

BEFORE THE STATE OF WISCONSIN  
DIVISION OF HEARING AND APPEALS

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In the Matter of Manual Code 3565.1  
for the Approval Authorizing the  
Department of Natural Resources to  
Grade More Than 10,000 Square Feet  
On the Bank of North Lake, Install  
A Boat Launch Structure and Two Case No. IP-SE-2009-68  
Outfall Structures on the Bed of -05745, -05746, -0547,  
North Lake, Install Four Culvert -05748, -05749, -05750  
Crossings Over Wetlands, and Fill  
Up to 0.16 Acres of Wetland For  
Construction of a Public Boat  
Launch on North Lake and Adjacent  
Property Located in the Town of Merton,  
Waukesha County, Wisconsin

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Examination of ROBERT S. WAKEMAN, taken  
at the instance of Reddelien Road Neighborhood  
Association, under and pursuant to all applicable rules,  
before JESSICA R. WAACK, Registered Merit Reporter,  
Certified Realtime Reporter, Registered Diplomate  
Reporter and Notary Public in and for the State of  
Wisconsin, at Quarles & Brady, 33 East Main Street,  
Suite 900, Madison, Wisconsin, on Monday, October 17,  
2011, commencing at 12:07 p.m. and concluding at  
2:16 p.m.

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A P P E A R A N C E S

MR. WILLIAM C. GLEISNER, III,  
ATTORNEY AT LAW,  
300 Cottonwood Avenue, Suite 3,  
Hartland, Wisconsin 53029,  
appeared on behalf of the Reddelien Road Neighborhood  
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Waukesha, Wisconsin 53188,  
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Metropolitan District.

STATE OF WISCONSIN,  
DEPARTMENT OF NATURAL RESOURCES, by  
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101 South Webster Street,  
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appeared on behalf of the Department of Natural  
Resources.

A L S O P R E S E N T

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

\* \* \* \* \*

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1 Exhibit Identified: Page  
2 No. 1 - Chapter 70 Out of the Waterway and Wetland  
3 Handbook That Deals With Structures..... 31

4 Disposition Of Original Exhibit/s:

5 The original exhibit was included in the original  
6 transcript.

7 Requests: Page Line

8 By Mr. Gleisner - Guidance Document That the  
9 Water Regulation and  
10 Zoning Policy and  
11 Management Team Prepared... 32 25

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1 Q I think that would cover everything?

2 A Okay.

3 Q So let me just ask you, have there been permits  
4 issued for the wetlands on the Kraus site?

5 A Have there been permits issued for wetlands on the  
6 Kraus site?

7 Q For putting the fill into the wetlands or  
8 otherwise impacting the wetlands? Have there been  
9 any permits issued?

10 A I'm not aware of any.

11 Q And would the DNR be responsible as an owner of  
12 that property to get permits before they fill a  
13 wetland?

14 A Yes. Or authorization.

15 Q Authorization?

16 A Manual code approval, yes.

17 Q So are we to understand that the manual code  
18 approval is the equivalent of a permit for the  
19 DNR?

20 A It's the vehicle for which the department  
21 authorizes activities on its own properties, yes.

22 Q And with regard to navigable waters, have there  
23 been any permits acquired with regard to the Kraus  
24 site?

25 A Not -- well, through the department? Through the

1 department or through Mr. Kraus? I guess I'm a  
2 little confused by are we talking Mr. Kraus, or  
3 are we talking the department?

4 Q Sure. You are intending -- I don't want to put  
5 words in your mouth, but I understand you are  
6 intending to a certain extent to fill navigable  
7 waters on the Kraus site, is that correct?

8 MS. CORRELL: Objection. Clarification.

9 BY MR. GLEISNER:

10 Q The DNR uses.

11 MS. CORRELL: The DNR?

12 BY MR. GLEISNER:

13 Q The DNR. I'm sorry. I apologize.

14 A We are proposing to place fill for culverts, for,  
15 I believe, the boat launch -- I'm not -- I  
16 hesitate, because I'm not a hundred percent  
17 familiar with the most recent plans that the  
18 department has proposed for the site.

19 So other than those two recent  
20 activities, I'm not sure if additional fill is  
21 being placed or is being authorized at that  
22 location.

23 Q And is there a permit or has a permit been issued  
24 or has the DNR acquired a permit for filling lake  
25 bed?

1 A Well, there's the manual code approval, which has  
2 authorized for the activities required at that  
3 site. And, again, I don't remember enough about  
4 that manual code approval to know specifically  
5 what it authorized. It's been awhile since I've  
6 seen that.

7 Q Understood. I'm going to put before you what has  
8 previously been marked in a deposition of  
9 Mr. Hudak as RRNA Exhibit 1, and at the hearing  
10 before Judge Boldt as Exhibit 1-001. And do you  
11 recognize that, sir?

12 A Yes. This is the manual code approval dated  
13 November 4, 2010, by Andrew Hudak to Lynnette  
14 Check.

15 Q And is that the manual code approval which covers  
16 the Kraus site?

17 A I believe it is.

18 Q Take a moment and review that, because I would  
19 like to ask you some questions about that.

20 (Pause in testimony.)

21 THE WITNESS: Okay.

22 BY MR. GLEISNER:

23 Q You've seen this before, have you not?

24 A Yes.

25 Q Now, could you help us out here? Is there any

1 other manual code approval besides the one that  
2 has been marked as Exhibit 1 for the Kraus site?

3 Sorry.

4 A Not to my knowledge.

5 Q So could you tell me where in that manual code  
6 approval there is a permit or the equivalent of a  
7 permit for filling wetlands?

8 A The specific passage you're looking for?

9 Q I am. I am looking for something that would be  
10 the equivalent of filling a permit for wetlands.

11 A And without reading it word for word, I'm not sure  
12 I can do that. I know there was testimony at the  
13 hearing asking Mr. Hudak, I believe, the same  
14 question.

15 And, I believe, he underlined the word  
16 "wetland." There's a finding of fact saying --  
17 No. 5 which says the department proposes to fill  
18 up 0.16 acres of wetlands.

19 Q And besides paragraph 5 -- strike that.

20 Is that tantamount to a permit?

21 A Well, the manual code is technically the permit  
22 the department issues itself.

23 Q Thank you. Now, this is all foundational. I'm  
24 going to get back to the jurisdictional. But I do  
25 want to understand some things.

1                   Is there, in that Exhibit 1, a permit  
2                   for filling or impacting navigable waters on the  
3                   Kraus site by the DNR?

4    A    The findings of fact No. 1, it identifies one  
5           grading boat ramp structure and two outfall  
6           structures on the bed of North Lake, to install  
7           four culverts, crossing the wetlands. So it  
8           identifies those activities as part of this manual  
9           code approval.

10   Q    Thank you. Now, where in Exhibit 1 is there any  
11           reference to a permit for filling or impacting  
12           lake bed?

13   A    Again, in the findings of fact No. 1, it  
14           identifies, install the boat ramp structure and  
15           two outfall structures on the bed of North Lake.

16   Q    So that I can understand -- you are referencing  
17           paragraph 1, it's actually located on  
18           Exhibit 1-002 of the exhibit book that was  
19           submitted to the judge, Judge Boldt. So I can  
20           understand you, the fill for the lake bed is  
21           limited to the bank of North Lake?

22   A    No. The grading -- in the findings of fact  
23           No. 1 --

24   Q    Uh-huh.

25   A    -- it identifies the grading more than 10,000

1 square feet on the bank of North Lake to install a  
2 boat ramp structure and two outfall structures on  
3 the bed of North Lake.

4 Q And does it reference any other area than the bank  
5 of North Lake? I'm having trouble seeing where it  
6 references anything other than the bank of North  
7 Lake in that paragraph. And maybe I'm just not  
8 reading it well enough.

9 A All right. If you'll follow --

10 Q Sure.

11 A -- the Wisconsin Department of Natural Resources  
12 has submitted materials under the internal  
13 approval process manual code 3565.1 to obtain  
14 approval to grade more than 10,000 square feet on  
15 the bank of North Lake; to install a boat ramp  
16 structure and two outfall structures on the bed of  
17 North Lake; to install four culvert crossings over  
18 the wetlands and to fill up to .16 acres of  
19 wetland for the construction of a boat -- public  
20 boat launch on North Lake.

21 Q So if we take that first sentence to grade more  
22 than 10,000 square feet on the bed of North Lake,  
23 and we consider that a separate issue, where is  
24 the next phrase that says to install a boat ramp  
25 structure and two outfall structures on the bed of

1 North Lake? Where would those be located?

2 I mean, in other words, the boat ramp  
3 structure and the two outfall structures, where  
4 would they be located?

5 A They would be on the bed of North Lake.

6 Q Actually adjacent to the bank?

7 A Yes.

8 Q Am I correct -- and you certainly can look at the  
9 rest of the manual code besides this paragraph.  
10 Am I correct that there is nothing in the manual  
11 code that talks about filling lake bed inland from  
12 the bank of North Lake? Maybe I should rephrase  
13 that.

14 A Please do.

15 Q To the west, to the west of the bank of North  
16 Lake, is there anything in the manual code that  
17 authorizes the filling of lake bed to the west of  
18 North Lake?

19 A No.

20 Q I just wanted to get those preliminary matters out  
21 of the way. I would like to go now to the various  
22 exhibits that you've produced at the beginning of  
23 your testimony.

24 MR. GLEISNER: Counsel, I'm going to  
25 give you a blowup.

1 MS. CORRELL: Sure.

2 MR. GLEISNER: I'll mark this as our own  
3 exhibit number.

4 MS. CORRELL: That's fine. We didn't  
5 need it as an exhibit, but if you want it as one,  
6 that would be fine, just to help people. That's  
7 all it's for.

8 MR. GLEISNER: Yes.

9 BY MR. GLEISNER:

10 Q I'm now going to show you what's been marked as  
11 Exhibit 40-001. And I wonder if you could tell us  
12 what that means, what that's about.

13 A This is a schematic that I produced in  
14 anticipation of the hearing to help the  
15 administrative law judge understand some of the  
16 jurisdictional issues surrounding specific  
17 activities that were pertinent to the particular  
18 case.

