

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 September 20, 2011

Waukesha, Wisconsin

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

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

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1 ALJ BOLDT: Good morning, we're back on the
 2 record. The appearances are the same as
 3 yesterday. Today, I believe, is Tuesday,
 4 September 20th and we're continuing on with the
 5 case of the Redland Road Neighborhood
 6 Association, Incorporated. And are you ready to
 7 call your first witness of the day, Counsel?
 8 MR. GLEISNER: I am, Your Honor, and that
 9 would be Mr. Neal O'Reilly -- Dr. O'Reilly.
 10 ALJ BOLDT: Do you swear to tell the truth,
 11 the whole truth and nothing but the truth, so
 12 help you God?
 13 DR. O'REILLY: I do.
 14 MR. GLEISNER: And, Your Honor, as I said,
 15 as a housekeeping method, just to keep -- we
 16 move the admission of Exhibit 35-001 and 002
 17 from yesterday and Exhibit 10.
 18 ALJ BOLDT: 35-001, any objection?
 19 MS. CORRELL: No. Those are the photos,
 20 right?
 21 ALJ BOLDT: Correct.
 22 MS. CORRELL: And then 10 is the NRC map?
 23 ALJ BOLDT: Correct.
 24 MS. CORRELL: No objection.
 25 ALJ BOLDT: 10 is received as well as 35-

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1 ALJ BOLDT: Okay. I'm ready to go.
 2 MR. GLEISNER: Thank you, Judge.
 3 DIRECT EXAMINATION
 4 BY MR. GLEISNER:
 5 Q Please state your name for the record.
 6 A My name is Dr. Neal O'Reilly.
 7 Q And where are you employed?
 8 A I'm employed with a company called Hey and Associates
 9 in Brookfield, Wisconsin.
 10 MR. GLEISNER: Can everyone hear okay?
 11 MS. CORRELL: Yeah, could you speak up just
 12 a bit?
 13 THE WITNESS: Okay.
 14 MS. CORRELL: Thank you.
 15 Q Now, what is the address of Hey and Associates,
 16 Doctor?
 17 A The address of Hey and Associates is 240 Regency
 18 Court, Brookfield, Wisconsin.
 19 Q And that is where you office, correct?
 20 A That's correct.
 21 Q Now, I call your attention to Exhibit 1R-001.
 22 ALJ BOLDT: Any objection to Dr. O'Reilly's
 23 CV?
 24 MS. CORRELL: CV, no.
 25 MR. GLEISNER: So then we move --

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1 001. What was the other one?
 2 MR. GLEISNER: 35-001 and 002.
 3 ALJ BOLDT: Oh, okay. How about 35-002?
 4 MR. GLEISNER: Yes, and Exhibit 10.
 5 MS. CORRELL: No objection on any of those
 6 photos.
 7 ALJ BOLDT: Okay. Those are received as
 8 well.
 9 MS. KAVANAUGH: And I think there was an 03
 10 as well.
 11 MS. CORRELL: There was an 03, yeah.
 12 MR. GLEISNER: And 003 as well.
 13 ALJ BOLDT: 003?
 14 MR. GLEISNER: 35.
 15 ALJ BOLDT: Oh, 35-003? Okay. That's also
 16 received.
 17 MR. GLEISNER: Tim, can I ask you, did you
 18 note the admission of Exhibit 3 -- the entire
 19 Exhibit 3?
 20 UNIDENTIFIED SPEAKER: The entire --
 21 MR. GLEISNER: Yeah.
 22 UNIDENTIFIED SPEAKER: Yes.
 23 MR. GLEISNER: Thank you very much, Your
 24 Honor. We're ready to proceed when you are,
 25 Judge.

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1 ALJ BOLDT: 001R is received.
 2 MR. GLEISNER: Thank you, and it goes
 3 through to 1R-015, Judge, just so the record is
 4 clear.
 5 Q Please detail your educational background and degrees
 6 if you would, Doctor.
 7 A Okay. I have a bachelor's of science degrees in
 8 aquatic biology and environmental geology from the
 9 University of Wisconsin. I have a master's in civil
 10 engineering from Marquette University and I have a
 11 Ph.D. in environmental engineering and environmental
 12 law also from Marquette University.
 13 Q And do you currently teach, Doctor?
 14 A Yes, I'm on the staff of Marquette University as an
 15 adjunct professor in the Department of Civil
 16 Engineering and I've recently been added to the staff
 17 at University of Wisconsin-Milwaukee in the
 18 conservation and environmental sciences program.
 19 Q And what courses do you currently teach at those
 20 schools, Doctor?
 21 A Currently, this semester I'm teaching hydrology at
 22 Marquette University in the Department of Civil
 23 Engineering and I'm teaching natural resources
 24 management at University of Wisconsin-Milwaukee.
 25 Q And how long have you taught at MU?

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1 A At Marquette, I've been teaching there since 2004.
 2 Q Have you published any articles, Doctor?
 3 A Yes, in the back of -- well, I believe it's on the
 4 last page of my CV. There are a number of articles.
 5 I've also been an author of a textbook on non-point
 6 source pollution.
 7 Q And could you briefly summarize the --
 8 MR. GLEISNER: Strike that.
 9 Q Were you ever employed at the DNR, Doctor?
 10 A Yes, I was employed with the Department of Natural
 11 Resources from 1977 through 1992, so a 15-year
 12 period.
 13 Q And what did you do at the DNR, Doctor, in various
 14 periods of time?
 15 A Right. Through the majority of that period I was the
 16 Water Resources Planner for southeastern Wisconsin
 17 and I was in charge of the Lake Management Program,
 18 the non-point source management program. I was also
 19 the liaison with the southeastern Wisconsin Regional
 20 Planning Commission and was the liaison with a number
 21 of municipalities. So what I did is that liaison
 22 position is I provided technical assistance to local
 23 municipalities.
 24 Q And were you at any time head of a management group
 25 at DNR?

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1 Q And are you familiar today with the current versions
 2 of those procedures, policies, etcetera?
 3 A Yes. As part of my work as a private consultant, our
 4 role is to advise our clients, whether they be
 5 municipalities or private developers, typically what
 6 the various State regulations are, how they need to
 7 comply with them, so we actively keep current on
 8 regulations so we can best advise them.
 9 Q What percentage of your work involves work with the
 10 DNR in some capacity?
 11 A I would say probably 50 to 60 percent.
 12 Q And how long have you been employed by Hey and
 13 Associates?
 14 A I've been a -- I'm a principal of Hey and Associates.
 15 I'm one of the owners and I've been a principal there
 16 since 1998.
 17 Q And what are the -- if you could describe, what are
 18 the responsibilities or the areas of expertise of
 19 Hey and Associates?
 20 A Okay. Hey and Associates is a specialty firm that
 21 specializes only in water resources management so we
 22 deal with -- we have an interdisciplinary staff of
 23 environmental and civil engineers and then we also
 24 have a group of ecologists. We try to provide an
 25 interdisciplinary approach to water resources

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1 A In the last two years that I was at DNR I was for one
 2 year in a temporary position in the non-point source
 3 pollution program as the head of their technical unit
 4 and then I ended my career with DNR working in the
 5 State's Lake Management Program with the title of
 6 State Limnologist.
 7 Q And what's a limnologist, Doctor?
 8 A Limnologist is sort of equivalent to a freshwater
 9 oceanographer. It's an ecologist, physical
 10 scientist, who studies lakes.
 11 Q And while at the DNR, were you ever involved in
 12 writing manuals or administrative codes and such?
 13 A Yes. I was involved probably with at least three or
 14 four administrative codes where I was part of a
 15 technical advisory group that wrote those codes.
 16 Q And when I say administrative codes, in other words,
 17 additions to the Administrative Code book that's
 18 sometimes referred to as the Wisconsin Administrative
 19 Code?
 20 A Yes.
 21 Q And while you were at the DNR, did you have occasion
 22 to become familiar with the procedures, policies,
 23 statutes, regulations and codes of the DNR as they
 24 relate to water?
 25 A Yes.

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1 management, but water resources is all that we do.
 2 We're a firm of about 40 employees.
 3 Q Do you have offices other than at Brookfield?
 4 A Yes, we have three offices in northeastern Illinois
 5 and then one office in Brookfield, Wisconsin.
 6 Q And can you describe the clientele of Hey and
 7 Associates?
 8 A I would say about 50 percent to 60 percent of our
 9 clientele are municipalities or State agencies. The
 10 other 40 percent are private land developers,
 11 typically large developers.
 12 Q And so when you say that you do work in your capacity
 13 at Hey and Associates, did I understand that you do
 14 work that's similar to the work you did when you were
 15 with the DNR?
 16 A That's correct.
 17 Q And could you describe how that comes about -- how
 18 that comes to happen?
 19 A Well, what we do is we assist our clients in, first
 20 of all, the design of projects, but we also do a lot
 21 of permitting for them so as part of that permitting
 22 we need to advise them as to what type of regulations
 23 are going to be applied. So we do things like
 24 wetland delineations, ordinary high water mark
 25 determinations, navigability determinations, we map

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1 environmental corridors. So what we're doing is, is
 2 we're identifying basically restrictions that may
 3 exist on a piece of property, sometimes as part of
 4 due diligence if somebody is looking at purchasing
 5 the property, other times as part of a site
 6 development so they can understand where they need to
 7 perhaps avoid -- and our experience is, we find most
 8 of our clients tend to take an avoidance approach.
 9 So much of our work is never actually seen by the
 10 regulatory agencies because many of our clients would
 11 prefer not to apply for a permit if they don't need
 12 to do so. So, for example, if there's a wetland or a
 13 navigable stream on the property, they will typically
 14 try to avoid it.

15 Q Now, I gather that a good deal of what you do then is
 16 in the nature of due diligence?

17 A That's correct.

18 Q So that would be similar to the work that you
 19 performed while you were with the DNR then?

20 A Yes.

21 MR. GLEISNER: Judge, I'm going to turn off
 22 this fan before I turn blue, if that's all right
 23 with you?

24 ALJ BOLDT: Sure. It'll be easier to hear
 25 too.

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1 Wisconsin Association of Lakes. Those groups do a
 2 very good job of letting their members know of
 3 changes that are happening in State regulations or
 4 administrative codes. We routinely monitor DNR's web
 5 page. We're aware of various committees that are
 6 working and we tend to track those so that we can
 7 keep as current as possible.

8 Q Now, when you were mentioning your educational
 9 background, did you -- I don't recall. Did you
 10 mention that you also have a degree in environmental
 11 law?

12 A Yes, I -- it's a specialty Ph.D. minor in
 13 environmental law from Marquette University.

14 Q Are you familiar with the 1987 case of Village of
 15 Menomonee Falls v. DNR at 140 Wis. 2d 579?

16 A Yes, I was an expert witness in that case for the
 17 Wisconsin DNR.

18 Q And is that regarded today as one of the landmark
 19 decisions concerning the establishment of
 20 navigability?

21 A It's one of them and also with DeGanert (phonetic)
 22 and Munich (phonetic) as important cases.

23 Q Did you testify at the contested case hearing in that
 24 case?

25 A Yes, I did.

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1 MR. GLEISNER: Okay, good, Judge.
 2 ALJ BOLDT: Thank you.
 3 MR. GLEISNER: You're welcome.

4 Q Are you familiar with the DNR engineers who will be
 5 called as experts in this proceeding?

6 A Yes.

7 Q How do you know Bob Wakeman (phonetic)?

8 A Bob Wakeman and I worked together in the southeast
 9 regional office. In fact, I worked with Bob when he
 10 was hired originally as an intern while he was going
 11 to school at the University of Wisconsin-Milwaukee so
 12 I've known Bob for well over 25 years.

13 Q And how do you know Pete Wood (phonetic)?

14 A I know Pete Wood through my current position at Hey
 15 and Associates. We interact through permitting
 16 activities. We also run into each other a lot at
 17 technical meetings, conferences, etcetera.

18 Q And do you also know Andrew Hudak?

19 A Yes, I do.

20 Q Now, how do you stay current with DNR regulations and
 21 methodologies? How have you stayed current since you
 22 left the employ of the DNR?

23 A In a number of ways. One is we stay active in a
 24 number of State organizations, State Flood Plain
 25 Managers, the Wisconsin Wetlands Association,

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1 Q And were you familiar with all aspects of the DNR's
 2 strategy in that case?

3 A Yes.

4 Q And now I would like to ask you, Doctor, how does one
 5 go about determining whether water is navigable?

6 A Okay. I look at in this approach. I first start
 7 with the definitions in statutory language. There
 8 are definitions in Chapter 30, Chapter 31 and 281 of
 9 the statutes. We also then have refined definitions
 10 in administrative codes. They show up in NR310, 320,
 11 325, 328, 341, 343, 345. Then I've also had the
 12 opportunity in working with Michael Cain who used to
 13 be an attorney with the Wisconsin DNR, have had a lot
 14 of training in the case law that has followed the
 15 definitions of navigability.

16 Q May I interrupt you?

17 A Sure.

18 Q Is Michael Cain who represented the DNR in the
 19 Menomonee Falls case?

20 A Yes, and I was involved with Michael Cain also in a
 21 somewhat similar case with the City of Oak Creek.

22 Q Okay. Go ahead. I'm sorry I interrupted you.

23 A So I've also tracked the case law. I've basically
 24 read every one of these decisions and so I factor in
 25 the various comments that the courts have made. And

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1 then I am aware of DNR's guidance manual.
 2 Personally, I found it deficient so what I did is, is
 3 I have prepared my own set of procedures to make sure
 4 that I comply with predominantly the case law.
 5 Q Now, when you say its own manual, are you referring
 6 to the document that has been marked here as
 7 Exhibit 1B? It starts out looking like this?
 8 A Right. It's Chapter 30 of their Waterway and Wetland
 9 Handbook.
 10 Q Okay. Very good.
 11 MR. GLEISNER: And that's been previously
 12 marked and received, Your Honor.
 13 Q All right. Now, can you discuss your understanding
 14 of the meaning of Section 30.12(1) and (2) in terms
 15 of what you do in evaluating navigable waters? I
 16 believe it was right here.
 17 A Okay. I'll ask for a correction. Are you asking
 18 about Section 30.10?
 19 Q 30.10. I apologize.
 20 A Okay.
 21 Q I misspoke. The record should be I asked about
 22 30.10(1) and (2). I'm sorry.
 23 A Yes, right, and 30.10(1) and (2), there's a
 24 definition or it's described as the declarations of
 25 navigability. The legislature created two sections.

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1 define every word that's used in a statute and, you
 2 know, if we did so we'd have 30, 40 pages of
 3 definitions, I mean, which would be ridiculous and so
 4 you need to go to common definitions of words. You
 5 know, often the courts have used dictionaries to
 6 define words and that's what I've done, you know,
 7 and, you know, the definition of a slough is a
 8 depression or a hollow.
 9 ALJ BOLDT: I'm sorry, a depression or?
 10 THE WITNESS: A depression or a hollow.
 11 A A bayou is a body of water --
 12 MS. CORRELL: Can you -- I apologize, I
 13 don't write fast enough so can you just --
 14 THE WITNESS: Okay. I'm sorry.
 15 MS. CORRELL: -- repeat what you said for
 16 slough -- your own definition?
 17 THE WITNESS: A slough -- right, right.
 18 The dictionary definition is a depression or a
 19 hollow.
 20 MR. GLEISNER: Are we good, Counsel?
 21 MS. CORRELL: Uh-huh.
 22 A Okay. A bayou is a body of water such as a creek or
 23 small river that is a tributary of a larger body of
 24 water.
 25 Q Okay, sir. And a marsh outlet?

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1 Number one is lakes and it says all lakes wholly or
 2 partly within the State which are navigable in fact
 3 or declared to be navigable and public waters. And I
 4 won't read the entire citation because I know it's in
 5 the record. And then they create a second section
 6 called streams and it says except as provided under
 7 Sections 4(c) and (d), all streams, sloughs, bayous
 8 and marsh outlets which are navigable in fact for any
 9 purpose whatsoever are declared navigable.
 10 Q Why do you think the legislature made a distinction
 11 between -- in (1) and (2)?
 12 A This is my opinion, but my opinion is that they broke
 13 these into two classes, lakes which are basically
 14 stagnant bodies of water, and streams which are
 15 flowing bodies of water and then they went on to
 16 define streams as including also sloughs, bayous and
 17 marsh outlets.
 18 Q Now, are you aware of any definition that the DNR has
 19 applied to the words bayous, sloughs or marsh
 20 outlets?
 21 A No, I'm not.
 22 Q Do you happen to have a working definition that you
 23 use in your capacity as a water engineer for bayous,
 24 sloughs and marsh outlets?
 25 A Yes. I mean, as we're aware, the legislature can't

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1 A And then a marsh is a tract of soft wetland commonly
 2 covered partially or wholly with water including a
 3 fen, a swamp or a morass. Marshes are also defined
 4 as wetlands and there is a definition in NR103.02 of
 5 what a wetland is so there's -- I believe there's a
 6 synonym comparable term to define what a marsh is.
 7 MS. CORRELL: I'm sorry, again, I was
 8 hoping you could repeat your own definition of
 9 marsh outlet?
 10 THE WITNESS: Oh, yes.
 11 MS. KAVANAUGH: Marsh he said.
 12 MS. CORRELL: Oh, you're just defining
 13 marsh?
 14 THE WITNESS: Of just the marsh. A marsh,
 15 and a marsh is a tract of soft wetland commonly
 16 covered partially or wholly with water, includes
 17 a fen, a swamp and a morass. And, again, those
 18 are dictionary definitions.
 19 MR. MEYER: Can you spell that last word,
 20 Mr. O'Reilly?
 21 THE WITNESS: M-A-R-A-S-S.
 22 Q Now, Doctor, do you use those definitions as working
 23 definitions in your work as a water engineer?
 24 A Yes, I use those as definitions when I interpret
 25 30.10(2), the definitions under streams.

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1 Q And do you have a distinction or is there a
 2 distinction between marsh and marsh outlet?
 3 A Again, I think it's -- you know, it's common terms.
 4 An outlet is an area where water would be exiting so
 5 in this case a marsh outlet would be the exit area of
 6 a marsh.
 7 Q Thank you very much. Now, normally when the DNR is
 8 asked to determine navigability, is it doing for land
 9 it itself it owns -- I didn't say that well. When
 10 the DNR normally determines navigability, is it doing
 11 it with respect to land that it owns?
 12 A I would say that's unusual. I would say the majority
 13 of their navigability determinations are done for
 14 either municipalities who are trying to determine
 15 whether or not Wisconsin Administrative Code NR115
 16 applies, which is the State shoreline zoning
 17 regulations, or whether or not it applies to the
 18 implementation of Chapter 30.
 19 Q And so it would be more --
 20 MS. CORRELL: Dr. O'Reilly, can you make
 21 sure you're continuing to enunciate loudly so we
 22 can hear you well?
 23 THE WITNESS: Okay. I apologize. I also
 24 have a cold today and --
 25 MS. CORRELL: Yeah, so do I. I understand.

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1 earlier about DNR discretion?
 2 A Yes.
 3 Q And is that discretion without limitation, Doctor?
 4 A I don't believe it is without limitation.
 5 Q In terms of making determinations of navigability
 6 what, in your opinion, must be done before the DNR is
 7 free to exercise its discretion?
 8 MS. KAVANAUGH: I guess I'd object. I mean
 9 he may have a degree in environmental law. I
 10 mean are you licensed to practice as a lawyer
 11 where you can render legal opinions?
 12 MR. GLEISNER: May I be heard, Your Honor?
 13 MS. KAVANAUGH: I mean because --
 14 ALJ BOLDT: Well, I think more like in what
 15 context. Discretion has a lot of different
 16 characteristics.
 17 MR. GLEISNER: Sure. I --
 18 MS. KAVANAUGH: If you're talking about the
 19 legal definition.
 20 MR. GLEISNER: And I'm not talking about
 21 the legal definition, Judge, just so we're
 22 clear.
 23 ALJ BOLDT: Okay.
 24 MR. GLEISNER: What I was getting at with
 25 this question is before they exercise their

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1 MR. GLEISNER: So he can speak well and
 2 your ears are plugged, is that --
 3 MS. CORRELL: Right, therein lies the
 4 problem.
 5 MR. GLEISNER: I have no objection, Your
 6 Honor, if Counsel would like to come and sit up
 7 here for this witness?
 8 MS. CORRELL: No, I'm fine. I think he can
 9 speak a little bit louder and we'll be just
 10 fine.
 11 Q Would you please do that, Mr. O'Reilly?
 12 A I will.
 13 Q Thank you. Mr. O'Reilly, so in other words as a rule
 14 the DNR does navigability determinations similar to
 15 what they did in the Menomonee Falls case?
 16 A Correct.
 17 Q For property that they don't own?
 18 A Right. I would say that is the majority of the
 19 navigability determinations that they do.
 20 Q But in this case, just so the record is clear, they
 21 are proffering or they are advocating a determination
 22 of navigability on land that they own, is that
 23 correct?
 24 A That's correct.
 25 Q In this proceeding, did you hear the arguments

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1 discretion with respect to determining
 2 navigability, are there certain steps that they
 3 should take based on his knowledge before they
 4 reach the point of exercising their discretion.
 5 ALJ BOLDT: All right. Go ahead and pursue
 6 that.
 7 MR. GLEISNER: Thank you, Judge.
 8 Q Before -- with reference to the specific facts of
 9 this case, are there certain steps that the DNR
 10 should take before they reach the point where they
 11 exercise their discretion?
 12 A Yes. You know, we've stipulated in this case that
 13 Wisconsin DNR is not mandated to follow the
 14 permitting procedures in Chapter 30, but I think
 15 we've all agreed that they need to follow the
 16 substantive standards that the legislature has set
 17 for the public --
 18 MR. MEYER: Objection, is he including all
 19 parties to that because we do not.
 20 MS. KAVANAUGH: And I don't believe we're
 21 all stipulating to that because they're
 22 objecting to it in their judicial review, you
 23 know, so --
 24 MR. GLEISNER: Well, I don't know that
 25 we've actually reached that stipulation either.

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1 MS. KAVANAUGH: If you've stipulated to it,
 2 you've never told us.
 3 THE WITNESS: Okay.
 4 Q Can you rephrase that --
 5 A Sure.
 6 Q -- because I don't think there was a stipulation on
 7 that point. I agree with Counsel on that issue.
 8 A Okay. And I apologize for misunderstanding.
 9 Q No problem. I can't have the court reporter read the
 10 question back. I'll try to rephrase it.
 11 ALJ BOLDT: He can play the tape back if
 12 you really need it.
 13 UNIDENTIFIED SPEAKER: I can try. I've
 14 never had to do it before, but I can try.
 15 MR. GLEISNER: Oh, no, no, let's not go
 16 there. I'll try and rephrase it.
 17 UNIDENTIFIED SPEAKER: It's available.
 18 ALJ BOLDT: We used to make his predecessor
 19 do it all the time.
 20 Q Okay. Let me do it this way. What steps should the
 21 DNR take before making a determination of
 22 navigability? What steps should they take?
 23 A What steps. Okay. And these are based on the
 24 procedures that I follow.
 25 Q Okay.

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1 navigable streams. The dilemma with that rule
 2 is that they are required to implement zoning
 3 regulations as soon as a stream is declared
 4 navigable --
 5 MS. CORRELL: Right, we understand
 6 shoreline zoning.
 7 THE WITNESS: -- but they don't know what
 8 streams are navigable. I spent a lot of time
 9 with those municipalities, explaining to them
 10 why it was difficult not to have a state-wide
 11 map of navigable streams, why because of the
 12 history of the case law that we had to go
 13 through as an agency when I was there a series
 14 of procedures in the field to determine
 15 navigability.
 16 MS. CORRELL: Correct. I guess I still
 17 have the objection that your experience in water
 18 reg and zoning and jurisdictional determinations
 19 under Chapter 30 has not been established as a
 20 foundation.
 21 MS. KAVANAUGH: Have you ever worked as a
 22 water management specialist?
 23 THE WITNESS: Yes.
 24 MS. KAVANAUGH: Water management
 25 specialist, not water resources specialist.

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1 MS. CORRELL: Objection, is there
 2 foundation laid?
 3 MR. GLEISNER: For what, Counsel?
 4 MS. KAVANAUGH: Why would those be
 5 procedures we -- DNR has to follow?
 6 MS. CORRELL: DNR's procedures in
 7 determining navigability is I believe what your
 8 question relates to.
 9 Q Do you understand that Dr. O'Reilly?
 10 A Yes.
 11 Q What we're looking for is what your understanding of
 12 the DNR's requirements are before they determine
 13 navigability.
 14 A All right. These are procedures based on my training
 15 at Wisconsin DNR and my interpretations of Wisconsin
 16 case law.
 17 MS. CORRELL: And I object that you did not
 18 hold a position in which that was within your
 19 job duties with the WDNR.
 20 MS. KAVANAUGH: You've never worked --
 21 THE WITNESS: It was part of my job duties
 22 to go out -- as I said, I was liaison with local
 23 communities that were required to implement
 24 Wisconsin shoreline zoning ordinances. Many of
 25 them had a lot of questions about what are

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1 THE WITNESS: I'm sorry --
 2 MS. CORRELL: A water regulation and
 3 zoning --
 4 THE WITNESS: I thought -- I apologize, I
 5 thought I heard you say have I ever worked with
 6 a water regulation --
 7 MR. GLEISNER: Judge, I'll be happy to
 8 qualify the witness further, but I object to the
 9 cross-examination at this juncture.
 10 ALJ BOLDT: Yeah, I mean you'll have the
 11 opportunity to cross-examine. I think it's
 12 likely it goes to weight and not admissibility
 13 in this instance in terms of --
 14 MS. KAVANAUGH: But foundation, Judge.
 15 ALJ BOLDT: He certainly -- he has some
 16 foundation of -- and you are -- you all
 17 are -- can highlight that and we're giving you
 18 some slack here to do voir dire basically, but
 19 go ahead and answer it to the extent that you
 20 can.
 21 A Okay. I start with an office procedure --
 22 MS. KAVANAUGH: And, again --
 23 Q Hold on a minute, Doctor, I'm going to --
 24 MR. GLEISNER: Judge, with your permission,
 25 I'm going to go back and do some foundational

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1 testimony.
 2 ALJ BOLDT: Okay, sure.
 3 Q Doctor, in your work with the DNR were you ever
 4 required to do navigability tests?
 5 A No, I was not.
 6 Q And did you in fact participate in navigability tests
 7 while you were with the DNR?
 8 A Yes, I did.
 9 MS. KAVANAUGH: And I guess that's vague.
 10 I'll object. Can you define participate?
 11 MR. GLEISNER: I haven't finished, Counsel.
 12 May I finish my questions? I just started the
 13 foundation.
 14 Q And while you were the DNR did you actually become
 15 aware of and work with the procedures that are used
 16 to establish navigability?
 17 A Yes, on many occasions I accompanied the water
 18 regulation specialist while doing navigability
 19 determinations.
 20 Q And while you were the DNR did you have occasion to
 21 review the procedures that are used in making
 22 navigability determinations?
 23 A Yes.
 24 Q To your knowledge, as a professional schooled in this
 25 area and working in this area, have the DNR

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1 ALJ BOLDT: Okay.
 2 Q Mr. -- Dr. O'Reilly, I apologize, did you or do you
 3 now perform navigability tests for your clients?
 4 A Yes.
 5 Q And are those navigability tests done on a regular
 6 basis?
 7 A Yes.
 8 Q How many navigability tests for clients do you
 9 perform in a year?
 10 A Eight to ten.
 11 Q And have you done that consistently since you left
 12 the employment of the DNR?
 13 A Yes.
 14 Q Do you utilize the same methodology that was utilized
 15 by the DNR while you were employed there?
 16 A Yes.
 17 Q Do you follow the same procedures as were followed by
 18 the DNR while you were employed there?
 19 A Yes.
 20 Q Now, the Judge is always right so I'm going to take
 21 up NR103 now and ask you how that relates to
 22 navigability?
 23 A I'm going to grab a copy just so I --
 24 ALJ BOLDT: Sure, uh-huh.
 25 A NR103 is a Wisconsin Administrative Code that relates

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1 procedures involving the determination of
 2 navigability changed since the time you were employed
 3 at the DNR?
 4 A No, they have not changed.
 5 Q And to your knowledge, did the DNR procedures that
 6 were employed in the Menomonee Falls case to which we
 7 have had reference previously, were those procedures
 8 the same procedures that you are familiar with using
 9 the same regulations for determining navigability?
 10 A Yes.
 11 ALJ BOLDT: Can I ask you though, isn't
 12 Menomonee Falls and isn't your experience with
 13 DNR before the promulgation of NR103 as it
 14 relates to wetlands?
 15 THE WITNESS: Yes.
 16 ALJ BOLDT: Okay. So might that be a
 17 relevant difference in both the regulation and
 18 the way DNR approaches these issues?
 19 MR. GLEISNER: We'll get to NR103,
 20 Judge --
 21 ALJ BOLDT: All right.
 22 MR. GLEISNER: -- and we're not -- all
 23 we're doing at this point is focusing just on
 24 the concept of navigability, Judge, and I
 25 apologize, but we're going to go there.

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1 to water quality standards for wetlands. Under
 2 NR103.03, the Code defines wetland water quality
 3 standards and I'll paraphrase those into the
 4 categories that relate to storm water and flood water
 5 storage, hydrologic function, filtering and storage
 6 of pollutants, shore land protection, habitat
 7 protection for aquatic organisms, habitat protection
 8 for wildlife and then there is a last category which
 9 says recreation, culture, education, scientific and
 10 natural scenic beauty values and uses. Now, I will
 11 agree that navigation would fall under the category
 12 of recreation under the definitions in case law.
 13 However, in NR103.03(2), the Code goes on to lay out
 14 a series of criteria that are used to comply with
 15 those standards. And I'm not going to read all of
 16 those, but there is no mention of navigability in any
 17 of those criteria so the Code remains blank on it.
 18 So my opinion is that NR103 is a set of standards to
 19 protect water quality of wetlands, but it does not
 20 address clearly the issue of navigability which is
 21 dealt with by the legislature under Chapter 30 and so
 22 to -- so we -- if we're going to address
 23 navigability. Now, we need to remember that these
 24 are separate terms. I can have a wetland that is not
 25 navigable. I can have a navigable body of water that

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1 is not a wetland. What we have here under this
2 discussion is a body of water that are both wetlands
3 and navigable waters.

4 MS. CORRELL: And I would object as to the
5 probative value of the testimony based on the
6 fact that you do not have experience
7 implementing the regulatory Chapter -- or
8 wetland standards that you just reviewed the
9 water quality standards to in the application to
10 wetlands that contain navigable waters.

11 MS. KAVANAUGH: And the areas that
12 Mr. Gleisner is contending this grove of trees
13 were determined by the Corps of Engineers not to
14 be wetlands except for the --

15 MR. HARBECK: Is this cross or is this
16 making speeches in the middle of testimony?

17 MR. GLEISNER: I don't understand why this
18 is happening.

19 MS. CORRELL: I'm just objecting to
20 probative value.

21 MR. GLEISNER: I'm trying to establish
22 foundation, Judge.

23 ALJ BOLDT: Yeah, I mean I think he has
24 some specialized knowledge by virtue of his
25 Ph.D. and all of his years of training and look

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1 A Yes.
2 Q You're familiar with its terms?
3 A I'm very familiar with its terms. I've actually done
4 workshops on how to interpret the Code.
5 Q And are you familiar with how the DNR implements
6 NR103?

7 A Yes, I believe I am.

8 MR. GLEISNER: With that foundation, Judge,
9 I'm going to return, hopefully accurately, to
10 the question that I was pursuing at the point at
11 which foundation needed to be elaborated on.

12 Q What must be done by the DNR before a determination
13 of navigability is made?

14 A Well, the -- I mean the case law discusses
15 navigability in fact. The statutes discuss
16 navigability in fact. The difficulty is that we
17 don't always have optimum conditions to do so and so
18 there is a preliminary determination process where
19 you look for are there -- as Mr. Hudak said
20 yesterday, are there characteristics of navigability.
21 And so the procedures that I follow is I start with
22 are there certain existing documents that may help
23 define that.

24 MS. KAVANAUGH: And, Judge, I guess I'd
25 object. He asked what DNR does so he should be

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1 at his CV is 15 pages long. He obviously
2 has --

3 MS. CORRELL: I agree. I'm not contesting
4 that.

5 ALJ BOLDT: He has specialized knowledge in
6 terms -- and I'm sure, you know, if the
7 foundation is laid, I'm sure that he has
8 familiarity with it and he certainly can render
9 opinions in terms of the regulatory processes.
10 He has considerable experience and he has
11 specialized knowledge, so go ahead. The
12 objection is overruled.

13 MR. GLEISNER: Thank you very much, Judge.

14 Q Dr. O'Reilly, have you ever worked with NR103?

15 A Yes.

16 Q And in what respect have you worked with NR103?

17 A Actually, the Code was being written while I was
18 still at Wisconsin DNR and I was part of a technical
19 group that was working on it, but I did leave the
20 agency just as the Code was being implemented and so
21 my -- the majority of my experience is in
22 implementing it as part of the permitting process for
23 my private clients and municipal clients.

24 Q And so you worked with and pursuant to NR103 then in
25 your private practice?

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1 testifying as to what he thinks DNR must do, not
2 what he does.

3 MR. GLEISNER: Judge, I think these
4 interruptions are unwarranted. I think he's
5 trying to answer the question I posed.

6 MS. KAVANAUGH: Well, I just want to make
7 sure he's answering your question.

8 MS. CORRELL: He doesn't have personal
9 knowledge is the objection to what DNR does.

10 MS. KAVANAUGH: He can testify as to what
11 his -- in his experience DNR does, but not what
12 he does.

13 A Okay, I'll --

14 Q Wait a minute, let the Judge rule.

15 ALJ BOLDT: Well, I don't recall if the
16 question was specifically what DNR does or what
17 his opinion of what DNR should do or -- let's
18 get some clarity.

19 MR. GLEISNER: You bet, Judge. You bet.
20 I'll rephrase it, Judge.

21 ALJ BOLDT: Okay.

22 Q What is your opinion of what DNR should do before it
23 makes a determination of navigability?

24 A Okay. The first step is to determine whether or not
25 these navigability characteristics, as Mr. Hudak

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1 described yesterday, exist. One of the first steps
 2 would be to look at a U.S. geological survey map and
 3 see if there are any stream channels there that have
 4 been indicated, a crude definition because these are
 5 10-foot contour maps which have a plus or minus five
 6 foot air. The second thing would be to look at
 7 available more accurate topographic maps that could
 8 be available from the local municipality or a county
 9 and see if the contours show any lines of a potential
 10 channel, determine if the watershed has an adequate
 11 size and characteristics to produce enough runoff
 12 during frequent storms to produce enough depth to
 13 float a recreational craft, contact the -- well,
 14 various individuals within the DNR local counties to
 15 determine whether or not a formal determination has
 16 been made in the past. So those are things that I
 17 feel should be followed before you enter the field.
 18 When you go into the field, you should confirm if the
 19 waterway has a bed and bank that is capable of
 20 constricting water flow to produce enough depth to
 21 float a recreational craft. You should identify if
 22 there are any high water marks that may be -- that
 23 may indicate frequent inundation of water. You
 24 should talk to neighbors to determine if the waterway
 25 frequently carries adequate flow to float a

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1 the public by applying wetland regulations to
 2 navigable waters? Did you hear that?
 3 A Yes.
 4 Q What is your opinion of that?
 5 A It was my understanding that DNR had stated that it
 6 had applied the standards under NR103, the State
 7 Administrative Code, to this property and that that
 8 adequately protected the public interests.
 9 MS. CORRELL: And I'd object just that the
 10 record speaks for itself. I'm not sure that I
 11 disagree with your categorization, but I can't
 12 remember every word that was stated on the
 13 record.
 14 MR. GLEISNER: Well, Counsel, that's right,
 15 we don't have daily copy here and I'm bringing
 16 this up so that we tie the record together,
 17 Judge.
 18 MS. CORRELL: And I'm simply making
 19 objection for the record, sir.
 20 ALJ BOLDT: Okay. And that's both
 21 appropriate. Go ahead.
 22 Q And now, Dr. O'Reilly, are you familiar with
 23 Section 30.12(3m)(b)?
 24 A Yes.
 25 Q Do you have that in front of you?

