

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 ANDY HUDAK, 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 Thursday, August 25, 2011, commencing at
1:04 p.m. and concluding at 5:35 p.m.

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7 Association.

8 QUARLES & BRADY, LLP, by
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12 appeared on behalf of Reddelien Road Neighborhood
13 Association.

14 REINHART, BOERNER, VAN DEUREN, S.C., by
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19 District.

20 STATE OF WISCONSIN,
21 DEPARTMENT OF NATURAL RESOURCES, by
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25 appeared on behalf of the Department of Natural
26 Resources.

27 A L S O P R E S E N T

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

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1 TRANSCRIPT OF PROCEEDINGS

2 (Exhibits were marked prior to the start
3 of the deposition.)

4 ANDY HUDAK, called as a witness
5 herein, having been first duly sworn on oath, was
6 examined and testified as follows:

7 MR. GLEISNER: I'd like to first state,
8 for the record, that I received yesterday
9 afternoon about 250 pages of material that I
10 hadn't had before. I've put those materials into
11 separate packets. Edwina?

12 MS. KAVANAUGH: Are you talking about
13 that training stuff?

14 MR. GLEISNER: Yeah. And I've also
15 marked them, et cetera. I haven't had a chance to
16 completely digest them. And depending on what we
17 learn today, it may be possible I'll need to
18 recall him as a witness based on some of the
19 material that I only got possession of yesterday.

20 MS. KAVANAUGH: Well, I don't know what
21 Andy's got -- it's training material. Basically,
22 it speaks for itself.

23 MR. GLEISNER: Yeah.

24 MS. KAVANAUGH: You know, it's
25 PowerPoints. So I don't think Andy's going to be

1 able to tell you very much about it. And just in
2 an effort to be inclusive, since you were asking
3 about navigability and Bob had mentioned somebody
4 had compiled all the stuff onto one place, the
5 training materials on navigability...

6 MR. GLEISNER: Are you going to tape
7 record this?

8 MS. KAVANAUGH: Yes.

9 MR. GLEISNER: Maybe I'll wait while you
10 get that situated. Maybe while you're doing that,
11 I'll ask you a couple questions that won't slow
12 you down. Is this your 804.52(e) witness?

13 MS. KAVANAUGH: Yes, it would have to
14 be.

15 MR. GLEISNER: Okay. Fine.

16 MS. KAVANAUGH: Again, like I said, some
17 of those other questions about, you know, the
18 manual code approval, I would say it speaks for
19 itself. I don't know whether Andy can answer
20 simple questions about it.

21 MR. GLEISNER: Sure. We'll do our very
22 best to make it relevant to navigability
23 throughout.

24 MS. KAVANAUGH: Because that is the
25 issue.

1 MR. GLEISNER: That certainly is the
2 issue. You tell me when you're ready, Edwina.

3 MS. KAVANAUGH: Yes.

4 (Discussion held off the record.)

5 EXAMINATION

6 BY MR. GLEISNER:

7 Q Would you please state your name for the record.

8 A Andrew Hudak.

9 Q What is your present condition?

10 A My present position is water resource specialist.

11 Q For the Department of Natural Resources?

12 A For the Department of Natural Resources.

13 Q And how long have you been with the DNR?

14 A I started -- I was hired on permanently in
15 January of 2006.

16 Q Now, I'm going to show you --

17 MS. KAVANAUGH: I want to make sure this
18 is working first, Bill.

19 MR. GLEISNER: Pardon me?

20 MS. KAVANAUGH: I want to make sure
21 first this is working, and it doesn't seem to be.

22 (Discussion held off the record.)

23 BY MR. GLEISNER:

24 Q Now, I'm going to show you what has been marked
25 RRNA Exhibit 00.

1 MR. GLEISNER: For the record, every
2 time I mention an exhibit number that I am
3 offering, we'll just assume RRNA, Madame Reporter.

4 BY MR. GLEISNER:

5 Q Have you seen that, Mr. Hudak?

6 A If this is the most recent, yeah, I would say I
7 have seen it, but I have not read it thoroughly.

8 Q Well, we're just going to make that part of the
9 record. That was the notice of examination that
10 was served on you under 804.05(2)(e), which says
11 we want to ask you certain questions on behalf of
12 the agency.

13 And this is going to be different -- a
14 little bit different than the questions that we're
15 going to ask you with respect to your
16 responsibilities on the Kraus site and your other
17 responsibilities with regards to navigability, et
18 cetera.

19 I would like to start in that regard by
20 having you take a look at what has been marked
21 here as Exhibit 1-A. This was prepared by your
22 counsel.

23 MR. GLEISNER: You want your own copy,
24 Edwina?

25 MS. KAVANAUGH: Yes.

1 BY MR. GLEISNER:

2 Q Your counsel has stated that you'll be able to
3 testify to the materials that are set forth in
4 that first paragraph. Take a moment and look at
5 them and see if those comport with your
6 understanding to what you will be testifying to
7 today.

8 A It's accurate.

9 Q All right. Would you please read that into the
10 record for me so we have a road map here?

11 A "Mr. Hudak is the DNR water management specialist
12 who processed the application and issued the
13 manual code approval for the DNR North Lake boat
14 launch."

15 "He may be called to testify to issues
16 related to this matter of which he has knowledge
17 including DNR processing and analysis of the
18 application for a manual code approval, DNR
19 determination that the project met the standards
20 to issue manual code approval, DNR determination
21 of the location and extent of navigable waterways
22 of the State on and adjacent to the DNR, formerly
23 Kraus property, and DNR procedures generally to
24 determine the location and extent of navigable
25 waters of the State on and adjacent to

1 properties."

2 Q Thank you very much. Now, all of the exhibits
3 that I'm going to give to you, just keep in front
4 of you, because those are going to become the
5 exhibits --

6 MR. GLEISNER: With your permission,
7 Edwina, we'll just let the court reporter take
8 charge of the exhibits when the deposition is
9 over.

10 MS. KAVANAUGH: Once we're done?

11 MR. GLEISNER: Yes. That's my
12 preference.

13 BY MR. GLEISNER:

14 Q Now, the first part of that is what I want to
15 inquire into for a short while. We want to
16 understand how the agency operates with regard to
17 manual code.

18 Now, we're not trying to get a -- you
19 know, everything that manual code stands for. I'm
20 only interested in manual code as it relates to
21 issues of navigability or similar issues.

22 So could you explain to us how the DNR
23 actually employs the manual code process and when
24 it employs it?

25 A I can specifically state during the manual code

1 process as far as waterway or wetland regulatory
2 projects are concerned that what portion of the
3 DNR is actually applying for the application,
4 whether it would be a wildlife project or a
5 fishery's project that are doing projects in or
6 near navigability waterways or wetlands, will seek
7 to have that project reviewed under the manual
8 code process.

9 Q Can you explain to me how the manual code process
10 works? When is it triggered? Let's start there.

11 A When a project has been identified to potentially
12 impact or be adjacent to a navigable waterway or
13 wetland.

14 Q And I'm afraid I'm not quite clear. Is the manual
15 code a process that the DNR uses when it's
16 applying for a permit as opposed to a citizen?

17 A It's the process that the entity within the DNR is
18 proposing a project, comes to the appropriate
19 staff to ensure that specific standards or
20 concerns are met as it relates to navigable
21 waterways or wetlands.

22 Q Let's back up a moment. Let's just take the
23 specific Kraus property here. The DNR owns that
24 property, correct?

25 A To the best of my knowledge, correct.

1 Q So when the DNR applies for a manual code permit,
2 it's actually --

3 MS. KAVANAUGH: I object. It's not a
4 permit. Remember? It's approval. We're not
5 subject to permitting.

6 MR. GLEISNER: Very, very good.

7 BY MR. GLEISNER:

8 Q When it applies for an approval, it is, in effect,
9 applying for the same type of device that a
10 citizen would use when applying for a permit?

11 MS. KAVANAUGH: I'll object. Clarify
12 "device." I mean, the manual code speaks for
13 itself, and it says when it's employed in the
14 manual code, and you've been provided a copy of
15 the manual code.

16 MR. GLEISNER: Sure. And I don't
17 understand how it works. I'm trying to
18 understand.

19 BY MR. GLEISNER:

20 Q Is the manual code what the DNR uses when it's
21 applying for approval from itself?

22 A The manual code is the process that the DNR uses
23 to apply the similar standards that a private
24 entity or a private citizen would have to gain
25 approval to do a similar-type project in a

1 navigable waterway or wetland.

2 Q So, in other words, if a corporation, say the
3 Walgreen corporation came to the Kraus site and
4 said, "We want to do certain things there that
5 relate to construction of putting in pavement,
6 putting in a building," whatever, they would --
7 they would apply to the DNR for a permit, is that
8 correct?

9 A Provided what activity they're doing --

10 Q Let's say putting in pavement.

11 A -- is under DNR jurisdiction.

12 Q Yes, yes. Putting in pavement in the type of land
13 that is there, would they apply for a permit?

14 A Putting in pavement may not assert jurisdiction on
15 that site. That may not be the sole regulatory
16 factor that would require a permit on that site.

17 Q And so a private citizen such as the Walgreens
18 corporation wouldn't have to apply for a permit
19 for the Kraus site?

20 A Depending upon the location of the pavement,
21 depending upon the extent of size of disturbance,
22 they may not need to. It all depends upon, again,
23 the regulatory authority of the DNR on the
24 particular project that they're proposing.

25 Q And when they apply for a manual code approval,

1 the DNR -- one department of the DNR is applying
2 to another department of the DNR? Is that how it
3 works?

4 MS. KAVANAUGH: That's not a
5 clarification. The department is the department.

6 BY MR. GLEISNER:

7 Q So the department is applying to the department?

8 MS. KAVANAUGH: One -- there are
9 subdivisions --

10 MR. GLEISNER: Uh-huh.

11 MS. KAVANAUGH: -- of the department.
12 And if one bureau or one section or one division
13 wants to undertake an activity --

14 MR. GLEISNER: Sure.

15 BY MR. GLEISNER:

16 Q Now, Mr. Hudak, I'd like you to answer this -- and
17 I appreciate the comments of counsel, but I'd like
18 you to answer this: When you sought manual code
19 approval for the Kraus site, what subdivision or
20 part of the DNR made the application, and what
21 part or subdivision of the DNR acted on the
22 application?

23 A I would say that it was an application by the -- I
24 don't know the exact title, but it would be
25 basically kind of the land management portion of

1 the DNR that would be in charge of doing
2 improvements on DNR property. And in this case,
3 it would be the public access.

4 Q Okay. And who would they apply to?

5 A They aren't applying. They're submitting
6 paperwork to determine whether or not their
7 project meets applicable standards for the
8 jurisdiction that may be asserted on that site.

9 Q Now, if a company came along, wouldn't they have
10 to also make certain that they were complying with
11 applicable regulations?

12 A Yes.

13 Q They'd have to come and talk to you, right?

14 A Not necessarily. It all depends on whether or not
15 the application they're making is -- meets one of
16 the criteria, one of the authorities the
17 department has to review in association with
18 navigability waterways or wetlands.

19 Q But if a corporation made an application for
20 whatever work they were going to do on a site like
21 the Kraus site, you would be acting as a neutral
22 enforcer of environmental laws in reviewing that,
23 correct?

24 A I would say that would be correct, that I would
25 review any applicable activity that would have

1 department jurisdiction over that activity.

2 Q And who has oversight over the DNR when it decides
3 that it's going to grant itself manual code
4 approval?

5 MS. KAVANAUGH: That's a vague question.

6 MR. GLEISNER: Let me be more specific.

7 MS. KAVANAUGH: Yeah, be more specific
8 as to the DNR agency.

9 BY MR. GLEISNER:

10 Q Yeah, we should remember the record, all of us.
11 One person speaks at a time. Who makes certain
12 that the DNR is playing by the same rules as the
13 public?

14 MS. KAVANAUGH: And object, it's vague.
15 What do you mean by "the same rules as the
16 public"? Are you asking whether it's the same
17 statutory standards?

18 BY MR. GLEISNER:

19 Q I am asking that in the same circumstance where
20 the DNR is seeking manual code approval and a
21 private citizen is seeking the same kind of
22 approval on a different piece of land, where all
23 things are equal except that one case you're
24 seeking manual code approval for DNR property and
25 in another case a private citizen is seeking a

1 permit from you as an enforcement agency, who or
2 what in the DNR ensures that the DNR plays by the
3 same rules as the private citizen?

4 MS. KAVANAUGH: And, again, I'll object
5 "the same rules." Are you asking who ensures that
6 it meets the statutory standards?

7 MR. GLEISNER: Counsel, the question's
8 clear.

9 MS. KAVANAUGH: The question isn't
10 clear. It's vague. The same rules? Playing by
11 the same rules?

12 MR. GLEISNER: Let's see if he can
13 answer it.

14 THE WITNESS: The only answer that I can
15 provide is that a water management specialist is
16 entrusted to enforce Chapter 30 and wetland rules
17 with projects that may impact, be adjacent to, in
18 proximity to wetlands or navigable waterways of
19 the State.

20 BY MR. GLEISNER:

21 Q Okay. Let's go with that. Let's say, for
22 example, that Walgreens decides they're going to
23 build a building where there is clearly wetlands
24 present, okay?

25 And they come to you, and they apply

1 under Chapter 30, probably under -- well, let's
2 say that there may be navigable water on there,
3 just to bring this closer to home, under
4 Chapter 30.10.

5 And they say, "We want to put something
6 in the navigable waters here," okay? What would
7 that private entity have to do to get a permit
8 from you?

9 MS. KAVANAUGH: I would object. The
10 question is so confusing. You've thrown in
11 wetlands, you've thrown in the definition of
12 navigable waters, you've thrown in Chapter 30. If
13 you would clarify your question...

14 MR. GLEISNER: Certainly.

15 MS. KAVANAUGH: What type of application
16 are they seeking?

17 BY MR. GLEISNER:

18 Q If a private corporation wants to build a building
19 or a structure in a place where there are
20 navigable waters, what permit would they have to
21 seek?

22 A There may be, and I'll say maybe, because we don't
23 know the extent of the project --

24 Q Uh-huh.

25 A -- Chapter 30 jurisdiction. Or in a case of

1 wetlands, potentially water quality certification
2 requirements or permits needed to build that
3 Walgreens.

4 Q And who would, in the DNR, determine whether they
5 needed a permit?

6 A That would be the water management specialist.

7 Q And when the DNR seeks to build a comparable
8 structure, we're not necessarily talking Kraus
9 here, but a comparable structure where there's
10 navigable waters, who do they apply to in the DNR?

11 A They would seek guidance and provide plans to a
12 water management specialist to determine whether
13 or not there is jurisdiction, whether or not there
14 are applicable standards that need to be met with
15 that particular project.

16 Q Being sensitive to counsel's concerns now, we have
17 identical plans, an identical -- the DNR wants to
18 put a structure A in navigable water or near
19 navigable water, and the DNR wants to put a
20 structure in navigable water (sic).

21 Who in the DNR ensures that the same
22 standards that apply to the private citizen apply
23 to the DNR?

24 MS. KAVANAUGH: And just object. You
25 say in or near. Are you talking about either one

1 or one or the other?

2 MR. GLEISNER: Counsel, you're being an
3 obstructionist.

4 MS. KAVANAUGH: No, I'm not. I'm trying
5 to get you to ask clear questions.

6 BY MR. GLEISNER:

7 Q The question is: If the DNR wants to put a
8 structure in navigable water, period, and a
9 private citizen wants to put a structure in
10 navigable water, period, who ensures that the same
11 standards apply to both?

12 A That would be the water management specialist.

13 Q And the water specialist person would be somebody
14 such as you?

15 A Depending upon the location, within the western
16 half of Waukesha County at that time, that would
17 have been me.

18 Q So if someone representing Walgreens came to you
19 and said, "I want to put a structure in navigable
20 waters," just briefly, not in great detail, what
21 process would you go through?

22 A That's very vague. I'm not really sure what
23 activity you're asking me to answer as to what
24 process, because there's potentially different
25 processes with different activities.

1 Q Okay. What standards would you look to in
2 assessing an application to put a structure in
3 navigable waters?

4 A The five basic standards are whether there's an
5 navigational impact from that structure; whether
6 or not there's a recreational impact from that
7 structure; whether or not there's fish and
8 wildlife impact from that structure; whether or
9 not there's a natural scene of beauty impact from
10 those structures.

11 Q Okay. Now, when you put -- when you're put in the
12 position of the DNR asking to put an identical
13 structure in navigable waters, what are the
14 standards that you apply in assessing that
15 request?

16 A The same.

17 Q The same standards?

18 A Correct.

19 Q Now, meaning no offense, because I'm sure you're a
20 very fair and honest man, who oversees you to make
21 sure you apply the same standards with an equal
22 hand?

23 A I would have to say the DNR section chief.

24 Q And that would be who?

25 A Liesa Lehmann-Kerler.

1 Q And this lady is what in the DNR? What's her --

2 A She's the section chief of the -- basically she's
3 the water management specialist section chief that
4 oversees both the water management division and
5 also the dam safety division. They're the same
6 under her, same bowl.

7 Q And who oversees her to make sure that she is
8 ensuring that the DNR and the private citizen are
9 treated the same in the circumstance we've
10 described?

11 A I would have to say probably the division
12 administrator.

13 Q Who is?

14 A Currently?

15 Q Uh-huh.

16 A Ken Johnson.

17 Q And who oversees him?

18 A I would have to say probably the -- up to the top
19 would be the secretary. I believe that's --
20 again, keep in mind, things are changing a little
21 bit now.

22 Q Yeah, I understand.

23 A So I'm trying to understand. That right now,
24 that's pretty much the process.

25 Q So if I understand you correctly, and you tell me

1 if I'm wrong, for most purposes, a permit applied
2 for by an individual to place a structure in
3 navigable waters and a permit applied for by the
4 DNR to put a structure in navigable waters are the
5 same, but the DNR is passing judgment on itself
6 quite a ways up the ladder?

7 A Project standards are similar, identical. The
8 review process is the permit path for the private
9 individual and the manual code process for DNR
10 projects.

11 Q We'll come back to this, but I'd like to turn to
12 the specifics now of what you did. I'm going to
13 show you what has been marked as Exhibit 1, and
14 I'm going to pass that over to Edwina. Would you
15 identify this for the record, please.

16 A This would be the manual code approval granting
17 permission to construct a boat launch at the DNR
18 property on the west side of North Lake.

19 Q And we'll get back to this in a little while, but
20 is this still an accurate survey? This was done
21 in 2008. I mean, I can give you a copy, and I
22 will in a little while. But does that look
23 accurate to you?

24 A I don't know the origin of that, but it's vaguely
25 similar to the general aerial extent of the DNR

1 site on the west side of North Lake.

2 Q Okay.

3 MR. GLEISNER: The witness is referring
4 to a plat of survey done by the DNR in 2008, and
5 we will -- it is marked as an exhibit, and we'll
6 get back to it.

7 BY MR. GLEISNER:

8 Q But I just wanted to understand that this
9 Exhibit 1 relates to the Kraus site and relates to
10 the manual code approval of the boat launch that
11 you proposed putting into that site, is that
12 correct?

13 A Exhibit 1 relates to the DNR's approval for
14 construction to have a boat launch at the DNR site
15 on the west side of North Lake, also formerly
16 known as the Kraus site.