19 This one deals with an installation of a  
20 culvert in a stream and the authorization of that  
21 culvert through a Chapter 30 permit, even if there  
22 is a wetland fringe of that stream, staff will  
23 treat it as a Chapter 30 permit and not require a  
24 water quality cert for the wetland impact.

25 Q And so if I understand you correctly then, the

1 permit that would be sought in connection with  
2 40-001 would be a 30.12 permit, is that correct?

3 A It would be a culvert permit, which, I believe, is  
4 a 30.12.

5 Q And just so I understand your testimony, your  
6 point with this exhibit is that you don't need to  
7 worry about the wetlands, even if they're next to  
8 the culvert; you're only going to be concerned  
9 when you're installing a culvert with 30.12? Am I  
10 understanding that?

11 A The Chapter 30 permit would take into  
12 consideration the wetland fringe but would not  
13 require a separate water quality certificate.

14 Q So with regard to the culvert, it would be 30.12  
15 that would control?

16 A Yes.

17 Q I'm now going to show you what has been marked as  
18 Exhibit 40-002 and ask you if you can tell me the  
19 significance of that document.

20 A Again, this is a document that I prepared in  
21 anticipation of the hearing to help the  
22 administrative law judge understand the  
23 jurisdictional issues associated with some of the  
24 activities proposed at the site.

25 It's a schematic showing a driveway

1 cutting across the wetland. In this particular  
2 instance, the authorization would come under a  
3 water quality cert for the wetland fill to be  
4 placed in the wetland.

5 Q So let me try and understand this. In other  
6 words, you're saying if there is a roadway that is  
7 built over a wetland, the only thing that is of  
8 concern to the DNR is a water quality cert?

9 A If it's a wetland, we have the authorization --  
10 the authorization for wetlands is to place enough  
11 fill. So in this particular instance, since it's  
12 not a navigable wetland, it's a wetland, we would  
13 authorize it under a water quality cert.

14 Q That begs the question. If it was a navigable  
15 wetland, would it be different?

16 A It would still be a water quality cert.

17 Q And what if the driveway that you have put on the  
18 schematic in Exhibit 40-002 involved the placing  
19 of a structure in that wetland? Let's not worry  
20 about the definition of structure right now, but,  
21 you know, like a bridge, for example, if there was  
22 a structure placed in the wetland?

23 A The water quality certificate would be the driving  
24 authorization.

25 Q And your testimony is that even if there were

1           navigable water in the wetland portrayed in  
2           Exhibit 40-002, there would be no need for a 30.12  
3           permit, is that correct?

4    A       If the activity is the placement of fill, we  
5           regulate that under a water quality cert.

6    Q       And if it were a structure that was placed in the  
7           wetland, would it still be a water quality cert?

8    A       If it's a structure in a nonnavigable wetland or a  
9           wetland, it would be a water quality cert.

10   Q       And if it was a navigable wetland?

11   A       A water quality cert.

12   Q       Never a 30.12?

13   A       Well, if you have culvert, then you would issue  
14           that under Chapter 30, if it's a navigable  
15           wetland.

16   Q       So just so we're clear, whenever there is a road  
17           or a structure placed in a wetland, whether it's  
18           navigable or nonnavigable --

19                   MS. CORRELL: Objection. Foundation.  
20           You need to ask one question at a time, because I  
21           think you're getting confused.

22                   MR. GLEISNER: I don't want to get  
23           confused.

24   BY MR. GLEISNER:

25   Q       With regard to a road placed in a wetland,

1           navigable or otherwise, water quality cert and no  
2           30.12?

3       A     Correct.

4       Q     With regard to a structure placed in a wetland,  
5           navigable or otherwise, water quality cert; no  
6           30.12?

7       A     If it's a navigable wetland, we would issue it  
8           under a Chapter 30.

9       Q     So let me be clear on this then.  If the structure  
10          -- strike that.

11                   If the structure is to be placed in a  
12           navigable wetland, you would issue a 30.12 permit?

13      A     Correct.  The culverts policed in a navigable  
14           wetland will be a Chapter 30, because they're not  
15           considered fill.  They're considered structure.  
16           But a roadway placed in a navigable wetland or a  
17           nonnavigable wetland would still be -- would be a  
18           water quality cert.

19      Q     How about the parking lot?

20      A     That would be considered fill.  That would be  
21           water quality cert.

22      Q     I'm going to show you what's been marked as  
23           Exhibit 40-003 and ask you to explain the  
24           significance of that, please.

25      A     Again, this is a schematic that I prepared in

1 anticipation of the hearing to help the  
2 administrative law judge understand the  
3 jurisdiction the department would take on  
4 different activities. The fill for the driveway  
5 would require a water quality cert across the  
6 navigable wetland.

7 The culverts under the driveway would  
8 require a Chapter 30 permit. Grading outside of  
9 the wetland, which is shown in the brown area on  
10 the figure, would require a Chapter 30 for  
11 grading. And the, quote/unquote, wetland fill in  
12 the isolated wetland would require a water quality  
13 cert.

14 Q Now, let me understand, if I may -- or try to  
15 understand what you just said. Grading requires a  
16 30.12 permit?

17 A I don't think it's 30.12. I forget. Grading is  
18 authorized under Chapter 30, but I don't know  
19 the --

20 MS. CORRELL: I can tell you what it it  
21 is, if I can tell you.

22 MR. GLEISNER: Sure.

23 MS. CORRELL: It's 30.19.

24 THE WITNESS: 30.19.

25 MS. CORRELL: Since Bob doesn't work in

1           this program anymore.

2   BY MR. GLEISNER:

3   Q     So grading would not be a water quality  
4         certificate issue?

5   A     Correct.

6   Q     So if there was a substantial amount of roadwork  
7         that needed to be done to prepare a roadway and it  
8         entailed grading, that would not be a water  
9         quality cert issue, is that correct?

10  A     Where is the work being done?

11  Q     Well, in a wetland.

12  A     Then it would be a water quality cert.

13  Q     Thank you. Now, tell me something. I'm just  
14         trying to understand here. Is a water quality  
15         cert a permit?

16  A     It's a certification. I believe there's a legal  
17         difference between a permit and a certification.

18  Q     And does the department ever require both a water  
19         cert and a 30.12 permit? I'm just going to use  
20         30.12 at this point.

21  A     Under what facts -- what situation?

22  Q     Where there's navigable water in a wetland.

23  A     What's being proposed?

24  Q     Let's just say a roadway.

25  A     So we have a roadway going to --

1 MS. CORRELL: Objection. Asked and  
2 answered. I'm not sure what you're asking.

3 MR. GLEISNER: Uh-huh.

4 BY MR. GLEISNER:

5 Q I just want to understand. You're going to put a  
6 roadway in. Let's just try and review this.  
7 You're going to try to put a roadway in. And in  
8 order to put the roadway in, in a wetland, you  
9 discover that you need to grade quite a bit before  
10 you put the roadway in. Would that be a water  
11 cert, or would that be a Chapter 30?

12 A It's a water quality cert.

13 Q Would it also be a Chapter 30?

14 A The fill placed in the wetland would be a water  
15 quality cert authorization.

16 Q How about the grading?

17 A Grading is essentially -- it would be considered a  
18 water quality cert. You wouldn't need a grading  
19 permit.

20 MS. CORRELL: Objection again to  
21 foundation. You need to clarify your hypothetical  
22 if you're trying to ask a question about a  
23 hypothetical. It's unclear based on this report  
24 what you're asking.

25 BY MR. GLEISNER:

1 Q Well, let me try and clarify it a little bit.  
2 You, obviously, are familiar with Chapter 30 of  
3 the Wisconsin statutes?

4 A I'm beginning to lose my familiarity, but -- I'm  
5 not quite as familiar as I used to be.

6 Q You're familiar with Section 30.12, however?

7 A Yes.

8 Q I'm going to show you -- I don't need to mark  
9 this, because this is state law. I'm going to  
10 show you Section 30.12.

11 MR. GLEISNER: Here, Counsel.

12 MS. CORRELL: Sure.

13 BY MR. GLEISNER:

14 Q And I'm just going to ask you, first of all,  
15 Section (1) (a) and (b) appear to require permits  
16 in two different instances. (A) says that a  
17 permit will be required, as I read it, for any  
18 material or place any structure upon the bed of  
19 any navigable water where no bulkhead line has  
20 been established, and (b) says, deposit any  
21 material or place any structure on the bed of any  
22 navigable water beyond a loftily established  
23 bulkhead line. Can you help us out? What's a  
24 bulkhead line?

25 A A bulkhead line is a mechanism in which the state

1           can authorize, I believe, it's limited to  
2           municipalities, the ability to even out their  
3           shoreline to minimize the amount of complexity in  
4           the curvature of the shoreline. They're  
5           allowed -- if there's a bulkhead line, they're  
6           allowed to fill out to that bulkhead line.

7       Q     And how does that relate to bed and bank, if at  
8           all?

9       A     I don't --

10                   MS. CORRELL:  Objection.

11       BY MR. GLEISNER:

12       Q     Is a bulkhead line associated or not with a bed  
13           and bank?

14       A     You're placing fill on the bed of a waterway, and  
15           it would ultimately create a new bank.

16       Q     At this point, I'm just going to call up on the  
17           screen here Exhibit 2-002.  That was the exhibit  
18           number given to it at the hearing before Judge  
19           Boldt.  And previously it was marked in the  
20           deposition of Mr. Hudak as Exhibit RRNA 2.

21                   And I'm just going to ask you -- let me  
22           just zoom in on it a little bit here and ask you  
23           with regard to the northwest corner of the Hanson  
24           property -- do you see that there?  Right where my  
25           mouse is.

1 A Yes.

2 Q Was there a bulkhead line ever established?

3 A Not to my knowledge.

4 Q Okay. So it would be controlled by 30.12 (1) (a)  
5 then, is that correct?

6 A What would be controlled by it?

7 Q The area in the northwest corner of the Hanson  
8 property on Exhibit 2 would be subject to the  
9 provisions of 30.12 (1) (a)?

