

BEFORE THE STATE OF WISCONSIN
DIVISION OF HEARING 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 Launch Structure and Two Case No. IP-SE-2009-68
Outfall Structures on the Bed of -05745, -05746, -0547,
North Lake, Install Four Culvert -05748, -05749, -05750
Crossings Over Wetlands, and Fill
Up to 0.16 Acres of Wetland For
Construction of a Public Boat
Launch on North Lake and Adjacent
Property Located in the Town of Merton,
Waukesha County, Wisconsin

Examination of KYLE J. DRAKE, taken at the
instance of Reddelien Road Neighborhood Association,
under and pursuant to all applicable rules, before
JESSICA R. WAACK, Registered Merit Reporter, Certified
Realtime Reporter, Registered Diplomate Reporter and
Notary Public in and for the State of Wisconsin, at
Quarles & Brady, 411 East Wisconsin Avenue, Milwaukee,
Wisconsin, on Friday, August 26, 2011, commencing at
3:53 p.m. and concluding at 4:26 p.m.

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A P P E A R A N C E S

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

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

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

A L S O P R E S E N T

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

* * * * *
I N D E X

Examination: Page
By Mr. Gleisner..... 3

Exhibit Identified: Page
No. 2-A - Blow-Up of a Portion of Exhibit 2
Created By Mark Powers..... 22

Disposition Of Original Exhibit/s:
Exhibit 2-A was returned to Mr. Gleisner. A copy of
the original exhibits was included in the original

1 sometimes, but let me ask you this: Do you
2 actually have any opinion about the Kraus site in
3 terms of navigation? You know what the Kraus site
4 is?

5 A Yes.

6 Q Do you have any opinions, observations or
7 knowledge about navigation on the Kraus site?

8 A I don't know how to answer that question.

9 Q Okay. Let's do it this way. Have you been on the
10 Kraus site?

11 A Yes, I have.

12 Q Okay. I'm going to show you what's been marked as
13 Exhibit 2. And I'll represent to you that the
14 Kraus site encompasses what has been circled in
15 orange and green in the top portion.

16 In other words, the orange part is where
17 the proposed launch -- previous testimony would
18 show the orange part is where the proposed launch
19 or parking lot, rather, is going to go, and the
20 top green circle is where the rest of the Kraus
21 property supposedly exists.

22 MR. GLEISNER: Have you made a sudden
23 discovery, Counsel?

24 MS. KAVANAUGH: No, no. I guess I
25 wasn't -- I wasn't sure where our property starts

1 here. I see how it comes this way. Okay.

2 MR. GLEISNER: Got it?

3 MS. KAVANAUGH: Yes.

4 MR. GLEISNER: Okay.

5 BY MR. GLEISNER:

6 Q Could you -- and now we're going to be a little
7 indefinite in terms of the record right now, but
8 could you just point out to me on that plat of
9 survey the locations where you've been? Have you
10 been all over that property?

11 A I've been down the road a number of times and then
12 the -- I guess the orange portion that you have
13 circled there adjacent to the lake.

14 Q Okay.

15 MR. GLEISNER: So let the record show
16 that the warden has indicated that the road
17 denominated on the plat of survey as the gravel
18 drive to the west of the large green circle on
19 Exhibit 2 is a road that he has traveled a number
20 of times.

21 And he has traveled that gravel drive
22 between the big green circle and the small green
23 circle down to the -- what is the orange circle on
24 Exhibit 2.

25 BY MR. GLEISNER:

1 Q Would that be a generally satisfactory statement
2 of where you've been on that property?

3 A Correct. And then I've also been up to the house
4 on the same drive.

5 Q "The house" being the Kraus house?

6 A Correct.

7 Q Okay. Now, with respect -- let's just take this
8 one at a time, one point at a time. With regard
9 to the access road from Reddelien Road north to
10 the point at which the gravel drive -- so-called
11 gravel drive turns east toward the lake, with
12 respect to just that area, in other words, to the
13 west of the large green circle on Exhibit 2, have
14 you made any observations of any kind with regard
15 to navigability?

16 A That is a road -- I have never seen anyone
17 navigate that with any type of watercraft.

18 Q Okay. Now, with regard -- thank you. With regard
19 to the so-called gravel drive between the southern
20 big green circle and the northern green circle
21 down to where the proposed parking lot will begin,
22 have you ever seen or have you ever made any
23 observations about navigability there?