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1 recreational craft, ask neighbors if they've ever
 2 observed navigation in fact in the area of question,
 3 and then the ultimate test would be an actual
 4 navigability impact.
 5 Q Thank you, Doctor. And we'll return to some of this
 6 information when we get to your opinions, but I just
 7 wanted to lay that foundation. Doctor, in this
 8 proceeding you've been present for this entire
 9 proceeding, correct?
 10 A That's correct.
 11 Q As you were present for all of the depositions that
 12 have been conducted on August 25th and 26th of
 13 Messrs. Hudak, Wakeman, Wood and Drake (phonetic), is
 14 that correct?
 15 A That is correct.
 16 Q And you were actually present, physically present,
 17 during the surveying of this property on
 18 September 2nd, is that correct?
 19 A That is correct.
 20 Q And did you in fact direct and supervise the
 21 surveyors in their work?
 22 A That is correct.
 23 Q Now, in this proceeding did you hear the arguments
 24 earlier about wetlands and what I understood to be
 25 the assertion by DNR counsel that it has protected

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1 A Yes, I do.
 2 Q Would you mind explaining --
 3 MR. GLEISNER: For the record, Judge, that
 4 is the section that controls what you put in the
 5 notice of hearing for matters such as this.
 6 Q Would you, for the record, explain --
 7 MS. CORRELL: I'm sorry, I didn't catch
 8 that question.
 9 MR. GLEISNER: No, I didn't -- I
 10 interrupted myself, Counsel, and I said for the
 11 record, Judge, 30.12(3m)(b) is what the hearing
 12 examiner or the Office of Hearing is required to
 13 put in their notice of hearing, okay? That's
 14 what I --
 15 MS. KAVANAUGH: Are you sure it's not what
 16 we do for the public informational hearing as
 17 opposed to this hearing examiner?
 18 MR. GLEISNER: I will check that out. Can
 19 we just have a moment, Your Honor?
 20 ALJ BOLDT: Sure.
 21 MS. KAVANAUGH: That's 208. That's for the
 22 public informational hearing, not a contested
 23 case hearing. The Judge can take judicial
 24 notice.
 25 MR. GLEISNER: Well, let me read into the

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1 record and then we can discuss it if necessary
 2 or argue about it. (3m)(c) or (3m)(b) says the
 3 notice of hearing provisions of 30.208(3) to (5)
 4 shall apply to an application under
 5 paragraph (a). (c) reads, "The Department shall
 6 issue an individual permit to a riparian owner
 7 for a structure or a deposit pursuant to an
 8 application under paragraph (a) if the
 9 Department finds that all of the following
 10 apply: (1) the structure or deposit will not
 11 materially obstruct navigation; (2) the
 12 structure or deposit will not be detrimental to
 13 the public interest; and (3) the structure or
 14 deposit will not materially reduce the flood
 15 flow capacity of the stream." And, Judge, I
 16 would reference the fact that I believe your
 17 Exhibit 213 actually uses those.

18 MS. KAVANAUGH: What I was asking for was
 19 clarification. 30.209 is what has the notice
 20 requirements for administrative reviews like
 21 this. 30.208 is the procedure for individual
 22 permits so any hearing notices that would be
 23 referenced in 30.208 would have to do with the
 24 public informational hearing. That's all I'm
 25 trying to clarify.

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1 ALJ BOLDT: Yeah, this -- 213 is for the
 2 public informational hearing.

3 MR. GLEISNER: Oh, okay.

4 ALJ BOLDT: That's different than the
 5 contested case proceeding.

6 MR. GLEISNER: And I apologize then, Judge.

7 Q I will -- I will read into the record from
 8 Exhibit 213, which I'm going to pass to the witness,
 9 the following language, quote -- and I apologize for
 10 referencing the wrong hearing, Judge, but I think the
 11 standards are the standards here still are
 12 applicable. Quote, "The Department must consider
 13 factual information about the following legal
 14 standards in deciding whether to issue, modify or
 15 deny the approval. First, whether navigation is
 16 materially obstructed, including commercial,
 17 recreational, active and passive forms of navigation.

18 Two, whether there is detriment to the public
 19 interest, including fish and wildlife or their
 20 habitat, natural scenic beauty or water quality.
 21 Three, whether the flood flow capacity of the stream
 22 is materially reduced", close quote. Have I read
 23 that correctly, Doctor?

24 A Yes.

25 Q Now, Doctor, with regard to those three items, I'm

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1 ALJ BOLDT: Yeah, except -- it's confusing
 2 because 30.209(2)(d)(3) says that we do follow
 3 208 because we're also -- I mean there is some
 4 overlap there but yeah, no, your general point
 5 is correct, that is for notice of project and
 6 public notice.

7 MS. KAVANAUGH: Yeah, I'm just trying to
 8 clarify.

9 MR. GLEISNER: And, Judge, just to maybe
 10 make it a little easier, can I see that again
 11 please, so that we're sure that we're -- 30.12.

12 MS. KAVANAUGH: Maybe you were looking at
 13 (c), sir, because you were starting to read the
 14 standards?

15 MR. GLEISNER: Well, here, why don't we do
 16 this --

17 MS. CORRELL: Just let him talk.

18 MR. GLEISNER: -- why don't we go to
 19 Exhibit 213 that's been admitted, Your Honor.
 20 That is the notice of public informational
 21 hearing.

22 ALJ BOLDT: 213? Okay.

23 MR. GLEISNER: And -- now wait, sir. Do
 24 you have Exhibit 213 in front of you? Do we
 25 have it here?

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1 going to direct your attention to the last one. Are
 2 you aware of whether or not anything has been done to
 3 determine the flood flow capacity of any stream on or
 4 near the North Lake -- sorry, the DNR property -- the
 5 Krause property?

6 A I have seen no document that has analyzed the
 7 potential impacts --

8 MS. CORRELL: Objection as to foundation.
 9 Can we clarify what stream?

10 MR. GLEISNER: Any stream is what I said.

11 MS. CORRELL: Is there a stream?

12 MR. GLEISNER: I just asked any stream,
 13 first of all, ma'am, and then --

14 MS. KAVANAUGH: But it has to -- for that
 15 standard to apply, a stream has to exist. We
 16 stipulate that there's the -- you know, the
 17 slough up at the top.

18 MR. GLEISNER: All right.

19 MR. MEYER: I didn't stipulate that there's
 20 a slough at the top.

21 MS. KAVANAUGH: Well, a ditch.

22 MR. MEYER: The watercourse or whatever I
 23 think is a better term.

24 MS. KAVANAUGH: Okay, watercourse then.
 25 I'm sorry, I meant to say --

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1 MS. CORRELL: Swale.
 2 MS. KAVANAUGH: -- swale -- swale.
 3 MR. GLEISNER: I'm going to call up
 4 Exhibit 2-002, Your Honor, at this time and
 5 ask -- I withdraw the question that was objected
 6 to for the moment.
 7 Q And I'm going to go to Exhibit 2-002 which has
 8 previously been admitted and ask you, Doctor, do you
 9 see anything that would be -- or do you see any
 10 reference on that exhibit to anything that would be
 11 characteristic of a stream?
 12 A Yes, it's my understanding, based on testimony and my
 13 field observations, that the area marked in blue
 14 which is north of the orange circle is a stream.
 15 Q Now, with regard to the area marked in blue on
 16 Exhibit 2-002, I return to the question that I posed
 17 to you a moment ago. Are you aware if any flood flow
 18 study has been done in connection with that area?
 19 A I am not aware of any flow -- flood flow study that
 20 has been done by the Department of Natural Resources,
 21 and let me clarify. I have reviewed the Department's
 22 storm water management plan prepared by Kapur and
 23 Associates. There is no reference at all to volume
 24 of flow or flood flow capacity. I've seen no flood
 25 plain analysis --

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1 make a speech. Register your objection and then
 2 stop. I mean that's discourteous and it's not
 3 proper procedure.
 4 MR. GLEISNER: Proper procedure, I would
 5 respectfully submit Judge, is that an objection
 6 is interposed before the answer is given or
 7 after an answer is given.
 8 MS. CORRELL: He didn't speak about storm
 9 water until I said relevance.
 10 ALJ BOLDT: Yeah, I mean in general -- I
 11 mean in theory you can even make a motion to
 12 strike after the answer comes in, but we're not
 13 going to -- let's not go down that road either,
 14 please. But, I mean, in terms of -- yeah, I
 15 think it's fair to -- why don't you pause after
 16 you do the question, Doctor, before you
 17 answer --
 18 THE WITNESS: Okay.
 19 ALJ BOLDT: -- to make sure there's no
 20 objection to the question --
 21 THE WITNESS: Okay.
 22 ALJ BOLDT: -- and then after the answer
 23 comes in if there's an objection -- and, again,
 24 a lot of this you can highlight on
 25 cross-examination or we're going to be here a

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1 MS. CORRELL: Objection to relevance. The
 2 storm water plan is not what's being reviewed
 3 here.
 4 MR. GLEISNER: This is obstructionist
 5 tactics. I need to be able to allow my witness
 6 to answer.
 7 MS. CORRELL: I understand --
 8 MR. HARBECK: I would just suggest that if
 9 there's an objection, if the witness can finish
 10 completing the answer -- if there's an objection
 11 before the question, make it --
 12 MS. CORRELL: That's fine, but storm water
 13 is not relevant.
 14 MR. HARBECK: -- but don't interrupt the
 15 witness when he's testifying.
 16 MS. KAVANAUGH: Well, you have to make an
 17 objection before you answer.
 18 MR. HARBECK: No, you do not. If you have
 19 an --
 20 MS. KAVANAUGH: You can't make an objection
 21 after he's answered.
 22 MR. HARBECK: If you have an objection to
 23 the question state it before he answers, but in
 24 the middle of an answer, halfway through, it's
 25 not appropriate to interrupt the witness and

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1 long time today. We may not be able to get to
 2 the site inspection if we go at this pace.
 3 MS. KAVANAUGH: Well, we do have to make
 4 our objections to get them in the record, right
 5 Judge? I mean --
 6 ALJ BOLDT: No, I understand. I'm not
 7 saying the objections themselves are
 8 objectionable.
 9 MR. GLEISNER: Right, nor am I suggesting
 10 that, Judge. I'm not suggesting that.
 11 ALJ BOLDT: All right. Go ahead.
 12 MR. GLEISNER: Okay. Thank you, Judge.
 13 A Do you want me to complete the answer?
 14 Q Yes, please, I do want you to complete the answer.
 15 A Okay. On behalf of the Redland Road Neighborhood
 16 Association I prepared an open records request to the
 17 Department of Natural Resources requesting all
 18 documents related to this case. I have seen no
 19 document related to the issue of flood flow capacity.
 20 Since I believe the Department understands and
 21 complies with the open records regulations, I have to
 22 make the assumption that that document does not
 23 exist.
 24 Q And, Doctor, you and I both went to the DNR to
 25 conduct the open records request -- to implement or

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1 execute the open records request, is that correct?
 2 A That is correct.
 3 Q And Mr. Hudak brought in all of the documents we
 4 asked to look at, is that correct?
 5 A That is correct.
 6 Q And you and I and Attorney Surridge (phonetic) of my
 7 office sat there for several hours and went through
 8 each document in each of the several boxes that were
 9 brought in, is that correct?
 10 A That is correct.
 11 Q And you did not find during that time a flow
 12 direction study?
 13 A I did not find any study related to flood flow
 14 capacity.
 15 Q Now, I'm going to redirect your attention because it
 16 has been questioned whether or not the blue line on
 17 Exhibit 2-002 is a stream. Could you address that,
 18 Doctor?
 19 A Yes. I feel that this area marked as blue in that
 20 exhibit is clearly a stream. There is a bed and bank
 21 on both the north and south sides of the channel.
 22 It's clearly observable in the field. It's clearly
 23 observable on the topographic maps that were provided
 24 by DNR taken by Kapur and Associates and I believe it
 25 has all the characteristics of a stream channel.

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1 MR. GLEISNER: Oh, I apologize, the exhibit
 2 number that we have given it for this hearing is
 3 4-030B. That is what we've given for this
 4 hearing. It is the second page of your
 5 Exhibit J appended to your answers to
 6 interrogatories.
 7 MS. KAVANAUGH: Oh, okay.
 8 MR. GLEISNER: And, Judge, I --
 9 ALJ BOLDT: I know you emailed and I
 10 printed them out and I believe I put them at the
 11 front of the book.
 12 MR. GLEISNER: Judge, if it's missing from
 13 your book --
 14 ALJ BOLDT: What is this number, yeah,
 15 4-30b?
 16 MR. GLEISNER: Yes, Your Honor. We can
 17 copy it over the lunch hour, Judge. Judge, here
 18 it is. If I may approach?
 19 ALJ BOLDT: Sure.
 20 MR. GLEISNER: What happened here, Judge,
 21 is printers are wonderful things, but they
 22 missed a page for some reason and what we have
 23 here as Exhibit 4-030A is the first page of an
 24 email and 4-030B is a map that was appended to
 25 that email. It's J because it's J of the

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1 Q I'm going to now show you what has been marked as
 2 Exhibit 4-032 and ask if you can identify that -- or
 3 have you seen that?
 4 MR. GLEISNER: That was the exhibit that
 5 was missing from our book, Judge --
 6 ALJ BOLDT: Oh, okay.
 7 MR. GLEISNER: -- we submitted later. I
 8 apologize for that.
 9 A Okay. So it's not in the book. Yes, it's
 10 my -- well, first of all, that is a part of --
 11 MS. CORRELL: Sir, we haven't located that
 12 exhibit.
 13 MS. KAVANAUGH: Here it is, 4-032.
 14 MR. GLEISNER: I submitted it late --
 15 MS. CORRELL: Oh, okay.
 16 MR. GLEISNER: -- because of the fact that
 17 it didn't print out. The exhibit is J in your
 18 answers to interrogatories.
 19 MS. KAVANAUGH: Oh, I'm sorry, then you did
 20 send that.
 21 MS. CORRELL: Does it also say L-1 on it?
 22 MR. GLEISNER: No, it does not.
 23 MS. KAVANAUGH: That's the same one because
 24 we have one marked 4-032.
 25 MR. HARBECK: You said 4-032.

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1 answers to interrogatories by the DNR.
 2 ALJ BOLDT: Okay.
 3 MR. GLEISNER: And I could supply -- Your
 4 Honor, we're going to copy this over the lunch
 5 hour and bring it in --
 6 ALJ BOLDT: Okay, thank you.
 7 MR. GLEISNER: -- to make sure that the
 8 record is complete.
 9 ALJ BOLDT: Okay, sure. We're going to go
 10 off the record. We've got a lot of people
 11 talking here.
 12 (Recess Taken)
 13 ALJ BOLDT: We're back on the record and
 14 we're going to substitute out the
 15 30 -- Exhibit 4-0030-B for Exhibit 212 and
 16 that's -- Pages 1 and 2 are the same as what we
 17 had there, so go ahead.
 18 MR. GLEISNER: Thank you, Judge. Thank you
 19 very much, Judge.
 20 Q Do you recognize that, Dr. O'Reilly?
 21 A Yes, I recognize that exhibit. It was presented
 22 during the deposition of Engineer Pete Wood.
 23 Q And can you explain, if you're able, the significance
 24 of that document?
 25 A It's my understanding that Mr. Wood was attempting to

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1 show the flow path of water from basically the
 2 southern boundary of the Wisconsin DNR site as it
 3 routes its way towards the blue area on our previous
 4 Exhibit 2-002.
 5 Q And directing your attention to this, there is a
 6 green arrow broken line that starts -- and I don't
 7 want to misrepresent this, but that it starts in the
 8 middle of what is apparently the Krause site and then
 9 it follows around and the arrow continues here and
 10 then it follows up and down through the quote,
 11 unquote, unnamed stream.
 12 MR. HARBECK: The Judge can't see.
 13 MR. GLEISNER: Sorry, Judge, I apologize.
 14 ALJ BOLDT: That's all right, that's all
 15 right. It's following the arrow, right?
 16 MR. GLEISNER: Right, Judge.
 17 A It goes like this, up and around, and then out.
 18 MR. GLEISNER: And you can see that if you
 19 look at the exhibit there, Judge.
 20 Q Is that the flow that you're referring to?
 21 A Yes.
 22 Q Okay.
 23 MR. GLEISNER: Now I'm going to move the
 24 admission of Exhibit 212, Pages 1 and 2, Judge.
 25 ALJ BOLDT: I assume there's no objection?

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1 A It is a graphic out of the report prepared by the
 2 Natural Resources Consulting, Incorporated as part of
 3 a wetland delineation report that they prepared and
 4 it's an exhibit showing flow directions from the
 5 watershed that feeds the wetland stream complex in
 6 the Redland Road Krause property area.
 7 Q Now, that exhibit --
 8 A And I'd just add one thing. The blue line shown on
 9 that graphic which is the boundary of the watershed
 10 was actually drawn by my company.
 11 Q Thank you, Doctor. Now --
 12 MS. CORRELL: I'm sorry, the blue line --
 13 MS. KAVANAUGH: The light blue line.
 14 MS. CORRELL: -- is it very light blue?
 15 THE WITNESS: It's very light blue and it's
 16 hatched. It's a broken line.
 17 MS. CORRELL: Okay.
 18 Q Now, Dr. O'Reilly, is this the type of thing that you
 19 would expect to see in connection with what you
 20 referred to as a flow study?
 21 A It would be the start of it, at least it would show
 22 the flow directions. A flow capacity study would be
 23 more than this, it would also include a flood
 24 hydraulics analysis.
 25 Q And, Dr. O'Reilly, going back, if we may, for a

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1 MS. CORRELL: None.
 2 MS. KAVANAUGH: No.
 3 ALJ BOLDT: 212, 1 and 2, are
 4 received -- or 212 is received.
 5 Q Now I'm going to direct your attention, and hopefully
 6 we'll get the exhibit right this time.
 7 MR. GLEISNER: Your Honor, my co-counsel
 8 has asked that we move the admission of the
 9 entire Exhibit 212 which is I think what you
 10 just did, is that correct?
 11 ALJ BOLDT: Yes, correct.
 12 MS. KAVANAUGH: Yes, he did.
 13 MS. CORRELL: Yeah.
 14 MR. GLEISNER: Thank you very much.
 15 Q I'm going to call up, and I apologize for this when
 16 it comes up on the screen, Exhibit 23-018. For
 17 whatever reason, my software has failed me here and
 18 so I can't flip this so it's the right way, but I'll
 19 represent to the Judge and to Counsel that this is
 20 east, this is north and south on that exhibit. And,
 21 as I say, for some reason I can't flip it. If you'd
 22 take a look at that please, Dr. O'Reilly. That is
 23 23-018.
 24 A Yes.
 25 Q What is that, if you know, Doctor?

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1 moment to Exhibit 212 which I'm going to call up
 2 using my thumbnails, and I apologize for that but we
 3 know it's 212, Page 2 at this point, the green arrows
 4 that appear on there are showing the water flowing
 5 from the center portion of the Krause property around
 6 and then up to the north and out the stream, is that
 7 correct?
 8 A That's correct.
 9 Q Now, Dr. O'Reilly, what would -- you heard the
 10 testimony yesterday concerning -- from Mr. Peters,
 11 did you not?
 12 A Yes.
 13 Q Assuming that his testimony is accurate, if as he
 14 testified the water flows back from North Lake at
 15 various times, would you expect the water to follow
 16 the same trajectory going west from North Lake?
 17 A Yes, if North Lake is high, water will flow to the
 18 west from the lake into the stream wetland complex as
 19 Mr. Peters described yesterday. If the lake level is
 20 low, then the wetland complex drains from west to
 21 east into North Lake. So the flow direction varies
 22 greatly, depending on the elevation of North Lake.
 23 Q Now, Dr. O'Reilly, what would be the importance in a
 24 general sense of a flood flow capacity study of a
 25 stream?

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1 A The importance of it is determining whether or not
 2 there's going to be a change in flood elevations.
 3 Q And why would that be important?
 4 A If you start raising flood elevations on other
 5 people's property, you could cause potential damage.
 6 There are requirements under State Administrative
 7 Code that regulate flood plains that require if
 8 you're going to raise flood plains on neighboring
 9 properties you need to get easements, etcetera.
 10 Q Now --
 11 MS. CORRELL: Objection to -- he's
 12 finished, right? Objection to relevance. Flood
 13 plain regulations are also not at issue in this
 14 case.
 15 ALJ BOLDT: Okay. I mean I think it's
 16 information that he's using to support his
 17 opinion testimony relative to the standards that
 18 are at issue --
 19 MS. CORRELL: Uh-huh.
 20 MR. GLEISNER: Thank you, Judge.
 21 ALJ BOLDT: -- so the objection is
 22 overruled.
 23 Q Now --
 24 ALJ BOLDT: Can I ask you, did you guys do
 25 a hydraulics analysis?

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1 A -- so that --
 2 Q I'm sorry.
 3 A So that flood storage that is there will be lost.
 4 Q And so what will that do to the, quote, flood flow
 5 capacity of the stream identified by the blue line on
 6 Exhibit 2-002?
 7 A It will increase the volume of water that will be
 8 part of that flood flow.
 9 MS. CORRELL: Objection to relevance. The
 10 parking lot is not a stream nor is there a 30.12
 11 structure being placed there. I believe the
 12 jurisdiction on the parking lot is 30.19.
 13 ALJ BOLDT: It's the grading permit?
 14 MS. CORRELL: Correct.
 15 MR. GLEISNER: Judge -- may I be heard,
 16 Judge?
 17 ALJ BOLDT: Sure.
 18 MR. GLEISNER: Judge, we are not at this
 19 point attempting to prove that the parking lot
 20 is going to have a discreet cause, we are
 21 attempting to prove the importance of doing a
 22 flood flow analysis. And what I would like to
 23 do is have an opportunity to ask a couple more
 24 questions to bring that up.
 25 ALJ BOLDT: See if you connect --

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1 THE WITNESS: No, we did not.
 2 Q Now, Dr. O'Reilly, the third standard on Exhibit 213
 3 says before the Department issues, modifies, denies
 4 an approval, it needs to determine, quote, whether
 5 the flood flow capacity of a stream is materially
 6 reduced, close quote. Now, you're familiar with
 7 where the parking lot is going to be located,
 8 correct?
 9 A Correct.
 10 Q And I'm going to just call your attention briefly, so
 11 that we have that in mind and in the record -- I'm
 12 going to call up Exhibit 12. And to a reasonable
 13 degree of professional certainty, can you tell me
 14 what will occur when a large piece of asphalt is
 15 dropped into the middle of the Krause site in terms
 16 of flood flow capacity of the stream that we've
 17 identified earlier on Exhibit 2-002 as a blue line to
 18 the north of the Krause property?
 19 A One issue that comes to mind is that in the middle of
 20 that parking lot, and it's illustrated nicely on
 21 Exhibit 15, there is a depressional area in the
 22 middle of that parking lot currently that will be
 23 filled with several feet of fill and then the parking
 24 lot will be placed on top of that fill --
 25 Q And what will that do --

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1 MR. GLEISNER: Yes, sir.
 2 ALJ BOLDT: -- to that standard that's
 3 relevant?
 4 MR. GLEISNER: Yes, Judge, if I may.
 5 ALJ BOLDT: Okay.
 6 Q To a reasonable degree of professional certainty, was
 7 the failure to conduct a flow capacity analysis a
 8 necessary prerequisite to the DNR's exercising its
 9 discretion to make a determination of navigability on
 10 this property?
 11 A I don't believe so. I --
 12 MS. CORRELL: I'm not sure I understood the
 13 question. Could you just restate it, please?
 14 MR. GLEISNER: I apologize. Let's try it
 15 again.
 16 ALJ BOLDT: You lost us at navigability, I
 17 think.
 18 MR. GLEISNER: I'm sorry, Judge, I
 19 apologize.
 20 Q Was the flood flow capacity -- let's do it this way.
 21 Is the flood flow capacity study related in any way
 22 to the issue of navigability? Answer that question
 23 first.
 24 A I believe it relates under Section 30.12(3m) which is
 25 the standard for structures which Item 3 says the

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1 structure or deposit will not materially reduce the
 2 flood flow capacity of the stream.
 3 Q And do you think that a flood flow -- to a reasonable
 4 degree of professional certainty, do you think that a
 5 flood flow capacity study should have been done
 6 before the DNR made a determination of navigability?
 7 MR. GLEISNER: How's that? No? No?
 8 Q Do you think a flood flow capacity study should have
 9 been done here?
 10 A I believe a flood flow capacity study should have
 11 been done here, yes.
 12 Q Why?
 13 A To show compliance with Section 30.12. It's my
 14 opinion that part of that parking lot area lies
 15 within navigable waters and that this in fact is a
 16 structure under 30.12 because of that, that
 17 regulating it under 30.19 under a rating permit only
 18 ignores that there is navigable waters in the area of
 19 the parking lot.
 20 Q Okay. Thank you, Doctor. Now, moving on, what are
 21 the criteria for determining whether navigable waters
 22 are adversely impacted, Doctor?
 23 A I believe those again apply to Section 30.12(3m) and
 24 they've been stated, but I'll restate them again.
 25 That the structure or deposit will not materially

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1 you saw the videotapes that have been introduced into
 2 evidence as Exhibits 17F, I and N, correct?
 3 A Those were the videotapes?
 4 Q Yes, right. Now, with regard to the videotapes that
 5 were introduced into evidence and were -- it was
 6 testified were shot on June 23rd, 2010, did you at my
 7 request analyze the weather conditions before and
 8 after that videotaping?
 9 A Yes, I collected the climatological data from the
 10 National Oceanographic and Atmospheric Administration
 11 for those periods.
 12 Q Now, I'm going to call your attention to
 13 Exhibit 17-001 which is up on the board here -- TV.
 14 Is that the study that -- or is that the
 15 climatological information that you retrieved for the
 16 June 23rd date?
 17 A Yes, that's part of it. What happens, Your Honor, is
 18 the National Weather Service under NOAA makes a
 19 couple different publications of rainfall. One is,
 20 this graphic illustrates a 24-hour rainfall for the
 21 previous day. In southeastern Wisconsin, it
 22 represents rainfall from seven o'clock in the morning
 23 to the following seven o'clock in the morning period.
 24 This is considered provisional data until they
 25 officially go through and they publish a series of

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1 obstruct navigation, that the structure or deposit
 2 will not detriment -- will not be detrimental to the
 3 public interest and, lastly, the structure or deposit
 4 will not materially reduce the flood flow capacity of
 5 a stream.
 6 Q And, to repeat, it is your opinion, to a reasonable
 7 degree of professional certainty, that this large
 8 piece of asphalt is a structure and will reduce the
 9 flood flow capacity of the stream to the north of the
 10 property that's marked in blue on Exhibit 2-002, is
 11 that correct?
 12 A Yes. I also believe that this area of the parking
 13 lot can also be described as a stream.
 14 ALJ BOLDT: Can be described as a
 15 structure?
 16 THE WITNESS: As a stream.
 17 ALJ BOLDT: Oh, as a stream.
 18 Q Now, Doctor --
 19 A If I go back and I look at Exhibit 212 of Wisconsin
 20 DNR, I believe that entire green line is -- falls
 21 under the definition of stream under 30.10(2).
 22 Q Including bed and bank?
 23 A Yes.
 24 Q Now, Doctor, as you've said or as you testified to
 25 earlier, you were present for all of the hearing so

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1 monthly documents which are called the climatological
 2 data and these are monthly reports for all of
 3 Wisconsin. These typically come out six months after
 4 because there's a quality control process that NOAA
 5 goes through before they actually formalize the data.
 6 So the graphic in front of you in Exhibit 17-001 is
 7 the 24-hour rainfall for the period from June 22nd at
 8 7:00 in the morning to the 23rd at 7:00 in the
 9 morning that was pulled off of NOAA's website.
 10 Q How would you characterize that rainfall, Doctor,
 11 during that period?
 12 A The best way to characterize it is to look at flood
 13 frequency atlases for southeastern Wisconsin. Your
 14 Honor, rainfall has a couple of dimensions to it. I
 15 have the --
 16 MS. CORRELL: I'm sorry to interrupt you,
 17 Doctor, I'm having trouble hearing you again.
 18 THE WITNESS: Okay.
 19 A I was stating that rainfall has several dimensions to
 20 it. It has a dimension of depth which is how many
 21 inches of rain fell. There is the dimension of
 22 duration, over what period of time did that rain
 23 fall. If I get two inches of rain in an hour, I'm
 24 going to generate, for example, more runoff than if I
 25 got 24 inches of rain over 24 hours. The

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1 Southeastern Wisconsin Regional Planning Commission
 2 has published research that they have done on
 3 rainfall for the region and have produced what's
 4 called the recurrence interval depth table and so I
 5 typically use that to compare that rainfall. So on
 6 that particular graph we're somewhere between two to
 7 three inches of rainfall for that 24-hour period.
 8 Now, I do not know did that rain fall in six hours or
 9 whatever because the gauges only are read once every
 10 24 hours, but if we assume that was a 24-hour
 11 rainfall, it falls somewhere between -- well, let me
 12 state the numbers. A two-year 24-hour rainfall was
 13 2.57 inches, a five-year is 3.14, so for this area we
 14 were somewhere between the two and five-year
 15 (inaudible).
 16 Q So the record is clear, Doctor, when you say a
 17 two-year and a five-year, you're referring to what is
 18 sometimes called a two-year storm and a five-year
 19 storm, is that correct?
 20 A That's correct. It deals with how frequent an event
 21 like that will happen statistically.
 22 Q And statistically, based on what you've just reported
 23 to us, how often would one anticipate a rainfall of
 24 the magnitude that fell between 7:00 a.m. on
 25 June 22nd and 7:00 a.m. on June 23rd?

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1 MS. CORRELL: And just to clarify, you're
 2 referring to your own documents, not an exhibit
 3 that's in --
 4 THE WITNESS: That's correct.
 5 MS. CORRELL: -- the record anywhere?
 6 THE WITNESS: Right.
 7 MS. CORRELL: Okay.
 8 MR. GLEISNER: And may it please the court,
 9 or may it please the Judge, I believe that as an
 10 expert, a qualified expert, he has the right to
 11 rely on information that an expert would
 12 normally rely under 907.03.
 13 MS. CORRELL: No objection.
 14 ALJ BOLDT: Sure.
 15 A For July 15th, the Oconomowoc gauge read 2.93 inches
 16 of rain.
 17 Q And the Holy Hill gauge?
 18 A Read 4.12 inches.
 19 Q Now, how often would a rain event such as apparently
 20 occurred at those two locations likely occur?
 21 A At Oconomowoc it would be just slightly over a
 22 two-year reoccurrence. At Holy Hill, that would be
 23 between a 10 and 25-year.
 24 Q Now --
 25 A And on both dates, two days prior to that there was

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1 A As I stated, it'd be somewhere between a two and a
 2 five-year rain event -- frequency event.
 3 Q Now, Doctor, the third video that was played
 4 yesterday, and that would be Exhibit N -- no, I had
 5 that backwards. Exhibit F, the one in the woods, was
 6 shot on July 15th, 2010 by the testimony of the young
 7 lady yesterday. What weather data do you have
 8 available for that -- that date?
 9 A I have the climatological data report for July of
 10 2010 so this is the official published rainfall. The
 11 two nearest stations are Oconomowoc and Holy Hill and
 12 they're both located pretty much exactly seven miles
 13 in two directions. One is north, one is directly
 14 southwest so those are the two closest.
 15 MS. KAVANAUGH: Could you repeat the name
 16 of the second one?
 17 THE WITNESS: Holy Hill.
 18 MS. KAVANAUGH: Holy Hill?
 19 THE WITNESS: Yes.
 20 MS. CORRELL: Holy with an H.
 21 MS. KAVANAUGH: Oh, Holy.
 22 THE WITNESS: Yeah, H-O-L-Y, H-I-L-L.
 23 MS. KAVANAUGH: Right.
 24 THE WITNESS: It's located just north of
 25 North Lake across the -- in Washington County.

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1 no rainfall.
 2 Q Thank you, Doctor. Now, so you were present for the
 3 playing of the videotapes and I'm going to ask you a
 4 series of questions that are intended to establish
 5 the basis for some opinion testimony I'm going to try
 6 and elicit from you in a few minutes. You were
 7 present for the testimony of Tom Peters yesterday,
 8 correct?
 9 A Yes.
 10 Q You're aware of what Ms. Hanson, that would be
 11 Mrs. Hanson, or Tom Schwartzburg would testify to.
 12 I'm not going to ask at this point any hypotheticals,
 13 but right now I'm just asking if you're aware of what
 14 they would say historically about the conditions, the
 15 water conditions, at the Krause site?
 16 A Yes, I've had an opportunity to actually talk with
 17 the Hansons and they have stated to me that they
 18 routinely see standing water on the Krause site which
 19 also crosses on their property annually.
 20 Q Now, were you present for the testimony of
 21 Andrew Hudak yesterday?
 22 A Yes, I was.
 23 Q And you were present for the depositions of Mr. Hudak
 24 and Messrs. Wakeman, Wood, Drake on August 25th,
 25 26th, correct?

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1 A Correct.
 2 Q And you have seen Exhibit -- I'll just do this so
 3 that you can refresh your recollection appropriately.
 4 You saw and are familiar with Exhibit 2-006 now on
 5 the TV which has been moved and admitted previously?
 6 A Yes.
 7 Q And you are also familiar with Exhibit 16 which was
 8 moved and admitted previously, are you not? Do you
 9 want me to call it up unless you can find it there?
 10 Have you got it there?
 11 A Yes, I have it here.
 12 Q I think I will call it up anyway because we're going
 13 to use it in a few minutes. And so with that
 14 background, all of the questions which I am now going
 15 to propound to you, ask you, and ask you would you
 16 please make your responses to a reasonable degree of
 17 professional certainty. In other words, all of the
 18 questions I'm going to propound to you from here on
 19 out, would you please make your responses to a
 20 reasonable degree of professional certainty? Do you
 21 understand my question?
 22 A Yes, I do.
 23 Q Did Mr. Hudak properly determine the extent of
 24 navigable waters on the Krause site?
 25 A No.

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1 showing a girl in a kayak paddling near a sign, a red
 2 and white sign, do you recall that video?
 3 A Yes.
 4 Q Were the waters depicted there navigable?
 5 A Yes.
 6 Q And based on the algae or duckweed present in that
 7 video in Exhibit 17F, do you have an opinion, again
 8 I'll just state this, to a reasonable degree of
 9 professional certainty, how long that water had
 10 existed at that location?
 11 A I feel that that water must have existed for several
 12 weeks prior to that. I'd like to clarify too -- and
 13 I'm digging for a list of site visits. I have been
 14 on the property between six and seven times myself
 15 also and other than this late summer of 2011, I have
 16 never seen that site that was referenced in
 17 Exhibit 17N dry. I've always seen water at that
 18 site.
 19 Q And now, Doctor, were you --
 20 A And that goes back to 2005.
 21 Q Thank you, Doctor. Were you tasked -- if you had
 22 been tasked with the duty of determining
 23 navigability, would you have, yourself, conducted
 24 interviews of neighbors?
 25 A Yes.

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1 Q And why?
 2 A I believe because he only identified the stream
 3 located at the northern boundary of the Krause site
 4 as navigable. As I stated earlier, I feel that there
 5 is a depression in the middle of the property that is
 6 also navigable. We saw that yesterday. Page Hanson
 7 demonstrated that she was able to navigate in an area
 8 that's been called the grove of trees. Mr. Peters
 9 testified that he navigated from his home all the way
 10 through the property to the Hansons and so we had two
 11 testimonies yesterday of people doing navigation in
 12 fact through the center of the Krause site and
 13 Mr. Hudak did not declare that area navigable.
 14 Q Should Mr. Hudak have visited the site more than
 15 seven times?
 16 A Not necessarily.
 17 Q If he was only able to visit the site seven times,
 18 however, should he have tried to learn the extent of
 19 navigable waters by other means such as by
 20 interviewing neighbors to the site?
 21 A Yes.
 22 Q Having reference to the video -- and I'll be happy to
 23 replay it if you need to have me do it, Doctor?
 24 A No.
 25 Q Having reference to the video marked as Exhibit F

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1 Q If an access road such as the one that is described
 2 in Exhibit 2-006 -- which I will call up for the
 3 benefit of the Judge. If the access road which is
 4 depicted, I don't like that, in Exhibit 2-006, now on
 5 the TV screen --
 6 (Discussion off the record)
 7 Q Now, returning to Exhibit 2-006 and my question which
 8 I interrupted myself on so I'll start over. If the
 9 access road depicted in blue is built over the waters
 10 depicted in Exhibit 17F, would that constitute an
 11 adverse impact on navigable waters? And I remind
 12 you, Exhibit 17F is the videotape of her by the sign.
 13 MS. CORRELL: I apologize, Attorney
 14 Gleisner --
 15 MR. GLEISNER: I'm sorry.
 16 MS. CORRELL: -- I can't quite see what
 17 exhibit we're looking at here.
 18 MR. GLEISNER: Oh, I apologize too.
 19 MS. CORRELL: 2-006.
 20 MR. GLEISNER: Let me see if I can move it
 21 without -- can you see a little better?
 22 MS. CORRELL: Yeah, I just -- you were
 23 blocking the screen for me. I'm fine.
 24 MR. GLEISNER: Oh, I'm sorry.
 25 MS. CORELL: Thank you.