10 A I don't know what the activity that you're  
11 referring to is.

12 Q Okay. That's fair enough. Let me read 30.12 (1)  
13 (a). "Unless an individual or a general permit  
14 has been issued under this section or  
15 authorization has been granted by the legislature,  
16 no person may do any of the following; A, deposit  
17 any material or place any structure upon the bed  
18 of any navigable water where no bulkhead line has  
19 been established."

20 So since there is no bulkhead line  
21 established, assuming that 30.12 applies in any  
22 respect, (1) (a) would be what we're talking  
23 about, correct?

24 A I'm sorry. I didn't follow that very well.

25 Q There's no bulkhead line?

1 A Correct.

2 Q So (a) applies, and (b) does not --

3 MS. CORRELL: Objection.

4 BY MR. GLEISNER:

5 Q If it applies --

6 MR. GLEISNER: Counsel, I'm trying to --

7 MS. CORRELL: Foundation.

8 MR. GLEISNER: Yeah. I'm just trying to  
9 get him to indicate what subsection of 30.12 (1)  
10 (a) would apply --

11 MS. CORRELL: Correct. But your  
12 question assumes something.

13 MR. GLEISNER: Counsel, this is  
14 cross-examination.

15 BY MR. GLEISNER:

16 Q Do you understand the question?

17 A I believe so.

18 Q Okay. How would you answer that?

19 A I would say if we're talking about the placement  
20 of fill in that corner, we would authorize the  
21 fill under water quality certification and not  
22 Chapter 30.

23 Q Thank you. That's what I was looking for. Now,  
24 in 30.12, show me where it says that this section  
25 is subject to NR 103 -- NR 103 is the water cert,

1 right?

2 A Yes.

3 Q Show me where it shows that in 30.12.

4 A I don't believe it does.

5 Q I'm now going to show you the entirety of NR 103.

6 Where in NR 103 does it say that Chapter 30 is

7 subject to the provisions of NR 103?

8 A Not knowing offhand whether or not it does or

9 doesn't, I would have to go through this very

10 slowly to find it, if it does.

11 Q You agree that NR 103 is an administrative

12 regulation, correct?

13 A It's a Wisconsin Administrative Code, correct.

14 Q Okay. Let's stop right here and concentrate for a

15 moment, if we can, on NR 103. Is there any

16 statutory basis that you're aware of for NR 103?

17 MS. CORRELL: Objection. Asks for a

18 legal opinion.

19 MR. GLEISNER: That's okay. He's a

20 person who is charged with the responsibility of

21 administering both Chapter 30 and NR 103.

22 MS. CORRELL: Correct. But he didn't

23 write the law.

24 MR. GLEISNER: No. But I think it's a

25 pertinent question, if he can answer it.

1 BY MR. GLEISNER:

2 Q Can you answer it?

3 A If I read NR 103.01, "Purpose (1). The purpose of  
4 this chapter is to establish water quality  
5 standards for wetlands. Chapters 102, 104 and 105  
6 and the subchapter provide water quality standards  
7 for water to the state pursuant to Section 381.15  
8 (2) (b) stats."

9 Q And where does it -- where does it state in NR 103  
10 that a permit is to be -- or a permit can be  
11 issued? Where does it authorize a permit under  
12 NR 103?

13 A Okay. I'm confused by your question.

14 Q Okay. I apologize. You have talked about water  
15 quality cert. And I have the understanding from  
16 your testimony that you're referring to some kind  
17 of authorization or permit in connection with that  
18 under a water quality cert, am I correct on that?

19 A Yes.

20 Q Where does NR 103 provide authority for a permit  
21 or the issuing of a permit?

22 (Pause in testimony.)

23 THE WITNESS: I believe NR 103.06, the  
24 applicability.

25 BY MR. GLEISNER:

1 Q Yes.

2 A It identifies the activities that are requirements  
3 to the chapter.

4 Q And does that Section 103.06 authorize the issuing  
5 of a permit under and pursuant to NR 103?

6 A There are a number of state statutes that it  
7 points to. And, honestly, I've forgotten what  
8 those statutes are. So without -- it may be  
9 pointing to the statute that then authorizes the  
10 issuance of the water quality cert. I'm just not  
11 familiar enough with it.

12 Q Let's go back for a moment, if we could, to --  
13 thank you, Mr. Wakeman.

14 A Uh-huh.

15 Q Let's go back to Section 30.12. What is the basis  
16 in DNR regulations or in documents issued by the  
17 department that 30.12 (1) (a) does not apply in  
18 the context of a wetland?

19 A The placement of fill --

20 MS. CORRELL: You know that I still have  
21 a continuing objection for a legal opinion?

22 MR. GLEISNER: I appreciate that,  
23 Counsel.

24 MS. CORRELL: Because you're asking a  
25 question about overall DNR implementation.

1 MR. GLEISNER: Well, here's the problem,  
2 Counsel. You're representing to Judge Boldt that  
3 this is a jurisdictional witness. He, obviously,  
4 has a good deal of knowledge about Chapter 30 and  
5 NR 103, or he wouldn't be here --

6 MS. CORRELL: Correct.

7 MR. GLEISNER: -- and you wouldn't have  
8 presented him as such. So I'm not assuming that  
9 he is going to give us a legal opinion, but I do  
10 want his understanding of what the DNR regulations  
11 provide and the documents provide.

12 MS. CORRELL: That's fine. I'm stating  
13 my objection for the record.

14 MR. GLEISNER: Understood.

15 THE WITNESS: We have always treated  
16 wetland fill as water quality cert. If it's  
17 related to a structure like the culvert example in  
18 figure 1 --

19 BY MR. GLEISNER:

20 Q Which would be Exhibit 40-001 --

21 A Which is your -- yeah.

22 Q Uh-huh.

23 A In that situation, we have treated the de minimis  
24 wetland fill as still being authorized under a  
25 Chapter 30.

1 Q Uh-huh.

2 A So if it's related to a structure or if it's rip  
3 rap, that's still considered a structure and  
4 authorized under Chapter 30, whereas a wetland  
5 fill we authorize under a water quality  
6 certificate.

7 Q You have never authorized wetland fill both under  
8 a Chapter 30 and NR 103?

9 A Not to my knowledge.

10 Q Would you be surprised if I told you that the  
11 agency has?

12 A There may be instances of inconsistency throughout  
13 the state, but I think there has been a good faith  
14 effort to minimize those inconsistencies.

15 Q With regard to fill in a wetland, what statutory  
16 basis is there for you treating that as a water  
17 quality cert issue?

18 MR. HARBECK: Bill, do you mean fill in  
19 a navigable wetland?

20 MR. GLEISNER: Yes.

21 (Cell phone rings.)

22 BY MR. GLEISNER:

23 Q The question was interrupted. Instead of having  
24 her interrupt, what statutory basis is there for  
25 treating fill in a navigable wetland as being

1 subject just to a water quality cert?

2 MS. CORRELL: Just for the record, I  
3 will object to relevance as well. Because this is  
4 20 years of DNR practice. What you're attacking  
5 is the statutes and the rules we've been  
6 implementing for 20 years; not as applied in this  
7 case. Go forward.

8 THE WITNESS: When the Army Corps of  
9 Engineers takes authority over wetland, we then  
10 certify to that authority. So when the Corps  
11 says, "This is a wetland," we are bound to issue  
12 or deny a water quality cert after their issuance  
13 of -- there's a word there, Bill. I'm trying to  
14 think of it -- their jurisdiction.

15 BY MR. GLEISNER:

16 Q Jurisdiction. Notwithstanding your counsel's  
17 observation of 20 years' practice, where is the  
18 statutory basis for the DNR, not the Army Corps  
19 now, the DNR, treating navigable water in a  
20 wetland differently than navigable water that's  
21 not in the wetland?

22 A At this point, I don't know.

23 Q Is there any regulatory basis that you know of?

24 A Offhand, I don't recall.

25 Q And you say that there is a practice. Your

1           counsel referenced a practice. What can you point  
2           to in terms of DNR documents that support that  
3           practice of treating navigable water in a wetland  
4           different than other navigable water?

5    A    We have -- we developed a guidance for staff that  
6           looked at the correct jurisdictional and  
7           authorization to help minimize inconsistencies as  
8           well as to train new automation specialists and  
9           also to assist in the administrative tracking of  
10          permits or applications.

11                    It was a document that was prepared, I  
12           don't remember exactly when, that laid out what  
13           authority and how things ought to be tracked  
14           depending upon applications.

15    Q    Anything else?

16    A    Not that I know of offhand.

17                    MR. GLEISNER: Could you mark these,  
18           please, Madame Reporter.

19                    (Exhibit No. 1 was marked.)

20    BY MR. GLEISNER:

21    Q    I am now going to show you what's been marked as  
22           Wakeman Exhibit 10-17-11, Exhibit 1. Is this the  
23           document that you were referring to a few moments  
24           ago?

25    A    No.

1 Q And what is this? Do you recognize this document?

2 A This is Chapter 70 out of the Waterway and Wetland  
3 Handbook that deals with structures.

4 Q I direct your attention to A on page 1 of this  
5 document. Do you agree with that as a purpose?  
6 And why don't you read it into the record so we  
7 have, first of all, a statement of what that is.  
8 Exhibit 1 of the Wakeman deposition, Section A on  
9 page 1, what does that read, Mr. Wakeman?

10 A Section A is entitled, "Purpose. The construction  
11 or maintenance of structures in navigable  
12 waterways can seriously affect the environment and  
13 public rights or interests. Throughout the  
14 state's history, the degree of regulation and  
15 control over structures in navigable waterways has  
16 gradually increased in order to preserve and  
17 protect the waterways."

18 Q Could you also do us the favor of reading in  
19 paragraph B?

20 A Paragraph B is entitled, "Mechanism. Section  
21 30.12, Wisconsin stats requires a person to obtain  
22 a permit prior to placing structures in navigable  
23 waters. Also see Chapter 80, bridges, and  
24 Chapter 85, culvert/waterway crossings for a  
25 discussion of highway structures and private

1 waterway crossings (these chapters will be  
2 combined to address Sections 30.123 entitled,  
3 'Bridge Construction and Maintenance.')

