeah. I really didn't have
 18 any reason to not trust the guys. I've been working
 19 with them for, you know, 15 years so --
 20 Q And nothing you saw when you were out there changed
 21 your opinion at all?
 22 A No, nothing.
 23 MR. MEYER: No further questions.
 24 ALJ BOLDT: Okay. Mr. Gallo?
 25 CROSS-EXAMINATION

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1 to 224 through 230?
 2 MR. GLEISNER: No, Your Honor.
 3 ALJ BOLDT: Including the -- we're now up
 4 to G. Okay. 224 through 230A through G are all
 5 received.
 6 DIRECT EXAMINATION
 7 BY MS. KAVANAUGH:
 8 Q Okay. Can you state and spell your full name and
 9 your work address for the record?
 10 A Sure. Peter Wood. Last name is W-O-O-D. Work
 11 address is DNR, Sturtevant Service Center, 9531 Rain
 12 (phonetic) Road, Sturtevant, Wisconsin.
 13 Q Okay. And your current employer?
 14 A State of Wisconsin, Department of Natural Resources.
 15 Q And your current position?
 16 A Water resources engineer.
 17 Q Okay. And where are you stationed?
 18 A At the DNR Sturtevant Service Center.
 19 Q Okay. So the southeast region, correct?
 20 A Yes.
 21 Q Okay.
 22 MS. KAVANAUGH: And I realize that I was
 23 going to mark this, didn't make copies, so maybe
 24 I'll just have you read it. It's -- and we
 25 won't put it in unless --

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1 MR. GLEISNER: I don't know what it is,
2 Counsel.
3 MS. KAVANAUGH: It's a brief resume. Okay.
4 And then we'll mark it and then you'll get a
5 copy of it when --
6 Q Can you identify that?
7 A Do you want me to identify this?
8 ALJ BOLDT: Sure.
9 Q Yes.
10 A This is just a brief resume, including my education
11 and work experience.
12 Q Okay.
13 MS. KAVANAUGH: And that would be exhibit
14 what, Tim?
15 UNIDENTIFIED SPEAKER: 231.
16 MS. KAVANAUGH: 231. Okay.
17 Q And what years does it cover?
18 A It covers 1988 through the present.
19 Q Okay. And then just --
20 MR. MEYER: Is that going to be read into
21 the record at all?
22 MS. KAVANAUGH: Right. Well, I think we'll
23 just make copies but we can have him read
24 it -- go through it briefly, yes.
25 MR. MEYER: Okay.

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1 water resources engineer focused in the storm water
2 management program at DNR. And my duties under the
3 storm water management program are primarily in
4 construction site permitting and municipal storm
5 water regulation. Through that program I do
6 engineering plan review, permitting and site
7 inspections and I currently am working predominantly
8 in Racine and Kenosha Counties and provide just
9 general water engineering assistance when needed to
10 other DNR staff throughout the southeast region.
11 Q Okay.
12 MS. KAVANAUGH: And this is I believe
13 Page 2, I'm sorry, of the DNR listing. They
14 never seem to be on one page.
15 UNIDENTIFIED SPEAKER: That's part of --
16 MS. KAVANAUGH: Part of the listing
17 of -- yes, of his --
18 MR. HARBECK: Is that part of Exhibit 232?
19 UNIDENTIFIED SPEAKER: Yes.
20 MS. KAVANAUGH: Yes.
21 Q Okay. Are you a professional engineer?
22 A Yeah, registered in Wisconsin since 1996.
23 Q Okay. So in your duties as an engineer do you review
24 off of engineering input on applications for DNR
25 permits or approvals?

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1 MS. KAVANAUGH: And then I'm going to have
2 him -- I'm sorry, this is off the DNR website
3 but we'll make copies -- basically the listing
4 of what he does and the areas he's responsible
5 for.
6 Q Can you identify that, please?
7 A Sure. This is just a datasheet off of the Wisconsin
8 DNR website that indicates the different job duties,
9 areas of expertise and the counties that I work in.
10 Q Okay.
11 MS. KAVANAUGH: And that would be
12 Exhibit 232, Tim right?
13 UNIDENTIFIED SPEAKER: Yeah.
14 MS. KAVANAUGH: Okay.
15 Q Referring to those exhibits if needed, can you
16 briefly highlight your post-high school education?
17 A Sure. I have an associate's degree in ecology and
18 environmental technology from Paul Smith's College
19 and Paul Smith's Newark and a bachelor's degree in
20 forest engineering from the State University of
21 New York College, environmental science and forestry
22 at Syracuse, New York. I've been working for DNR
23 since 1991. I initially was hired as a municipal
24 water supply engineer, worked there for approximately
25 seven years, and for the last 13 years I've been a

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1 A That's primarily my role at DNR, is a plan review
2 engineer for development projects that come in.
3 Q Okay. And when you say development projects, is that
4 anyone's or just DNR?
5 A It's development projects that require NR216 permits
6 which is our construction site storm water discharge
7 permit program so that would be construction sites
8 that will disturb in excess of one acre.
9 Q Okay. So when you're reviewing these is it typical
10 or unusual to go on field investigations of surveys
11 regarding these projects?
12 A I very rarely do any kind of field investigation as
13 part of plan review. Most of my field work is during
14 construction as an erosion control inspector. My
15 field experience is primarily with construction
16 inspection.
17 Q Okay. So you're going out to see if they're doing
18 what they're supposed to do and if there's any
19 erosion occurring?
20 A Yes, that's true.
21 Q Okay. And Waukesha County -- I think you said you're
22 primarily in Racine and Kenosha now, but is Waukesha
23 County an area for which you have these
24 responsibilities?
25 A Not currently, no.

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1 Q Okay. But are you familiar with the DNR proposal to
2 build a public boat launch on North Lake?
3 A Yes. Yes, I'm familiar with the project.
4 Q Okay. And did you have a role in the application for
5 manual code approval of this proposed boat launch?
6 A I had just a role as more or less a consultant, an
7 engineering consultant, whenever questions were asked
8 that I thought I could -- that someone thought I
9 could help with.
10 Q Okay. So it's fair to say you didn't do the
11 engineering, Kapur did that?
12 A Right, I was not responsible for any engineering, no.
13 Q Okay. And you're not the project manager (inaudible)
14 the project either?
15 A No, no.
16 Q And that would be who?
17 A Lynette Check (phonetic) is my understanding of the
18 project manager.
19 Q Okay. And I believe the application, DNR
20 Exhibit 200, will show that Ms. Check was the one who
21 signed it. The manual code approval, and that's
22 Exhibit 201 in the blue binder, that's addressed to
23 Lynette Check and that's been admitted already into
24 evidence and was issued by Andy Hudak who's already
25 testified, a water management specialist. So it's

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1 A I've always been with Lynette and the first was just
2 to get a feel for the land. I believe that was back
3 in the time when we were scoping out, thinking about,
4 the storm water treatment practices. The second time
5 was with Lynette and the surveyor from Kapur and
6 Associates to do surveying of the -- what we're
7 calling the channel or the wetland swale on the north
8 end of the DNR boat launch property and the third
9 time was with the group of us that went out to the
10 site in I believe it was August of this year.
11 Q And that was during the discovery process, correct?
12 A Right, exactly.
13 Q And you've heard descriptions, I think various
14 descriptions -- you've been here for most of the
15 testimony during this hearing?
16 A All of it, yes.
17 Q And you've heard descriptions of the site. Do you
18 generally agree with the way the site has been
19 described, fairly flat, a little bit of a depression,
20 the swale on the north, the big wetland on the west,
21 North Lake on the east?
22 A Yes, I would agree with everything that's been said.
23 Q Okay. Now, when -- you said that at one point you
24 were asked for your opinion about drainage on the
25 site and you said it might have come up

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1 fair to say you're not the DNR person who reviews it
2 for compliance with Chapter 30 either, correct?
3 A Correct, I wasn't involved in that.
4 Q Okay. And you're not the storm water staff person
5 who reviewed it to see if it met the storm water
6 statute and administrative --
7 A No, that's one of my counterparts out of Waukesha.
8 Q And who would that be?
9 A Brian Hartsook (phonetic).
10 Q Okay. So your role in regard to the DNR boat launch
11 proposal, can you elaborate what that was exactly?
12 A Initially, some years ago, it was just to give some
13 ideas, concept plans, for the storm water treatment
14 system that was going to be necessary for the boat
15 launch project and then, secondarily, it was -- more
16 recently there were some questions that came up, I
17 believe during the EA review process, about draining
18 on the property.
19 Q Okay.
20 A So my role was to try to understand that a little
21 better.
22 Q Okay. And have you visited the DNR site?
23 A Yes, I've been there to my knowledge three times.
24 Q Okay. And what was the purpose of each visit and
25 who, if anyone, accompanied you?

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1 during -- like as a result of comments on the EA, I
2 believe?
3 A Yes, I believe there was an EA document. It may have
4 been generated by Dr. O'Reilly in which there was a
5 map that showed some arrows of drainage and as
6 mentioned by Kurt, the surveyor from Kapur
7 Engineering, that map was generated using the
8 publicly available contour maps. I believe it was
9 the two-foot contour map that was referenced that was
10 generated on behalf -- or for Waukesha County.
11 So -- and as mentioned before that the map is
12 somewhat crude, a two-foot contour map is somewhat
13 crude, and because this property is so flat, this
14 general area, my thought process was it didn't give
15 enough detail to really nail down how water moves
16 around in this direction. So that's why I
17 recommended that Kapur go out and pick up some data,
18 particularly of the north channel because that had
19 not shown up to my knowledge on any previous maps or
20 anything -- any plans. So that was my recommendation
21 and that's why I went out in the field, was to
22 observe getting data on that north swale. And then,
23 in turn, Kapur turned that into a topographic map of
24 the site and of the -- including the north swale.
25 Q Okay. And I'd ask you to look at Exhibit -- the DNR

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1 exhibit in the blue binder, Exhibit 210, and can you
2 identify that?
3 A Yes, I finally get to talk about my famous exhibit.
4 Yes, I'm very much aware of this one as is everybody
5 else by now. Yes, this is the map that I'm referring to
6 to -- that I was just previously referring to.
7 Q Okay. So this is the one that you looked at --
8 A This is the information that was -- the information
9 gathered by Kapur with the north swale plus all the
10 other data points they had in development of a
11 contour map, right.
12 Q Okay. And I'd ask if you could look at Exhibit 212
13 and identify that -- the documents in there.
14 A Yes, 212 is another representation of the information
15 that was obtained during the survey data, a
16 representation of my assessment of a low path from
17 the DNR property.
18 Q Okay.
19 MS. KAVANAUGH: And I don't remember if
20 those have been entered into evidence yet. If
21 not, I'd ask that they be.
22 MR. GLEISNER: I think they have been.
23 They were marked --
24 MS. CORRELL: I think so too.
25 MS. KAVANAUGH: Okay. Yeah, I don't

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1 212 in connection --
2 MS. KAVANAUGH: (Inaudible).
3 MR. HARBECK: Is this a piece of 210?
4 MS. KAVANAUGH: That's a piece of -- yeah,
5 I kept trying to blow it up or something where
6 it'd be easier to read, but the higher it got
7 the fuzzier the numbers got, you know,
8 so -- okay.
9 MS. CORRELL: Oh.
10 MS. KAVANAUGH: Yeah, so it's not that
11 useful. I was trying to look at some of the
12 numbers.
13 Q Okay. You prepared both of these then it's your
14 testimony to try to answer the question of where's
15 the drainage from the DNR site?
16 A The perspective I looked at is, you know, a drop of
17 water falling on the DNR proposed boat launch site,
18 what would happen to that drop of water, so that's
19 the perspective I came from in developing these maps.
20 Q Okay. So looking at 210, show me how you decided
21 where that water would go?
22 A Yes. And a lot of this has been testified to and so
23 it kind of supports my conclusions essentially that
24 there is an elevation of about 899 where the access
25 road, the current access road, comes in to the

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1 remember, but 210 and 212.
2 ALJ BOLDT: Yep, they're both in.
3 MS. KAVANAUGH: They're already in? Okay.
4 ALJ BOLDT: Yes. I'm sorry, no, 210 was
5 not in previously.
6 MS. KAVANAUGH: Okay. 212 was though?
7 ALJ BOLDT: Any objection to 210?
8 MR. GLEISNER: No, Your Honor, none at all.
9 ALJ BOLDT: Okay.
10 MR. GLEISNER: I think it came in under a
11 different number, just so we're aware of that.
12 ALJ BOLDT: Okay. 210 is now in.
13 MS. KAVANAUGH: (Inaudible).
14 MR. GLEISNER: Correct, I think we have it
15 in, Your Honor, at -- let me just quickly get
16 here and I'll tell you. We have that one in as
17 Exhibit 16-002 I believe, Tim.
18 MS. KAVANAUGH: (Inaudible).
19 MR. GLEISNER: Your Honor, just for the
20 record, if I may? 16-002 needs to stay in
21 because there's additional annotation on that.
22 ALJ BOLDT: Sure, sure. We could mark it
23 210A if you want.
24 MS. KAVANAUGH: (Inaudible).
25 Q So you prepared these documents at Exhibit 210 and

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1 proposed boat launch area from the west. That
2 elevation kind of holds for the most part running
3 along the north end of the DNR proposed boat launch
4 site along the south end of the channel, working its
5 way towards the lake.
6 Q Okay. So you're talking about the north part of --
7 A Yes. So just laying out the lay of the landscape --
8 Q Oh, okay.
9 A -- and this had been kind of a test -- essentially,
10 people had pointed this out. I'm just verifying. I
11 think Mr. Peters actually made a good summary of
12 this.
13 Q Okay. That's fine.
14 A There's essentially a ridge at elevation, and I'm
15 just going to estimate, 899 running along the north
16 end of the DNR property adjacent to the wetlands,
17 adjacent to the wetland swale, heading towards the
18 lake. When it gets near the lake it takes a turn to
19 the south and runs down and connects into the Hanson
20 property.
21 Q Okay.
22 A So the process of that ridge creates a depression
23 within the DNR boat launch site so that's what I
24 tried to --
25 MR. MEYER: Clarification. And that ridge

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1 is sort of where the road comes towards the
2 lake?
3 THE WITNESS: Yes.
4 A And it really holds essentially almost to the same
5 elevation as the road.
6 MR. MEYER: Okay.
7 A It holds within inches of that --
8 Q Okay. So I guess I'm --
9 A -- so it creates -- it contains this depressional
10 area that I depicted essentially.
11 Q Okay. And is that what you outlined on Exhibit 210?
12 A Yes, essentially, yes.
13 Q And then I've duplicated the outline on here. Okay.
14 A So what I next -- understanding that, what I tried to
15 do is find out what is the lowest point elevation
16 from this area that would be essentially the first
17 point of outlet and I found that point elevation
18 that's highlighted at the start of this black dashed
19 line with the arrow of 898.68.
20 Q Okay. And that would be right where the west side of
21 that black arrow, the dash, right next to it?
22 A Right. So that is the lowest point that I could find
23 looking at this -- the spot elevations --
24 Q Okay.
25 Q -- where water would leave -- that would be the

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1 Q -- contour line?
2 A Yes.
3 MR. GLEISNER: Can Counsel approach, Your
4 Honor?
5 MR. MEYER: And can I ask a -- that's the
6 wetland that's been referred to as a
7 federally-designated wetland that appeared near
8 the grove of trees?
9 THE WITNESS: That's correct, right.
10 MS. KAVANAUGH: Yes, yes, the grove of
11 trees is (inaudible).
12 A So what would happen again --
13 Q So it looks like that is 898.4 for the line --
14 A Right, exactly.
15 Q -- and then there's -- it looks like there's a
16 couple of points inside that line?
17 A Yes, like any contour map, there would be lower spot
18 elevations that represent --
19 Q Okay. So those are those --
20 A The ultimate lowest point is actually a little bit
21 lower, a few inches --
22 Q Okay.
23 A An inch or so lower than this contour.
24 Q Okay.
25 A So there is an ultimate low point.

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1 primary location water would prefer to go, again,
2 following the laws of gravity, water flowing
3 downhill. That would be the point --
4 Q Okay.
5 A -- where water would flow off the DNR property.
6 Q So this is sort of like a bowl, this whole
7 outline --
8 A Yes, so the outline -- yes.
9 Q -- here that's going to be like the lip of the bowl?
10 A Yes, so the outline is a bowl.
11 Q And this is the spout or this is like if you took a
12 bowl, if you were making one with clay, and you put
13 your finger in to lower it at that point?
14 A Yes -- yeah. Now, there is -- there's obviously a
15 lower contour elevation, 898.4, essentially
16 represents the bottom of this bowl.
17 Q Right.
18 A It's where essentially that delineated wetland that
19 people have mentioned --
20 Q Okay.
21 A It's essentially down in that area, okay?
22 Q Okay. If you want to maybe --
23 A So that's 898.4, yeah.
24 Q Maybe you want to outline the lowest --
25 A Sure.