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1 MR. GLEISNER: 2-006, Counsel.
 2 Q Did you understand my question?
 3 A Yes. If I can restate, the question is will the fill
 4 for the proposed road in the area that is marked on
 5 the official exhibit as .P-3 by Page Hanson, would
 6 that fill obstruct navigation?
 7 Q Yes.
 8 A And the answer would be yes.
 9 Q To a reasonable degree of professional certainty?
 10 A Yes.
 11 Q And am I understanding you correctly that if you
 12 block the ability of water to flow, that is an
 13 adverse impact?
 14 A If you block the ability of water to flow, it relates
 15 to, I'm looking at Exhibit 2-13, the issue of whether
 16 the flow capacity of a stream is materially reduced.
 17 Q And do you have an opinion as to whether the DNR took
 18 into account the existence of the waters --
 19 MS. CORRELL: Excuse me, 2-13?
 20 MR. GLEISNER: No, 213 Counsel, your
 21 exhibit.
 22 THE WITNESS: Yeah, your exhibit.
 23 MS. CORRELL: Oh, yes -- yep.
 24 MR. GLEISNER: Sorry.
 25 Q Having reference to Exhibit 17F, that's the videotape

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1 Exhibit 17F as being the one of the girl
 2 floating next to the sign. The record should
 3 reflect that it was Exhibit 17N where she
 4 floated next to the red and white sign. So the
 5 last several questions when I referenced
 6 Exhibit 17F, I meant 17N.
 7 ALJ BOLDT: Was that your understanding
 8 when you made your answers?
 9 THE WITNESS: That was my understanding,
 10 yes. He was referencing the sign and I
 11 recognized that.
 12 MR. GLEISNER: I apologize. Thank you,
 13 Your Honor.
 14 Q Now, with regard to the grove of trees which is
 15 depicted on Exhibit 2-006 as occupying the area in
 16 green, I'll blow it up, do you have an opinion to a
 17 reasonable degree of professional certainty as to
 18 whether or not that constitutes navigable water?
 19 A Yes, I do.
 20 Q And what is that opinion, sir?
 21 A My opinion is that there is an area adjacent and
 22 including portions of that grove of trees that are
 23 navigable waters.
 24 Q I'm going to --
 25 A And that was based on two navigability in fact tests,

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1 of the young lady paddling a kayak next to the red
 2 and white sign, do you have an opinion as to whether
 3 the DNR took into account the existence of these
 4 waters before they decided to build a road over that
 5 area?
 6 A I don't know. Mr. Hudak testified that that area was
 7 wetland and navigable waters. How he factored that
 8 into his determination, I'm not -- it was not clear
 9 to me.
 10 Q To a reasonable degree of professional certainty,
 11 should the DNR have taken into account those waters?
 12 A Yes.
 13 Q And why?
 14 A Because they're navigable waters of the State and I
 15 feel that that is clearly a structure under 30.12 of
 16 the statute and the three tests outlined in 30.12
 17 should have been applied.
 18 ALJ BOLDT: What is a structure, the
 19 parking lot?
 20 THE WITNESS: The roadway.
 21 ALJ BOLDT: Oh, the roadway.
 22 MR. GLEISNER: Let me see. My counsel has
 23 called an attention to a possible mistake by me.
 24 It was a mistake by me, Your Honor. I have been
 25 referencing for the last several questions

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1 one done by Page Hanson and one that was testified
 2 yesterday by Mr. Peters.
 3 Q Now, you testified earlier this afternoon or this
 4 morning -- it feels like this afternoon. You
 5 testified earlier that that grove of trees was, if I
 6 understood you correctly, part of a larger area of
 7 navigable water, is that correct?
 8 A That is correct.
 9 Q If we return for a moment to Exhibit 4-032, which I'm
 10 now calling up on the screen, where that green --
 11 ALJ BOLDT: Which is the same as Exhibit
 12 212, Page 2?
 13 MR. GLEISNER: I just realized I did that.
 14 I'm sorry, Your Honor.
 15 ALJ BOLDT: Okay. That's fine.
 16 Q I put up on the screen what is Exhibit 212. Although
 17 I referred to it as -- by the wrong exhibit number a
 18 moment ago, in Exhibit 212, Page 2, there is a dot
 19 where the green arrows begin. Is that at or near
 20 what appears to be the grove of trees?
 21 A It is slightly west of the grove of trees. If I
 22 could stand up and point at the screen and I'll try
 23 not to be in anyone's way. The testimony that I
 24 heard yesterday -- and this is the grove of trees.
 25 Page Hanson demonstrated that she had navigated from

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1 the grove of trees out into this open field and then
 2 she got out of the kayak and walked over to her
 3 property line at this location. Mr. Peters testified
 4 that he had navigated from his property at a location
 5 approximately here, came across through the grassy
 6 area and navigated over to this southwest corner of
 7 the Krause site to the Hanson property.
 8 Q Okay. Now, let's make sure that we've got a clear
 9 record here. Let me just repeat for the record what
 10 you have said. You have said that there is
 11 apparently in this aerial photograph a body of trees
 12 in the central quadrant toward the eastern side of
 13 that quadrant and about an inch or two inches to the
 14 east of the dot where the green arrow begins you just
 15 testified that Page Hanson had rowed out of that
 16 grove of trees closer than the grove of trees is to
 17 the green dot, got out of her kayak, and walked onto
 18 her property, moving in a southwesterly direction, is
 19 that correct?
 20 A That's correct.
 21 Q You then testified that Mr. Peters testified
 22 yesterday that he had rowed a canoe from the boundary
 23 line of his property over the stream and southwest to
 24 an area near the grove of trees, is that correct?
 25 A That's correct.

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1 of trees that everyone talks about. The parking lot
 2 is proposed right here and for everyone else the
 3 parking lot I just stated is proposed for an area in
 4 here. This area of the Krause property drains to the
 5 southwest when you only have a foot of water. If the
 6 water depth gets more than one-and-a-half feet, what
 7 will happen then is water will begin to spill over
 8 this shallow rise and will enter the stream channel
 9 to the north on the property. Now, it was --
 10 Q Just a minute, Doctor.
 11 A Okay.
 12 Q I hate to interrupt my own witness, but we've got to
 13 make sure we've got a clear record here.
 14 A Sure.
 15 Q On Exhibit 15, you've indicated that the grove of
 16 trees in question lie just to the east of the red
 17 circle that Mr. Wood drew on this Exhibit 15, is that
 18 correct?
 19 A Actually, if you overlay the two you will find that
 20 the grove of trees overlaps into. If you take the
 21 drip line that Mr. Powers discussed yesterday, that
 22 drip line will extend into this red area.
 23 Q Now, you've also indicated that there is an arrow
 24 which was drawn on there by who?
 25 A That was drawn on there by DNR.

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1 Q Thank you very much, Doctor. Now, can you explain
 2 for the Judge why you believe that the entire area
 3 that is represented by the green arrows constitutes a
 4 stream?
 5 A Yes. Could you temporarily pull up Exhibit 17?
 6 Q I certainly can. 17?
 7 A 15, excuse me.
 8 Q 15, sure. There you go, Doctor, and I'll note for
 9 the record that this was previously marked as
 10 Exhibit 15, RRNA Exhibit 15, in the August 26th
 11 deposition of Mr. Wood.
 12 A Your Honor, what this exhibit is, is a topographic
 13 map of the proposed boat launch site. This was an
 14 exhibit prepared by Mr. Wood to illustrate flow
 15 directions on the property, but what he nicely did
 16 for us is here is the grove of trees, is over here.
 17 In this red line that he highlighted, he circled
 18 approximately a one-foot deep depressional area. We
 19 heard comments yesterday from both Page Hanson and
 20 Mr. Peters that on the dates that they had crossed
 21 this property the water was in excess of one foot. I
 22 believe one of them said that it was two feet deep.
 23 So we have a large depressional area here. Mr. Wood,
 24 on this exhibit, shows that this depression outlets
 25 towards the wetland to the west. So here's the grove

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1 Q Was that drawn by Mr. Wood?
 2 A It was drawn by Pete Wood, yes.
 3 Q Now, Doctor, you were testifying further about the
 4 characteristics of this area, that when it gets
 5 fuller than a foot-and-a-half in water, correct? Did
 6 you finish your testimony in that regard?
 7 A In that regard, when we get more than a
 8 foot-and-a-half of water, it -- the water will take
 9 two routes. It will go to the southwest, as Mr. Wood
 10 as shown here, and it will also spill over to the
 11 north.
 12 Q Now, if one puts a -- and you had also testified, and
 13 I want to make the record clear on this, that the
 14 proposed parking lot will occupy a substantial, at
 15 least 75% as I understood your testimony, of the area
 16 that is circled in red. Am I correct in that?
 17 A I don't know the exact percent, but it's a
 18 significant area, yes.
 19 Q Okay. Doctor, do you have an opinion to a reasonable
 20 degree of professional certainty what will occur if
 21 you put that parking lot there with respect to the
 22 navigable waters that you've identified?
 23 A If you place the parking lot there, that area that
 24 has been navigated in fact shown in red on Exhibit 15
 25 will no longer be navigable.

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1 Q Will that have any effect on the property on
2 Redland Road, if you know?
3 A Yes.
4 Q And what will that effect be, if you know?
5 A I believe that there is drainage that comes from the
6 south towards the north and takes that similar flow
7 path then to the south -- or, excuse me, to the
8 southwest into the wetland complex and I have a
9 concern that that area will be blocked by the
10 construction of the parking lot.
11 Q And if it's blocked, what will occur to the
12 neighborhood?
13 A We'll have higher flood elevations in the
14 neighborhood.
15 Q And if that is the case --
16 MR. GLEISNER: Strike that.
17 A If -- I hadn't totally finished my discussion on
18 this. If you could pull up Exhibit 2-002 --
19 Q I certainly will.
20 A -- because this only shows a portion of the issue.
21 Q Certainly, Doctor. There you are, Doctor.
22 A Okay. We stated yesterday that Mr. Hudak that the
23 area in green, both north and south of the causeway
24 or gravel road, were navigable waters. It's my
25 opinion that this area shown in red, the portion that

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1 Q Right. How does that -- there is an arrow that was
2 put on there by it appears to be Mr. Wood out of the
3 orange area on Exhibit 2-002. It appears to be
4 pointing in the southwesterly direction, is that
5 correct?
6 A That's correct.
7 Q Does that denote a flow pattern from that navigable
8 water area into the wetlands that is surrounded by
9 the green line, the large green line, to the south of
10 the causeway?
11 A Yes.
12 Q So if there were an asphalt parking lot there, to a
13 reasonable degree of professional certainty is it
14 your testimony that that would increase the flow into
15 the wetlands in the large green area?
16 A No, not necessarily. Their storm water management
17 plan has sloped the parking lot to drain towards the
18 north.
19 Q And would that have any effect?
20 A That will have an effect on the area shaded in blue
21 on this drawing, but not the green area.
22 Q Now, Doctor, I'm going to call your attention,
23 Doctor --
24 MR. GLEISNER: Strike that.
25 Q Do you have an opinion to a reasonable degree of

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1 we've just discussed on Exhibit --
2 UNIDENTIFIED SPEAKER: Can we move that
3 microphone over in front of the TV? Thank you.
4 Yes, the whole thing.
5 MS. CORRELL: You can also take it out.
6 UNIDENTIFIED SPEAKER: You can set it down.
7 That will be fine.
8 A So, the red area shaded on Exhibit 15, as we've
9 indicated, flows to the southwest into this larger
10 navigable water and it's my opinion that that is part
11 of this navigable water.
12 Q The area in the green circle to the south, the large
13 green circle that Mr. Hudak put on Exhibit 2-002, is
14 part of the navigable water. And when you say part
15 of the navigable waters, what navigable waters is it
16 part of?
17 MR. HARBECK: Bill, ask that again.
18 MR. GLEISNER: Yeah.
19 MR. HARBECK: Yeah, I think you
20 (inaudible).
21 MR. GLEISNER: Okay.
22 Q You testified that the lower green circle was part of
23 navigable waters?
24 A My understanding from Mr. Hudak's testimony is that
25 area is navigable waters.

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1 professional certainty as to whether the DNR
2 miscalculated the navigable waters at or near where
3 the sign was located in Exhibit 17N? That's the one
4 with the girl in the boat next to the sign.
5 A I believe they testified that they're navigable
6 waters. I don't know how they factored that into
7 their balancing test for that particular site.
8 Q Do you have an opinion to a reasonable degree of
9 professional certainty as to whether the DNR
10 miscalculated the navigable waters at or near the
11 so-called grove of trees?
12 A Yes, and I feel that they did not -- that they missed
13 that there were navigable waters at that location.
14 Q You've heard testimony earlier in these proceedings
15 that on occasion a person can paddle a kayak on
16 Redland Road. Will the DNR's miscalculation increase
17 or decrease the potential for that occurring in the
18 future?
19 MS. CORRELL: Objection, relevance.
20 MR. GLEISNER: What happens --
21 MS. CORRELL: Isn't that a common law
22 issue?
23 MR. GLEISNER: Wait.
24 MS. KAVANAUGH: Yeah, I mean diverting
25 storm water from one property to another is

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1 reasonable use on the (inaudible). It's got
 2 nothing to do with the standard.
 3 MR. GLEISNER: So you're saying
 4 Redland Road is irrelevant?
 5 MS. KAVANAUGH: We're saying it's not one
 6 of the statutory standards here.
 7 ALJ BOLDT: It's not within the
 8 jurisdiction that I have.
 9 MS. CORRELL: It's a common law issue.
 10 ALJ BOLDT: Fortunately, there's enough to
 11 do with the waters and the air and so forth.
 12 MR. GLEISNER: Okay, Your Honor, I
 13 understand.
 14 Q I'm now going to turn your attention to Exhibit 16,
 15 Doctor, and specifically Exhibit 16-001 which I do
 16 believe has been admitted into evidence.
 17 MR. GLEISNER: Thank you very much, Jim.
 18 Q I'm going to direct your attention to that and ask if
 19 you have seen that before?
 20 A Yes, I have. This was provided at the deposition of
 21 Mr. Pete Wood.
 22 Q And it was at that deposition denominated Exhibit 16
 23 also, correct?
 24 A Yes.
 25 Q Now, Doctor, could you please tell me the

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1 western edge of the parking lot. We asked Mr. Powers
 2 to do two things. One is confirm the elevations of
 3 Kapur and Associates in this reach, but also take
 4 additional shots to the west, as far west as the sign
 5 that was shown in Exhibit 17N, so that we could make
 6 that connection, does that elevation below the
 7 lakebed continue all the way into the wetland area
 8 that's shown on Exhibit 2-002.
 9 Q And do you know what those elevations showed, Doctor?
 10 A Yes, they show all of the bed elevations are below
 11 the ordinary high water mark established by
 12 Robert Wakeman of the Wisconsin DNR, so they're below
 13 897.76. On the top of the exhibit -- there was some
 14 discussion about this exhibit yesterday. What wasn't
 15 discussed is on the top of the exhibit there is a
 16 profile showing the bed elevation of the stream
 17 channel and if you read off of that scale you'll see
 18 that all of the shot elevations at the bottom of the
 19 stream are below that 797.76. There was some
 20 confusion yesterday because there is a blue line that
 21 unfortunately, and a marker, that goes right through
 22 the bottom of the channel and obscures some of the
 23 elevations.
 24 Q And can you see the --
 25 MR. MEYER: Attorney Gleisner, can -- what

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1 significance of the blue lines which appear to have
 2 the initials of Pete Wood next to them on Exhibit 16?
 3 A Yes. They're to generally represent the bank of the
 4 stream channel that is in that reach and this is
 5 located along the north side of the DNR property
 6 abutting the Peters property.
 7 Q Now, Doctor, you testified earlier that you were
 8 supervising and directing Surveyor Powers during his
 9 visit to the property on September 2nd, is that
 10 correct?
 11 A That's correct.
 12 Q Now, Dr. O'Reilly, while you were doing this did you
 13 make any observations, either then or subsequently,
 14 concerning the elevations in that streambed that is
 15 identified as passing between the two blue lines east
 16 to west on Exhibit 16-001?
 17 A Yes. When I first saw this exhibit I noticed that
 18 the elevations at the bed of the stream channel from
 19 the lake to a point that's approximately near the
 20 western edge of the parking lot shows that the bed of
 21 that channel is below the ordinary high water mark of
 22 the lake and that it's my opinion that this stream
 23 channel is part of the lakebed. Now, with regards to
 24 Mr. Powers, as I stated, this survey by Kapur and
 25 Associates for Wisconsin DNR ends right about the

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1 exhibit is this?
 2 MR. GLEISNER: 16-001. It was admitted
 3 yesterday.
 4 MR. MEYER: Yes, I understand, I just
 5 wanted to have the number.
 6 MR. GLEISNER: Okay. Does that answer your
 7 question?
 8 MR. MEYER: Thank you very much.
 9 MR. GLEISNER: You're welcome, sir.
 10 Q Do you have a clean copy of what has been marked as
 11 Exhibit 16-001?
 12 A Yes, I do.
 13 Q And would you pass that over to the Judge so he can
 14 see what you're referring to? And can you point to
 15 him -- point for him to the elevation that is
 16 obscured by the blue marker?
 17 A Yes.
 18 THE WITNESS: And if I could, just for a
 19 second, because of my age I need a magnifying
 20 glass to read a drawing like this.
 21 MR. MEYER: Your age?
 22 MS. CORRELL: I don't know if that's an age
 23 distinction always.
 24 MR. MEYER: That makes us all feel good.
 25 ALJ BOLDT: You're in good company too.

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1 MR. GLEISNER: I need glasses and a
2 magnifying glass.
3 A Yesterday there were questions about a cross-section
4 located approximately here that I'm pointing and,
5 just for the audience, I'm pointing to the Examiner
6 to an area right in here.
7 ALJ BOLDT: Shall we mark this 16A or
8 something like that or --
9 MR. GLEISNER: I think that would be an
10 excellent idea, Judge. 16A would work great.
11 And for the record, we're only having this
12 additional exhibit marked because the blue lines
13 obscure some of the markings on it, Counsel, and
14 this is exactly the same as existing Exhibit 16.
15 MS. CORRELL: Yeah, that's fine. Is that
16 just the underlying plan we're talking about?
17 MS. KAVANAUGH: Yes.
18 MR. GLEISNER: Thank you, Judge.
19 ALJ BOLDT: Yeah.
20 A Yesterday, Attorney Meyer made a reference to this
21 spot elevation within the larger channel that had an
22 elevation of 897.78, so slightly above, but if you go
23 to the south of that point what you see is that is
24 just a small high spot in the channel. In fact, the
25 channel elevation -- they have a spot elevation at

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1 I got the record cleared up, Judge.
2 ALJ BOLDT: Yeah, sure.
3 A This line is the northern bank. This line which
4 actually goes to here slightly below where Mr. Wood
5 showed it is the southern bank. The center of the
6 channel runs here, crosses through this point and
7 then (inaudible).
8 Q Let the record reflect that Dr. O'Reilly has
9 confirmed on Exhibit 16 the lines drawn by Mr. Wood
10 as being the northern and southern boundary of the
11 channel -- do you believe those --
12 MR. HARBECK: Bill, Bill, he went below the
13 line.
14 MS. KAVANAUGH: He went below it, yes, he
15 didn't confirm the bottom --
16 MR. GLEISNER: Okay. Very good.
17 Q Would you take a --
18 MR. GLEISNER: Counsel is correct -- both
19 Counsel.
20 Q Would you take a -- no, let's take a purple pen. I
21 think that that's blue and --
22 A And red and green?
23 Q Yeah, and would you please indicate on Exhibit 16
24 where you believe the channel actually goes on the
25 southern part?

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1 that location of 897.11.
2 Q Can you --
3 A And so, again, if you refer to the profile on the top
4 of the drawing which is where Kapur and Associates,
5 Wisconsin DNR's surveyor, connected the low spots
6 through the channel bottom, you'll see that all of
7 those elevations are below the lake ordinary high
8 water mark.
9 Q Can you, for the Judge's benefit, please take a pen
10 or a colored pen perhaps, in front of you there are a
11 few there, maybe a light green pen, and just circle
12 the elevation that is obscured by the blue line on
13 Exhibit 16? And don't obscure it in the process.
14 A No, I'm being very careful.
15 Q And would you initial that, please? Now, as long as
16 you have that exhibit in front of you, I'm going to
17 direct your attention up here to the TV screen and
18 ask you, this is the channel here, is that correct?
19 ALJ BOLDT: Where are you indicating,
20 Counsel?
21 MS. KAVANAUGH: He's testifying.
22 MR. GLEISNER: I'm sorry, this was for
23 informational purposes only. First of all, for
24 informational purposes only. I was just asking
25 is this the channel that you're referring to and

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1 A Okay. And for the record, I'm marking the bank of
2 the channel.
3 ALJ BOLDT: And that's on 16-001, as we're
4 calling it?
5 THE WITNESS: Correct.
6 MR. GLEISNER: 16A. No, no, I'm sorry.
7 Okay.
8 Q So then, Dr. O'Reilly, would you put your initials by
9 that, please?
10 MR. GLEISNER: And while I'm thinking about
11 it, Judge, I'll move the admission of
12 Exhibit 16A.
13 ALJ BOLDT: I assume there's no objection?
14 MS. CORRELL: Can I just -- no objection,
15 but can I just make sure, because we've got so
16 many plan sheets, what it is?
17 MS. KAVANAUGH: So you marked it on 16A or
18 16-001?
19 MR. GLEISNER: No, I -- thank you very much
20 for that, Counsel. We marked it on
21 Exhibit 16-001 and the reason for that, Counsel,
22 is because we want to keep 16A just for the
23 purposes of that.
24 MS. CORRELL: This is what we're calling
25 16A? I thought that was just the -- okay,

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1 that's what I want to see. I want to know which
2 Kapur document this is.
3 ALJ BOLDT: Why don't we go off the record
4 here. Maybe it's an appropriate time for a
5 five-minute break.
6 (Recess Taken)
7 ALJ BOLDT: Okay. We're back on the
8 record.
9 MR. GLEISNER: Thank you, Your Honor.
10 Q I'm now going to call up what has been
11 marked -- well, it's -- ignore the exhibit mark up
12 here.
13 MR. GLEISNER: This has been moved as
14 Exhibit 129 and accepted, I believe, Your Honor.
15 A Is that in the North Lake --
16 MR. GLEISNER: And it is our Exhibit 2-008
17 if you want to look at it.
18 ALJ BOLDT: Okay.
19 Q No, look it up in the DNR book because you may have
20 to mark on it.
21 A The blue one?
22 ALJ BOLDT: I'm sorry no, actually it's
23 in -- I'm not sure if I received 16A or not.
24 MR. GLEISNER: I don't think you did,
25 Judge.

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1 Q Now, Dr. O'Reilly --
2 MR. GLEISNER: Oh, I'm sorry, Judge, am
3 I --
4 ALJ BOLDT: Go ahead.
5 Q Dr. O'Reilly, do you recognize that?
6 A Yes.
7 MR. GLEISNER: May I approach the witness,
8 Doctor -- Judge?
9 ALJ BOLDT: Sure.
10 Q Dr. O'Reilly, can you describe generally what you
11 understand that to be?
12 A Right. It's a survey that was conducted by Lake
13 County Engineering by Mark Peters.
14 Q Mark who?
15 Q Oh, I'm -- Mark Powers. Thank you. What it depicts
16 is a survey they conducted on September 2nd of the
17 channel that leads from North Lake through the Krause
18 property, crosses into the wetland and crosses the
19 northern corner of the Hanson property. The
20 elevations on here show the bed of the channel that
21 feeds the wetland to North Lake. Also on here
22 they've illustrated the location of the easement for
23 the access road and I'm also seeing some lines on
24 here that appear to be property boundaries.
25 Q Do you see where the area would be that Page Hanson

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1 ALJ BOLDT: I'm doing so now. Oh, or
2 Megan, you wanted to look at it first. Did you
3 get a chance?
4 MS. CORRELL: I did look at it. It can be
5 received. I'm not sure it's the most current
6 plan, but it could be received.
7 MR. GLEISNER: Counsel, is it the same as
8 16-001?
9 MS. CORRELL: 16-001. Yes, they are both
10 September 28th, '10, so for that purpose, yeah.
11 MR. GLEISNER: Thank you, Counsel.
12 ALJ BOLDT: Okay. 16A is received.
13 THE WITNESS: If I could ask a question,
14 which exhibit number --
15 MR. GLEISNER: 129.
16 THE WITNESS: 129.
17 MS. CORRELL: Can you remind me what
18 your -- because I don't have a copy of 129.
19 MR. GLEISNER: Sure. My exhibit number?
20 MS. CORRELL: Yes.
21 MR. GLEISNER: 2-008.
22 THE WITNESS: I have to apologize, the
23 exhibit is empty.
24 ALJ BOLDT: Here it is. It looks like it's
25 already got some marks on it.

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1 navigated the boat near the sign?
2 A Yes.
3 Q Can you point to that and then we'll have you initial
4 it in a moment.
5 A Okay. And for everyone in the audience, the location
6 would be right here.
7 Q Okay. Can you -- above that area can you put your
8 initials and then draw a line down to where Page
9 would have been navigating? Thank you very much.
10 Now, I hope you haven't obscured them for yourself.
11 Can you read the elevations that are near where she
12 is --
13 A Yes.
14 Q -- navigating?
15 A Yes, the bed elevation --
16 Q Wait until Counsel gets here.
17 MS. KAVANAUGH: (Inaudible).
18 MR. GLEISNER: Right here that she
19 navigated.
20 MS. KAVANAUGH: Okay.
21 MR. GLEISNER: Can everyone see that?
22 A I can read the elevation still, it's 897.42. And,
23 again, the ordinary high water mark at the lake is
24 897.76.
25 Q Okay. Thank you, Dr. O'Reilly. Now, before we do

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1 anything else, what are the elevations next to the
 2 lake, if you can put that in the record, please?
 3 That's to the east of Exhibit 129 and I would ask you
 4 to read the elevation far to the right, first of all.
 5 A Okay. There are three elevations that were shot in
 6 that area. The one furthest to the east has an
 7 elevation of 897.65 and is labeled as Channel Mid.
 8 Just for clarification, Your Honor, there is a small
 9 ridge. Mr. Peters talked about it as an area where
 10 ice pushes up. There also is some indication that
 11 someone may have placed artificial fill in that area,
 12 in my opinion. There are at least two culverts that
 13 go through that. That's why I feel it's not just ice
 14 heaving because someone artificially placed culverts
 15 through it. There was also a series of surface
 16 channels that the stream has cut its way through that
 17 fill area and so these elevations are of that channel
 18 or those series of small channels that have cut
 19 through that.
 20 Q Now, you mentioned a mid. Are there two other --
 21 A Yes.
 22 Q -- elevations? What are they and can you identify
 23 them?
 24 A Yeah. There is a channel to the south of the mid
 25 one. Unfortunately, his notes overlap part of the

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1 approximate location where the Kapur drawing ends in
 2 Exhibit 16A or 16, either one?
 3 A Yeah. I'm drawing a line from north to south. If
 4 you'd like, I can --
 5 Q No, no, I'll -- approximately this -- I don't have
 6 that (inaudible), so approximately right here?
 7 A Yeah, just a little bit east of that, but yes, about
 8 in that location.
 9 Q So now let the record reflect that on Exhibit 129
 10 you've drawn a north/south green line that is
 11 approximately an inch east of the blue lines. What
 12 do those blue lines stand for, if you know?
 13 A My understanding from the testimony yesterday, those
 14 blue lines represent the existing gravel road.
 15 Q And the purple lines, again, represent the easement,
 16 is that correct, or not?
 17 A It was my understanding that the red lines, the red
 18 dash lines, represent the easement.
 19 Q Yes, I can see that. I'm sorry.
 20 MR. GLEISNER: I withdraw that.
 21 A And I'm not sure what the purple lines represent.
 22 Q Were you going to say something?
 23 A No.
 24 Q I guess we're waiting for each other and not
 25 realizing it. I'm going to take you back to

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1 elevation, but it looks like it's 897.43, and then
 2 there is a channel to the north which is at 897.46.
 3 Q Now, Doctor, just so the record is clear, why don't
 4 you circle broadly so you don't hit anything the
 5 elevations you've just been testifying about. Those
 6 are right here, for the record, and put your
 7 initials -- thank you very much. Now, I'd like you,
 8 if you would, to compare this Exhibit 129 with
 9 Exhibit 16, if you would please. Now, I'm not going
 10 to call up 16 right now, I'm just going to ask you
 11 how the elevations compare between 16A and
 12 Exhibit 129, first in terms of the elevations that
 13 are shown on 16A and then we'll talk about the total
 14 area that is covered.
 15 A Well, the first elevations on Exhibit 16 are just
 16 slightly to the west. Unfortunately, Kapur and
 17 Associates cut off the lakeshore on their drawing,
 18 but as we move slightly inland the elevations
 19 generally concur with the Lake County Engineering. I
 20 see a spot elevation here of 897.65 which is very
 21 similar to their 897.65.
 22 Q Now, does the Kapur drawing go as far west as
 23 Exhibit 129 goes?
 24 A No, it does not.
 25 Q Can you, with your same green marker, indicate the

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1 Exhibit 16, if I may.
 2 A Okay.
 3 Q Now, on Exhibit 16 I'm going to point, just for the
 4 purposes of orienting everyone to what I'm referring
 5 to, and I'm going to ask you if you can testify about
 6 it. On Exhibit 16, there appears to be a bend and
 7 I've drawn -- I've taken my pen and traced where that
 8 bend is and before we have you mark it and identify
 9 it officially, can you tell me if you see what I'm
 10 referring to?
 11 A Yes.
 12 Q And can you tell me -- let me just zoom in on that
 13 for the benefit of everyone. That is the area which
 14 has in its middle the marking 897.78, do you see
 15 that?
 16 A Yes.
 17 Q What is that?
 18 A It's a spot elevation on a small terrace area within
 19 the channel.
 20 Q What is that line? Is that a contour line? Let me
 21 ask that.
 22 A If you could point to the --
 23 Q Sure, this line right here.
 24 A That is a contour line, yes.
 25 Q Okay. Now, my impression, Doctor, is that where you

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1 drew an additional mark the channel kind of branches
 2 to the south on Exhibit -- you should take a look at
 3 16-011, I think.
 4 A I have both of them in front of me.
 5 Q Okay. You had indicated the channel kind of goes
 6 down to the southwest of the blue line, is that
 7 correct?
 8 MS. KAVANAUGH: I'm sorry, can you ask the
 9 question again? I'm sorry.
 10 MR. GLEISNER: Okay.
 11 Q Well, let me just first of all understand do you see
 12 where I'm --
 13 A Yes.
 14 Q -- what I'm referring to?
 15 MR. GLEISNER: Then I'll have him come up
 16 here and do it for you, Counsel.
 17 MS. KAVANAUGH: Okay. No, I didn't hear
 18 the question, is what it was.
 19 MR. GLEISNER: Oh, I apologize. I'll
 20 rephrase the question as soon as he gets to the
 21 TV.
 22 MS. KAVANAUGH: You don't have to rephrase
 23 it, just repeat it.
 24 MR. GLEISNER: Well, I'll try.
 25 MS. KAVANAUGH: Okay.

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1 move slightly to the south from where he drew it.
 2 His line is at the bottom of the bank.
 3 Q Now, Dr. O'Reilly, you were here for the testimony of
 4 Dr. --
 5 MR. GLEISNER: Sorry, strike that.
 6 Q -- Tom Peters, correct?
 7 A Yes.
 8 Q You heard him testify that during heavy rains the
 9 lake will rise and it will flow backwards into the
 10 channel area that is described in Exhibit -- flow
 11 back along the channel area into -- let me just call
 12 it up. Exhibit 4-002 which I will call up here.
 13 It'll flow backwards along -- in the opposite
 14 direction of where the green arrows are going, is
 15 that correct?
 16 A That is correct.
 17 Q Dr. O'Reilly, what is the significance if water flows
 18 into and out of a lake? I didn't say that well.
 19 With respect to a stream that is adjacent to and is
 20 contiguous with a navigable lake, what is the
 21 significance if water flows into and out of that
 22 stream?
 23 A If the bed of that stream is below the ordinary high
 24 water mark then that area where the water is ebbing
 25 back and forth, in my opinion, would be part of the

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1 Q Okay. Do you know the elevation of this contour
 2 line?
 3 A This contour line is 897.6.
 4 Q So this entire contour line is 897.6?
 5 A Right.
 6 Q And is this roughly, very roughly, comparable to like
 7 a little island or something in the channel?
 8 A Yes.
 9 Q Does the channel flow north and south of that raised
 10 area?
 11 A It flows to the south of this area right through
 12 where the blue line is drawn.
 13 Q And also to the north where the northern boundary is?
 14 A What we have is the stream channel is going to carry
 15 different depths of flow, depending on how much water
 16 is there. At its lowest elevation, water is going to
 17 pass through the southern quarter of the channel
 18 through a small area and there's an elevation that
 19 I'm pointing to right now which is 897.11. Then you
 20 have this small terraced area. During high flows,
 21 water will get up as high and at times even overtop
 22 the banks that are located -- in this case, Mr. Wood
 23 drew the bank correctly on the north. My opinion,
 24 which I drew on Exhibit 16-001 in a purple line, is
 25 that at that location the bank actually starts to

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1 lakebed.
 2 Q And is it your testimony -- now referring again -- I
 3 don't think we need to mark this because it's pretty
 4 clear from -- this is Exhibit 212, Page 2, from the
 5 DNR materials. It is Exhibit 4-030B for my purposes,
 6 but it is Exhibit 212, Page 2. The green arrows, is
 7 that the approximate flow location of the stream that
 8 you say exists next to -- or begins next to the
 9 Peters' property -- east of the Peters' property?
 10 A Yes.
 11 Q And is that stream, based on the survey that you
 12 supervised and that you directed, is that streambed
 13 below the ordinary high water mark?
 14 A Yes.
 15 Q Based on the testimony of Mr. Peters yesterday, to a
 16 reasonable degree of professional certainty, is this
 17 area where the green arrow flows a portion of the
 18 North Lake lakebed?
 19 A To the point in which we surveyed it, which is
 20 approximately -- here's the -- if I'm reading
 21 this -- this is the access, the current access, road
 22 so at least to the point of this culvert which
 23 crosses under that existing road where we surveyed
 24 to, yes.
 25 Q And so the water flows east from there into the area

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1 of the -- if this -- Mr. Peters -- Mr. Wood is
 2 the -- is a storm water engineer for the DNR. He has
 3 indicated that that is where the flow begins, is that
 4 correct?
 5 A That's where he has indicated it begins, yes.
 6 Q And it's your opinion, if I understand you correctly,
 7 that the entire area over to the grove of trees and
 8 along the entire line of that stream constitutes
 9 navigable water, is that correct?
 10 A That's correct.
 11 Q And it's your testimony that that stream, at least so
 12 far as the first bend in the green arrow to the west,
 13 is in fact part of the lakebed of North Lake, is that
 14 correct?
 15 A That is correct.
 16 Q Now, there's going to be some testimony by
 17 Mr. Tom Schwartzburg, who is here --
 18 MR. GLEISNER: And let me just very briefly
 19 characterize that, if I may, Judge.
 20 Q Mr. Schwartzburg -- first of all, you met with
 21 Mr. Schwartzburg?
 22 A Yes, we've met.
 23 Q He is going to provide some testimony that the water
 24 that we saw yesterday in Exhibits 35-001 through 002
 25 and the water that we saw in the videotape

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1 these type of navigable conditions happen on
 2 reoccurring periods and so comply with the DeGanert
 3 decision.
 4 MR. GLEISNER: No further questions, Your
 5 Honor.
 6 ALJ BOLDT: Okay. Thank you. Mr. Gallo?
 7 MR. GALLO: I'd like to call Dr. O'Reilly
 8 after our geotechnical presentations, if I may.
 9 MR. GLEISNER: He'll be here. He'll be
 10 here the whole time.
 11 ALJ BOLDT: Okay. So at this time you have
 12 no cross?
 13 MR. GALLO: That's correct.
 14 ALJ BOLDT: Okay. Ms. Correll?
 15 CROSS-EXAMINATION
 16 BY MS. CORRELL:
 17 Q Good morning, Dr. O'Reilly.
 18 A Good morning.
 19 Q It's still morning. You testified regarding the
 20 precipitation data for, I believe, it was June 23rd,
 21 2010, is that correct?
 22 A That is correct.
 23 Q And you were referring to Exhibit -- well, in part
 24 you were referring to Exhibit 17F which is one of
 25 the -- oh, I'm sorry, that's the wrong -- 17N, I

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1 Page -- all three videotapes of Page Hanson, have
 2 been present on this property for a very long time,
 3 going back to about 1950 or so. Does that bear -- if
 4 that testimony bears up, if I call Mr. Schwartzburg
 5 and he does so testify, does that testimony have any
 6 impact on your definition of navigability?
 7 A Yes.
 8 Q And what is that impact?
 9 A Searching my notes that are getting mixed up, as I
 10 mentioned earlier, Your Honor, when I go through the,
 11 you know, determination of navigability, I always,
 12 you know, reference back to the case law because it
 13 refines the definitions, and so this gets back to the
 14 DeGanert v. Department of Natural Resources and deals
 15 with their statement that a stream may not, however,
 16 be in a normal or natural condition when navigability
 17 is determined. The court went on to say may be
 18 determined during recurring periods of high water
 19 such as (inaudible) floods. So --
 20 ALJ BOLDT: Can you lift your voice up
 21 again?
 22 THE WITNESS: Yeah.
 23 ALJ BOLDT: Thanks.
 24 Q Those statements from Mr. Peters yesterday and which
 25 your next witness is going to testify, tell me that

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1 believe, would be for that date.
 2 MR. GLEISNER: Just a second, let me just
 3 check, Counsel. I've already gotten this wrong
 4 once.
 5 A 17N was for June 23rd, 2010.
 6 MR. GLEISNER: Yes, that's correct.
 7 Q And you also referred to Exhibit 17-001, is that
 8 correct?
 9 A My understanding was for the 23rd of June, 2010, the
 10 exhibits were 17N, which was a videotape near
 11 the -- what I'll just call the sign which is the
 12 triangle at the northwest corner of the Hanson
 13 property. Exhibit 17I, also shot on the 23rd, was
 14 Ms. Hanson navigating the channel adjacent to the
 15 Peters property so the channel on the north side of
 16 the DNR property, and then Exhibit 17F which was shot
 17 on July 15th was Ms. Hanson navigating in what's been
 18 called the grove of trees.
 19 Q Correct. And you created Exhibit 17-001, is that
 20 correct?
 21 A I don't know what Exhibit 17-001 is.
 22 Q It should be before you. I'll give you a moment to
 23 get that exhibit. It's an RRNA exhibit.
 24 A I opened Tab 17 and I found a CD.
 25 MR. HARBECK: Keep going behind it.