4 Q Thank you very much, Mr. Wakeman. Are you  
5 familiar with Chapter 70?

6 A Generally, yes.

7 Q Where in there does it say that paragraph B  
8 doesn't apply to navigable waters in wetlands?

9 A Again, without going through page by page and  
10 reading this over again, I can't tell you where it  
11 says that or if it would say that at all.

12 Q Would you be surprised if I told you that I did  
13 not find anything in here that says a navigable  
14 water in a wetland is not subject to  
15 Section 30.12?

16 A No.

17 MS. CORRELL: Objection. Foundation.  
18 For what activity is it not subject to 30.12?

19 BY MR. GLEISNER:

20 Q When I started my questioning with regard to  
21 Exhibit 1 that I just passed over to you,  
22 Mr. Wakeman, you said this was not the document  
23 you were talking about. What document were you  
24 talking about?

25 A There's a guidance document that the water

1 regulation and zoning policy and management team  
2 prepared to help prepare new water management  
3 specialists and also the -- what we call the  
4 intake folks that receive applications and log  
5 them into the database on how they should be  
6 parcelling out the docket numbers and -- into the  
7 database.

8 MR. GLEISNER: Counsel, can you get us a  
9 copy of that?

10 MS. CORRELL: It's possible. I might or  
11 might not be able to. If it's a public document,  
12 then I can.

13 MR. GLEISNER: Could you get back to us  
14 this week as to whether it is a public document  
15 and --

16 MS. CORRELL: I am not sure what --  
17 yeah. I can get back to you.

18 MR. GLEISNER: Okay.

19 MR. HARBECK: Is it a public document,  
20 Mr. Wakeman?

21 THE WITNESS: It was prepared by  
22 department staff. I don't know what renders  
23 public -- a document public or not public, but I  
24 don't see why it wouldn't be.

25 MR. GLEISNER: I would state for the

1 record if it isn't public but it buttresses your  
2 position, I can't for the world of me imagine why  
3 you wouldn't produce it.

4 MS. CORRELL: Oh, absolutely. If you  
5 want me to produce exhibits and you'll not object,  
6 I'll bring them along.

7 MR. GLEISNER: I would like to see it  
8 before the next hearing, Counsel. That's my  
9 point.

10 MS. CORRELL: We'll see. That is,  
11 perhaps, something they could do, perhaps. I  
12 don't think I'm required to, since it's been so  
13 courteous to work together.

14 MR. HARBECK: Well, can we just ask -- I  
15 mean, assuming it's a public document, in other  
16 words, there's no internal confidentiality or  
17 security reasons --

18 MS. CORRELL: Correct. That's what I  
19 need to see.

20 MR. HARBECK: If it's a public document  
21 in that sense, will you provide us a copy in that  
22 respect?

23 MS. CORRELL: Yes. You're putting it in  
24 an open records request?

25 MR. HARBECK: That's okay. That's fine.

1 MR. GLEISNER: You're going to make us  
2 do a public records request?

3 MS. CORRELL: He just did.

4 MR. HARBECK: I just did.

5 MR. GLEISNER: Thank you.

6 MS. CORRELL: Correct.

7 MR. GLEISNER: Off the record.

8 (Discussion held off the record.)

9 BY MR. GLEISNER:

10 Q I would like to know, Mr. Wakeman, are there ever  
11 any circumstances where both a water quality  
12 permit and a Chapter 30 permit are required for  
13 navigable waters located in a wetland?

14 MS. CORRELL: Objection. Foundation.  
15 What activity is taking place?

16 BY MR. GLEISNER:

17 Q With regard to storm water, fill or placing a  
18 structure in navigable waters, those three  
19 circumstances, are there -- is there ever a time  
20 when a water quality certificate and a Chapter 30  
21 permit are required?

22 A You mentioned storm water, culvert -- or  
23 structure?

24 Q Structure.

25 A What was the --

1 Q Or fill.

2 A Or fill. The fill would require water quality  
3 cert, and the structure would require a  
4 Chapter 30. I'm not sure what you mean by "storm  
5 water."

6 Q Storm water management issues.

7 A It's too general. Sorry.

8 Q If you want to place a structure in navigable  
9 water, what type of permit do you need?

10 MR. HARBECK: Bill. This is a navigable  
11 water that's not a wetland?

12 MR. GLEISNER: Right.

13 THE WITNESS: Chapter 30.

14 BY MR. GLEISNER:

15 Q And if you want to place fill in navigable water  
16 in a wetland, what type of permit do you need?

17 A If you're placing fill in a navigable wetland, it  
18 would be a water quality cert.

19 MR. HARBECK: Bill, I think you messed  
20 up your question.

21 MR. GLEISNER: Okay. Go ahead.

22 MR. HARBECK: I think what you meant to  
23 ask him is: If you're placing fill in a navigable  
24 water when it's not a wetland, what kind of permit  
25 do you need?

1 BY MR. GLEISNER:

2 Q And did you get that, Mr. Wakeman?

3 A Yeah, I understand the question. For example, if  
4 you're placing fill such as rip rap in a navigable  
5 waterway, you need a Chapter 30 permit.

6 Q Okay.

7 EXAMINATION

8 BY MR. HARBECK:

9 Q What about just soil or substance or materials and  
10 it's not a wetland?

11 A You can apply for a Chapter 30 permit.

12 Q Will the DNR grant you a permit in those  
13 circumstances?

14 A Not in effect -- not enough facts to grant or  
15 deny. I mean, under what circumstances?

16 Q Okay.

17 A That's a very complex...

18 Q Okay. But in that circumstance, if you have a  
19 navigable water that's not a wetland and you want  
20 to place -- let's say you're constructing a  
21 roadway and you want to place fill in order to  
22 construct the roadway in the navigable waters.  
23 What's the permit requirements for that?

24 A If you're proposing to fill a navigable waterway?  
25 Say a stream?

1 Q Right.

2 A You're filling a stream to place a culvert.  
3 You're filling from both sides, place culverts.  
4 That would be a Chapter 30 issued for the  
5 culverts. That's how you would authorize that  
6 structure.

7 Q And what if there are no culverts involved, and  
8 you're just simply placing fill into navigable  
9 waters?

10 A You can apply for a Chapter 30 permit. Whether it  
11 would be approved or not, can't say.

12 Q Are you aware of any circumstances under which DNR  
13 has approved under Chapter 30 the placement of  
14 fill in a navigable water without a culvert or any  
15 other sort of structure?

16 A I believe there was an instance, and this is a  
17 number of years ago, so I will qualify in my  
18 answer by saying I might not have all the facts  
19 correct.

20 I believe there was a situation on a  
21 lake in Southeast where because of the facts  
22 situation, temporary fill was allowed for a  
23 temporary access.

24 And I -- I don't recall the construction  
25 activity that it was associated with, but I

1 believe that that fill was authorized under a  
2 Chapter 30 and then required to be removed in a  
3 navigable waterway.

4 Q Okay. So it sounds like typically, and maybe  
5 universally, in the absence of this temporary fill  
6 situation, DNR would not allow the placement of  
7 fill permanently in a navigable water under  
8 Chapter 30 or any other process?

9 A Under Chapter 30, it would be a very difficult --  
10 unless it's a rip rap bulkhead line, that type of  
11 situation. It would really depend upon the fact  
12 situation.

13 Q Why does DNR turn down those types of applications  
14 when someone makes one?

15 A It's not in the public interest to approve.

16 Q Okay. Tell me why not.

17 A It would be not in -- water quality, fish and  
18 wildlife habitat, natural scenic beauty, and  
19 navigation, those are the things that we evaluate  
20 when we receive an application, whether it's for a  
21 structure, fill or grading. We evaluate those  
22 applications based on the public interests.

23 Q So when you do your Chapter 30 permit process in  
24 connection with fill and a culvert -- are those  
25 situations in which DNR will grant permits under

1 Chapter 30? Again, navigable water, not a  
2 wetland.

3 A We do -- we definitely grant water culvert  
4 placements.

5 Q And tell me why that is just so I understand why  
6 you allow it when there's a culvert versus why you  
7 don't allow it, there's no culvert and you're just  
8 putting straight fill in and there's not a  
9 permanent basis.

10 A Again, if water reg and zoning staff view it as  
11 not detrimental to the public interest, it would  
12 be approved. So the culvert would not necessarily  
13 be adverse to water quality or fish and wildlife  
14 habitat, navigability, those things, then it could  
15 be approved.

16 Q Is that because -- I don't want to put words in  
17 your mouth. Is that because culverts allow the  
18 passage of water versus the sort of blockage of  
19 water that you have without a culvert?

20 A Possibly.

21 Q Any reasons besides that when you will have a  
22 culvert and you might say yes and not have a  
23 culvert and you say no?

24 A I think what -- I think what you were fringing on  
25 is the construction of a dam across a navigable

1 waterway.

2 Q Could be. Or maybe not a dam, but, you know,  
3 constructing a peninsula that goes out into a  
4 waterway and doesn't necessarily block the entire  
5 waterway, but you're filling in part of that  
6 navigable waterway. That would be another  
7 situation?

8 A Agreed.

9 Q Okay. Would you -- I assume you take the same  
10 approach if you're filling out a piece of the  
11 navigable waterway, creating a peninsula or  
12 something like that; the typical -- or maybe  
13 universal response would be "No, we don't allow  
14 that unless you put a culvert in"?

15 A We would have to look at the public interest and  
16 weigh the pros and cons of that type of an  
17 application.

18 Q Okay. Are you aware ever of any of DNR allowing  
19 the filling in of a navigable waterway, not  
20 completely, maybe partly through a -- you know,  
21 adding material or fill into a navigable waterway  
22 like a stream and creating, you know, I'll say  
23 partial blockage versus a dam that would be a  
24 complete blockage?

25 A Well, there's bulkhead lines, which would fit that

1 definition or your description. And rip rap,  
2 which conceptually fits that description. I can't  
3 think of any other situations offhand that have  
4 been allowed under a Chapter 30.

5 MS. CORRELL: Just to clarify, are you  
6 asking about under Chapter 30? Correct?

7 MR. HARBECK: Yeah, I'm dealing with the  
8 situation where we don't have wetlands, but we  
9 have some sort of navigable water.