17 Q Take a moment and tell me where in there you talk
18 about navigability.

19 THE WITNESS: Can you provide additional
20 detail of what you want to know about navigability
21 as it relates to the findings of this --

22 BY MR. GLEISNER:

23 Q Tell you what, I'll make you a deal. Find me the
24 word "navigability" or "navigable" in there.

25 MS. KAVANAUGH: I can.

1 MR. GLEISNER: Counsel, you're not
2 testifying. But thank you.

3 THE WITNESS: She's a faster reader than
4 I am. Under findings of fact No. 2.

5 BY MR. GLEISNER:

6 Q And what tests were performed to substantiate
7 finding of fact No. 2?

8 A The discussion about North Lake and the Oconomowoc
9 River are taken from a lake drainage -- or
10 basically, yeah, our lake book to describe the
11 characteristics of North Lake as it's deemed as a
12 navigable waterway and the Oconomowoc River.

13 The portions of the wetland complex and
14 portions of the site that were determined to be
15 navigable would have been analyzed during the
16 field visits that were -- occurred in the fall of
17 October.

18 Q Did you supervise these field visits?

19 A I was -- I was in attendance.

20 Q I'm going to show you what was marked as
21 Exhibit 2. And now we'll get to --

22 MR. GLEISNER: Edwina.

23 BY MR. GLEISNER:

24 Q And now we'll get to the plat that's up here on
25 the easel. This is a plat of survey. It is done

1 by Welch Hanson. It's now part of Yaggy Colby.
2 I've confirmed that this is a DNR survey, and it's
3 represented as such on the face of the survey.

4 I'd like you to do something for me.
5 I'm going to give you a nice purple pen here. And
6 prior to -- I want to be specific about this.

7 Prior to the issuance of the manual code
8 approval on November 4, 2010, would you show me --
9 this is identical to what you got in front of you.
10 Would you show me where you did navigability tests
11 on the property?

12 A Prior to what date?

13 Q Prior to November 4, 2010, the date that you
14 issued the manual code approval for this property.

15 MS. KAVANAUGH: Would you clarify what
16 you mean by "navigability test"?

17 MR. GLEISNER: Any navigability test.

18 BY MR. GLEISNER:

19 Q In fact, in other words, the type of tests that
20 were done in the Village of Menomonee Falls, DNR,
21 for example. But any tests that were done to
22 confirm navigability.

23 MS. KAVANAUGH: Okay.

24 THE WITNESS: There were no, in fact,
25 navigability tests done prior to the 2010

1 decision. During the field visits prior to the
2 decision, there were professional judgment
3 observations documented that led to the ultimate
4 areas of potential navigability.

5 BY MR. GLEISNER:

6 Q Okay. I'm going to skip ahead here for a moment
7 and pull out another exhibit.

8 MR. GLEISNER: Edwina, here's your copy.

9 MS. KAVANAUGH: Thank you.

10 MR. GLEISNER: You're welcome.

11 BY MR. GLEISNER:

12 Q This has been marked as Exhibit No. 13. When did
13 the DNR do this drawing?

14 A It's not a drawing I did. I do not know the
15 information on that.

16 Q I'm going to show you what has been marked as
17 Exhibit 14.

18 MR. GLEISNER: Edwina, here's your copy.

19 BY MR. GLEISNER:

20 Q Did the DNR do that one?

21 A Again, I did not produce this, so I can't confirm
22 or deny that it was a DNR document.

23 Q Fair enough. Using this light blue pen and
24 referring back now to Exhibit No. 2, tell me, if
25 you would, the location of any streams on that

1 property. And I'm saying the Kraus property now.

2 MS. KAVANAUGH: The former Kraus
3 property.

4 MR. GLEISNER: Yes, yes. Thank you,
5 Edwina.

6 THE WITNESS: Would you like me to
7 identify streams or --

8 BY MR. GLEISNER:

9 Q I would like -- I'm sorry. I apologize.

10 A Go ahead.

11 Q I apologize. I would like to know, first of all,
12 are there any streams on the Kraus property?
13 Let's start there.

14 A An area identified as a waterway that had
15 potential navigable characteristics was located
16 along the northern portion of the property
17 boundaries.

18 Q Would you mind, if you can, taking this light blue
19 pen, could you draw a line where that --
20 understanding it's going to be an approximation --
21 where that stream or that waterway was or is?

22 A On Exhibit 2?

23 Q Yes, ma'am -- yes, sir. Sorry about that. Yes,
24 sir.

25 A That was a location where a defined waterway was

1 present.

2 Q Would you, please, initial that? What you just
3 wrote on Exhibit 2, would you just initial that,
4 please?

5 A (Witness complies.)

6 Q Now, could you just pass that to me for a moment
7 and let me just...

8 A (Witness complies.)

9 Q So you've identified an area to the north of the
10 former Kraus parcel, and you've gone back to --
11 you've gone back approximately 200 feet?

12 A Approximation.

13 Q Yes, of course. That stream does not continue on?

14 A A stream with perceivable flow, no.

15 Q Is there a stream that connects to that?

16 A There is additional water courses to the west that
17 have navigability features.

18 Q Could you draw -- here, let's not be unclear. I
19 want to make sure the record is clear.

20 A Sure.

21 Q Take this green pen. We both will prosper if we
22 have a clear record here. And draw for me from
23 that blue point west where that waterway with
24 navigable features is located, please.

25 A There is not great detail on this, but I will draw

1 approximations.

2 Q I appreciate that.

3 A (Witness complies.)

4 Q Thank you very much. Now, could you, please, just
5 put your --

6 A Yep, I got one here.

7 Q Thank you very much.

8 A (Witness complies.)

9 Q So, now, if I may have that back for just a
10 moment.

11 A Yep.

12 Q Thank you very much. You have drawn a green line
13 around the western portion of the former Kraus
14 site, and you've intersected the northwest corner
15 of the Hanson property where the DNR now owns an
16 easement, is that correct?

17 A I have drawn a line across the Hanson property.

18 Q Is that the northwest corner of the Hanson
19 property? Can we agree to that?

20 A That is the northwest corner of the Hanson
21 property, the northern northwest corner of the
22 Hanson property.

23 Q Thank you very much. Now, this area that you've
24 drawn a green line around, to the south of the
25 western portion of the Kraus property, can you

1 describe what that is, if you know?

2 A Sure. It is a shrub-carr, vegetated dominant
3 wetland with periods of inundation.

4 Q Would you mind taking a -- I assume this entire
5 area that you've circled here in green to the
6 south of the western portion of the Kraus site is,
7 as you've described it, a wetland?

8 A Yes.

9 Q Could you just -- I feel guilty having to take
10 Edwina's pen. I'll give you one of mine. Can you
11 just write "wetland" in the middle of that and put
12 your initials so we're clear on what you're
13 talking about?

14 A (Witness complies.)

15 Q Now, I notice that you have, in effect, carved out
16 a channel, for want of a better word, or a space
17 between the northern green circle that you've
18 drawn and the southern green circle that you've
19 drawn, is that correct?

20 A There is a -- an existing access road --

21 Q Uh-huh.

22 A -- in that current location that is above and
23 would be considered not having or containing
24 characteristics of a navigable waterway.

25 Q Is that road denominated on Exhibit 2 as a gravel

1 drive?

2 A It is labeled that on Exhibit 2.

3 Q And have you ever observed that to have gravel in
4 it?

5 A I have been on the site multiple times, and I
6 could not make a point in my observation whether
7 there's exposed gravel on that road or not.

8 Q Fair enough. Do you know how wide that existing
9 path is at this point?

10 A Offhand, without looking at the file, I do not.

11 Q Okay. Let me ask you this then, if I may. I'm
12 going to go up here and point so that we can maybe
13 have an easier way of communicating, if you
14 wouldn't mind.

15 I am going to point up here to this --
16 what is the northwest corner of the Hanson
17 property and ask if these double lines that go --
18 these, what do you call them? dotted lines that go
19 up to the northeast and through the Kraus
20 property, that's the easement, is that correct?
21 That's the northern tier of the easement, is that
22 correct?

23 A To the best of my knowledge, that is an easement
24 the DNR holds.

25 Q Very good. Now, there is a notation on Exhibit 2

1 that states, "Parcel 5, 60 degree -- 60-foot
2 ingress/egress easement." Is that your
3 understanding that the easement is 60 feet wide at
4 that point?

5 A To the best of my knowledge, this exhibit states
6 it's a 60-foot wide easement, but I don't know
7 whether it's a 60-foot wide easement or not. I
8 can just tell you this says it's a 60-foot wide
9 easement.

10 Q Has anyone at the DNR confirmed that?

11 A That it's truly a 60-foot wide easement? I have
12 had limited discussions about the exact length of
13 that easement. I would basically need to go back
14 and look at the record and look at the file to
15 determine what information was provided to me in
16 the course of the review.

17 Q Now, there are a number of exhibits that I'm going
18 to be showing you this afternoon, and so I -- I
19 don't want to get there right now, because this
20 will become very disjointed. But you should know
21 that we have final plans of the DNR available to
22 us.

23 So I'm not trying -- this isn't a trick
24 question. I'd like to know if you know how wide
25 the final road is going to be as it traverses the

1 Hanson northwest corner.

2 A I would have to look back at the file to determine
3 exactly what it states.

4 Q Fair enough.

5 A I don't know exactly the width.

6 Q Okay. Fair enough. And we'll wait until we get
7 there then. Now, the area that you have drawn or
8 surrounded in green, you described that a few
9 moments ago.

10 I could look it up here, but you
11 described that a few moments ago as being a shrub
12 and tall grass, I think, wetland with -- I thought
13 you said navigability characteristics? Did I say
14 that right?

15 A You -- check back. I believe I said navigability
16 characteristics.

17 Q Can you explain what that means?

18 A Sure. A navigability characteristic would be
19 something identified to have a potential bed and
20 bank and appear to have the ability to have
21 adequate water at a given point to be able to
22 float a watercraft.

23 Q Can I stop you there? I know that there are some
24 administrative regulations that talk about bed and
25 bank. But there is a statute, which I think you

1 would agree -- well, I don't want you to make a
2 legal conclusion.

3 There is a statute that you would -- you
4 would certainly agree that is different than an
5 administrative regulation. And it's 30.10. I'm
6 sure you're familiar with it, sub 2.

7 It talks about navigable in connection
8 with streams, sloughs, bayous and marsh outlets.
9 Are you familiar with that statute?

10 A I would have to review it. I don't have the exact
11 language in front of me to know it.

12 Q Fair enough. Do you happen to know how the DNR
13 defines slough?

14 A I've never heard the term "slough" before. Can
15 you explain exactly what you mean by that?

16 Q Okay. Slough, slough. S-L-O-U-G-H, slough.

17 A To my understanding, there's no regulatory
18 definition of a slough.

19 Q And how about a marsh?

20 A To my knowledge, there's no regulatory definition
21 for marsh for navigable waterways.

22 Q And how about a bayou?

23 A Similarly.

24 Q Okay. I think that I want to --

25 MR. GLEISNER: And, Counsel, I will be

1 happy to have Mr. Harbeck get us a copy if you
2 need it. If you will permit, I would just like to
3 read you 30.10(2). Do you have your statute book
4 there?

5 MS. KAVANAUGH: I do not have mine.

6 MR. GLEISNER: If you need to have me
7 clarify this or get verification, I would be happy
8 to do that.

9 MS. KAVANAUGH: You can read the
10 statute.

11 MR. GLEISNER: That's all I'm going to
12 do.

13 MS. KAVANAUGH: I'll assume you're
14 reading it correctly.

15 MR. GLEISNER: So we can see if I did it
16 correctly. It will be on the record.

17 BY MR. GLEISNER:

18 Q Sub 2 of section 30.10 reads, "Except as provided
19 under (4)(c) and (d)," which I would represent is
20 not relevant, "all streams, sloughs, bayous and
21 marsh outlets which are navigable in fact for any
22 purpose whatsoever are declared navigable."

23 And I didn't read the whole thing, but
24 that gets the idea. So, apparently, a bayou, a
25 marsh outlet or a slough or stream can be

1 navigable?

2 A Per that definition, I would say correct.

3 Q And you don't have any regulations that deal with
4 sloughs, bayous or marsh outlets; am I
5 understanding you correctly?

6 A That's incorrect.

7 Q Okay. Please elucidate me.

8 A Navigable waterways associated with sloughs,
9 bayous, marsh outlets, rivers, streams, lakes
10 encompass the entire definition of what a
11 navigable waterway is.

12 If it meets the definition of navigable
13 waterways, per that it has a defined bed and bank
14 and the ability to float watercraft, Chapter 30
15 jurisdiction can be asserted.

16 Q Do you know, as we're sitting here, whether or not
17 a marsh outlet has a bed and bank?

18 A Define "marsh outlet" for me.

19 Q I asked you first.

20 A I would define a marsh outlet as a characteristic
21 between two different type of systems, whether it
22 be a system of a lake or a system of a stream, and
23 having, in that situation, a difficult bed and
24 bank determination because of the characteristics
25 and nature of the aquatic plants that would be

1 growing in that particular setting.

2 Q Are you familiar with this book, Wetland Soils?

3 A No.

4 Q This is a book by -- just for the record, a book
5 by Richardson and Veoraskas, V-E-P-R-A-S-K-A-S.

6 MS. KAVANAUGH: And, I guess, I would --

7 MR. GLEISNER: I understand.

8 MS. KAVANAUGH: You can ask questions
9 about wetlands --

10 MR. GLEISNER: I'm not going to use this
11 book if he's not familiar with it, Counsel.

12 BY MR. GLEISNER:

13 Q You are familiar with, say, for example, the
14 Horicon Marsh?

15 A Correct.

16 Q What are the characteristics of the Horicon Marsh
17 in terms of hydrology and in terms of bed and
18 bank?

19 MS. KAVANAUGH: And I guess you're
20 asking him to assume something. You know, unless
21 he's inspected the Horicon Marsh, he's not going
22 to know if he's done navigability
23 determinations --

24 BY MR. GLEISNER:

25 Q Have you done --

1 A I haven't done navigability tests or made
2 determinations on the Horicon Marsh.

3 Q Fair enough. With regard to the green areas on
4 Exhibit 2, and I'm now specifically referring to
5 the so-called gravel drive that runs between those
6 two green areas that you've identified, were any
7 navigability tests done before you issued the
8 November 4, 2010 approval?

9 A On the road? No navigability tests were done on
10 the road.

11 Q And how close to the road were they done?

12 A As I stated previously, in the fall site visits
13 that I was present on to inspect the site, these
14 were observed to have navigability
15 characteristics.

16 Q And I want -- I don't want to unfairly press you,
17 but I want to understand more about this term
18 "navigability characteristics," if you could
19 please elaborate.

20 A As having a defined bed and bank with capability
21 of having enough water on a reoccurring basis to
22 float a watercraft.

23 Q Now, I'm not going to at this point ask you to
24 mark on that Exhibit 2. I just would like you to
25 point, for my own information, as to where

1 approximately water was located in connection with
2 that gravel road that had navigability
3 characteristics. You don't have to mark on it
4 right now. Just point to it.

5 A Can you repeat that question?

6 Q Oh, sure. I can.

7 A I'm trying to catch you.

8 Q No. And I'm trying to be clear. Here's the
9 gravel road --

10 A Correct.

11 Q -- or gravel path; whatever it is right here. Do
12 you agree with that?

13 A Correct.

14 Q And I want to know with reference to this gravel
15 path where it begins at the west and moves
16 northwest -- or northeast, excuse me, between the
17 two green --

18 A Uh-huh.

19 Q -- areas you've identified. I want to know what
20 navigability tests were done or where navigable --
21 where navigability characteristics existed, et
22 cetera, with reference to that gravel path.

23 A Based on the October site visit before the permit
24 was issued --

25 Q Uh-huh.

1 A -- I would say here and here.

2 MR. GLEISNER: Just let the record show
3 that you've identified the northwest portion of
4 the top green area and the central portion of the
5 southern green area.

6 BY MR. GLEISNER:

7 Q Would that be a fair statement?

8 A There is one located on the northern portion and
9 one located on the southern portion.

10 Q Using this nice orange pen, would you, please,
11 show me where the northern portion on -- where the
12 area on the north -- to the north of the gravel
13 trail that has navigable characteristics, can you
14 show me where this is located? Again, this is an
15 approximation.

16 A The green has navigability characteristics.

17 Q All of it?

18 A All of it.

19 Q Okay.

20 A But you asked me before the decision being made.

21 Q Uh-huh. And before the decision date, was
22 anything done to test those areas that had
23 navigability characteristics?

24 A The green areas, no.

25 Q Other --

1 A I'll elaborate.

2 Q Yeah. Okay.

3 A Other than professional observation and judgment.

4 Q Okay. Now, I'm going to just step up here again
5 so we can all be clear, and counsel and everybody
6 else can see what I'm doing. You see on Exhibit 2
7 what I'm pointing to right now?

8 A The northwest corner of the Hanson property?

9 Q Yes, exactly. And the two green wetland areas
10 that you've identified in Exhibit 2, this gravel
11 drive that goes between them, it appears -- now, I
12 don't want to -- I don't want to put you in a
13 situation where you're saying something you don't
14 mean, but it appears that that northern circle,
15 that northern wetland area embraces and
16 encompasses the northwest corner of the Hanson
17 property. Am I correct?

18 A These are very approximate, so I will not make
19 such assertion unless I saw exactly where that
20 would be located in the field.

21 Q Okay.

22 A These are too broad to be able to make that
23 distinction.

24 Q Okay. But you've been at the northwest corner of
25 the Hanson property?

1 A I have not been on the northwest corner of the
2 Hanson property. I've been along the DNR easement
3 through the Hanson property.

4 Q Okay. That's a fair observation. That easement,
5 according to Exhibit 2, which I will represent,
6 again, is a DNR plat of survey, or so it
7 represents itself, that easement at the point,
8 shall we say, at the apex of what is a scalene
9 triangle -- it appears to be a scalene triangle.
10 It has a shorter side here, a much longer side
11 here and a shorter base.

12 At the point where the scalene triangle
13 comes to a head, if you went about 10 degrees off
14 bubble southeast, it looks like that easement at
15 that point encompasses fully the northwest corner
16 of the Hanson property, am I correct?

17 A Can you re-describe your description of that?

18 Q Sure. I'd be happy to.

19 A I'm trying to --

20 MS. KAVANAUGH: I guess the document
21 speaks for itself.

22 MR. GLEISNER: That's fine.

23 MS. KAVANAUGH: It shows lines and it
24 describes things. Whether it's accurate or not,
25 we don't know.

1 BY MR. GLEISNER:

2 Q Okay. Do you stand by the approximation that
3 you've given, recognizing it's an approximation,
4 that the wetland area does encompass a part of the
5 northwest corner of the Hanson property?

6 A As depicted on this exhibit, yes.

7 Q Okay. Let's move along now for a moment. So
8 there were no -- now, I don't want to put words in
9 your mouth. But there were no navigability tests
10 such as the Menomonee Falls versus DNR, where you
11 float a skiff, et cetera, there were no
12 navigability studies done on the Kraus property,
13 am I correct?

14 A That is correct.

15 Q And the extent of any navigability tests that were
16 done anywhere on the Kraus property prior to
17 November 4, 2010, comprised professional
18 observations? Was that your word?

19 A Professional judgment and observations of
20 waterways, water courses and potential navigable
21 waterways.

22 Q Who made those judgment calls, Mr. Hudak?

23 A That would have been me.

24 Q By the way, do you read maps as a -- in your
25 business, in your line of business? Is it your

1 job to read maps?

2 A What type of maps are you referring to?

3 Q Surveys.

4 A It is very common for me to review surveys,
5 engineering plans, drawings, to basically assert
6 DNR jurisdiction over projects.

7 Q Before we move along, I just want to, for a
8 second, just shift gears slightly. One of the
9 things that we are here about is a grove of trees.
10 Are you familiar with that grove of trees?