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1 MR. GLEISNER: Behind the CD.
 2 A Oh, okay, I found it. Yes, Exhibit 17-001 was an
 3 email that I had sent to Mr. Gleisner on June 24th
 4 indicating what the rainfall that was being reported
 5 for the following -- no, what was being reported for
 6 that date by the National Weather Service for
 7 southeastern Wisconsin.
 8 Q And isn't it true that this exhibit that you created
 9 is a snapshot of a 24-hour rain event?
 10 A That's exactly correct.
 11 Q And isn't it also true, as a hydrologist, that you
 12 should take into consideration antecedent
 13 precipitation?
 14 A That is correct. Unfortunately, the National Weather
 15 Service, who I rely on for my weather data, takes
 16 several months before they officially publish their
 17 rainfall data for an extended period of time so all
 18 I'm capable of doing on an individual day for that
 19 preceding 24-hour period is able to capture a
 20 snapshot. And so this is only part of the story and
 21 I agree and that's why I've also -- I subscribe to
 22 the weather service's monthly reports and so I also
 23 have collected the monthly data for those preceding
 24 months.
 25 Q Right. But none of that data is in the record,

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1 someone else prepared. I assume that the
 2 foundation will come in later.
 3 MR. GLEISNER: I was just concerned that we
 4 don't know who prepared that document, that's
 5 all, Your Honor.
 6 ALJ BOLDT: Sure.
 7 A Well, and I'd ask the question too, where are these
 8 three rain gauge sites? These are not -- none of
 9 these three are listed by the National Weather
 10 Service as official weather sites.
 11 Q Correct, Doctor, but my question is --
 12 A So, my --
 13 Q -- do these rain gauge sites depict antecedent
 14 precipitation prior to the date of June 23rd for the
 15 year 2010?
 16 A Yes, and so does the National Weather Service sites.
 17 Q Correct, but the National Weather Service data,
 18 again, is not in the record, correct?
 19 A Correct.
 20 Q And you didn't testify to any antecedent data that
 21 you analyzed or considered in reviewing the snapshot
 22 of a 24-hour period, is that correct?
 23 A That's -- except for the July storm I mentioned, it
 24 hadn't rained two days prior to that.
 25 Q I'm not asking you about July right now, I'm asking

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1 correct?
 2 A Correct.
 3 Q Could I refer you to what's been marked Exhibit 218,
 4 I believe, and now I'm talking about the binder -- I
 5 think it's blue -- your copy -- DNR exhibits? I'll
 6 give you a minute to get to that. Just let me know
 7 when you're there, Doctor.
 8 A Could you repeat the exhibit number again? Oh, could
 9 you repeat the exhibit number?
 10 Q Exhibit Number 218.
 11 A Okay. Yes, I have found it. It's a -- it looks like
 12 an Excel graph.
 13 Q And the graph depicts rain data from three locations
 14 in terms of precipitation impacts and the date, is
 15 that correct?
 16 A Yes.
 17 Q If you take a look at the dates from the beginning of
 18 June 1st of 2010 up to the third largest peak which
 19 is right around June 23rd, 2010 and tell --
 20 MR. GLEISNER: Objection -- shall I. I was
 21 going to wait for you to finish the question.
 22 Q And tell me what your analysis of that data would be?
 23 MR. GLEISNER: Objection, no foundation.
 24 ALJ BOLDT: I think it's cross-examination.
 25 She's asking this expert about a document that

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1 you about up to and including June 23rd of 2010.
 2 A Yes. So the answer is no, I did not testify to
 3 antecedent conditions prior to that and I would be
 4 happy to at this time.
 5 Q And you didn't consider those antecedent --
 6 A Yes, I did.
 7 Q -- precipitation events? Would the month of June
 8 for 2010 in your opinion be a standard June
 9 precipitation representation?
 10 A No, June of 2010 was wetter than normal.
 11 Q Thank you. Could you also locate on Exhibit 218 the
 12 July 15th peak which is the second largest peak for
 13 the months of June and July for 2010?
 14 A Yes. For which site? For which rain gauge site are
 15 you asking?
 16 Q I'm looking at all three triangulation rain gauge
 17 sites.
 18 A Okay. And I see a rainfall that, at Blackhawk, which
 19 again I don't know where that is, of about 1.7, 1.8,
 20 inches. For Winchester, it looks like about 2.2 and
 21 for this (inaudible), about 3.15 to 3.2.
 22 Q And you testified earlier that the rain gauges that
 23 you looked at, Oconomowoc and Holy Hill, were, I
 24 believe, 2.9 and 4 inches, is that correct?
 25 A For July 15th?

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1 Q Yes, July 15th, 2010.
 2 A Yes, 2.93 at Oconomowoc, 4.12 at Holy Hill.
 3 Q So we're in a very similar ball park, wouldn't you
 4 say, Doctor?
 5 A Yes.
 6 Q And for the months of June and July 2010, on
 7 Exhibit 218, these are two of the largest rainfall
 8 events for those two months of that year, is that
 9 correct?
 10 A For the year? I couldn't -- I don't have data to
 11 specify for the entire year, no.
 12 Q I didn't ask for the entire year, I asked for the
 13 months of --
 14 A Your statement was the year. You said year.
 15 Q The months of June and July for the year 2010.
 16 A Okay. I will take them in order with -- I'll start
 17 with June. The rainfall on June 23rd was the largest
 18 rainfall at Oconomowoc for the month of June,
 19 correct, and it did rain on the 22nd. Your second
 20 question related to the month of July 2010. In that
 21 particular month, the largest rainfall was actually
 22 on July 23rd after the date of July 15th. The --
 23 Q Correct, it's the second highest --
 24 A July 15th was the second highest recorded at
 25 Oconomowoc.

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1 that the record will speak for itself.
 2 Q But my recollection of his testimony was that those
 3 conditions appear --
 4 MS. CORRELL: Strike that.
 5 Q When did you form your opinion that waters in the
 6 grove of trees, as they've been referred to, or in
 7 the area of the DNR parking lot, were navigable
 8 waters?
 9 A It first was in early June of 2010 during a site
 10 visit when I noticed the characteristics of the site
 11 and raised the question that these may be navigable
 12 waters and suggested to the Redland Road Association
 13 that they actually do a navigability in fact test,
 14 which then was conducted on June 23rd.
 15 MS. CORRELL: Could I approach the witness?
 16 ALJ BOLDT: Sure.
 17 Q I'm placing before you --
 18 MS. CORRELL: And I only have one other
 19 copy. I'm not sure if the Judge or you needed
 20 one.
 21 UNIDENTIFIED SPEAKER: Give it to the
 22 Judge.
 23 MR. GLEISNER: If I may step behind you,
 24 Counsel, so I can see what you're doing. Thank
 25 you very much, Counsel.

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1 Q I apologize for interrupting. Thank you, Doctor.
 2 You testified regarding your opinion regarding water
 3 located in the area of where the DNR project parking
 4 lot will be placed under the plans. I want to
 5 clarify your testimony. I believe that you stated
 6 that it was your opinion that there were navigable
 7 waters, is that correct?
 8 A That is correct.
 9 Q Your opinion was not limited to the navigability of
 10 those waters, is that correct?
 11 A No, it was related to the navigability of those
 12 waters and a navigability in fact test that was
 13 testified by Ms. Page Hanson and also by Mr. Peters
 14 yesterday.
 15 Q So it's your opinion that because Mr. Peters and
 16 Ms. Hanson were able to navigate a kayak, that those
 17 are considered navigable waters, is that correct,
 18 sir?
 19 A Not only did they testify that they physically
 20 navigated those waters, but they both stated that
 21 they had seen the site in similar conditions on a
 22 frequent basis and that they could navigate those
 23 properties frequently.
 24 Q Isn't it true that Mr. Peters' testimony --
 25 MS. CORRELL: And I understand, Counsel,

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1 Q I place before you your affidavit in Waukesha County
 2 Circuit Court 10-CV-3792 -- the injunctive action.
 3 I'd like to refer you to Page 2 of that document.
 4 A Okay.
 5 Q In Paragraph 2, toward the bottom of the page, I
 6 believe it's the last sentence -- oh, no, I'm sorry,
 7 it's the second-to-last sentence on the page
 8 beginning on June 22nd, 2010. Could you read that
 9 for the record, please?
 10 A Yes. It states, "On June 22nd, 2010, the North Lake
 11 area received approximately two inches of rainfall."
 12 Q I'm sorry, continue until --
 13 A Okay.
 14 Q -- I tell you, onto Page 3.
 15 A Okay. "24 hour totals recorded by the National
 16 Weather Service are illustrated in Exhibit 5." And
 17 I'd like to add that that is -- Exhibit 5 is the same
 18 as Exhibit 17-001 in the record. "Based on rainfall
 19 frequency data" --
 20 Q Just a moment, I just want to take that down. Thank
 21 you. Continue please.
 22 A "Based on rainfall frequency data from the
 23 southeastern Wisconsin Regional Planning Commission,
 24 Exhibit 6, the June 22nd, 2010 had a frequency of
 25 less than two years in occurrence, indicating that it

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1 was not an unusual, but recurring event. At the
 2 recommendation of Hey and Associates, residents of
 3 the Redland Road attempted to float a recreational
 4 craft", and in -- a kayak, "on June 23rd in the area
 5 of the drainage channel, marshland, in a grove of
 6 trees, wetland complex, where the proposed fill will
 7 be placed to construct an access road and where the
 8 proposed boat launch parking lot will be constructed.
 9 The navigability test was recorded on videotape and
 10 film. I have reviewed the tapes and photographs and
 11 concluded to a reasonable degree of scientific
 12 certainty that the drainage channel and wetland
 13 complex are navigable in fact as defined in Wisconsin
 14 Stats. 30.12(2) and further defined in the
 15 courts" -- oh, excuse me.

16 MR. GLEISNER: You said 12.

17 A Okay. 30.10(2), "and further defined by the courts
 18 in DeGanert & Company, Inc. v. DNR, 70 Wis. 2d 936,
 19 236 N.W.2d 217 (1975) and Village of Menomonee Falls
 20 v. DNR, 140 Wis.2d --

21 MS. CORRELL: I don't think you need to
 22 read the citations. We're good there, Doctor.

23 ALJ BOLDT: You don't need to read the
 24 cites.

25 THE WITNESS: Okay. All right.

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1 on regarding the navigable waters, the first time I
 2 heard this area, you referred to a flow from the
 3 grove of trees going to the wetland complex and I
 4 believe that's the western wetland complex, is that
 5 correct?

6 A That is correct.

7 Q And you opined today that this water is a navigable
 8 water, is that correct?

9 A That is correct.

10 Q When did you form that opinion?

11 A I formed that opinion after the deposition in August
 12 of the DNR staff when, for the first time, we were
 13 provided a contour map of the DNR property which gave
 14 us an opportunity to see that the area where
 15 Page Hanson had navigated -- and I had viewed those
 16 videotapes back in 2010. And as we saw in the
 17 videotape, she navigated from the grove of trees into
 18 the grassed area, but unfortunately she stopped and
 19 she got out of her kayak and walked for a short
 20 distance. When I finally had an opportunity to see
 21 the actual topography of the site, I could see that
 22 there was a connection from where she had navigated
 23 to that larger wetland complex to the west of
 24 Redland Road. That's when I concluded that that
 25 whole area was connected and is really all part of

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1 Q Thank you. The passage that you just read, your
 2 affidavit testimony sworn on the record stated that
 3 on June 23rd various areas were attempted to be
 4 navigated and those areas -- one of those areas
 5 included the marshland in a grove of trees, is that
 6 correct?

7 A That is correct.

8 Q And when you referred to the marshland in a grove of
 9 trees, we're talking about the area that's been
 10 depicted on some of the exhibits by Redland Road
 11 Neighborhood Association as the grove of trees. I
 12 believe it's in green on some exhibits, is that
 13 correct?

14 A That is correct.

15 Q And that is also the area that you opined today is a
 16 navigable water, is that correct?

17 A That is correct.

18 Q However, in this affidavit testimony dated
 19 September 3rd, 2010, you conducted -- or you oversaw
 20 navigability tests at all of these sites and you
 21 concluded that the drainage channel and the wetland
 22 complex were navigable in fact, is that correct,
 23 Doctor?

24 A That is correct.

25 Q Thank you. Doctor, you also testified -- continuing

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1 one larger complex. That was then reinforced
 2 yesterday when Mr. Peters stated that when the whole
 3 area backs up and floods from North Lake, that that
 4 water backs up, it backs up the channel along the
 5 south side of his property, fills the wetland and
 6 then backs up into the DNR property where the parking
 7 lot is proposed.

8 Q Doctor, I want to make sure I understand the
 9 testimony that you just gave now. With respect to
 10 this channel that connects the grove of trees to the
 11 wetland complex, the information that you relied upon
 12 is the topography contours on Kapur documents?

13 A That is one piece.

14 Q And testimony received in this contested case hearing
 15 yesterday?

16 A And prior.

17 Q And by prior you mean prior conversations with
 18 Ms. Hanson and Mr. Peters, is that correct?

19 A And with Mr. Gleisner. I had also been on the
 20 site --

21 Q Pardon me, Mr. Gleisner, he's one of the --

22 A He provided me the videotapes for Ms. Hanson.

23 Q Okay. Did he provide factual information to you that
 24 would be relevant to your determination that a
 25 navigable water existed?

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1 A No.
 2 Q Thank you.
 3 A Just the evidence. When I was on the site in 2010,
 4 there was standing water --
 5 Q There's not a question pending right now, sir.
 6 A All right.
 7 Q I apologize. I want to make sure that I cover this,
 8 but, again, going back to the grove of trees, what
 9 information did you rely upon to determine that those
 10 waters located in the grove of trees were navigable
 11 waters?
 12 A I had walked the site in early 2010. There was
 13 standing water at that time eight to ten inches deep.
 14 That's when I advised the Redland Road Association
 15 that these may be navigable waters and that they
 16 should conduct a navigability in fact test which was
 17 the test that we saw conducted by Page Hanson.
 18 Q Thank you, Doctor. Dr. O'Reilly, you testified
 19 earlier that DNR was deficient in its review of
 20 evidence, both desk top review and field evidence
 21 review and you went through quite a list of steps
 22 that should be done in order to make a navigability
 23 determination. You said preliminarily you could make
 24 a determination regarding the characteristics of
 25 navigability based on site visit identification. You

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1 believe then you said contact others to see if there
 2 had been a formal ordinary high water mark
 3 determination, and what I said actually was to
 4 contact DNR staff, county staff, to determine if a
 5 formal navigability determination had been made.
 6 Q And by navigability determination, what do you mean?
 7 A If you dig through DNR files you'll find many memos,
 8 letters, that reference to individuals or
 9 municipalities that the Department has conducted a
 10 navigability determination and has declared a
 11 particular water body navigable. And, as I stated
 12 earlier, where that's significant to many local
 13 municipalities is, once that determination has been
 14 made, shore land zoning laws begin to apply.
 15 Q Well, isn't it true that technically the location of
 16 the ordinary high water mark is the pivotal piece for
 17 county jurisdiction under shore land zoning?
 18 A For a lake, but not a stream. It needs to be a
 19 navigable water.
 20 Q Correct. But it's your opinion that whether or not
 21 ordinary high water mark determinations have ever
 22 been located is not a relevant piece of information?
 23 A I was going to go on to that because I never did use
 24 the word ordinary high water mark. I stated that in
 25 my field visit I would first check for bed and banks

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1 referred to a review of USGS maps, review of more
 2 accurate contour maps, review of the size of the site
 3 to evaluate the frequency and sufficiency of the
 4 evidence regarding -- I'm sorry, regarding the
 5 impacts in relation to the depths of water the site
 6 would receive. You said you could refer to past
 7 determinations regarding ordinary high water marks on
 8 that water body. You referred to then field
 9 observations to locate a bed and bank, the location
 10 of an ordinary high water mark, and that gets more
 11 specifically into the preliminary determination, such
 12 indicators that one might look to in the field, and I
 13 won't recite all of those -- that's my expertise.
 14 You also said that you should ask neighbors, which I
 15 believe you did here, and to then finally, the last
 16 step, is to conduct a navigability impact test, isn't
 17 that correct, Doctor?
 18 A I would say it's partially correct. If I could just
 19 clarify a couple of points that you've got wrong?
 20 Q You may.
 21 A On the Item 3 in the pre-field visit I said determine
 22 the watershed size, not the site size, so that was to
 23 determine whether or not the watershed could generate
 24 enough runoff to be able to create conditions where
 25 you would have water depth to float a craft. I

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1 and then, secondly, I would look for high water marks
 2 which are different than ordinary high water marks.
 3 And if you'd like, I could clarify why that's
 4 significant.
 5 Q No thank you, Doctor.
 6 MS. CORRELL: Just a moment, please.
 7 Exhibit 132.
 8 Q I'm -- if you have your own copy of 30.12 you can
 9 reference that. I'm trying to locate the North Lake
 10 Management District Exhibit 132.
 11 MR. GLEISNER: I'm sorry, Counsel, are you
 12 asking for an exhibit number?
 13 MS. CORRELL: I believe it's Exhibit 132.
 14 MR. GLEISNER: Oh, I apologize.
 15 A I have a portion of Section 30.12. I don't have the
 16 entire section in front of me.
 17 Q That's fine.
 18 ALJ BOLDT: I've got it here if you need
 19 it.
 20 Q Doctor, do you have 30.12 in front of you?
 21 A Yes, I do.
 22 Q Can you tell me, based on your expert review of
 23 30.12, what the jurisdictional point is for DNR under
 24 30.12?
 25 A It states under 30.12(1), "Unless an individual

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1 general permit has been issued under this section or
 2 authorization has been granted by the legislature, no
 3 person may do any of the following: (a) deposit any
 4 material or place any structures upon the bed of any
 5 navigable waters where no bulkhead line has been
 6 established; (b) deposit any material or place any
 7 structure on the bed of any navigable water beyond a
 8 lawfully established bulkhead line." Is that what
 9 you're referring to?
 10 Q Thank you, Doctor. Well, I was specifically asking
 11 what, in this statute, defines what DNR's
 12 jurisdiction is? Is that question clear, Doctor?
 13 A No, it's not because -- well, I mean the title of the
 14 statute is navigable waters, harbors and navigation.
 15 Q Correct. What activities does it regulate?
 16 A You want a list of all of them?
 17 Q Generally, what's the statute regulate?
 18 ALJ BOLDT: Are we speaking of 30.12,
 19 Counsel?
 20 MS. CORRELL: Yes, specifically --
 21 ALJ BOLDT: Because I gave him all of
 22 Chapter 30 so maybe that's part of the confusion
 23 here.
 24 MS. CORRELL: Oh, yes, I'm --
 25 Q Yep, I'm not going to make you go through reams of

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1 incorrect?
 2 A You are incorrect. What I testified was the channel
 3 running along the north side of the property from the
 4 lake to where the sign was shown by -- in the
 5 testimony of Ms. Hanson which is in that triangle
 6 area where the easement crosses the Hanson
 7 property --
 8 Q Yes, I understand --
 9 A -- that location is below the ordinary high water
 10 mark. I never stated that the grove of trees was
 11 below the ordinary high water mark.
 12 Q But you stated the grove of trees was a navigable
 13 water, correct?
 14 A That's correct, and I can have navigable waters that
 15 are above the ordinary high water mark of a lake. If
 16 not, how would any stream that feeds a lake ever be
 17 declared navigable?
 18 Q So your contention is that if I can float a canoe in
 19 my backyard it's a navigable water?
 20 A If it falls under the definition -- if your backyard
 21 falls under the definition of 30.10(2), yes.
 22 Q So based on your testimony, Ms. Hanson testified that
 23 you could easily float a kayak down Redland Road? Is
 24 that also a navigable water, Doctor?
 25 A It may be. I didn't determine navigability on

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1 specific activities, I just want to know generally
 2 what does 30.12 regulate in terms of the activity?
 3 A 30.12 regulates the placement of structures in
 4 navigable waters.
 5 Q Thank you. And placement of those structures where?
 6 A As I stated earlier, under 30.12(1) it states upon
 7 the bed of any navigable waters.
 8 Q Thank you. And how does one identify what the bed of
 9 a navigable water is? I could rephrase that, if
 10 you'd like?
 11 A Yes, I would like.
 12 Q Isn't it true that in order to define what the bed or
 13 the bank of a navigable water, an ordinary high water
 14 mark needs to be determined?
 15 A No, and I'll state why. I can have a navigable
 16 stream that's intermittent that has no ordinary high
 17 water mark and yet still could be navigable because
 18 it frequently carries enough flow and complies with
 19 the DeGanert decision.
 20 Q Dr. O'Reilly, is the grove of trees a stream? I
 21 thought you testified that it was lakebed?
 22 A No, the grove of trees is not lakebed because it is
 23 above the ordinary high water mark.
 24 Q You just testified earlier that it was lakebed, I
 25 believe. The record speaks for itself. Am I

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1 Redland Road.
 2 Q I'm almost finished, Doctor. Thank you for your
 3 patience. I just want to review my notes. I have
 4 one limited area I believe I'd like to ask you a
 5 question about. There may be two areas. I
 6 apologize. You testified earlier about the
 7 requirement under 30.12(3m) and specifically the
 8 requirement that DNR assess the flood flow capacity
 9 of the stream and whether or not the project would
 10 have a detrimental effect to flood flow capacity. I
 11 think I'm using the wrong language. It's actually
 12 obstruct flood flow capacity of a stream or something
 13 like that. However, you testified that it was your
 14 opinion that a flow study should have been conducted
 15 by DNR, is that correct?
 16 A That is correct. When I applied for a permit under
 17 Chapter 30, and I will recognize that you are doing
 18 this under Administrative Code process, but as an
 19 engineer, when I apply for one of my clients for a
 20 Chapter 30 permit, to comply with this section of the
 21 Code I have to conduct a flood plain analysis which
 22 means that I do a formal hydraulics analysis to show
 23 that my fill or my placement of a structure is not
 24 going to materially reduce the flood flow capacity of
 25 the stream. And as I stated, we requested that from

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1 the Department under open records law, I did not
 2 receive it, and therefore I've come to the conclusion
 3 that it therefore must not exist.
 4 Q So you -- let me see if I understand this. When you
 5 conduct --
 6 MS. CORRELL: I'm sorry, strike that.
 7 Q When you apply to the Department for an application,
 8 you prepare, I thought you said earlier, a flood flow
 9 analysis, but just now I think you said a flood
 10 plain --
 11 A They're the same.
 12 Q Is it the same thing?
 13 A They are the same thing.
 14 Q Thank you for educating me. Okay. So you do a flood
 15 plain hydrologic evaluation, is that correct?
 16 A That's correct.
 17 Q Is it true that you didn't conduct one for this site?
 18 A No, I did not because I was not the applicant for the
 19 project.
 20 ALJ BOLDT: Okay. But did you --
 21 Q However --
 22 ALJ BOLDT: Okay. Go ahead.
 23 MS. CORRELL: Go ahead, Judge.
 24 ALJ BOLDT: No, go ahead.
 25 MS. CORRELL: No, you should really -- I

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1 channel --
 2 A Okay. The access road?
 3 Q North of the access road where you opined that in
 4 your determination a stream existed -- exists today?
 5 MR. GLEISNER: And what's the question?
 6 MS. CORRELL: Did he opine that there was
 7 an obstruction to flood flow capacity of that
 8 stream.
 9 A I don't remember that and I apologize because it's
 10 been several hours --
 11 Q That's okay. The record could speak for itself.
 12 A -- but I -- right. I do --
 13 Q I thought that was your opinion?
 14 A I do remember a question being asked to me that if
 15 fill took place in that area would it impede
 16 navigation and I do remember saying yes. I
 17 apologize, I don't remember a question about the fill
 18 of that area creating basically a blockage to flood
 19 flow.
 20 ALJ BOLDT: In this area? I'm sorry, I'm
 21 not tracking. This area --
 22 THE WITNESS: I'll point to it, Your Honor.
 23 It's area marked on its northern boundary by P3
 24 in Exhibit 2-006. It's an area that has been
 25 delineated by DNR and their representatives as

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1 should not interrupt the Judge.
 2 ALJ BOLDT: No, no, go ahead.
 3 MR. GLEISNER: Oh, it's okay to interrupt
 4 us, but nobody else.
 5 MS. CORRELL: That's my job.
 6 ALJ BOLDT: Go ahead. No, I strike my
 7 comment.
 8 Q Dr. O'Reilly, didn't you opine that this project
 9 impacts the flood flow analysis of the swale, stream,
 10 whatever people are referring to it as, the northern
 11 channel boundary?
 12 A I believe that was the question Mr. Gleisner asked
 13 me. My opinion is that the flood analysis should be
 14 done for the entire site and the impact on all of the
 15 neighboring properties should have been analyzed.
 16 Q Okay. But can I clarify again? Did you opine that
 17 there was an impact to flood flow analysis in what
 18 you determined to be a stream?
 19 A I don't believe I -- I believe the question that was
 20 asked me by Mr. Gleisner, would filling the
 21 depression area where the parking lot is proposed --
 22 Q I'm not talking about the parking lot right now.
 23 A Okay.
 24 Q I'm sorry if it's not clear. If you take a look at
 25 one of the larger exhibits, I'm talking about the

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1 wetland. It's a depressional area that's
 2 several feet deep that they're going to have to
 3 fill to create their roadway to stay -- and the
 4 reason they have to fill it is to stay within
 5 their access easement.
 6 Q Dr. O'Reilly, the current plan does not show impacts
 7 in the stream that you just described, is that
 8 correct?
 9 A I believe yes, it does. And I'm looking for an
 10 exhibit right now, a Department-provided exhibit --
 11 MR. GLEISNER: Off the record, are you
 12 looking for the plans?
 13 THE WITNESS: I have the plans in front of
 14 me and I'm digging through the sheets to find
 15 the area.
 16 Q I think we can move on.
 17 MS. CORRELL: Just strike the question.
 18 A Okay.
 19 Q So you're not sure if you opined -- there was quite a
 20 bit of testimony that you gave regarding the flood
 21 flow analysis that DNR did and that that analysis was
 22 deficient, is that correct?
 23 A No, my testimony was I have never seen a flood flow
 24 analysis done by the Department and my assumption is,
 25 because I requested it and was not provided, that it

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1 does not exist. So my testimony was that I believe
 2 that it was not done. So I didn't testify that it
 3 was inadequate because I've never seen one to
 4 evaluate its adequacy.
 5 Q Dr. O'Reilly, sticking again with this swale, you
 6 testified that it was a stream, is that correct?
 7 A On which area of the property?
 8 Q Again, I'm referring to the same area of the property
 9 which is north of the access road.
 10 A Okay. Yes, I've declared -- I have stated that that
 11 is navigable waters.
 12 Q But that wasn't my question. My question was whether
 13 or not you had opined in your testimony just a little
 14 while ago that that navigable water was a stream?
 15 A Yes, I feel that it falls under 30.10(2) which is a
 16 broad category of streams, but then the legislature
 17 went on to state all streams, sloughs, bayous and
 18 marsh outlets. I feel that area falls under those
 19 categories of sloughs, bayous and marsh outlets and
 20 therefore falls under this broader definition of
 21 streams.
 22 Q Dr. O'Reilly, you provided us --
 23 MS. CORRELL: Well, strike that.
 24 Q First of all, which of those three types of water
 25 bodies did you determine the area closest to the lake

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1 blue on Exhibit 2-002 in my opinion is clearly a
 2 stream. It has a bed and bank and meets all the
 3 characteristics of a stream channel.
 4 Q Thank you.
 5 A You then asked about a marsh outlet. This area and
 6 the big green area to the south is part --
 7 Q Could you --
 8 A -- and has already been --
 9 Q Just two seconds.
 10 A Everyone has agreed it's a marsh. This area drains
 11 to the north. It's been testified that there is a
 12 culvert right here under the existing gravel drive,
 13 this artificial causeway, that was placed in that.
 14 The water drains then across under that causeway and
 15 then drains through this northern marsh region to the
 16 east into that stream channel. I would declare this
 17 area right here as a marsh outlet.
 18 MR. MEYER: Can we describe that more
 19 carefully on some documents?
 20 ALJ BOLDT: You want to just indicate marsh
 21 outlet somewhere on Exhibit 2-02 if you can do
 22 it maybe with just a fine pen or something just
 23 so that it doesn't get too hard to read?
 24 MR. GLEISNER: Let the record show that the
 25 witness has just drawn -- he's written marsh

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1 consisted of? Was it a bayou, a slough or a marsh
 2 outlet?
 3 THE WITNESS: If could ask, Mr. Gleisner,
 4 could you pull up Exhibit 2-002 so that I
 5 can --
 6 MR. GLEISNER: Sure.
 7 THE WITNESS: -- be clear to the Examiner
 8 of the areas that we're discussing?
 9 MR. GLEISNER: Sure. Just a minute. Let
 10 me re-hook up to my -- okay. I didn't expect
 11 that. I'll just take a moment here to find
 12 my --
 13 MS. CORRELL: I'm sorry, what are we doing?
 14 MR. GLEISNER: The witness asked me to call
 15 up an exhibit and I'm trying to accommodate him.
 16 THE WITNESS: To answer your question, I've
 17 asked if we could pull up Exhibit 2-002 so that
 18 I can be clear about the areas that we're
 19 discussing.
 20 MS. CORRELL: Yeah, I just want to make
 21 sure I have an exhibit in front of me.
 22 MR. GLEISNER: Okay. We're almost there.
 23 That one?
 24 THE WITNESS: Yes.
 25 A What I've stated earlier is that the area shown in

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1 outlet and he's drawn an arrow into the east and
 2 west sections of the northern green circle, is
 3 that correct?
 4 THE WITNESS: Correct.
 5 MR. MEYER: Your Honor, I believe I asked
 6 that the area be defined. From what I can tell
 7 so far on the map, there's been the words marsh
 8 outlet placed on the map and an arrow pointing
 9 to an area, but there's no definition
 10 circumscribing the area that's being detailed as
 11 a marsh outlet.
 12 ALJ BOLDT: Can you cross-hatch that or
 13 something to that effect?
 14 MR. GLEISNER: Do you understand the
 15 question -- the Judge's question?
 16 THE WITNESS: Yes, I understand the Judge's
 17 question. If I use the hash mark --
 18 ALJ BOLDT: If you can. If you can't, if
 19 it makes it too messy then --
 20 MS. KAVANAUGH: Sorry, we're all hovering.
 21 THE WITNESS: I would say it is from the
 22 culvert under the gravel drive. So, Your Honor,
 23 it runs from the culvert under the gravel drive
 24 which brings drainage in from the southern
 25 three-quarters of the wetland and then there

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1 is -- within the marsh itself there is a clearly
2 defined channel and that was the channel that
3 was surveyed by Lake Country Engineering that
4 leads to what is clearly a stream channel and
5 I'm declaring that yellow line as the marsh
6 outlet under Section 30.10(2).

7 MS. CORRELL: And then did you ask, George,
8 as well for him to clarify the stream here? Is
9 that --

10 MS. KAVANAUGH: I think he did testify this
11 was stream --

12 THE WITNESS: Right. I testified the blue
13 line, yeah. If you'd like me to mark it, I
14 will.

15 MS. CORRELL: Yeah, if you could label that
16 as your stream (inaudible).

17 Q Dr. O'Reilly, you testified that marsh outlet was not
18 defined in the statute, correct?

19 A That is correct.

20 Q And your working definition, I believe you testified,
21 was that it was a tract of soft wetland commonly
22 covered with water such as a fen, swamp or morass.
23 Is that close or can you correct me where I haven't
24 included everything, please?

25 A No, that is correct. That was my definition of a

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1 MS. CORRELL: I'm looking for one of your
2 documents that depicts the grove of trees.

3 MR. GLEISNER: Well, I have some
4 photographic information from yesterday --

5 MS. CORRELL: I'm looking for a site plan
6 aerial diagram where it depicted it in green
7 where --

8 MR. GLEISNER: Yes, I think I know what
9 you're -- let me see if I can help you, Counsel.
10 Just a minute.

11 MS. CORRELL: Thank you, sir.

12 MR. GLEISNER: Counsel, if you direct your
13 attention to the screen, is this what you're
14 referring to?

15 MS. CORRELL: No, sir, I was looking
16 for --

17 THE WITNESS: Could it be Exhibit 2-006?

18 MR. GLEISNER: Here, let me try that one.
19 Is this it, Counsel?

20 MS. CORRELL: It should be an exhibit
21 created by -- thank you, yes, one of those.

22 MR. GLEISNER: Okay. I'll call that right
23 up. Is that it, Counsel?

24 MS. CORRELL: That is one of the exhibits,
25 yes. So that's 2-00 --

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1 marsh. And in the term -- in the definition, again,
2 this is a dictionary definition, it was a tract of
3 soft wetland. Then I went on to say that I felt that
4 that term was synonymous with wetland and wetland is
5 defined in Wisconsin Administrative Code NR103. And
6 the term outlet, I believe, is self-explanatory.

7 Q What type of dictionary did you rely upon?

8 A I believe those were out of the American Webster.

9 Q Did you rely on any learned treatises regarding
10 wetlands?

11 A Yes, I attempted to find in the literature a textbook
12 which defined those terms and found a variety of
13 similar definitions to what's in the dictionary for
14 the terms of slough, bayou, wetland.

15 Q Could you identify any of that literature that you
16 relied upon?

17 A Not off the top of my head, no.

18 Q Thank you. I'd like to refer you to one of the RNA
19 exhibits that depicts the grove of trees.

20 MS. CORRELL: And we can page through them
21 unless Counsel Gleisner would like to assist me
22 in locating in his --

23 MR. GLEISNER: Yeah, sure. Counsel, I
24 apologize. Could you just tell me what you're
25 looking for?

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1 MR. GLEISNER: 6.

2 THE WITNESS: And 2-007 is the -- a blow-up
3 of a portion of that one.

4 MR. GLEISNER: You take your chocolate or
5 vanilla. That's a zoom out.

6 MS. CORRELL: How about both?

7 MR. GLEISNER: That's a zoom in. Whatever
8 you want.

9 MS. CORRELL: Okay.

10 Q Again, referring to Exhibit 2-006, Dr. O'Reilly, you
11 opined earlier that the area marked in green is a
12 navigable water, is that correct?

13 A Yes, portions of that area are navigable water.

14 Q Portions?

15 A Portions, yes.

16 Q And would you characterize that navigable water as a
17 lake?

18 A No.

19 Q Would you characterize it as a stream?

20 A Yes.

21 Q Could you circle -- could you refer to Exhibit 2-007,
22 please?

23 A Yes.

24 Q And could you mark on Exhibit 2-007 where the stream
25 is a navigable water within the green area labeled

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1 grove of trees?
 2 A I'll first indicate it on the screen and then if
 3 you'd like I'll mark it on the exhibit.
 4 Q Sure, that would be fine.
 5 A As we saw in the videotape of Ms. Page Hanson, she
 6 had navigated in an area approximately here across in
 7 this direction.
 8 UNIDENTIFIED SPEAKER: I didn't -- I'm not
 9 getting that.
 10 A Again, as we heard yesterday --
 11 MS. KAVANAUGH: Could you lower your mic a
 12 little just so I can see? Thanks.
 13 A As we heard yesterday, Page Hanson showed us in a
 14 videotape that she had navigated from a point
 15 approximately here in the grove of trees outward and
 16 then she navigated slightly across the grassy area
 17 and then got out and walked. We also heard from
 18 Mr. Peters that he had navigated from his home at a
 19 location approximately that I'm pointing to now, had
 20 navigated across to the Hanson property. It's my
 21 opinion that the area of navigable water encircles an
 22 area approximately here and then crosses and heads
 23 westward and connects into a point over here at
 24 approximately Station 24.32.7 on this drawing which
 25 is the navigable wetland that Mr. Hudak talked about.

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1 MS. KAVANAUGH: You're saying this whole
 2 thing is a navigable stream?
 3 Q (Inaudible)?
 4 A Yes, somewhere, yes, in that approximate area.
 5 MS. KAVANAUGH: And the beds and banks are
 6 around here of this navigable stream?
 7 THE WITNESS: Yes, and the beds and banks
 8 are easily seen on Exhibit 15 which was an
 9 exhibit put together by Mr. Pete Wood of the DNR
 10 where he has drawn a red line around this
 11 depression area that's approximately a foot to
 12 a-foot-and-a-half deep.
 13 A And my crude drawing was my attempt to approximate
 14 what is shown as a depression on Exhibit 15, and I
 15 apologize for my inaccuracies and sketching.
 16 Q Could I just -- maybe a darker marker, but I'm not
 17 sure if you've circled an area here on Exhibit 2-007.
 18 I can clearly see the line coming from what is the
 19 green grove of trees area on this exhibit and you've
 20 labeled that navigable water. Have you circled an
 21 area here or is this all a stream circumference or
 22 perimeter?
 23 A The line is to represent the bank of the depression
 24 area and, if you'd like, I can draw it in a different
 25 color. You just need to pick one then.