10 MS. CORRELL: You're not talking about  
11 any other legislative approval, is that correct?  
12 You're talking about Chapter 30?

13 MR. HARBECK: Under Chapter 30, right.

14 MS. CORRELL: Okay.

15 MR. HARBECK: And if there are, that's a  
16 fair -- I mean, that's a fair clarification.

17 BY MR. HARBECK:

18 Q Is there any other process, legislative approval  
19 or permit process that you go through outside of  
20 Chapter 30 when looking at the placement of fill  
21 in a navigable water that's not wetlands?

22 A The department? No. The legislature can  
23 certainly pass legislation that permits it without  
24 our involvement.

25 Q Right. Are you aware, is there any current

1           legislation that allows, in general, people to do  
2           that?

3                           MS. CORRELL:  Sorry.

4  BY MR. HARBECK:

5  Q       Or are we talking about special legislation?

6  A       I don't know of any proposed legislation currently  
7       that's proposing that type of an approval.

8  Q       Okay.  Is there any existing legislation outside  
9       of Chapter 30, the Chapter 30 permit issues that  
10       we talked about that would allow that sort of  
11       activity?

12  A       Not that I know of.

13  Q       Okay.  Thank you.

14                                           EXAMINATION

15  BY MR. GLEISNER:

16  Q       We're playing tag team.

17  A       Good.

18  Q       Mr. Wakeman, with regard to now navigable waters  
19       in a wetland, why do you treat those differently  
20       than navigable waters that aren't in a wetland?

21  A       Point of clarification, if you will.

22  Q       Sure.  Please.

23  A       You can have a navigable stream that's in a  
24       wetland without the wetland being navigable.

25  Q       Uh-huh.

1 A So I just wanted to clarify if that's the example  
2 you're referring to, or if you're referring to a  
3 navigable wetland. Do you see the difference?

4 Q I do. And I guess I'd like to ask you first the  
5 general question. Why would there ever be a  
6 circumstance that you would treat navigable water  
7 in a wetland differently than you would navigable  
8 water that's not in a wetland? Is that a fair  
9 question?

10 A I want to make sure that the front end of that  
11 question is that we're talking about a navigable  
12 wetland.

13 Q Co-counsel has raised a good point. Why do you  
14 treat navigable water in a navigable wetland  
15 differently than navigable water that's not  
16 associated with a wetland? Is that a fair  
17 question?

18 A We're getting warmer.

19 Q Okay. Can you answer that one?

20 A What's the activity? Is it fill?

21 Q Fill. Let's do fill.

22 A Because our authorization for fill in a wetland is  
23 a water quality cert.

24 Q Bear with me a moment.

25 (Pause in testimony.)

1 BY MR. GLEISNER:

2 Q What about ponds or streams that exist within a  
3 wetland?

4 A Could I ask you to put it in a question? I'm  
5 sorry.

6 Q What is the difference between a navigable wetland  
7 and a stream or a pond in a navigable wetland in  
8 terms of fill, just in terms of fill?

9 A Your question was: Why would we treat  
10 jurisdiction of a pond or a stream in a navigable  
11 wetland different than outside of a wetland?

12 Q Correct. That's correct. That is the question.

13 A It would all depend on ordinary high water mark.

14 Q And that begs a question. Can a pond or a stream  
15 that's navigable exist within a wetland?

16 A That's exactly why I phrased the ordinary high  
17 water mark. If we picture this table as a  
18 navigable wetland, we have a stream running in and  
19 a stream running out, we have a pond -- say the  
20 speaker box is a pond. If that pond ordinary high  
21 water mark is above the ordinary high water mark  
22 of the stream, then we really don't have a pond.

23 Q What do we have?

24 A We have a navigable wetland. If the pond ordinary  
25 high water mark is above the ordinary high water

1 mark of the navigable stream -- excuse me,  
2 navigable wetland, then you may have a separate  
3 water body. You'd have a pond.

4 Q What's the authority for that?

5 A If it's above the ordinary high water mark of the  
6 navigable wetland, you would treat the pond,  
7 depending upon the activity, Chapter 30 -- or not  
8 depending on the activity. If it's not a wetland,  
9 it would be a Chapter 30. Anything in the wetland  
10 would be water quality cert.

11 Q I show you what has been marked previously as  
12 1B-016. You've seen this before? You testified  
13 to it before at the previous deposition. It says  
14 the -- I'm quoting from it now. "The real issue  
15 to be considered" -- and I'm going to ask a  
16 question after I read it. You read it last time,  
17 so I'll do the honors this time.

18 "The real issue to be considered when  
19 evaluating lakes and ponds including wetlands are  
20 whether they are navigable in fact. Although" --  
21 and by the above criteria, which is on the  
22 preceding page, and we may go back and look at.

23 "Although one may argue that there  
24 should be some minimum cutoff size for a body of  
25 water to be considered navigable, any body of

1 water capable of floating a canoe is valuable and  
2 should be considered navigable."

3 To support this conclusion, consider the  
4 resource value associated with even a tiny spring  
5 pond or isolated wetland pond. The fishery and/or  
6 wildlife values in preserving these values is in  
7 the public interest, even if they're not readily  
8 accessible by the public, closed quote.

9 You testified at the previous deposition  
10 that you agreed with that statement. Now, my  
11 question is: Where does it say in that statement  
12 that only ponds that are higher or lower than the  
13 ordinary high water mark are to be considered?

14 A It doesn't.

15 Q If a pond is higher than the ordinary high water  
16 mark --

17 A Okay.

18 Q If a pond in a wetland --

19 A Okay.

20 Q -- is higher than the ordinary high water mark of  
21 the wetland --

22 A Uh-huh.

23 Q -- if I understand your testimony, it would then  
24 be subject to Chapter 30 as a navigable stream?

25 A Yes.

1 Q And so if a pond in a wetland is lower than the  
2 ordinary high water mark in the wetland --

3 A Navigable wetland.

4 Q -- navigable wetland, why -- and it's navigable in  
5 fact, someone can get in a canoe and paddle for a  
6 hundred yards or hundred feet or whatever, why do  
7 we treat that differently?

8 A Because it's -- at that point, it's really not a  
9 pond. You're talking about a depression, a  
10 wetland.

11 Q Forgive me. I don't see the distinction. I mean,  
12 let me back up and say it this way. Looking at  
13 the Gainer and looking at the Menomonee Falls and  
14 these other cases that have attempted to define  
15 navigability, they don't seem to make a  
16 distinction as to water that lies above or below a  
17 high water mark.

18 The definition of navigable in fact is  
19 what determines whether water is navigable. So if  
20 you're able to put a canoe in a pond, in a wetland  
21 and navigate it, why isn't that navigable water?  
22 Just stop there. Why isn't that navigable water?

23 A It --

24 Q In a pond that is lower than the ordinary high  
25 water mark.

1 A It is navigable.

2 Q Okay. It is navigable?

3 A Uh-huh.

4 Q And you're familiar with the definition in  
5 30.10 (2) that a navigable water can consist of a  
6 slough -- a slough?

7 A I'm not familiar with that one.

8 Q A slough a bayou and marsh outlet. Yeah, that was  
9 the one I was thinking of. Why wouldn't that  
10 definition apply to a pond that is lower than the  
11 high water mark in a wetland?

12 MS. CORRELL: Objection. I think you're  
13 mischaracterizing his testimony. I don't think he  
14 said it wouldn't apply.

15 MR. GLEISNER: Okay.

16 MS. CORRELL: Can you rephrase your  
17 question?

18 BY MR. GLEISNER:

19 Q No. If that's the case then --

20 MR. GLEISNER: Thank you, Counsel, Thank  
21 you for answering for him.

22 BY MR. GLEISNER:

23 Q If that's the case, why wouldn't 30.12 apply to  
24 that pond?

25 A If that situation, it's in a navigable wetland.

1           So if you're placing fill in that area, we would  
2           regulate it under a water quality cert.

3   Q       And what's your authority for that?

4   A       NR 103.

5   Q       So you're saying NR 103 trumps Section 30.12?

6   A       That's not what I'm saying.

7                       MS. CORRELL: Again, asking for a legal  
8           opinion.

9   BY MR. GLEISNER:

10   Q       Can 30.12 apply as well as a water cert?

11   A       Under what fact situation?

12   Q       Under the fact situation I just gave you, a pond  
13           lower than the ordinary high water mark located  
14           within a wetland that one is trying to fill.

15   A       Is the wetland navigable?

16   Q       In that area it might be navigable?

17   A       In the area of the pond?

18   Q       Yes.

19   A       Okay. If it is in a wetland, our authority is  
20           water quality cert. If the Corps were to take  
21           jurisdiction on the placement of fill in that  
22           wetland, our authority is the water quality cert.

23   Q       And if the Corps declines -- strike that.

24                       The Corps did decline to take  
25           jurisdiction here, correct?

1 MS. CORRELL: Objection. A, that's  
2 incorrect, and, B --

3 THE WITNESS: I don't believe so.

4 BY MR. GLEISNER:

5 Q Did the Corps take jurisdiction?

6 A Yes.

7 Q It did take jurisdiction --

8 A Yes.

9 Q -- over the entire of the Kraus site?

10 A It took jurisdiction over the wetlands on the  
11 Kraus site, to my knowledge.

12 Q It issued a permit for you to go ahead on July 30  
13 of 2010, but it didn't take jurisdiction in the  
14 sense that it precluded you from acting; it  
15 authorized you to act, correct? It passed  
16 jurisdiction to you through this permit?

17 A I haven't seen the Corps authorization, so I don't  
18 know what it says. So to go beyond -- I guess I  
19 don't know what happened after the Corps gave  
20 its -- I can't even think of what they give. I'll  
21 call it a permit.

22 Q Okay.

23 A I don't know what happened after the Corps issued  
24 their permit for the wetland work.

25 Q Okay. Fair enough. Getting back to our pond.

1 Below the ordinary high water mark, that is going  
2 to be filled or that one would like to fill, why  
3 wouldn't you require, besides a water search, a  
4 30.12 water permit?