11 A I am not familiar with the grove of trees other
12 than the language of a few of the documents that
13 you've produced describing a grove of trees. I do
14 not know exact locations.

15 Q I see. I'd like to move on for right now and hand
16 to you -- I'd like to hand to you Exhibit No. 4.

17 MR. GLEISNER: Edwina, here's your copy.
18 You have this, of course.

19 BY MR. GLEISNER:

20 Q This is the answers to interrogatories that were
21 provided by your counsel on your behalf. And I
22 note, first of all, at the end of this document
23 that you signed it.

24 And I also note at the end of this
25 document that it was signed by a number of other

1 people from the DNR, Christine Gengler, and a --

2 MS. KAVANAUGH: Christine Gengler is
3 the --

4 MR. GLEISNER: Yeah.

5 MS. KAVANAUGH: What do you --

6 MR. GLEISNER: Notary.

7 BY MR. GLEISNER:

8 Q James Morrissey.

9 MR. GLEISNER: Thank you, Counsel. I
10 apologize.

11 BY MR. GLEISNER:

12 Q Patricia Trochlell, Robert Wakeman. And I just
13 would like, for openers, for you to identify to me
14 the portions of Exhibit 4 that you were
15 responsible for, if you know.

16 A I would have to look through all of these
17 independently to see what portions of these
18 answers were developed by myself.

19 MS. KAVANAUGH: And the document
20 identified those, as it's required to do.

21 MR. GLEISNER: Let me just --

22 BY MR. GLEISNER:

23 Q Let me just rephrase that then. Take a look at --
24 I'm most particularly interested in page 4. And
25 I'm interested in the DNR answer that appears at

1 the top, which I read as almost an index of the
2 attachments -- or most of the attachments to the
3 DNR document that you have in front of you. Were
4 you responsible for that?

5 A I am responsible for portions of this answer.

6 Q Okay. That's fair.

7 A I can't validate that I'm all of it.

8 Q That's fair. Let me -- before we -- I'd like to
9 ask questions about the documents that are
10 attached to this --

11 A Sure.

12 Q -- in a moment, but before we do that, I'd like to
13 understand, after the issuance of the November 4,
14 2010 manual code approval, were there any
15 navigability tests conducted on the Kraus
16 property?

17 A Following, I believe, a few motions or legal
18 issues brought forth, there was additional work
19 taken into effect, basically, reaffirm our initial
20 findings within the manual code decision on
21 navigability locations on the site.

22 Q Well, turning our attention, for a moment, from
23 Exhibit 4 back to Exhibit 2, if we could.

24 A Okay.

25 Q And, now, I'll let you use that nice pretty orange

1 pen. Could you just put Xs where the
2 navigability -- now, I don't want to put words in
3 your mouth. Did you say navigability test? What
4 did you say?

5 MS. KAVANAUGH: You can have her read it
6 back.

7 MR. GLEISNER: I'm reading it right now.

8 BY MR. GLEISNER:

9 Q "It was additional work taken into effect,
10 basically reaffirm our initial findings within the
11 manual code decision on navigability locations on
12 the site."

13 MR. GLEISNER: Thank you for that,
14 Counsel.

15 MS. KAVANAUGH: Yes.

16 BY MR. GLEISNER:

17 Q Let me back up as foundational -- some
18 foundational questions are in order. What do you
19 mean when you say "additional work"? Let's start
20 there.

21 A As I identified previously, the initial manual
22 code approval and the review of that, that took
23 place prior to the November decision.

24 Q Yeah.

25 A There was professional judgment, professional

1 opinion as to what were potential navigable
2 waterways on the site.

3 Q And that judgment was yours?

4 A That judgment was mine. As a follow up to my
5 judgment and to reaffirm the case of what portions
6 of the site are navigable and non-navigable,
7 additional work was completed.

8 Q Can you explain what you mean by "additional
9 work"?

10 A Sure.

11 Q That's what I was...

12 A Site investigation. I'll call it witness
13 observations. And survey work of topographic
14 elevations throughout the site.

15 Q Okay. Let's stop right there. That was a nice
16 list, and I guess I would like to go back to that
17 now. Let's start with survey work. What survey
18 work was done and by whom?

19 A To my knowledge, Kapur & Associates had conducted
20 spot elevation survey work throughout the parking
21 area on the site.

22 Q And the parking area on the site, looking at
23 Exhibit 2, if we looked south of the blue line
24 that you have put on Exhibit 2 and east of the
25 green line -- top green line that you put on

1 Exhibit 2, that would be the approximate location
2 of the parking lot that we're talking about?

3 A You can see the approximate location on your
4 Exhibit 14.

5 Q Right. I understand that. I just want to
6 understand -- we're going to have -- we're going
7 to have a lot of fun with that in a minute, but
8 right now, I want to understand that's the area
9 we're talking about, right?

10 A South of the blue line, east of the green -- blue
11 line.

12 Q Why don't you use that orange pen and make a note
13 or put an X where the survey work was done, you
14 think. Approximation, of course.

15 A I'll just draw a polygon on here --

16 Q Sure.

17 A -- in an approximation.

18 Q Understood.

19 A Broad approximation.

20 Q Understood. And why don't you put your initials
21 on there so we can...

22 A (Witness complies.)

23 Q Thank you very much. Now, regarding survey work,
24 was there anything else in terms of surveys or
25 survey work done anywhere else on the Kraus

1 property or on the area where the access road will
2 be?

3 A By a certified surveyor, not to my knowledge.

4 Q And by an uncertified surveyor?

5 A Survey work -- as far as taking spot elevations?

6 No.

7 Q Okay. So let me just extrapolate on that just a
8 moment. That was an interesting comment. Have
9 there been site elevations done on the Kraus site?

10 A To my knowledge, yes.

11 Q By whom and when?

12 A Kapur & Associates.

13 Q And do you know what areas they did site
14 elevations on?

15 A What I just discussed, the parking lot area.

16 Q Okay. Let me -- let me --

17 A I'll state it this way: Lakeward of the joining
18 of the access road. So west -- I'm sorry. East
19 of the access road.

20 Q Very good.

21 A Maybe that's a little easier way to explain it.

22 Q Let me take us back for a moment to the channel
23 that exists between your top and lower green lines
24 there. And I'm now referring again to the gravel
25 drive.

1 On either side of that gravel drive,
2 that's this area right here between your top green
3 circle and your bottom green circle, did anybody,
4 to your knowledge, do site elevations?

5 A They could have. I'd have to check the file to
6 see if they extended that way under the road.

7 Q You don't know?

8 A I'd have to check the file.

9 MR. GLEISNER: Counsel, could you get
10 back to me on that?

11 MS. KAVANAUGH: I'll have him check the
12 file, sure.

13 MR. GLEISNER: That's what I meant.

14 THE WITNESS: At that time, they could
15 have done. I don't know. I'd have to look at the
16 file.

17 BY MR. GLEISNER:

18 Q Now -- okay. Let's go back to Exhibit 4, if we
19 could. And is there anything in Exhibit 4 that
20 relates to the survey? I'm not accusing counsel
21 of being less than complete. I just want to know
22 if there's anything in there.

23 MS. KAVANAUGH: Were there any questions
24 asked about survey work done?

25 MR. GLEISNER: I just want to know if

1 there is anything in here about surveying being
2 done. As I say, I'm not making an accusation that
3 you were incomplete. I just wanted to know if
4 there was anything in there.

5 THE WITNESS: To the best of my
6 knowledge, Exhibit B is the survey work I was
7 referring to.

8 BY MR. GLEISNER:

9 Q Thank you very much. Let's look at Exhibit B
10 together then. We're looking at -- we're looking
11 at our Exhibit 4, and we're looking at DNR
12 counsel's yellow Exhibit B.

13 MR. GLEISNER: Does that make sense to
14 the record? Exhibit 4, sub-Exhibit B.

15 BY MR. GLEISNER:

16 Q Now, that appears to me to be, among other things,
17 a topographical map. Would you say that's
18 correct?

19 A That's accurate.

20 Q Can you read topographical maps, Mr. Hudak?

21 A I can. Not to this scale. This is pretty tiny.
22 If you're asking me specifics, these are pretty
23 small, even for my eyes.

24 Q That's fair, that's fair. The circles in red and
25 the circles in blue denote what? Do you know

1 that?

2 A They denote site photographs that were taken at
3 the site, and the dates are indicated in the upper
4 right corner.

5 Q I see that. And do you know if there was any --
6 does this identify the work of the Kapur
7 engineering firm?

8 A To the best of my knowledge, their name is on the
9 side of the page. They did the survey work.

10 MS. KAVANAUGH: I'm asking you to
11 clarify. You're talking about the map itself
12 and not the additions, not the circles?

13 MR. GLEISNER: I am asking -- that's a
14 good question, Counsel.

15 BY MR. GLEISNER:

16 Q I am asking about who did the map itself, and that
17 would be Kapur & Associates, is that correct?

18 MS. KAVANAUGH: You're asking me?

19 MR. GLEISNER: I'm asking, actually,
20 Mr. Hudak --

21 THE WITNESS: Again, stating -- their
22 name is on the plan sheet. I would assume they
23 did the survey work.

24 BY MR. GLEISNER:

25 Q Do you know who would have put the red circles and

1 the blue circles?

2 A That would have been myself.

3 Q Did you take photographs at that point?

4 A That would be correct.

5 Q Are those exhibits attached to Exhibit 4?

6 A I believe they would be. Let me check. That
7 would be accurate.

8 Q And so are the -- I'm looking at Exhibit D, which,
9 I presume, is where you start. Are the red
10 circles that are adjacent to the photographs
11 starting at D corresponding to the red circles on
12 Exhibit B -- sub-Exhibit B of 4?

13 A To the best of my knowledge, they are
14 corresponding. They should have been when I put
15 them together.

16 Q Do you know if all of the photographs that you
17 shot in red on Exhibit -- sub-Exhibit B of 4 are
18 attached to this Exhibit 4?

19 A I believe they are. Again, I'm trying to pick out
20 my small handwriting here.

21 Q Is it your handwriting?

22 A Yes. Yep. No, I see that. 14 isn't circled on
23 this one, but 14 is still located on the sheet
24 here.

25 Q Now, am I correct that Exhibit E -- sub-Exhibit E

1 of Exhibit 4 contains the photographs that you
2 took of the Kraus site that are shown on
3 sub-Exhibit B of 4?

4 A The blue under Exhibit E correlates to the blue on
5 Exhibit B.

6 Q So then am I correct in saying that most of the
7 items identified on page 4 of Exhibit 4 are
8 photographs? Or your contribution?

9 MS. KAVANAUGH: You mean the circles?

10 MR. GLEISNER: Yes.

11 THE WITNESS: Repeat that again.

12 BY MR. GLEISNER:

13 Q Sure. I apologize. Look back at page 4 of that
14 document that you have in front of you, page 4 of
15 Exhibit 4.

16 A Okay.

17 Q Besides the photographs, did you contribute
18 anything else to that answer?

19 A I contributed Exhibit C.

20 Q And what is Exhibit C, if you don't mind?

21 A Exhibit C is an aerial photo, a flyover taken from
22 Bingmaps.com.

23 Q When was that done, do you know?

24 A I want to believe it was done in either 2004, 2008
25 or 2010. That's not a great way to be able to

1 identify the date of those pictures. They have a
2 copyright date on there, but that's not always
3 accurate. I don't know the exact date of that.

4 Q Okay. Can we just go to Exhibit C of Exhibit 4 --
5 actually -- yeah, Exhibit C, yellow Exhibit C of
6 Exhibit 4. Am I correct that's water? What is
7 that in that picture? Is that water there?

8 A Yeah, the photo doesn't show it very well, but
9 that is the extent of inundation. And if you were
10 to line that up with this, the photo is actually
11 orientated to the east, facing east.

12 Q Let me see if we can get the record clearer.
13 Exhibit C -- sub-Exhibit C of 4 is an aerial
14 photograph looking east out of the large green
15 circle that you've drawn on Exhibit 2 toward North
16 Lake, is that correct?

17 A It incorporates more than just the one green
18 circle. It would incorporate the location of the
19 launch, parking lot as well.

20 Q Yes. I see Silver Spring and Silver Spring
21 Drive --

22 A Yep.

23 Q -- and that's Reddelien Road up there. It looks
24 like this inundation stretches quite far into the
25 Kraus site, am I right?

1 A Based on my review of this photograph, the
2 inundation depicted in this photograph is very
3 similar to the inundation or the navigability
4 characteristics identified on Exhibit 2.

5 Q Let's get back to the navigability characteristics
6 for a moment, Mr. Hudak. When you say
7 "navigability characteristics," do you mean that
8 the area that possesses those characteristics
9 would be navigable by a skiff or a canoe?

10 A I would say with the investigation, the
11 navigability characteristics depicted in this site
12 could be navigated by a skiff or small watercraft.

13 Q And you say "navigability characteristics," which
14 leads me to assume that you feel that it's not a
15 full-blown navigability situation?

16 A No. I say "navigability characteristics," because
17 I did not encompass and walk the entire boundary
18 of this waterway or wetland complex.

19 So based on the characteristics I could
20 observe from the locations along the DNR access
21 road, air photo interpretation of having
22 hydrology, it appeared to me this waterway could
23 be considered navigable.

24 Q Let's return to your discussion, which we started
25 a few moments ago. Keep Exhibit 4 in front of

1 you. Thank you.

2 We had started talking about what
3 additional work you had done --

4 A Uh-huh.

5 Q -- after November 4, 2010. Now, you've identified
6 survey work as one of those components. And
7 we've --

8 MS. KAVANAUGH: Are you asking whether
9 he did it?

10 MR. GLEISNER: No.

11 MS. KAVANAUGH: Okay. Because you said
12 work he did, just to clarify your question.

13 MR. GLEISNER: I said -- actually, your
14 witness said that there was additional work
15 performed --

16 MS. KAVANAUGH: Yes. But you said --

17 MR. GLEISNER: -- to verify his
18 judgment --

19 MS. KAVANAUGH: Yes.

20 MR. GLEISNER: And let me retract the
21 question and rephrase it this way, Counsel.

22 MS. KAVANAUGH: Okay. Thank you.

23 BY MR. GLEISNER:

24 Q There was survey work done either at your
25 direction or with your knowledge by Kapur &

1 Associates as identified by the orange circle?

2 A With my knowledge. Not by my direction.

3 Q What other additional work was done to verify your
4 judgment?

5 A Back to before, the additional site investigation
6 along the indicated waterways in green and blue
7 and other potential areas located within the
8 orange polygon or the potential parking lot area.

9 Q "Additional site investigation," what does that
10 mean?

11 A It means basically going out, conducting a site
12 visit, looking at characteristics of the site,
13 plant species, trying to identify whether or not
14 there may be an ordinary high water mark,
15 determining whether there's a valid or justifiable
16 bed and bank and the capability or capacity to be
17 able to float a watercraft on a reoccurring basis.

18 Q Fine. Who did that site investigation?

19 A That was performed by me and accompanied by -- I'm
20 drawing a blank -- Kyle Drake, the warden.

21 Q Kyle Drake, the warden?

22 A Correct.

23 Q Does he have any hydrology training? He's just a
24 warden, correct? carries a gun?

25 A He was accompanying me on the site knowing that

1 there are a few upset neighbors in the area. And
2 as a means -- as negotiable -- negotiating and
3 basically allowing me to be on the site.

4 Because it is basically a
5 development-proposed site. So as to not draw any
6 questions about what I was doing out there, he was
7 with me.

8 Q The warden was there for protection; is that what
9 you're saying?

10 A Not in so many words. I'm a pretty -- I don't
11 need any protection. But he was accompanying me
12 to the site.

13 Q I believe that. Okay. What I'm getting at,
14 though, is this: The additional site inspection
15 to confirm your judgment was done by you?

16 A That is correct.

17 Q So nobody else confirmed your judgment?

18 A The only other person that confirmed my judgment
19 would have been an associate, Geri Radermacher.

20 Q And what is he or she?

21 A She is a water management specialist.

22 Q What did she do?

23 A She basically reviewed the information that I
24 presented, collected, went over it with me and
25 reaffirmed that I made a correct judgment call

1 that these are navigable waterways.

2 Q "These are navigable waterways." That's a phrase
3 you haven't quite used before. I could search my
4 realtime, but I don't think I heard that before.

5 A You've never asked that question.

6 Q And I'm glad I heard it, because now I do have a
7 couple questions. Where are the navigable
8 waterways on this property?

9 A The area indicated in blue and green.

10 Q So both the northern green circle, southern green
11 circle and the blue line, which denotes a stream,
12 are navigable waterways?

13 A Navigable, that would meet the definition of the
14 State, correct.

15 Q And let me just back up here a moment, if I may.
16 It seems to me that among the documents that were
17 furnished to me by your counsel yesterday -- well,
18 I know where it is. Bear with me a moment.

19 343.03 --

20 A Okay.

21 Q -- sub 7 defining navigable as having a bed or
22 bank, but the statute 30.10(2) doesn't. I'm
23 curious, now that you've defined the green areas
24 on Exhibit 2 and the blue area on Exhibit 2 as
25 navigable waterways. I'm curious, are you saying

1 that there's bed and bank present there? Or what
2 are you saying exactly?

3 A I'm saying that through the investigations that
4 I've conducted both pre and post
5 November decision, all features of these waterways
6 could be determined as -- or meeting the State's
7 definition of having defined bed and bank with
8 capacity to float a boat.

9 Q Now, forgive me, but I want the record to be
10 really clear here. The area in blue on Exhibit 2,
11 the area encompassed by the top green circle on
12 Exhibit 2 and the area encompassed by the large
13 green circle on Exhibit 2 all have -- are all
14 navigable waterways that meet the State definition
15 of navigable?

16 A That would be correct.

17 Q That gravel road looks kind of lonely there,
18 doesn't it?

19 A Correct.

20 Q Let me -- let me just skip ahead to that, because
21 I think otherwise I'm being unfair to you. Let's
22 go to Exhibit 3.

23 MR. GLEISNER: Edwina, this is a big
24 one.

25 MS. KAVANAUGH: Thank you.

1 MR. GLEISNER: You're welcome.

2 BY MR. GLEISNER:

3 Q Keep those in front of you, if you wouldn't mind.
4 Thank you very much. Exhibit 3 are the actual
5 final plans of the DNR for this site.

6 If you go to C116, I think we now see,
7 would you agree, a pretty clear picture of the
8 access road and the parking lot where it's going
9 to be. We don't see, however, where the Hanson
10 property is going to be.

11 Are you familiar with C116 or any other
12 drawing in Exhibit 3 that you could identify where
13 the Hanson property would intersect with that
14 drawing of the final roadway?

15 A Not to be able to draw it on here, no. I mean, I
16 could approximate it.

17 Q I'll settle for right now if you just point to
18 where you think it is.

19 A Well, based upon, to my knowledge, the Hanson
20 property is in or adjacent to where the road
21 actually gets extended or bumped away from the
22 original road alignment.

23 Q So would it be safe to say, looking at Exhibit 3,
24 C116, that the denomination PC21 plus 4926,
25 between that and PT21 plus 73.24 is the

1 approximate location of the bump?

2 A That would be correct, between stations 2100 --
3 I'm sorry, 2100 and 2200 would be the
4 approximate --

5 Q We haven't used orange nearly enough. Would you
6 mind taking the orange marker and making a circle
7 around that area?

8 A Make a circle between 2100 and 2200 stations?

9 Q Yeah. Would you agree that is the approximate
10 location of where the Hanson property might
11 intersect or come near to the road?

12 A Yes.

13 Q What I would like you to do, if you can -- I would
14 assume that these drawings would be pretty much
15 familiar to you?