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1 Q Okay. And the contour is at 898.4?
2 A Yes.
3 Q And the top of the -- the rim of the bowl is what?
4 A Is 898.8, okay?
5 Q Okay. So you're talking about --
6 A So to project this out, the drop of water
7 scenario --
8 Q Okay.
9 A -- several drops of water start filling up this low
10 spot, the elevation rises until it gets to the
11 elevation of 898.68 which is approximately talking
12 about three inches or three or four inches up to this
13 elevation where it will start to flow.
14 ALJ BOLDT: And that's where the black dash
15 line is?
16 THE WITNESS: Yes, right.
17 A But that's when flow would start, but the reason why
18 I added in the -- I went up to the next contour
19 elevation to just show, depict, that there has to be
20 some reasonable flow depth so that would basically
21 represent -- if you project from 898.68 up to the
22 next contour which is 898.8, water would be flowing
23 through this area at a depth of about an
24 inch-and-a-half or so. So the point of that was
25 saying this would be the point where you could

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1 actually physically see flow.
 2 Q Okay. Because it would have to get high enough --
 3 A A couple inches, yes.
 4 Q -- to fill all of this --
 5 A Right.
 6 Q -- and get out to this --
 7 A Right.
 8 Q -- 8.6 -- 8.98 --
 9 A Right. So water would be flowing through this area
 10 at a depth of a couple inches --
 11 Q Okay.
 12 A -- is how -- that's the point of making it so I had
 13 to show, you know -- I could go backwards and try to
 14 make my own contour at 698.6 to show the actual
 15 isolated depression where water would -- in other
 16 words, water would fill up to that point and it would
 17 just sit there.
 18 Q Okay.
 19 A So it doesn't flow out of there until it gets to the
 20 898 -- or 898.68 it would start flowing --
 21 Q Okay.
 22 A -- so I put in the pink line to show a reasonable
 23 depth of flow where you could actually see water
 24 flowing through this area.
 25 Q So if water wasn't flowing out of this bowl, would be

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1 Q -- and flows downhill is what I've heard over and
 2 over in this -- okay.
 3 A So that was the whole point of this map, is try to
 4 represent --
 5 Q Okay.
 6 A -- that concept.
 7 Q Okay. So once you -- what is the difference between
 8 the elevation at the outside edge of this lip, the
 9 pink line, and the lowest contour elevation? I think
 10 you've got 898.4, is that correct, for that blue
 11 line?
 12 A Right, 890 -- from the lowest contour elevation --
 13 Q Okay.
 14 A -- the contour shown is 898.4 --
 15 Q Okay.
 16 A -- so the 898.8 would be four-tenths of a foot which
 17 is --
 18 Q Okay.
 19 A -- five and some odd -- you know, somewhere in that
 20 neighborhood.
 21 Q Yeah, so we're talking about --
 22 A Five inches, yeah.
 23 Q -- 4.8 inches or something?
 24 A Right, right.
 25 Q So maybe five inches again, you know?

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1 sort of the deepest it could get based on the lower
 2 and the upper elevations here? Would it be the
 3 difference between like the very low point of --
 4 A Yeah.
 5 Q -- 898.36 and 898.68 or --
 6 A There's actually a little bit -- there's
 7 one -- there's an 898.27.
 8 Q Okay.
 9 A So it'd be the difference between 898.27 and 898.68.
 10 Q 898.68. So we're talking --
 11 A Which is in that four to five inch --
 12 Q Okay.
 13 A -- range.
 14 Q Yeah, about .41 of a foot. Yeah, okay, so about five
 15 inches?
 16 A Right. At the deepest, right.
 17 Q Okay. And then once --
 18 A And then when water was flowing it'd be another
 19 couple inches so that's --
 20 Q Right, right, because you'd have to have enough --
 21 A Right.
 22 Q -- inches above it for the water to start
 23 equalizing, right, because water seeks its own
 24 level --
 25 A Right.

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1 A Right.
 2 Q Okay. So you concluded then that it drained to the
 3 southwest here. And then Exhibit 212, is that sort
 4 of the continuation of --
 5 A Yes. Well, let's go back to 212.
 6 MR. HARBECK: And do you mean 212, Page 2?
 7 THE WITNESS: Yes, right.
 8 MS. KAVANAUGH: Yeah, the aerial map.
 9 A So this was my effort to make it a little simpler to
 10 understand and put in a broader context of water
 11 movement, okay? Again, and I think I mentioned this
 12 in deposition. You know, I did some rounding because
 13 this is just a -- you know, it gets confusing when
 14 you start talking hundredths of a foot so I did some
 15 rounding. So the first -- the point -- surface
 16 runoff discharge location elevation 898.7 is
 17 that -- is really the 898.68 that I mentioned. I
 18 rounded up just for the ease of this document.
 19 Q Right. Okay. Okay.
 20 A So that's the point that I talked about, the
 21 discharge point from the depression area within the
 22 DNR boat launch --
 23 Q Okay.
 24 A -- which would head west, okay? Now, this is
 25 essentially -- I think I mentioned this at deposition

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1 also that this is a connect the dot exercise. What I
 2 tried to do is find the next known elevation point
 3 and the point I picked was the existing culvert under
 4 the existing access road, the 18-inch culvert. The
 5 invert elevation of that culvert or the bottom
 6 elevation --
 7 Q It's the bottom.
 8 A -- of the culvert from the Kapur surveying --
 9 Q Okay. So that had been surveyed in on the Kapur
 10 stuff used in the standards?
 11 A Right.
 12 Q Okay.
 13 A Which is 897.6.
 14 Q Okay.
 15 A So then what I basically did is connect the dot from
 16 that to the next lowest known location in this
 17 general area which was the outlet from the north
 18 swale location, the area marked in blue on the
 19 previous exhibits, to the lake. So there was a bunch
 20 of surveying that was collected in kind of that --
 21 MR. GLEISNER: Are you referring to
 22 Exhibit --
 23 THE WITNESS: Yes.
 24 MR. GLEISNER: -- 2-002?
 25 THE WITNESS: Yes, the blue line 2-002.

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1 THE WITNESS: Yep.
 2 Q Okay.
 3 A So that's really what this is, is a connect the dot
 4 exercise with known elevations. Again, this is my as
 5 best I could do assess the question that was asked
 6 about where is -- you know, what happens with water
 7 from the DNR boat launch site, where does it end. I
 8 think I mentioned this in the deposition also that
 9 this is not -- I don't have -- this is based on the
 10 only information we have so it's my best guess at
 11 that based on the elevation data that we have.
 12 Q Okay. Now, the green arrow on Exhibit 212, this Page
 13 2, I think there was some testimony earlier where
 14 people were asking did that represent a stream, did
 15 that represent a channel. Were you indicating by
 16 drawing that, that there was a channel there or just
 17 that discreet low elevations?
 18 A It was just the -- it wasn't intended to represent a
 19 channel, it was just intended to represent a
 20 possible -- again, this drop of water flow path, how
 21 would a drop of water eventually make its way to the
 22 lake. No, it wasn't because -- yeah, it's
 23 not -- knowing that these are very large wetland
 24 complexes, it probably doesn't exactly work this way.
 25 It's a very -- as we talked about, it's very flat,

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1 A There was quite a bit of surveying done in the area
 2 that that drainage channel connects to the lake.
 3 It's very -- people have mentioned that before. It's
 4 very confusing. It starts to lose its nice uniform
 5 channel characteristics and --
 6 Q Over here, you mean?
 7 A -- there's humps and -- yes. I mean if you look at
 8 the detailed surveys it's just like Andy and some
 9 others that Mr. Peters had described. It's kind of
 10 a -- or, yeah, Mr. Peters. There's kind of a
 11 build-up of material. The single channel, the nice
 12 wide single channel, that works its way towards the
 13 lake, when it gets there, it kind of splits in two.
 14 Q Okay.
 15 A So this is what I did. I picked the lowest elevation
 16 and where the split occurs.
 17 Q Okay. Because the water, again --
 18 A Right.
 19 Q -- will travel from --
 20 MR. GLEISNER: Counsel, to expedite matters
 21 can I just clarify? So you're saying that the
 22 water flows out on your Exhibit 212, Page 2, at
 23 the eastern end of the blue line?
 24 THE WITNESS: Exactly, yes.
 25 MR. GLEISNER: Thank you.

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1 you know, it enters probably a pool of water, the
 2 wetlands probably --
 3 Q Right.
 4 A -- at this time when the water -- DNR's launch is
 5 flowing back, there's probably already water in the
 6 wetland or some comingling.
 7 Q Okay.
 8 A So, yeah, it wasn't designed to represent any kind of
 9 channel, it was just to represent --
 10 Q But just the idea that water goes downhill --
 11 A -- ultimately -- yes, ultimately where water would
 12 end up, yes.
 13 Q -- and that -- and is it true that like even with
 14 sheet -- you know, I think Dr. O'Reilly had
 15 testified, you know, about there being flow, you
 16 know, sheet flow. I mean even if something is not in
 17 a channel, if you've got --
 18 MR. GLEISNER: Objection, I don't think he
 19 testified there was sheet flow. I don't think
 20 he -- he disagreed with that as I recall.
 21 MS. KAVANAUGH: No, I didn't say he
 22 testified that there was sheet flow. I guess
 23 I'll withdraw what I said because what he --
 24 Q He said something about even with sheet flow it would
 25 flow from a higher to a lower elevation and I guess

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1 that's what I'm asking. Do you need a channel for
 2 water to flow from a higher to a lower elevation or
 3 do you just need -- or can sheet flow flow to a
 4 higher --
 5 A Well, there's different mechanisms of water flow and
 6 this was not intended to represent any particular
 7 condition, it was just a graphical represent -- not
 8 meant to simulate -- so as far as the arrows and the
 9 flow path, not to represent anything particular.
 10 Q Okay. So based on the elevations then, you know, the
 11 water, if water is flowing, if things are fairly
 12 where you're just tracing this drop of water, it's
 13 going from higher to lower elevations?
 14 A Right, exactly.
 15 Q Are there other things going on in the watershed that
 16 could influence the direction that the water would
 17 flow?
 18 A Yes, and I think a lot of this has already been
 19 talked about.
 20 Q Right. And do --
 21 A I mean it is acknowledged that water could go both
 22 ways at this location. It's just an elevation.
 23 Q Okay.
 24 A So, you know, especially -- you know, this elevation
 25 I'm talking about, this 898.68, obviously water could

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1 wetland or is it going to go in the other direction?
 2 A Well, yeah, people have talked about that. I mean
 3 there's obviously no way to back flow from the lake
 4 through the channel. And, again, water will find its
 5 elevation so it -- if the elevation rises high
 6 enough, if it raises above 898.68, it will -- in the
 7 lake it'll back flow into this depressional area.
 8 Q Right.
 9 A And even if it raised to that elevation in the
 10 wetland complex it would do the same thing.
 11 Q Okay. So now you -- I think that during your
 12 deposition you said that you tried to determine where
 13 the water would go once it entered the southern
 14 portion of the wetland, is that correct? I
 15 don't -- but at some point we were talking about
 16 that.
 17 A Well, the only -- yeah, well, I mean when we talked
 18 about this, that's the culvert. That's the only
 19 information that is available to me that is of
 20 sufficient detail is the elevation of the existing
 21 culvert.
 22 Q Okay. Okay.
 23 A So that's why I picked that elevation. It's the
 24 lowest elevation that's -- that we could -- that was
 25 available to me.

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1 flow out of the DNR launch towards the wetland.
 2 Q Right.
 3 A The opposite could occur when water increased to, you
 4 know, I'm going to say about a foot of depth in the
 5 larger wetland complex to the west. It could
 6 overflow or would overflow towards the DNR
 7 depressional area.
 8 Q Right. And if North Lake was gathering -- I think
 9 there's been testimony it has a pretty big watershed,
 10 correct -- North Lake?
 11 A Oh, yeah, North Lake, of course, yes, right.
 12 Q So if a lot of stuff was happening, a lot of rain or
 13 flooding, upstream or snow melt and things entering
 14 North Lake pretty fast and I think there was
 15 testimony there's no control structure on the lake,
 16 correct, no dam or anything like that, it's just a
 17 natural -- there's nothing to control the elevation
 18 there? So if a lot of water was coming in so fast
 19 that it couldn't go out the river fast enough because
 20 the Oconomowoc comes in at both ends, right? I think
 21 it enters on the northeast and exits on the southwest
 22 I think?
 23 A That's correct, yes.
 24 Q So if the water is coming in fast enough there that
 25 it rises, is the water going to still come out of the

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1 Q Okay. Now, if the water flowed from the depressed
 2 area of the DNR property into the southern part of
 3 the wetland, is it possible that it would flow in
 4 another direction other than north through the
 5 culvert with the invert?
 6 A Yes, well, it is definitely possible, again, because
 7 we talked about the level of detail that's available
 8 with the publicly available maps. The two-foot
 9 contour interval essentially shows this whole area
 10 bounded by the we'll call it a bluff to the west of
 11 the wetland complex, including Redland Road
 12 essentially at the same elevation. So the two-foot
 13 contour map doesn't give that answer either way.
 14 It's not of enough detail so --
 15 Q So we've got better detail about what's going on, on
 16 here, because of our 2.4 --
 17 A Right, exactly.
 18 Q Our 2.4 inch contours than we do with the county
 19 maps --
 20 A Exactly, right.
 21 Q -- those two-foot contours? Okay.
 22 A Because the two-foot does not distinguish other than
 23 a couple -- it shows a couple bumps along the way,
 24 but it shows essentially no distinguishing difference
 25 in the contour in that whole area so --

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1 Q Okay. Now, I think from all the testimony here I
2 think everyone agrees that the water is not going to
3 go west, right, because I think there's been
4 testimony there's a ridge on the west side of the
5 wetland, correct?
6 A Yes, the two-foot contour map is suitable to tell you
7 that.
8 Q Okay.
9 A It does tell you that it's bounded, this whole area
10 is bounded, by a contour elevation of 900 essentially
11 which is also the same as approximately the flood
12 plain elevation. So it's enough detail to tell you
13 that, that the whole area is bounded, but between
14 there and the lake there's not enough detail in the
15 two-foot contour map to provide a lot of answers.
16 Q Okay. Now, there's been some testimony, and I don't
17 remember if it was Dr. O'Reilly, that at certain
18 times the water would back up from the southern
19 portion of the west wetland into the DNR depression.
20 Is that possible to?
21 A Yes.
22 Q Okay. Now, the culvert under the access road is, I
23 think you said, 897.6?
24 A Yes.
25 Q Okay. And the discharge point from the DNR property

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1 somewhere in that neighborhood of 897.6, around the
2 same elevation as the existing culvert. That seems
3 like a pretty good number to represent the wetland
4 complex.
5 Q And usually --
6 A So -- right.
7 Q -- people try to put culverts on the bottom?
8 A Right. So what would need to happen is that water
9 would need to fill up about a foot and then it would
10 start flowing back into the DNR wetland complex.
11 Q Okay. But there'd be -- I'm not sure what the
12 elevation -- do we know what the elevation of the top
13 of the access road is?
14 A Yeah, it runs from -- on the western part it's
15 basically the same elevation as the bottom of the
16 bluff or slope, about 900.
17 Q Okay. What about over --
18 A As it works towards the --
19 Q -- over here?
20 A -- boat launch it gets about a foot lower, 899.
21 Q 899.
22 A Right.
23 Q So once the water --
24 A So it kind of acts as a little bit of dam there.
25 Q Okay. Well, once it got to 899 the water would

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1 to the southern portion of the wetlands is this
2 898.63 or 68?
3 A 68, right. I rounded it up to 898.7, yes.
4 Q Right. Okay. So if that -- I'm trying to get a
5 sense of if the culvert is at 8.98 -- 8.976, the
6 invert of the culvert, and this is at 898.68, it
7 doesn't seem that under normal -- well, under normal
8 conditions where you aren't getting flow from
9 North Lake, would it be likely that the water would
10 go up into the depression or --
11 A Well, it would have to -- okay.
12 Q From that 14-acre --
13 A The wetland complex obviously would have to fill up
14 with water to about a foot depth.
15 Q Okay. And the wetland complex is --
16 A Now, again, we don't have a lot of detailed
17 information about the -- all the points, all the
18 elevation data, in the wetland, but we can -- you
19 know, you can make an assessment that you see a
20 wetland, it's the lower area, there's some points
21 that I know that Lake Country Engineering had
22 developed, that gives you a kind of a feeling for
23 what the bottom elevation is in that whole wetland
24 complex and I think it's probably around that -- it's
25 not hard to believe that the wetland complex is

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1 go -- would it overtop the road or --
2 A Right, yes. Right.
3 Q Okay. So I guess I'm trying to get a sense of how
4 far up this water is likely to come in the absence of
5 flood conditions into this depression. If you don't
6 have flood conditions and you've got a road that
7 might be a barrier until you get to 899, but you've
8 got culverts and you don't know what the low or
9 southern elevation is, you know, do we have any idea
10 of how far the water would come up into this
11 depression?
12 A I don't personally. I didn't run any calculations or
13 do any kind of analysis of that --
14 Q Okay.
15 A -- so I don't really have a good feeling for that.
16 Q Okay. And this -- I think this wetland was testified
17 that it was 14 acres I believe, the whole thing -- 14
18 something approximately?
19 MS. CORRELL: Point 57.
20 MS. KAVANAUGH: 14.57? Okay.
21 MR. GLEISNER: I believe that was correct,
22 Counsel.
23 Q So in terms of volume of water flowing into this
24 wetland to raise the elevation of the wetland water
25 enough to start backing up, that would be quite a

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1 quantity of water, correct?
 2 MR. HARBECK: Objection, he just said he
 3 didn't analyze it and hasn't looked at it so --
 4 Q No, I'm not asking for a number, I'm asking if you've
 5 got 14 -- if you've got to raise it from -- you've
 6 got -- 897.6 is the bottom I think you said, we've
 7 got 898.68 as being this exit point, so we're talking
 8 about -- that's a foot if my math is right, huh, from
 9 the bottom of the culvert? So you're going to have
 10 to have over a foot --
 11 MR. GLEISNER: Wait, can he answer Counsel?
 12 I thought he was going to answer.
 13 Q Yeah, well, I'm trying to figure out -- you said the
 14 bottom of the wetland was probably 897.6 or close?
 15 A That's as best I can estimate with the information we
 16 have.
 17 MR. HARBECK: That's the point at the
 18 culvert.
 19 MS. KAVANAUGH: At the culvert, the invert,
 20 yes.
 21 MR. HARBECK: Right. Not anywhere else,
 22 it's just the culvert? Okay.
 23 MS. KAVANAUGH: Okay. But that's a
 24 low -- you know, we're assuming it's a low
 25 point.

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1 A -- a 10-acre feet of water --
 2 Q Right, in that wetland before it's going to start
 3 backing up?
 4 A -- all right? Right. So it'd be more than -- okay.
 5 I mean it would have to rain -- in order to fill a
 6 wetland of just direct rainfall, it'd have to rain 12
 7 inches.
 8 Q Okay. Okay.
 9 A Okay? So that the water -- and that's not a normal
 10 rain event so --
 11 Q Right. Okay.
 12 A -- there'd have to be water from the upland --
 13 Q Right.
 14 A -- drainage area that also --
 15 Q Okay. So you'd have to have that --
 16 A -- helps fill that wetland up so it couldn't --
 17 Q -- and that's just to reach the low point and the
 18 low point is 898.68 and to get up and start filling
 19 this whole area that is a stream according to
 20 Dr. O'Reilly that's at 898.8, is it?
 21 A That'd be the area bounded in pink on --
 22 Q Yes.
 23 A -- Exhibit -- yes, that's 898.8, right.
 24 Q Yes, and the other one is 898.68?
 25 A Right.