5 A We authorized the fill through a water quality  
6 cert. We do not authorize it through a  
7 Chapter 30.

8 Q Because Chapter 30 does not apply?

9 A Because our water quality cert would authorize the  
10 fill in a wetland, that that pond would be deemed  
11 still a wetland, even though it's navigable.

12 Q And your authority for that?

13 A NR 103.

14 Q No other statute, just NR 103?

15 A That's the administrative rule in which we apply  
16 whatever the state statutes are that give us the  
17 authority.

18 MS. CORRELL: Continuing objection as to  
19 legal conclusion. I can certainly provide you the  
20 authority if you'd actually like to know what the  
21 answer to this is.

22 MR. GLEISNER: Your continuing objection  
23 is noted; however, this gentleman is going to  
24 testify as to a jurisdictional issue.

25 MS. CORRELL: Correct.

1 MR. GLEISNER: So we would hope that he  
2 would be able to give us some guidance.

3 MR. HARBECK: Do you want to take five  
4 minutes?

5 MR. GLEISNER: Yeah, I think we should  
6 take five minutes.

7 (A brief recess is taken.)

8 MR. GLEISNER: Back on the record.

9 BY MR. GLEISNER:

10 Q Now, I have a few more questions. Not too many.  
11 But I'd like to go back to Exhibit 1-002, which  
12 was marked thus at the hearing before Judge Boldt.  
13 And I'd like to reference your attention to the  
14 findings of fact, again, Mr. Wakeman, and  
15 especially paragraph 1 and 5.

16 Let me just understand here. The only  
17 place a lake bed permit was issued for -- or the  
18 only place that the lake bed is going to be  
19 affected is right adjacent to North Lake, is that  
20 correct?

21 A That's my understanding from the findings of fact  
22 here.

23 Q Now, there were also culvert permits issued? Is  
24 this, in effect, a culvert permit as well?

25 A This authorized grading on the bank, installation

1 of boat ramp, two outfall structures, four  
2 culverts and wetland fill.

3 Q Do you know where the culverts are located?

4 A I'm guessing they're the four culverts under the  
5 driveway, east-west part of the road going into  
6 the launch site.

7 Q I'm going to direct your attention up here to what  
8 was marked at the hearing as Exhibit 2-002 and  
9 RRNA Exhibit 2 before that at Mr. Hudak's  
10 deposition.

11 Do you recall that counsel entered into  
12 a stipulation concerning the two areas circled in  
13 green, to the south a large green circle, and to  
14 the north a smaller green circle? Do you remember  
15 that, Mr. Wakeman?

16 A About the stipulation?

17 Q Yes.

18 A That it's navigable?

19 Q Actually, I think the stipulation is that it's  
20 navigable wetlands?

21 MS. CORRELL: I think that's the best of  
22 my recollection is it all right --

23 MR. HARBECK: It's navigable and it's  
24 wetland.

25 MS. CORRELL: Yes, I recall that now.

1 THE WITNESS: That's fine.

2 BY MR. GLEISNER:

3 Q On Exhibit 2-002, were there permits issued for  
4 the culverts under the entirety of the roadway  
5 from Reddelien Road to the -- Reddelien Road being  
6 to the very far south --

7 A Could you point to the screen for me?

8 Q I'd be happy to do that. To the very far south of  
9 Exhibit 2-002 running up to the beginning --  
10 running north and then northeast to the beginning  
11 of the proposed parking lot circled in orange,  
12 were there permits issued for culverts under all  
13 of that roadway?

14 A The manual code just identifies four culverts  
15 crossing over the wetlands. So I believe those  
16 culverts are limited to the east-west section that  
17 separate the north from the south navigable  
18 wetland sections.

19 I don't know there were any proposed or  
20 authorized under the -- well, I could be wrong. I  
21 don't know about the north-south road.

22 Q In other words, looking at Exhibit 2-002, when you  
23 say the east-west road, you mean the road that is  
24 running slightly northwest from the north-south  
25 portion of the access road between the north green

1 or smaller green circle and the large green  
2 circle, is that correct, on Exhibit 2-002?

3 A Yes.

4 Q And, to your knowledge, we're, again, referencing  
5 2-002. Besides the lake bed permit, which is  
6 referenced in Exhibit -- sorry, finding of fact  
7 one on page 2 of Exhibit 1-002, to your knowledge,  
8 there are no lake bed permits to the west of where  
9 the orange circle on 2-002 is located? There's no  
10 lake bed permits issued to the west of that, is  
11 that correct?

12 A That's my understanding.

13 Q And were there any grading permits issued in  
14 connection with the manual code approval?

15 A Yes. It identified grading of more than 10,000  
16 square feet on the bank of North Lake in the  
17 findings of fact.

18 Q Thank you. Is there anything that talks about  
19 grading in the orange area on Exhibit 2-002,  
20 which, as I understand it from the testimony at  
21 the hearing and before, is where the proposed  
22 parking lot is going to be located?

23 MR. GLEISNER: Can you see that all  
24 right?

25 THE WITNESS: Yeah. Let me just --

1 MS. CORRELL: Yeah. My picture of the  
2 design -- obviously this is drawn by hand,  
3 correct?

4 MR. GLEISNER: Correct, correct.

5 MS. CORRELL: So it's sort of hard to  
6 see where the things are.

7 MR. GLEISNER: Just for the record, the  
8 testimony of Mr. Wood and Mr. Hudak was that the  
9 orange circle on Exhibit 2-002 is the approximate  
10 location --

11 MS. CORRELL: Okay, yeah, right. It's  
12 approximate.

13 MR. GLEISNER: -- of where the parking  
14 lot is going to be located?

15 THE WITNESS: That's my understanding of  
16 where the grading will be taking place.

17 BY MR. GLEISNER:

18 Q In what portion of that orange circle will it be  
19 taking place?

20 A All I know is that, generally, that's the area  
21 where the grading will take place. I don't have  
22 the specific grading plans in front of me. My  
23 understanding is that grading will take place  
24 within that orange or red circle.

25 Q Well, let me just call up these findings of fact

1           then for a moment, if I may -- this is finding of  
2           fact one on the manual code.

3                         It says, "The DNR has submitted  
4           materials under its internal approval process to  
5           obtain approval to grade more than 10,000 square  
6           feet on the bank of North Lake." So, in other  
7           words, it would be to the east of that orange  
8           circle on 2-002, is that correct?

9   A       I don't think so.

10 Q       Okay. Is there any -- okay. You think it  
11       encompasses what area of the orange circle?

12 A       Some portion of the orange circle, if I'm reading  
13       that map correctly.

14 Q       All right. That's fair. And what about -- and  
15       what about the access road, which I'm now pointing  
16       to is running to the west of the large green  
17       circle on Exhibit 2-002, and then northeast to the  
18       western portion of the orange circle?

19                         Did the manual code, in effect, issue  
20       any grading permits for that area for the access  
21       road? And take your time and review as much of  
22       the manual code as you need.

23                         MR. GLEISNER: Off the record.

24                         (Discussion held off the record.)

25 BY MR. GLEISNER:

1 Q Have you had a chance to review it, Mr. Wakeman?

2 A Yes, I have. It don't see anything specifically  
3 that identifies where the grading will take place  
4 other than on the bank of North Lake.

5 Q Now, could you pull out -- I think you have it  
6 over there, Mr. Wakeman, to your right, actually,  
7 what has been marked as Exhibit 1, which is the  
8 Chapter 70.

9 And take a look at page 8. Page 8,  
10 No. 2-D. It says that permits should require  
11 applicants to conform with established NR 116.  
12 Those are the flood plane permits.

13 Are you aware of whether or not any  
14 studies have been done about how or to what extent  
15 the work on the access road and the proposed  
16 parking lot will have in terms of flooding or in  
17 terms of its effect on neighbors?

18 A I'm not aware of any.

19 Q And I'm going to show you what has been marked as  
20 Exhibit 41-001, which is a water resource  
21 application for project permits.

22 MR. HARBECK: Bill, you said 40?

23 MR. GLEISNER: 41-001.

24 MR. HARBECK: Okay. I misheard.

25 BY MR. GLEISNER:

1 Q Would it surprise you that lawyers have been  
2 required to file both a request for a water cert  
3 and a Chapter 30 with respect to fill in navigable  
4 wetlands under this permit?

5 A There may be some inconsistencies in how this is  
6 regulated. That's a possibility. Would I be  
7 surprised? I would be disappointed. Would I be  
8 surprised? Not necessarily.

9 Q Surprised, but not necessarily? I'm sorry?

10 A Disappointed.

11 Q This does allow in the upper left-hand corner for  
12 work in public waters, Chapter 30 permits, as well  
13 as permits for wetland fill, is that correct?

14 A Yes.

15 Q So this application can be used both to solicit or  
16 seek a Chapter 30 permit and a wetland fill permit  
17 as to the same land, in other words?

18 A Yes.

19 Q Now, I have just a couple more questions, and then  
20 we'll be done. Mr. Wakeman, other than the  
21 testimony that you have provided here today, will  
22 you be offering any other testimony at the hearing  
23 on the 31st of October regarding jurisdiction?

24 A I hope not. Being at the mercy of my counselor --  
25 my counsel on this and counselor/counsel, I

1 believe what I have talked about today is the  
2 extent of what my testimony will be on the 31st.

3 Q When we resume?

4 A On the 31st.

5 Q Can you think of anything that you've left out on  
6 the jurisdictional issues that you were asked to  
7 testify on?

8 MS. CORRELL: Am I allowed to consult  
9 with him or no?

10 MR. GLEISNER: Well --

11 MR. HARBECK: That's fine.

12 MR. GLEISNER: I think I would allow  
13 it --

14 MS. CORRELL: He's not going to be able  
15 to remember all the areas.

16 MR. GLEISNER: Off the record.

17 (Discussion held off the record.)

18 MR. GLEISNER: Back on the record.

19 MR. HARBECK: Go ahead. Megan, do you  
20 want to say it again in terms of what we're  
21 talking about?

22 MS. CORRELL: I believe Attorney  
23 Gleisner asked a question about grading, possibly  
24 in relation to Exhibit 40-003. And I'm not clear  
25 exactly what the question was based on my notes.