16 A Familiar.

17 Q You sort of live with these animals, right?

18 A Reviewed them a time or two.

19 Q Yes, sir, I would think so. Can you tell me how
20 wide that access road is going to be if there is
21 a -- let me rephrase that. That was a poorly-put
22 question.

23 At its widest, before it intersects with
24 the parking lot, how wide is the access road going
25 to be?

1 A Based on the scale of this drawing --

2 Q Yes, sir.

3 A -- I would say between 20 to 25 feet wide.

4 Q Now, you are -- because you are the water resource
5 specialist, you have some knowledge of what is
6 going to be involved in putting that road down; I
7 mean, you have some knowledge of that, correct?

8 A Correct.

9 Q Okay. What's going to go under that road?

10 A I can't answer that question. I'd have to look at
11 the --

12 Q Okay.

13 A -- engineering specification, which I --

14 Q No, I appreciate that.

15 A Yeah.

16 Q And let me rephrase that. Generally, what's going
17 to go under that road?

18 A I would anticipate some type of a road base prior
19 to that pavement.

20 Q Would it be fair to say, again, not putting words
21 in your mouth, but would it be fair to say that
22 the base of that road, the 20- to 25-foot wide
23 road is going to involve fill that extends beyond
24 the boundaries of the roadway itself, some kind of
25 shoulder, in other words?

1 A Typically, a roadway would contain a side-sloped
2 shoulder depending upon the current elevation and
3 the proposed elevation of the roadway.

4 Q Let me ask you this: Would it be fair to say that
5 that road could be as wide as 30 feet?

6 MS. KAVANAUGH: I think calling for
7 speculation.

8 THE WITNESS: Outside my --

9 MS. KAVANAUGH: The plans show what
10 the --

11 THE WITNESS: Out of my knowledge.

12 BY MR. GLEISNER:

13 Q Okay. That's fair. Now, let me ask you this:
14 When that roadway is put down, what steps have
15 been taken to make certain that the roadway, when
16 it settles as all roads do, doesn't impinge upon
17 the wetlands that surround the original path?

18 A The extent of disturbance has been permitted based
19 upon the extent of roadway fill. To the best of
20 my knowledge, that is the extent of disturbance
21 that we've assessed, reviewed, analyzed and
22 permitted. I recall permitted or reviewed.

23 Q Let me, first of all, make clear that I respect
24 the limitations of this proceeding and what we're
25 about. This is navigable water we're talking

1 about, okay?

2 So what I'm -- what I'm getting at is:
3 If you look at the original gravel drive here and
4 you look at the 60-foot wide -- or ostensibly
5 60-foot wide easement there, what -- since your
6 job is navigability, your job as a water resource
7 manager is assuring that navigable waters aren't
8 impinged upon.

9 What steps have been taken to ensure
10 that the navigable waters, which we now agree are
11 very close to that channel, aren't going to be
12 impinged upon by this construction?

13 A I'm not sure the clarification that you're looking
14 for with that question.

15 Q Okay. Let me rephrase it.

16 A It's very broad.

17 Q Okay. Let me see --

18 A Refine that.

19 Q Yeah, let me do that, because this is important.

20 MS. KAVANAUGH: And, I guess, I have an
21 objection. The hearing was granted on the basis
22 of whether the area that you guys identify as a
23 grove of trees contains or is a navigable water.

24 MR. GLEISNER: Unfortunately not. The
25 North Lake Management District also has a petition

1 in the document.

2 MS. KAVANAUGH: The North Lake
3 Management District --

4 MR. GLEISNER: Yes, they do.

5 MS. KAVANAUGH: I'll pull out the
6 petition.

7 MR. HARBECK: Let's not argue about what
8 it says or not.

9 MR. GLEISNER: Let's just proceed.

10 MS. KAVANAUGH: I think he's asking
11 questions that go beyond the scope of what the
12 hearing will be. I know it's discovery, but
13 discovery is only permitted for stuff that's
14 potentially admissible.

15 And as to -- if what you asked for a
16 hearing for was on an allegation that an area that
17 you identified as a grove of trees was a navigable
18 water and that's the only issue for which the
19 hearing was granted --

20 MR. GLEISNER: That's not the only issue
21 the hearing was granted for.

22 MS. KAVANAUGH: I'll pull out the
23 hearing.

24 MR. GLEISNER: Yeah.

25 BY MR. GLEISNER:

1 Q The question is, though ,you are responsible to
2 ensure that the navigable waters in the top and
3 the lower green circles are not impinged upon,
4 correct?

5 A I'm responsible to review a project based on the
6 standards and adverse impacts, cumulative impacts
7 to those standards.

8 Q Have you examined the grove of trees?

9 A I don't know what grove of trees you're referring
10 to on that site.

11 Q Have you examined the site where the central
12 portion of the parking lot is going to be located?

13 A Can you draw that on a plan sheet for me so I
14 can --

15 Q I can show you.

16 A -- indicate what area you're discussing?

17 Q This is the area right here. We're not going to
18 mark this as an exhibit, at least not right now.
19 This is the area we're talking about.

20 This is the proposed parking lot. This
21 is what we believe, just between us now -- the
22 record is going to be a little unclear for a
23 moment -- where the grove of trees is located.

24 MS. KAVANAUGH: And would you identify,
25 for the record, the exhibit? Exhibit E is an

1 exhibit prepared by --

2 MR. GLEISNER: It's an Exhibit E
3 prepared by one of our engineers, and it is --

4 MS. KAVANAUGH: Reddelien Road's
5 engineers?

6 MR. GLEISNER: Yes. And it is something
7 that we're only showing to the witness so he can
8 get an idea of where we're talking about.

9 THE WITNESS: So repeat your question.

10 BY MR. GLEISNER:

11 Q Okay. The parking lot is going to be 275 feet
12 long?

13 A I'd have to check the plans.

14 Q Let's do that. Here is a drawing, Exhibit 9,
15 which was done by the Department of Natural
16 Resources, which I am passing over to Edwina and
17 I'm handing to you.

18 A So you want me to look at Exhibit 9?

19 Q Exhibit 9.

20 A Okay.

21 Q Now, can you answer how long and how wide the
22 parking lot's gonna be from looking at that?

23 A If these are 100-foot station markers, I would
24 make the estimation that it would be between 250
25 and 300 feet long.

1 Q And how wide?

2 A An approximation, a hundred.

3 Q Okay.

4 A I'd have to look.

5 Q Yeah. Now, I'm going to point to Exhibit 9, and
6 I'm going to point to the -- what is ostensibly
7 the eastern area of the parking lot. And you see
8 where I'm pointing?

9 A Correct.

10 Q All right. And I will represent for the record
11 that it is probably the eastern third of what is
12 shown as the parking lot on Exhibit 9. Would you
13 agree that that's approximately right?

14 A The area you were pointing to was the eastern
15 third of the parking lot area.

16 Q On Exhibit 9. Okay. Have you -- what
17 examination, what type of inspection have you made
18 of that area?

19 A Visual observations of site characteristics
20 related to defined bed and bank, plant
21 communities, to some degree hydrology. And when I
22 say "some degree," looking at photo documentation,
23 air photo surveys.

24 Q Have you done any type of soil borings in that
25 area?

1 A I have not.

2 Q Has anybody that you are aware of in the DNR done
3 any soil boring investigation in that area?

4 MS. KAVANAUGH: I guess I would object.
5 What does soil have to do with navigability?

6 MR. GLEISNER: Well, Counsel, I'll
7 represent for the record, a great deal. Because
8 the soil, if it is saturated, is going to be much
9 more likely to be navigable at different times of
10 the year.

11 MS. KAVANAUGH: The soil is going to
12 be --

13 MR. GLEISNER: The soil will support
14 navigable water.

15 MS. KAVANAUGH: So it won't permeate as
16 much, is that what you're saying?

17 MR. GLEISNER: Right.

18 MS. KAVANAUGH: Okay.

19 BY MR. GLEISNER:

20 Q Now, you said you've done a good inspection of the
21 eastern third of where the parking lot is going to
22 be, right?

23 A I've done visual inspection and relied upon my
24 professional judgment on that eastern third to
25 make navigability determinations that there are no

1 navigable waterways present.

2 Q Did you happen to see any trees there?

3 A Off the top of my knowledge, I don't know
4 exactly in that specific eastern third of a
5 parking lot where the trees are located in
6 relation to the question you're asking.

7 I am aware that there are trees located
8 throughout the parking lot area. Again, what --
9 what you're asking for is -- this has never been
10 staked out. So to be able to field-truth the
11 location of this parking structure in relationship
12 to the trees, I don't -- we have never done that
13 type of detail.

14 Q Even to this day?

15 A Even to this day.

16 Q Well then, tell me something, how do you know, as
17 you sit here right now, whether or not that area
18 that I have identified as the eastern third of the
19 proposed parking lot, how do you know that that
20 isn't marshland?

21 A I rely on the fact that it's not marshland in that
22 it does not meet the Corps' or State's definition
23 of wetland, nor did it meet my professional
24 judgment of the State's definition of a navigable
25 waterway.

1 Q Let's just have an understanding here. I'm sure
2 you're very familiar with the case law like Gainer
3 and the Village of Menomonee Falls. Again --

4 A Conceptually.

5 Q -- because of your background --

6 A Correct.

7 Q -- you're a specialist and expert in navigability.
8 Am I correct in stating that navigability does not
9 turn on a permanent state of saturation or a
10 permanent state of being capable of being
11 navigated?

12 A Can you repeat that assessment again?

13 Q Sure. That was poorly said. Let me try it this
14 way: Can a stream or an area of navigable water
15 be navigable a couple or three times a year and
16 still be navigable within the meaning of 30.10(2)?

17 A Yes, it can.

18 Q What tests have you done or what type of
19 assessments have you made to ensure that that
20 isn't navigable at various times of the year?

21 A Based upon my professional judgment on the
22 historic work I've completed, my trainings, I did
23 not declare that as a reasonable area that would
24 have a definable bed and bank or have the ability
25 to float a boat on a reoccurring basis on the

1 limited knowledge I had on the hydrology of the
2 area.

3 Q Have you done anything to attempt to inspect that
4 property after spring freshets?

5 A I have been out there multiple times of the year
6 during multiple given times, and those inspections
7 ranged in variable -- depending upon the weather,
8 rainfall patterns.

9 Q And have you done anything following significant
10 storms? I'll define that. Let me define that.
11 Storms with one- to two-year, maybe three-year
12 storm ratings.

13 A A site visit was conducted -- again, I'm not sure
14 what the date is. I'd have to go back and check
15 my records. It was very recently after a fairly,
16 fairly wet period of time.

17 Q And have you ever attempted to float a skiff or
18 any type of canoe or boat in that area?

19 A I have not.

20 Q In fact, as I understand your testimony, there's
21 never been an effort to float a skiff or a boat
22 anywhere on the Kraus -- the former Kraus
23 property, is that correct?

24 A That is correct.

25 Q So all we really have to answer for whether or

1 not -- or to the extent of which navigability
2 exists anywhere on the Kraus site would be your
3 judgment?

4 A That would be correct.

5 Q And did you think it was important to -- strike
6 that. That was verging on argumentative. I
7 apologize.

8 Let me phrase it this way: Do you think
9 it was appropriate, referring again to Exhibit 2,
10 to do navigability tests in the blue areas you
11 have identified on the north portion of the Kraus
12 property -- the former Kraus property?

13 A I did not believe it was important to do an in
14 fact navigability along the blue portion of that
15 property that was identified in Exhibit 2.

16 Q And why?

17 A It was very apparent on the multiple site visits I
18 was there, through all ranges of weather patterns,
19 that that portion of the site contained defined
20 bed and banks with a capacity to be able to float
21 a watercraft at a reoccurring basis.

22 Q Did you ever assess the relationship between the
23 blue line that you've identified and the ground
24 that is or comprises the area where the eastern
25 portion of the parking lot is going to be

1 constructed?

2 MS. KAVANAUGH: And I'll object to
3 vagueness --

4 MR. GLEISNER: Okay.

5 MS. KAVANAUGH: -- in relationship --

6 MR. GLEISNER: Don't want vagueness in
7 my record.

8 BY MR. GLEISNER:

9 Q Let's just do it this way. Here's the blue line
10 where the stream is.

11 A Yep.

12 Q Did you ever attempt to determine the relationship
13 between that blue line where you've said it is a
14 stream and the orange area where we are certain
15 that the parking lot is going to be?

16 MS. KAVANAUGH: And, again, I would
17 object to "relationship." Can you clarify what
18 you mean by "relationship"?

19 MR. GLEISNER: I think he's a pretty
20 bright man.

21 BY MR. GLEISNER:

22 Q Do you understand what I'm saying?

23 A Can you direct me on your --

24 Q Sure. I'd be happy to.

25 A -- Exhibit 9? Let me just show you something.

1 MR. GLEISNER: I think I would like to
2 just -- we actually have this exhibit in a smaller
3 form so we can mark it, Edwina. Let me pull it
4 out so you have a -- I'm now pulling out
5 Exhibit 12. Edwina, here's your copy.

6 MS. KAVANAUGH: Thank you.

7 MR. GLEISNER: You're welcome.

8 BY MR. GLEISNER:

9 Q Here's your copy, Mr. Hudak.

10 MS. KAVANAUGH: Can you refresh me,
11 Counsel? The orange area is the whole DNR site
12 or --

13 MR. GLEISNER: That would be Mr. Hudak's
14 job.

15 MS. KAVANAUGH: You've got the record.

16 MR. GLEISNER: I've got the record.
17 This is the area that he identified as being the
18 parking lot and where the Kapur engineers did
19 their elevations.

20 BY MR. GLEISNER:

21 Q Am I correct, the surveying?

22 A Included but maybe not limited to.

23 Q Yeah. Okay. I just want to show you this,
24 because I think -- you have in front of you
25 Exhibit 12. I'm showing you an enlarged version

1 of Exhibit 12, only because I think it more
2 dramatically helps us understand where we're at.

3 MS. KAVANAUGH: And, sir, could you
4 identify that? Did we do that? Did you do that?

5 MR. GLEISNER: This was done by our
6 engineers.

7 MS. KAVANAUGH: Okay. By Reddelien Road
8 engineers. If you identify who prepares them so
9 we know what we're looking at.

10 MR. GLEISNER: Right.

11 BY MR. GLEISNER:

12 Q Let me just explain. This is an aerial
13 photograph, Exhibit 12 I'm talking about.
14 Overlaid on that exhibit is the parking lot and
15 access drive that was done by our engineers based
16 on a review of the drawings and engineering plans,
17 including mine, of the DNR. Does that make it
18 clear?

19 MS. KAVANAUGH: Yes. Thank you.

20 MR. GLEISNER: You're very welcome.

21 BY MR. GLEISNER:

22 Q Now, the reason I wanted to show this is I wanted
23 to ask a question. This Exhibit 12 represents a
24 parking lot that seems fairly close to the Hanson
25 and fairly close to the Peters' property.

1 So I'd like to ask you, first of all, do
2 you know the distance between the southern
3 boundary of the parking lot in the Hanson property
4 line?

5 A I do not, without referring back to a plan.

6 Q Same with the Peters?

7 A Same goes with the top.

8 Q Now, what I was asking about was there's this
9 stream here that I am pointing out to the northern
10 part of Exhibit 12. And there's a red line and a
11 yellow line on the exhibit going east and west
12 near the Peters' home.

13 And I'm going to represent, for the
14 record, that that is the approximate location of
15 the stream.

16 MS. KAVANAUGH: The orange line? I'm
17 sorry.

18 MR. GLEISNER: Right. This line. The
19 red and yellow.

20 MS. KAVANAUGH: Oh, the red and yellow.

21 MR. GLEISNER: Yes. There's two lines
22 going east and west on that.

23 BY MR. GLEISNER:

24 Q And what I'm asking you is: Has anybody made a
25 study of or made an investigation of how the

1 stream interacts with or impacts on or is involved
2 with the area where the eastern portion of the
3 parking lot's going to be located?

4 A A particular study to investigate that? No.

5 Q Okay. Thank you. All right. Now, thank you for
6 that. Let me switch gears just a little bit here.
7 I'm going to show you now what's been marked as
8 Exhibit 10.

9 MR. GLEISNER: And I'm giving you a
10 copy, Edwina.

11 MS. KAVANAUGH: Thank you.

12 BY MR. GLEISNER:

13 Q This is being shown for, at this point, just
14 informational purposes.

15 MS. KAVANAUGH: Again, that was --

16 MR. GLEISNER: This was done by an
17 expert for the North Lake Management District,
18 Attorney Gallo's client.

19 BY MR. GLEISNER:

20 Q And I'm showing you this, because I have some
21 follow-up questions. But it's very, very bright
22 and very easy to see.

23 This expert states that the only place
24 there are wetlands on the Kraus property at or
25 about the parking lot is going to be in the yellow

1 area.

2 Now, I'm not going to stop there,
3 because if I stop there, then that would be
4 verging on argumentative. I want to, instead,
5 take Exhibit 9 up again.

6 And if you take a look at Exhibit 9,
7 there is a hash mark area at the approximate
8 location where the yellow area is on Exhibit 10.
9 Do you see that? Let me just point to it. Right
10 here.

11 A Yes, in approximation, yep.

12 Q And this is foundational. We're not -- we're not
13 here about wetlands, and we understand that. But
14 this is foundational. Is that your understanding
15 of the approximate location of where wetlands are
16 located on this property?

17 A The entire property? No.

18 Q No, no. I understand. Thank you for that. Where
19 the parking lot will be.

20 A In the location of the parking lot, yes.

21 Q Okay. So then let me ask you this: How was that
22 identified, Mr. Hudak, if you know?

23 A To the best of my knowledge, that wetland area was
24 identified by department personnel and personnel
25 from the Southeastern Wisconsin Regional Planning

1 Commission.

2 Q And did you have any part in determining that?

3 A I did not.

4 Q Now, relating that to navigability, for a moment,
5 are you familiar with the soil borings that were
6 done on this property by the Gestra Corporation?

7 A I am not.

8 Q Okay. Fair enough. Have you --

9 MS. KAVANAUGH: I'm sorry, can you say
10 who did those?

11 MR. GLEISNER: G-E-S-T-R-A.

12 MS. KAVANAUGH: Are they a DNR --

13 MR. GLEISNER: Yeah, they are. They're
14 a DNR engineering report. But if the witness
15 doesn't have any knowledge of it, then I'm not
16 going to go there. At least not now.

17 BY MR. GLEISNER:

18 Q So now let me just say that I'm a little unclear
19 as to what was done regarding the eastern end of
20 the parking lot. It was only you who did the
21 investigation of that area?

22 A I would say it's -- as relating to the manual code
23 approval and asserting regulatory standards on the
24 site, I was the one in charge or entrusted to
25 determine what jurisdiction authority was

1 associated with this project.

2 Q Now I'd like to change gears a little bit, if I
3 might, and redirect us in a different direction
4 for a moment.

5 Prior to your manual code approval, on
6 June 30 of 2010, you received a preliminary
7 approval from the Army Corps of Engineer, and on
8 the 30th of July, you received final approval from
9 the Army Corps of Engineers. Did they -- do you
10 know that?

11 MS. KAVANAUGH: I guess I'd object to
12 the relevance of this in terms of navigable
13 waters.

14 MR. GLEISNER: I have --

15 MS. KAVANAUGH: Because this isn't a
16 Section 10 law. So they're not going to be making
17 navigability determinations.

18 MR. GLEISNER: And I have questions
19 about that. I'm going somewhere with this.

20 BY MR. GLEISNER:

21 Q Do you know about that?

22 A I knew that the DNR, and I'll say that loosely,
23 was granted permit approval to fill wetlands for
24 the boat launch, and that that was received by the
25 Army Corps in approximate -- the dates that you

1 mentioned.