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1 Q And the low point exiting is 898 -- the DNR property,
 2 898.68, right?
 3 A Right, yes.
 4 Q So that's about a foot of water?
 5 A It'd be about a foot of rise above the --
 6 Q Well, a foot of water from the bottom I guess to
 7 the --
 8 A From the bottom of the culvert, right.
 9 Q Right.
 10 A And assuming the wetland bottom is in that
 11 neighborhood --
 12 Q Right.
 13 A -- right, it would be a foot of water --
 14 Q So you'd need at least a foot of water to even reach
 15 that low point?
 16 A -- over the wetland complex being 14 acres, but I
 17 guess we should segment the south from the north
 18 because, you know, the south is probably
 19 three-quarters of that, right, or --
 20 Q Okay. So then it reaches --
 21 A So we could probably call the south southern wetland
 22 maybe 10 acres --
 23 Q Okay. Okay.
 24 A -- so that'd be --
 25 Q So you'd need --

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1 Q So we're talking about you're going to have to get a
 2 half an inch more of rain all over the whole wetland
 3 before it starts backing up into here too, correct?
 4 MR. HARBECK: Object to the form of the
 5 question, it's completely leading and --
 6 MS. KAVANAUGH: Okay. Well, I'm asking if
 7 a map --
 8 MR. HARBECK: -- he said he hasn't
 9 analyzed any of this and he's not -- that's not
 10 his job.
 11 MS. KAVANAUGH: Okay. Well, I'm asking him
 12 to sort of -- I'm asking him then sort of to do
 13 that now, to give us a sense of the --
 14 Q How many inches of rain -- of water would you have to
 15 have in this wetland above the culvert to start
 16 filling up this thing?
 17 A Right, about a foot.
 18 Q Okay. About a foot in the wetland?
 19 A Yes, from the data that we have, right.
 20 Q Okay. And then to come above the low point and get
 21 all the way up to the lip of this thing?
 22 A Maybe another couple inches, right, I mean so --
 23 Q Okay. All right. Now, we've been talking about, you
 24 now, the water going in different directions
 25 depending on the North Lake -- how much water is

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1 there or how much water is in the wetland. Would
 2 adding more or larger diameter culverts under the
 3 west/east access road than the number that are there
 4 now help the water exit the southern wetland faster
 5 than it does now?
 6 A It's possible. It's complicated.
 7 Q Okay. All right. If you can't -- if you don't know,
 8 you don't know.
 9 A So, yeah, I can't -- I mean it would take some
 10 analysis.
 11 Q Okay. Now --
 12 ALJ BOLDT: I'm sorry, were you asking
 13 about the current proposal vis-à-vis what's
 14 there now?
 15 MS. KAVANAUGH: Yes.
 16 ALJ BOLDT: Is that how you understood the
 17 question?
 18 MS. KAVANAUGH: That's what I was asking.
 19 THE WITNESS: Right, and I can't answer
 20 that in any kind of detail.
 21 ALJ BOLDT: Okay. I just want to make sure
 22 I understood.
 23 MS. KAVANAUGH: All right. Okay.
 24 Q So based on the information DNR had available you
 25 said you didn't have any availability about the

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1 storm water management plan approved for the site for
 2 during and after construction?
 3 A I do know that there is a storm water
 4 management -- water quality management plan that was
 5 developed for the 216 permit.
 6 Q Okay. And are there --
 7 A So it's not an all-encompassing storm water
 8 management plan, it's a storm water management plan
 9 with a water quality focus to meet -- for DNR permit
 10 requirements.
 11 Q Okay. So storm water plans, are they designed to
 12 handle like the storm water runoff from these
 13 projects? I mean --
 14 A Yes, a storm water management plan developed
 15 to -- for -- under 216 is designed to manage storm
 16 water in accordance to 216 and 151. There are other
 17 types of storm water management plans, but --
 18 Q Okay. Now, if you -- can you -- yeah, if you would
 19 take a look -- I think Dr. O'Reilly had testified
 20 earlier --
 21 MS. KAVANAUGH: And I don't remember
 22 exactly what exhibit he used so Counsel can
 23 correct me, but that his area of the stream
 24 pretty much corresponded with this pink area
 25 that was outlined, correct?

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1 elevations on the southern part of the wetland and
 2 you reviewed and understanding that you lacked those
 3 additional elevations to areas south, you haven't
 4 done formal analysis, did you form an opinion to a
 5 reasonable degree of professional certainty regarding
 6 the predominant direction of storm water flow from
 7 the DNR property?
 8 A I did based on the information I have --
 9 Q Okay.
 10 A -- as I described --
 11 Q Okay. So basically you haven't --
 12 A -- earlier, yes.
 13 Q -- heard anything at this hearing that would change
 14 your mind that that is the predominant flow?
 15 A I -- yes, but --
 16 Q Okay. Under normal conditions?
 17 A -- although acknowledging that water can go both
 18 ways --
 19 Q Right, right, okay.
 20 A -- which was not the context that I'd looked at it
 21 initially so --
 22 Q Right, right. Now, and this is the current pattern
 23 of this runoff on the undeveloped site, correct?
 24 A Right.
 25 Q Okay. Now, do you know whether there has been a

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1 MR. GLEISNER: Correct, Counsel.
 2 MS. CORRELL: As well as Exhibit 10.
 3 MR. GLEISNER: Exhibit 10 right there,
 4 Counsel.
 5 MS. KAVANAUGH: Yes. Okay.
 6 MS. CORRELL: Yeah, if we could also put
 7 that up and there was a third exhibit in terms
 8 of the --
 9 MR. GLEISNER: I don't recall that,
 10 Counsel.
 11 MS. CORRELL: -- a blue line that he drew.
 12 MS. KAVANAUGH: Yeah, he drew some lines
 13 last time in his testimony, but I don't remember
 14 what exhibit they were on.
 15 MR. GLEISNER: I apologize, Counsel --
 16 MS. KAVANAUGH: That's okay.
 17 MR. GLEISNER: -- my memory fails me on
 18 that. I'm not sure.
 19 ALJ BOLDT: Not 2, right?
 20 MS. CORRELL: Nope.
 21 Q And Dr. O'Reilly, he testified that the area he
 22 circled -- he was talking about at one point, and I
 23 don't know whether he testified today or last time,
 24 about a stream with about a one-foot depression and
 25 Ms. Hanson testified that the water depth in the

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1 grove of trees identified in green on that -- well,
 2 you can see the grove of trees there, was about one
 3 foot deep. And I believe Mr. Schwartzburg testified
 4 that when you stand in the grove of trees area when
 5 the water was two feet deep -- he said 24 inches.
 6 Now, can you -- we've got the pink outline on
 7 Exhibit 210. Can you show us -- to get to a one foot
 8 depth in this bowl, can you show us how far up the
 9 water would have to come, in other words, follow the
 10 contour line. If this lowest line is 290 -- I'm
 11 sorry, 898.4, right?
 12 A Yes.
 13 Q So to get to 899.4 --
 14 MR. HARBECK: Excuse me, Counsel, the
 15 lowest point is 898.27.
 16 MS. KAVANAUGH: Okay.
 17 MR. HARBECK: He already testified to that.
 18 MS. KAVANAUGH: Okay. A very good point.
 19 Okay.
 20 Q To get from 898.27 to 899.
 21 MS. KAVANAUGH: I was talking about the
 22 contour line and I think that's what he said.
 23 A So to go one foot or to go two feet?
 24 Q To go one foot, first of all.
 25 A To 890 --

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1 Q (Inaudible) the entire property except for the ridge
 2 near the shore and I don't remember what we said the
 3 elevation of the road was.
 4 A Near the boat launch it's about 899. It's close to
 5 899.
 6 Q Okay. So that might be -- so that would be under
 7 water too --
 8 A Right.
 9 Q -- or just barely covered with water?
 10 A Right.
 11 Q Okay. And to get to the water to be two feet deep in
 12 this area, as Mr. Schwartzburg testified that he was
 13 in that grove of trees when there was 24 inches of
 14 water, where would that water have to be? Where
 15 would it have to get to?
 16 ALJ BOLDT: I'm sorry, these mics are
 17 really sensitive and we're picking you up when
 18 you talk. You've got to cover your mic if
 19 you're consulting.
 20 Q If there is (inaudible).
 21 A I guess everything would be under water at that point
 22 because then you're below the -- under your flood --
 23 Q Okay.
 24 A -- or your -- that elevation is higher than under
 25 your flood elevation.

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1 Q Let me give you a -- maybe I'll give you a green one
 2 this time.
 3 A So 899.3, correct?
 4 Q 899.3 or as close to that as you can get. I think
 5 these are -- to get a foot of water in that bowl
 6 (inaudible). Can you find it?
 7 A Yeah, I'm trying. So 890 -- okay. 899.3, everything
 8 is -- other than a portion of the ridge that runs
 9 perpendicular to the -- or parallel with the lake --
 10 MR. GLEISNER: May we approach, Your Honor?
 11 THE WITNESS: Yeah.
 12 A I'm just going to continue just so it makes sense.
 13 Q Yes.
 14 A The only piece of land that would be visible would be
 15 the ridge that runs parallel to the lake that
 16 connects into the Hanson property. Everything else
 17 would be submerged with that elevation.
 18 Q Okay. And even up here too? I don't know what the
 19 elevation --
 20 A There might be some. I mean it gets really confusing
 21 over here, but these are basically -- these are less
 22 than 899.3 up in here.
 23 Q Okay. Okay. So -- okay. So --
 24 A So everything would be under water basically except
 25 for --

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1 Q Okay.
 2 A That would be above 900.
 3 Q Okay. So it's fair to say that the only time you
 4 have one foot of water in this grove of trees is if
 5 this entire property was flooded --
 6 A Right.
 7 Q -- and only this ridge was sticking out?
 8 A Right, right.
 9 Q And the only time you've had two feet of water in
 10 this -- on this property is if the whole property was
 11 connected -- you know, flooded basically --
 12 A That'd be the 100-year --
 13 Q -- it's in the lake, the 100-year flood?
 14 A Yeah, that'd be the 100-year flood condition in the
 15 lake.
 16 Q Okay. And that would probably cover even the
 17 channel --
 18 A Yes. Oh, yes, right.
 19 Q -- and flow over the road and --
 20 A Well, the whole are would be -- I mean anything
 21 below -- as we talked about the two-foot contour kind
 22 of containing this whole (inaudible) shown on
 23 that --
 24 Q Right. And I know we don't have elevations for
 25 Redland Road, but have you observed -- have you

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1 looked down Redland Road? Do you have a sense of
 2 whether the water would be covering going down this
 3 way too or --
 4 A Again, the only thing -- the only other information
 5 we had for Redland Road is on the two-foot contour
 6 map for the county and other than a few humps that
 7 are shown, it'd all be below that flood plain
 8 elevation of 900.
 9 Q Okay. Okay. Now, I'd ask you to look at DNR
 10 Exhibit 205 which has been identified I think as the
 11 2008 FEMA flood plan map from Waukesha County.
 12 A Yes.
 13 Q Does that map show the DNR property? And I think
 14 there is another exhibit that gives tax information
 15 if you need that to find it.
 16 A Is it where they -- where the X's are?
 17 Q Well, you tell me.
 18 A I think it is because I can -- you know, I think this
 19 is the easement --
 20 Q Okay.
 21 A -- so I'm --
 22 MS. KAVANAUGH: I mean I think Counsel
 23 would probably stipulate that this area here
 24 where the X's are is the DNR property in
 25 Exhibit 205?

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1 has in this --
 2 MR. MEYER: I object.
 3 MS. KAVANAUGH: I take it back. I take it
 4 back.
 5 Q Okay. Let's take a look then at --
 6 MS. CORRELL: (Inaudible) property line.
 7 It's their exhibit and Neil drew on it. What
 8 are you trying to --
 9 MS. KAVANAUGH: I'm trying to show -- have
 10 him show where the property is. There is a tax
 11 information document in here that shows what we
 12 own.
 13 MS. CORRELL: Oh, yes.
 14 ALJ BOLDT: Okay. You know, everything is
 15 recorded so let's --
 16 MS. KAVANAUGH: Okay. I'm looking for the
 17 tax information document in Exhibit -- okay.
 18 Q Okay. Well, let me just ask -- we'll find the tax
 19 information number and then you can record it based
 20 on that. But is it fair to say that this map shows
 21 the properties in the area that's at issue? Okay.
 22 A Yes, right, correct.
 23 Q And is it fair to say -- the red hatched lines,
 24 what's your understanding of what they represent?
 25 A The flood -- the 2008 FEMA flood plain boundaries.

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1 MR. GLEISNER: We're not going to stipulate
 2 to that without testimony.
 3 MR. HARBECK: Which area is she talking
 4 about?
 5 MS. KAVANAUGH: Okay. This area.
 6 MS. CORRELL: There's already been
 7 testimony on --
 8 MS. KAVANAUGH: I think there has been
 9 testimony.
 10 MS. CORRELL: What is the question?
 11 MS. KAVANAUGH: And there's a tax
 12 identification number on here.
 13 MR. GLEISNER: No, we're not going to
 14 stipulate to that.
 15 MS. KAVANAUGH: Okay.
 16 Q Well, then I would ask you to look at the documents
 17 in 200. There's a --
 18 MR. GLEISNER: May it please, Your Honor?
 19 MS. KAVANAUGH: What?
 20 MR. GLEISNER: This testimony has led to
 21 the need for another rebuttal witness and the
 22 hour is growing late. I just want to urge that
 23 we move as quickly as we can through this.
 24 MS. KAVANAUGH: I'm moving as quickly as I
 25 can. I'm moving quicker than any other attorney

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1 Q And are --
 2 A Everything within that hatched area would be within
 3 the FEMA flood plain (inaudible).
 4 Q And how would you characterize the location of most
 5 of those properties? Are they out of the flood
 6 plain, in the flood plain, most of them in the flood
 7 plain?
 8 A Well, this particular snapshot, most of them are in
 9 the flood plain.
 10 Q Okay. So -- well, actually, the Judge when he's
 11 looking through the documents can look at the tax
 12 identification number on that map and the tax
 13 identification number in Exhibit 200 something if we
 14 can't find it, in 200, to identify the DNR property
 15 since they won't stipulate to it.
 16 ALJ BOLDT: Well, you can put it in your
 17 brief too if it's in the record, sure.
 18 MS. KAVANAUGH: Yes, yes, okay, but --
 19 MS. CORRELL: I think we already covered
 20 this in the record with Mr. Hudak's testimony.
 21 MS. KAVANAUGH: Yes, yes, I think we did
 22 too.
 23 MS. CORRELL: There's no reason for --
 24 Q Okay. So looking at this map and considering the
 25 information we've discussed about the elevations and

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1 the 100-year flood and this being in the flood plain,
 2 do you have an opinion to a reasonable degree of
 3 professional certainty as to whether it's possible
 4 that the entire DNR property could flood from time to
 5 time?
 6 A Yes. Well, the flood plain map would suggest that's
 7 the case, that under a 100-year event it's within the
 8 regulatory flood plain.
 9 Q Okay, yes. And what about the other properties south
 10 of the DNR property and Redland Road, they're zoned
 11 in the flood plain too except for certain --
 12 A Some of them are right, except for I mentioned the
 13 humps. I mean this --
 14 Q Right.
 15 A -- map corresponds basically with the two-foot
 16 contour map.
 17 Q Right. So is it likely that those areas would flood
 18 from time to time as well?
 19 A Yes, when in the flood plain it's assumed that
 20 flooding will occur in a 100-year occurrence.
 21 Q Okay.
 22 MS. KAVANAUGH: I had a copy of NR16 here
 23 which I can't seem to find right now. Well,
 24 Judge, I guess I won't read it into the record,
 25 but I'd ask the ALJ to take judicial notice of

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1 frequency roughly?
 2 A Yes, yes, it's commonly known 100-year event,
 3 commonly known as the 100-year recurrence interval,
 4 right, for a storm event.
 5 Q Can you explain what percent occurrence level means?
 6 A What that means -- what it basically means is that an
 7 event of that size has a probability of
 8 occurring -- has a one percent chance of occurring in
 9 any given year essentially what that means.
 10 Q If you know, what is a relative frequency of a
 11 one-foot water over that area? Would you have
 12 appreciation with even within broad parameters?
 13 A One foot in the depressional area, we're talking
 14 about?
 15 Q Yes.
 16 A Yeah, I don't have a good feeling for that, so no.
 17 Q Okay. Then fine, thank you.
 18 MS. KAVANAUGH: Can I ask a few -- I did
 19 find 116 and I would like to have him read those
 20 definitions, if that's okay.
 21 ALJ BOLDT: Okay. Yeah, when Mr. Meyer is
 22 finished.
 23 MS. CORRELL: I think he can just take
 24 official notice.
 25 MS. KAVANAUGH: Huh?