1 But I think you asked what jurisdiction we would  
2 have for grading on a site similar to this.

3 MR. GLEISNER: I think what I was trying  
4 to ask, Counsel, was, do you require a separate  
5 permit for grading in a wetland where you're  
6 putting in a road over a wetland?

7 BY MR. GLEISNER:

8 Q Is that --

9 MS. CORRELL: Okay. So that's a  
10 different question than I thought you were asking.

11 MR. GLEISNER: I apologize.

12 MS. CORRELL: Which I think, is more --

13 MR. GLEISNER: Exhibit --

14 MS. CORRELL: -- this situation.

15 MR. GLEISNER: -- 40-002.

16 BY MR. GLEISNER:

17 Q Do you understand the question, Mr. Wakeman?

18 A I believe the question was: What permit would be  
19 authorized to place the fill in the wetland for  
20 the drive?

21 Q No. Thank you for that, Mr. Wakeman. If there  
22 was grading that was required in the area where  
23 the roadway is going to be --

24 MS. CORRELL: Here's a hypothetical.

25 MR. GLEISNER: Yeah.

1 MS. CORRELL: Let's say there's a cabin.  
2 You're trying to get there, but you don't have  
3 room for a full, like, parking pad here.

4 MR. GLEISNER: Right.

5 MS. CORRELL: So you want to give your  
6 guests an opportunity to park here.

7 MR. GLEISNER: Uh-huh.

8 MS. CORRELL: So you're going to grade  
9 this whole area.

10 MR. HARBECK: "This area" being the area  
11 in green?

12 MS. CORRELL: It would be pretty big.  
13 It would be a 10,000 square foot, which -- this is  
14 the best hypothetical I can come up with. But  
15 you're going to grade this whole area.

16 MR. GLEISNER: The area in green in  
17 Exhibit 40-002.

18 MS. CORRELL: And it's a wetland, and  
19 it's over 10,000 square feet.

20 THE WITNESS: It would be a water  
21 quality cert, because it's fill.

22 MS. CORRELL: But would we also issue a  
23 Chapter 30 permit for the grading?

24 THE WITNESS: Not if there's a -- not if  
25 there isn't a navigable waterway.

1 MS. CORRELL: Okay. As opposed to the  
2 situation on 40-003?

3 THE WITNESS: On 003 we have --

4 MS. CORRELL: Where there's brown  
5 indicated and green indicated.

6 THE WITNESS: We have grading indicated  
7 in brown. That's in excess of 10,000 square feet,  
8 and we would require grading. And for the,  
9 quote/unquote, fill in the wetland, that would be  
10 a water quality cert.

11 MS. CORRELL: Okay. I think that's just  
12 the clarification I wanted to make on that point.

13 MR. GLEISNER: Thank you, Counsel. I  
14 appreciate that very much.

15 MS. CORRELL: And the other area they  
16 thought was a little gray was Mr. Harbeck -- or  
17 Attorney Harbeck was asking you some questions  
18 about whether Chapter 30 ever allowed placing fill  
19 for the purpose of a roadway or a peninsula. That  
20 was the example you gave and whether or not there  
21 were any authorities for that.

22 THE WITNESS: Yeah. And if it is for a  
23 bulkhead line within a municipality, then we  
24 would. But if it's an individual property owner,  
25 they're -- they're not eligible for that bulkhead

1 line exception.

2 MR. GLEISNER: I'm sorry. Can I just  
3 follow up on that, Counsel?

4 MS. CORRELL: Please.

5 BY MR. GLEISNER:

6 Q Can you elaborate? In other words, we're in  
7 agreement that there's no bulkhead line possible  
8 on the Kraus property, is that correct?

9 A That's my understanding.

10 Q Okay. That being the case, would a property owner  
11 be eligible then to grade over 10,000 feet or get  
12 a permit for over 10,000 feet?

13 A Grading on the bank of North Lake?

14 Q Yes.

15 A Or any --

16 Q Any --

17 A Sure. They could apply for a permit for grading.

18 Q And would they get one?

19 A Without knowing the fact situation, I can't  
20 speculate.

21 Q Would they be eligible to grade the roadway, which  
22 is now the access roadway from Reddelien Road to  
23 the proposed parking lot?

24 A If they are -- are they adding fill to this?

25 Q They would be, yes.

1 A Is that --

2 Q Yes. They would be grading and adding fill.

3 A That would require a water quality cert through  
4 this portion and this portion and perhaps --  
5 depends on how much it is. If it exceeds 10,000  
6 square feet, it may require that as well.

7 MR. HARBECK: When you say "this  
8 portion," just for the record --

9 THE WITNESS: I'm sorry.

10 MR. HARBECK: -- can you describe --

11 THE WITNESS: The sections within the  
12 wetland would be water quality cert if they're  
13 adding fill material to the drive. Outside of the  
14 wetland area, depending upon if it's on the bank  
15 in excess of 10,000 square feet, they might need a  
16 Chapter 30.19 for grading.

17 BY MR. GLEISNER:

18 Q They would never need a Chapter 30.19 in the  
19 wetland?

20 A If it's adding fill and it's in the wetland, it  
21 would be water quality cert.

22 Q And are there any documents besides what you've --

23 MR. GLEISNER: That's the extent of the  
24 testimony, I assume?

25 MS. CORRELL: Right. So the only other

1 piece that I was just trying to clarify is that  
2 there are authorizations to place fill under other  
3 statutes that another agency is the main lead on.

4 MR. GLEISNER: Like DOT?

5 MS. CORRELL: A lake bed -- no. DOT.  
6 BCPL for a lake bed lease and, obviously, the  
7 legislature has the prerogative to have lake bed  
8 grants as well as there are many in the City of  
9 Milwaukee, for example.

10 MR. GLEISNER: There are none of those  
11 type permits --

12 MS. CORRELL: Correct.

13 MR. GLEISNER: -- here?

14 MS. CORRELL: I'm just covering all your  
15 bases.

16 MR. GLEISNER: I appreciate that.

17 MS. CORRELL: Because if we mention  
18 anything else about jurisdiction, I don't want you  
19 to scream.

20 MR. GLEISNER: No, no. I don't scream.  
21 Some people scream, but I don't scream.

22 BY MR. GLEISNER:

23 Q Now, is there any other things in terms of a  
24 document that you will be relying on when you  
25 testify about jurisdiction on the 31st, other than

1           what we've talked about previously, which is the  
2           document which we requested and you will supply to  
3           us?

4                   MS. CORRELL: Oh, right. I will look  
5           for that.

6                   THE WITNESS: Not that I can think of.

7                   MR. HARBECK: Can I just ask a couple  
8           follow-up questions based on clarification?

9                   MS. CORRELL: Sure.

10                                   EXAMINATION

11 BY MR. HARBECK:

12 Q     I just want to make sure I understand with respect  
13     to the manual code of approval, which is the  
14     subject of this matter, the Chapter 30 portions of  
15     that manual code approval pertain to the area  
16     right at the proposed boat launch where it goes  
17     into North Lake? That's one area, correct?

18 A     Yes.

19 Q     And the two culverts associated with that boat  
20     launch that are right on the shores of North Lake?

21                   MS. CORRELL: I think those are all  
22     outfall structures.

23                   MR. HARBECK: Outfall structures.  
24     That's right.

25                   MS. CORRELL: Yeah.

1 BY MR. HARBECK:

2 Q And that's the other area where the Chapter 30  
3 equivalent of manual code applies, is that  
4 correct?

5 A I just hesitate, because I haven't seen the final  
6 plans for the launch. I don't know exactly where  
7 those two culverts or outfall structures --

8 MS. CORRELL: There are outfall  
9 structures. There are also culverts that are in a  
10 different area, right?

11 MR. HARBECK: That's right. I'm dealing  
12 with the two outfall structures.

13 BY MR. HARBECK:

14 Q Because I believe your testimony was that the  
15 Chapter 30 comes into play for both the boat  
16 launch itself, the structure that's going into  
17 North Lake and then the two outfall structures  
18 that are right on the banks of North Lake. Have I  
19 gotten that correctly?

20 A Barring any discrepancy in location, yes.

21 Q Okay.

22 MS. CORRELL: And the grading as well on  
23 the bank?

24 THE WITNESS: Yeah.

25 BY MR. HARBECK:

1 Q The grading in the area of the parking lot?

2 A Uh-huh.

3 MS. CORRELL: Right.

4 BY MR. HARBECK:

5 Q Third area. Are there any other areas where a  
6 Chapter 30 equivalent approval has been granted by  
7 the DNR in connection with this proposed boat  
8 launch?

9 A Under the four --

10 Q Under the manual code that we're dealing with.

11 A The four culverts that are identified -- let's go  
12 back to the findings of fact.

13 Q Right.

14 A You got grading on the bank in North Lake, boat  
15 ramp structure and two outfall structures on the  
16 bed of North Lake. And those, quite honestly, I'm  
17 not familiar with.

18 And four culverts crossing over the  
19 wetlands, which I assume are the four culverts  
20 placed under the access road that goes southwest  
21 to northeast. Those would be the Chapter 30  
22 activities.

23 Q Okay. And with respect to any proposed fill that  
24 will be necessary in connection with the  
25 construction of the access road or in or around

1           those -- the four culverts we've just talked  
2           about, those have been -- those are being allowed  
3           or those are being authorized pursuant to the  
4           water quality certification process that you  
5           described earlier?

6    A       To the Chapter 30 process.

7    Q       Now I'm talking about the fill.  Not the culverts,  
8           but the fill itself associated with constructing  
9           the access road.  You understand there's going to  
10          be some additional fill that's going to be  
11          necessary, correct?

12   A       I understand.

13   Q       And that fill is going to go into the navigable  
14          wetlands to some extent, correct?

15   A       Yes.

16   Q       And at this point, there is no Chapter 30 approval  
17          under the manual code for placing that fill,  
18          correct?