24 A Again, I have never seen anything navigate that
25 area, any type of watercraft.

1 Q Thank you very much. Now, directing your
2 attention to the orange area, which I will
3 represent to you previous testimony has
4 established as the location of the proposed
5 parking lot. Have you ever made any observations
6 regarding navigability there?

7 A Again, I have never seen any type of watercraft
8 navigate in that area.

9 Q Thank you very much. I will now represent to you
10 that this blue line north of the orange circle on
11 Exhibit 2 has been identified in previous
12 testimony as being a stream, a ditch, a place
13 where water is conveyed. Are you familiar with
14 that?

15 A Yes.

16 Q Have you ever seen -- strike that, made any
17 observations on the navigability with respect to
18 that?

19 A I have never seen any watercraft navigate that
20 area either.

21 Q So then in terms of navigability in the big green
22 circle area, the small green circle area, the
23 orange area and the blue area, would it be correct
24 to say that you have not made any observations
25 regarding navigation?

1 A I have never seen anyone navigate any type of
2 watercraft in that area, correct.

3 Q Thank you, Warden. Now, have you seen standing
4 water anywhere on the Kraus site or near the
5 access road that leads to it?

6 A Yes.

7 Q We're not going to ask you to mark right now, but
8 I would like you to just for purposes of
9 foundation, point to me the general locations
10 where you've seen standing water.

11 A Standing water as in -- just anyplace I've seen
12 water?

13 Q Well, let's just say that -- let's have an
14 understanding of standing water would mean where
15 you've seen actual water that is above the
16 surface, not just like a marsh or a wet area, but
17 where the water is actually above the surface.
18 Have you made observations of that?

19 A Yes.

20 Q And could we just -- so that we have an
21 understanding of, in general, where we might be
22 talking about, could you point to the map and tell
23 me where you've seen that?

24 A I've seen water in the green areas designated as
25 wetlands. I have seen water in this blue area

1 designated as a channel or a ditch, what have you.
2 I have seen pockets of water on the roadway as in
3 puddles on the roadway. I've also seen pockets of
4 water in the orange area too designated as the
5 launch site.

6 Q Let me just be clear then for the record. You've
7 said you've seen standing water within the large
8 green circle on Exhibit 2, and you've seen pockets
9 of water in the small green circle north of the
10 north part, and you've seen occasionally puddles
11 of water on the access road?

12 A Correct.

13 Q Would that be the access road from Reddelien Road
14 up to where it turns east or...

15 A It would be on the eastern section towards where
16 it comes into, I guess, the launch site.

17 Q Can you quantify that in this respect: Is that
18 puddles of water such as you get after a
19 rainstorm, or is that where there's flooding over
20 the so-called gravel drive?

21 A That would be indicative of puddles from the
22 rainstorm.

23 Q Thank you. By the way, Officer, have you ever
24 seen gravel on that -- how long have you been a
25 warden?

1 A Twenty years.

2 Q And when was the first time you were on the Kraus
3 site?

4 A I could not specify the date or the year even.
5 I've got -- I got to know Mr. Kraus fairly early
6 as he was a town chairman for Merton. I would
7 imagine it would be somewhere around 1994, 1995.

8 Q Thank you. And would it be fair to say that you
9 have often been on the access road that runs north
10 from Reddelien Road then?

11 A I've been on there a number of times, yes.

12 Q Okay. Thank you. So 20 years ago would be 1991?

13 A I started in '92, correct.

14 Q '92. Did you at any time observe gravel on that
15 access road?

16 A This eastern section, this section that goes to
17 the east?

18 Q Let me, first of all, just start so we're clear,
19 the access road running north from Reddelien Road
20 to the point where it turns east, in other words,
21 directly to the west of the large green circle on
22 Exhibit 2.

23 MS. KAVANAUGH: And, again, I guess I
24 would object again. I'm going to have to object
25 again for relevance and how it's going to lead to

1 the discovery of admissible evidence on the
2 question of navigability.

3 It seems like you're going after the
4 issue of redevelopment instead of development and
5 storm water permit, which is outside the scope of
6 this hearing.

7 MR. GLEISNER: Thank you, Counsel.

8 BY MR. GLEISNER:

9 Q Did you see gravel there?

10 A Yes.

11 Q Did you see gravel going from the point that the
12 road turns east toward the orange circle? Between
13 the two green circles, did you see gravel there?

14 A I believe there is gravel that extends down from
15 the main road for a distance to the east.

16 Q How far?

17 A I could not recall.

18 Q When was the last time -- I'm sorry, I apologize.

19 A I mean, as far as the distance, I believe there is
20 a large concrete block currently sitting in the
21 road or a cistern, so about that general area.