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1 Chapter --
 2 MR. MEYER: Official notice.
 3 MS. KAVANAUGH: I'm sorry, official notice,
 4 of Chapter NR116 and read the definitions of
 5 flood or flooding at Section NR116.03(12) and
 6 the definition of flood plain at NR116.03(16).
 7 ALJ BOLDT: Okay. I can officially notice
 8 both of those.
 9 MS. KAVANAUGH: Okay.
 10 Q Is there anything else then now that you want to add
 11 to your testimony at this point, Mr. Wood?
 12 A Nothing more to add.
 13 MR. MEYER: Just a few questions if you're
 14 finished, Counsel.
 15 MS. KAVANAUGH: Yes, I'm done.
 16 MR. MEYER: I'll be brief.
 17 CROSS-EXAMINATION
 18 BY MR. MEYER:
 19 Q Mr. Wood, I believe you just testified that at 24
 20 inches or two feet you're over the 100-year flood
 21 level for this area?
 22 A Well, from the reference, the reference point I think
 23 we talked about, was the lowest point shown on the
 24 survey data.
 25 Q And that's known as the one percent occurrence

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1 ALJ BOLDT: When Mr. Meyer is finished.
 2 MS. KAVANAUGH: Oh, I'm sorry, when he's
 3 done, yes. I'm sorry, Judge.
 4 MR. MEYER: No problem.
 5 Q In your career -- once again a broad range would be
 6 fine for the purpose of this question, how many
 7 surface water projects have you worked on in your
 8 career?
 9 A I'm not sure how to answer that. I mean in the storm
 10 water program everything is related to surface water
 11 in some way so I'm not sure how to answer that.
 12 Q How many projects have you worked on then?
 13 A Oh, boy, we get quite a few in a given year.
 14 Q A hundred?
 15 A Way more than that. We get -- because when I first
 16 started doing this work I was -- myself and
 17 Jim Ritchie, we were the only two storm water staff
 18 people in this part of the State. We were probably
 19 processing a couple hundred permit applications a
 20 year at that time.
 21 Q Okay. So without trying to put any words in your
 22 mouth, and believe me don't let that happen, would
 23 you say you may have done hundreds, possibly over
 24 1,000, where you've looked at surface water projects?
 25 A That's probably a pretty good number. I've been

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1 doing it for about --
 2 Q Okay. I'd like to refer you to Exhibit 210 and
 3 that's the area -- the --
 4 MS. KAVANAUGH: It's the blowup too, Pete,
 5 so if you wanted to use the bigger one.
 6 THE WITNESS: Okay, yep.
 7 Q And that's the area of the grove of trees,
 8 encompasses the grove of trees, also the -- that
 9 federal -- small federal designation wetland. You've
 10 been to that -- into that site how many times?
 11 A Three times that I recall.
 12 Q Have you ever -- based on your experience in working
 13 on hundreds of other projects have you seen anything
 14 there that you would call, from your professional
 15 standpoint as an engineer, a stream?
 16 A That's a good question. I guess I don't look at
 17 things that way so the projects I've been involved
 18 with I guess I don't have a -- I can't give you a
 19 real good feeling on that.
 20 Q That's a good answer. I appreciate that. Thank you
 21 for an honest answer. Thank you.
 22 MS. KAVANAUGH: (Inaudible) Judge, if you
 23 permit me.
 24 REDIRECT EXAMINATION
 25 BY MS. KAVANAUGH:

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1 normally dry land areas caused by (a) the overflow or
 2 rise of inland waters, (b) the rapid accumulation or
 3 runoff of surface waters from any source", skipping
 4 (c) to (d), "the sudden increase caused by an unusual
 5 high water level in a natural body of water
 6 accompanied by a severe storm or by an unanticipated
 7 force of nature such as a (inaudible) or some similar
 8 unusual event."
 9 Q Okay. And then could you read the definition of
 10 flood plain at Paragraph 16 in that same section?
 11 A "Flood plain means that land which has been or may be
 12 covered by flood water during the regional flood.
 13 The flood plain includes a floodway, flood fringe,
 14 shallow depth flooding, flood storage and coastal
 15 flood plain areas."
 16 Q Okay. Now, you testified that to get two feet of
 17 water -- to get one foot of water on this property,
 18 on the DNR property, the only piece that would be
 19 still above the water was that ridge that you
 20 outlined in green, I believe, correct, on
 21 Exhibit 210A?
 22 A That's correct.
 23 Q Okay.
 24 MS. KAVANAUGH: And did I walk off with
 25 your 210A?

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1 Q I would ask you to read this definition at 116.03 --
 2 MR. MEYER: I'm finished.
 3 MS. KAVANAUGH: I'm sorry. I'm sorry,
 4 Judge, I'm not meaning to be impolite. I'm too
 5 efficient.
 6 MR. GLEISNER: Judge, we'll stipulate to
 7 this definition and --
 8 MS. KAVANAUGH: Well, I'd like to have it
 9 read into the record.
 10 MR. GLEISNER: Okay.
 11 MR. GALLO: 116. What's the --
 12 MS. KAVANAUGH: Exhibit 116 which is flood
 13 plain --
 14 Q NR116, can you read the title of Chapter
 15 NR115 -- 116, Wisconsin Administrative Code?
 16 A Chapter NR116, Wisconsin Flood Plain Management
 17 Program.
 18 Q And then can you read the definition at NR116.03(12)
 19 of flood. I think you could skip subparagraph (c)
 20 because that talks about Lake Michigan and
 21 Lake Superior.
 22 MR. GLEISNER: Good, we can leave them out.
 23 MS. KAVANAUGH: Right, we'll make it quick.
 24 A "Flood and flooding means a general and temporary
 25 condition, a partial or complete inundation, of

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1 ALJ BOLDT: It looks like you did.
 2 MS. KAVANAUGH: I'm sorry. Good thing I
 3 didn't mark on it.
 4 Q And then I believe you testified that if you had
 5 24 inches, two feet, of water on that property that
 6 the whole property would be covered, correct?
 7 A Correct.
 8 Q Okay. In your opinion -- I know you're not a flood
 9 plain engineer, but looking at that definition of
 10 flood, would that happen during flood conditions?
 11 MR. HARBECK: Objection, foundation. I
 12 mean he's got no --
 13 MS. KAVANAUGH: Okay. Well, he's got the
 14 definition to apply.
 15 MR. HARBECK: If you want to make the
 16 argument you can, but he's already said that's
 17 not his area of expertise or competency so --
 18 MR. GLEISNER: And this is a matter of law,
 19 Your Honor.
 20 MS. KAVANAUGH: Well, it's a matter of a
 21 definition. I'm asking as a layperson for a
 22 flood.
 23 MR. GLEISNER: He is an expert.
 24 MS. KAVANAUGH: He's not an expert in flood
 25 plain, he's a storm --

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1 MR. HARBECK: Well, if you're asking the
2 opinion of a layperson then it's not relevant.
3 MS. KAVANAUGH: No, I'm asking --
4 ALJ BOLDT: The objection is sustained.
5 MS. KAVANAUGH: Okay. Okay. All right.
6 ALJ BOLDT: Yeah, the objection is
7 sustained.
8 MS. KAVANAUGH: Never mind. Okay. I've
9 got no further questions. Thank you.
10 ALJ BOLDT: Mr. Gallo?
11 CROSS-EXAMINATION
12 BY MR. GALLO:
13 Q Mr. Wood, do you have any experience in navigability
14 in fact determinations?
15 A No, I'm not -- have no experience in that.
16 Q Okay. Did any of your work on the Krause site
17 involve a hydrology study beyond the areas you
18 testified to and that are covered under 210?
19 A No, I didn't conduct any kind of hydrology
20 study -- hydrology or hydraulics, no.
21 Q Thank you.
22 ALJ BOLDT: Okay. Thank you. Now sir.
23 MR. GLEISNER: I have a few questions.
24 CROSS-EXAMINATION
25 BY MR. GLEISNER:

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1 northwest from the Hanson property.
2 A Okay.
3 Q And I'm going to show you --
4 MS. CORRELL: I'd object to entry of
5 additional exhibits at this eleventh hour.
6 MR. GLEISNER: This is rebuttal and we're
7 going to bring in testimony --
8 ALJ BOLDT: I think it's fair
9 cross-examination.
10 MR. GLEISNER: Thank you, Your Honor.
11 ALJ BOLDT: It's on your list and --
12 MS. CORRELL: Oh, it's on the list, I'm
13 sorry.
14 ALJ BOLDT: Yes.
15 MS. CORRELL: I thought you said it was a
16 new exhibit.
17 MR. GLEISNER: No, it's not a new exhibit.
18 Thank you, Counsel, it's not a new exhibit.
19 Q And I'm going to show you another photograph of the
20 grove of trees from earlier this year and I'm not
21 asking you to comment on these right now, I just want
22 to put these in your -- you also saw, did you not,
23 Exhibit 17N which was a videotape of a young lady
24 paddling out of the grove of trees, correct?
25 A Yes, correct.

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1 Q You've been present for all of the -- first of all,
2 good afternoon, Mr. Wood.
3 A Thanks.
4 Q You've been very patient and always unfailingly civil
5 and courteous and I think truthful. Can you see that
6 okay?
7 A Yes.
8 Q This is what was produced by Mr. Peters and he
9 testified that that was in the area of the boat
10 launch looking north. I believe he said it was in
11 2006.
12 MR. HARBECK: Do you want to identify it?
13 Q And it is Exhibit 35-002, a photograph of waters that
14 he says he paddled a canoe across. Do you see that,
15 sir? Do you recognize it?
16 A Yes, yes. I've seen that picture, yes.
17 Q And he testified also -- I believe he said it was
18 about two feet deep there, do you recall that?
19 A I think he -- I don't remember the exact depth he
20 mentioned, but I do recall him talking about it.
21 Q Okay. Now, I am going to try and short circuit the
22 need for too much rebuttal and recalling witnesses.
23 I'd like to show you, it hasn't been admitted yet,
24 Exhibit 34-001, and there is testimony available that
25 that is a picture from earlier this year looking

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1 Q And I believe you heard testimony from
2 Mr. Schwartzburg and Mr. Peters. It's late and my
3 recollection may fail me, but I believe they said
4 that this type of accumulation occurred on more or
5 less an annual basis, do you recall that?
6 A Yes. That sounds familiar, yes.
7 Q Could it possibly be that this is an area that is
8 subject to flooding more often than in a 100-year
9 basis or filling with water more often than in a
10 100-year basis?
11 A Yes. Yeah, we've talked about that, right.
12 Q Now, I'm going to ask you some questions and I'm
13 going to try and expedite it. I'm going to base them
14 on responses that you gave in your deposition, but I
15 don't expect you to read from that. Have you done
16 any studies with regard to runoff that will be
17 occasioned from the farm fields?
18 A No.
19 Q Now, directing your attention to Exhibit 10 can you
20 identify where the farm fields might be located with
21 regard to the Krause property and you can stand up to
22 do that and --
23 A This map is not -- doesn't show far enough --
24 Q Right.
25 A -- west, but they would be here. We need another

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1 map.
 2 ALJ BOLDT: They're about a foot or so off
 3 the --
 4 A Yeah, it's too zoomed in on the launch --
 5 Q Okay.
 6 A -- because it would be -- the farm fields are
 7 obviously on the west side of the wetland -- the
 8 larger wetland complex.
 9 MS. KAVANAUGH: And I think they're visible
 10 on some of the other photos.
 11 MR. GLEISNER: Right.
 12 Q And, again --
 13 MR. MEYER: Can't we describe those in
 14 distance maybe?
 15 MS. CORRELL: Well, one of Pete's
 16 photographs depicts them.
 17 MR. GLEISNER: What I'm attempting to do is
 18 just move quickly through this, Your Honor, and
 19 I'm --
 20 ALJ BOLDT: Yeah, by all means.
 21 MR. GLEISNER: That's what I'm trying to
 22 do.
 23 Q I just wanted to get -- now, what Mr. Wood has done
 24 is he has shown where the -- where -- and I'll let
 25 you do that in a moment. He's shown where the farm

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1 I'm going to call up what we have marked as 16-002.
 2 Now, I know that has been marked as Exhibit 212,
 3 Page 2, I believe, by the --
 4 MS. CORRELL: No, I think it's actually
 5 210.
 6 A 210?
 7 Q 210, yeah.
 8 MS. CORRELL: The other exhibit is 212.
 9 MR. GLEISNER: Thank you very much.
 10 Q When you were at your deposition I believe you put
 11 some blue lines on that exhibit --
 12 A Correct.
 13 Q -- which don't appear on Exhibit 210. Can you
 14 describe for the Judge what those blue lines
 15 represent?
 16 A You had asked me to try to outline the north swale
 17 channel that we had discussed during deposition and
 18 that was my best try to draw some lines to represent
 19 the confinements of the channel.
 20 Q Thank you very much. And so, in other words, that
 21 red area that -- or pink area that you have
 22 identified on Exhibit 210 and again now on 16-002,
 23 that would be the relative location approximately of
 24 that depression to the swale, stream, ditch, whatever
 25 it is, that runs east to west and is represented on

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1 fields would be by gesturing to the west and
 2 northwest of the green area on Exhibit 10 and you
 3 were about to take Exhibit 2-002 and also show where
 4 the farm fields are?
 5 A It's a little easier because I'm still -- I'd be on
 6 the board at least, but the farm fields are up in
 7 this general area to the west of the current
 8 north/south access road.
 9 ALJ BOLDT: Where the legal description is,
 10 is that what that --
 11 THE WITNESS: Yes.
 12 Q You've heard testimony --
 13 THE WITNESS: It's not a great map for
 14 this.
 15 Q You've heard testimony from Mr. -- or from
 16 Dr. O'Reilly and from others that the farm fields
 17 empty into the wetlands that are depicted on
 18 Exhibit 2-002, have you not?
 19 A That's -- yes.
 20 Q And is it my understanding from your testimony
 21 previously that no studies have been made by the DNR
 22 of the effect of the runoff from the farm fields into
 23 the wetlands, is that correct?
 24 A That's correct.
 25 Q Now, let me just call up a couple of exhibits here.

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1 Exhibit 2-002 by a blue line, is that correct?
 2 MS. KAVANAUGH: That's a long question.
 3 A I think I follow the gist.
 4 MS. CORRELL: Objection, foundation,
 5 but --
 6 A Or maybe not.
 7 Q Well, all right, let me try -- I'm just trying to do
 8 this quickly.
 9 A Yep, yep.
 10 Q Are the blue lines on Exhibit 16-002 the same as the
 11 blue line on Exhibit 2-002?
 12 A Yes.
 13 Q And are you aware of the elevations in the -- where
 14 the -- we could bring up the exhibit, but are you
 15 aware of the elevations in the actual grove of trees,
 16 itself?
 17 A I believe -- I guess we'd have to further define the
 18 grove of trees. I know it's been mentioned. I'm
 19 unclear whether it's my pink area or if it's another
 20 smaller part --
 21 Q Did you see the exhibit where we had the green on the
 22 map?
 23 A Yes, I think I saw that.
 24 Q Okay.
 25 MR. GLEISNER: Let me just bring that up

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1 here if I may, Judge. This is -- excuse me
 2 everybody. I hope I don't commit any torts
 3 here.
 4 Q The exhibit that is now up on this board has been
 5 introduced previously as Exhibit --
 6 MS. CORRELL: 2-007.
 7 MR. GLEISNER: Thank you very much,
 8 Counsel. That is correct.
 9 MS. CORRELL: And actually there is a
 10 depiction of the grove of trees on the marked
 11 exhibit by Dr. O'Reilly.
 12 MR. GLEISNER: Okay. 2-006, Counsel?
 13 MS. KAVANAUGH: We think so. I think so.
 14 I'm not positive.
 15 MS. CORRELL: I believe it's 2-007.
 16 MR. GLEISNER: Well, let's get that up here
 17 then.
 18 MS. KAVANAUGH: One of those he marked.
 19 MS. CORRELL: No, I think it's 2-007. At
 20 least my copy is. I went up and he helped me
 21 draw this. Not on that big one, on a piece of
 22 paper. I guess it was like a plan sheet size.
 23 MR. GLEISNER: Well, I'm not attempting to
 24 define it exactly, Your Honor, I just --
 25 ALJ BOLDT: Yeah, let's just use the one

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1 MR. GLEISNER: Well, we move the admission
 2 of his deposition, Your Honor, and here it is.
 3 MS. KAVANAUGH: That's fine. And which
 4 exhibit is -- I think that Don again
 5 included -- or maybe you did?
 6 MR. GLEISNER: Exhibit 15 from his
 7 deposition.
 8 MS. KAVANAUGH: Okay.
 9 MR. GLEISNER: Thanks, Tim. We move the
 10 admission --
 11 MS. KAVANAUGH: And that's Redland Road
 12 Exhibit 15? Okay.
 13 MR. HARBECK: Yes, ma'am. Yes, ma'am.
 14 MS. KAVANAUGH: Okay. Can't always tell
 15 the players.
 16 MR. HARBECK: No, no, no, no, no.
 17 MS. KAVANAUGH: No, that's Don Gallo?
 18 MR. HARBECK: The exhibit is -- the
 19 deposition is not Exhibit 15.
 20 ALJ BOLDT: Yeah, I don't think we need to
 21 mark the depositions. I think they're in the
 22 record.
 23 MS. KAVANAUGH: It's in here, I just don't
 24 remember which one it is. That's what I'm
 25 asking, is it in Don's or --

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1 that's marked though if they both depict --
 2 MR. GLEISNER: Certainly, Judge.
 3 Certainly, Judge.
 4 ALJ BOLDT: -- so the record is coherent.
 5 MR. GLEISNER: Is clear, you bet.
 6 Q This is Exhibit 2-006 and the grove of trees, as we
 7 have had a surveyor mark them, is in the green area
 8 here. Do you have any way of knowing how that
 9 relates to the pink on your Exhibit 210?
 10 A Sure. Yes, I mean within a reasonable assessment it
 11 appears to fall within my pink bounded area.
 12 Q Okay. Thank you very much. Now, did you -- do you
 13 recall this drawing?
 14 A Again, I must -- it was probably another one of our
 15 depositional drawings --
 16 Q Right.
 17 A -- am I correct?
 18 Q Right. It was marked as Exhibit 15 at your
 19 deposition. Is that essentially the same? I just
 20 want to make sure that we got this straight. Is that
 21 essentially the same as Exhibit 210A and
 22 Exhibit 16-002?
 23 A It seems to be, correct, yes.
 24 ALJ BOLDT: I guess I better have his
 25 deposition then.