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1 And my position is, is that these are all one body of
 2 water and that, as was stated, the water flows in
 3 this location from east to west. And that's what I'm
 4 describing as a channel and the reason is, is if you
 5 look at the topographic map there is a depression in
 6 this area that is about one foot deep and that
 7 one-foot contour line determines and finds a bed and
 8 bank.
 9 MR. GLEISNER: Counsel, do you want him to
 10 mark it?
 11 MS. CORRELL: Yes.
 12 Q I've asked you to mark the exhibit, please, for the
 13 record where the navigable water exists. The
 14 navigable portion of the stream that you just
 15 described to us on the large exhibit, and include the
 16 depression area that you also just testified to if,
 17 in fact, that is part of the navigable water that
 18 you've determined to be a stream.
 19 A For the record, on Exhibit 2-007 in blue pen I just
 20 marked the approximate area, and I will quantify the
 21 approximate area because this exhibit does not show
 22 any contour lines or spot elevations, but an
 23 approximate area of this depression that I argue is a
 24 navigable stream and I put an arrow showing the
 25 direction of flow towards the larger wetland.

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1 Q Yeah, I just -- something a little bit darker. Blue
 2 is fine, but it's sort of hard to see because
 3 of -- it's overlaid over the parking lot.
 4 A Okay. Let the record show that I have redrawn my
 5 outer boundary of the navigable area on Exhibit 2-007
 6 in a dark green marker.
 7 Q And you've determined that the area that you've drawn
 8 on Exhibit 2-007 depicts the bed and the banks of a
 9 stream, is that correct?
 10 A Correct.
 11 Q Thank you for explaining that, sir.
 12 ALJ BOLDT: Okay. Before we start a new
 13 line of questioning, let's go off the record
 14 here.
 15 (Recess Taken)
 16 ALJ BOLDT: Okay. We're back on the
 17 record.
 18 MS. CORRELL: Thank you.
 19 Q Dr. O'Reilly, you have testified regarding the survey
 20 conducted by Lake County, is that correct? I refer
 21 you to Exhibit 129 which is also Exhibit 2-008.
 22 A Just to clarify this, you're referring to Exhibit 129
 23 of the North Lake Management District?
 24 Q Yes, that's correct -- that's correct.
 25 A Okay.

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1 Q It should be a large foldout.
 2 A Yes. I put it away just because I'm -- things are
 3 getting messy up here. That's part of the engineer
 4 in me. Yes, we have the exhibit in front of us.
 5 Q Okay. Isn't it true that Mr. Powers only shot random
 6 elevations at your direction to represent various
 7 points in the channel rather than to shoot sufficient
 8 points to define the channel?
 9 A What we did is we walked the area and identified
 10 where we felt the lowest points in that complex were.
 11 Q So he only --
 12 A The reason we didn't do cross-sections through there
 13 were for two reasons. Number one is -- was time. We
 14 had only one day in which we were allowed to be on
 15 the site, September 2nd. Secondly, to do adequate
 16 cross-sections, we would have probably had to trim
 17 some of the trees so that we could get clear shots
 18 through with the survey equipment and we didn't feel
 19 that we had permission to disturb vegetation on the
 20 site. So what Mr. Powers did is he took shots where
 21 he could get clear views through the vegetation and
 22 so that's why there's some randomness to this. If we
 23 would have had, as I said, permission to do more
 24 disturbance to the site or had more time, we would
 25 have done detailed cross-sections.

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1 MR. GLEISNER: We named Mr. --
 2 MR. HARBECK: We don't need to argue about
 3 it on the record.
 4 ALJ BOLDT: Yeah, this is the kind of
 5 breakdown that we have when we're hungry.
 6 MR. GLEISNER: You're right, Judge.
 7 ALJ BOLDT: No, truly, truly, that's my
 8 experience doing these long hearings over many
 9 years. It's like let's stay on point here and
 10 finish up with the cross.
 11 MR. GLEISNER: Thank you, Judge, you're
 12 right.
 13 Q Dr. O'Reilly, you're not a surveyor, is that correct?
 14 A No, I'm not, I'm an engineer.
 15 Q But you're not a professional engineer, is that
 16 correct?
 17 A I am a -- in Wisconsin I'm licensed as a professional
 18 hydrologist. I am eligible for a professional
 19 engineering license in Wisconsin. I have chosen so
 20 far not to take the time to take the test.
 21 Q Take the test.
 22 A But I am -- I meet all of the requirements of
 23 education, work experience, etcetera.
 24 Q Isn't it true that only approximately 22 points were
 25 shot by Lake County as depicted in Exhibit 129?

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1 Q What's the date of Exhibit 129?
 2 A It says September 2011, but the date was
 3 September 2nd, 2011.
 4 Q Is that when you were there for a site visit in
 5 relation to this contested case hearing?
 6 A That is correct.
 7 Q To your knowledge, did the petitioners give any
 8 notice to DNR regarding the collection of additional
 9 data for that contested case hearing on that date?
 10 A I wouldn't --
 11 MR. GLEISNER: For the record, Your Honor,
 12 we gave notice that we were going to be making
 13 measurements and taking measurements.
 14 MS. KAVANAUGH: And were bringing five
 15 people as opposed to (inaudible).
 16 MR. GLEISNER: I'll concede there were more
 17 people, Counsel, but I wouldn't concede that it
 18 was for measurements.
 19 MS. CORRELL: You'll concede that experts
 20 were brought that were not --
 21 MS. KAVANAUGH: Measuring like --
 22 MS. CORRELL: -- disclosed to DNR?
 23 MR. GLEISNER: No, I wouldn't concede that.
 24 I wouldn't concede that.
 25 MS. KAVANAUGH: I have my emails.

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1 A I haven't counted them, but that was the testimony of
 2 the surveyor. And let me clarify because I was
 3 directing the survey. We already had the Kapur
 4 survey from the lake to the western edge of the
 5 parking lot. We didn't feel a need to duplicate what
 6 Kapur had already done. We have never questioned the
 7 quality of their work. We only took a few shots in
 8 that eastern half of the property just to verify that
 9 we were on the same datum and that we were matching
 10 points with them. If you look at the 22 points, over
 11 two-thirds of them are in the western half of this,
 12 you know, points of the exhibit. Kapur had shot from
 13 here to here so we have a detailed survey with
 14 cross-sections, contour lines. We wanted to confirm
 15 that from that point to the west that that bed
 16 elevation maintained itself all the way to where the
 17 culvert was under the access road. That's why you
 18 don't see a lot of points in this eastern half.
 19 Q I understand that, but you did just testify that
 20 those points were shot specifically at the lowest
 21 elevations, is that correct?
 22 A Right. We walked through the marsh, looked for the
 23 lowest elevations, and also looked for a continuous
 24 channel that was heading towards the east.
 25 MS. CORRELL: I have no further questions.

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1 Thank you, Doctor.
 2 THE WITNESS: Thank you.
 3 ALJ BOLDT: Okay. Let's go ahead and take
 4 that break.
 5 (Lunch Recess Taken)
 6 ALJ BOLDT: Okay. We're back on the
 7 record. Mr. Meyer?
 8 MR. GLEISNER: Before -- with your
 9 permission, Mr. Meyer?
 10 MR. MEYER: Sure, go right ahead.
 11 MR. GLEISNER: I just have a little
 12 housekeeping. I would like to move the
 13 admission of Exhibit 17-001 and Exhibit 15 at
 14 this time, otherwise the floor is yours.
 15 MS. CORRELL: I don't think there's an
 16 objection. Let me just refresh my recollection
 17 as to what those are.
 18 MR. GLEISNER: Sure.
 19 MS. CORRELL: Yeah, no objection.
 20 MR. GLEISNER: Thank you, Counsel.
 21 ALJ BOLDT: Okay. 17-001 and 15 are
 22 received at this time.
 23 MR. GLEISNER: Thank you, Judge.
 24 ALJ BOLDT: Now back to Mr. Meyer.
 25 CROSS-EXAMINATION

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1 really relied on that to a fairly large extent in
 2 making some of your decisions in this project?
 3 A That's correct.
 4 Q Do you know the history of that section of the
 5 statute, how it came to be in referring to things
 6 like bayous and sloughs?
 7 A No, actually I do not. My assumption is it came
 8 somewhere out of the case law, but I don't know which
 9 case that that reference came from.
 10 Q Okay. I'm well aware of your knowledge of various
 11 scientific aspects of water resources. I think
 12 that's in the record from your counsel and your
 13 engineering. I was -- I'd like to explore the area
 14 of law a little bit, if you don't mind.
 15 A Sure.
 16 Q There seem to be (inaudible) of testimony from
 17 statutes and case law. You have a degree in -- with
 18 a minor in -- it included law. Can you give me the
 19 exact title?
 20 A Yes, I have a Ph.D. in civil and environmental
 21 engineering with a Ph.D. minor in environmental law.
 22 Q Okay. What law courses did you take, if you can
 23 refresh my memory?
 24 A Sure. I'm going to refer to my CV.
 25 Q Sure.

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1 BY MR. MEYER:
 2 Q Good afternoon, Dr. O'Reilly. Do you mind if I call
 3 you Neal --
 4 A You sure can. We've worked together many years.
 5 Q -- because knowing each other for 30 years, it's
 6 pretty formal. Okay. Once again, thank you for
 7 being here and sharing your opinions on this and
 8 also, you know, I know of your fine work when you
 9 worked at the Department of Natural Resources and
 10 your area of responsibility. I want to thank you for
 11 some of the very good work you did there. It's done
 12 a lot to improve the areas of southeastern Wisconsin,
 13 as I recall. Let me -- there's been a lot of
 14 testimony about 30.10, the definition of
 15 navigability, and could you bring up a copy. I think
 16 the -- if you don't have one immediately, I know
 17 Judge Boldt has one.
 18 A I have a document in front of me that said I have
 19 sections of 30.10.
 20 Q Sure. And we referred to specifically repeatedly the
 21 subsection (2) which provides except as provided on
 22 certain other measures all streams, sloughs, bayous
 23 and marsh outlets which are navigable in fact for any
 24 purposes whatsoever are declared navigable and to the
 25 extent that dams, etcetera, can be built and you've

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1 A And just for clarification for the Examiner, what
 2 we're talking about is in many colleges when you
 3 receive a Ph.D. they require you to also get a minor
 4 in a second degree non-related to your major. The
 5 purpose is to make you more well-rounded and
 6 diversified. Most engineers do theirs in mathematics
 7 because it's the easy route out. They've already
 8 taken so much math by the time you get to a Ph.D. in
 9 engineering that you sort of get it, the requirement,
 10 by default. I chose not to take that easy route out
 11 and because Marquette has a law school, I asked the
 12 graduate school could we establish a special minor in
 13 environmental law and with the permission of the law
 14 school Marquette established that. So just to
 15 clarify, it is not a J.D. --
 16 Q No, I understand.
 17 A -- and so -- and I am not a practicing attorney nor
 18 do I try to present myself as one. The coursework
 19 that I've taken is -- of course I've taken
 20 environmental law, international environmental law,
 21 natural resources law, land use law and there was one
 22 other, basic Wisconsin water law, and I don't see it
 23 listed here, but there was a course on clean water
 24 act.
 25 Q Okay. So you had one course in basic Wisconsin water

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1 law?
 2 A Yes.
 3 Q Okay. Referring back to that Section 30.10(2), have
 4 you ever been involved in a case either before,
 5 during your time at DNR, or after, where DNR
 6 regulated a watercourse as a slough or a bayou by
 7 name?
 8 A No.
 9 Q What about a marsh outlet?
 10 A No.
 11 Q So as I understand your testimony -- okay, let
 12 me -- are you aware of any statutory definitions of
 13 those three terms, bayous, slough and marsh outlet?
 14 A As I stated earlier no, I'm not aware of any of
 15 those.
 16 Q Any administrative rule, DNR --
 17 A No administrative rules.
 18 Q Case law?
 19 A I'm not aware of the case law. There may be case
 20 law. I --
 21 Q So what I -- and correct me if I'm wrong because I
 22 definitely do not want to misconstrue your testimony.
 23 What I heard you say, at least, was that you went to
 24 the dictionary and looked at terms in the dictionary
 25 to try to figure out what that meant?

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1 Resources, yes.
 2 Q Okay. In your duties at DNR did you have the -- did
 3 you ever have the legal responsibility to make
 4 decisions as -- to make the decisions, regulatory
 5 decision for permitting purposes, as to what was a
 6 stream or a lake?
 7 A No.
 8 Q And, once again, I don't want to misconstrue your
 9 testimony, but what I heard you say at various points
 10 in your testimony that if it was someplace where
 11 there was water regularly, annually or bi-annually or
 12 whatever, and you could float on it, float a canoe
 13 like Ms. Hanson testified that she did, that that was
 14 a navigable waterway? Did I hear that correctly?
 15 A Yes, I would consider that a navigability in fact.
 16 Q Yes. Okay. And I'm just trying to pin things down.
 17 This goes to jurisdiction, but does your regulatory
 18 flood plain of 100-year flood and that, the water
 19 goes up fairly substantially. It's a fairly large
 20 amount of water, but there's smaller flooding events,
 21 aren't there?
 22 A Correct.
 23 Q One-year or two-year?
 24 A Yes, there's an infinite frequency of flood events.
 25 Q And that means in those areas that have -- that are

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1 A Correct.
 2 Q Is that -- okay. I think my notes reflect, but
 3 correct me if I'm wrong, on sloughs the definition
 4 was a depressional hollow?
 5 A Correct.
 6 Q And is that it, depressional hollow?
 7 A That was the dictionary definition, yes.
 8 Q Okay. Well, however, you'll concede that there's
 9 many depressions or hollows that aren't waterways?
 10 A Correct.
 11 Q Or navigable streams?
 12 A Yes.
 13 Q The area in question, and I'm talking about the
 14 Krause property, okay, Krause property, is that in
 15 the flood plain of North Lake?
 16 A Yes.
 17 Q The whole property is in it?
 18 A If not all, most.
 19 Q It is.
 20 A Yes.
 21 Q And actually part of Redland Road and many of the
 22 properties along Redland Road?
 23 A Yes, are in the regulatory 100-year flood plain --
 24 Q Correct.
 25 A -- as mapped by the Wisconsin Department of Natural

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1 in the one, two, five-year flood plain, they get
 2 water on them every year? For instance, a one-year
 3 or two years, right?
 4 A Yes.
 5 Q I'm just trying to clarify if you can -- in those
 6 years, if you, you know, at that time when they're
 7 inundated and you can float a kayak on them, does
 8 that make them part of the navigable waterway?
 9 A That's my understanding of the court's decision under
 10 DeGanert.
 11 MS. KAVANAUGH: Under what? I'm sorry.
 12 MR. MEYER: Under DeGanert.
 13 Q Even if they are -- do they become part of the
 14 waterway in your opinion, legally, because of the
 15 increased flood stage of a one-year or two-year
 16 flood?
 17 A I'm not sure about the question. Maybe if you could
 18 restate it.
 19 Q Well, assuming for sake of argument, and I believe
 20 this to be the law, that the waterway extends, any
 21 waterway extends, to the ordinary high water mark and
 22 that demarks the point between upland and waterway,
 23 okay? By definition, we talked about situations
 24 where the one or two-year flood goes above that and
 25 floods low-lying land adjacent to it. Does the fact

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1 that you could float a kayak in that now inundated
 2 upland, does that make it part of the waterway?
 3 A I believe yes, and I used the example earlier that if
 4 I have an intermittent stream, which actually was the
 5 situation in the DeGanert case, it's above the
 6 ordinary high water mark. It's an intermittent
 7 channel and so if it, during periods of spring
 8 flooding, spring freshets, if that channel can carry
 9 enough flow to float a recreational craft, it makes
 10 it a navigable water.
 11 Q I'm not going to -- I don't think it's appropriate
 12 to -- for me to (inaudible) DeGanert. I was involved
 13 in that case, but I think your testimony is that a
 14 navigable body of water can be established above the
 15 ordinary high water mark, is that correct?
 16 A That is correct.
 17 Q And is it your then your opinion that Section 30.12
 18 jurisdiction extends up to that level that's been
 19 flooded and navigated?
 20 A Yes.
 21 Q Okay.
 22 MR. MEYER: Pardon me, my handwriting is
 23 giving me a challenge at times.
 24 Q One thing that puzzles me in this case, and you're
 25 relatively new to the case and you and your counsel,

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1 for any purpose whatsoever, it then goes on to say,
 2 "Are declared navigable to the extent that no dam,
 3 bridge or other obstruction shall be made in or over
 4 the same", but then goes on, "without the permission
 5 of the State", is that correct?
 6 A That is correct.
 7 Q Whether we agree it's the right format or not, and
 8 I'm saying that from my organization's standpoint,
 9 the question why they had to do it, clearly in this
 10 case the State gave itself permission to fill in
 11 parts of this whatever we call it, wetland or
 12 navigable body of water, is that correct?
 13 A That is correct.
 14 Q Okay. So the question is whether standards were met
 15 regardless of what we call it?
 16 A That's correct.
 17 Q Okay.
 18 MR. MEYER: I'm just going to double check
 19 things here.
 20 Q What position did you hold at DNR in 1989 and 1990,
 21 if you can recall and we can refer to your CV if you
 22 wish.
 23 A In 1989 my title was Water Resources Planner.
 24 Q Okay. For the southeast region?
 25 A For the southeast district, called it at that time

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1 and the DNR have been on the case a lot longer. We
 2 tend to look at the bottom line. Let's say there's
 3 jurisdiction under NR103.
 4 MR. GLEISNER: Counsel, clarification, is
 5 that NR103?
 6 MR. MEYER: NR103, yes.
 7 MR. GLEISNER: Thank you.
 8 MR. MEYER: Thank you, Attorney Gleisner.
 9 Q There's not a total prohibition on filling in
 10 wetlands in NR103, is there?
 11 A No, there is not.
 12 Q It's a permitting statute if you meet certain
 13 standards, correct?
 14 A Correct.
 15 Q Section 30.12. It mentions a prohibition, but then
 16 it does allow for permits, doesn't it? It's a
 17 prohibition unless you get a permit, is that correct?
 18 A That's correct.
 19 Q Okay. And if you meet the standards you can get a
 20 permit to place a structure or fill on a bed of a
 21 navigable waterway, is that correct?
 22 A Correct, you can receive an individual permit.
 23 Q Okay. And even -- if you could refer back to
 24 Section 30.10(2). As you get further down, after the
 25 marsh and bayou outlets which are navigable in fact

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1 before the reorganization.
 2 Q District at that time, yes. It's before I
 3 (inaudible). Okay. And you had that position also
 4 in 1990?
 5 A I believe so.
 6 Q Do you recall the date that -- that was also in the
 7 district -- also in the district?
 8 A Yes.
 9 Q Okay. Do you recall the date when NR103 was adopted?
 10 A It states in the Code August 1997.
 11 Q Well, could that have been a revision?
 12 MS. KAVANAUGH: I think it's 1991.
 13 ALJ BOLDT: I think it's '91 and '92.
 14 Q Can we (inaudible) for the record?
 15 A Oh, yes, I apologize, I was reading this wrong and
 16 it's small type. July 31st, 1991.
 17 Q All right. That's the date it was published. Okay.
 18 What were your duties as a Natural Resource Planner
 19 for the southeastern district?
 20 A I was working in the Lake Management Program
 21 coordinating the non-point source program. I was the
 22 liaison with Sewer Pak in the coordination of the
 23 various federal grants with that agency and then I
 24 was also acting as a liaison to local communities.
 25 If you remember at that time, it was a few years

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1 after Lilly Creek (phonetic) and the (inaudible)
 2 Creek cases, there was a lot of bad blood between DNR
 3 and a lot of the local municipalities in the
 4 Milwaukee area so Jeff Body (phonetic), who was my
 5 supervisor at the time, assigned me to basically
 6 going out and trying to work with the municipalities
 7 to understand the Department better so that we could
 8 improve working relationships.
 9 Q Okay. This is going to seem like a strange question,
 10 but there is a reason for it. Have you ever been in
 11 my private residence in Madison, Wisconsin?
 12 MR. GLEISNER: That is a strange question,
 13 Counsel.
 14 A And the answer is no.
 15 Q Okay.
 16 MR. MEYER: Your Honor, I will tie this in.
 17 MS. KAVANAUGH: You better.
 18 MR. HARBECK: You have to testify next.
 19 MR. GLEISNER: You are dangerous, Counsel.
 20 Q At the time NR103 was established, who headed the
 21 Division of -- that had responsibility for that
 22 program for wetlands protection?
 23 A The Division leader or the section chief?
 24 Q The Division head for the division that developed
 25 NR103.

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1 it's -- you drew a line on Exhibit 2-007 and it
 2 included part of the grove of trees?
 3 A Yes.
 4 Q It's a blue line I recall that -- and it encompasses
 5 about 10 percent of the grove and then heads in a
 6 westerly direction from there and I think you
 7 identified it as a stream, is that correct?
 8 A That is correct.
 9 Q Did you determine the ordinary high water mark on
 10 that stream?
 11 A No, I did not.
 12 Q In your opinion does a lake or a stream, and for sake
 13 of more specificity a navigable lake or stream, have
 14 to have an ordinary high water mark?
 15 A As I stated earlier, I can have an intermittent
 16 condition where I don't have an ordinary high water
 17 mark. I may have a high water mark.
 18 THE WITNESS: If I could ask Mr. Gleisner
 19 to pull up Exhibit 23-016.
 20 Q I ask a very specific question and I think it's a
 21 narrow answer and I think you answered it. Your
 22 answer was no?
 23 A That I didn't -- that I did not.
 24 Q No, the question, and correct me, my mind sometimes
 25 slips, but I think the question is -- if not, I will

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1 A Boy, we're talking 20 years ago. I --
 2 Q Okay. No, that's fair. That's fair.
 3 A I don't remember. I remember the section chief at
 4 the time was Scott Hausmann (phonetic).
 5 Q Do you recall who headed the technical group that
 6 developed NR103?
 7 A No, I don't. That was, as I said, 20 years ago.
 8 Q Would it surprise you if I were the individual that
 9 was head of the Division of Enforcement that had
 10 responsibility to develop NR103?
 11 MR. GLEISNER: Counsel, before he answers,
 12 can you speak up? People are having difficulty,
 13 I think, hearing you. Sorry, Counsel.
 14 Q Was it a surprise to you that I was --
 15 A Yes, yes, I was aware of that. At that time you were
 16 the head of the enforcement section for Wisconsin
 17 DNR.
 18 Q Enforcement division that had responsibility for
 19 developing NR103. Would it surprise you that I
 20 headed up the technical team that developed NR103?
 21 A No, it doesn't surprise me.
 22 Q Would it surprise you if I would indicate that you
 23 weren't a member of that team?
 24 A No.
 25 Q Getting back to the flooding situation, and I think

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1 restate it and it's a narrow answer. In your opinion
 2 does a navigable lake or stream need to have an
 3 ordinary high water mark?
 4 A Okay. I'll --
 5 Q It's a yes or no answer.
 6 A I'll --
 7 Q It's a yes --
 8 A The answer --
 9 ALJ BOLDT: Well, he's asking for a yes or
 10 no. Can you answer it yes or no?
 11 THE WITNESS: I can answer it yes.
 12 ALJ BOLDT: Okay. Go ahead and answer it.
 13 MR. MEYER: That wasn't my question.
 14 THE WITNESS: Your Honor, he wants a single
 15 answer, but he asked about two bodies of water.
 16 MR. MEYER: Okay. Let me ask them
 17 separately.
 18 ALJ BOLDT: There you go.
 19 MR. MEYER: That's fair. That is fair. I
 20 (inaudible) it. I'm sorry. I was trying to get
 21 us done faster.
 22 Q In your opinion does a navigable lake have to have an
 23 ordinary high water mark?
 24 A And to that question, yes.
 25 Q Let's go to the second question. In your opinion

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1 does a navigable river or stream, just split that if
 2 you think it needs splitting, need to have an
 3 ordinary high water mark?
 4 A My answer to that is no.
 5 MR. MEYER: And just if I could just check
 6 to see if I missed any questions. Oh, one more.
 7 I didn't tie it back and I apologize.
 8 Q Would it be a surprise to you, I did this out of
 9 order, that most of NR103 was drafted in my house?
 10 MR. MEYER: That's how I tied it back.
 11 I'll withdraw that question. Oh, I do have one
 12 more question.
 13 Q We talked about filling, that in fact navigable
 14 waters can be -- permits can be granted to fill. Are
 15 you familiar with court cases in the State that have
 16 allowed -- and I'm talking about State Supreme Court
 17 cases that have recognized the filling of very large
 18 areas, including large portions of Lake Michigan?
 19 A Yes, I am.
 20 Q For public purposes, especially public navigation
 21 purposes?
 22 A Yes.
 23 Q Okay.
 24 MR. MEYER: Thank you very much, Neal, and
 25 you're invited to my house any time.

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1 A Okay.
 2 MS. CORRELL: Could you pause please so
 3 that I can locate it?
 4 MR. GLEISNER: Oh, certainly, Counsel.
 5 MS. CORRELL: Oh, I do have -- okay. Thank
 6 you.
 7 MR. GLEISNER: Are we good now, Counsel?
 8 MS. CORRELL: Yes, we're good.
 9 MR. GLEISNER: May I proceed?
 10 MS. CORRELL: You may, but I'm just
 11 realizing I didn't move this.
 12 MR. GLEISNER: Oh, darn it, and I
 13 redirected on it, Your Honor.
 14 ALJ BOLDT: Okay. We can treat it like a
 15 deposition I think, that's fine.
 16 MS. CORRELL: I mean it is a --
 17 ALJ BOLDT: It's part of the record, it's
 18 sworn under oath from a --
 19 MR. GLEISNER: Do you want to move to
 20 introduce it now or --
 21 MS. CORRELL: I don't think it's necessary.
 22 MR. GLEISNER: Okay. Fine.
 23 ALJ BOLDT: Yeah, it's part of the record.
 24 MR. GLEISNER: Great.
 25 Q Anyway, Dr. O'Reilly, do you have any clarification

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1 MR. GLEISNER: Judge, may we have a moment
 2 to confer?
 3 ALJ BOLDT: Sure.
 4 MR. GLEISNER: Thank you very much, Judge.
 5 ALJ BOLDT: Let's go off the record.
 6 (Recess Taken)
 7 ALJ BOLDT: Okay. We're back on the record
 8 and we changed our equipment here so we're ready
 9 to go.
 10 MR. GLEISNER: Thank you, Judge, and I just
 11 have a couple of questions on redirect.
 12 ALJ BOLDT: Sure.
 13 MR. GLEISNER: Maybe just one.
 14 REDIRECT EXAMINATION
 15 BY MR. GLEISNER:
 16 Q Mr. O'Reilly -- Dr. O'Reilly, excuse me, you were
 17 asked questions about an affidavit that you did on or
 18 about September 3rd and you were asked to read from
 19 that affidavit. Have you had a chance to look at
 20 that affidavit?
 21 A Yes, I have.
 22 Q Do you wish to clarify your previous testimony with
 23 regard to that?
 24 A Yes.
 25 Q Okay. Please do.

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1 you --
 2 A Yes, I'd like to -- first of all, recognize that this
 3 was written in September of 2010, over a year ago,
 4 and I'd like to just clarify a couple of points in
 5 here so that my statement isn't misread. It states,
 6 "At the recommendation of Hey and Associates,
 7 residents of the Redland Road attempted to float a
 8 recreational craft on June 23rd, 2010 in the area of
 9 the drainage channel, marshland and the grove of
 10 trees, wetland complex, where proposed fill would be
 11 placed to construct an access road and where the
 12 proposed boat launch parking lot will be
 13 constructed." Now, at this particular date, I made
 14 an error and that's why I want to go put this on the
 15 record. I was under the assumption, when I received
 16 the videotapes from Mr. Gleisner, that all three
 17 areas on the property that were presented in
 18 Exhibit 17N, 17I and 17F were all shot on the 23rd of
 19 June. It was at a date after I had prepared this
 20 affidavit that I was informed that Exhibit 17F was
 21 actually shot on July 15th and so that was an error
 22 in my affidavit. I was not aware of those dates.
 23 Q Do you wish to clarify anything else, Doctor?
 24 A The other thing I'd clarify, it said, "I have
 25 reviewed the tapes and photographs", which I did,

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1 "and concluded to a reasonable degree of scientific
2 certainty that the drainage channel and wetland
3 complex are navigable in fact." Now, I want to
4 emphasize that what I mean by that sentence, that
5 includes the drainage channel which is the area shown
6 in blue on Exhibit 2-002, it includes the marshland
7 in the grove of trees. And the reason I call it a
8 marshland is if we look at Exhibit 23-016, this is a
9 report that was produced by Natural Resources
10 Consulting, Inc. for the North Lake Management
11 District. It's a wetland delineation report which I
12 and my staff have reviewed and we concluded that the
13 area that NRC, as they're nicknamed, shows in green
14 is wetland. And I know that is not a part of this
15 case, but when I wrote this affidavit it still was
16 and therefore that's what I meant as the marshland in
17 the grove of trees. And then, of course, I stated,
18 you know, marsh and that, of course, includes the
19 areas that we're not contesting that are marshland
20 that were drawn on Exhibit -- also --

21 Q Dash 007?

22 A Yes, that were shown in the green areas in two green
23 blobs. So I want to clarify that in my affidavit
24 from September of 2010 I was stating that all three
25 of those areas in my opinion at that time were

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1 ALJ BOLDT: Yeah, you did -- you waived
2 your earlier cross and that's still noted on the
3 record. Any other questions of Dr. O'Reilly?
4 Could I ask you, sir -- oh, did you have one?

5 MS. CORRELL: No.

6 ALJ BOLDT: Oh, I'm sorry. In terms of
7 some of these critiques of what DNR did or
8 didn't do in this matter, to what degree does
9 professional judgment enter into some of these
10 decisions? Like, let's say, if you have an area
11 that's both a navigable -- that is navigable and
12 is a wetland, how you treat it for regulatory
13 purposes, to what extent is that a matter of
14 just making a professional or a regulatory
15 judgment?

16 THE WITNESS: In my opinion, no.

17 ALJ BOLDT: It doesn't enter in?

18 THE WITNESS: If we have a classification
19 of a wetland, we have a classification of a
20 navigable water, and it's my opinion that each
21 one of those has their own set of standards that
22 have to be met. The wetland fill permit needs
23 to comply with Wisconsin Administrative Code
24 NR103 and the filling of the navigable waters
25 that may be sitting on top of that wetland needs

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1 navigable.
2 Q Now, Dr. O'Reilly, just so the record is clear here,
3 in referencing Exhibit 23-016, the green area that is
4 marked on that exhibit, green hash marks or slash
5 marks, encompasses or includes the -- what is being
6 referred to as the grove of trees, is that correct?

7 A It includes yes, the grove of trees.

8 Q And so that I understand your testimony further,
9 while you mentioned three distinct entities earlier
10 in your affidavit that you've just clarified, when
11 you reached the conclusion about the navigability,
12 you conflated two of those. Can you tell the Judge
13 again which two you conflated?

14 A I conflated all three.

15 Q Okay.

16 A I'm stating that all three -- what I did in my
17 affidavit is I lumped the marsh area shown in green
18 here and the marsh area that has been indicated on
19 other exhibits basically as all marshland or wetland.

20 MR. GLEISNER: That's it, Judge. Nothing
21 further, Judge.

22 ALJ BOLDT: Mr. Gallo:

23 MR. GALLO: I just want to reserve my
24 opportunity to question Dr. O'Reilly after my
25 two witnesses.

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1 to comply with the standards under Chapter 30.
2 If it was only a marsh, then only NR103 would
3 apply.

4 ALJ BOLDT: So you think if there
5 are -- your own professional judgment and your
6 opinion in this matter is that if there are
7 overlapping jurisdictions, you have to meet both
8 sets of requirements?

9 THE WITNESS: That's my opinion, yes.

10 ALJ BOLDT: Okay. And now what
11 about -- thank you for that -- clarifying that
12 for me. With respect to, for example, how much
13 work a reviewing regulator undertakes in
14 accomplishing a review, how much is that a
15 matter of professional judgment? And, in this
16 instance, I'm thinking of whether or not to take
17 on a full hydraulic study in connection with the
18 flood flow capacity of a stream issue.

19 THE WITNESS: I don't know of any other way
20 to comply with Section 30 that states the
21 structure or deposits will not materially reduce
22 the flood flow capacity of the stream. That is
23 something that's pretty much black and white.
24 Either you reduce the flow capacity or you
25 don't. I do recognize, you know, some of the

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1 other standards that structures or deposit will
2 not -- or will not be detrimental to the public
3 interest. That has, you know, some leeway
4 there --

5 ALJ BOLDT: Sure.

6 THE WITNESS: -- because someone needs to
7 define public interest. But I think at least
8 under that Item 3, when you're talking about
9 materially reducing the flood flow capacity,
10 that's a pretty black and white decision that
11 needs to be verified by an engineering analysis
12 which is this hydraulics analysis.

13 ALJ BOLDT: So you think for every
14 structure on a navigable waterway to meet that
15 requirement you need an engineer to do a
16 hydraulic study?

17 THE WITNESS: Not for every one, but any
18 one that is going to, you know, significantly
19 block a waterway. I mean for my -- for our
20 municipal clients, if we're constructing a
21 bridge, if we're constructing any type of fill
22 for roadways or park expansions, etcetera, we're
23 always required to do that type of hydraulics
24 analysis.

25 ALJ BOLDT: And does the scale of the

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1 this matter and apparently the legislature has
2 taken on that that rule ultimately will probably
3 be the default rule or something or they're
4 considering that, but that's neither here nor
5 there. But in this instance where the objectors
6 have the burden of proof, what am I to rely on
7 in terms of whether or not that condition
8 has -- which way to go on that -- with respect
9 to that issue of the flood flow capacity of the
10 stream where we don't -- you're saying we need a
11 hydraulic study and we don't have one?

12 MR. GLEISNER: Judge, if I --

13 ALJ BOLDT: Are you with me on that?

14 MR. GLEISNER: I am, but I think that this
15 is potentially an issue for post-trial briefing.

16 ALJ BOLDT: Okay.

17 MR. HARBECK: I mean he's told you his
18 interpretation of the statute and what it
19 requires and what his practice is and, you know,
20 his experience so I think --

21 ALJ BOLDT: Yeah, but he's also been -- he
22 also -- I mean I didn't pose that question well
23 and I'll sustain the objection. I mean, in
24 general, I mean what do you make of it in terms
25 of this situation in terms of this issue? Do

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1 project enter into that at all, in terms of
2 sometimes you're required to do it, other times
3 you're not?

4 THE WITNESS: Well, typically, where we're
5 not is where it falls under -- in Chapter 30
6 there are some exemptions where, if I'm under a
7 certain size, I'm not required to. There is
8 general permits, there are individual permits,
9 and so the general permits will outline the
10 standards that I have to comply with and those
11 are typically for very small structures, very
12 small fills.

13 ALJ BOLDT: And when you were asked -- I
14 forget who asked you, but you were asked about
15 doing one -- doing a hydraulic study as it
16 relates to the flood flow capacity of any stream
17 on the project site. You said you didn't think
18 it was necessary for you to do one because your
19 client was not the applicant, is that correct?

20 THE WITNESS: That's correct. We're
21 talking about spending thousands of dollars
22 and --

23 ALJ BOLDT: Now, in this situation it's
24 somewhat unusual because the objectors, rather
25 than the applicant, has the burden of proof in

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1 you think it's fatal to the project or what's
2 your opinion? I guess that's a fair way to ask
3 the question.

4 THE WITNESS: That it doesn't exist. I
5 feel it's fatal to the project in that it
6 doesn't allow the public to evaluate the
7 potential impacts of this proposed project.
8 Now, with regard to your question about burden
9 and those types of things in a contested case
10 hearing, I would have to say that is outside of
11 my expertise.

12 ALJ BOLDT: Okay.

13 MR. GLEISNER: Judge, if I just could make
14 an observation?

15 ALJ BOLDT: Sure.

16 MR. GLEISNER: Very often when there is a
17 burden of proof, it's a burden of proof going
18 forward and burdens shift. In other words, if
19 we -- just getting back to --

20 ALJ BOLDT: Okay. Yeah, so it may well be
21 a matter of briefing. No, I hear that, I just
22 wanted to make sure that I understood his
23 earlier testimony and that the implications are
24 considered as part of the record.

25 MR. GLEISNER: I understand, Judge. Very

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1 well. But, Judge, I have one housekeeping issue
 2 and that is --
 3 MR. HARBECK: Are you done with him?
 4 MR. GLEISNER: We're done with him, but I
 5 have a motion and that is I'd like to move --
 6 ALJ BOLDT: Okay. Well, let's see if
 7 anybody -- does anybody else have any other
 8 questions of Dr. O'Reilly?
 9 MR. GLEISNER: Oh, I'm sorry, Judge.
 10 ALJ BOLDT: All right. Hearing none,
 11 you're excused, sir.
 12 THE WITNESS: Thank you.
 13 MR. GLEISNER: I'd like to move the
 14 admission of Exhibit 23-016. Sorry, Your Honor.
 15 UNIDENTIFIED SPEAKER: 018?
 16 MR. GLEISNER: No, 016, Tim. 23-016.
 17 (Discussion off the record)
 18 ALJ BOLDT: Let's go off the record and see
 19 if we can agree on what we --
 20 (Recess Taken)
 21 ALJ BOLDT: Okay. We're back on the
 22 record. As far as Exhibit 23-016 and 018, is
 23 there an objection?
 24 MS. CORRELL: DNR would just object for the
 25 record that 23-016 is of limited relevance and

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1 ALJ BOLDT: Okay. Any other witnesses?
 2 MR. GLEISNER: One, Judge.
 3 ALJ BOLDT: Okay.
 4 MR. GLEISNER: Mr. Schwartzburg, please.
 5 ALJ BOLDT: Do you swear to tell the truth,
 6 the whole truth and nothing but the truth, so
 7 help you God?
 8 MR. SCHWARTZBURG: I do.
 9 DIRECT EXAMINATION
 10 BY MR. GLEISNER:
 11 Q Good afternoon, Mr. Schwartzburg.
 12 A Good afternoon.
 13 Q Would you please state and spell your name for the
 14 record.
 15 A Schwartzburg, S-C-H-W-A-R-T-Z-B-U-R-G.
 16 Q And where do you reside, sir?
 17 A I live at 1700 Barbados Avenue, Marco Island,
 18 Florida.
 19 Q You lucky man. I would also ask if you own property
 20 on North Lake?
 21 A I do, I own half of a property at W3227 N7574 Redland
 22 Road.
 23 Q Is that the property that is also owned by a person
 24 named Margo Hanson?
 25 A She's my sister, yes.