2 Q Did the -- what steps were taken by the Army Corps
3 of Engineers to identify wetlands of
4 navigability --

5 A I don't have any knowledge of that.

6 Q Okay. Fair enough. Now I'd like to show you some
7 photographs here that were taken, and I will
8 represent that they were also taken by the NRC.
9 And that's Exhibit 11. I'm passing it over to you
10 as well, Mr. Hudak.

11 Have you -- first of all, are you
12 familiar with the area that is represented here?

13 A I am not -- I don't have any reference to where
14 these are facing, looking or at.

15 Q Then I'll just ask a general question.

16 MS. KAVANAUGH: Can you say, again, who
17 took these?

18 MR. GLEISNER: NRC.

19 MS. KAVANAUGH: That is Natural --

20 MR. GLEISNER: Right.

21 MS. KAVANAUGH: So North Lake Management
22 District's --

23 MR. GLEISNER: Right, right. They're
24 co-counsel.

25 MS. KAVANAUGH: Okay.

1 BY MR. GLEISNER:

2 Q Now, what I'd like to know about this is: Did you
3 ever see this type of ponding on the Kraus site at
4 or near the area where the boat launch is going to
5 be located?

6 A Again, I don't have any reference of where these
7 pictures are taken or where this is in relation to
8 the boat launch.

9 Q I certainly accept that. And that's not what I'm
10 asking. I'm just asking it as a representation of
11 ponding, did you ever see ponding of this sort at
12 or near the boat launch?

13 And understanding that this is not -- I
14 would say it is near the boat launch, but that
15 isn't necessary for what I'm asking for. I just
16 want to know, did you ever see ponding like this?

17 MS. KAVANAUGH: Anywhere on the
18 property --

19 MR. GLEISNER: Uh-huh.

20 MS. KAVANAUGH: -- or on the eastern
21 part of the property?

22 MR. GLEISNER: On the boat launch.

23 MS. KAVANAUGH: The boat launch isn't
24 there yet.

25 MR. GLEISNER: The area where the boat

1 launch will be, the 275 foot --

2 MS. KAVANAUGH: The boat launch parking
3 lot?

4 MR. GLEISNER: Yes. Thank you, Counsel.

5 MS. KAVANAUGH: You don't even know what
6 you're talking about.

7 THE WITNESS: I would say the entire
8 vicinity, including the entire Reddelien
9 neighborhood. On certain visits, I had observed
10 ponding throughout that area. And the area I'm
11 referencing is the entire Reddelien Road area.

12 BY MR. GLEISNER:

13 Q First of all, I just want to make sure I
14 understand this correctly. You've stated on the
15 record that you believe that navigability requires
16 some sort of bed or bank?

17 A Correct.

18 Q I'm going to show you now what's been marked as
19 our Exhibit 1-B, and I'm going to pass that over
20 also to Edwina. And I'm going to ask you to turn
21 in here to page -- bear with me a moment. I think
22 I've got it. Page 15 and 16.

23 MR. GLEISNER: I'm going to anticipate
24 an objection here. I understand that it's the
25 position of the DNR that these memos aren't

1 necessarily binding on the agency and that they
2 aren't -- that they aren't necessarily part of the
3 regulations --

4 MS. KAVANAUGH: Correct --

5 MR. GLEISNER: -- of the handbook --

6 MS. KAVANAUGH: -- they're guidance.

7 MR. GLEISNER: Guidance.

8 BY MR. GLEISNER:

9 Q I would like to read into the record or have you
10 read into the record on page 16 the
11 paragraph beginning -- if you wouldn't mind, if
12 you would read it into the record, the
13 paragraph beginning, "The real issue to be
14 considered."

15 A "The real issue to be considered when evaluating
16 lakes and ponds including wetlands is whether
17 they're navigable in fact by the above criteria."

18 "Although one might argue that there
19 should be some minimum cutoff size for a body of
20 water to be considered navigable, any body of
21 water capable of floating a canoe is valuable and
22 should be considered navigable."

23 "To support this conclusion, consider
24 the resource value associated with using a tiny
25 spring pond or isolated wetland pond. They have

1 fishery and/or wildlife values, and preserving
2 these values is in the public interest even if
3 they are not readily accessible to the public."

4 Q Thank you very much, Mr. Hudak. Do you agree or
5 disagree with that statement?

6 A I would agree with that statement.

7 Q Thank you. Now, you used this -- or do you -- I
8 apologize. Do you use this "Waterway and Wetland
9 Handbook" on a regular basis?

10 A On a regular basis it is used for reference for
11 certain issues.

12 Q Is it safe to say -- and I'm not now just
13 referring to page 15 or 16. Is it safe to say
14 that this document is the primary manual that you
15 utilize if you have a question about navigability?

16 A I would say that would be correct.

17 Q Are there any other documents that you refer to?

18 A For navigability?

19 Q Yes.

20 A One that is often handed out to public citizens is
21 a little brochure of navigability. That would be
22 maybe the only other one sort of given.

23 Q Is it a green color?

24 A I couldn't tell you the color. There's one on
25 navigability and two on unordinary high water

1 marks.

2 MR. GLEISNER: Counsel, it would be a
3 convenient time for a short potty break.

4 MS. KAVANAUGH: Sure.

5 MR. GLEISNER: Off the record then.

6 (A brief recess is taken.)

7 MR. GLEISNER: Back on the record.

8 BY MR. GLEISNER:

9 Q Mr. Hudak, before we took our break, there were
10 some discussions about elevations and so on and so
11 forth and what the Kapur engineering firm did on
12 the eastern part of the proposed parking lot.

13 And I wonder if you could, if it's
14 possible, expand for me a little bit on what the
15 Kapur people actually did. Do you know?

16 Besides...

17 A I can expand on the fact that I know that they did
18 spot elevations and used those to generate an
19 on-site topol.

20 Q Do you know if they ever did an onsite elevation
21 before or not?

22 A I do not.

23 Q Do you happen to know if there was --

24 MR. GLEISNER: Can we take a very short
25 break?

1 (Exhibit Nos. 100 through 103 were
2 marked.)

3 MR. GLEISNER: Back on the record. What
4 I've done is I've informally marked your copy,
5 Edwina, and my copy.

6 BY MR. GLEISNER:

7 Q And now I'm going to show you a packet of
8 exhibits, Mr. Hudak, that I've been told -- first
9 of all, these are NMLD exhibits, North Lake
10 Management District's exhibits. I've been told by
11 Mr. Gallo that these were taken from your files.

12 A I notice them to be taken from the Bing's website
13 or bird's eye view from Bing. Now it -- used to
14 be able to get access from Waukesha County server.
15 But Bing has this access. So I know I have
16 pictures of here somewhere. So this could be from
17 our time.

18 MR. HARBECK: Bill, what exhibit number
19 are you on?

20 MR. GLEISNER: I have 100 through 104
21 (sic) in front of me, and I will make copies for
22 our group.

23 MR. HARBECK: You just didn't get it on
24 the record. That's all.

25 MR. GLEISNER: Sorry, I apologize.

1 BY MR. GLEISNER:

2 Q Let's take Exhibit 100 first of all.

3 A Okay.

4 Q Do you recognize what that is?

5 A Yes.

6 Q Can you describe for the record what that is?

7 A It appears to be a flyover air photo of the
8 eastern extent of the DNR site encompassing the
9 parking area.

10 Q Okay. Now, if I were to -- maybe you could use
11 the orange pen there. Do you see the Peters'
12 house on that?

13 A Would that be north or south of the parking lot?

14 Q North.

15 A Yes.

16 Q And can you -- is that the stream that you're
17 talking about that runs just a little bit to the
18 south of the Peters' house there?

19 A You cannot pick that up on this air photo, but the
20 stream would be located in the general vicinity to
21 the -- on this photograph looking right of that
22 Peters' house.

23 Q Could you do us the favor of taking your orange
24 pen and drawing where you think the stream would
25 be? realizing it's an approximation, of course.

1 A Sure.

2 Q Now, if you could just initial that. I would
3 appreciate that.

4 A (Witness complies.)

5 Q Now, to the right or as you look to the right,
6 actually to the south, do you see the Hanson
7 house?

8 A If that is the immediate house south of the DNR
9 parcel, yes.

10 Q Okay. Now, I don't mean to be flip here, but in
11 between the Peters' house and the Hanson's house,
12 I see this big clump of trees. Am I imagining
13 that?

14 MS. KAVANAUGH: That's argumentative.

15 MR. GLEISNER: It's a little --

16 MS. KAVANAUGH: There's several clumps
17 of trees there.

18 MR. GLEISNER: A little argumentative.
19 I'll withdraw that.

20 BY MR. GLEISNER:

21 Q What that's?

22 MS. KAVANAUGH: Can you identify that?

23 THE WITNESS: What are you pointing at
24 there? This? This?

25 BY MR. GLEISNER:

1 Q That.

2 A The second circle?

3 Q Yes.

4 A I would stipulate that those are trees.

5 Q Would you call that a grove of trees?

6 A I don't know the exact definition of "grove," but
7 I would say that there are trees present at that
8 location.

9 Q A stand of trees, perhaps?

10 A A stand of trees.

11 Q Would you take your orange pen and draw a circle
12 around the trees that we're talking about? Yes.

13 A (Witness complies.)

14 Q And, in fact, that circle may even be little bit
15 bigger because the trees go up in the air there?

16 A Well, you have to take the vantage point of this
17 photograph. This isn't straight looking down.
18 This is looking at the angle. These are tops of
19 the trees but not the extent -- I drew the
20 approximate extent of the location of the bottom
21 trees.

22 Q Okay. Answer me this: Did you see those trees
23 when you were making an inspection of the eastern
24 end of where the parking lot was going to be?

25 A I haven't inspected the portion of the DNR site.

1 Q And what was your assessment of the DNR site?

2 MS. KAVANAUGH: Object. That is a vague
3 question.

4 MR. GLEISNER: That is a vague question,
5 Counsel.

6 MS. KAVANAUGH: Can you clarify?

7 BY MR. GLEISNER:

8 Q What was your impression of the trees that you've
9 drawn a circle around? What was your -- when I
10 say, "Impression," we're going to go beyond that.
11 But what was your -- what was your reaction when
12 you saw those trees?

13 MS. KAVANAUGH: And those are all vague.

14 MR. GLEISNER: They're deliberately
15 vague.

16 MS. KAVANAUGH: Is there something that
17 you want to know about what he thought about the
18 trees? Ask him that. An impression is, you
19 know...

20 BY MR. GLEISNER:

21 Q What did you think when you saw those trees,
22 Mr. Hudak?

23 A Beautiful trees.

24 Q And were they large trees?

25 A I would say there is a mix of trees with different

1 diameter base, DBH, diameter at breast height,
2 circumference, anywhere from 6 inches to 24
3 inches. Very, very broad approximation.

4 Q And would you say those were very tall trees,
5 Mr. Hudak?

6 A "Tall" is a very relative word. I'll give it an
7 approximation of 15 to 60 feet.

8 Q Now, let's get more specific so we don't get in
9 trouble with counsel again. In that area where
10 those trees exist in, where they're planted, where
11 they're growing, did you go in there and inspect
12 the soil?

13 A No.

14 Q You did not?

15 A No, I did not inspect the soil.

16 Q At any time?

17 A No.

18 Q And, to your knowledge, were soil borings ever
19 done at that point?

20 A Not to my knowledge.

21 Q Okay. Now, did you make an assessment where those
22 trees are located? Did you make an assessment as
23 to whether or not there was a bed and bank in
24 there?

25 A I made a professional judgment that I did not

1 discern a bed or bank.

2 Q Could there have been a bed or bank that you
3 didn't discern?

4 MS. KAVANAUGH: Again --

5 THE WITNESS: My opinion, no.

6 BY MR. GLEISNER:

7 Q Did you ever see water standing in -- at any depth
8 in those trees? I'm saying at any depth. I'm not
9 trying to be cute here.

10 A I couldn't speculate if I've ever seen zero or six
11 inches of water. I don't have any recollection of
12 that area and water depth in that particular area.

13 Like I stated earlier, I had visited the
14 site during wet periods where there was ponding
15 throughout this Reddelien Road neighborhood --

16 Q Uh-huh.

17 A -- however, my recollection at that date when
18 there was probably the wettest period I was out
19 there, I can't recollect whether or not there was
20 water or not in that specific location.

21 Q Do you know if anybody else in the DNR inspected
22 those trees, inspected where those trees were at,
23 is what I mean, excuse me?

24 A Inspected for what?

25 Q I apologize. For anything. Was there ever a DNR

1 inspection that you know of where those trees are
2 located?

3 A That's very broad. I don't know what you're
4 asking me what they inspected for.

5 Q Okay. I just am trying to get an idea if anybody
6 from the DNR has ever really taken a hard look at
7 those trees and where they are located.

8 MS. KAVANAUGH: For what?

9 THE WITNESS: For what?

10 BY MR. GLEISNER:

11 Q For the type of soil they're in, whether or not
12 there's an elevation that would be above or below
13 the high water mark, whether or not there's any
14 kind of unusual characteristics of that grouping
15 of trees.

16 A I can't speak to any other department personnel or
17 consultant for the DNR. My own investigations did
18 have me look at that area, again, to determine is
19 there a discernible bed and bank; are there
20 indicators that there may be a navigable waterway
21 there? Those are findings -- or, I should say,
22 investigations that I had conducted.

23 Q I'm curious about the concept of bed and bank.
24 And I heard you use that term, and I see it in the
25 DNR, and I understand the concept in general.

1 But when we're talking bed and bank, how
2 high, low is a bed and bank? Are we talking about
3 something that's got to be six inches high or a
4 foot or two feet? Could it be as low as an inch
5 or two? I'm wondering --

6 A I can relate to historic sites I've seen, and the
7 bed and bank can be any discernible change in
8 substrate. And whether that's an elevation of
9 zero inches or whether that's an elevation of six
10 feet, it's highly variable, per se.

11 Q Now, can you explain for the record what
12 "substrate" is?

13 A In context?

14 Q In any form. I just want you to define
15 "substrate."

16 A I don't have a Webster's dictionary to define
17 "substrate."

18 Q What is it?

19 A I don't have the definition of substrate.

20 MS. KAVANAUGH: Are you trying to ask
21 him how he's using the term?

22 MR. GLEISNER: Yeah, I guess I am.

23 BY MR. GLEISNER:

24 Q Because you just used it a moment ago, and I guess
25 I was trying to figure out --

1 MS. KAVANAUGH: So you want to ask him
2 what does he mean by "substrate"?

3 MR. GLEISNER: Yeah.

4 BY MR. GLEISNER:

5 Q Here's what you said. You said, and I quote, "I
6 can relate to historic sites I've seen. And the
7 bed and bank can be any discernible change in
8 substrate. And whether that's an elevation of
9 zero inches or whether that's an elevation of six
10 feet..." That's what you said.

11 A Correct.

12 Q So you used the word "substrate," so I don't
13 understand.

14 A In context --

15 Q Okay.

16 A -- in relationship to identifying a bed and bank,
17 that is often one of the observations that is made
18 by a WMS as to discern is there a bed and bank.
19 And that would be a change in substrate or
20 material compromising the bed or the bank.

21 Q Let me just see if I understand. And I'm really
22 struggling here to understand, and that's all -- I
23 want your help in understanding this.

24 Are you saying that a bed and bank can
25 exist if there is a flat surface that consists of

1 the type of soils you would find at the bottom of
2 a bed of a river and another surface that's the
3 same height but of a different makeup, for
4 example, grass or some other type of -- am I
5 understanding you correctly?

6 A No. If you want to use your example --

7 Q Okay.

8 A -- of a river --

9 Q Yeah.

10 A -- and discerning the substrate types and the
11 elevations associated with that, as a river
12 meanders, it has different characteristics along
13 those ways, whether it's a cut or a bend where
14 it's deposited or where it cuts.

15 A lot of times in depositional areas you
16 can have a change in substrate that's very
17 gradual. In other places you can have a substrate
18 cut that's very distinct.

19 Q I infer from what you're saying -- let me just
20 read what you said again a moment ago. "The bed
21 and bank can be any discernible change in
22 substrate. Whether that's an elevation of zero
23 inches or whether that's an elevation of six
24 feet..."

25 I infer from what you're saying that the

1 bank -- I think that's what we're talking about --
2 that's the sides of whatever we're talking about,
3 like the side of the river, side of the stream --
4 can actually be almost the same height as the bed?

5 A Depending upon the way that that particular bank
6 is formed under any particular process, again,
7 could be the height elevation change that I stated
8 previously.

9 Q All right. Now, let's reapply what we just
10 learned to Exhibit 100. Where those trees are,
11 was there any effort made by you or anyone at the
12 DNR to determine if there was a substrate change
13 between the area in those trees and the area
14 surrounding those trees?

15 A There was no investigation made by me, I don't
16 believe anybody else at the DNR, to specifically
17 identify the substrate change with the area below
18 the grove of trees and outside the area of trees.

19 Of note during those inspection was,
20 i.e., lack of vegetation due, in part -- again, to
21 partially, in my professional judgment, of shade
22 occurring from the tree canopy in that particular
23 area.

24 Q The tree canopy was pretty thick, was it there?

25 A Well, as you can see, there are deciduous and

1 evergreen species, conifer species, that, again,
2 provide year-round shading of that area.

3 MR. GLEISNER: Counsel, I'm not going to
4 go very far field here, but I do have a question
5 that relates to --

6 BY MR. GLEISNER:

7 Q I am going to show you Exhibit 8.

8 MR. GLEISNER: Counsel, here's your
9 copy.

10 BY MR. GLEISNER:

11 Q And this purports to be a drawing done by the DNR.
12 It purports to be a drawing done on December 4,
13 2008. Now, where are those trees that appear on
14 Exhibit 100? They don't seem to be marked. Am I
15 missing something?

16 A What's your question?

17 Q Okay. Take a look at the eastern end of -- first
18 of all, strike that.

19 You recognize this, do you not, as being
20 a topographical of the area where the parking lot
21 is going to be located?

22 A The Exhibit 8?

23 Q Yeah. Yes.

24 A Exhibit 8, to the best of my knowledge, would be a
25 topographical map. I don't know the exact -- who

1 developed this. It looks like it was provided by
2 us, but, again, I don't see any other specific
3 information to let me know exactly where it is or
4 what it's from.

5 Q I'm going to show you --

6 MR. GLEISNER: That's a fair response,
7 by the way, Counsel.

8 BY MR. GLEISNER:

9 Q I understand you didn't make that, so you would
10 have a problem testifying about what it shows.

11 Let's go back to Exhibit 9, if we could
12 for a moment. Now, Exhibit 9 is a map of the
13 parking lot.

14 I also don't find there any indication
15 of the trees on the eastern end of where the
16 parking lot -- the proposed parking lot's going to
17 be. At least I don't see the same kind of large
18 canopy trees that appear in Exhibit 100. Help me.
19 Am I missing something?

20 A I still don't know -- I understand you're trying
21 to understand where these trees are that are
22 located on this map in relationship to this plan
23 set.

24 Q Yes. Thank you.

25 A And I can't relate to why particularly the trees

1 are identified or not identified on this plan set.
2 What trees they chose to identify or not identify,
3 I can't testify as to why --

4 Q I understand --

5 A -- or presently locate on there --

6 Q Above your pay grade. I understand that. The
7 point I'm making, I guess, would you agree with me
8 that on Exhibit 9, that the trees that are on
9 Exhibit 100 don't exist?