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1 ALJ BOLDT: Oh, it's in Don's -- it's in
 2 North Lake Management District's.
 3 MR. HARBECK: Yes.
 4 MS. KAVANAUGH: Okay. I think it might be
 5 111. I mean they're all in there.
 6 MR. GLEISNER: To facilitate things can we
 7 just move all of the deposition exhibits into
 8 evidence?
 9 MS. KAVANAUGH: That would be fine with me.
 10 MR. GLEISNER: Does anybody have an
 11 objection to that?
 12 MS. KAVANAUGH: I don't.
 13 ALJ BOLDT: And Don, you put all of them
 14 in?
 15 MR. GLEISNER: All except the last one.
 16 ALJ BOLDT: Okay.
 17 MS. KAVANAUGH: The last one of
 18 Mr. Wakeman, you mean?
 19 MR. GLEISNER: Yes.
 20 MS. KAVANAUGH: Okay.
 21 MR. GLEISNER: I think -- do you have that
 22 one, Judge? Do you have the one of Mr. Wakeman?
 23 ALJ BOLDT: I don't have the new one I
 24 don't believe. Okay. So I'll receive --
 25 MR. GLEISNER: Oh, you did -- that's the

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1 October 17th Mr. Wakeman? Thank you for that.
 2 UNIDENTIFIED SPEAKER: I think so.
 3 ALJ BOLDT: Oh, you left it up here? Okay.
 4 Well, let me stay on task first. 111, 112 --
 5 MS. KAVANAUGH: I think Exhibit -- okay.
 6 ALJ BOLDT: -- 113 and 114 are all
 7 received.
 8 MR. GLEISNER: Your Honor, I'm almost done.
 9 I'm not going to --
 10 MR. HARBECK: Just so we're clear, do you
 11 have the second Wakeman deposition?
 12 ALJ BOLDT: Yes, I do. I do.
 13 MR. HARBECK: Okay. The one that's dated
 14 October --
 15 ALJ BOLDT: I didn't think it would be that
 16 thick, but --
 17 MS. KAVANAUGH: We don't, do we?
 18 MS. CORRELL: No, we haven't received a
 19 copy.
 20 MS. KAVANAUGH: We haven't received a copy.
 21 MR. HARBECK: We'll get you a copy if it's
 22 going into evidence.
 23 MS. KAVANAUGH: Thank you.
 24 MS. CORRELL: Oh, thank you.
 25 ALJ BOLDT: My error.

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1 A I saw a -- yeah, I saw a video with someone floating
 2 a canoe and I agree that they were floating a canoe.
 3 Q Now, with reference --
 4 MR. GLEISNER: And I've got three more
 5 questions, Your Honor.
 6 Q With reference to the large green circle on
 7 Exhibit 2-002 I asked you at your deposition,
 8 assuming that large circle became full with water is
 9 there any way that it could wash east over the homes
 10 that are located on Redland Road. Do you recall
 11 getting that question?
 12 A Yes.
 13 Q And what did you say?
 14 A Yes.
 15 Q Thank you, sir.
 16 MS. KAVANAUGH: I'm sorry, Counsel, was the
 17 question could or would or, I'm sorry, I
 18 didn't --
 19 MR. GLEISNER: I said if it filled with
 20 water could it wash east over the homes --
 21 MS. KAVANAUGH: Okay, thank you.
 22 MR. GLEISNER: -- located on Redland Road.
 23 MS. KAVANAUGH: Okay.
 24 Q Finally, you testified at your deposition that the
 25 DNR does not know the characteristics of the wetland

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1 Q Just to get back here and make sure that the record
 2 is complete, you also testified at your deposition
 3 with regard to Exhibit 2-002, did you not?
 4 A Correct.
 5 Q And you made some markings on here and I'm
 6 principally going to call your attention to your
 7 marking of the blue arrow with your initials next to
 8 it. Is that your initial on it?
 9 A Yes.
 10 Q And you were drawing basically on Exhibit 2-002 the
 11 arrow which also appears on Exhibit 210A or on --
 12 A Correct.
 13 Q Okay. And -- thank you. You're not disputing, are
 14 you, that people could float a kayak at various times
 15 on the Krause site?
 16 A The video apparently showed that so no, I wouldn't
 17 dispute that.
 18 Q At intermittent times and throughout the year you
 19 could float a kayak on that property, is that
 20 correct?
 21 MR. MEYER: Objection --
 22 MS. CORRELL: Leading -- well, I guess
 23 leading.
 24 MS. KAVANAUGH: All he can testify to is
 25 what he's seen.

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1 surrounded by the green circle in Exhibit 2. Do you
 2 recall that?
 3 MS. KAVANAUGH: And I'd object, that's
 4 vague. What do you mean by characteristics?
 5 Q Do you understand the question?
 6 A I want you to try to rephrase it. I think it was
 7 phrased a little differently during the deposition, I
 8 believe.
 9 MS. CORRELL: And also I guess I'd ask, we
 10 have all the depositions in the record so --
 11 MS. KAVANAUGH: He had -- yes.
 12 MS. CORRELL: -- do we really have to go
 13 through all this right now at twenty to six?
 14 MS. KAVANAUGH: With one more witness.
 15 MR. GLEISNER: No, Your Honor.
 16 ALJ BOLDT: Okay.
 17 MS. CORRELL: Thank you.
 18 ALJ BOLDT: All right. Thank you. Any
 19 other questions?
 20 MR. GLEISNER: No.
 21 ALJ BOLDT: Any redirect?
 22 MR. MEYER: Yes.
 23 RE-CROSS-EXAMINATION
 24 BY MR. MEYER:
 25 Q I just want to make clear, going back to -- and we

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1 might as well use 2-002 as a reference point. The
 2 grove of tree area, if I'm -- I'm just trying to
 3 clarify to make sure I understand what you testified
 4 to in response to Mr. Gleisner's questions. That red
 5 area is the grove of trees, correct? Within that red
 6 area is the grove of trees?
 7 A As much of the grove of trees that's on the DNR
 8 property because I think the red circle I believe is
 9 just the DNR property.
 10 Q Right, but --
 11 A But I believe the grove of trees extends onto the
 12 Hanson property.
 13 Q I understand, but that portion --
 14 A Right.
 15 Q -- that's the subject of this hearing?
 16 A Right.
 17 Q And the blue line shows what's been called a stream,
 18 a swale, a waterway, is that correct?
 19 A That's correct.
 20 Q The depressional area within that red area, grove of
 21 trees area, you've testified to flows when it does
 22 have water it flows to the southwest, is that
 23 correct?
 24 A That would be the preferred initial flow path.
 25 Q Okay. What prevents it from going to the north to

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1 Mr. Wood.
 2 THE WITNESS: Thank you.
 3 MR. GLEISNER: Your Honor, I'm losing my
 4 wingman.
 5 ALJ BOLDT: You're heading out?
 6 MR. HARBECK: I have to. I have a two-hour
 7 drive and I've got a meeting that I need to get
 8 to so --
 9 ALJ BOLDT: Okay. Sure, yep, absolutely.
 10 Wow, another meeting. Okay.
 11 MR. GLEISNER: Another deposition.
 12 ALJ BOLDT: All right. Are you ready to
 13 call your next witness?
 14 MS. KAVANAUGH: Yes.
 15 MS. CORRELL: We are.
 16 MS. KAVANAUGH: Yes, we'll call
 17 Warden Kyle Drake.
 18 ALJ BOLDT: Do you swear to tell the truth,
 19 the whole truth and nothing but the truth, so
 20 help you God?
 21 MR. DRAKE: I do.
 22 DIRECT EXAMINATION
 23 BY MS. KAVANAUGH:
 24 Q And can you please state and spell your full name and
 25 work address for the record?

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1 the swale?
 2 A There's nothing that particularly prevents it other
 3 than there's the ridge --
 4 Q The ridge.
 5 A -- with a higher elevation so --
 6 Q Right. And how much higher is the ridge?
 7 A The ridge over -- compared to what, to the --
 8 Q To the depressional area.
 9 MR. HARBECK: And I just object, this has
 10 all been covered initially.
 11 MR. MEYER: I'm just trying to clarify the
 12 record.
 13 MR. HARBECK: This has all been gone over,
 14 asked and answered.
 15 ALJ BOLDT: I think we did go over this in
 16 fairly significant detail or substantial detail,
 17 I should say.
 18 MR. MEYER: I have no further questions.
 19 ALJ BOLDT: Okay.
 20 MR. GLEISNER: No further questions.
 21 ALJ BOLDT: Any other redirect?
 22 MS. KAVANAUGH: Just a second. Okay. No,
 23 I've got no further questions.
 24 MR. GLEISNER: No further questions, Judge.
 25 ALJ BOLDT: Okay. Thank you very much,

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1 A Kyle Drake, K-Y-L-E, D-R-A-K-E, 141 Northwest Barstow
 2 Street, Waukesha, Wisconsin.
 3 Q Okay. And your current employer?
 4 A Wisconsin Department of Natural Resources.
 5 Q And your current position?
 6 A Recreational Safety Warden.
 7 Q Okay. And how long have you been employed in that
 8 position?
 9 A Since January of this year.
 10 Q Okay. Can you briefly summarize your education after
 11 high school?
 12 A I have a bachelor's in science from the University of
 13 Wisconsin at Stevens Point in biology and wildlife
 14 management. Employment history was limited term
 15 employment with the Wisconsin DNR in both the
 16 fisheries and wildlife department for approximately
 17 two years, took a position as a wildlife biologist
 18 with the U.S. Fish and Wildlife Service, spent about
 19 a year-and-a-half there, went back to the DNR as a
 20 wildlife biologist for about a year-and-a-half and
 21 then finally was hired as a conservation warden in
 22 January of 1992.
 23 Q Okay. So you've been a warden since 1992?
 24 A Correct.
 25 Q Have you been stationed at any other locations

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1 besides the Waukesha office since you began your
2 career as a DNR warden?
3 A Prior to becoming a Recreational Safety Warden I was
4 a conservation warden for Waukesha County and prior
5 to that I spent a short period of time as a
6 conservation warden in Rock County.
7 Q Okay. And so how long have you been stationed at the
8 DNR Waukesha office?
9 A I've been a warden in Waukesha County since April of
10 1993.
11 Q Okay. And can you briefly summarize your duties or
12 job responsibilities as a DNR recreational and safety
13 warden in regard to navigable water bodies?
14 A As a Recreational Safety Warden I act as a liaison
15 with the municipal boat patrols, any of the
16 county -- or, excuse me, municipalities that have
17 boat patrols, I work with them, and that is about it
18 for the current position.
19 Q Okay. Now, do you receive any -- well, any training
20 at DNR to help you carry out your DNR duties or
21 responsibilities in regard to your duties?
22 A We receive training every year.
23 Q Okay. Do you receive -- and I don't know the answer
24 to this. Do you receive any training while employed
25 at DNR in navigation and navigational issues?

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1 not being met or a possible enforcement action, I'd
2 be consulted with that as well.
3 Q Okay. And are you asked to opinion on, you know,
4 when there are navigability issues just in terms of
5 obstructions to navigation or history of navigation
6 in an area, that type of thing?
7 A Correct.
8 Q Okay. Are you familiar with North Lake?
9 A Yes.
10 Q And when did you first visit North Lake?
11 A It would have been shortly after taking this position
12 in Waukesha County so sometime in early May,
13 April/May, of 1993.
14 Q Okay. And have you ever visited -- have you visited
15 it in a personal and professional capacity, or just
16 professional?
17 A Both.
18 Q Okay. And have you ever visited it to boat or fish,
19 you know, recreate on the lake?
20 A I have fished on the lake, yes.
21 Q Okay. And is it within the geographic area for which
22 you have duties as a DNR warden?
23 A In my current position, yes and in my former
24 position.
25 Q Okay. And so how many years has North Lake been in

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1 A We get a baseline training on Chapter 30 water issues
2 and some related NR codes.
3 Q Okay.
4 A And that's updated periodically.
5 Q Okay. And how about the State law, you know, in
6 terms of -- well, you have Chapter 30, the permitting
7 stuff, and then you get -- I guess, well, Chapter 30
8 is boating too, right, so I guess --
9 A Correct, Chapter 30 is both boating and then the
10 water law.
11 Q Okay. In your duties as a DNR warden do you
12 sometimes offer input on applications for DNR permits
13 or approvals?
14 A Yes.
15 Q Okay. And can you give us some examples of the types
16 of projects for which you've been -- your comments
17 have been sought? When would you get involved?
18 A As far as Chapter 30 issues?
19 Q Uh-huh.
20 A In my previous employment I would get questions
21 regarding permits and applications based on my
22 knowledge of the landscape, being the field warden in
23 the area and oftentimes being on the land itself.
24 And then if there were concerns or issues after the
25 approval was granted with permits -- or conditions

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1 your area? I think you said '93 is when you
2 first --
3 A April of '93, correct.
4 Q Okay. So in performing your duties as a DNR warden
5 do you have occasion to enter and navigate
6 North Lake?
7 A Yes.
8 Q Okay. And any idea how many times a boating season
9 you're entering and navigating on North Lake?
10 A I tried to get to all the lakes that were in my
11 administrative area at least once a week.
12 Q Okay. So is it fair to say that since 1992 you've
13 probably been on the lake on an average once a week
14 or is --
15 A Depending on the season. They're really season
16 dependent.
17 Q Well, during the boating season.
18 A A lot more during the boating season,
19 fishing -- ice fishing season on the ice as well, not
20 as much in the fall or early spring.
21 Q Okay. Are you familiar with the DNR proposal to
22 build a public boat launch on North Lake in
23 Waukesha County?
24 A Yes.
25 Q And this area is on the west side of the north

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1 portion of North Lake, correct?
 2 A It is on the west side of yeah, the big --
 3 Q The north lobe I guess, yeah.
 4 A -- portion of North Lake -- what they call the big
 5 lake.
 6 Q Okay. And are you familiar with that area of
 7 North Lake?
 8 A Yes.
 9 Q Have you ever launched from the DNR site?
 10 A Yes.
 11 Q Okay. And when did you first start doing that and
 12 how often do you think you've done it?
 13 A I don't remember the exact year. There was a period
 14 of about two or three years where I was using the
 15 site to launch boats for patrol duties based on
 16 permission from former owner, Tom Krause.
 17 Q Okay. And did you have a role in DNR's application
 18 for manual code approval of this proposed boat
 19 launch?
 20 A No, thankfully.
 21 Q Okay. And have you -- thank goodness, huh? But I
 22 think you said that you know DNR owns the site now?
 23 You do know that?
 24 A Correct.
 25 Q And now you've heard the description of the site by a

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1 MR. GLEISNER: It'd be the white book,
 2 Warden.
 3 THE WITNESS: Thank you.
 4 ALJ BOLDT: Here's 2-002.
 5 MS. KAVANAUGH: Correct. Okay.
 6 Q Well, actually, maybe you can just use this.
 7 A Sure.
 8 Q And I think previous testimony has identified this
 9 blue area as being the location of the swale, the
 10 channel, the stream, depending on who talks about
 11 this, the wetland, on the northern part of the DNR
 12 property. Would you agree that that's the location
 13 of that channel?
 14 A Correct.
 15 Q Okay. Have you ever seen standing water in that
 16 channel?
 17 A Yes.
 18 Q Have you ever seen standing water deep enough to
 19 float a small watercraft in that channel?
 20 A Yes.
 21 Q Have you ever seen water flowing in that channel?
 22 A In the channel itself, no. The only time I have
 23 observed flowing water anywhere on the site was with
 24 Mr. Hudak when he described the water flowing from
 25 the far eastern part of the channel into the lake.

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1 lot of folks so I won't -- but just sort of the
 2 topography of it, sort of flat and, you know, with
 3 that little bit of a depression, a little bit of a
 4 ridge over on the west, the wetland on the west, the
 5 swale on the north, the Hanson property on the south
 6 and Redland Road. Would you pretty much agree with
 7 those descriptions, you know?
 8 A Yes.
 9 Q Okay. Now, the issue in this case is whether DNR
 10 failed to identify any navigable waters at this site
 11 so during your deposition in this case you were asked
 12 I believe if you'd ever seen water standing above the
 13 surface anywhere on the DNR site or anywhere near the
 14 access road, correct?
 15 A Yes.
 16 Q Okay. So and I think that Redland Road probably has
 17 the best --
 18 MS. KAVANAUGH: I guess I'd like him to
 19 look at the exhibits. I don't know whether you
 20 object to him marking up the exhibits you've
 21 entered into evidence.
 22 MR. GLEISNER: Well, why don't you tell me
 23 what you're talking about, Counsel.
 24 MS. KAVANAUGH: Okay. Redland Road
 25 Exhibit 2-002 and 2-003.

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1 Q Okay.
 2 A The trickle of water.
 3 A Okay. So any idea how often you've seen water deep
 4 enough to float a canoe or a small watercraft in that
 5 channel? I don't know whether you can estimate?
 6 A It'd be difficult to say. Some years it's very dry
 7 in there and the past several years it's been fairly
 8 wet.
 9 Q Okay.
 10 A A lot more recent years than the past years previous
 11 to that.
 12 Q Have you ever observed the waters of North Lake
 13 flowing into that channel?
 14 A No.
 15 Q Okay. But you said you did see a trickle once with
 16 Mr. Hudak, a trickle of water, coming out of the east
 17 end of the channel into the lake, correct?
 18 A Correct.
 19 Q Okay. Now, on areas anywhere near the access road,
 20 we've had testimony there, can you mark --
 21 MS. KAVANAUGH: And I guess I'd like him to
 22 mark on your Exhibit 2-002 and 2-003 where he's
 23 seen standing water, I think similar to the
 24 question you've asked him on --
 25 MR. GLEISNER: Why don't we do it in the

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1 white book, Your Honor?
 2 MS. KAVANAUGH: Right. That's what I'm
 3 going to --
 4 MR. GLEISNER: Sure.
 5 MS. KAVANAUGH: Yeah, which would be
 6 Exhibit 2-002 and 2-003.
 7 MR. GLEISNER: May Counsel approach, Your
 8 Honor?
 9 ALJ BOLDT: Sure.
 10 Q And rather than a circle I'll just give you a
 11 highlighter. I think that will work on those.
 12 A One, two. There you go.
 13 Q 2-002, can you mark with this blue marker any areas
 14 on or near the access road where you've seen standing
 15 water?
 16 A Near the access road it'd be --
 17 Q Yeah, both of them.
 18 A -- our DNR access road coming north from
 19 Redland Road it goes east/west into the launch site.
 20 It'd be somewhere at where the access road enters
 21 into the launch area per se -- the yard.
 22 Q Okay. And how about along the road, have you ever
 23 seen it on the road or alongside of the road?
 24 A I have never observed water on the road. I have
 25 observed water in the wetland areas.