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1 with respect to 23-018, no objection.
 2 ALJ BOLDT: Okay. 018 is received. I'll
 3 take a look at that other one and withhold
 4 ruling for now on 016.
 5 MR. GLEISNER: It's right up there, Judge.
 6 ALJ BOLDT: Oh, that one, okay. We've
 7 marked that as Exhibit 10?
 8 MR. GLEISNER: There's two places it
 9 appears, Judge.
 10 ALJ BOLDT: Okay.
 11 MR. GLEISNER: It's the same exhibit.
 12 MS. CORRELL: The only reason DNR objects
 13 to it is --
 14 ALJ BOLDT: It's already in as Exhibit 10
 15 so that makes it easy. It's received.
 16 MS. CORRELL: Okay. But it's just part of
 17 the NRC wetland delineation so that's the only
 18 reason we object.
 19 ALJ BOLDT: Understood, understood. Yeah,
 20 and it's for a limited purpose. It was for
 21 basically a schematic almost, right?
 22 MR. GLEISNER: Exactly, Judge, it was a
 23 schematic for Mr. Peters to show the aerial and
 24 now it was used by Dr. O'Reilly simply to
 25 indicate boundaries.

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1 Q And is she married to Fritz Hanson?
 2 A She is.
 3 Q So then you've been present for a great deal of the
 4 testimony. You're aware that that is the land
 5 immediately to the south of what's come to be called
 6 the Krause site or the DNR site, correct?
 7 A That's correct.
 8 Q Did you grow up on Redland Road?
 9 A I did.
 10 Q And from what year to what year did you live on
 11 Redland Road?
 12 A I believe my grandfather built the house in around
 13 1950 and I stayed -- I lived there until early to
 14 mid-70s.
 15 Q I'm going to show you -- actually, you can look in
 16 the white book right in front of you and if you would
 17 go to the back tabs, starting at Tab 29. I'm also
 18 going to pull up on the screen here what has been
 19 marked as Exhibit 33 and ask you what that is? Wait
 20 a minute, look at the screen, I don't think that's
 21 the right one. No, that's not the right one either.
 22 MS. CORRELL: Which are we doing first?
 23 MS. KAVANAUGH: Well, he said 29, but then
 24 he said take a look at 33.
 25 Q You're on 29 so just keep going. It's right here.

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1 A Oh, I thought you said 29. Sorry.
 2 Q Oh, no, I apologize, 33.
 3 A That's a picture of our house in about probably 1952,
 4 I believe.
 5 Q If you look at the top of the picture it purports to
 6 be a different date?
 7 A '59, okay.
 8 Q April of 1959?
 9 A Right.
 10 Q The last picture depicts the house looking from what
 11 direction? What is the perspective of the cameraman
 12 who took that one -- or camerawoman?
 13 A It's from the lake looking west.
 14 Q So that would be looking west from North Lake toward
 15 the Hanson home, right?
 16 A Yes.
 17 Q That house has been remodeled a number of times, but
 18 that's basically the first building block, as it
 19 were, of the house that now exists there?
 20 A Pretty much, without the porch.
 21 Q Without the porch. Now, Mr. Schwartzburg, I see
 22 water in your front yard there. Was that a normal
 23 occurrence for you?
 24 A All the time, yes.
 25 Q Now, I'm going to call up -- now go back to Tab 30,

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1 Q And I notice a tree here. What is that?
 2 A That's our cedar tree.
 3 Q And is that tree still there?
 4 A It still is, yes.
 5 Q Now, if you could, I'm going to ask you to take this
 6 nice blue pen here and I'm going to ask you if you
 7 can draw an arrow from the perspective of the
 8 cameraman or woman toward where the Krause property
 9 is located in that picture. And you've drawn an
 10 arrow, as I see it, going back like this?
 11 A Well, it's directly north from there, yeah, so I drew
 12 it northeast.
 13 Q Do we see any part of the Krause property on this?
 14 A Yeah, I would say from probably 20 -- from where our
 15 pier is, 20 to -- 15 to 20 feet is where the Krause
 16 property starts.
 17 Q So would you please put an X where you think the
 18 Krause property starts on that Exhibit 30? And now
 19 as to both of those marks that you've placed on that
 20 exhibit, would you please put your initials next to
 21 them? Thank you very much. Now, what year do you
 22 think this picture was taken approximately?
 23 A Mid-50's, late 50's.
 24 Q Based on your recollection and based on your time
 25 living in the Krause site, does that accurately

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1 Mr. Schwartzburg. Do you see where Tab 30 is there?
 2 A Yeah.
 3 Q All right. Now, can you identify this for the
 4 record?
 5 A That's looking from about our house northeast toward
 6 the Krause property.
 7 Q And just so we're clear, when you say northeast you
 8 mean from the Hanson property looking northeast, is
 9 that correct?
 10 A That's correct, yes.
 11 Q Now, I'd like to direct your attention for a moment
 12 up here so everyone out there can see what we're
 13 doing. There are -- there appears to be, in the
 14 eastern quadrant in the middle of the picture, some
 15 white items. Do you know what those are?
 16 A That's our dock.
 17 Q And dock pulled up onto the pier?
 18 A Pier, pier.
 19 Q Pier pulled up onto the --
 20 A Right.
 21 Q Was that because -- I notice the trees are bare of
 22 leaves, etcetera. What time of year was that, do you
 23 know?
 24 A I think that's probably early spring. The pier
 25 hadn't been put in yet.

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1 depict how the land to the northeast of your property
 2 looked in a typical spring?
 3 A Yes, but as a matter of -- I can -- if you look at
 4 the far end of the property on the left-hand side of
 5 that picture, there's a rolling log. You can see it.
 6 Q Would you please get up so everyone can see what
 7 you're referring to, sir?
 8 A Right there. We used that when we were kids. We
 9 pushed it in the water and would roll on it, stand up
 10 and try to -- I don't know what it's called -- like a
 11 log roller.
 12 Q Did you ever row on it?
 13 A What we had to do was tie that down so it wouldn't
 14 float away.
 15 Q And did you ever row on it in the Krause property?
 16 Did you ever use an oar or anything?
 17 A No.
 18 Q Now, did the water invade the Krause property as it's
 19 depicted here on a regular basis?
 20 A Yes.
 21 Q Every year would you say?
 22 A Every year.
 23 MR. GLEISNER: I would -- so it doesn't get
 24 away from us, I'll move the admission of
 25 Exhibit 30 and Exhibit 33 at this time, Your

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1 Honor.
 2 ALJ BOLDT: I'm sorry, did Exhibit 30 have
 3 a date?
 4 MR. GLEISNER: It does not have a date. He
 5 approximated it as the spring in the 50's,
 6 Judge.
 7 THE WITNESS: I can only -- I can tell by
 8 our pier. We have a -- that was our first pier.
 9 ALJ BOLDT: Do you think that's earlier
 10 than 33 or about the same time or --
 11 THE WITNESS: I really can't tell.
 12 ALJ BOLDT: Okay.
 13 THE WITNESS: Probably about the same time.
 14 ALJ BOLDT: Okay.
 15 Q Now, we --
 16 MR. GLEISNER: Oh, you scared me.
 17 MR. MEYER: I'm sorry, I'm sorry.
 18 MS. KAVANAUGH: Can you see when 33 was
 19 taken?
 20 MS. CORRELL: 1959.
 21 Q You were making a comment a moment ago about the pier
 22 that appears in that picture, is that correct?
 23 A Yes.
 24 Q What comment were you making?
 25 A That it was our first pier.

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1 time that you lived there, is that the way the view
 2 would have looked north from your house toward the
 3 Krause property in a typical spring?
 4 A Yes.
 5 Q And having reference to the water that is standing
 6 there, was that something that you saw on a regular
 7 basis?
 8 A Yes.
 9 Q And when would you see that normally?
 10 A In spring and some summer rainfalls.
 11 Q Did you ever make an observation as to whether the
 12 lake moved inland from North Lake into the Krause
 13 property?
 14 A Well, the water usually came from the swamp onto our
 15 land.
 16 Q And do you have in mind the grove of trees that we
 17 have been talking about?
 18 A I do.
 19 Q You know where those exist, is that correct?
 20 A Well, they weren't there when I was there.
 21 Q I understand that sir, but you're aware of the grove
 22 of trees that --
 23 A I am.
 24 Q -- now exists north of your property?
 25 A Uh-huh.

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1 Q And when did you replace that pier? Do you remember
 2 the year?
 3 A Probably 1970, I'm guessing.
 4 Q Okay. So that picture was at least dated prior to
 5 1970?
 6 A Yes.
 7 MR. GLEISNER: I'm going to -- I did move
 8 the admission of Exhibit 30 and 33, Judge.
 9 ALJ BOLDT: Any objections there?
 10 MS. CORRELL: None
 11 ALJ BOLDT: 30 and 33 are received.
 12 MR. MEYER: Could we go back to the last
 13 one?
 14 MR. GLEISNER: Certainly we can. There you
 15 go, sir.
 16 MR. MEYER: Thank you.
 17 MR. GLEISNER: You're welcome.
 18 Q I'm not going to show you what has been marked as
 19 Exhibit 31 and ask if you can identify that, please?
 20 A That is looking from our property directly to the
 21 Krause property.
 22 Q And do you have any opinion as to what date that
 23 would be?
 24 A I would -- possibly the same time.
 25 Q Now, let me do it this way. During the period of

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1 Q When you were growing up --
 2 MR. GLEISNER: Strike that.
 3 Q You saw the videos that were played in the hearing
 4 yesterday, did you not?
 5 A I did.
 6 Q You saw particularly Exhibit 17F which was a -- which
 7 portrayed your niece rowing in water in the grove of
 8 trees --
 9 A Yes.
 10 Q -- correct?
 11 A Yes.
 12 Q How often would you see water that deep in the grove
 13 of trees?
 14 A Some summers it would stay all summer long because we
 15 couldn't cut the grass there. In fact, there was all
 16 cattails when I was growing up.
 17 Q Did you ever see water deeper than that in the grove
 18 of trees?
 19 A Yes.
 20 Q Did you ever go into that area?
 21 A All the time.
 22 Q And why would you go into that area?
 23 A To play.
 24 Q Oh, okay. What did you play in the grove of trees?
 25 A Catching frogs, bullheads.

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1 Q Were there a lot of frogs and bullheads in there?
 2 A It was loaded, yes.
 3 Q It was loaded?
 4 A Uh-huh.
 5 ALJ BOLDT: Is that yes, sir?
 6 THE WITNESS: Yes, yes, sir.
 7 ALJ BOLDT: Thank you.
 8 Q And did you have occasion to wade into the water
 9 then?
 10 A Yes, I did.
 11 Q And how deep was the water?
 12 A It was probably knee deep.
 13 Q And this was on a regular, annual basis?
 14 A Yes.
 15 MS. KAVANAUGH: And just clarification,
 16 could he state it sort of in inches or something
 17 since he was a kid, you know.
 18 MR. GLEISNER: Good point, Counsel.
 19 Q Could you state it in terms of inches?
 20 A How about 24 inches.
 21 Q Okay. You were a big boy?
 22 A I was a big kid.
 23 Q All right.
 24 MR. GLEISNER: Just a minute.
 25 Q Now, I'm going to show you another photograph.

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1 A Fifty-six.
 2 Q Fifty-six. So then we can extrapolate from that it'd
 3 probably be in the mid-50's?
 4 A Yeah.
 5 Q Thank you.
 6 A 1960.
 7 Q 1960? Okay.
 8 MR. GLEISNER: Move the admission of
 9 Exhibit 32, Your Honor.
 10 ALJ BOLDT: Any objection?
 11 MS. CORRELL: No objection.
 12 ALJ BOLDT: 32 is received.
 13 MR. GLEISNER: No further questions, Your
 14 Honor.
 15 ALJ BOLDT: Thank you, Counsel. Mr. Gallo?
 16 MR. GALLO: No questions.
 17 ALJ BOLDT: Ms. Correll?
 18 CROSS-EXAMINATION
 19 BY MS. CORRELL:
 20 Q Is your sister still so charming?
 21 THE WITNESS: What did she say?
 22 MR. GLEISNER: Is your sister still so
 23 charming?
 24 A She's bigger.
 25 MS. KAVANAUGH: You're not answering the

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1 MR. GLEISNER: Move the admission of
 2 Exhibit 31, by the way.
 3 ALJ BOLDT: Any objection?
 4 MS. CORRELL: No objection.
 5 ALJ BOLDT: 31 is received.
 6 MR. GLEISNER: Thank you, Your Honor.
 7 Q I'm not going to show you what has been marked as
 8 Exhibit 32 and ask if you can identify that,
 9 Mr. Schwartzburg?
 10 A That's my sister Margo and it's from the corner of
 11 our house looking out toward the lake and toward
 12 the -- it's sort of northwest toward the -- or
 13 northeast toward the Krause property.
 14 Q Okay. And I see that the water from North Lake has
 15 invaded fairly far into your land, is that correct?
 16 A That's correct.
 17 Q And is that white structure in the far east,
 18 northeast, quadrant of that photograph the pier that
 19 we were looking at before?
 20 A That's correct.
 21 Q How old would you say your sister was in that
 22 picture?
 23 A Looks to be about five.
 24 Q Meaning no disrespect to your sister, how old is she
 25 now?

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1 question.
 2 Q That was evasive.
 3 MS. KAVANAUGH: Yes or no?
 4 ALJ BOLDT: Her daughter is, right?
 5 MR. GLEISNER: Yes, her daughter is. We've
 6 seen her daughter, she's charming.
 7 Q So we can only conclude?
 8 MS. KAVANAUGH: We'll stipulate then
 9 Ms. Hanson is charming.
 10 MR. GLEISNER: Thank you, Counsel. We
 11 will --
 12 MR. MEYER: Can I ask --
 13 MR. GLEISNER: Oh, sure, I'm sorry. I'm
 14 sorry, Mr. Meyer.
 15 ALJ BOLDT: Are you finished?
 16 MS. CORRELL: Yes.
 17 ALJ BOLDT: Okay. Mr. Meyer?
 18 MR. MEYER: Very briefly.
 19 CROSS-EXAMINATION
 20 BY MR. MEYER:
 21 Q I was trying to get your testimony and then one of
 22 the questions that Mr. Gleisner asked. At one time I
 23 heard that you referred to the water came from the
 24 swamp. Do you recall saying that?
 25 A Yes, I do.

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1 Q Okay. Can you reference where that is for us? Where
 2 is the swamp?
 3 A The swamp?
 4 Q Yeah.
 5 A It was behind our house.
 6 MS. KAVANAUGH: But east, west, north,
 7 south?
 8 Q Yeah, I'm trying to get oriented --
 9 A It would be directly west and a little bit northwest.
 10 Q Okay. And a later question, I think it was in regard
 11 to Paragraph 31, but I may have missed it, Attorney
 12 Gleisner asked the water coming from the lake was
 13 shown there on your property. Did the water come
 14 both ways?
 15 A It did.
 16 Q Okay. Were you here -- were you present when
 17 Dr. O'Reilly testified?
 18 A Yes, I was.
 19 Q About the Krause property and the water there?
 20 A The Krause property, you mean?
 21 Q Krause, yes.
 22 A Say it one more time?
 23 Q And did you hear his testimony about the presence of
 24 water on the Krause property?
 25 A Yes.

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1 yes, Judge.
 2 MR. MEYER: We're full of jokes.
 3 MR. GLEISNER: So stipulated, Judge.
 4 ALJ BOLDT: All right. Any other
 5 questions? Okay. Thank you very much.
 6 MR. GLEISNER: Thank you, Mr. Schwartzburg.
 7 Thank you, Judge. Judge, we will defer resting
 8 for the time being for the rest of the afternoon
 9 and pass the baton to Mr. Gallo with your
 10 permission.
 11 ALJ BOLDT: Okay. Mr. Gallo?
 12 MR. GALLO: Can we take a quick bathroom
 13 break?
 14 ALJ BOLDT: Sure. Take a five-minute break
 15 and continue on.
 16 (Recess Taken)
 17 ALJ BOLDT: Would you raise your right
 18 hand, please. Do you swear to tell the truth,
 19 the whole truth and nothing but the truth, so
 20 help you God?
 21 MR. GIESE: I do.
 22 MR. GALLO: Okay. Your Honor, we have
 23 pulled out Exhibit 128 which is a report
 24 prepared by the witness, Paul Giese, and a roll
 25 of drawings which are the same as Exhibit 3-001

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1 Q And it's very similar to the water on your property,
 2 right, those times of year? When they had water, you
 3 had water?
 4 A Exactly, but they had a lot more.
 5 Q Okay. You heard him talk about what was a navigable
 6 body of water?
 7 A I did.
 8 Q Do you consider your lawns navigable bodies of water?
 9 A Sometimes we brought our boats up and tied them to
 10 the front door.
 11 Q Were they legally navigable bodies of water?
 12 A Sir, I have no idea. I just have no idea. That's
 13 your business.
 14 Q Okay. You've never applied for permits from the DNR
 15 to do anything on your front lawn, have you?
 16 A Not that I'm aware of.
 17 Q Okay.
 18 MR. MEYER: Thank you.
 19 MR. GLEISNER: Are you suggesting he's
 20 going to have to in the future?
 21 MR. MEYER: I'm warning him.
 22 ALJ BOLDT: And that's a joke too?
 23 MR. GLEISNER: That is a joke.
 24 MR. MEYER: That was a joke.
 25 MR. GLEISNER: Of course that is a joke

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1 which I believe are --
 2 MR. GLEISNER: The official drawings of the
 3 official plans of the DNR.
 4 MR. GALLO: And they've been accepted.
 5 MR. GLEISNER: They have been accepted.
 6 MS. KAVANAUGH: And what's the exhibit
 7 number, Don?
 8 MR. GALLO: The drawings -- I'm sorry, the
 9 report is --
 10 MS. KAVANAUGH: 128.
 11 MR. GALLO: -- 128 and the drawings are
 12 3-001 through 3-031. And then the other exhibit
 13 that we pulled out is RRNA7, the GESTRA report.
 14 MS. KAVANAUGH: Okay. Now, is there
 15 another number on it because that sounds like
 16 that was the deposition number or does it just
 17 say Exhibit 7?
 18 MS. CORRELL: No, it is Exhibit 7.
 19 MS. KAVANAUGH: Okay, okay.
 20 MR. GALLO: Okay. And we have on the
 21 screen Exhibit 2-007 for our point of reference.
 22 ALJ BOLDT: Okay. Thank you.
 23 MS. CORRELL: I do think then my colleague
 24 had a point. It's 7A. Is there a regular old 7
 25 too or --

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1 MR. GLEISNER: Yes, it follows 7A, Counsel.
 2 MS. CORRELL: Okay.
 3 MS. KAVANAUGH: 7A? Okay.
 4 MS. CORRELL: Yeah. I don't know if that
 5 makes a difference.
 6 MR. GLEISNER: I apologize, Don. She's
 7 asking about my exhibit. I'm just explaining.
 8 7A is the first part of the GESTRA report and
 9 then the next two --
 10 MS. CORRELL: Right, I'm just clarifying.
 11 MR. GLEISNER: Oh, sorry.
 12 MS. CORRELL: Yep.
 13 DIRECT EXAMINATION
 14 BY MR. GALLO:
 15 Q Paul, is it okay -- or, Mr. Giese, is it okay if I
 16 call you Paul?
 17 A Yes.
 18 Q Paul, can you --
 19 ALJ BOLDT: Can we get his name and
 20 professional affiliation and so forth?
 21 MR. GALLO: I'm sorry.
 22 A Sure. My name is Paul Giese, that's G-I-E-S-E, and
 23 I'm with Giles (phonetic) Engineering Associates,
 24 Incorporated.
 25 Q Work address?

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1 Q Have you worked on similar projects before?
 2 A Yes, I have, throughout my career with Giles and
 3 Midwest Engineering, I have.
 4 Q When I indicate similar projects, road construction
 5 projects of this kind?
 6 A Yes.
 7 Q And are you familiar with the geological conditions
 8 at this site and do you have experience with --
 9 A Yes, I'm familiar with them from my review of the
 10 GESTRA report, but then also am familiar with the
 11 type of soils that are indicated as being there from
 12 various other sites that I've worked on throughout
 13 southeastern Wisconsin.
 14 Q So approximately how many sites have you worked on
 15 that are, as we classify, similar in geological
 16 terms?
 17 A Sure. I would say probably throughout my career at
 18 least ten that I've either been directly involved in
 19 or indirectly involved in as a reviewer or as an
 20 overseer of engineering staff.
 21 Q And when we talk about working on these types of
 22 projects, can you be more specific with regard to
 23 design, supervision or observation during
 24 construction?
 25 A As to what my role was?

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1 A The address is N8 W22350 Johnson Drive, here in
 2 Waukesha.
 3 Q Can you explain for us your post-high school
 4 education?
 5 A Sure. I graduated from the University of Minnesota
 6 in Minneapolis and have a geological engineering
 7 degree with an emphasis on geomechanics and
 8 geotechnical engineering. Prior -- or after I
 9 graduated, I worked for -- started with Giles
 10 Engineering in 1984 and worked there until 1999. And
 11 then I moved to another firm, Midwest Engineering
 12 Services, here in Waukesha until 2006 when I went
 13 back to Giles in 2006 until currently.
 14 Q And you're a licensed engineer?
 15 A Yes, I'm a registered PE in the State of Wisconsin.
 16 Q And your area of specialization with regard to civil
 17 engineering is geotechnical?
 18 A Geotechnical engineering, that's correct.
 19 Q You're being asked to testify today as an expert in
 20 the field of geotechnical engineering and
 21 specifically regarding the geotechnical conditions in
 22 the area of the access road, the north wetland area
 23 and the south wetland areas which are the enter of
 24 that exhibit?
 25 A Yes.

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1 Q Yes.
 2 A Yes. Yeah, both of -- early in my career it was more
 3 of design, where I would evaluate the soil conditions
 4 based on the test borings that we did and then work
 5 on design of the roadway, and then a lot of that time
 6 I would actually be in the field observing the proof
 7 rolling or the removal and replacement of unsuitable
 8 soils for the purpose of developing a subgrade that
 9 would support a roadway sufficiently or properly.
 10 Q Are you familiar with geotechnical test borings such
 11 as we have --
 12 A Yes, I sure am.
 13 Q -- on this project?
 14 A Yes.
 15 Q And are they important to every project? Are
 16 there --
 17 A Absolutely. They're crucial to every project that we
 18 work on in the sense that that's what we are basing
 19 our information on.
 20 Q Okay. Have you worked on geotechnical failures with
 21 regard to construction of roadways or parking lots or
 22 building sites?
 23 A Yes, I have.
 24 Q And they are -- I guess I'd like to be more specific.
 25 Failures with regard to the types of soils that we

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1 have here?
 2 A Yes, I am. I have been.
 3 Q And can you define for us or point to the
 4 GESTRA -- somewhere in the GESTRA report to better
 5 describe the types of soils that we're referring to?
 6 A Sure. Now, they've got two or separate, I guess --
 7 MS. CORRELL: Can you just wait a sec so we
 8 can turn to the GESTRA report?
 9 MR. GALLO: Sure.
 10 MR. HARBECK: And, Don, this is Exhibit 7?
 11 MR. GALLO: This is Exhibit 7, thank you.
 12 MR. GLEISNER: It's 7, I believe. Okay.
 13 A On Page 7, at the bottom of Page 7-003, and
 14 continuing into Page 7-004, they refer to
 15 petrological information and what that is, is GESTRA
 16 did a review of soil survey maps for the purpose of
 17 defining or establishing what soil types were present
 18 in this area, in the area of the proposed roadway and
 19 then they compared that. The Wisconsin DOT has a
 20 publication where they -- based on that soil texture
 21 and the soil type, you can get the typical soil
 22 design parameters for that soil.
 23 Q Are you -- you're referring to Page 7-004 and the
 24 bottom of the two tables on that page?
 25 A That's correct, yes.

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1 where it turns, are you talking about the
 2 proposed access road for the site?
 3 THE WITNESS: The proposed access road,
 4 yes.
 5 MR. HARBECK: Okay.
 6 MS. KAVANAUGH: So not where the existing
 7 one turns, but where (inaudible), is
 8 that -- because there's an existing and a
 9 proposed.
 10 THE WITNESS: Well, yeah, I guess it's -- I
 11 guess it's whatever the stationing in the GESTRA
 12 report is referring to.
 13 MS. KAVANAUGH: Okay. Thank you.
 14 THE WITNESS: I don't know if that's the
 15 existing or the proposed.
 16 Q At that stage are the -- the stationing or the
 17 proposed road is on top of the existing road, I
 18 believe, is that correct?
 19 A Yes, yes, for the most part.
 20 MR. GALLO: So they're one and the same at
 21 that stage.
 22 MS. KAVANAUGH: Okay.
 23 Q I'm looking at not marking that figure, but your --
 24 A Oh, right here.
 25 Q It'd be Figure -- or Exhibit 3. I can give you the

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1 Q And at the top of that page, the upper table, can you
 2 explain what we have here in terms of tying these
 3 soil types to the stationing --
 4 A Yes.
 5 Q -- of the access road?
 6 A Yeah, the -- I mean the top -- the top soil texture
 7 or the mapping unit is the fox silt loam. Those are
 8 the soils that were encountered in the -- from the
 9 entrance at Redland Drive up to the point where the
 10 proposed roadway turned east.
 11 Q I don't mean to interrupt you, but can you point that
 12 out on the --
 13 A Oh, sure. Yeah, yeah, that top -- again, that
 14 topsoil description, basically what they're saying
 15 is, is that it's present from Station 10.00 that, I
 16 believe, begins at Redland Road up to just to where
 17 it turns to go east up to Station 24 plus 75.
 18 Q I'm sorry. I'd like to have you mark that --
 19 A Oh, sure.
 20 Q -- on your paper copy.
 21 A Okay.
 22 MR. HARBECK: And, Don, just for
 23 clarification --
 24 A Does it matter what color or --
 25 MR. HARBECK: -- when you're talking about

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1 exact --
 2 MR. GLEISNER: Oh, 18, I believe.
 3 Q Yeah, 18, 318 -- 3-018. So if you could pull that
 4 drawing.
 5 MR. GLEISNER: Do you want me to pull it up
 6 also?
 7 MR. GALLO: No, that's okay.
 8 MS. KAVANAUGH: So it's Exhibit 3-018?
 9 MR. GALLO: Yes.
 10 MS. KAVANAUGH: Okay.
 11 MR. GALLO: And I'm just having him mark
 12 the area of the access road as it relates to the
 13 soil types that are in the GESTRA report.
 14 MS. KAVANAUGH: Okay. So you're marking
 15 where the (inaudible) is?
 16 MR. GALLO: Correct.
 17 A Oh, I see. Okay. Here we go. All right.
 18 Q You can --
 19 MS. CORRELL: Can I take a peek?
 20 MR. GALLO: Sure.
 21 Q If you want to use a magic marker.
 22 A Any color or --
 23 Q Yeah, any color is fine -- maybe green or --
 24 A Sure, sure.
 25 Q And just mark the stationing that you're looking at

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1 and mark it as fox silt loam.
 2 A Okay.
 3 Q And then maybe put your initials next to that?
 4 A Sure.
 5 MS. CORRELL: Oh, I'm sorry, you haven't
 6 marked it yet?
 7 THE WITNESS: Oh, no.
 8 A Yeah, what they --
 9 MS. CORRELL: Well, I know what you're
 10 marking.
 11 THE WITNESS: Yes.
 12 Q Okay. What they identified is fox silt loam from
 13 Station 10 plus 00 to 20 plus 00 so that's from, you
 14 know, 10 plus 00 up to 20 plus 00 where I just turns
 15 to go east towards North Lake. So that is the fox
 16 silt loam soils. Now, from -- now, they've also
 17 identified that east of Station 24 plus 75 --
 18 ALJ BOLDT: We're still on the fox silt
 19 loam?
 20 THE WITNESS: Yes.
 21 ALJ BOLDT: Okay.
 22 THE WITNESS: Yes.
 23 ALJ BOLDT: So are you going to change
 24 colors then?
 25 THE WITNESS: Yeah, for the next one, yeah.

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1 that circle?
 2 THE WITNESS: Yeah, that's 21, just 30 feet
 3 past that.
 4 MS. CORRELL: Okay.
 5 Q And then with another color, the last soil
 6 classification?
 7 A Yes, and then that -- the Roland muck (phonetic) is
 8 from 21 plus 30 to 24 plus 75.
 9 MS. CORRELL: So basically the rest of the
 10 access road?
 11 THE WITNESS: That's correct, right.
 12 Q Back to the report that you prepared, Exhibit 128,
 13 did you and Jeff Miller (phonetic) prepare this
 14 report?
 15 A Yes, I --
 16 MS. KAVANAUGH: Don, can you talk a little
 17 louder too?
 18 MR. GALLO: Sure, sure.
 19 A Yes, I was the main author of the report based on the
 20 review of the documents and then Jeff Miller, one of
 21 my colleagues, reviewed the report for me.
 22 Q And who is your client?
 23 A North Lake Management District is our client.
 24 Q Okay. What technical documents did you review
 25 relating to the geotechnical engineering of the DNR's

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1 ALJ BOLDT: Okay.
 2 A So east of 24 plus 75 --
 3 MR. GLEISNER: Wait, wait, I think the
 4 Judge was indicating you should use a different
 5 color for the next section.
 6 ALJ BOLDT: No, no, not if it's the same
 7 soil type.
 8 MR. GLEISNER: Okay, Judge.
 9 ALJ BOLDT: That's what he's doing. That's
 10 what I was clarifying.
 11 A Yeah, so it's about 24 plus 75, so east of that is
 12 the fox silt loam as well.
 13 MS. CORRELL: So you're looking right in
 14 here, is that correct?
 15 THE WITNESS: Yes, that's correct, right.
 16 All the way to the lake, I guess, east -- east
 17 all the way to the end of the -- sounds like
 18 right up to the edge of the lake.
 19 MS. CORRELL: Okay.
 20 Q Paul, with another color then can you mark the
 21 Houghton muck section of the access road area?
 22 A All right. The Houghton muck they've identified from
 23 Station 20 plus 00 to 21 plus 30, so that is about
 24 130 foot.
 25 MS. CORRELL: Your second line is inside

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1 proposed project?
 2 A Sure. The two documents that I reviewed, number one,
 3 was the GESTRA report that we've referred to, and
 4 then the second was a plan set prepared by Kapur and
 5 Associates.
 6 Q And that plan set was dated December 22nd, 2010?
 7 A Yes.
 8 MR. HARBECK: Could we just give those
 9 exhibit numbers so we have that?
 10 MR. GALLO: Okay. The GESTRA report is
 11 Exhibit RRNA7 and the Kapur design drawings are
 12 Exhibit 3.
 13 MR. GLEISNER: Just to clarify, Your Honor,
 14 it is the court exhibit 7-007. Strike that.
 15 MR. GALLO: And Exhibit 3 is 001 through
 16 031.
 17 Q Paul, did you go out to the DNR project site and
 18 inspect the site?
 19 A Yes, I did, on September 2nd of this year.
 20 Q Okay. Did you do any testing on the site?
 21 A No.
 22 Q So it was strictly a walk-through?
 23 A Yeah, a walk-through and just visually observing what
 24 was there.
 25 Q And you just observed soils?

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1 A Yes.
 2 Q And soil conditions?
 3 A That's correct yeah, from the surficial soil.
 4 Q Your report starts out with a brief summary of the
 5 site location and description and then -- and
 6 proceeds to a section entitled Plan Review?
 7 A Yes.
 8 Q If you could --
 9 A Sure.
 10 Q If you could turn to Page 2. That's the section
 11 entitled Plan Review.
 12 A Right.
 13 Q And in this portion of --
 14 MS. CORRELL: Don, could you just give me a
 15 minute?
 16 MR. GALLO: Sure.
 17 MS. CORRELL: I have trouble with these
 18 binders with such a large amount of documents.
 19 MR. GALLO: We're on Page 2.
 20 MS. CORRELL: You're on Page 2 of the Giles
 21 report?
 22 MR. GALLO: Of the Giles report.
 23 MS. CORRELL: Thank you.
 24 Q And this is a summary -- I'm just going to read from
 25 your report.

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1 pavement, a one-foot wide gravel shoulder on either
 2 side of that pavement and then a planned slope, curve
 3 or retaining wall, depending upon where along the
 4 alignment that the roadway was, you know, to the base
 5 of that slope, just to get the estimated width of
 6 the -- or the planned width, I should say, of the
 7 proposed roadway.
 8 Q To save some time, let's narrow up our focus to the
 9 portion of the access roadway that is to be
 10 constructed over the Houghton and Roland muck.
 11 A Sure.
 12 Q So we're at approximately Station 20 plus 00 to 24
 13 plus 75?
 14 A Right, right.
 15 Q Can you describe the side slopes and the details of
 16 that section of roadway?
 17 A Sure. What is planned, based on a review of the plan
 18 set, basically between those stations, about
 19 Station -- basically from -- yeah, between those
 20 stations where the Houghton muck and the Roland muck
 21 is located, on either side of that proposed roadway
 22 there's going to be a three-to-one slope extending
 23 down from the edge of the gravel, the outside edge on
 24 either side of that roadway, extending down, you
 25 know, at a three-to-one slope. Now, looking at the

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1 A Okay.
 2 Q It says, "Assembly of relevant items from the view of
 3 the North Lake Access Site Plan prepared by Kapur and
 4 Associates." And I'm assuming that you're referring
 5 to Exhibit 3 -- the drawings?
 6 A Yes, I am.
 7 Q Kapur drawings. The first two bullets are a
 8 description of the access road design, is that
 9 correct?
 10 A Yes, it is.
 11 Q Can you just briefly go through each of those
 12 bullets?
 13 A Sure. Yeah, what I wanted to do was just, you know,
 14 familiarize myself with the project so -- you know,
 15 and I did that by review of the plans that were
 16 provided. Number one, just basically went through
 17 and described that the width of the planned roadway,
 18 you know, that the width of the hot mix asphalt
 19 section of the roadway, the --
 20 Q I don't mean to interrupt you, but can you actually
 21 describe the width? It's like 22 feet?
 22 A Oh, sure. Yeah, determined what the planned roadway
 23 was, that, you know, that the -- in plan view it
 24 was -- or, I'm sorry, in cross-sectional view it was
 25 going to consist of a 22-foot wide hot mix asphalt

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1 plans that I think that's -- it's planned to extend
 2 out approximately five feet from the edge of this
 3 shoulder on either side of the roadway.
 4 Q And is that best described referring to Sheet C100?
 5 It would be Exhibit 3-002.
 6 MS. CORRELL: Don, what exhibit did you
 7 just say?
 8 MR. GALLO: 3-002. It's Plan Sheet C100.
 9 It should be at the beginning of the drawings.
 10 MS. CORRELL: Yeah.
 11 A And, yes, that is the plan sheet that refers to that.
 12 Q There's two typical sections. There's one at the top
 13 which is a typical finished section so that's -- am I
 14 correct that that is of the proposed roadway?
 15 A That's correct. That's my understanding.
 16 Q And then there's an existing typical section at the
 17 bottom of that sheet which is a typical drawing of
 18 the -- what's purported to be the --
 19 A Yes.
 20 Q -- existing driveway?
 21 A Yes.
 22 Q Okay. And in this plan sheet at the top is
 23 there -- can you explain the aggregate base?
 24 A Sure. What they're showing is that there's going to
 25 be a four-inch thick pavement, hot mix asphalt

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1 pavement, at the surface and that's going to be
 2 underlain by an eight-inch thick one-and-one-quarter
 3 inch aggregate base course material.
 4 Q And so that's the typical design section of the
 5 access road?
 6 A That's -- yes.
 7 Q Consisting of the base?
 8 A Yes, consisting of the surficial asphalt and the
 9 underlying base course.
 10 Q Okay. Let's go to bullet two on Page 2 of your
 11 report and this is a review of C100 and I think we
 12 just did that?
 13 A Yes.
 14 Q Okay. And let's go to bullet three and this is a
 15 series -- a review of a series of sheets?
 16 A Yes.
 17 MS. CORRELL: Exhibit what again?
 18 MS. KAVANAUGH: It's bullet three.
 19 MS. CORRELL: Oh.
 20 MR. GALLO: The Giles report.
 21 MS. CORRELL: We're back at the Giles
 22 report?
 23 MR. GALLO: Yeah.
 24 MS. CORRELL: Got it.
 25 MR. GALLO: And it's bullet three on

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1 for you, Judge?
 2 ALJ BOLDT: No, that's fine. I just want
 3 to make sure I can read the numbers.
 4 Q Can you -- you were pointing that out on which
 5 exhibit? It's 2 --
 6 A 2-007.
 7 Q Yeah, thank you. We're going to skip over the next
 8 bullet. It's the parking lot layout --
 9 A Yes.
 10 Q -- and we're going to look at the bottom bullet
 11 which is -- is that referencing the title sheet to
 12 the design set of plans?
 13 A Yes.
 14 Q This would be Exhibit 3-001. And you have a comment
 15 in your report. If you don't mind, just could you
 16 read that bullet?
 17 A Sure. That bullet -- it's the last bullet on Page 2.
 18 "Sheet TS101, a title sheet, contained a listing of
 19 general notes relative to the project. General Note
 20 Number 4 states that before paving, the engineer may
 21 require that various unstable areas be undercut and
 22 removed. Compacted six-inch lifts of breaker run
 23 stone shall be used to backfill these areas."
 24 Q In your opinion, your professional opinion to a
 25 reasonable degree of scientific certainty, is this a

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1 Page 2.
 2 MS. CORRELL: Uh-huh, thank you.
 3 A Yes, what that bullet item describes is just the
 4 review of the various plan sheets from the plan set
 5 relative to, you know, our understanding of the
 6 alignment that the proposed roadway is planned to
 7 follow. As we indicated, you know, generally it's
 8 going to follow the alignment of the existing gravel
 9 access road. The exception is between approximately
 10 Station 19 plus 67 and east to approximately
 11 Station 25. It's going to veer north into the
 12 navigable waterway.
 13 Q Can you just point out in that?
 14 A Sure. Yes, based on our review of that sheet, of
 15 those various sheets, approximately -- let's see,
 16 starting at Station 20 plus 83 which is about right
 17 at that point, the roadway -- it follows -- for the
 18 most part it follows the proposed -- or, I'm sorry,
 19 the existing access drive to that point, but then it
 20 turns to the northeast, I guess that is, up into the
 21 navigable waterway area and then it goes east until
 22 Station 25 plus 00 where it realigns with the
 23 existing access road.
 24 Q Okay.
 25 MR. GLEISNER: Would you like me to zoom in

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1 common process or procedure?
 2 A Yes, I would say that it is a common procedure for
 3 roadway construction evaluation of roadway subgrades.
 4 Q Okay. And you've seen this on a lot of projects?
 5 A Yes.
 6 Q Is this a procedure that normally is implemented on
 7 projects of a routine nature?
 8 A Yes.
 9 Q Like a, for example, a Home Depot parking lot or --
 10 A Yes.
 11 Q -- a private commercial development?
 12 A Yeah, commercial projects, yes.
 13 Q Okay. Let's go to Page 3.
 14 A Okay.
 15 Q And this page, what are you doing on this page or
 16 what are you trying to do?
 17 A On this page, just summarizing the various items from
 18 the GESTRA report that we were -- that we
 19 reviewed -- that I reviewed.
 20 Q Okay. Let's turn to the -- let's look at both the
 21 bullets in your report and then how they correlate to
 22 sections in the Giles report.
 23 A In the GESTRA.
 24 Q The first bullet, can you explain what you're
 25 describing there?