10 A I --

11 Q There's no reference --

12 A To me, there are trees that exist. Again, which
13 trees they chose to indicate on this map, I don't
14 know.

15 Q Okay.

16 A Which trees are --

17 Q That's fair.

18 A Which trees are located on this map as far as
19 which trees are located in this circle --

20 Q That's a fair response. You testified to as much
21 as you can. I understand. Now, let's take a look
22 at Exhibit 101, NLMD Exhibit 101. Do you
23 recognize that?

24 A It would appear to be a different vantage point.
25 This one would be -- would appear to be facing

1 south looking at the parking lot area, DNR launch
2 side.

3 Q And looking at this, do you see where the stream
4 would be that we're -- we've been talking about
5 all afternoon, the blue stream that you identified
6 in Exhibit 2 earlier?

7 A I would be able to identify an approximate
8 location where the stream would be.

9 Q And I would state that anything that you say with
10 regard to these exhibits are understood to be
11 approximations.

12 Could you draw with the -- let's do it
13 with the purple this time. I like colors. Could
14 you draw where the stream would be approximately
15 on Exhibit 101?

16 A (Witness complies.)

17 Q So we've run pretty close to the Peters' house by
18 your drawing there?

19 A And, again, you're distorting the photo because of
20 the vantage point.

21 Q Understood.

22 A So it is located beyond the house, but, again, it
23 is close to that property line between the DNR and
24 the Peters' house.

25 Q I'm going to stand up, because I think we can

1 communicate better if I point here. Is that the
2 Hanson house?

3 A That would be the approximate location of the
4 Hanson house.

5 Q And I'm going to ask you a specific question in a
6 moment, but I just want to get myself oriented.
7 Is this the rough area where the parking lot's
8 going to be located?

9 A Rough approximation, yep.

10 Q Okay.

11 MS. KAVANAUGH: Could you identify for
12 the record the part you're pointing to?

13 MR. GLEISNER: I certainly will. I'm
14 going to do that really specifically right now.

15 BY MR. GLEISNER:

16 Q Are these the trees you had in Exhibit 100?

17 MS. KAVANAUGH: Can you identify them so
18 she has what you're pointing to in the record?

19 THE WITNESS: I would say that's the
20 approximate grove of trees that I've identified in
21 Exhibit 100.

22 BY MR. GLEISNER:

23 Q Okay. Would you please take your purple pen and
24 draw a circle around the grove of trees -- or the
25 trees that we're talking about?

1 A (Witness complies.)

2 Q And, again, you've drawn a circle around where you
3 think the base of the trees are?

4 A Correct.

5 MR. GLEISNER: And so, Counsel, for your
6 edification, what I was pointing to on Exhibit 101
7 is now identified by the purple circle on
8 Exhibit 101.

9 MS. KAVANAUGH: Thank you.

10 BY MR. GLEISNER:

11 Q Do you know what this is back here? And now I'm
12 pointing to the west of the circle and where the
13 stream has been identified.

14 A It appears to be the wetland complex that would be
15 located along the western portion of the DNR
16 parking lot area.

17 Q Could you take the orange pen to your right and
18 draw a circle around that wetland complex, please?

19 A (Witness complies.)

20 Q Thank you. Now, earlier on Exhibit 2, I asked you
21 to extrapolate out from the stream. Can you take
22 the green and show me where you think the stream
23 goes after it -- after this point, if you know?

24 A I don't believe it's channelized after that point.

25 Q What do you believe happens to it?

1 A I don't know what you're -- what happens to what?

2 Q Okay. The stream that -- let me do it this way.

3 When one is on the property owned by Peters,
4 looking south, you can see a stream. You can
5 actually see a stream.

6 A You can see a water course.

7 Q A water course, thank you. If one walks back
8 along that water course?

9 A Direction? Which direction?

10 Q To the west.

11 A Okay.

12 Q At what point does the water course cease to
13 exist, in your opinion? Where...

14 A The water course of the purple and the orange is
15 the same approximate water course; however, you do
16 not have as narrow of a channel through the
17 purple -- sorry, through the orange location as
18 you do through the purple.

19 Q Okay. Thank you very much for that. Now let me
20 see if I understand what you just said to me. The
21 blue line to the south of the Peters' home running
22 from the lake west, in effect, diffuses and
23 becomes a generalized wetland at the point where
24 your orange circle begins, am I correct?

25 A I would consider -- at that orange portion

1 intersection you would consider the wetland
2 complex navigable.

3 Q And that would be navigable right there?

4 A Correct.

5 Q And do you happen to -- if you don't, I'll
6 understand. Do you happen to know where the point
7 is -- and I'm going to point up here just for the
8 purposes of clarification. Can you see where this
9 is on that photograph?

10 A I don't believe so.

11 Q Okay. Very good. Thank you very much. Now,
12 let's go to Exhibit 102 for a moment, NLMD
13 Exhibit 102. Do you recognize that?

14 A It is a secondary -- this is the third orientation
15 of the DNR launch site facing to the west.

16 Q And to the right on that picture as we look west,
17 that would be the Peters' home?

18 A That would be correct.

19 Q And to the left at the edge of the picture, that
20 would be the Hanson home?

21 A That would be correct.

22 Q Now, so I don't get in trouble with counsel again,
23 to the immediate north of the Hanson home, are
24 there trees there?

25 A According to that photograph, yes.

1 Q Would you draw a circle around those trees for me?

2 A What color?

3 Q I think we'll use green this time. What do you
4 say? You got green. Go ahead.

5 A To the extent of the grove of trees on the DNR
6 property or this vantage point you're able to pick
7 them up as a grove even up onto the Hanson
8 property?

9 Q Around the grove.

10 A (Witness complies.)

11 Q Now, this is a better vantage point, is it, for
12 purposes of getting the borderline of the trees,
13 would you say?

14 A You're able to identify trees in locations that
15 you weren't able to identify on other vantage
16 points.

17 Q Now, Exhibit 102 where you've drawn the green line
18 around there, that is the trees that you didn't go
19 in and inspect before or look at before or take
20 any measurements before, is that correct?

21 A Before what?

22 Q At any time, let me put it that way.

23 A I've walked that portion of trees.

24 Q And what have you done in that portion of trees?

25 A I've explained previously that I've used

1 professional judgment to assess, identify whether
2 any navigable waterways are present.

3 Q By the way, did you make any tests to see whether
4 or not there was a bank there?

5 A What do you refer to as a "test" to determine
6 bank? Can you --

7 Q Well, you testified -- I'm sorry. I apologize.

8 A There's -- I'm trying to understand what test you
9 want me to --

10 Q That's fair.

11 A -- describe if I've completed there.

12 Q You know, I don't know. Let me just do it this
13 way. What did you do to determine whether or not
14 there was a bank there or not?

15 A I used professional judgment through the course of
16 site investigation to rule out the presence of
17 bank and bed.

18 Q Did you make any effort to determine whether or
19 not -- now I'm pointing back to Exhibit 103 at
20 this point -- 102, I apologize.

21 Did you make any effort to determine
22 whether or not there was a difference in substrate
23 between what's inside the green circle and what's
24 outside the green circle on Exhibit 102?

25 A Substrate as far as visual only. And the site

1 characteristics led me to believe that there was
2 lack of vegetation below that tree canopy as
3 opposed to thicker, denser vegetation outside that
4 tree canopy. But as far as substrates are
5 concerned, no tests or study were done.

6 Q So let me see if I understand you correctly. And
7 I don't want to put words in your mouth, but
8 you're testifying then that you never did anything
9 to confirm whether there was a bank -- whether
10 there was or wasn't a bank there, other than your
11 observations?

12 A No tests were completed other than my professional
13 judgment.

14 Q And thank you. Now, let's take a look at
15 Exhibit 103, NLMD Exhibit 103. Do you recognize
16 that?

17 A It's a north-facing vantage point of the DNR
18 launch site.

19 Q Okay. Now, taking your purple pen, can you --
20 because that will be consistent -- can you draw
21 where the approximate location of the stream bed
22 would be that we've talked about so often?

23 A (Witness complies.)

24 Q Thank you. And am I correct, take your orange --
25 if you wouldn't mind, take your orange marker, and

1 am I correct that that blends into what appears to
2 be another vantage point of the wetland?

3 A I will draw on the map in the orange location
4 where the navigable portion of wetlands --

5 Q Very good.

6 A -- would likely begin.

7 Q Thank you.

8 A Approximation.

9 Q Of course. I appreciate that. Thank you. Now,
10 you can see the Peters' house just north of the
11 blue line or purple line that you drew in there,
12 correct?

13 A Correct.

14 Q And you can see in the lower left-hand corner of
15 Exhibit 103 the Hanson house, correct?

16 A Correct.

17 Q Now, here's our old friends the trees again. Do
18 you see them there?

19 A I would see them there.

20 Q Would you mind doing me the favor of doing a green
21 circle around those?

22 A (Witness complies.)

23 Q Do you have an approximate -- and I realize you
24 can't do it from this picture and your memory may
25 not be clear on this, but do you have an

1 approximation as to how much ground is covered by
2 those trees?

3 A I do not.

4 Q Okay. Would it be fair looking at those trees
5 there, the grouping of trees there would be about
6 three times as big as the Hanson house?

7 A I wouldn't make that approximation only as this
8 vantage point is very deceiving. So I don't want
9 to use it as a reference point.

10 Q Okay. Fair enough, fair enough. All right then.

11 MR. GLEISNER: I want to leave time for
12 Mr. Gallo to do some questioning, Counsel, so I'm
13 going to ask permission to just take a very short
14 break so we can confer outside.

15 MS. KAVANAUGH: Sure.

16 (A brief recess is taken.)

17 MR. GLEISNER: Back on the record.

18 BY MR. GLEISNER:

19 Q First of all, I'd like to ask you a couple of
20 fairly brief questions. The area that is depicted
21 in Exhibits -- NLMD Exhibits 100 through 103,
22 pretty beautiful area, would you agree?

23 A It's a nice area, yeah.

24 Q What do you think an asphalt --

25 MS. KAVANAUGH: Object. That has

1 nothing to do with navigability, Bill.

2 MR. GLEISNER: Hold on. I'm going to
3 tie this in this way.

4 BY MR. GLEISNER:

5 Q A number of the cases, including the Menomonee
6 Falls case, say that once, if navigability has
7 been assessed, the next step -- and, in fact, this
8 is right out of the Menomonee Falls case -- is to
9 determine whether or not there is an impact on the
10 right to beauty and the right to aesthetics.

11 MS. KAVANAUGH: The Menomonee Falls case
12 deals with the stream with an established bed and
13 bank.

14 MR. GLEISNER: But would you agree with
15 me that if navigability is established --

16 MS. KAVANAUGH: I would agree that if
17 there is a navigable water body, that one of the
18 public interest factors is natural scenic beauty.

19 MR. GLEISNER: There you go.

20 MS. KAVANAUGH: If there is a navigable
21 water body.

22 MR. GLEISNER: Will you give me a little
23 latitude? I'm going to ask about three questions
24 on it.

25 MS. KAVANAUGH: I don't think -- I think

1 the question here --

2 MR. HARBECK: Why don't we get the
3 question out? We don't know what the question is
4 about. Fight about it after you hear it.

5 MS. KAVANAUGH: But the issue of
6 whether -- if what we're looking at is if there's
7 navigable waters here, that's what he's trying to
8 establish, whether there's a navigable water body
9 here and if -- for which you know -- you would
10 need to look at that type of thing.

11 And then he can argue whether or not, if
12 there is a navigable water body here, whether they
13 should have granted it, whether they gave the
14 proper impact to that in making --

15 MR. GLEISNER: Edwina. Would you agree,
16 Edwina, that the hearing examiner, just as in the
17 Menomonee Falls case -- and I've got most of the
18 transcript -- the hearing examiner is not going to
19 make a determination on navigability and say, "You
20 folks come back in a couple weeks and we'll take
21 up beauty"?

22 MS. KAVANAUGH: No. The hearing
23 examiner is not determining whether the permit
24 should have issued.

25 The only issue that it went to the

1 hearing for is whether or not -- and DNR is the
2 one who makes the determination of jurisdiction in
3 that -- that we granted it for, and that was the
4 presence of navigable waters and navigable water
5 body, whether this area that you're claiming is a
6 navigable water of the State -- is a navigable
7 water to the State.

8 Whether or not the manual code of
9 approval -- approval should have been granted to
10 build a parking lot there is something that you
11 get at court --

12 MR. GLEISNER: I'm going to short
13 circuit this.

14 MR. HARBECK: My only purpose was let
15 him ask the question. It's the deposition
16 process. You can object on relevance. Let's get
17 through it.

18 MS. KAVANAUGH: It's past relevance.
19 It's jurisdiction of the examiner here, you know?

20 MR. GLEISNER: Oh, my goodness.

21 BY MR. GLEISNER:

22 Q Oh, my goodness. Let's do it this way. With
23 having reference to Exhibits 100 and 103, with the
24 red pen could you draw for me the approximate
25 location where this parking lot is going to be

1 located?

2 A On all four of these?

3 Q Yeah.

4 A To the best of my ability, approximation of
5 these -- of the boat launch parking structure?

6 Q Yeah.

7 A (Witness complies.)

8 Q Thank you.

9 A Very approximate.

10 Q I see.

11 A (Witness complies.)

12 Q And that's going to be two feet above grade,
13 right?

14 A Based on the plan review, that -- there is a grade
15 change. And the depth of fill is variable along
16 the site.

17 MR. GLEISNER: For the record, Mr. Hudak
18 has, on Exhibits 100 through 103, kindly noted the
19 approximate location of the parking lot --
20 proposed parking lot in red, in the color red.

21 BY MR. GLEISNER:

22 Q Now, I just have a couple of wrap-up questions
23 here for you, Mr. Hudak. First of all, with
24 respect to the notice -- what we call in the trade
25 the 804.02(2)(e) notice, I just have a couple of

1 questions for you.

2 Is there -- No. 1 says in the notice --
3 would you like a copy?

4 A Just what exhibit is it? I probably have it. Is
5 it Exhibit 00?

6 Q 00, uh-huh. Got it there?

7 A Yeah.

8 Q Just take a look at page 2. Go to No. 1. "The
9 manner, method" -- this is No. 1 from the notice.

10 "The manner, method or procedure by
11 which DNR assesses, evaluates, tests or determines
12 the presence of navigable waters in connection
13 with its permitting process."

14 My question to you, is there anything at
15 the Kraus site regarding the issues addressed
16 there, method, procedures, tests, et cetera, that
17 you have not testified to?

18 Have you testified to everything that
19 was done at the Kraus site to determine
20 navigability?

21 A I can testify to what I've personally conducted.

22 Q Understood. Which is the way to do it.

23 A And that's kind of vague for me to try and
24 explain. I believe we touched on everything that
25 you've asked, but I...

1 Q Let me explain 804.05(2)(e). And your counsel can
2 help out here. This -- you've been identified as
3 the person to speak on behalf of the DNR.

4 So is there anything else that you're
5 aware of that the DNR has done on the Kraus site
6 to determine navigability?

7 A Other than the field work that I conducted and my
8 professional judgment and, I believe, I would say
9 the -- the little bit confirmation work that we
10 discussed previously, that was the extent of the
11 DNR's work to investigate navigable waterways on
12 this site.

13 Q No. 2, "Any and all tests, evaluations, analyses,
14 studies or similar evaluative techniques utilized
15 by the DNR or anyone on its behalf or by others on
16 the Kraus site intended to determine the existence
17 of navigable waters at any time."

18 And that's the -- the answer that you
19 gave to one is the same as to two. Is there
20 anything else that you're aware of?

21 A Yeah, one and two are pretty much the same
22 discussing all test evaluation, analysis or
23 manner, means or methods of how that was
24 conducted. I would say they're similar in that
25 regard. And the answer to one is suffice to

1 No. 2.

2 Q No. 3 talks about the manual code process, which
3 you've testified to. And No. 4, the identity,
4 duties and responsibilities of those who
5 participated in the determination issues of
6 November 4, 2011 manual code approval for the
7 Kraus site.

8 MS. KAVANAUGH: Again, I still object to
9 the relevance of that. But, you know, if he
10 remembers in terms of who --

11 MR. GLEISNER: You're the one who wants
12 to get out at 5:30, Edwina.

13 MS. KAVANAUGH: And I'm also the one who
14 wants to make the right objections.

15 BY MR. GLEISNER:

16 Q What I'm asking there, I'm not asking about -- I
17 just want to know the identity of other people.
18 Were there any other people besides you who
19 participated in the manual code approval for the
20 Kraus site?

21 A Who participated in the manual code approval?

22 Q That's what it says, who participated in the
23 determination to issue the manual code approval
24 for the Kraus site.

25 A There's a lot of different responsible people that

1 were involved in issuing the manual code approval.

2 Q And I don't expect you to name all of them --

3 A Okay.

4 Q -- just the principals. Who are the main people
5 who worked with you on that?

6 A Typically what the water management specialist
7 will do is elicit comments from the resource
8 managers. The resource managers on this case --
9 tough. Tim Lazotte, Heidi Bunk, Craig Helker,
10 I'll throw out Bob Wakeman, and I will throw
11 out -- one I just totally drew a blank on as a
12 resource manager.

13 Q Pete Woods?

14 A Pete Wood was -- I don't believe he really played
15 a role in giving expert opinion as to the impacts
16 of the site as it relates to the manual code
17 approval.

18 Did he do -- did he do work on the
19 procedure to develop plans and those type of
20 things? I believe he did work in that capacity.

21 Exactly what he all did, you're going to
22 have to ask him that question. I can't testify as
23 to what he all has completed. I want to make sure
24 I didn't forget anybody in that resource managers
25 that I just lifted off. Did I say Sue Beyler?

1 Q Sue Beyler?

2 A Sue Beyler would be the fishery biologist.

3 Q Now, let me just ask you to take a look at
4 Exhibit 1-A. And we're just about done.

5 We've already talked about what you did
6 in terms of the manual code. It states that you
7 may be called to testify about issues within your
8 knowledge including whether the project met the
9 standards to issue a manual code approval, talked
10 about that.

11 DNR determination of the location and
12 extent of navigable waters of the State and
13 adjacent to the DNR, formerly Kraus property.
14 Yes, I'd like to ask you about that.

15 Did you do anything to assess or
16 determine the navigability of land adjacent to the
17 Kraus site other than the large green circle on
18 Exhibit 2?

19 A On adjacent properties, I have not done any
20 navigability determinations other than the
21 immediate adjacent portions of the larger wetland
22 complex and the DNR lot here in proper.

23 Q How about the access road?

24 A Yes, that's included.

25 Q And so is that why, going back to Exhibit 2, you

1 said that the access of the area to the east of
2 the access road was navigable waters?

3 A I never stated to the east of the access road as
4 navigable waters.

5 Q Let's get Exhibit 2 out. Got it?

6 A I'm just looking at -- is that -- is -- it's that
7 exhibit up there, isn't it? That's a blow-up of
8 that? Too many here to look through.

9 Q We have to get these all in order before we run
10 off here. That's it.

11 A East as it relates to the access road as it
12 relates to this portion or that portion?

13 Q Thank you for that. Let's take a look at the
14 large green area to the south of the -- what we
15 call the gravel road. You denominated that as
16 navigable water?

17 A That is correct.

18 Q And that is not DNR property?

19 A That is correct.

20 Q And you denominated the area north, of course, as
21 navigable water, and the blue stream is navigable
22 water.

23 Now, with regard to the Kraus's existing
24 home or with regard to anything to the west of the
25 access road or anything such as that, you did not

1 do any work on attempting to ascertain navigable
2 waters in those areas, correct?

3 A To the extent to the locations that I attempted to
4 ascertain navigable water locations would be
5 immediately east of the access road as it adjoined
6 Reddelien Road.