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1 or in the wetland and waterways adjacent to the site,
 2 correct?
 3 A Correct.
 4 Q And I believe you responded you have seen water that
 5 deep in several areas, correct?
 6 A I think I responded I've never taken measurements or
 7 walked through it, but it did appear to be deep
 8 enough --
 9 Q Right, right, yes.
 10 A -- to float a small watercraft.
 11 Q Okay. So using this purple highlighter, can you show
 12 the Judge the approximate areas on the site, the DNR
 13 site, the wetlands, the roads, where you've seen
 14 water deep enough, appear to be deep enough, to float
 15 a small watercraft?
 16 A Just on the DNR site?
 17 Q And on the -- well, we own the road so -- and the
 18 access road. We have an easement. All of that I
 19 guess.
 20 A Okay. Seen water deep enough to float a canoe or a
 21 boat by the -- well, this area, this area going up
 22 towards the channel, and then this area of the DNR
 23 launch site, sorry, and then down Redland Road,
 24 including the Hanson property and a ways down
 25 Redland Road.

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1 Q Okay. Any idea of where?
 2 A Most of my observations have been going in and out of
 3 the road so it'd be close to the roadway.
 4 Q Okay.
 5 A Or access road, sorry.
 6 Q Okay. So and would that be, you know, like whole
 7 sheets of water or any idea? I mean would it be
 8 ponds or a whole sheet of --
 9 A In the wetland areas?
 10 Q Yes, on the sides of the road.
 11 A In the wetland areas designated in green I've seen
 12 various depths of water in there.
 13 Q Okay. Have you ever seen it completely inundated?
 14 A The wetlands?
 15 Q Uh-huh.
 16 A Yes.
 17 Q Okay. Are there particular times of the year when
 18 you're more likely to observe standing water in these
 19 areas?
 20 A My experience is any time of a hard rain event there
 21 may be water. In the wetlands, it'd be a hard rain
 22 event or during the spring melt off.
 23 Q Okay. Now, have you -- during your deposition you
 24 were asked whether you'd ever seen water deep enough
 25 to float a small watercraft anywhere on the DNR site

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1 Q Okay. Could you mark down Redland Road how far
 2 you've observed water that appeared deep enough?
 3 Just an estimate.
 4 A Ever?
 5 Q Uh-huh.
 6 A A long ways.
 7 Q Okay.
 8 A If you're talking about ever, I've seen water
 9 probably deep enough to float a watercraft
 10 surrounding the houses off Redland Road.
 11 Q Okay.
 12 A So it'd be something like this I guess, not knowing
 13 the location of the houses --
 14 MR. GLEISNER: Your Honor, for the purposes
 15 of the record, I wonder if that purple is a
 16 little light. Maybe we could get a different
 17 color (inaudible). Maybe red.
 18 ALJ BOLDT: Well, there's red on there.
 19 MR. GLEISNER: Orange, actually.
 20 THE WITNESS: There's yellow, there's
 21 green, blue.
 22 MS. KAVANAUGH: We're running out of
 23 colors. How about purple?
 24 THE WITNESS: Compare the orange with the
 25 red. That's a lot better.

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1 ALJ BOLDT: Okay.
 2 A All right. We'll go there --
 3 MR. GLEISNER: Oh, there you go.
 4 A -- we go there, up to the channel, we will go
 5 something like this, including houses on
 6 Redland Road, and then this would bleed into the
 7 wetlands.
 8 MR. GLEISNER: Would you, just for the
 9 record -- and I don't mean to interrupt. I'm
 10 sorry, Counsel. Could you put an initial by
 11 each of those red circles?
 12 THE WITNESS: Sure, no problem. Mine
 13 or --
 14 MR. GLEISNER: Preferably yours, yes. So
 15 the record shows then, Your Honor, that he has
 16 seen water deep enough to float a craft in each
 17 of the three red circled areas that he's put on
 18 Exhibit 2-002, correct?
 19 MS. KAVANAUGH: Yes.
 20 Q Now, any idea how often you've seen water deep enough
 21 to float a watercraft in these areas?
 22 A It varies. I recall -- do not recall the year. My
 23 red marks are based upon a one-time event that I
 24 observed.
 25 Q Okay.

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1 are you asking where I've seen navigable water
 2 deep enough to float a canoe in or a boat in?
 3 MS. KAVANAUGH: And my last question I
 4 believe had to do with -- I thought it had to do
 5 with how often, but maybe --
 6 MS. CORRELL: In what area?
 7 THE WITNESS: In the areas I've --
 8 MS. KAVANAUGH: Oh, in what area.
 9 Q Yeah, in what area on the DNR site?
 10 A Are you including the wetlands or just the launch
 11 site, parking site -- parking lot site?
 12 Q Let's just say the launch site right now.
 13 A Okay. Then I would stick to my previous answer about
 14 it.
 15 Q Okay. And, again, I think you said when
 16 there's -- you were talking about heavy rain, spring
 17 snow melt. Is that the times you're likely to see
 18 this type of water in all of these areas? I mean --
 19 A Correct.
 20 Q Okay. I'd ask you to take a look at Exhibit 34, I
 21 think it was dash 002 and 001, which would be I
 22 believe in the white book.
 23 MR. GLEISNER: Yes, they would be, Counsel.
 24 MS. CORRELL: You just showed them, right?
 25 MS. KAVANAUGH: Yeah, that were just shown.

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1 A It varies throughout the year. Again, the last
 2 several years there's been probably one or two events
 3 that I observed that. Some years I don't observe it
 4 at all.
 5 Q Okay. So the last few years how often have you seen
 6 water that you thought was deep enough to float a
 7 canoe on the DNR property?
 8 A Probably twice a year.
 9 Q Okay. And what about -- and that would be like the
 10 last two or three years or how many?
 11 A 2006 I recall one event and then 2008. Probably
 12 since 2008 it's been about twice a year.
 13 Q Okay. And what about in the years from '93 through
 14 2006, did you observe water on the DNR property that
 15 looked deep enough to float a canoe?
 16 A I don't recall seeing any water.
 17 Q Okay.
 18 A Perhaps in 2005 and let's clarify that.
 19 Q Now, when you've seen water deep enough to float
 20 a --
 21 MR. GLEISNER: Wait a minute, Counsel, I
 22 just want to understand it. Perhaps in 2005 at
 23 which circle?
 24 THE WITNESS: I guess I need to retract my
 25 answer and look at some clarification. Where

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1 MR. GLEISNER: Yeah, do you want me to put
 2 them up again?
 3 MS. KAVANAUGH: Sure, that would be
 4 helpful.
 5 A 34 is way in back.
 6 MR. GLEISNER: Warden, that's 001.
 7 Q Can you tell -- do you have any idea what season that
 8 would be when that photo was taken -- that 001?
 9 A Based on what appears to be sheet ice on the water,
 10 I'd say that'd be again early spring.
 11 Q Okay. And then 34-002 --
 12 MR. GLEISNER: Was it 02 or 03, Counsel? I
 13 think it was --
 14 MS. KAVANAUGH: I'm sorry, I thought it was
 15 002.
 16 MR. GLEISNER: I think it was 03, Counsel.
 17 MS. KAVANAUGH: Oh. I had 34-002 so let's
 18 see which one. The one that Mr. Peters
 19 produced.
 20 MR. GLEISNER: Oh, no, I'm sorry, Counsel.
 21 That was 35-002. I'm sorry, I'm putting it up
 22 right now.
 23 MS. KAVANAUGH: Okay. Did he show 3 as
 24 well?
 25 MR. MEYER: He did all three of them.

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1 MS. KAVANAUGH: Oh, okay. Well, let's look
2 at all of them then. 35-002 then.
3 MR. GLEISNER: It's up on the screen too,
4 Warden, if you want.
5 THE WITNESS: Okay. Thank you, sir.
6 Q Can you get a sense of what time of the year that
7 would be?
8 A There appears to be buds forming on some of the
9 trees, the deciduous trees, so again I'd go late
10 spring, early --
11 Q And that would be like April?
12 A April/May, correct.
13 Q And the one with the ice on the water, I
14 forget -- the earlier one, you said that would be
15 when month-wise?
16 A Depending on the year, late spring -- March/April.
17 Q Okay. And, I'm sorry, I'm still not used to the idea
18 of frozen water in March and April. And then 35-003
19 I believe is the last one.
20 MR. GLEISNER: I don't think we -- no, we
21 put up 34-003, Counsel.
22 MS. KAVANAUGH: Oh, 34-003, excuse me. Can
23 we take a look at that one?
24 MR. GLEISNER: It's up.
25 Q And can you give us an idea of when -- what time of

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1 MR. GLEISNER: I'm going to object to
2 speculation, Your Honor.
3 MS. KAVANAUGH: No, I'm not asking him to
4 speculate, I'm asking him whether he can based
5 on his observations. If he can't, he can't.
6 MR. GLEISNER: He's a trained law
7 enforcement officer, I'll withdraw my objection.
8 MS. KAVANAUGH: He's trained in
9 observation.
10 A It appears to be fairly flat.
11 Q Okay.
12 A When I've seen water in one area, there's usually
13 water in all the areas.
14 Q Okay. So by that you mean when you see water on the
15 DNR property you tend to see it further down
16 Redland Road?
17 A Correct.
18 Q Okay. Have you ever tried to access the DNR site
19 using the existing east/west road that we've
20 discussed and been unable to because of water
21 covering the road?
22 A No.
23 Q Okay. Now, when you've noticed standing water in any
24 of these areas, except for that trickle that you
25 mentioned when you were out there with Andy at the

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1 year that might be?
2 A It looks -- again, no leaves on the trees. It could
3 be extreme late fall or early spring.
4 Q Okay.
5 A There's no snow so I don't it's wintertime, but --
6 Q Okay. And have you ever seen water to that extent
7 portrayed in those photos on the property -- those
8 three --
9 A Similar, yes.
10 Q Okay. Now, from what you know, and I know you're not
11 a meteorologist, but in early spring or -- in early
12 spring, is that the time when typically you have snow
13 melt or spring runoff?
14 A Yes, hopefully.
15 Q Okay. Hopefully, yes. Okay. Have you ever walked
16 from the DNR Hanson property south on Redland Road or
17 vice versa?
18 A Yes.
19 Q Okay. Based on your observations -- I know we don't
20 have elevations show down lower Redland Road. Does
21 the Hanson property, which has been identified as the
22 property just south of the DNR property, and then the
23 other properties on Redland Road and Redland Road
24 itself, do they appear higher or lower in elevation
25 than the DNR site? Can you form an opinion on that?

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1 east end of the channel, have you noticed any
2 perceptible flow or movement in any of these waters?
3 A No.
4 Q During your deposition I believe you were asked
5 whether you'd ever seen anyone navigating in certain
6 areas of the site. Have you ever seen anyone
7 navigating a watercraft anywhere depicted on
8 Redland Road, Exhibit 2-002, except for the videos
9 the other day? Have you ever, in person, observed
10 anyone navigating a watercraft in those two green
11 areas, for example -- the wetlands?
12 A No.
13 Q Have you ever observed anyone navigating a watercraft
14 on the north/south access road?
15 A No.
16 Q How about in the east/west access road?
17 A No.
18 Q How about in the northern channel that's identified
19 as blue on there?
20 A No.
21 Q How about the red circled area that's the DNR
22 property?
23 A No.
24 Q Okay. Now, where there's been a lot of -- well, you
25 said you haven't seen -- okay, let's see. Have

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1 you -- as part of your duties as a warden, at least
 2 when you were a conservation warden, and now a
 3 Recreational Safety, you regulate activities on lakes
 4 and streams, correct?
 5 A We enforce the regulations that are put into effect
 6 on the lakes, correct.
 7 Q Yes. Have you ever seen anything that -- you know,
 8 you have to make decisions when you're in the field
 9 whether something looks like a lake or looks like a
 10 stream. Have you ever seen anything that looks like
 11 a stream or looks like a lake on the DNR property?
 12 A No.
 13 Q Okay.
 14 MS. KAVANAUGH: I've got nothing else to
 15 ask. Thank you, Warden.
 16 MR. GLEISNER: No cross.
 17 MR. MEYER: Two very brief
 18 questions -- very brief.
 19 CROSS-EXAMINATION
 20 BY MR. MEYER:
 21 Q From either your training, professional training, or
 22 your work experience, what watercrafts would you
 23 consider yourself proficient in using?
 24 A I have used -- fairly proficient in everything from
 25 an eight-foot pack canoe up to a 32-foot boat we use

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1 boat, two to three inches.
 2 MR. GALLO: No further questions. Thank
 3 you.
 4 ALJ BOLDT: Okay. Any other questions of
 5 the warden?
 6 MR. GLEISNER: No.
 7 ALJ BOLDT: Okay. Thank you very much.
 8 You're excused. Any further witnesses on behalf
 9 of the Department?
 10 MS. KAVANAUGH: No.
 11 ALJ BOLDT: Mr. Meyer, did you want to
 12 testify?
 13 MR. MEYER: I do not.
 14 ALJ BOLDT: Okay. Any rebuttal witnesses?
 15 MR. GLEISNER: We have some rebuttal
 16 witnesses. I have one. It will be very short.
 17 Mr. Gallo has two, I believe, Your Honor.
 18 ALJ BOLDT: Okay. Who wants to go first?
 19 MR. GLEISNER: Mr. Gallo.
 20 MR. GALLO: I'd like to call Paul Giese and
 21 this will be quick.
 22 ALJ BOLDT: I'll remind you that you're
 23 still under oath.
 24 DIRECT EXAMINATION
 25 BY MR. GALLO:

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1 on Lake Michigan.
 2 Q So both motorized and non-motorized?
 3 A Correct.
 4 Q In an average year, both either professional in your
 5 job or as recreation, how many days a year do you
 6 spend on non-frozen water in a watercraft?
 7 A It, again, is seasonal, depending how nice the
 8 weather is.
 9 Q Ball park.
 10 A In a typical boating season, late April through
 11 October, probably three to five days a week.
 12 MR. MEYER: No further questions.
 13 ALJ BOLDT: Any other questions? Mr.
 14 Gallo?
 15 CROSS-EXAMINATION
 16 BY MR. GALLO:
 17 Q Warden, are you familiar with a navigability in fact
 18 test?
 19 A I'm familiar with what's been testified today and
 20 yesterday.
 21 Q Have you ever seen one of these tests?
 22 A Yes. Actually, yes, I am familiar with that, yes.
 23 Q In your opinion, how much water depth is necessary to
 24 be able to float a watercraft in this type of test?
 25 A Depending on the weight and what the burden is in the

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1 Q Paul, I'd like to refer you --
 2 MR. GALLO: Is everybody ready?
 3 Q I'd like to refer you to the GESTRA report. It's
 4 Exhibit 7A.
 5 MR. GLEISNER: It's in the white book.
 6 It's in the white book.
 7 A White book?
 8 Q Yes, Exhibit 7.
 9 A Okay.
 10 MR. GALLO: Just one second, I want to make
 11 sure everybody is on the same page. Are you
 12 ready?
 13 MS. CORRELL: Yeah, sorry. I didn't -- was
 14 there a question that was posed?
 15 ALJ BOLDT: Exhibit 7.
 16 MR. GALLO: No, Exhibit 7, GESTRA report.
 17 MS. CORRELL: Oh, we're back there. Okay.
 18 Do I have it? No, this is the wrong binder.
 19 Give me one minute.
 20 MR. GALLO: Sure.
 21 MS. CORRELL: Okay, got it. Thank you.
 22 MR. GALLO: Okay.
 23 Q Paul, are you familiar with this report?
 24 A Yes, I am.
 25 Q And you've read it?

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1 A Yes, I have.
 2 Q And I'd like to --
 3 MR. GLEISNER: Pardon me, I'm sorry.
 4 MS. KAVANAUGH: Is it the GESTRA report?
 5 MR. GALLO: Yeah, the GESTRA report.
 6 Q I'd like to refer you to Page 7-003. During your
 7 analysis of this report you pointed something out to
 8 me that I hadn't understood with regard to
 9 Paragraph 2 regarding the focus of this report. Can
 10 you -- do you recall that point?
 11 A Yes, I do.
 12 Q Can you explain for the record your thoughts with
 13 regard to this second paragraph?
 14 A Sure. What my thoughts were with regard to that
 15 paragraph was that this report was based on the plan
 16 that the new access road would follow the existing
 17 access trail that exists today.
 18 Q And what's the basis for your opinion?
 19 A The basis would just be the fact that the -- let's
 20 see, the fourth sentence in that paragraph, "The
 21 roadway will generally follow an existing access
 22 trail that is cleared but not paved."
 23 Q Okay. I want to refer you to Boring 4, 7-017.
 24 A Yes.
 25 Q And are you familiar with the location of this

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1 ALJ BOLDT: Sure.
 2 MR. GLEISNER: Thank you.
 3 Q Paul, I want to direct your attention to the log of
 4 Test Boring B4, Page 7-017.
 5 A Yes.
 6 Q Is there anything within this log that leads you to
 7 believe that the location is confirmed to be in the
 8 existing roadway?
 9 A Yes.
 10 Q Can you tell us --
 11 A Yes, the presence of the -- this log indicates that
 12 there's three feet of silty sand with gravel, trace
 13 organic brown fill, that was encountered from the
 14 ground surface to a depth of three feet.
 15 Q I believe from your earlier testimony you indicated
 16 that you would, as a geotechnical engineer practicing
 17 in this locale, you would recommend additional
 18 borings to be conducted --
 19 MS. CORRELL: All of this has been covered.
 20 I object to duplicity.
 21 ALJ BOLDT: Yeah, what are we rebutting
 22 right now?
 23 MS. CORRELL: Right now -- these were
 24 our -- he did in his direct. I recall the same
 25 testimony.