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1 A Sure. The first thing that we discuss there is the
2 fact that GESTRA did six test borings throughout the
3 proposed alignment of the access road and the parking
4 lot area. Four of those test borings were originally
5 drilled in October of 2007, extended to a depth of
6 ten feet below grade. All four of those borings were
7 located within the existing gravel access
8 road -- access drive. Then, approximately a year
9 later, test boring Number 4 was re-drilled and
10 extended, you know, an additional ten feet in depth
11 to a final depth of 20 feet and two additional
12 borings, B5 and B6, were performed further to the
13 east in the parking lot area.
14 Q Turning to the GESTRA report, Page 7-010, is this the
15 location of the six borings?
16 A Yes. Yes, it is.
17 Q We're focusing on the portion of the access road
18 that's in the Houghton and Roland muck. How many
19 borings are in that area?
20 A There's just -- there's one test boring. B4 is
21 performed almost right on the -- between the Houghton
22 muck and the Roland muck soil.
23 Q And on the figure that's behind you --
24 A Yes.
25 Q -- can you point out the B4 boring?

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1 UNIDENTIFIED SPEAKER: I'll do it when we
2 get to it.
3 MR. GALLO: Okay, good.
4 Q 143 is a blow-up of Design Sheet C116 with some
5 markings on it and we'll describe the origin of the
6 markings and who made those. Okay. Paul, turning
7 back to the Giles report, can you describe Boring 4?
8 That would be the third bullet on Page 3.
9 A Yes. Boring 4, what that is, there is a test boring
10 log in the GESTRA report and what that is, is a
11 description of the soils that were accounted in
12 that -- for at that test boring location.
13 Q Okay. So you're referring to the GESTRA report
14 test -- log of test borings before Exhibit
15 7-017 -- 7-017?
16 A Yes, that is correct.
17 Q Okay. Can you go over the critical aspects of the
18 information that's contained on this boring log?
19 A Sure, that --
20 MS. CORRELL: Can you wait until I can get
21 to that, please?
22 MR. GALLO: Sure.
23 THE WITNESS: Sure.
24 MS. CORRELL: Its page what of the GESTRA
25 report?

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1 A Sure. Yeah, test boring 4 was performed just within
2 the existing access drive and, again, the Houghton
3 muck and the Roland muck were, you know,
4 roughly -- so that was between or within the mapped
5 area of the muck soils.
6 MR. GLEISNER: Counsel, has that been
7 marked as an exhibit?
8 MR. GALLO: No, it hasn't. We -- let me
9 explain what that exhibit is.
10 MR. HARBECK: Why don't you just mark it
11 and then, you know --
12 MR. GLEISNER: Just mark it so the
13 record --
14 MR. HARBECK: Yeah, just so when he says
15 that I'm looking here, we'll know what he's
16 talking about.
17 MR. GALLO: Let's mark it --
18 ALJ BOLDT: Yeah, if you give us a number
19 we can mark it.
20 MR. GALLO: What's our last number? 143.
21 And we might as well mark the other sheet as
22 well.
23 MR. GLEISNER: What other sheet, Counsel?
24 MR. GALLO: Thank you, Tim. 143 and 144.
25 There's one behind that, Tim.

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1 MR. GALLO: 7-007.
2 MS. CORRELL: No, I know. I have 7-017 as
3 the exhibit, but my copy doesn't have and my
4 expert needs to be able to follow along.
5 MR. GALLO: Page 067 on the side.
6 MS. CORRELL: Okay.
7 MR. GALLO: At the top it says Log of Test
8 Boring B4.
9 MS. CORRELL: Okay. Good. Thanks.
10 Q So, Paul, can you describe the critical information
11 that's depicted on this boring log?
12 A Sure. What we look at is, number one, what the soil
13 description that was encountered in that boring.
14 What this particular log tells me is that there is
15 three feet of silty sand fill, silty sand with gravel
16 trace organic brown moist soils to a depth of three
17 feet. Underlying that material was a silty clay
18 layer approximately a half a foot thick underlain by
19 a silty sand layer with gravel. Under that, from a
20 depth of about four to five feet is a peat layer of
21 fibrous black very soft peat layer which is, in turn,
22 underlain by an organic silt layer, light brown, wet,
23 very soft. That extends to a depth of 12 feet which
24 is then underlain by silty clay soils that have trace
25 organic material to a depth of 16 feet and then silty

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1 clay that did not have the organic materials to a
2 depth of 20 feet.
3 Q Okay. I just want to question you a little bit about
4 these descriptions.
5 A Sure.
6 Q The -- Boring 4 is in the center of the existing
7 access road?
8 A Yes.
9 Q And the top three to four feet are fill material that
10 was the construction of the existing access road?
11 A Yes, that's my understanding is where that came from.
12 Q And then from a depth of four feet to end of
13 boring --
14 A Uh-huh.
15 Q -- that would -- would you consider that to be
16 natural soils?
17 A Yeah, based on the -- on this log, we would consider
18 that to be natural native undisturbed soils that were
19 placed there geologically.
20 Q I just want to ask you some questions regarding
21 standard practice or in your opinion what would be
22 adequate for designing a road or building a road
23 through this Houghton muck and Roland muck?
24 A Sure. I guess for this particular, you know, our
25 opinion is that there should have been test borings

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1 identification of the muck soils, the Houghton muck
2 and the Roland muck. Number two is to do those
3 borings within that alignment to evaluate so, number
4 one, so you can design the pavement and, number two,
5 design what needs to be done to prepare the site for
6 support of that proposed roadway.
7 Q Okay.
8 A The more subsurface information you have, the better
9 to perform that task.
10 Q My understanding was that Boring Number 4 was
11 originally drilled to one depth and then later
12 drilled to a depth of 20 feet for an end of boring,
13 is that correct?
14 A That's correct yes, based on review of that log.
15 Q Do you -- to a reasonable degree of scientific
16 certainty and in your professional opinion, do you
17 think that the boring is deep enough and do you have
18 enough information from this boring?
19 A Our standard is to extend a test boring
20 through -- it's still in very soft material at a
21 depth of 20 feet. What we typically do is extend the
22 test boring to a depth until you're in suitable
23 bearing material to allow you to evaluate all
24 possible methods of support of that roadway.
25 Q Okay. So is it your opinion that this boring is deep

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1 performed north of that existing access drive within
2 the proposed alignment of that -- of the new roadway.
3 Based on the approximate 500-foot length of that
4 segment of the roadway, I would say that we recommend
5 drilling at least three borings. Sometimes we go as
6 much as every 100 feet of a roadway like that just
7 to, you know, really confirm and verify the
8 conditions that are going to be encountered within
9 that area.
10 MR. GLEISNER: Counsel, to your -- was that
11 stated to a reasonable degree of professional
12 certainty?
13 MR. GALLO: I'm sorry.
14 Q All of these questions that are of a technical
15 nature, I would like you to answer them with regard
16 to your professional opinion to a reasonable degree
17 of scientific certainty.
18 A Okay.
19 Q Was that response consistent with your professional
20 opinion?
21 A Yes.
22 Q Why would you have five borings in this kind of
23 stretch? Is this a particularly complicated or
24 difficult section?
25 A Yes, just because of the -- number one, the

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1 enough or not deep enough?
2 A I would say it's my opinion that this is not deep
3 enough.
4 Q Okay. Back to the log, let's go from left to right.
5 You've described this -- the layers of soil and the
6 elevation and depth. WL, what is that?
7 A Sure. WL, what that does, it's the water level that
8 they encountered. If you go down that little -- or
9 down at the bottom of the log where it says water
10 level measurements, they encountered groundwater at a
11 depth of three feet zero inches during the drilling
12 operations and then at several other depths at the
13 completion of drilling and then approximately 15
14 minutes after completion of the drilling. What that
15 does is it just gives us an indication as to where
16 the groundwater table was at that time on that date
17 that it was drilled.
18 Q Okay. With regard to water level and on the lower
19 left-hand side it says the date drilled, 10-3-2007
20 and September 16th, 2008. With regard to the water
21 table or water levels, does that complicate the
22 construction process or the design given these types
23 of soils?
24 A Yes. In my opinion yes, it does.
25 Q Does it -- is it a simple complication or is it

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1 something that can be easily addressed from an
 2 engineering standpoint?
 3 A In this particular case it's my opinion that it's
 4 complicated based on the proposed roadway and the
 5 proposed cross-section.
 6 Q And are there -- as we proceed from left to right,
 7 the next column, there are white and black blocks
 8 throughout the depth.
 9 A Right.
 10 Q And can you explain what these white or black blocks
 11 represent?
 12 A Yeah, what that is identifying is with the black
 13 blocks, but then in the next column over, they
 14 actually collected six samples from this test boring
 15 to a depth of ten feet. They got a one-and-a-half
 16 foot sample every two-and-a-half feet and then at ten
 17 feet they got a -- they went down five additional
 18 feet and sampled and then from there went down to 20
 19 feet and sampled at eighteen-and-a-half to 20 feet.
 20 Q So during the drilling process they were using a
 21 sampling device --
 22 A That's correct.
 23 Q -- to collect --
 24 A Right. Yeah, what this particular -- they were using
 25 a CME 45 drill rig. It identifies down in the

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1 inches.
 2 Q Okay. And the next column, it says SPT blows?
 3 A Yes.
 4 Q Can you explain what's going on here?
 5 A Yes.
 6 Q Is that a type of a test?
 7 A Yeah, that's a test that we use -- our drillers or
 8 our drilling machinery use. It stands for standard
 9 penetration test and what that is used is, again, you
 10 drive the sampling spoon a depth of 18 inches and
 11 what you do is you drop a 140-pound hammer 30 inches
 12 and you count the number of blows that it takes to
 13 drive that sampler every six inches. So, for
 14 example, that first sample, the first six inches it
 15 took six blows of that 140-pound hammer to drive the
 16 sampler six inches. Then it took two blows to go the
 17 second six inches and one blow to go the last six
 18 inches.
 19 Q What do you gather from that?
 20 A What you gather from that then is the -- you
 21 determine the end value which is the next column
 22 over. For that particular Sample Number 1 then, the
 23 end value was three. What that does is it gives us
 24 an indication of the in-place density or the in-place
 25 strength of the soil.

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1 drilling information, down in the lower left-hand
 2 corner of that log.
 3 Q And the next column is Sample Numbers 1 through 6?
 4 A Right, and that identifies that they got six soil
 5 samples from that test boring.
 6 Q Okay. And what's the SB?
 7 A The SB, I believe that refers to the split spoon.
 8 I'd have to look to see what that exactly -- they
 9 should have -- in the back of the report, I think,
 10 they've got a legend that --
 11 Q A table?
 12 A Yeah, that identifies that.
 13 MR. GLEISNER: Counsel, for clarification,
 14 we're at 7-019 now?
 15 MR. GALLO: It's 7-017.
 16 MR. GLEISNER: Thank you very much.
 17 Q The next column, it's REC?
 18 A Yes.
 19 Q And what does that stand for?
 20 A What that does is it identifies how much sample is
 21 recovered. The split spoon sampler that's driven at
 22 those sampling intervals, is driven a depth of 18
 23 inches so that identifies that at each sampling
 24 interval they obtained a full sampler full of soil
 25 except at Sample Number 3 where they got 17 out of 18

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1 Q Okay. And you calculate the number 3 based
 2 upon -- how do you do that?
 3 A Yes. That number 3 -- standard of the industry is
 4 you ignore that first -- the blow counts that it took
 5 to drive that spoon the first six inches, just
 6 because that accounts for if the sampling is
 7 disturbed by the auger or whatnot, but that end
 8 value, you add the number of blows it took to go the
 9 second six inches and the third six inches. In this
 10 particular case at Sample 1, the end value was three,
 11 two plus one -- gave us that three.
 12 Q Okay. And if you look at the samples going
 13 vertically down in depth --
 14 A Right.
 15 Q -- you see a series of blow counts?
 16 A Yes.
 17 Q 111, 101, 000, 111. What is this an indication of
 18 and what does this tell us?
 19 A What that, again, is an indication of, the end value
 20 gives us an idea of the in-place strength of those
 21 soils. That three up on top would tell us that that
 22 fill has a very loose relative density. It was
 23 probably just placed without much compactive effort.
 24 As you go down then it's 210. That indicates to us
 25 that those are very soft, very low strength,

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1 materials.
 2 Q When you have a zero, what is that telling us?
 3 A What that's telling us is when you go down to that
 4 depth, when you send that sampler down to that depth,
 5 it's sinking into that soil under its own weight.
 6 Q So it doesn't have to be hit with a hammer?
 7 A Right. We don't have to drive that hammer at all, it
 8 just sinks of its own weight because it's so low
 9 strength.
 10 Q And I found -- let's see. If you look at the other
 11 borings, Boring through 3 --
 12 A Yes.
 13 Q -- you can pick any one of those three borings out,
 14 but can you use those for comparison --
 15 A Yes.
 16 Q -- in terms of geotechnical strength?
 17 A Yes. Those -- looking at Boring 2, B2 --
 18 MS. KAVANAUGH: And what page are you on?
 19 THE WITNESS: 7-014.
 20 MS. KAVANAUGH: Thank you.
 21 A That was done over in that existing where the fox
 22 silt loam soils were and if you look at the end
 23 value, that one also had fill to a depth of three
 24 feet. That had an end value of 8 which means that
 25 there -- it's been compacted a little more relative

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1 identified between Stations 20 plus 00 and 21 plus 30
 2 and Station 21 plus 30 and 24 plus 75.
 3 Q What's the importance of the second table? When they
 4 look at -- when they put this table in, it shows the
 5 Houghton muck as HT, capital A --
 6 A Yes.
 7 Q -- and the Roland muck as RU and then it says none
 8 all the way across?
 9 A Right. What that is, is the -- that comes from the
 10 DOT geotechnical manual where, again, based on, you
 11 know, a whole slew of lab testing that the DOT has
 12 done, they've identified the pavement design
 13 parameters that you can use for those soils. HTA,
 14 the Houghton muck, and RU, the Roland muck, basically
 15 there are no strength because the DOT basically
 16 doesn't recognize them as a suitable material for
 17 support of a roadway.
 18 Q Okay. Let's go to the GESTRA design recommendations
 19 and you've summarized those in your report. Page 3.
 20 A Yes.
 21 Q One, two, three, four, five, six. The sixth bullet
 22 down says, "GESTRA concluded that due to the deep
 23 deposits of very soft clay and very loose silt". Can
 24 you summarize this paragraph?
 25 A Sure. What they're recognizing is that there

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1 to what was encountered in Test Boring 4. And then
 2 you get deeper and you see an end value of 42, 44,
 3 48. That means that that material was very dense
 4 in-place. It's a pretty well compacted material.
 5 Q And that's an indication of the bearing capacity of
 6 those soils?
 7 A Yes, you can use those values then to evaluate
 8 bearing capacity for support of a structure.
 9 Q Okay. Let's go back to your report.
 10 A Okay.
 11 Q I'm on, again, on Page 3. I'm looking at Bullet 1,
 12 2, 3, 4, 5. It starts out, "The GESTRA report
 13 discussed petiological information"?
 14 A Yes.
 15 Q Can you explain what this paragraph is about?
 16 A Sure. What that is, that's referring to that table,
 17 again, on the second page of the GESTRA report.
 18 Q Let's go to that table.
 19 A Okay.
 20 Q On the GESTRA report we're at Exhibit 7-004. Can you
 21 explain --
 22 A Right. And, again, what that does is it just refers
 23 to the fact that they -- on the maps that were
 24 reviewed, the USDA NRSC web soil survey maps that
 25 they reviewed, again, those muck soils were

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1 are -- in that Test Boring 4 they did encounter those
 2 deep deposits of very soft clay and very loose silt
 3 and recognizing that those aren't suitable materials
 4 for support of a roadway, so what they recommended is
 5 just that the three-foot layer of fill that they
 6 identified in their test borings basically remain in
 7 place and that, you know, where that three-foot layer
 8 doesn't exist that it be placed such that there is a
 9 three-foot layer of the granular fill on top of that
 10 material. And then they also -- you know, they've
 11 indicated that in areas where there's very soft or
 12 very loose soil, that a separator fabric could be
 13 placed to separate the underlying organic soils from
 14 mixing with the fill that's being placed.
 15 Q Okay. You made a comment or you expressed an
 16 opinion, professional opinion, that the borings, if
 17 you were doing this work, should have been drilled to
 18 a depth of suitable strength materials, is that
 19 correct?
 20 A That's correct.
 21 Q On Page 3 of the GESTRA report, Exhibit 7-004, I
 22 think -- at the bottom of the page, can you explain
 23 this program of hand probes?
 24 A Sure. What they're identifying there is it sounds
 25 like what they did is they -- now, the location of

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1 these hand probes is not identified in this report,
 2 but it sounds like what they did was just
 3 manually -- they took a one-half inch diameter steel
 4 probe that had a point to it and pushed that into the
 5 ground. It says, "It was pushed up to nine feet
 6 below grade. However, nearly all attempts, it became
 7 clear that the probe was meeting either gravel, wood,
 8 roots or otherwise binding up on some obstruction.
 9 It was not terminating in sound bearing soil. After
 10 the borings were completed, it was clear that the
 11 probe program would not be able to reach sufficient
 12 depths to map the thickness of the soft soils which
 13 was over 20 feet in places. Therefore, the probe
 14 program was terminated."

15 Q So this -- in your opinion, this probe program was
 16 not successful and they abandoned it?

17 A That's correct, based on the description in the
 18 report.

19 MR. GLEISNER: To a reasonable degree of
 20 professional certainty?

21 THE WITNESS: Yes.

22 ALJ BOLDT: Sorry, and let's let Counsel do
 23 his direct.

24 MR. GALLO: Okay.

25 ALJ BOLDT: And I know we've had some of

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1 A Sure. What that has done -- a proof roll is a common
 2 test that's done on almost every roadway or parking
 3 lot, any pavement site that you're working on.
 4 Typically, what it consists of is a loaded dump truck
 5 is the most common method of these and you literally
 6 just go back and forth in a grid pattern typically
 7 over the area that's proposed to be paved and you're
 8 visually looking for areas that are pumping or areas
 9 that may be running, areas that will require some
 10 type of mitigation to correct them to support that
 11 pavement.

12 Q Okay. Let me see if I understand it. This kind of a
 13 test is conducted after the fill is placed for -- and
 14 during the construction of the road base?

15 A It can be performed either before placement of a fill
 16 and after. In this case they're recommending that it
 17 be placed after they fill the site.

18 Q If they were to do this test before they placed the
 19 fill on the virgin ground out in the area of the
 20 navigable waterway, assuming it's dry enough to do
 21 that --

22 A Right.

23 Q -- what's your opinion to -- what's your
 24 professional opinion to a reasonable degree of
 25 scientific certainty?

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1 these editorial comments, but --
 2 Q Paul, can you -- with regard to the last opinion --
 3 A Yes.
 4 Q -- with regard to the probe point program, did you
 5 express your opinion as a professional opinion to a
 6 reasonable degree of scientific certainty?
 7 A Yes, I did.

8 Q Thank you. In the GESTRA report there's a section on
 9 Page 4, Exhibit 005, 7-005, titled 3.0 Analysis and
 10 Recommendations and I want to move through this
 11 section to Section 3 -- on Page 5, Section 3-3.1, and
 12 I believe this is the geotechnical recommendation of
 13 the GESTRA authors with regard to the Houghton muck
 14 soils. It says, "East of Station 20 plus 00." Is
 15 that your understanding?

16 A Yes, that is my understanding.

17 Q Okay. And this section correlates to the bullet in
 18 your report where you discussed the recommendation of
 19 granular layer of three foot to one foot, depending
 20 upon whether or not you used the (inaudible)?

21 A Yes.

22 Q The test outlined in this section is at the bottom
 23 paragraph of Section 3.3-1. It says, "After
 24 placement to the subgrade a proof roll." Can you
 25 explain that proof roll test?

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1 A My opinion is that there will be extreme stability
 2 problems and extreme pavement structure construction
 3 problems.

4 Q Okay. On Section 3.4, Page 6 of the GESTRA report,
 5 there are additional comments. Have you addressed
 6 these additional comments within your Giles report?

7 A Yes, I have addressed some of them.

8 Q Can you highlight that for us?

9 A Sure. Yeah, the -- in going to Page 4 of the report
 10 that we prepared, one of the things that GESTRA had
 11 indicated is that there's a possible nuisance
 12 problems with adjacent houses just because of the
 13 poor soils that were encountered and it's our -- my
 14 and our professional opinion that that is very much a
 15 potential on this site just because of the soils that
 16 were encountered.

17 Q Can you elaborate on that? What kind of a nuisance
 18 problem will the neighbors have?

19 A Basically vibrations. I mean, you know, with the
 20 heavy equipment going by, those soils are going
 21 to -- humans can feel vibrations way before a
 22 vibration is at a level that could cause structural
 23 damage and, you know, with the heavy equipment that
 24 could be -- that would need to be on this site to
 25 prepare this roadway, and because of these soils and

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1 the low strength and the materials that they are, the
 2 adjacent neighbors could feel vibrations which, you
 3 know, they're a nuisance. People feel them and then
 4 think something is happening.
 5 Q Are there any other considerations in the additional
 6 comments section?
 7 A Yes. What the -- it was recommended that the
 8 contractor use sound construction practices in
 9 working on the soft soil areas and should consider
 10 the access limitations. They then had that east of
 11 Station 20 plus 00 in the area where the muck soils
 12 were encountered, it discusses the fact that
 13 regardless of what approach is used to prepare that
 14 pavement subgrade, neither approach will eliminate
 15 settlement and that they concluded, based on their
 16 evaluation, that raising the site two feet would
 17 result in settlement on the order of two to four
 18 inches.
 19 Q In your professional opinion, were they talking about
 20 construction of the access road or the existing
 21 driveway or in the area of impacts to the navigable
 22 waterway?
 23 A In my opinion, they were talking about construction
 24 over -- the proposed new alignment over the existing
 25 alignment and I don't believe that that estimate of

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1 and organic soils. And using basically the water
 2 contents that were reported for those materials, we
 3 took a weighted average of what those organic
 4 materials, what water content those present, and then
 5 there's various geotechnical publications that you
 6 can go to where you can estimate settlement
 7 characteristics of those soils based on what the
 8 existing -- the loads of the existing soils that are
 9 there when you add in the load of the new roadway and
 10 the new section of soil that's going to go over that
 11 material. And then we determined, on a preliminary
 12 basis, both primary settlement which is, you know,
 13 relatively speaking immediate, and then secondary
 14 settlement of the peat soils over, you know, a period
 15 of three to ten years.
 16 Q And in your professional opinion and to a reasonable
 17 degree of scientific certainty have you calculated
 18 what the anticipated settlement would be?
 19 A Yes, we did calculate that and we came up with a
 20 range of 1 to 1.4 feet of settlement based on those
 21 organic soils.
 22 Q So as much as 1 to 1.4 feet of settlement?
 23 A That's correct, right.
 24 Q With regard to the GESTRA report, do you think there
 25 were enough tests? You had a comment with regard to

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1 settlement takes into account the soils that are most
 2 likely going to be encountered in the actual
 3 alignment that is planned.
 4 Q In your professional opinion and to a reasonable
 5 degree of scientific certainty, do you agree with the
 6 calculation of two to four inches over the existing
 7 roadway based upon a triaxial truck loading?
 8 A Yes, I would agree with that over in that area just
 9 based on the history of where the -- in the
 10 areas -- and I should qualify that. In the areas
 11 where the existing silty sand fill has been in place
 12 over a number of years.
 13 Q And that -- is that the magnitude of the long-term
 14 settlement?
 15 A I believe yes, that is what they are referring to.
 16 Q And if you were calculating the settlement on the new
 17 or proposed roadway in the navigable waterway
 18 area --
 19 A Uh-huh.
 20 Q Have you calculated --
 21 A We did -- what we did was -- now, we couldn't base it
 22 on actual soil parameters just because there have not
 23 been any test borings that have been done out in the
 24 actual alignment, but what we did was use the
 25 information on Test Boring B4 for the underlying peat

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1 the additional --
 2 MS. CORRELL: Objection, can you rephrase
 3 it as a question rather than testimony?
 4 MR. GALLO: Sure, thank you.
 5 Q Did you find that there were adequate soil testing
 6 completed in the GESTRA report?
 7 A In my opinion no, not to -- there wasn't adequate
 8 testing to evaluate the strength and the settlement
 9 and the lateral strength capacity of those organic
 10 soils.
 11 Q I'm going to ask you about each of those categories
 12 and I want you to respond in your professional
 13 opinion to a reasonable degree of scientific
 14 certainty. The first is compressive strength and
 15 compressibility. Can you elaborate?
 16 A Sure. What we -- now, the GESTRA did do -- they
 17 did -- the extent of their laboratory testing on the
 18 samples that they took back to their soils laboratory
 19 was moisture contents and organic contents of the
 20 peat and the organic silt that they encountered. In
 21 this situation, what we would typically do is get
 22 undisturbed tube samples of that material and the
 23 significance of that is when you're -- compared to
 24 the split spoon sample that I described earlier, by
 25 the very act of pounding that sampler into the

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1 ground, you're theoretically disturbing that sample
 2 so you're affecting the strength parameter somewhat.
 3 When you push an undisturbed tube sample, you're not
 4 pounding it, you're just basically gently pushing it
 5 into the ground and then you get a sample that
 6 theoretically simulates the in-place strength
 7 characteristics a little more. In this particular
 8 situation where you're going to be placing fill and
 9 these side slopes on this organic material, those
 10 tests are crucial. The test that we would do for
 11 that is a consolidation test and what that does is it
 12 measures the settlement characteristics of that soil
 13 and then we can go through calculations based
 14 on -- by adding the weight of that new roadway, you
 15 can determine how much settlement you are going to
 16 incur -- how much settlement is going to occur over a
 17 period of time.
 18 Q Okay. Thank you. Are there any other tests?
 19 A Yeah, another test that we would do is a triaxial
 20 test and what that does is it, again, it gives you
 21 the strength parameters of that soil, but it then
 22 also gives you stress strain parameters for that
 23 material which allows us to evaluate a slope and
 24 what's going to happen laterally in that material
 25 when you're loading that soil.

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1 A Sure. What's going to happen is when you load that
 2 muck soil with the fill that's going to be placed,
 3 there's going to be two components. There's going to
 4 be a vertical settlement component, but with that
 5 slope that is proposed up the edge of that roadway,
 6 there's also going to be a lateral component that
 7 could cause sheer failure or a bearing capacity
 8 failure of the organic soils laterally outside the
 9 edge of the proposed roadway. Those -- the
 10 consolidation testing and the triaxial testing that I
 11 described allow you to get the actual strength
 12 characteristics of those particular soils and thus do
 13 a better or perform a better evaluation of those
 14 parameters based on the loading of that new roadway.
 15 Q Okay. I want to explore the lateral strength issue a
 16 little bit further.
 17 A Okay. Sure, uh-huh.
 18 Q The practical effect of this additional testing is
 19 that you can -- if I'm correct and please correct me.
 20 A Sure.
 21 Q It's a function of how much the -- or the strength of
 22 the sideways direction --
 23 A That's correct, right.
 24 Q -- in the soils?
 25 A Yeah.

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1 Q I'm very interested in the lateral stability and a
 2 slope's stability.
 3 A Sure, uh-huh.
 4 Q Can you elaborate for us on what that's really about?
 5 A Sure. Yeah, what you --
 6 Q In plain English.
 7 A Sure.
 8 Q Thank you.
 9 A Yeah, and I mean what you're doing, like in this
 10 particular case, there's going to be a -- from the
 11 outside edge of the shoulder there's going to be a
 12 three-to-one slope that's placed of gravel.
 13 Q Let me see if I get this picture right. We're going
 14 to put a roadway, we're going to construct a roadway,
 15 on the virgin soil, we've got Houghton muck or the
 16 Roland muck, and so that has a certain weight to it.
 17 A That's correct.
 18 Q The granular material that we're considering to be
 19 fill in road base.
 20 A Right.
 21 Q So if you can, take it from there. So we have this
 22 weight and it's going to compress the soil?
 23 A Sure. It's going to do two things.
 24 MS. CORRELL: Again, Don, please refrain
 25 from testimony and ask a direct question.

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1 MR. GALLO: Can we pull out the second
 2 exhibit --
 3 ALJ BOLDT: Sure.
 4 MR. GALLO: -- and can we mark it B1?
 5 MS. KAVANAUGH: Don, can you repeat that
 6 question? I didn't really understand it.
 7 MR. GALLO: Oh, sure, sure, I'd be happy
 8 to. With regard -- I'm trying to clarify what
 9 this lateral component is in practical terms and
 10 what Paul is saying is that there's a
 11 compressive strength which --
 12 MS. KAVANAUGH: I understood. I just asked
 13 your question, could you just repeat your
 14 question, not paraphrase what he said.
 15 MR. GALLO: Okay.
 16 Q With regard to the lateral strength, can you explain
 17 the dynamics?
 18 A Sure. What --
 19 MS. CORRELL: What are we -- I'm sorry,
 20 what is this, is this an exhibit?
 21 MR. GALLO: Yes.
 22 ALJ BOLDT: And we're going to mark it
 23 right now.
 24 MR. GALLO: And this is --
 25 UNIDENTIFIED SPEAKER: C127.

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1 MS. CORRELL: Okay. It was not disclosed
2 to us previously, is that correct?
3 MR. GALLO: No, it's in your book.
4 MS. CORRELL: Where?
5 MR. GALLO: It's in my Exhibits --
6 MS. CORRELL: Okay. If you can point me to
7 where it is.
8 MR. GALLO: -- 128 with the report, hence
9 the roll of large drawings. These are the two
10 sheets that were marked --
11 MS. CORRELL: Oh, is that C27 with markings
12 on it?
13 THE WITNESS: 127 -- C127.
14 MR. GALLO: Yeah. Everyone has a copy -- a
15 large roll of drawings.
16 MS. CORRELL: Okay. Thank you.
17 A Now, what this -- I mean this shows the new fill that
18 is going to go onto that material and when you place
19 this fill on whatever soil it is, there's going to be
20 a vertical component of settlement when you place
21 that material, but then there's also --
22 MR. GLEISNER: Edwina, could you just move
23 a little bit to the right, please?
24 A -- because you're building this slope --
25 MR. GLEISNER: Thanks, Counsel.

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1 basis of placing that new fill material on that one
2 to one-and-a-half feet of settlement, you know,
3 that's what we roughly preliminarily calculated, but
4 then didn't really have anything to go on laterally.
5 That's something that an actual subsurface
6 exploration and additional analysis should determine.
7 Q So, Paul, the way GESTRA has designed this, is it
8 your professional opinion to a reasonable degree of
9 scientific certainty that it's going to fail?
10 A In that section where the roadway juts or veers north
11 into that existing navigable waterway area, yes.
12 Q And describe failure. Let's really identify --
13 MS. CORRELL: Objection, foundation.
14 ALJ BOLDT: I'm sorry, to this question or
15 the prior one?
16 MS. CORRELL: I just want to know
17 specifically where he's opining failure will
18 occur.
19 Q So what stations? What area of the roadway --
20 A Basically, in the station where those muck soils have
21 been identified. You know, and that's based on our
22 evaluation of the organic soils that were encountered
23 in Boring 4 and one thing to identify is that that
24 peat and that organic soil are representative of
25 those muck soils that -- either the Houghton muck or

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1 A -- on the side slope, there's also going to be a
2 lateral component to the settlement of that material.
3 Now, part of the concern here is that the subgrade
4 soils that are there, there hasn't been any actual
5 subsurface exploration out in that material. All we
6 have is Boring 4 to use as a -- you know, assuming
7 that the peat and the organic soils are the materials
8 that are here, I mean those materials are not going
9 to pass the proof roll. Depending upon how much
10 removal you do, you also -- if you remove so much
11 soil vertically, you also, just for the sake of the
12 safety of the excavation and the type of materials
13 that we have here, you're also going to typically,
14 you know, take out soils at a one-to-one slope up
15 from the outside edge of that removal excavation. So
16 the deeper you go, you know, say we go down 15 feet,
17 I mean then you've got a one-to-one slope that you're
18 going to be removing that material for just -- you
19 know, to identify. Now, you're also going to have in
20 these materials problems with these -- with the side
21 slope maintaining stability and whatnot. So, you
22 know, theoretically, I mean you could have as much
23 removal that you do have you could have additional
24 removal laterally outside of that excavation. And
25 that's what we look at, you know, I mean from the

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1 the Roland muck soils.
2 MS. KAVANAUGH: I'm sorry, your basing
3 yours on that opinion, just to clarify?
4 THE WITNESS: I'm basing it on my knowledge
5 of Houghton and Roland muck typically would have
6 characteristics similar to the peat and the
7 organic soils that were encountered in Test
8 Boring B4.
9 MS. KAVANAUGH: But you're also basing it
10 on the idea that the further out we'll have
11 Houghton muck too? I mean --
12 THE WITNESS: Yeah, that was --
13 MS. KAVANAUGH: -- the new part, right?
14 THE WITNESS: Right.
15 MS. KAVANAUGH: Okay.
16 THE WITNESS: Yeah, and that was identified
17 in the GESTRA that that Houghton muck went
18 further north --
19 MS. KAVANAUGH: Okay.
20 THE WITNESS: -- or the muck, both muck
21 soils, went further to the north.
22 MS. KAVANAUGH: Okay.
23 Q Paul, is your opinion based upon not only Boring B4,
24 but the blow counts that are encountered there and
25 let's get specific with regard to what soils do you

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1 feel are soft and --
 2 A I mean if there's going to be a proof roll on this
 3 material, I mean there basically is very low to no
 4 strength in these materials to a depth of 12 feet in
 5 that area. You know --
 6 Q You said basically, is that certain or not?
 7 A Well, based on this boring, I'm sorry, that that
 8 is -- if we were proof rolling this material, it's my
 9 opinion that that material would fail a proof roll,
 10 thus requiring removal.
 11 Q Substantially fail?
 12 A Yes.
 13 Q So would it be your professional opinion to a
 14 scientific certainty, would it be appropriate or your
 15 recommendation that these soils be removed?
 16 MS. CORRELL: Objection, can you ask him a
 17 question rather than --
 18 MS. KAVANAUGH: Telling him what to say.
 19 MS. CORRELL: -- drawing a conclusion?
 20 Q So I'm not asking you -- okay. I'll rephrase it.
 21 And let's --
 22 ALJ BOLDT: I mean the classic way to do it
 23 is ask him if he has an opinion, he says yes or
 24 no -- and we haven't done that, any of the
 25 witnesses, but you ask him do you have an

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1 report and our understanding of -- you know, based on
 2 the plan set and the proposed -- the final proposed
 3 alignment of that roadway. It was my opinion that
 4 the GESTRA report was basing their conclusions and
 5 recommendations for preparation of that roadway base
 6 on the proposed new access road following the
 7 alignment of the existing access road. And I say
 8 that because they -- this report does not address the
 9 major issues that, in my opinion, are going to be
 10 encountered by placing that roadway to the north of
 11 that existing alignment out into the navigable
 12 waterway.
 13 MR. MEYER: Objection, speculation.
 14 Q Is that your professional opinion?
 15 A That's my professional opinion.
 16 Q Okay.
 17 MS. KAVANAUGH: But it's based on the idea
 18 that they're not doing that, correct?
 19 MR. HARBECK: Is this cross or is this --
 20 ALJ BOLDT: Okay. The objection is noted.
 21 Go ahead and you can pursue that line on
 22 cross-examination.
 23 Q The second bullet I think you've testified to with
 24 regard to GESTRA test boring before?
 25 A Yes, yes.