7 Q Uh-huh.

8 A Adjacent to the east-west portion of the access
9 road as it transects the wetland --

10 Q The two green circles?

11 A The two green circles indicated on Exhibit 2. And
12 the large portion of the DNR lot that is adjacent
13 to North Lake where the launch and parking
14 structure would be located.

15 Q Would you agree that the southern end of the large
16 green circle is at or near Becks Road?

17 A I don't have any reference for where Becks Road is
18 on this.

19 Q Reddelien Road is bisecting it. Reddelien Road
20 runs to the west, as you can see denoted there on
21 the map. Then there's Becks Road, and it runs
22 east and then what is known as Lower Reddelien
23 Road begins.

24 Why I'm asking that is there are a
25 number of what appear to be wetland areas south of

1 Becks Road below your finger there. You didn't do
2 any work there?

3 A I did not do any work there.

4 Q Okay.

5 MR. GLEISNER: Okay. I am done, except
6 I want to now gather up all of the, exhibits so we
7 don't have a problem, and give them to our
8 friendly court reporter.

9 (Discussion held off the record.)

10 EXAMINATION

11 BY MR. GALLO:

12 Q Andy, I want to ask you just a few background --

13 A Sure.

14 Q -- questions. Can you state for the record your
15 date of birth?

16 A 9/11/82.

17 Q And can you describe briefly your professional
18 education? I don't mean kindergarten or
19 elementary school, but college.

20 A I have a bachelor's degrees from the University of
21 Stevens Point with a major in water shed
22 management hydrology and also a soils and
23 chemistry background minor.

24 Q Okay. And your employment history, did you start
25 work at -- with the DNR out of college?

1 A Yep, very close.

2 Q How long have you worked for the DNR?

3 A Since the spring of 2006.

4 Q And have you received any formal training on
5 assessing navigability?

6 A Can you explain "formal training"? The process
7 how I was trained?

8 Q Yes.

9 A That's what you'd like to know?

10 Q That's fine.

11 A Would be assigned a mentor, typically for the
12 first six months to learn the program, learn the
13 rules, learn the statute, learn the field
14 investigation techniques that are required for a
15 certain jurisdiction for projects.

16 Q And the mentor would go into the field with you,
17 or you would go into the field with --

18 A That's correct.

19 Q -- he or she? Who was your mentor?

20 A Geri Radermacher.

21 Q I'm going to ask you some questions that -- just
22 to confirm some of your answers earlier.

23 A Uh-huh.

24 Q When you -- when Bill was asking questions with
25 regard to surveying, you commented on the parking

1 lot area.

2 And what I'm interested in is then from
3 the parking lot area back up the hill on the
4 access road -- are you familiar with surveying
5 that was performed by the DNR or contractors with
6 the DNR?

7 A I am aware that surveying was conducted or
8 completed to develop the plans associated with the
9 manual code process.

10 Q And also for the design?

11 A I use those interchangeably, one and the same.
12 Design, construction, review.

13 Q Okay. I have a series of exhibits.

14 MR. GALLO: Maybe I'll just give you
15 each a package. I'm just going to ask questions
16 regarding these exhibits to enter them into the
17 process.

18 MS. KAVANAUGH: And these all have to
19 deal with navigability?

20 MR. GALLO: Yeah.

21 BY MR. GALLO:

22 Q I have some questions regarding the establishment
23 of ordinary high water mark at the site and some
24 emails. And we can number this 104.

25 (Exhibit No. 104 was marked.)

1 BY MR. GALLO:

2 Q Andy, can you take a minute and review the email
3 and the attached drawing? And this is a series of
4 emails, but more importantly, it ends with Jim
5 Morrissey sending an email to Dale Pfeiffle at
6 Army Corps, and you were copied on it. Are you
7 familiar with this email?

8 A I see I was copied on this email. I can't say I'm
9 familiar with it. I have it in my record. Let me
10 review it a little bit more here.

11 Q It refers to a question that Dale at the Corps
12 asked with regard to various ordinary high water
13 mark determinations.

14 And is it your understanding that this
15 is the -- kind of the definitive answer from the
16 department from Jim Morrissey that the ordinary
17 high water mark at this location is 897.76?

18 A I believe 897.76 is the elevation that we were
19 utilizing as the ordinary high water mark for
20 purposes of this application for this project.

21 Q Andy, I'm going to refer to RRNA Exhibit No. 1.
22 And are you -- the question is: Are you the
23 primary author of this memo?

24 A So you're asking me about Reddelien Road, the memo
25 for --

1 Q This would be --

2 A -- Exhibit 1?

3 Q -- the manual code memo.

4 MR. GLEISNER: Your manual code
5 approval.

6 MS. KAVANAUGH: Oh, approval.

7 THE WITNESS: Yeah, I am the author of
8 that manual code approval.

9 BY MR. GALLO:

10 Q Did you work with other people in the department?

11 A The development of this memo was a compilation of
12 all of the comments that I had received in review
13 of this project and the standards. So there was
14 additional input from additional parties, also
15 basic things such as grammar. But basically the
16 start, the development of -- of myself.

17 Q As to the technical information that was submitted
18 to you in evaluating the site and for the manual
19 code approval, it's my understanding that other
20 people may have provided some of the technical
21 information.

22 But the question I have for you is: Did
23 you work through that technical information, and
24 do you have a good understanding of -- reasonably
25 good understanding of that information to then

1 complete an approval of this nature?

2 A I believe I have technical knowledge of the site
3 to have been able to develop this document, yes.

4 Q Okay. These are just foundational questions.

5 A Uh-huh.

6 Q Andy, when you review all sorts of wetland or --
7 not necessarily wetlands, but waterway permits,
8 I'm going to use the term broadly "Chapter 30" --

9 A Uh-huh.

10 Q -- type permits, you mentioned that you often
11 review plans and drawings and engineering
12 drawings.

13 And so over the past five years, do you
14 feel that you had a fair amount of experience
15 doing that, and you do understand those drawings
16 sufficient to make the analysis for permit
17 applications, approval of permit applications as
18 well as manual code approvals?

19 A Yes.

20 Q Okay. So then when you were reviewing this
21 project for the manual code approval, you reviewed
22 probably several Kapur drawings. Is that a fair
23 statement?

24 A There was a multiple plan sheet submitted with
25 this -- or with this approval process.

1 Q I'm familiar with, you know, various versions of
2 the Kapur drawings. And I have a set here today.
3 I'm not sure if -- I'd like you to take a look at
4 this. These were dated -- these were design
5 drawings that are dated February '08.

6 And we'll mark this set of drawings as
7 105. Do you want to step down here and look at
8 those? Or I can hand them to you. Are you
9 familiar with this set?

10 A Yeah. Again, the date of 2/15/2008, I don't know
11 how that correlates with the final approval, but,
12 yeah, this is a -- vaguely familiar set of plans
13 that I've seen.

14 Q Okay. And do you think it fairly, within a
15 reasonable degree of accuracy, reflects conditions
16 during the design of the access road and the
17 parking lot on this project?

18 A I guess can you kind of restate that?

19 Q Yeah.

20 A I don't understand how you're...

21 Q I'm just trying to establish how this set of
22 drawings was a set that, in the progression of the
23 final design, was prepared by Kapur and accurately
24 represents the conditions at the time of the
25 drawings that -- the date on the drawings.

1 A I could state that this would be a similar set of
2 plans that was used throughout the process. But,
3 again, what stage this is at, whether it was
4 beginning or end -- you know, it's a 2/15/2008.
5 And I don't know what part of the review or
6 revision process this is -- this is at.

7 Q That's fine. That's fair. And to prepare this
8 set of drawings, are you familiar with the fact
9 that Kapur would have to do some surveying to
10 document existing conditions?

11 A On this plan sheet? I would assume there would
12 have been some degree of survey work that would
13 have been completed to produce this.

14 Q If you don't mind taking the time, can you just
15 flip through this plan of drawings, and let's talk
16 about them a little bit. This, I think -- is
17 this -- I'm pointing to -- maybe we should use
18 these -- those colors.

19 MR. GLEISNER: Sure.

20 THE WITNESS: We're on sheet C100-2.

21 And I'll just say revision date of 7/10/08.

22 BY MR. GALLO:

23 Q That's good. It's a little bit newer. And can
24 you take this blue -- and then we'll point to this
25 area and circle it. And can you identify that as

1 the start of the project?

2 MS. KAVANAUGH: Just to clarify for me.
3 You said it was 105, it was February 2008. So
4 it's multiple sheets in Exhibit 105, is that
5 correct?

6 MR. GALLO: Yes.

7 MS. KAVANAUGH: And then they may have
8 different dates on them?

9 MR. GALLO: Let's identify all the
10 sheets. They're going to have -- they don't have
11 sequential numbers.

12 BY MR. GALLO:

13 Q They jump around, don't they?

14 A Yeah.

15 Q So we'll refer to each drawing --

16 MS. KAVANAUGH: Yeah, as you look at
17 them. That's fine.

18 BY MR. GALLO:

19 Q Is this --

20 A The blue location circled on sheet C100-2,
21 revision date 7/10/2008, is the approximate
22 intersection of the Reddelien Road and proposed
23 DNR access to the launch location.

24 Q Okay. Thank you. Can you just initial that?

25 A (Witness complies.)

1 Q And I'm going to jump ahead here, Andy --

2 A Okay.

3 Q -- in the interest of time. Bill had you mark
4 wetland areas and the stream. And we're going to
5 do these on these drawings so we have a general --

6 A Sure.

7 Q -- location. What I'm most interested in, this is
8 fairly high. And I think this is the turn that
9 goes between the wetland areas. Is that a fair
10 statement?

11 A That station approximately, 1950, would be the
12 direction heading east.

13 Q And you might -- I think you stated at around
14 these -- these stations, 1960 -- 19 plus 67.27 was
15 essentially the transition from the higher
16 elevations through the wetlands? Is that --

17 MS. KAVANAUGH: I don't understand what
18 you're asking.

19 THE WITNESS: A very generalistic view
20 would say that you have a transitional area
21 between ridges, upland areas and approaching
22 wetland corridor at station 1950.

23 BY MR. GALLO:

24 Q Okay. Thank you very much. I'm going to jump
25 around a little bit. I want to refer to

1 Exhibit RRNA 4. It's sub-Exhibit J. And I'm
2 going to hand that to you --

3 A Okay.

4 Q -- Andy. Can you explain for me what is being
5 discussed in that? And you can refer to --

6 A I'll read directly. This is an email from Pete
7 Wood to Jim McNelly, Jim Ritchie, Lynette Check
8 and Jim Morrissey with an attachment.

9 And the email from Pete states that it's
10 a general depiction of the flow path from the
11 proposed parking lot area -- the existing
12 depression of the proposed parking lot area.

13 Blue shaded area drains west to the
14 wetland complex at elevation 898.7. The southern
15 portion of the wetland complex drains north
16 through the culvert at elevation 897.6. The
17 portion -- or the northern portion of the wetland
18 complex then drains to the lake through the outlet
19 channel at elevation 897.5.

20 Q Okay. And then this email -- and this exhibit is
21 referring to the drawing attached. And do you
22 know whether or not that exhibit was then prepared
23 by Pete Wood?

24 A I can only estimate that this was the one that was
25 developed by Pete Wood. I believe he developed

1 something very similar to this, if this is the one
2 he developed.

3 MS. KAVANAUGH: And you can ask --

4 MR. GALLO: We'll ask Pete tomorrow.

5 THE WITNESS: Yeah.

6 BY MR. GALLO:

7 Q But on this attached exhibit, you can see these --
8 there's elevations and kind of a flow area that
9 describes the circuitous flow to the lake?

10 A Very generalistic flow path, yes. It would flow
11 to the southwest and then curving back around to
12 the north and then eventually flowing east.

13 Q Okay. I'm going to ask you to correlate those
14 elevations to these drawings. And we'll kind of
15 flip through here.

16 There's a culvert right here that goes
17 under this access road. And we're trying to
18 find -- I think this may be it. I'm pointing to
19 an eight-inch PVC, cross-culvert...

20 A I can't -- I can't -- I can't positively identify
21 what culvert he is pointing to with this location.
22 This may be one of the proposed culverts. It may
23 be an existing culvert. I don't know.

24 It says "existing culvert." So I don't
25 believe this is this cross-culvert here, because

1 this would be a proposed culvert, so.

2 Q Okay. I think that's fair.

3 A I don't know if the existing culverts are depicted
4 on these plan sets. Yeah, there's no indication
5 exactly what the -- what the existing culvert is
6 on that set.

7 Q Okay. I think that's a question I can ask Pete --

8 A Yeah, yeah.

9 Q That's fine. On this particular plan sheet -- and
10 let's get the number. It's C101-2. Could you
11 draw for me in orange the location of the ditch
12 that you were referring to earlier? This is the
13 ditch?

14 MS. KAVANAUGH: Of the what?

15 THE WITNESS: I'll draw the location of
16 a water course that was identified on the northern
17 portion of the parking lot.

18 MS. KAVANAUGH: The approximate
19 location.

20 THE WITNESS: The approximate location.

21 BY MR. GALLO:

22 Q And the question I have here is: Are there any
23 elevations on this drawing for the bottom of that
24 ditch?

25 A On this drawing? I don't see any.

1 Q Are you aware of any elevations that were taken at
2 the -- on that ditch along the bottom?

3 A I believe, to the best of my knowledge, there was
4 survey work done to identify the elevations
5 throughout that ditch line.

6 Q Do you know who might have done that?

7 A Kapur & Associates.

8 Q And can we, on this same drawing, C101-2, can you
9 mark in green the area of transition from the
10 existing road onto the easement that was referred
11 to -- this is on the Hanson property -- or at
12 the -- at the west end of the Hanson property?

13 A Can you just explain a little bit better in detail
14 what transition part --

15 Q Sure.

16 A -- location you want me to mark?

17 Q The way I read this drawing, it's -- the access
18 road is being constructed on an existing driveway.
19 And then at this point where it goes onto the
20 Hanson property, it needs to move onto the actual
21 access easement which is, I think, depicted by the
22 lines on this drawing. So what I'm asking you to
23 point out is and identify is the point of
24 transition.

25 MS. KAVANAUGH: Transition from?

1 BY MR. GALLO:

2 Q Or the point of traverse from the roadway into --

3 A I'll identify the location of construction of new
4 access road off of the existing alignment.

5 Q Excellent. And then the question that I --
6 follow-up question is: What -- is this roadway
7 then, when it transitions off of the existing
8 roadway, in wetland?

9 A Can you explain that again real quick?

10 Q Okay.

11 A I can't --

12 Q You had identified an area to the west -- I have
13 to get my directions --

14 A Yep.

15 Q -- that is wetland. And I'm asking whether this
16 is a transition into the wetland. And I think
17 that this shading is, in essence, the wetland
18 flow?

19 A To the best of my knowledge, the shading on sheet
20 C101-2, revision date 2/15/2008, does depict the
21 location of wetland impact by the shading, dashed
22 area.

23 Q Okay. I'm going to jump around a little bit here.
24 I'm going to Exhibit North Lake Management
25 District 100. And I'm going to hand that to you,

1 Andy. And I want to ask you to look at the
2 exhibit.

3 And what I want to point out to you --
4 let me see. If you can -- if you can see, there's
5 maybe a blue here and some blue within this area.
6 And I think that that's water. Would you agree
7 that that's water?

8 A I would agree that that would be water picked up
9 in this photo.

10 Q Okay. And could you identify -- and I think you
11 have, but if you don't mind drawing the ditch --
12 the ditch line --

13 A I'll identify the approximate ditch location.

14 Q Maybe you should do it in red. There's a lot of
15 green on it. So you're going to mark that in red.

16 MR. GLEISNER: Go off the record.

17 (Exhibit Nos. 105 and 100-A were
18 marked.)

19 BY MR. GALLO:

20 Q So we are on Exhibit 100-A. And you marked the
21 approximate location of the stream, unnamed
22 tributary and initialled it. And then can you
23 also identify in green the wetland that's to the
24 west?

25 A (Witness complies.)

1 Q And I want to confirm this. I think you stated
2 earlier, and I want to confirm, your opinion is
3 that that's the stream, and the wetland to the
4 west of that is navigable?

5 A Correct.

6 Q Andy, in RRNA Exhibit 1, I think -- let me make
7 sure of the -- I think it's Exhibit 4, the
8 interrogatories. There's some discussion
9 regarding stream history. And you were asking --

10 MS. KAVANAUGH: I'm sorry, what exhibit
11 are we on?

12 MR. GALLO: I'm sorry. We're on
13 Exhibit RRNA 4.

14 MS. KAVANAUGH: RRNA 4, okay.

15 BY MR. GALLO:

16 Q And there's an Exhibit I. Exhibit I. I'll let
17 you look at this. And you're corresponding with
18 Lois Simon. Can you explain what Lois's job
19 description or duties or why you were going to
20 Lois for information?

21 A Lois Simon assists water management specialists
22 with historic waterway review and has the ability
23 to access and is very good at interpreting older
24 government surveys to -- that may or may not have
25 presence of navigable waterways as they transect

1 throughout Wisconsin.

2 Q So if I can just clarify this. You were going to
3 Lois to better understand what the history, stream
4 history was of the unnamed tributary in the
5 wetlands in this area?

6 A I was -- I asked Lois for assistance to look at
7 the old government surveys and to indicate to me
8 whether or not there were any waterways identified
9 in those surveys for the close proximity of the
10 North Lake boat launch and access road.

11 Q Okay. Thank you. I'm going to hand you some
12 photographs.

13 MR. GALLO: And, Edwina, I will provide
14 an affidavit of how those -- these photographs
15 were obtained.

16 BY MR. GALLO:

17 Q And let's mark those -- this first photograph as
18 an Exhibit 106. And we'll do the second
19 photograph as Exhibit 107. Can you take a minute
20 and just look at those?

21 A Sure.

22 MR. GALLO: 106 is titled Winter 1968,
23 and 107 is "Predevelopment 1937."

24 BY MR. GALLO:

25 Q Andy, I believe that the 1968 aerial photograph

1 shows the Reddelien Road area and the DNR proposed
2 site as developed at this stage. There are
3 cottages or houses along the lake. Is that your
4 interpretation?

5 A My interpretation of this air photo is that -- I
6 can identify Reddelien Road and houses that
7 were -- having been constructed between Reddelien
8 Road and North Lake.

9 And I can also identify a -- what
10 appears to be the same access road the department
11 is proposing to construct as the access to the
12 boat launch that transects north and then heads
13 east to the current DNR-loaned access location.

14 Q Okay. And this photo is a photo with snow cover
15 on it and -- what appears to be snow cover, and
16 the lake appears to be frozen, is that fair?

17 A I don't necessarily state that there would be snow
18 cover. I would state that it -- you can identify
19 water. And from this photo, it could appear that
20 is ice covered, especially on the lake and on two
21 locations and the, quote/unquote, wetland areas to
22 the west of Reddelien Road.

23 Q Okay. Thank you. You had mentioned the wetland
24 areas. Could you identify those areas with this
25 green on that map? It would be --

1 A I can give some crude approximations --

2 Q Yes, exactly --

3 A -- as to what the area is --

4 Q -- sure.

5 A -- as they're located west of the Reddelien Road
6 neighborhood. Again, very general.

7 Q Do you have an opinion as to whether or not the
8 tributary, the unnamed tributary can be identified
9 in that drawing?

10 A I believe the label that says "frozen ditch line"
11 could be an indication of the location of that
12 ditch or a ditch at that time.