22 Q To about that general area, but not east of there?

23 A I don't recall seeing gravel east of there.

24 Q Ever?

25 A Correct.

1 Q Thank you very much. Now, I'd like to focus in on
2 the orange area that we're talking about by
3 showing you Exhibit 9. Now, Exhibit 9, have you
4 seen that exhibit or anything like that exhibit
5 before?

6 A I've seen a rudimentary sketching of the launch
7 site, but I don't know if that's in this document
8 itself.

9 Q Fair enough. I'll represent to you that previous
10 testimony has established that that is roughly
11 where the proposed parking lot of the DNR is going
12 to be located on the Kraus site. And just so
13 we've got a common reference point, we're talking
14 about this general area here.

15 A Okay.

16 Q And I would direct your attention to the eastern
17 1/3 of that parking lot area and ask, have you
18 been in that area?

19 A Yes.

20 Q You testified a few moments ago that you had seen
21 standing water where the parking lot is going to
22 go. I believe that was your testimony, correct?
23 I'm not mischaracterizing it, am I?

24 A I've seen water in that orange section, yes.

25 Q With reference to the parking lot plat that is

1 before you, at this point, just point to me for
2 the purposes of establishing a foundation the
3 areas where you've seen standing water.

4 A Again, I've seen standing water in a puddle form
5 where the road accesses -- into the main widening
6 area. I've seen the water, I guess, in this
7 wetland area extending to these trees here to the
8 east.

9 Q Any other place?

10 A On this site?

11 Q Yes.

12 A That's about it, yes.

13 Q Okay. Have you observed trees on the eastern 1/3
14 of the area where the proposed parking lot is
15 going to be located?

16 A Yes.

17 Q I'm going to show you what has been marked as
18 100-A.

19 MR. GLEISNER: Off the record.

20 (Discussion held off the record.)

21 MR. GLEISNER: For the record, Madame
22 Reporter, 100-A is the same as 100, except
23 Mr. Gallo had it marked differently as an NLMD
24 exhibit because of the fact that two copies of the
25 same photograph are in the record now, 100 and

1 100-A.

2 MS. KAVANAUGH: And this one's been
3 marked up, too.

4 MR. GLEISNER: Yeah.

5 MS. KAVANAUGH: 100-A.

6 BY MR. GLEISNER:

7 Q But that's ideal for our purposes, Warden.

8 A Okay.

9 Q Can you show me -- for the purposes of foundation
10 only, can you point to me where the trees are in
11 the vicinity of the eastern end of where the
12 proposed parking lot will be?

13 A I would imagine eastern end would be these trees
14 here --

15 Q I'm going to show you --

16 A -- where the pavement is, somewhere in that area,
17 yes.

18 Q Well, let me show you what's been marked as
19 Exhibit 102 and ask you if you are familiar with
20 the trees that are surrounded by a green line.

21 A Yes.

22 Q And do you recognize that house to the south of
23 that green line as belonging to anybody?

24 A Yes.

25 Q And who?

1 A I don't recall the name.

2 Q I don't want to be -- I'm sorry. I don't want to
3 make a trick question out of this. The Hansons?

4 A Yes. I knew as soon as you said it. Yes,
5 Mr. Hanson.

6 Q Have you been in that stand of trees that's been
7 circled with a green line?

8 A I have walked through the western edge of those
9 trees, yes.

10 Q Have you ever made any observations regarding
11 navigation in those trees?

12 A I have never seen anyone navigate a watercraft in
13 that area.

14 Q Have you ever seen standing water in that area?

15 A I have seen standing water in the area, yes, in
16 those trees and to the west.

17 Q And how deep was that standing water, if you know?

18 A I do not know.

19 Q Okay. That's fair. Did you see standing water
20 emanating from those trees toward the west or
21 toward the southwest at any time?

22 A It would be more toward the southwest towards the
23 dead end of -- is that still Reddelien Road?

24 Q Yes, sir.

25 A Toward Reddelien Road.

1 Q And, if you can, what was the depth of that
2 standing water emanating from those trees?

3 A I did not walk through it.

4 Q Okay. Let me just return your attention, if I
5 may, to Exhibit 2. Counsel has indicated that you
6 will also testify as to observations of navigation
7 in an area adjacent or connected waters of North
8 Lake. Am I reading that correctly?