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1 opinion and then you say what is that opinion.
 2 MR. GALLO: Thank you. Thank you.
 3 Q Paul, do you have an opinion with regard to the
 4 suitability of these soils for construction of this
 5 access road? And when I say these soils, I'm
 6 specifically referring to the Houghton muck and
 7 Roland muck.
 8 ALJ BOLDT: And when he says opinion he
 9 means to a reasonable degree of professional
 10 probability or certainty.
 11 A Yes, and that --
 12 MR. GALLO: Thank you.
 13 A Based on the parameters that are identified in Test
 14 Boring B4, it's my opinion that these soils would not
 15 be suitable for support of the roadway section and
 16 that there would be significant removal that would
 17 need to be performed.
 18 Q Thank you. Let's go back to your report and
 19 specifically Page 4, comments and recommendations,
 20 which do you mind going through your comments and
 21 recommendations?
 22 A Sure, uh-huh.
 23 Q First bullet.
 24 A Oh, I'm sorry, sure. Yeah, that first bullet
 25 just -- that was based on our review of the GESTRA

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1 Q The third bullet -- the second bullet on Page 5, can
 2 you highlight on the underlying sections?
 3 A Sure. Now, what that was -- you know and, again,
 4 this was based on our visual evaluation of the area
 5 on September 2nd, you know, in the area where that
 6 roadway is going to veer north into the navigable
 7 waterway, that that three feet of bed or pavement
 8 support, silty sand soils that were identified in the
 9 GESTRA report, are not present out to the north of
 10 that existing access drive and that therefore there
 11 has been no exploration that's been done out in that
 12 area so the actual -- the depth of those organic
 13 soils, the load carrying strength characteristics of
 14 those soils and the compressibility of those soils is
 15 not known at this time.
 16 Q And you've based your opinions though on Boring B4
 17 and assuming that --
 18 A That's correct, right, just --
 19 Q -- the conditions are the same under that roadway?
 20 A That's correct, right. And, you know, therefore I
 21 guess it's our opinion that the GESTRA report
 22 underestimates the construction difficulties that are
 23 going to be encountered by constructing that roadway
 24 north into that navigable waterway.
 25 Q I want to deviate on one question.

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1 A Okay.
 2 Q Parts of this new access road are going to veer north
 3 and then come back to the existing access road and,
 4 in essence, the new access road will be comprised of
 5 new fill and existing road base?
 6 A That's correct.
 7 Q Do you foresee a problem with regard to those
 8 conditions?
 9 A Yes, I do, that the problem that I foresee is
 10 differential settlement of that roadway. The portion
 11 of that roadway that has been in place for however
 12 many years, it's likely that a good portion of that
 13 settlement has already occurred, whereas you're
 14 placing this new fill over potentially organic soils
 15 and you're going to get a definite differential
 16 settlement where one side of that roadway will settle
 17 much greater than the other side of the roadway.
 18 Q Can that be cured by just continuing to fill in with
 19 asphalt or soil as the new road settles?
 20 A Sure.
 21 Q And what will happen with regard to -- as you
 22 continue to put material on and it settles, with
 23 regard to the lateral stability or lateral impact?
 24 Can you explain --
 25 A Right. Yeah, as you -- I mean as you're -- as that

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1 soils?
 2 A Sure. What's going to happen if you just place that
 3 fill and the roadway on that muck soil, it will
 4 settle. I mean it will settle significantly over
 5 time. You're going to get a vertical -- you know,
 6 it's going to drop vertically, but then there could
 7 also potentially be a, you know, a sideways failure
 8 that will push the soils out.
 9 Q You said potentially. Is that potential or is it
 10 actual?
 11 A I mean it's actual in this material. You know, that
 12 would have to be identified by or confirmed by
 13 testing, but for this type of material it's pretty
 14 certain that that will happen.
 15 Q Does the fact that we don't know the bottom of this
 16 soil, limited soil boring, have an impact?
 17 A It does. You know, again, we keep it a standard
 18 practice to try to find the bottom of that material
 19 just so we can identify -- you know, potentially
 20 there could be a deep foundation system that you
 21 construct to support this roadway over this material
 22 but, yes, that could absolutely have an impact on the
 23 long-term performance of that roadway.
 24 Q At the bottom of Page 5, starting with the word
 25 dependent, one, two, three, four, five, six, seven

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1 material settled, here is going to be a lateral force
 2 that will, you know, push some of the soil laterally
 3 out into the existing wetland area or designated
 4 waterway -- navigable waterway.
 5 Q In practical terms, when you say it's pushing out,
 6 it's going to essentially impact the virgin material
 7 in the waterway?
 8 A Yes, over time and as you -- I mean if it's settling
 9 and you're continually placing more asphalt or gravel
 10 or whatever, that's a greater force that's being
 11 subjected vertically, but there will also be that
 12 lateral force as well.
 13 Q Would you call those cumulative or secondary impacts?
 14 A Yes, I would call them either one of those.
 15 Q You've recommended excavation of the muck soils?
 16 A Uh-huh.
 17 Q So as I -- I'm trying to summarize this and correct
 18 me if I'm making this too simple, but if you don't
 19 excavate, you'll have this compression and the
 20 lateral movement so you have impact to the north and
 21 the --
 22 MS. CORRELL: Objection, question please.
 23 Q Can you explain for us the lateral impacts on
 24 building the access roadway as designed by GESTRA
 25 versus your recommendation of excavating the muck

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1 lines up, is this your opinion and recommendation?
 2 A It's my opinion based on the removal of the soil,
 3 what would need to be done if significant removal of
 4 that material is performed.
 5 Q And is this opinion made as a professional opinion to
 6 a reasonable degree of scientific certainty?
 7 A Yes, it is.
 8 Q Can you read this opinion?
 9 A Sure. "Dependent on the vertical depth of removal
 10 determined to be required based on evaluation by the
 11 engineer per General Note Number 4, substantial
 12 additional lateral removal of unsuitable soils to
 13 that estimated in the cross-sections included in the
 14 plan set will be necessary to obtain a reasonable
 15 stable access roadway surface. Additional lateral
 16 removal on the order of 15 to 20 feet or greater,
 17 dependent on the subsurface conditions will
 18 reasonably be necessary if substantial removal of the
 19 organic soils is determined to be necessary."
 20 Q Thank you.
 21 A Uh-huh.
 22 Q Paul, with regard to the exhibit that's up, what
 23 number is it?
 24 A Oh, this right here?
 25 Q Yes.

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1 A 144.
 2 Q 144. Can you describe and outline the area of
 3 lateral soil removal on that exhibit?
 4 A Sure. What we've got, I mean what this is showing,
 5 is that, you know, approximately four feet of fill is
 6 going to be placed on that existing roadway -- or,
 7 I'm sorry, on the existing ground surface. Per that
 8 General Note Number 4, and anticipating on the basis
 9 of the Test Boring B4 that was performed and visually
 10 looking at the surface materials that were out in
 11 that navigable waterway area, there is going to have
 12 to be some soil removal that will need to be
 13 performed such that we can develop a suitable -- a
 14 base that will support the planned roadway section.
 15 Now, again, depending upon the removal that is
 16 performed, I mean, you know, say we go down to a
 17 depth of ten feet and that -- no?
 18 Q I want you to use the scale.
 19 A Oh, okay.
 20 Q The scale is five feet to (inaudible).
 21 A Oh, five feet. I'm sorry. Okay. All right.
 22 Q Can you use it?
 23 A Sure. Yeah, so each two grids is five feet,
 24 two-and-a-half feet for each. Okay. So to use that,
 25 I mean I've identified -- so if we do a removal to a

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1 identified in Boring 4 that groundwater was at a
 2 depth of three feet. Now, just visually looking at
 3 it, this area is about three to four feet lower in
 4 elevation so water is going to be right at the
 5 surface. In these materials, that's going to create
 6 an absolute site preparation nightmare.
 7 Q Does it -- is de-watering a possibility here?
 8 A That's a possibility. You know, I mean that would
 9 have to be -- the short answer is yes, it is a
 10 possibility.
 11 Q What effect on the soils would de-watering have?
 12 A They would -- for these type of materials, I mean,
 13 over time they would settle because you're reducing
 14 the strength of those materials. You're removing
 15 them so I mean basically -- you know, but the soils
 16 that are left in place, whether it's this low
 17 strength silty clay that's already at a high moisture
 18 content, there's going to be significant construction
 19 and -- you're not going to run a piece of equipment
 20 over there without substantially disturbing those
 21 materials and that's where you get into like using
 22 gravel soils or, you know, crushed stone or something
 23 to stabilize the materials.
 24 Q If, during construction, you take your recommendation
 25 and I have to assume that's got to be done to build

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1 depth of five feet below that planned roadway --
 2 Q Paul, that's a what if to five feet?
 3 A Yes.
 4 Q You stated that the soft soil was at least to a depth
 5 of 12 feet.
 6 A Yes, that's correct, okay, and I'll use that as -- if
 7 we removed 12 feet, so that is roughly to that depth
 8 per the scale that's on here. Now, when you remove
 9 those soils, the type of soils that are here, you
 10 can't just remove those soils vertically and expect
 11 to maintain a vertical edge of that excavation
 12 without creating safety hazards. I mean it's just
 13 not going to happen, assuming that the soils that are
 14 identified in B4 are what is encountered in that
 15 area. So what you have to do is typically you remove
 16 soils at a one-to-one slope just to maintain
 17 stability in that slope that you're removing. You
 18 have to remove those soils and then replace them so
 19 you could have -- I mean and that's where if we
 20 removed to a depth of 12 feet, we're going out to
 21 probably at least a lateral width of 12 feet,
 22 probably more, because of the low strength
 23 characteristics of those soils.
 24 Q What effect is groundwater?
 25 A Groundwater has a significant effect. I mean they've

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1 this road, have you calculated the additional impact
 2 to the waterway?
 3 A Yeah, if -- I mean --
 4 Q Can you use that --
 5 A Sure. On this, you know, using that, if we have to
 6 go to the removal, I mean we --
 7 Q Excuse me, just let me interrupt you.
 8 A Sure.
 9 Q Can you explain the different lines? The first line
 10 is the -- close in is the blue line.
 11 A Oh, yes. Yeah, this is the blue line that I believe
 12 if you just go on the basis of the cross-sections
 13 that are in the plan set --
 14 Q The GESTRA and the Kapur design?
 15 A And the Kapur design. The blue lines identify the
 16 outside edge of what's going to be disturbed.
 17 Q Or the area of impact?
 18 A The area of impact, right. Now, if we get into that
 19 area and you have to do substantial removal,
 20 dependent upon the depth of removal, again,
 21 identifying the 12 feet or greater, then you've
 22 got -- what's actually going to have to be performed
 23 is removal either out to that -- laterally out to
 24 that distance or laterally out to that distance and
 25 that outside one is probably a worst case basis.

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1 Q But the -- so what are those two distances?
 2 A These two distances?
 3 Q Yeah.
 4 A Boy, I forget what the scale is on this, but --
 5 Q Don't -- if you go back to the other figure can
 6 you --
 7 A Sure.
 8 Q -- determine those distances?
 9 A Yeah, that's the 25 to 15 feet.
 10 Q So it'd be either 25 or a total of 40?
 11 A That's correct. Worst case theoretically, yes.
 12 Q Okay.
 13 A But then by just using those, you know, and
 14 estimating the area, I mean you can get an area of
 15 impact, you know, on the basis of that removal.
 16 Q So can you go through those calculations?
 17 A Sure. You know, identifying -- I mean the area at
 18 that corner, basically those three areas of navigable
 19 waterway impact.
 20 Q And those are the -- that's the length of the
 21 Houghton and Roland muck?
 22 A That's correct, right. What -- you know, coming up
 23 with an estimated depth of removal with an
 24 approximate plan view area of those materials, I mean
 25 we can come up with about 0.28 acres of impact to

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1 to get to that point, he shows some stations
 2 there. Can we get a reference point --
 3 MR. GALLO: Yes, sure.
 4 MR. MEYER: -- of that distance, what that
 5 is, how long?
 6 MR. GALLO: Sure.
 7 Q Can you pull the stations from the beginning to the
 8 end? I think we did that in the beginning.
 9 MR. MEYER: I didn't capture that. I've
 10 got the -- those stations I think were from 20
 11 to 24.75, but I didn't get a reference what that
 12 referred to.
 13 Q Okay. Can you explain those -- the stationing?
 14 A Sure, yeah. Basically, this one is, you know,
 15 station -- this is a potential wetland impact on the
 16 south side of the roadway so that's from about 19 to
 17 20. This --
 18 MR. MEYER: What is the distance between
 19 stations, is what I asked.
 20 THE WITNESS: A hundred feet.
 21 MR. MEYER: Thank you.
 22 A When we say 19 to 20, that's 100 feet distance, yeah.
 23 So this one is just about at Station 20 plus 00 to
 24 Station 21 plus 30, 21 plus 20, about 120 feet. This
 25 last one is from about Station 21.73 to

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1 0.45 acres of impact.
 2 Q And those estimates --
 3 MR. MEYER: Could you repeat that? I
 4 didn't hear that.
 5 THE WITNESS: Well, just, you know,
 6 assuming that we're removing, you know, either
 7 laterally to that distance or worst case basis
 8 to this outside distance --
 9 MR. MEYER: Yes.
 10 THE WITNESS: -- and assuming the amount
 11 of material that would need to be removed while
 12 you're constructing --
 13 MR. MEYER: Sure.
 14 THE WITNESS: -- then the range would be
 15 about 0.28 acres to 0.45 acres of removal that
 16 could potentially occur just based on --
 17 Q And those numbers --
 18 MR. MEYER: Could I ask a clarifying
 19 question, please?
 20 THE WITNESS: Sure.
 21 ALJ BOLDT: Sure, the witness -- he said
 22 sure.
 23 MR. GLEISNER: Yeah, you're right, Judge.
 24 MR. GALLO: That's fine.
 25 MR. MEYER: The distance he's talking about

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1 Station 24.75.
 2 Q And, Paul, your intention by displaying those
 3 stations is to depict the area of Houghton muck and
 4 Roland muck, is that correct?
 5 A That's correct, right.
 6 Q Okay. Can you go through your final additions of
 7 impact and --
 8 A Yeah, and that's just, you know, say we have 25 to 40
 9 feet of lateral removal times 120 feet times, you
 10 know, an average -- this one is 120 feet so -- in
 11 length by 25 feet, you know, came up with 3,000
 12 square feet, if we remove out to 40, 4,800 square
 13 feet which comes to roughly .7 acres and .11 acres.
 14 And then do that same calculation for the length,
 15 this approximate 300-foot length, of Houghton muck or
 16 muck soils.
 17 Q Can you do the total?
 18 A Sure. And then the total, just by adding those up
 19 is -- if it's the -- we don't have to do as much
 20 lateral removal, it's going to be approximately .28
 21 acres when you add up the three areas. If worst
 22 case, you're going out to the farthest area, it's .45
 23 acres of disturbance of additional materials.
 24 Q And so that's additional impact?
 25 A Additional to the --

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1 Q Navigable waterway?
 2 A Yes, that's correct.
 3 Q And the original calculated impact is -- can you
 4 point that out?
 5 A Based on these blue areas and then that section in
 6 the -- I believe that one is .02 acres and then .14
 7 acres in those blue areas that -- so then adding up,
 8 I mean that .16 and .44 to .61 acres --
 9 MS. KAVANAUGH: I'm sorry, what is the .16?
 10 THE WITNESS: That's the addition, that
 11 area, that .02 and then the -- just putting the
 12 cross-sections that are planned with that
 13 three-to-one slope, these blue lines, that would
 14 be the lateral impact and that -- I think that
 15 adds up to .14 acres of impact.
 16 MS. KAVANAUGH: So that's the
 17 proposed -- the .16?
 18 THE WITNESS: That's the proposed as it's
 19 proposed in the plans.
 20 Q Paul, just to be more clear and more certain, is it
 21 your opinion that there is any question or doubt
 22 about the fact that there will be additional waterway
 23 impacts?
 24 A It is my opinion that there will be additional water
 25 impacts to what's represented in the plans.

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1 MS. CORRELL: No objection to the report.
 2 ALJ BOLDT: 128 is received.
 3 MR. GALLO: And Exhibit 7A-001 through 25.
 4 MR. HARBECK: 7A-001 through 7-025?
 5 MR. GLEISNER: That's correct. That's the
 6 end of it.
 7 MR. GALLO: Yes, the GESTRA report.
 8 ALJ BOLDT: Okay. Any objection to that
 9 one?
 10 MS. CORRELL: No objection.
 11 ALJ BOLDT: That one is received as well.
 12 Any further direct, Counsel?
 13 MR. GLEISNER: Nothing in clarification.
 14 Thank you, Judge.
 15 ALJ BOLDT: Okay. Ms. Correll?
 16 CROSS-EXAMINATION
 17 BY MS. CORRELL:
 18 Q Good afternoon. Thank you for coming and patiently
 19 sitting through this hearing. I just want to clarify
 20 for the record what you were hired to do. I believe
 21 that Mr. Gallo asked you if you were hired by
 22 North Lake Management District and I believe the
 23 answer was yes, is that correct?
 24 A That's correct, right.
 25 Q And when were you hired in that capacity?

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1 Q And you've estimated those additional water impacts?
 2 A That's correct.
 3 Q And so -- and you've provided a range of those
 4 impacts on those calculations?
 5 A Yes.
 6 Q Okay. And those -- your opinions that you've just
 7 expressed are to -- are professional opinions to a
 8 reasonable degree of scientific certainty?
 9 A Yes.
 10 Q Okay.
 11 MR. GALLO: Can I just have a minute to go
 12 over my questions?
 13 ALJ BOLDT: Sure. Any objection to 143 and
 14 144 which are just -- I think they're already in
 15 the record in another form.
 16 MS. CORRELL: Oh, no objection.
 17 ALJ BOLDT: Okay. 143 and 144 are
 18 received.
 19 MS. CORRELL: Other than, again, we have a
 20 standing jurisdictional. We don't need to go
 21 through that.
 22 ALJ BOLDT: Okay.
 23 MR. GALLO: And have Exhibits 128 and 7
 24 been admitted?
 25 ALJ BOLDT: 128?

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1 A I was hired in late August.
 2 ALJ BOLDT: Of 2011?
 3 THE WITNESS: Of 2011, that's correct.
 4 Q Could you refer back to Exhibit 128. It's your
 5 report.
 6 A Uh-huh.
 7 Q And it's dated September 12th, 2011, is that correct?
 8 A That's correct, right.
 9 Q You were hired in late August and I believe you
 10 testified that the information that you reviewed
 11 consisted of the GESTRA report --
 12 A Uh-huh.
 13 Q -- which is at Exhibit 7?
 14 A Yes.
 15 Q And the proposed project plans which are at
 16 Exhibit 3?
 17 A Yes.
 18 Q Is that all the information you had to review in late
 19 August?
 20 A Yes.
 21 Q I believe you -- or I'm not sure if you testified to
 22 this, but when did you review the site for
 23 observation?
 24 A I attended the site on September 2nd.
 25 Q And that is --

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1 A Of 2011.
 2 Q And that was the site visit for purposes of this
 3 contested case hearing?
 4 A That is correct.
 5 Q And you didn't conduct any field work on that day?
 6 A No, just walked through and visual evaluation.
 7 Q You may not be aware and so you could obviously
 8 always answer you're not -- you don't know or you're
 9 not sure, but do you believe that DNR was aware that
 10 you would be attending the site for purposes of
 11 opining to the proposed project here?
 12 A That I am not sure of or --
 13 Q That's fine. And just to clarify, you and no one
 14 from Giles and Associates conducted any soil borings?
 15 A That's correct.
 16 Q You and no one from Giles and Associates conducted
 17 any undisturbed tube samples?
 18 A No, we did not.
 19 Q And, similarly, you did not conduct a consolidation
 20 test?
 21 A No.
 22 Q Nor a triaxial test?
 23 A No.
 24 Q I have reviewed your report and Mr. Gallo just
 25 stepped through it in quite a bit of detail. I

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1 on this access road?
 2 A Yes, we did.
 3 Q In your testimony and also in the report there's no
 4 evaluation of what stability -- what significant
 5 stability would be with the use of geotechnical --
 6 MS. CORRELL: Strike that. That was a
 7 terrible, terrible sentence. Let me start over.
 8 MR. GLEISNER: It wasn't that bad, Counsel.
 9 ALJ BOLDT: No, it wasn't.
 10 Q In the opinion that you just rendered --
 11 A Uh-huh.
 12 Q -- you did not articulate that you had considered
 13 geotechnical fabric and its ability to support the
 14 structure of the road, is that correct?
 15 A That is correct, but I'd like to clarify if possible.
 16 And I say that that -- the correct answer is yes that
 17 we did include that in our settlement, but the fact
 18 that we've got it listed on Page 6 of our report, or
 19 summarized, that the use of (inaudible) reinforcement
 20 is -- it works to stabilize the subgrade, however,
 21 the method does not reduce total settlement. What it
 22 does, is it reduces differential settlement over a
 23 short distance, but it does not reduce total
 24 settlement. In answer to your question, I guess by
 25 my answering no I meant that it didn't have an impact

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1 didn't find any reference to your account for plan
 2 designs including geotextile fabric, is that correct?
 3 A I'm sorry, I don't understand the question.
 4 Q Let me ask you -- break it out into more specific
 5 questions.
 6 A Okay.
 7 Q In your report evaluation --
 8 A Uh-huh.
 9 Q -- you testified --
 10 MS. CORRELL: Strike that.
 11 Q In your evaluation that was documented in your report
 12 at Exhibit 128, did your settlement calculations
 13 account for the use of geotechnical fabric on the
 14 site?
 15 A No, it did not.
 16 Q Did your road failure professional and scientific
 17 conclusions take into account the use of geotechnical
 18 fabric on the site?
 19 A Did the -- I'm sorry, did --
 20 Q Let me see if I can be more clear. I'll try. You
 21 concluded in your testimony just now within, I
 22 believe, a reasonable degree of scientific certainty
 23 that portions of the access road would fail. In
 24 reaching that conclusion, did you take into account
 25 the design specifications to use geotechnical fabric

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1 on the total settlement.
 2 Q In the calculations that you have on -- I think
 3 that's Exhibit 144?
 4 A Yeah, 143?
 5 Q Oh, is that 143?
 6 A 143.
 7 Q How did you calculate the lateral stability
 8 conclusions that you drew and also account for the
 9 use of geotechnical fabric?
 10 A Well, that -- in that calculation -- that calculation
 11 we have not used the use of -- in the calculation of
 12 that removal (inaudible), that's going to all be
 13 based on proof rolling and that's where the question
 14 comes in that this was all based on the -- our review
 15 of the plan set indicating that there's going to be a
 16 proof roll performed. I don't believe the plan set
 17 indicates geotextile fabric, to my
 18 understanding -- the use of geotextile fabric.
 19 Q If the design does include geotextile fabric, would
 20 that alter your opinion regarding the lateral
 21 stability conclusions that you just opined to here
 22 today?
 23 A It could have the -- it could affect them, but not
 24 knowing the actual subsurface conditions, it's hard
 25 to answer that question.

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1 Q And speaking of which, that was a good segue. You've
 2 made assumptions regarding the types of soils that
 3 would be present at various points on the access road
 4 in order to calculate anticipated impacts, is that
 5 correct?
 6 A That's correct.
 7 Q Have you ever recommended partial depth excavation
 8 with reinforced grid in any of the -- or in any of
 9 the reviews that you've assisted with?
 10 A Yes.
 11 Q Thank you.
 12 MS. CORRELL: I have nothing further.
 13 MR. MEYER: I just have a few questions.
 14 ALJ BOLDT: Mr. Meyer, yes.
 15 CROSS-EXAMINATION
 16 BY MR. MEYER:
 17 Q Mr. Gleese, thank you for being here. By the way, you
 18 get the award for the sharpest tie here today too.
 19 A Thank you.
 20 Q It's very nice.
 21 MR. GLEISNER: I second that.
 22 Q Just a few questions to try to clear up a couple
 23 things. You were asked by Attorney Gallo about the
 24 concept that there'd be vibrations during
 25 construction which could be a nuisance to neighbors?

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1 your filled area is de-watered, but the -- in terms
 2 of the impacts beyond, those are temporary -- the
 3 impacts beyond the filled area are temporary?
 4 A That's correct.
 5 Q Now, I haven't been to the site. I think we were
 6 talking about going there, but I understand there's a
 7 roadway out there now?
 8 A Yes.
 9 Q And it goes through the various types of soils you
 10 talked about already, right?
 11 A Right.
 12 Q Including the Houghton and Roland muck?
 13 A Yes.
 14 Q What impacts are you seeing from that road in terms
 15 of disturbance beyond the roadbed itself -- the
 16 filled area?
 17 A Well, that's all dependent upon the removal. I mean
 18 significant removal may have to occur to --
 19 Q No, I mean what's happening now?
 20 A Oh.
 21 Q I mean it's been in there some -- I heard somewhere
 22 50 years already.
 23 A Right. Yeah, I mean it was heavily vegetated along
 24 the outside edges of those roadways.
 25 Q So it's pretty stable to the extent roads through

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1 A That's correct.
 2 Q Is that something that happens quite often at
 3 construction sites, building and parking lots,
 4 excavation, that type of thing?
 5 A Yes.
 6 Q A term came up a few times that caught my ear and I
 7 think I got this fairly accurately. And Attorney
 8 Gallo used it a couple times, but then you used it a
 9 few times, and it was at the point you talked about
 10 the new construction being on the current road and
 11 then you used a term similar to then viewed into the
 12 navigable waterway area.
 13 A Right.
 14 Q Do you have any expertise on determinations of
 15 navigable areas or waterways or anything like that?
 16 A No, I do not.
 17 Q So that's not a description that you were making out
 18 of any of your professional knowledge, was it?
 19 A That's correct.
 20 Q Thank you. The concept of de-watering came up and
 21 obviously that's probably something you may have to
 22 (inaudible), is that correct?
 23 A Right.
 24 Q And that's a temporary phenomenon though, the
 25 de-watering during the construction. Now, obviously

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1 muck areas are stable?
 2 A Yeah, I can't attest to that, whether it's stable or
 3 not. I mean I don't know if it's moving still or
 4 not.
 5 Q You walked the area, right?
 6 A I did walk it, yeah.
 7 Q What did you observe?
 8 A I observed the gravel roadway that, you know, that we
 9 all walked. Basically, along the outside edges of
 10 that roadway there was pretty heavy vegetation that
 11 you couldn't readily visually observe the adjacent
 12 soils.
 13 Q Now, these soils, the Houghton and Roland muck,
 14 that's not just unique to this site, is it in this
 15 State?
 16 A No, it sure isn't.
 17 Q There's probably thousands of miles of roads in this
 18 State built on either a Houghton or Roland muck or
 19 similarly more degree of stability soils, right?
 20 A I can't answer that for a degree of certainty,
 21 but --
 22 Q There's a lot of roads built in a lot of wetland
 23 areas in this State and in certain counties and this
 24 isn't a unique situation, is it?
 25 A I don't know if it's a unique situation.

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1 Q Road building in muck soils is -- it sounds like
 2 you've had a lot of experience?
 3 A Yeah, I mean there's --
 4 Q I wasn't clear maybe.
 5 A Sure. I mean yes, I would say that in the State of
 6 Wisconsin there are roads that have been built over
 7 muck soils or that have experienced muck soils during
 8 the construction of that roadway.
 9 Q Yeah, I mean there could be a lot of roads -- miles
 10 of roads. I mean we're not talking a few.
 11 A Potentially.
 12 Q Ashland County and those areas?
 13 A Yeah, I'm not familiar -- I am not that familiar with
 14 Ashland.
 15 Q Okay. I was trying to get to the bottom of things to
 16 try and understand what the impacts are and I surely
 17 don't want to minimize this because there are
 18 (inaudible) to protect wetlands, but the bottom line
 19 I'm getting for your testimony, and I want to make
 20 sure I understand it, is somewhere between a quarter
 21 of an acre to four-tenths of an acre of additional
 22 wetland impacts will take place in your judgment
 23 based on your analysis of the -- for how the road is
 24 going to be constructed.
 25 A Could take place.

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1 conclusion or your analysis in terms of vertical
 2 settlement, does it change with the use of
 3 geotechnical --
 4 A Typically, vertical --
 5 MS. CORRELL: Asked and answered. I asked
 6 him --
 7 MR. GALLO: I'm just trying to be clear.
 8 MS. CORRELL: -- the same question and he
 9 answered it. Do you want a different answer.
 10 MR. GALLO: No.
 11 Q Okay. With regard to Boring Number 4 --
 12 ALJ BOLDT: Which exhibit is that again?
 13 MR. GALLO: I'm sorry, Boring Number 4 on
 14 the GESTRA report.
 15 ALJ BOLDT: Maybe it's time to put those
 16 back in the book, huh?
 17 THE WITNESS: Yeah, I think so.
 18 ALJ BOLDT: Just to make sure we get
 19 everything put back.
 20 MR. GLEISNER: Out of an abundance of
 21 caution.
 22 A All right. Boring 4.
 23 Q You reviewed blow counts and there were very low
 24 counts at the bottom of this boring?
 25 A Yes.

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1 Q During the course of this hearing and other
 2 proceedings related to it, there's been talk of a
 3 proposed alternative site for a boat launch off of
 4 Highway 83 on the eastern side of the lake and have
 5 you or your firm been asked by the lakeshore property
 6 owners to do any geotechnical work on that site?
 7 A No, we have not.
 8 Q Thank you very much for your clarifying of these
 9 questions.
 10 MR. MEYER: Thank you.
 11 ALJ BOLDT: Any redirect?
 12 MR. GALLO: Yeah, thank you.
 13 REDIRECT EXAMINATION
 14 BY MR. GALLO:
 15 Q Paul, just to be clear, you walked the proposed route
 16 on September 2nd --
 17 MS. CORRELL: Could you speak up please,
 18 Don?
 19 MR. GALLO: I'm sorry.
 20 Q You walked the proposed route on September 2nd to the
 21 extent you could. Did you actually walk the area of
 22 the new alignment -- the proposed roadway alignment?
 23 A Yes, I did.
 24 Q You had a number of questions regarding geotextile
 25 fabrics. I just want to be clear on this. Your

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1 Q There was zero at the 10-foot depth. Is that layer
 2 of soil your primary -- one of your primary concerns
 3 to a reasonable degree of scientific certainty --
 4 MS. CORRELL: Objection, leading.
 5 MR. GALLO: Okay.
 6 Q Is it -- okay, I'll reword the question. You've
 7 expressed an opinion with regard to settlement and
 8 lateral impacts?
 9 A Yes.
 10 Q Is there a particular layer of soil or a vertical
 11 section of soil that you're basing that opinion on?
 12 A Yes, that's based on the peat and the organic silt
 13 soils that were identified in Boring 4.
 14 Q And you answered that to -- as your professional
 15 opinion and to a reasonable degree of scientific
 16 certainty?
 17 A Yes.
 18 Q You asked a question with regard to would the road's
 19 failure be different with regard to whether a
 20 geotextile fabric was used.
 21 MS. CORRELL: Again, asked and answered.
 22 MR. GALLO: I haven't asked the question
 23 yet.
 24 Q When you discuss road failure, are you looking at
 25 different types of failure?

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1 A Yes, I mean there are different types of failure. I
 2 mean the main failure from that would be the
 3 settlement from settlement of that roadway or of that
 4 roadbed.
 5 Q Would a different type of failure be the lateral
 6 movement?
 7 A Yes. Potentially, yes.
 8 Q Is there any doubt in your mind whether geotextile
 9 fabric is used or not whether there'd be lateral
 10 impacts?
 11 A No, there is no doubt.
 12 Q You were asked about a number of your assumptions in
 13 developing your professional opinions.
 14 A Right.
 15 Q Were these assumptions based upon scientific
 16 treatises, publications or experience, or all three?
 17 A All three.
 18 Q You were asked a question about vibrations.
 19 A Uh-huh.
 20 Q And the question went along the line that most
 21 construction sites do have vibrations. Is it
 22 anticipated that there would be -- these vibrations
 23 would be more than normal or to a further extent
 24 beyond the construction site --
 25 MS. CORRELL: Objection, relevance.

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1 question with regard to a number of roadways being
 2 built on Houghton muck or Roland muck. If you were
 3 designing and constructing a project for, say, a
 4 national chain like Home Depot --
 5 A Uh-huh.
 6 Q -- or the Town of (inaudible), a community, and you
 7 ran --
 8 MR. MEYER: Objection, relevance.
 9 ALJ BOLDT: Well, let him finish the
 10 question.
 11 Q The question was, several roadways are built on this
 12 Houghton muck, what's your opinion?
 13 ALJ BOLDT: I'm sorry, the question is
 14 would you recommend that to your commercial
 15 client or what was the question?
 16 MR. GALLO: I'm sorry.
 17 Q Would you have -- what would your recommendations be
 18 to your commercial client or your town client?
 19 MR. MEYER: I would object on relevance.
 20 This is not the kind of site anyone would put a
 21 commercial Home Depot. This is a boat launch
 22 that goes down to a waterway. It's a totally
 23 different need and you can't avoid getting near
 24 a waterway if you build a boat launch.
 25 ALJ BOLDT: I think it is a hypothetical

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1 Q -- than normal?
 2 MS. CORRELL: Is this relevant to a common
 3 law nuisance issue or is this relevant to a
 4 regulatory issue?
 5 MR. MEYER: I'll also object on the fact
 6 it's a leading question.
 7 MR. GALLO: I'm sorry, I'll withdraw the
 8 question.
 9 ALJ BOLDT: Sure.
 10 Q You were asked a question about the existing roadway?
 11 A Yes.
 12 Q Do you think that existing driveway is constructed of
 13 an adequate design for the public access use?
 14 A I would say no, not in its current condition.
 15 Q So it's your professional opinion, and to a
 16 reasonable degree of scientific certainty, that --
 17 MS. KAVANAUGH: Don't tell him what it'll
 18 be, Don. Objection, ask him what it is.
 19 Q What additional work would be necessary?
 20 A Based on the -- that Boring 4 with the blow count of
 21 three and that fill material that's there, that would
 22 need to be compacted or improved in place to densify
 23 it to the point where it could -- you'd want it to
 24 support the roadway.
 25 Q This is a question with regard to -- you were asked a

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1 that's not really supported in the evidence so
 2 the objection is sustained.
 3 MR. GALLO: Okay. No further questions.
 4 ALJ BOLDT: Okay. Any other questions?
 5 MR. GLEISNER: No, Judge.
 6 ALJ BOLDT: Okay. Thank you very much,
 7 sir.
 8 MS. KAVANAUGH: Mr. Gleisner?
 9 MR. GLEISNER: Yes.
 10 MS. KAVANAUGH: I would just point out,
 11 remember when we talked about the GESTRA report,
 12 there was a page missing in --
 13 MR. GLEISNER: Yes.
 14 MS. KAVANAUGH: Have you added it in for
 15 me?
 16 MR. GLEISNER: Have I added it into
 17 our -- you supplied that to the Judge too,
 18 didn't you, Counsel?
 19 MS. KAVANAUGH: Yes, okay, so I mean you're
 20 agreeing it goes in?
 21 MR. GLEISNER: I'm happy with it, Counsel.
 22 Thank you very much. You sent that by email to
 23 me -- the Judge?
 24 ALJ BOLDT: It's in an email folder. I
 25 looked at it quickly Sunday before the Packer

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1 game. All right. Let's go off the record here.
2 (Hearing Adjourned)

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1 STATE OF WISCONSIN
2 DIVISION OF HEARINGS AND APPEALS
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5
6 In the Matter of Manual Code 3565.1 for the Approval
7 Authorizing the Department of Natural Resources to Grade
8 More Than 10,000 Square Feet on the Bank of North Lake,
9 Install a Boat Ramp Structure and Two Outpost Structures
10 on the Bed of North Lake, Install Four Culvert Crossings
11 Over Wetlands, Fill Up To .16 Acres of Wetlands for
12 Construction of a Public Boat Launch on North Lake and
13 Adjacent Property Located in the Town of
14 Merton, Waukesha County

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16 Case Nos. IP-SE-2009-68-05745 through 05750
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22 I, KRISTINE K. MCCARVILLE, do hereby certify that as
23 the duly-appointed transcriptionist, I transcribed the
24 proceedings held in the above-entitled matter on the 20th
25 day of September, 2011, and that the attached is a true
26 and correct transcription of the proceedings so taken.
27 Dated this 15th day of December, 2011.
28
29
30
31

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

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