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1 boring?
 2 A Yes, I am.
 3 Q Can you describe that location?
 4 A Sure. That boring, from the testimony, is that it
 5 was performed on the access road between Station 20
 6 and 25, the east/west portion of the existing access
 7 road that extends towards North Lake.
 8 MS. KAVANAUGH: And, I'm sorry, whose
 9 testimony? You said that was from the
 10 testimony?
 11 Q I'm sorry, do you know --
 12 A From Kurt's testimony earlier today.
 13 MS. KAVANAUGH: That it was on the road?
 14 THE WITNESS: That it was on the roadway.
 15 Q Can you -- let's look at one of the figures here,
 16 Exhibit 143. Can you locate Boring 4?
 17 A Yes, Boring 4 was --
 18 Q And can you confirm that it was performed on the
 19 existing road?
 20 A According to this, it has it that it was located just
 21 within the existing roadway.
 22 Q Okay. And let's look at Boring 4, Exhibit
 23 Page 7-017.
 24 MR. GLEISNER: Counsel, may I -- just,
 25 Judge, may I approach that for a moment?

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1 MR. GLEISNER: May it please the court, may
 2 it please the court, may it please the Judge. I
 3 just think that if we can just get through this
 4 we can all --
 5 ALJ BOLDT: What are we rebutting right
 6 now? I mean --
 7 MR. GALLO: The adequacy of the existing
 8 boring which was brought into contention today
 9 in Mr. Farrenkopf's testimony.
 10 MS. KAVANAUGH: But he's already offered
 11 his testimony on that.
 12 ALJ BOLDT: He already offered his direct
 13 testimony.
 14 MS. CORRELL: And we rebutted that.
 15 ALJ BOLDT: Anything -- you know, if you
 16 asked him what's his response to what he heard
 17 today or something like that, that's rebuttal.
 18 MR. GALLO: Okay. Thank you.
 19 Q Mr. Giese, do you have an opinion as to what you
 20 heard today with regard to the location and validity
 21 of Test Boring B4?
 22 A Sure. I mean I don't dispute the validity of
 23 Test Boring B4 and the conditions that are
 24 encountered, that are portrayed, on this test boring.
 25 I guess my opinion as a geotechnical engineer is that

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1 once that roadway veered to the north into that
 2 existing wetlands area, that that would absolutely,
 3 definitely require additional borings to determine
 4 the existing conditions of those soils because, in my
 5 opinion, those soils are going to act much
 6 differently than the peat soils and the organic soils
 7 that were encountered in Test Boring B4.
 8 Q Okay. You work for a geotechnical firm by the name
 9 of --
 10 A Giles Engineering.
 11 Q And that geotechnical firm has a number of soil
 12 boring rigs, is that correct?
 13 A Yes, we do.
 14 Q Do you have a soil boring rig that could go into the
 15 wetlands and take those soil borings?
 16 A Yes, we do.
 17 MR. GALLO: No further questions.
 18 ALJ BOLDT: Okay.
 19 MR. GLEISNER: Briefly, Your Honor.
 20 CROSS-EXAMINATION
 21 BY MR. GLEISNER:
 22 Q Is there a difference between a paved highway and the
 23 type of road they propose to put in here?
 24 A Well, the short answer is yes.
 25 Q And can you describe what that is in terms of the

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1 the exact terms, but the two types of geotech
 2 material that is going to be used for the snow --
 3 A Snowshoe?
 4 ALJ BOLDT: Snowshoe effect?
 5 MR. GLEISNER: Thank you very much, Your
 6 Honor. It's getting a little late. Thank you
 7 for that.
 8 Q Was unlikely to fail. Did you hear that testimony?
 9 A Yes.
 10 Q To a reasonable degree of professional certainty do
 11 you have an opinion as to that?
 12 A Well, I can't say whether it would or wouldn't fail
 13 because there has not been enough analysis of the
 14 anticipated soils in that wetlands area. There
 15 hasn't been any analysis I guess I should say.
 16 Q So is it your testimony they're going into this
 17 blind?
 18 A Somewhat.
 19 MR. MEYER: Objection.
 20 MS. KAVANAUGH: You're putting words in his
 21 mouth.
 22 MS. CORRELL: It's leading.
 23 ALJ BOLDT: Actually, it's not, it's a
 24 direct rebuttal case.
 25 MS. CORRELL: Yeah, exactly, it's leading.

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1 type of composition and the depth of the composition?
 2 A Sure. You know, again, as Kurt had testified to,
 3 it's all -- it's dependent upon the traffic loading
 4 that that particular roadway or pavement is subjected
 5 to. A highway surface would be -- would have a much
 6 thicker base course and a surface course, whether it
 7 be hot mix asphalt or Portland cement, just because
 8 of the number of loads that that pavement -- the
 9 number of traffic loads that that pavement is
 10 subjected to, whereas -- I mean there wouldn't be as
 11 much traffic loading on this particular project.
 12 Q Now, we've heard testimony today and I'd like to ask
 13 your opinion of it to a reasonable degree of
 14 professional certainty. We heard testimony today
 15 that it was not necessary to do any other borings on
 16 the road from Station 20 to Station 25, the east/west
 17 portion of the access road, because a boring had been
 18 done on B4. Do you have an opinion?
 19 A My opinion is that B4 does not represent the
 20 conditions that will most likely be encountered to
 21 the north of that existing roadway.
 22 Q Are you familiar with the concept of a land bridge?
 23 A Yes.
 24 Q You heard testimony today from Mr. Farrenkopf that it
 25 was unlikely that the geotech -- and I can't remember

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1 ALJ BOLDT: It seems like cross, but
 2 it's --
 3 MR. GLEISNER: It does seem like cross,
 4 Your Honor.
 5 ALJ BOLDT: Okay. Yeah, so the objection
 6 is sustained. See if you can ask it another
 7 way.
 8 MR. GLEISNER: Okay.
 9 Q Do you have an opinion as to whether or not what they
 10 propose doing from Station 20 to Station 25 is being
 11 done without proper analysis?
 12 A Yes, I do.
 13 MS. CORRELL: Leading.
 14 MS. KAVANAUGH: Yeah, and
 15 characterizing --
 16 ALJ BOLDT: He said do you have an opinion.
 17 I think that's allowed.
 18 A Yes, I do have an opinion.
 19 Q And what's that opinion?
 20 A My opinion is that I believe the GESTRA report
 21 underestimates the construction difficulties that are
 22 going to be encountered between Station 20 and 25.
 23 MR. GLEISNER: Just give me one second,
 24 Your Honor.
 25 Q I would direct your attention --

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1 MR. GLEISNER: And I'm just about done,
 2 Your Honor.
 3 Q -- to 7-007.
 4 A Okay.
 5 Q Do you have that?
 6 A Yes, I do.
 7 Q Actually, that is not the -- that is not --
 8 A Oh, 007, I'm sorry.
 9 Q Yeah, right. That is not where you want to be. I
 10 can see from here.
 11 A Okay.
 12 Q It says -- and I direct your attention specifically
 13 to the last paragraph, and I'm referring to the
 14 sentence one, two, I think three, four in. "If the
 15 roadway is raised two feet it is likely the resulting
 16 settlement would be on the order of two to four
 17 inches." Do you agree with that?
 18 A No.
 19 Q And to a reasonable degree of professional certainty
 20 why don't you agree with that?
 21 A Just because there has not been enough analysis of
 22 the organic soils to determine that amount of
 23 settlement.
 24 MR. GLEISNER: No further questions, Your
 25 Honor.

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1 asked is, isn't it true that you just testified that
 2 you can't say if there would or would not be failure
 3 of the access road because you don't have enough data
 4 or information?
 5 A I guess that is what I answered to.
 6 Q Okay. And were you a party to additional
 7 conversations between Doug Bath and Kurt Farrenkopf
 8 subsequent to preparation of the GESTRA report?
 9 A No.
 10 Q And isn't it true that Mr. Farrenkopf's testimony
 11 indicated multiple steps that are not specific
 12 recommendations in 3.3.1 at Exhibit 7-006?
 13 A I guess can you restate the question?
 14 Q Well, you can turn to 7-006 and identify --
 15 A Okay.
 16 Q -- if each and every step that Mr. Farrenkopf
 17 identified would take place on our design plans are
 18 specific written recommendations in that section.
 19 A Would they take place?
 20 MR. GLEISNER: Counsel, I don't think your
 21 question is clear.
 22 Q I'll ask you to take a couple minutes to review
 23 Section 3.3.1 --
 24 A Okay.
 25 Q -- on Exhibit 7-006 and let me know when you're

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1 ALJ BOLDT: I think these guys get a chance
 2 first.
 3 MR. GALLO: I'm just going to ask him if
 4 his opinions were to a reasonable degree of
 5 scientific certainty?
 6 THE WITNESS: Yes.
 7 CROSS-EXAMINATION
 8 BY MS. CORRELL:
 9 Q Thank you for waiting to the end here --
 10 A Sure.
 11 Q -- Mr. Giese. I heard you testify just now that you
 12 can't provide an opinion of whether or not the access
 13 road would or would not fail, is that an accurate
 14 characterization of your testimony just a couple
 15 minutes ago?
 16 A I would say no.
 17 Q Okay. Can you clarify what your testimony was
 18 precisely because I wrote down that you couldn't say
 19 it would or would not fail based on not knowing the
 20 information that was available if another boring site
 21 was taken in the wetland?
 22 A What I would say is that to clarify that is that
 23 another test boring would need to be done to
 24 determine if the proposed fix is adequate.
 25 Q I didn't ask that question though. The question I

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1 ready.
 2 A Okay.
 3 MR. GLEISNER: He's done, Counsel.
 4 Q What are the recommendations that are specifically
 5 provided in this section by the GESTRA report?
 6 A Sure. They say that, "There's a significant
 7 thickness, a very soft, very loose, soil that raises
 8 special concerns about the potential for poor
 9 pavement performance and settlement." They
 10 say -- estimate that three -- "A minimum of three
 11 feet of compacted granular soil is needed to provide
 12 suitable subgrade for pavement. In some places,
 13 three feet of fill may also already exist, though the
 14 type of fill material and level of compaction applied
 15 in the past will vary. In other areas, an additional
 16 one foot may be needed. If excavation exposes the
 17 very soft, very loose soil, a separator fabric should
 18 be used to prevent contamination of the new fill from
 19 the underlying soils."
 20 Q And it continues, alternatively?
 21 A "Uni-axial geograde could be used to reduce the
 22 required granular fill from three feet to one foot,
 23 does not include sub-base gravel. This type of grid
 24 has been shown to provide a snowshoe effect at
 25 spreading out the loading from tires. This method

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1 may also be useful in reducing the need to excavate
 2 close to the water table. After fill placement, the
 3 proof roll should be completed with a loaded triaxial
 4 dump truck, moving at no more than five miles per
 5 hour to determine the stability of subgrade soils.
 6 Soil remediation work may be needed where yielding
 7 during proof roll is noted. Specific recommendations
 8 can be provided where movement is observed."
 9 Q Okay. So you've just described, as I understand it,
 10 two specific recommendations in terms of providing
 11 subgrade improvements and there's two alternatives.
 12 Isn't it accurate to say that Mr. Bath recommends
 13 excavation at either a minimum of three feet or
 14 alternatively to one foot and adding, instead of
 15 those peat-type soils, one foot of granular material?
 16 A Well, he doesn't say the peat --
 17 Q Correct.
 18 A -- because there's been no test borings there.
 19 Q Removal of some of the specific soils -- the muck
 20 soils?
 21 A Yes, he does.
 22 Q And the second recommendation is that a separator
 23 fabric would be used in the one instance or
 24 alternatively that a uni-axial grid could be used?
 25 A Yes.

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1 things going on.
 2 A That's different than the recommendations --
 3 Q One is a -- that's exactly what I'm pointing out.
 4 These recommendations were done at a particular point
 5 in time in the project, correct?
 6 A Right.
 7 Q There have been subsequent conversations that you
 8 were not privy to?
 9 MR. GLEISNER: Counsel, I'm going to
 10 object. I mean you're testifying and --
 11 MS. CORRELL: I'm not testifying.
 12 MR. GLEISNER: -- I don't recall that --
 13 MS. CORRELL: This testimony was --
 14 ALJ BOLDT: She specifically asked him if
 15 he was -- if he had been involved in those
 16 conversations so I think she --
 17 MR. GLEISNER: Oh, okay.
 18 MS. CORRELL: Yes, I asked these questions.
 19 ALJ BOLDT: She laid the groundwork for
 20 that statement so go ahead.
 21 Q So you don't have a very precise recollection of
 22 Mr. Farrenkopf's testimony in that regard?
 23 A Well, I don't remember hearing breaker run. I don't
 24 remember him saying that that would be -- I don't.
 25 Q Okay. So you just don't recall it?

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1 Q Does he recommend providing both a layer of --
 2 MS. CORRELL: Strike that.
 3 Q Isn't it true that Mr. Farrenkopf testified that the
 4 DNR's design will incorporate --
 5 MS. CORRELL: Can you please not -- I'm
 6 having a hard time hearing.
 7 Q Could you --
 8 MS. CORRELL: I've lost my train of
 9 thought.
 10 Q Isn't it true that Mr. Farrenkopf testified that the
 11 DNR site plan design would not only excavate to a
 12 three-foot depth, in some areas there's going to be
 13 some differences? It would be between one to four
 14 feet. Excavate out that soft material, utilize
 15 separator fabric, also utilize breaker rock and
 16 reinforcement grid and, finally, eight inches of
 17 (inaudible) soil?
 18 A I didn't hear that.
 19 Q That wasn't your understanding of the testimony?
 20 A No, and I didn't hear breaker --
 21 Q I mean I can provide that testimony, but it was
 22 already provided on direct. We can provide it again.
 23 A Well, I didn't hear that there would be breaker run
 24 and two layers of geotextile.
 25 Q I want you to be specific. There's two different

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1 A Yeah.
 2 Q Well, how about this --
 3 A I do have an opinion on that method.
 4 Q -- if all six layers that the DNR --
 5 MS. CORRELL: Strike that.
 6 Q And worst case scenario, if there is movement when
 7 the proof roll test is conducted, aren't there
 8 engineering tools available to address any movement?
 9 A The engineering tube, yes.
 10 MS. CORRELL: I don't have any further
 11 questions. Thank you.
 12 MR. GLEISNER: Short redirect?
 13 ALJ BOLDT: Sure.
 14 MR. GLEISNER: Thank you, Your Honor.
 15 MR. MEYER: No question.
 16 ALJ BOLDT: Apologies from --
 17 MR. MEYER: No, not needed.
 18 RE-CROSS-EXAMINATION
 19 BY MR. GLEISNER:
 20 Q With regard, first of all, to 3.3.1, I heard that you
 21 had an opinion concerning a matter that Counsel had
 22 raised. Would you please share that with us?
 23 A The opinion of the method of stabilization?
 24 Q Yes, yes.
 25 A My opinion is that there's no basis for that to tell

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1 whether that method of stabilization would work or
 2 not.
 3 Q And why is that, sir?
 4 A Because there is no subsurface information about the
 5 in-place characteristics of the soils in the wetlands
 6 area.
 7 Q I'm going to -- are you through? I'm sorry.
 8 A Yes.
 9 Q I'm going to direct your attention to 7-004 and there
 10 has been -- I'm sorry, I know it's muck, but I can't
 11 remember what it is.
 12 A Houghton.
 13 Q Houghton muck?
 14 A Houghton.
 15 Q And that Roland muck?
 16 A Roland.
 17 Q Roland muck?
 18 A Right.
 19 Q That table just above Section 2.3 on 7-004, it says
 20 that the soil support value for those two types of
 21 muck is none, is that correct?
 22 A Yes.
 23 MS. CORRELL: This has all been done in
 24 direct.
 25 MR. GLEISNER: Well, I'm --

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1 A That's correct.
 2 Q It was muck all the way?
 3 A Basically. It's the organic silt down to a depth of
 4 12 feet and then at 12 feet it turns into silty clay,
 5 but those soils still have very low strength
 6 characteristics and high moisture contents.
 7 Q So that begs the question, how far would you have to
 8 excavate to get to a point where you could get a
 9 supporting road or a support for a road?
 10 A Well, it depends upon the conditions that are in that
 11 roadway. I mean on the basis of this boring?
 12 Q Yes, on the basis of --
 13 A I mean if they were -- if the roadway was going into
 14 the -- you've got that layer of better materials up
 15 in the top three to four feet and, you know, it's
 16 reasonable to say that that could be saved in place
 17 and build the roadway above that.
 18 Q I understand, but your testimony, as I understood it,
 19 and the testimony of Mr. Farrenkopf was that B4 was
 20 done on or close to the existing roadway, is that
 21 correct?
 22 A That's correct.
 23 Q And your testimony from a few moments ago was that
 24 due to the alteration of the roadway -- did I say
 25 that right, alteration?

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1 MS. KAVANAUGH: Laying a foundation.
 2 MR. GLEISNER: I'm laying a foundation.
 3 That's exactly right. Thank you, Edwina.
 4 Q That means there is no soil support value, is that
 5 correct?
 6 A That's correct.
 7 Q Okay. Now, I'd like you to go to 7- -- first of all,
 8 I'd like you to stop on the way at 7-010 and this is
 9 all foundational. Soil Boring 4 was done between the
 10 borderline between Houghton muck and the Roland muck,
 11 is that correct?
 12 A Yes.
 13 Q Now, I'd like you to go to 7-016 and 7-017 and ask
 14 you this specific question based on what we've just
 15 looked at. To a reasonable degree of professional
 16 certainty were the soil borings or the soil boring
 17 done at B4 in either 2007 or 2008 done deep enough?
 18 A I would have extended them deeper.
 19 Q And why?
 20 A Just to find the bottom, to find a layer of competent
 21 bearing soil.
 22 Q So is it your -- am I understanding your testimony
 23 correctly to a reasonable degree of professional
 24 certainty that you don't see a competent body of soil
 25 identified in B4?