9 A Any adjacent or connected water to North Lake,
10 correct.

11 Q Do you know what that means?

12 A I would imagine it's any water that's adjacent to
13 or connected to the water to the lake, so, yes.

14 Q Do you know what that might refer to in terms of
15 the Kraus property?

16 A I can imagine it might have to deal with the
17 wetland area, the ditch and the wetland area.

18 Q Let's just be sure we're clear on this, would that
19 ditch be the blue line?

20 A Correct.

21 Q And what observations about navigation have you
22 made concerning that blue line? Anything?

23 A Other than I've never seen anyone navigate a
24 watercraft in that area.

25 Q Have you ever seen water in that area?

1 A Yes.

2 Q And can you describe the water that you see in the
3 area that's marked in blue on Exhibit 2?

4 A I have not been in that ditch. Sometimes the
5 ditch -- some years the ditch is dry. Other times
6 I know there's water in there. Again, I've never
7 made any detailed observations on how deep the
8 water is or anything like that.

9 Q Is it sometimes filled as though it were a stream,
10 that it looked like a stream some years?

11 A I don't recall ever seeing it as actually moving
12 water, no.

13 Q Have you made any observations at the eastern end
14 of what has been marked as blue where the -- where
15 the so-called stream or ditch or conveyance, water
16 conveyance intersects with North Lake?

17 A Yes.

18 Q What have you seen, sir?

19 A This is -- it appears to me that there is actually
20 a lip between this ditch and then the waters of
21 North Lake.

22 Q Can you describe what you mean by "lip"?

23 A The waters of North Lake would have to come up
24 substantially in order to go into the ditch.

25 Q Have you ever seen that happen?

1 A I have never made detailed observation of that
2 area, no.

3 Q Is it part -- you are actually a warden who from
4 time to time patrols North Lake, is that correct?

5 A That is correct.

6 Q Would there ever be a time during the frequent
7 occasions when the lake is quite high, as it gets
8 from time to time like during our last annual
9 100-year storm, do you recall ever seeing or being
10 required to go to that area for the purposes of
11 making observations or --

12 A No.

13 Q -- apprehending a person or anything such as that?

14 A No. I've never been -- again, never made a
15 detailed observation of that area during the
16 high-level water of North Lake. There are usually
17 other concerns.

18 Q Yeah, I understand.

19 (Pause in testimony.)

20 BY MR. GLEISNER:

21 Q Let me just make certain that we have plumbed your
22 knowledge on this subject. Other than what you've
23 testified to this afternoon, is there anything
24 else that you have to say about navigation
25 concerning the large green circle on Exhibit 2,

1 the small green circle on Exhibit 2, the blue line
2 on Exhibit 2 or the orange circle on Exhibit 2?
3 Have you told us everything that you know that
4 might relate to navigation in those areas?

5 A As far as my understanding, again, of navigation,
6 if you're asking me what I know of navigation in
7 that area, all I can say as far as navigation is
8 that I have never seen anybody operate a
9 watercraft in that area. I am not an expert in
10 navigation delineation.

11 Q We just want to make sure we're not surprised.

12 A No, you're not going to be surprised.

13 Q Okay. Thank you. Did you -- I've got one other
14 question. Did you ever see in any of the areas
15 that we're talking about, the large green, small
16 green circles, the orange circle or the blue
17 circle, did you ever see water that was deep
18 enough to float a watercraft?

19 I'm not talking about whether you saw a
20 watercraft; waters that were deep enough to float
21 a watercraft?

22 A From above, yes, it appeared to be deep enough
23 that you could float the watercraft in those
24 areas.

25 Q Again, for foundational purposes, and we'll mark

1 it if necessary, can you point to me where you saw
2 it was deep enough to float a watercraft?

3 A Definitely in the wetland areas designated in
4 green, in part of the channel designated in blue,
5 again, not having made a detailed delineation of
6 the blue area.

7 And during extremely high water levels,
8 probably the water areas in the orange as well.
9 You would be able to probably float a very small
10 watercraft in there as well.

11 Q So let's -- this forces me to ask one or two more
12 questions.

13 A That's fine.

14 Q The testimony that you just gave is that you have
15 seen, on occasion, water in the big green area
16 occasionally high enough to float a watercraft?

17 A Correct.

18 Q You have also seen water high enough to float a
19 watercraft in the small green circle, is that
20 correct?

21 A That is correct.

22 Q I'm going to direct your attention. There's a
23 scalene triangle here. Let me say that I am
24 pointing to a triangle that exists almost in the
25 center southern section of the top green -- or the

1 small green circle, as we call it.