19   A       That's a water quality cert authorization.

20   Q       It's only through water quality cert.  There is no  
21          Chapter 30, correct?

22   A       Correct.

23   Q       The last question I had --

24                       MR. HARBECK:  Unless you have a  
25          follow-up on that.

1 MR. GLEISNER: I do, but go ahead.

2 MS. CORRELL: Just a clarification on  
3 your clarification.

4 MR. HARBECK: Go ahead.

5 MS. CORRELL: Just the plans, when you  
6 say "boat launch," there's, like, a turbidity  
7 barrier. When they say "boat launch," I think  
8 you're talking about the whole whatever needs to  
9 be placed for a safe launch.

10 MR. HARBECK: Right, at the lake.

11 MS. CORRELL: The ramp in the water --

12 MR. HARBECK: Right --

13 MS. CORRELL: -- in the water --

14 MR. HARBECK: -- right, right. That's  
15 what I was talking about.

16 MS. CORRELL: I don't know what all  
17 those things are, but they're there.

18 BY MR. HARBECK:

19 Q The purpose of my question was to confirm with  
20 respect to the activities where you're going to be  
21 filling in the navigable wetlands in connection  
22 with widening or creating this access road.  
23 There's no Chapter 30 equivalent permit; there's  
24 only a water quality certification?

25 A Correct.

1 Q Okay. When we deposed you earlier, the purpose  
2 was to find out what you're going to testify about  
3 at the hearing. We now talked about this  
4 jurisdictional issue. That was a new area, and we  
5 covered that.

6 Is there any other testimony that you  
7 anticipate giving at the hearing other than what  
8 we talked about at your deposition or other than  
9 what we've talked about in connection with  
10 jurisdictional issues? Anything new --

11 MS. CORRELL: I haven't reviewed the  
12 deposition, I have to admit. So what did you talk  
13 about? Your ordinary high?

14 MR. HARBECK: I mean, we talked about a  
15 lot of things. And we did ask him at the  
16 deposition, is there anything else that you  
17 anticipate testifying to, and he said no.

18 I want to make sure nothing else has  
19 come up since we deposed him now, and there's not  
20 another new topic or another area that he intends  
21 to go into, other than the jurisdictional issue,  
22 which I assume we've covered.

23 THE WITNESS: I don't -- I can't foresee  
24 any.

25 MS. CORRELL: And I don't know if they

1           asked you about manual codes. I didn't -- like I  
2           said, I didn't review that deposition, but that's  
3           already in our exhibits. You've seen it? And  
4           he's testified --

5                       MR. HARBECK: Manual codes --

6                       THE WITNESS: A manual code approval.

7                       MR. HARBECK: You mean the document?

8                       MS. CORRELL: Yeah, the little document  
9           that gives us the authority --

10                      MR. HARBECK: Right.

11                      MS. CORRELL: -- manual codes  
12           internally --

13                      MR. HARBECK: -- right, right.

14                      MS. CORRELL: It's a manual code -- I  
15           don't know -- do we want to call it working  
16           document? There's no question about that. It's  
17           the only area --

18                      MR. HARBECK: I think -- I mean, that's  
19           the document that sort of governs how the DNR  
20           treats and processes applications dealing with its  
21           own projects versus a private citizen project, is  
22           that right?

23                      THE WITNESS: Yes.

24                                       EXAMINATION

25           BY MR. GLEISNER:

1 Q Hearing Mr. Harbeck's questions and sitting here,  
2 something occurs to me that, I think, we haven't  
3 really touched on, and I would like to touch on  
4 for just a moment.

5 And I'm going to start by just reading  
6 you -- and I'll be happy to give you a copy of  
7 this, but this is pretty straightforward. In your  
8 deposition on page 13 that you gave before --

9 MR. GLEISNER: And it's gonna relate to  
10 jurisdiction, Counsel. I just want to put this  
11 out here.

12 BY MR. GLEISNER:

13 Q "QUESTION: How far would they be required to  
14 paddle before you would say this is navigable  
15 water?

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

22 I wanted to preface my questions with  
23 that, because of this: We've been talking here  
24 today about the fact that you might apply a  
25 wetland standard called water cert under NR 103 to

1 navigable water that's located within a wetland.

2 I'm not -- forget all the -- the  
3 particulars that we went into, but that's  
4 basically what we've been talking about, that if  
5 the wetland is located in the -- sorry. Strike  
6 that.

7 If the navigable water is located in the  
8 wetland, NR 103 kicks in, and not Chapter 30? Is  
9 that a very broad, general scope of where we've  
10 been?

11 A Depending upon the activity, that's correct.

12 Q Okay. My question is this -- or questions, maybe.  
13 My question is this: Irrespective of whether  
14 water cert applies or Chapter 30 applies,  
15 irrespective of that, like Richard Stein would  
16 say, a rose is a rose, navigable water is  
17 navigable water, is it not?

18 A Yes.

19 Q So if there is navigable water on a plot of land  
20 and it happens to be in a wetland, it doesn't  
21 diminish its navigability, does it, by virtue of  
22 it being in a wetland?

23 A No.

24 Q Again, irrespective of the standards -- you saw  
25 that little girl in Exhibit N, 17 N from our

1 videos. I won't play it again, but you remember  
2 the one --

3 A Yes.

4 Q -- where she was paddling next to that sign?

5 A Yes.

6 Q She was clearly in navigable water, was she not?

7 A That has been identified as navigable wetland,  
8 yes.

9 Q I'm not disputing that. That's not my question.  
10 My question is: That was navigable water she was  
11 in?

12 A Yes.

13 MS. CORRELL: Can I -- just a  
14 foundational?

15 MR. GLEISNER: Sure, absolutely.

16 MS. CORRELL: Foundational question.  
17 Which video are you talking about?

18 MR. GLEISNER: I can play it also.

19 MS. CORRELL: I don't need to know which  
20 one. Which area --

21 MR. GLEISNER: I think that that's a  
22 very fair question. I'm not going to play it.

23 MR. HARBECK: Off the record.

24 (Discussion held off the record.)

25 BY MR. GLEISNER:

1 Q It's Exhibit 17 N.

2 MS. CORRELL: Okay.

3 MR. GLEISNER: That's all I'm --

4 MS. CORRELL: Okay. Yep.

5 BY MR. GLEISNER:

6 Q My point is, my question that I'm trying to ask  
7 is: If there's navigable water in a wetland or if  
8 we're dealing with a navigable wetland, without  
9 regard to the code provision that may apply in  
10 terms of how you evaluate that navigable water,  
11 it's still navigable water, is it not?

12 A Yes.

13 Q Why would the impact on navigable water be  
14 different if NR 103 applies as opposed to  
15 Chapter 30?

16 A Say that one more time, please. I'm sorry.

17 Q Oh, sure. Why would the impact on navigable water  
18 be different if it is subject to NR 103 as opposed  
19 to Chapter 30?

20 A It may not be.

21 Q Okay. Thank you.

22 EXAMINATION

23 BY MR. HARBECK:

24 Q One follow up.

25 MS. CORRELL: Sure.

1 BY MR. HARBECK:

2 Q Sort of related, but sort of not. The DNR agrees  
3 that it is subject to the substantive requirements  
4 of Chapter 30 in connection with dealing with its  
5 own projects in areas that might implicate  
6 Chapter 30, is that -- is that correct?

7 A Yes.

8 MR. GLEISNER: Same standards?

9 MR. HARBECK: Yeah.

10 BY MR. HARBECK:

11 Q And it may not -- with respect to the procedural  
12 requirements, does DNR take issue with respect to  
13 whether it's subject to the procedural  
14 requirements of Chapter 30?

15 MS. CORRELL: I think I'm going to  
16 object that it calls for a legal conclusion.

17 BY MR. HARBECK:

18 Q Your understanding.

19 MS. CORRELL: I think the manual code  
20 documents speak for themselves.

21 MR. GLEISNER: Okay.

22 BY MR. HARBECK:

23 Q Are you familiar with the manual code? I think  
24 it's the document that talks about how the manual  
25 code applies.

1 I just want to understand if the DNR  
2 says, "Well, substantive provisions are one thing  
3 and procedural provisions are another," in terms  
4 of the way that they treat themselves when they're  
5 applying for their own projects in what may be  
6 navigable water.

7 A I have been more familiar with those, with that --  
8 I'll call it guidance, than I am now. I would  
9 have to review that. Sorry.

10 Q But in terms of the substantive applications, my  
11 question before was the DNR agrees that it's  
12 subject to the substantive applications?

13 A Yes.

14 Q And the reason I ask that is we heard some mention  
15 at the beginning from Mr. Meyer about the --  
16 whether or not DNR's even subject to the  
17 Chapter 30 requirements. I assume that DNR  
18 disagrees with an assertion that Chapter 30  
19 couldn't substantively apply to DNR?

20 A And I don't know --

21 MS. CORRELL: I think it calls for  
22 speculation as to what Mr. Meyer -- I'm not sure  
23 exactly what his position is, to be honest.

24 BY MR. HARBECK:

25 Q Right. If that was his position, DNR would not

1           agree with that position, assuming --

2                       MS. CORRELL:  If the position were what?

3  BY MR. HARBECK:

4  Q     If the position of the Wisconsin Wildlife  
5        Federation turns out to be that they think -- they  
6        assert that DNR is not subject to the  
7        substantive --

8                       MS. CORRELL:  Oh, oh.

9  BY MR. HARBECK:

10  Q     -- requirements of Chapter 30, DNR would take  
11        issue with that assertion, is that correct?

12  A     I believe so.

13  Q     Okay.  That's all.

14                       MS. CORRELL:  Okay.

15                       (Proceedings concluded at 2:16 p.m.)

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

3

4

5 I, JESSICA R. WAACK, a Registered Merit  
 6 Reporter, Certified Realtime Reporter, Registered  
 7 Diplomate Reporter and Notary Public in and for the  
 8 State of Wisconsin, do hereby certify that the above  
 9 examination of ROBERT S. WAKEMAN was recorded by me on  
 10 October 17, 2011, and reduced to writing under my  
 11 personal direction.

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

17 In witness whereof I have hereunder set  
 18 my hand and affixed my seal of office at Milwaukee,  
 19 Wisconsin, on October 21, 2011.

20

21

22

\_\_\_\_\_  
 Notary Public  
 In and for the State of Wisconsin

23

24

25

My Commission Expires: September 1, 2013.

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