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1 A The realignment?
 2 Q Realignment of the roadway, that this road will
 3 actually go into the wetlands, is that correct?
 4 A That's correct.
 5 Q So I would like to ask you to assume something and
 6 then I'm going to ask your opinion. I'd like you to
 7 assume that in the wetland to the north of where B4
 8 was done that you do not have the overlying three
 9 feet of fill, silty sand with gravel, etcetera, that
 10 we find in Boring 4 and then I would like to ask your
 11 opinion if that would have an effect on your ability
 12 to dig down and excavate down --
 13 A Absolutely.
 14 Q -- for support?
 15 A Absolutely.
 16 Q To a reasonable degree of professional certainty,
 17 what is that opinion?
 18 A My opinion is that it's going to be extremely
 19 difficult to even get equipment in there to
 20 place -- to remove any fill that's being proposed.
 21 Q Would that have an impact on the cost of the project?
 22 A Yes.
 23 MS. CORRELL: Objection to relevance.
 24 MR. GLEISNER: Well, not to the taxpayers.
 25 MS. CORRELL: Oh, if you want to talk about

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1 cost to the taxpayers, I think we could be here
2 all night.
3 MR. GLEISNER: No further questions, Your
4 Honor.
5 ALJ BOLDT: Yeah. No, there's a case
6 that's specifically part of Chapter 30 or the
7 issues before us. Okay. Any other questions of
8 this witness?
9 MR. GALLO: Yes.
10 REDIRECT EXAMINATION
11 BY MR. GALLO:
12 Q Mr. Giese, you heard the testimony of Kurt Farrenkopf
13 earlier today?
14 A Yes.
15 Q And he explained a system that was discussed with the
16 GESTRA folks that's outside of this report. It
17 consisted of layers and use of geo-fabrics and a
18 proof roll test. Do you have an opinion as to --
19 MS. CORRELL: Asked and answered.
20 ALJ BOLDT: It's not asked yet.
21 MS. CORRELL: Go ahead.
22 Q Do you have an opinion as to how that proof roll test
23 will go and the spot repairs of soft spots?
24 A I think my opinion is that that proof roll would
25 probably fail in substantial areas.

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1 approval.
2 Q Do you have an opinion?
3 MR. GLEISNER: Your Honor, I guess -- oh,
4 I'm sorry.
5 A If it doesn't work, then typically it would have to
6 be taken out and start over. I mean it's dependent
7 upon why it's failing the proof roll.
8 Q Thank you.
9 ALJ BOLDT: Any other questions of this
10 witness? Okay. You're excused. Thank you very
11 much, sir. Ready for your next one?
12 MR. GALLO: I don't have another one.
13 ALJ BOLDT: Okay. Good.
14 MR. GLEISNER: I'll call Mr. Rob Moevius.
15 MR. MEYER: Is this the last witness?
16 MS. CORRELL: Except for we're going to
17 have to call now sur-surrebuttal because
18 apparently we can't recall testimony that was
19 already provided today so we'll have to clarify
20 the record.
21 ALJ BOLDT: Okay. Do you swear to tell the
22 truth, the whole truth and nothing but the
23 truth, so help you God?
24 MR. MOEVIUS: Yes, I do.
25 DIRECT EXAMINATION

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1 Q What's -- to a reasonable degree of scientific
2 certainty I'm going to ask you if you have an opinion
3 of the process of repair for this system using the
4 multiple layers of fabrics to in effect bridge over
5 the --
6 MS. CORRELL: Objection, relevance.
7 ALJ BOLDT: Yeah, I'm not sure --
8 MS. CORRELL: How is that impacting a
9 regulatory matter?
10 MR. GALLO: Well it's --
11 MS. CORRELL: It may be a tedious process
12 if it in fact does happen.
13 MR. GALLO: That's what I'm trying to find
14 out.
15 MS. CORRELL: Is that relevant?
16 MR. GALLO: But it -- if it doesn't work,
17 then we're going to have to excavate and go
18 considerably wider.
19 ALJ BOLDT: Okay. If it has impacts on
20 something -- if you're saying it has some
21 environmental impacts, then let's tie that in
22 and then --
23 MR. GALLO: Yeah, okay.
24 MS. KAVANAUGH: If it doesn't work then
25 they'll have to apply the amendment to the

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1 BY MR. GLEISNER:
2 Q Briefly, the hour is late, what's your address?
3 A W322 N7492 Redland Road.
4 Q How long have you lived there, sir?
5 A Since the early '80s.
6 ALJ BOLDT: Could you get the spelling of
7 his last name?
8 MR. GLEISNER: Sure, M-O-E-V-I-U-S.
9 THE WITNESS: U-S, correct.
10 Q And are you familiar with the area that has come to
11 be known as the Krause site?
12 A Yes, I am. Just to clarify, I've known the Krause
13 site since the '70s. I moved out on the lake on
14 River Road which is right next to Redland Road in
15 1973.
16 Q And are you familiar with the area where the proposed
17 boat launch is going to go?
18 A Yes.
19 Q I'm going to direct your attention to a series of
20 exhibits beginning with, and you can look at the
21 white book in front of you, Exhibit 34-001.
22 MS. CORRELL: I guess I'm not sure where
23 you're going. Is that rebuttal testimony?
24 MR. GLEISNER: It sure is. It sure is.
25 MS. CORRELL: Please get there.

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1 MR. MEYER: Can I just ask clarification of
2 what's being rebutted?
3 MR. GLEISNER: What is being rebutted is
4 the opinions of several witnesses that this does
5 not flood very often here and that this is an
6 area that only infrequently, perhaps every 100
7 years or so, floods. That's what's being
8 rebutted.
9 MS. CORRELL: I don't think that's a fair
10 characterization of what the testimony was.
11 ALJ BOLDT: It's in a flood plain.
12 MR. GLEISNER: Well, I'd just like to get
13 the photographs in, Your Honor. It's going to
14 take about three minutes.
15 MS. KAVANAUGH: Aren't the photographs in
16 already?
17 MR. GLEISNER: No, they're not.
18 Q I'm calling up Exhibit 34-001. Did you take that
19 photograph, sir?
20 A Yes, I did.
21 Q And when did you take that photograph?
22 A I took it this year, 2011, I'd say it was in March.
23 Q And I'm going to show you what has been marked as
24 Exhibit 34-002. Did you take that photograph?
25 A Yes, I did.

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1 A Well, usually several times a year there is water in
2 that area.
3 Q And is that true of Exhibits 34-002 and 003 as well?
4 A Oh, yes, that's the same area.
5 MR. GLEISNER: Move the admission of these
6 exhibits, Your Honor.
7 ALJ BOLDT: Okay. Any objection to 34?
8 MS. CORRELL: No objection.
9 ALJ BOLDT: 34-001, 2 and 3 are received.
10 MR. GLEISNER: Oh, and I forgot one, 004 as
11 well, Your Honor. This -- real quickly.
12 Q Did you take this Photograph 004?
13 A Yes, and this is on the grove of trees, but closer to
14 where we walked into the grove of trees when we were
15 on our public, you know --
16 ALJ BOLDT: Site visit?
17 Q Site visit?
18 A Yeah, when we were on our site visit we walked in
19 this way so the rest of the grove of trees stands out
20 farther and I see Andy Hudak's cabbage -- what was
21 it, a skunk cabbage, and it was located back a little
22 bit farther where (inaudible) in our walkthrough.
23 Q Toward the southeast corner of Exhibit 34-004,
24 correct?
25 A Correct.

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1 Q And when did you take that photograph?
2 A Roughly either the same day or the next day so it's
3 in mid-March sometime.
4 ALJ BOLDT: I'm sorry, March of what year?
5 THE WITNESS: Of 2011.
6 ALJ BOLDT: Thank you.
7 Q I'm going to show you what has been marked as
8 Exhibit 34-003. Did you take that photograph?
9 A Yes, I did and that is the grove of trees.
10 Q And --
11 ALJ BOLDT: I'm sorry, and when was that?
12 THE WITNESS: That's 2011 -- March.
13 ALJ BOLDT: Okay.
14 Q I'm going to go back to Exhibit 34-001. Can you tell
15 me which direction you are facing and where you took
16 that photograph from?
17 A I took it from the Hanson side, that little
18 white -- here is about where the marker is for the
19 Hanson property and I was looking north toward Peters
20 and you can see northeast through the grove of trees.
21 Q And how often does it get that wet in the area where
22 the proposed boat launch is going to be placed, if
23 you know?
24 A Well, you mean how many times a year?
25 Q Yes.

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1 Q And that is also a photograph that you took in March
2 of this year?
3 A Yes, you can see a little bit of water stain on the
4 lens there.
5 MR. GLEISNER: Move the admission of this.
6 ALJ BOLDT: I assume there's no objection?
7 34-004 is received.
8 MR. GLEISNER: That's it, Your Honor.
9 ALJ BOLDT: Mr. Gallo, any questions?
10 MR. GALLO: No.
11 ALJ BOLDT: Mr. Meyer, so we don't forget
12 you, any questions?
13 CROSS-EXAMINATION
14 BY MR. MEYER:
15 Q Where do you live, Mr. Moevius, in relationship to
16 the boat launch area?
17 A Just about five houses south.
18 Q South.
19 MR. MEYER: Can you put the map or that
20 picture back up you just had up, Counselor? I
21 forget what number that was.
22 MR. GLEISNER: I know. Just a second,
23 Counsel.
24 MS. KAVANAUGH: The last one?
25 MR. MEYER: Yeah, or any of them.

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1 MR. GLEISNER: I will be very happy to do
2 that. Just a minute.
3 Q Now, when the water is like that, what is the water
4 like on the properties -- on your property?
5 A Not like that, it's dry.
6 Q It's dry.
7 A Or if it would have been, you know, let's say a
8 month-and-a-half earlier, it would have been full of
9 snow.
10 Q What about other properties between you and the boat
11 launch, is there similar water or standing water
12 present?
13 A On the Hanson property adjacent to the DNR property.
14 Q So the Hanson property would also be flooded?
15 A Yes. That first photograph showed the lot line and I
16 was standing on the Hanson property.
17 MR. MEYER: Can we go back to that, please?
18 MR. GLEISNER: Of course, Counsel.
19 MR. MEYER: That would be helpful.
20 MR. GLEISNER: You bet, just give me a
21 second here. And that is 34-001, Counsel.
22 MR. MEYER: 34-001.
23 Q Now, where were you standing again on this one,
24 please, if you could just maybe --
25 A This is the Hanson property. This is the start of

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1 could -- I have a canoe, a kayak, and a paddle boat,
2 but I would think that at least two of those boats
3 would be able to navigate or float, you know, in that
4 area.
5 Q Sure, sure.
6 A I mean I wouldn't want (inaudible).
7 Q You might put your life jacket on. Thank you very
8 much, Mr. Moevius, I appreciate your answers.
9 MS. CORRELL: I don't have any questions
10 for you, Mr. Moevius.
11 ALJ BOLDT: Okay. Thank you very much.
12 MR. GLEISNER: I think we're done, Your
13 Honor.
14 MS. CORRELL: I think we just need to put
15 up our --
16 MR. GLEISNER: Oh, I'm sorry, I apologize.
17 MS. CORRELL: -- witness as a rebuttal for
18 a very brief clarification. I think it's two
19 questions.
20 ALJ BOLDT: Okay. Let's do it.
21 MS. CORRELL: Sur-surrebuttal, Kurt.
22 MR. GLEISNER: We almost were done.
23 MS. CORRELL: I know, sorry. There just
24 seems to be a little bit of confusion. I just
25 want to clarify the record.

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1 the line going --
2 MR. GLEISNER: The Judge can't see.
3 ALJ BOLDT: No, I can see. That's fine,
4 sir.
5 A Okay. So this would be the Hanson's property on this
6 side of this marker.
7 ALJ BOLDT: Meaning the left side? The
8 left side, sir?
9 THE WITNESS: Yeah, to the --
10 A I'm looking north toward the Peters -- the Peters'
11 house is here and this is east a little bit and so
12 all of this area is the Hanson property.
13 Q Okay.
14 A To the -- this would be south so all this area south
15 would be the Hanson property.
16 MS. KAVANAUGH: So the foreground in the
17 picture is what you're saying --
18 THE WITNESS: Yeah.
19 MS. KAVANAUGH: -- is the Hanson property?
20 A And this area going straight through would be
21 the -- where we saw some, you know, navigation in
22 fact in this area.
23 Q So on that date could you have navigated the Hanson
24 property based on what you've seen out there?
25 A Yeah, there was over three inches of water so I

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1 ALJ BOLDT: I think just surrebuttal at
2 this point.
3 MS. CORRELL: Oh, is it just one sur?
4 Thank you.
5 MR. GLEISNER: I think it is.
6 MR. MEYER: Can I ask leading questions or
7 not at this stage?
8 MS. CORRELL: Yeah, where am I?
9 ALJ BOLDT: Okay. You're still under oath
10 and there's two questions for you.
11 MS. CORRELL: Thank you.
12 DIRECT EXAMINATION
13 BY MS. CORRELL:
14 Q Mr. Farrenkopf, could you clarify for the record each
15 of the steps that will be included in the design
16 conditions with respect to the partial excavation for
17 the DNR access road, please?
18 A Okay. I'll to recollect this as best I can based on
19 my conversations with Mr. Bath. Outside of the
20 existing roadway core, I guess I'm talking
21 specifically in the widening area, (inaudible) the
22 wetland three -- two to three to four feet in depth
23 because it was a -- Mr. Bath indicated he was
24 concerned about the layer of peat that shows up in
25 Boring Number 4. He wants to get through that to

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1 that layer, excavate that out, place geotextile
 2 fabric down at the bottom of that excavation, and
 3 then bring in, and this might be where some of the
 4 confusion might have been, either granular backfill
 5 or breaker run up to a point and then on top of that
 6 layer -- I -- and I can't -- I think the variation
 7 was between one and three feet according to his
 8 report in depth. And then on top of that layer of
 9 biaxial or uni-axial reinforcement grid, on top of
 10 that, and that's the grid that he talked about would
 11 be the kind of that -- create the snowshoe effect.
 12 And then on top of that would be, similar to any
 13 roadway embankment, suitable material, whether it be
 14 something from onsite or something -- if there's no
 15 suitable material onsite, something borrowed from a
 16 borrow pit off location up to the elevation of the
 17 bottom of the roadway gravel. And then on top of
 18 that would be eight inches of gravel. And then after
 19 that, once, as he indicated, recommends waiting two
 20 to four months or a season to see what kind of
 21 settlement takes place. And then after that we could
 22 come back in, redress the gravel where settlement may
 23 have occurred and bring it back to the proper design
 24 elevations and then at that point overlay that with
 25 the -- I believe it's four inches of asphalt I think

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1 You're excused. Any other witnesses? Any
 2 other surrebuttal or sur-sur now where we would
 3 be at? Okay. Hearing none, let's go off the
 4 record and get ready for tomorrow.

5 MR. MEYER: Before we do that, I made a
 6 couple motions --

7 (Recess taken)

8 ALJ BOLDT: Okay. We're back on the record
 9 and we've agreed off the record to have a
 10 conference call Friday at 11:00 -- just the
 11 attorneys. Everybody else, you're welcome to
 12 leave. It's been a long five days here on the
 13 record. I appreciate everybody working late
 14 tonight to get this done. And then there's a
 15 stipulation that -- why don't you go ahead and
 16 state it again.

17 MR. MEYER: Yes, that the Wisconsin
 18 Wildlife Federation and the Waukesha County
 19 Conservation Alliance, which is part of our
 20 organization, are parties to this matter.

21 ALJ BOLDT: Okay. And you also referenced
 22 off the record that your earlier motion you
 23 wanted to --

24 MR. MEYER: I made two motions and the
 25 second one was whether or not this -- the

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1 is what we're showing in the plans.
 2 Q Thank you for that clarification. Now I've forgotten
 3 my second question so I think you're off the hook.
 4 MR. MEYER: I have one more question.
 5 ALJ BOLDT: Sure.
 6 CROSS-EXAMINATION
 7 BY MR. MEYER:
 8 Q Would you have to do all those things if this was
 9 constructed on the existing grade which crosses the
 10 Hanson property?
 11 A We probably -- it depends on I guess -- if the
 12 existing grade were wide enough no, we wouldn't have
 13 to go through all of that, but because the existing
 14 grade is narrower than -- you know, even if the new
 15 roadway was centered on the existing roadway, we have
 16 widening, so we still would have to do some work on
 17 the outsides of that existing grade.
 18 Q But it'd be less than on what the proposed --
 19 A Right, yeah, if it was on the existing roadway.
 20 MR. MEYER: No further questions of this
 21 witness.
 22 ALJ BOLDT: Okay. Mr. Gallo, any
 23 questions?
 24 MR. GALLO: No questions.
 25 ALJ BOLDT: Sir, okay, thank you very much.

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1 decisions or the actions that are the subject of
 2 this hearing were subject to the Section 227.42
 3 hearing process and we withdraw that motion. We
 4 have -- the other motion which we can't -- I
 5 don't believe we can withdraw, at least not from
 6 our perspective, because the theory of the case
 7 of the petitioners is whether or not DNR is
 8 subject to Chapter 30 and Wisconsin Wetlands
 9 regulation and we are still maintaining that
 10 position.

11 ALJ BOLDT: Sure, and you can address that
 12 in a brief too as well.

13 MR. MEYER: We will do that.

14 ALJ BOLDT: So we'll include all Counsel on
 15 the record. With that, the hearing record is
 16 closed and we will reconvene for our scheduling
 17 conference Friday at 11:00.

18 (Hearing Adjourned)

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DIVISION OF HEARINGS AND APPEALS

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In the Matter of Manual Code 3565.1 for the Approval
Authorizing the Department of Natural Resources to Grade
More Than 10,000 Square Feet on the Bank of North Lake,
Install a Boat 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

I, KRISTINE K. McCARVILLE, do hereby certify that as
the duly-appointed transcriptionist, I transcribed the
proceedings held in the above-entitled matter on the 1st
day of November, 2011, and that the attached is a true and
correct transcription of the proceedings so taken.

Dated this 9th day of January, 2012.

Kristine K. McCarville
Notary Public, State of Wisconsin
My Commission Expires: 11/22/15

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