2 If you'd just look up here so we can --
3 actually, you took those other ones down already.

4 Are you familiar -- before we ask you
5 any questions, are you familiar with the northwest
6 corner of the Hanson property right here?

7 A I have an idea where it is. I don't know the
8 exact markings or boundary line.

9 Q Let me ask you this: You remember you testified a
10 while ago about the cement block?

11 A Uh-huh.

12 Q You've got to say yes or no for the --

13 A Yes, ma'am -- yes, sir.

14 Q Thank you for clarifying that. In this area where
15 the cement block is, did you see water deep enough
16 to float a watercraft?

17 A In the triangle area north of the road, I would
18 say yes.

19 Q Just so we're clear on this, I'm going to show you
20 a blow-up of that area.

21 MR. GLEISNER: Off the record.

22 (Discussion held off the record.)

23 BY MR. GLEISNER:

24 Q I'm now going to show you what's been marked as
25 2-A. A surveyor by the name of Mark Powers has

1 blown up this portion of the --

2 MS. KAVANAUGH: Do you have a copy for
3 me, too?

4 MR. GLEISNER: Sure. Just a second,
5 Counsel.

6 MS. KAVANAUGH: Okay.

7 MR. GLEISNER: Here you go, Counsel.

8 MS. KAVANAUGH: Thank you.

9 MR. GLEISNER: You're welcome.

10 BY MR. GLEISNER:

11 Q I just want to be exact on this, if I can. I'm
12 going to take this down for a second and represent
13 to you that Exhibit 2-A is a blow-up of the area
14 toward the center bottom of the top green circle
15 on Exhibit 2. Make sense?

16 A Yes.

17 Q And I'm now going to put up Exhibit 2-A like this
18 and ask you -- this is the gravel drive or alleged
19 gravel drive. Have you seen water in this area
20 right here deep enough to float a watercraft?

21 A Not knowing exactly where that water -- that
22 triangle is, but being familiar with that green
23 northern wetland area, there are areas close to
24 the road that there is -- have been water
25 sufficient to float a watercraft, again, not

1 knowing exactly where that triangle is.

2 Q I see. You know where the block is, right?

3 A Yes.

4 Q And you know there's a sign near there, too? Do
5 you know that sign?

6 A Yes, there is a sign there.

7 Q If I represent to you that that block is within
8 that triangle to the west, does that refresh your
9 recollection?

10 A Yes. I believe the block is on the road there
11 along the property line.

12 Q Okay. Right at this point we're just concerned
13 with establishing that you know where that block
14 is.

15 A Yes.

16 Q As you are looking -- as you're about to walk
17 down, you can see the block, and you can see as
18 you go east, the roadway that we referred to
19 euphemistically as the gravel drive on this.

20 Using this green marker on Exhibit 2-A,
21 as you walk east on that -- from that gravel block
22 and having in mind where the sign is, would you
23 just draw where you've seen water standing that's
24 deep enough to float a watercraft? Not on that
25 one.

1 A Okay. Sorry.

2 Q On 2-A.

3 A 2-A. Are you representing the block would be
4 there?

5 Q I'm representing that the block would be right
6 about there.

7 MR. MOEBIUS: Right here is where the
8 block would be sitting, right where the "W" is.

9 BY MR. GLEISNER:

10 Q And we're concerned about, as you walk along the
11 road and you look off to your left, as you leave
12 that block, have you seen water deep enough to
13 float a watercraft in this area?

14 A Based on my recollection, there would have been
15 water in this triangle area, but more to the east
16 of that area. This area.

17 Q That area. And that would be water deep enough to
18 float a watercraft?

19 A It appears to be.

20 Q Okay. So you've just made a circle. It wouldn't
21 go to the west? It would be right where you drew
22 the circle?

23 A That's to the best of my recollection.

24 Q Okay. That's fair. Would you just initial that,
25 Officer? Okay.

1 A (Witness complies.)

2 MR. GLEISNER: Thank you very much. And
3 that was a green circle drawn and initialled by
4 Officer Drake on Exhibit 2-A.

5 THE WITNESS: Yes.

6 BY MR. GLEISNER:

7 Q What's your date of birth, Officer?

8 A 9/24/1965.

9 Q We thank you very much, Officer, for coming in.
10 We thank you very much. It's very important to
11 the people in the neighborhood, and I apologize
12 for the inconvenience.

13 A Not a problem. Thank you.

14 (Proceedings adjourned at 4:26 p.m.)

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

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

12

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

18

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

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 Notary Public
 In and for the State of Wisconsin

My Commission Expires: September 1, 2013.

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