13 Q Thank you. Can you mark that in red? And I'll
14 let you initial that as well.

15 A (Witness complies.)

16 Q And then if you could look at the 1937 map and
17 give me your thoughts on what you see there.

18 MS. KAVANAUGH: The photo you mean?

19 MR. GALLO: I'm sorry, the photo.

20 THE WITNESS: I would say in the 1937
21 air photo, there is a lack of development along
22 the western side of North Lake. The access road
23 has not been constructed in its current location.
24 There is no indicators of open water or water
25 present at the surface.

1 There is a -- I'll call it vegetation
2 line that could be in the same approximate
3 location as the frozen ditch line that had been
4 identified in the 1968 air photo.

5 BY MR. GALLO:

6 Q Okay. Thank you. I'm going to move back to the
7 manual code memoranda. And this -- in this
8 memoranda on page -- I'm sorry, do you have a
9 copy?

10 MS. KAVANAUGH: What exhibit?

11 THE WITNESS: This is the manual code.

12 MS. KAVANAUGH: What exhibit is it?

13 MR. GALLO: 1.

14 THE WITNESS: Do we have these two
15 labeled as exhibits?

16 (Exhibit Nos. 106 and 107 were marked.)

17 BY MR. GALLO:

18 Q Andy, with regard to this manual code evaluation,
19 did the ordinary high water mark -- was that a
20 consideration on any of the navigable
21 determinations?

22 A Are you asking was an ordinary high water mark
23 determination identified for the additional
24 navigable waterways on the site aside from the one
25 identified at North Lake?

1 Q No. I'm sorry. I'll withdraw the question and
2 restate it.

3 Is it your opinion, and is it your
4 understanding, that any land that's below the
5 ordinary high water mark that's connected to the
6 lake, part of the lake yet?

7 A Can you expand on that in context?

8 Q Sure. Thank you. I'm happy to do that. I'm
9 going to refer to RRNA Exhibit 4, and I'm looking
10 at Exhibit J and the map attached. I think this
11 would be a good example. Here's the invert of the
12 outlet of the lake. Can you read that elevation?

13 A 897.5.

14 Q Okay. And earlier we agreed that the ordinary
15 high water mark for purposes of this project was
16 897.76, is that correct?

17 A That is correctly identified on this plan.

18 Q Okay. So as to that location, that would be below
19 the ordinary high water mark and considered to be
20 part of the public trust?

21 A I would consider the swale as a navigable waterway
22 subject to the public trust.

23 Q Yes. Okay. And at that location, you would agree
24 that it's lower than the ordinary high water mark?

25 It's not --

1 A At the invert outlet to the lake --

2 Q Yeah.

3 A -- it is lower than the ordinary high water mark
4 to North Lake.

5 Q Okay. Thank you. Are you familiar with -- I'm
6 going to mark these as exhibits. They're large.
7 108. This is a letter comment from myself dated
8 December 10, 2008 to Jim Ritchie.

9 MS. KAVANAUGH: And is that -- okay, I
10 got it.

11 MR. GALLO: Yeah.

12 BY MR. GALLO:

13 Q I'm just asking the question, are you familiar
14 with this comment?

15 MS. KAVANAUGH: And what exhibit is
16 this?

17 BY MR. GALLO:

18 Q And generally familiar, not specifically. There's
19 a lot of information. And we're talking --

20 MS. KAVANAUGH: What exhibit is this?

21 MR. GALLO: North Lake Management
22 District 108.

23 MS. KAVANAUGH: 108.

24 MR. GALLO: And it's dated December 10
25 to Jim Ritchie.

1 MR. GLEISNER: October 12.

2 MR. GALLO: There's two of them. We'll
3 get to the second one.

4 MS. KAVANAUGH: You're at the second
5 one. You're at the December 10, right?

6 THE WITNESS: I'm familiar with it as
7 this is a letter addressed to Jim Ritchie
8 regarding the environment assessment for the
9 public access.

10 BY MR. GALLO:

11 Q Did you look at this when you were preparing the
12 manual code approval?

13 A Are you referring to the letter or the
14 environmental assessment?

15 Q The letter and the comments that are attached.
16 I'm -- predominantly deals with the environmental
17 assessment, but it also addresses a couple other
18 issues within the letter. Do you want to take a
19 minute --

20 A I mean, I can't say that I addressed specifically
21 every item in this letter in the manual code
22 approval. Is there an additional -- specific
23 point you'd like me to draw attention to?

24 Q First of all, are you aware of this?

25 A I'm aware it exists, yeah.

1 Q Okay. And it is in the file that constitutes the
2 file that you reviewed with regard to the manual
3 code approval?

4 A I believe if I would have been CC'd on this or if
5 Jim would have been directed to provide a copy to
6 me, then I would have it in my files. It looks --
7 I've seen a lot of things from you over the course
8 of these projects, Jim, so I'm assuming I have
9 this in the file.

10 I don't want to assume that. I would
11 err on the side that I would have this included in
12 my files that we reviewed in preparation of the
13 manual code.

14 Q Okay. That's all I wanted to do on this one.
15 Let's go on. I appreciate your response. I want
16 to now direct you to the other one.

17 A Okay.

18 Q And this is probably more relevant in terms of the
19 manual code approval, because it was closer in
20 time. This is Exhibit 109. It's dated --

21 MR. GLEISNER: October?

22 BY MR. GALLO:

23 Q October 12, 2010. And it's addressed to Andy and
24 Jim Richard -- Jim Ritchie?

25 A Jim Ritchie.

1 Q Ritchie, I'm sorry. So take a minute to look at
2 it. And this was North Lake Management District's
3 comment just before -- you know, as part of the
4 comment period just before you produced to them
5 the manual code approval. And so are you more
6 familiar with this document?

7 A Yeah. If I have specifically received this one?
8 I believe I would have reviewed it and its
9 contents throughout the manual code review
10 process.

11 Q Okay. Thank you. Just give me a minute. I think
12 we're pretty close to being done.

13 MR. GALLO: Can we go off the record for
14 a minute.

15 (A brief recess is taken.)

16 MR. GALLO: Let's go back on the record.

17 BY MR. GALLO:

18 Q And I'm going to RRNA Exhibit 4, and I'll hand
19 this to you.

20 A Okay.

21 Q There's a diagram in this exhibit, Andy, we're
22 trying to understand better.

23 A Okay.

24 Q Oh, it's G, thank you. This is Exhibit G.

25 MR. HARBECK: Of Exhibit 4.

1 BY MR. GALLO:

2 Q Andy, are you familiar with that exhibit?

3 A Yes, I am.

4 Q Can you explain to us what that exhibit is all
5 about?

6 A Sure. This was a summary of notes that I had
7 taken in the course of reaffirming my navigability
8 determination of the swale along the northern
9 portion of the property.

10 Q Can you walk us through this?

11 A Sure. Basically, there are a few points
12 identified as stars of where I took particular
13 measurements or identified particular
14 characteristics that I thought were important.

15 Q If you don't mind, let's go over them one by one.
16 Flag No. 1.

17 A Sure. Flag No. 1 at the time of this site visit
18 of 9/22/2010 was the point of main overflow, flow
19 entering North Lake from the swale. So the flow
20 direction of water was from the swale into North
21 Lake.

22 Q And you also -- I don't mean to interrupt you, but
23 can you also identify the width and the depth of
24 the water?

25 A That would be correct. At that point, it was a --

1 again, it was an overland flow. It wasn't a very
2 well-defined bed or bank. The majority of the
3 channel was -- I'll call it closed off due to, in
4 my professional opinion, of ice heave and wind and
5 wave action accumulating sediment in that channel
6 from the lake.

7 Again, the water depth located at the
8 small overland locations were approximately 1 1/2
9 inches deep at a depth -- or at a width of 1.4.

10 Q Is that inches or feet?

11 A That would be 1.4 feet width and 1.5 inches deep.

12 Q Okay. And this is what I would characterize as
13 kind of fanned -- fanned outflow? It's not a
14 defined bed. And this is right on the shore --

15 A Correct. If you look at the circle that I
16 identified as the high point between these two
17 small flow paths, it was a -- again, a composition
18 of brush and curvaceous vegetation that really
19 impeded a channelized flow and just correlated to
20 small little -- two small overland paths across
21 that area of deposition.

22 Q Let's go to flag No. 2.

23 A Flag No. 2 was -- looked to be an identification
24 of where the main flow enters that northern
25 channel. That really is kind of overland. I

1 refer to it on here as a channel, but it's a
2 very -- again, overland type situation. But that
3 is probably the origin of where that, again,
4 channelizes toward the lake.

5 It looks to me like I identified a map
6 of vegetation at that location with no exposed
7 sediment with a -- again, a width of this area 14
8 feet -- I'm sorry, four feet wide and 2 1/2 inches
9 of water, and some other species I identified at
10 that location.

11 Q I want to ask you a question. When I read further
12 down flags four and five, it says, "No discernible
13 flow with six inches of water depth." And that's
14 on flag four. And on flag five, it says, "Nine
15 inches water depth. No discernible flow."

16 When you say "discernible," are you
17 characterizing the flow regime?

18 A I'm characterizing you cannot discern which
19 direction and a velocity.

20 Q Okay.

21 A And I'll reference that to the point of this
22 accumulation of material at the mouth of the
23 outlet was at an elevation where it was just at
24 the point of water barely making its way over
25 there flowing into the lake.

1 So in my estimation, it was very near
2 the end of even being able to discharge into the
3 lake. And so that's why you see that lack of
4 discernible flow.

5 Q Yet, this area, this unnamed tributary, you've
6 said numerous times today that this is navigable
7 waterway, though?

8 A That would be correct.

9 Q And at this date, October 22, 2010, these are just
10 the conditions that you noted?

11 A That's correct.

12 Q Okay.

13 MS. KAVANAUGH: September 22.

14 MR. GALLO: I'm sorry. I think I said
15 October. September.

16 MR. GLEISNER: Uh-huh, you did.

17 BY MR. GALLO:

18 Q Within the same RRNA number or exhibit, I'm going
19 to go now to Exhibit B. This is RRNA 4.

20 MR. GLEISNER: Yes, correct.

21 BY MR. GALLO:

22 Q Exhibit B. Andy, that's a map or drawing that
23 has -- I think it's red and blue stars on it with
24 numbers, circles. And those -- you testified
25 earlier, those were photo identification points.

1 But I want to ask you about the map
2 itself. There are contour lines and elevations.
3 Can you tell us who generated that map?

4 A Again, I'll refer back to that. It was a spot
5 elevation developed by Kapur & Associates. And
6 the numbers identifying site photographs was
7 labeled and depicted by me.

8 Q Okay. Thank you. Can I have that exhibit?

9 A Yes, you may.

10 Q Thanks. Within the same RRNA 4 exhibit, I'm
11 looking at Exhibit A. If you want to take a
12 minute to look at that.

13 A Okay.

14 Q Andy, can you describe what that document is and
15 its purpose?

16 A This was a memo to the file that I produced which
17 took into account the summary developed by the
18 resource managers during our site visits to
19 investigate the two potential boat launches on the
20 lake.

21 Q Okay. So it's, in essence, a summary of your
22 notes from documents or memos that were prepared
23 by other specialists?

24 A And firsthand discussions.

25 Q Yes, okay. Thank you. And one last question on

1 that document. You used that document then in
2 support of your manual code approval?

3 A That would be correct.

4 Q Thank you.

5 MR. GLEISNER: I have a few follow-up
6 questions. It won't take very long.

7 MR. GALLO: One more question.

8 MR. GLEISNER: Sorry.

9 BY MR. GALLO:

10 Q Andy, you mentioned there were elevations shot in
11 the unnamed tributary by Kapur. We've never seen
12 those. Do you have copies of those, or are you
13 aware of those?

14 A I believe those spot elevations that I referred to
15 would be all inclusive on Exhibit B of --

16 Q No. 4?

17 A No. 4.

18 Q All right. The question is: Those -- those
19 elevations don't go in the ditch themselves? They
20 go up to the ditch, but as I interpret them,
21 there's no elevations, like, at the invert of the
22 ditch?

23 A There are the low point invert elevations at the
24 ditch as identified in this map. And, I believe,
25 to the best of my knowledge, the lowest invert

1 that's indicated on this exhibit is also indicated
2 in that drainage flow path that was developed by
3 Pete Wood.

4 Q Can I see that for a minute? Thank you.

5 MR. GALLO: Do you have -- this was
6 supplied by the department as a response to
7 interrogatories. Do you have a better copy of
8 this that we can read? I mean, it's -- the actual
9 elevations are so small.

10 MS. KAVANAUGH: Can you blow it up on a
11 copier?

12 MR. GALLO: Could we?

13 MS. KAVANAUGH: Couldn't you do that now
14 if you want to ask questions about it now?
15 Couldn't you expand it on a copier?

16 MR. GALLO: I don't need to ask
17 questions about it now, but I do need to be able
18 to read the elevations.

19 BY MR. GALLO:

20 Q And this is what you were referring to, right?
21 The ditch itself and there's contours and some
22 elevations in the ditch?

23 A Yeah. Again, to the best of my knowledge, there
24 is -- there are spot elevations within this ditch
25 and, particularly, at the outlet of the water

1 course to the lake.

2 MR. GALLO: Edwina, can the department
3 ask Kapur for a better copy of that or larger
4 copy?

5 MS. KAVANAUGH: I guess we can.

6 THE WITNESS: It would be in my files.

7 MS. KAVANAUGH: I mean, we probably have
8 a big one.

9 THE WITNESS: Yeah, I do. So I can --

10 MR. GALLO: Then we can make
11 arrangements to maybe pick it up at Andy's office?

12 THE WITNESS: I mean, I don't have a
13 plotter, so I couldn't copy it that big.

14 MR. GALLO: Can you send it to me
15 electronically?

16 (Discussion held off the record.)

17 MR. GALLO: Okay.

18 BY MR. GALLO:

19 Q One more question, Andy. Sorry. What relevance
20 would those elevations within the end tributary
21 have with regard to navigability?

22 MS. KAVANAUGH: Of what?

23 BY MR. GALLO:

24 Q Your determination of the navigability.

25 MS. KAVANAUGH: Of the creek or the --

1 MR. GALLO: The unnamed tributary,
2 correct.

3 THE WITNESS: Those elevations weren't
4 used for me to define the navigability of that
5 waterway.

6 BY MR. GALLO:

7 Q They were not?

8 A They were not. They were used to support my
9 professional judgment of how the navigability
10 between the lake and the other additional water
11 courses on the site, the wetlands and swale
12 interacted and as they existed in their current
13 condition.

14 Q And the following question would be then: Did you
15 use that drawing and those elevations in your
16 evaluation for the manual permit -- or manual code
17 approval?

18 A The spot elevations were not developed prior to
19 manual code approval. So my professional judgment
20 of the navigable waterways on site were confirmed,
21 reaffirmed by the spot elevation use of that -- in
22 that document.

23 Q Thank you.

24 MR. GLEISNER: Edwina, what I want to do
25 here is I want to make sure I understood him

1 correctly that -- there were a number of documents
2 that you produced in the last couple of days. I
3 just want to make sure he's not relying on
4 anything.

5 EXAMINATION

6 BY MR. GLEISNER:

7 Q I'm going to show you, first of all, what has been
8 marked as Exhibit 1-C.

9 MR. GLEISNER: There's your copy,
10 Edwina.

11 BY MR. GLEISNER:

12 Q There's yours.

13 MR. GLEISNER: Madame Reporter, there's
14 yours.

15 BY MR. GLEISNER:

16 Q Just take a quick glance there. Is there any
17 material in there that you relied on or used in
18 connection with the Kraus site?

19 A You'd like me to review this entire document?

20 Q I mean, I don't think there is, actually, is what
21 I'm saying. But I want to make sure there is
22 nothing. Your counsel produced these things in
23 the last couple days, and I'd like to avoid having
24 to come back.

25 A I guess I can't answer what's in this document and

1 how it relates to my knowledge of navigable
2 waterways and how that would have reflected in my
3 decision on the manual code.

4 MS. KAVANAUGH: We'll say, Bill, that
5 they're training documents.

6 MR. GLEISNER: Okay.

7 MS. KAVANAUGH: I pulled them off -- you
8 know, they were put together, you know, all the
9 training documents that we had for navigability.

10 BY MR. GLEISNER:

11 Q The reason that I'm going to ask, though, these
12 other questions is because these appear to be
13 training documents.

14 This one is marked as Exhibit 1-D. That
15 seems to have a great deal of information about
16 how you go about navigability. And I want to know
17 if there's anything in there that you used in
18 doing the navigability, any of the standards,
19 other things that you used in doing the
20 navigability assessment at Kraus.

21 MS. KAVANAUGH: So just to clarify,
22 you're asking whether he used these documents or
23 whether he used any of the particular
24 techniques --

25 MR. GLEISNER: Concepts.

1 MS. KAVANAUGH: -- or concepts --

2 MR. GLEISNER: Exactly.

3 MS. KAVANAUGH: Okay.

4 THE WITNESS: I'm still struggling with
5 the question that you're asking me.

6 BY MR. GLEISNER:

7 Q Is there anything in there that you used either
8 directly or the concepts that are embodied there?

9 A Very generally, all these concepts are what I've
10 been trained to do as a water management
11 specialist. These are very generalistic training
12 documents that -- I mean, the answer is yes, would
13 -- I have used these concepts in my decision,
14 determination, review and approval of the manual
15 code.

16 Q Let me do it this way. I would like to be able to
17 look at the documents that Edwina has produced and
18 be able to say that these are the standards that
19 you used and the concepts and the methodologies
20 that you used. I just want to be sure that that's
21 an accurate statement.

22 A I'm sorry. Repeat that just one more time.

23 Q Sure. I want to know that -- let's do it this
24 way. Best practices. I want to know that you
25 adhere to the practices that are outlined here in

1 doing your navigability test.

2 MS. KAVANAUGH: If you could clarify --
3 I guess by "adhere," are you talking about whether
4 he goes through and applies every one of the tests
5 or things to look at, or whether those things
6 inform his general knowledge --

7 MR. GLEISNER: To the extent they're
8 relevant --

9 MS. KAVANAUGH: Yes.

10 MR. GLEISNER: -- to what he's doing on
11 the Kraus site.

12 THE WITNESS: To the extent that they're
13 relevant, I utilize the information contained
14 within these training documents --

15 BY MR. GLEISNER:

16 Q Okay. Great.

17 A -- to make permit decisions.

18 Q Take a look at 1-E then. Same question. I mean,
19 we don't have to go through all of those at all.

20 I just want to make sure -- are you
21 prepared to say that you would have used those
22 standards and informed your training and your --
23 informed your skill set that you used to make
24 navigation assessments?

25 A I'm prepared to say without knowing these

1 documents, that I utilized all my knowledge and
2 training as a WMS, which, I believe, would adhere
3 closely to what's within these.

4 But without knowing exactly what is in
5 these, without reading them, I'm not going to
6 state any specifics that, yes, they do. But in a
7 generalistic view, these do or will summarize my
8 review and procedure as in regards to the review
9 and approval of the manual code.

10 MR. GLEISNER: Edwina, I think it's
11 appropriate to ask counsel at this point, would
12 you stipulate that these are the training manuals,
13 training materials that are used to educate people
14 who are going to do navigability tests?

15 MS. KAVANAUGH: I would stipulate that
16 these are documents that when I asked Liesa about,
17 you know, "Is there anything else on
18 navigability?" a water management specialist had
19 compiled these, you know, so that we had an
20 electronic copy of things that we used,
21 PowerPoints and things used in training people,
22 you know.

23 MR. GLEISNER: Thank you. That's good.

24 BY MR. GLEISNER:

25 Q Okay. Then --

1 MS. KAVANAUGH: Whether they were each
2 done -- you know, whether Andy would have sat
3 through each one of these, I don't think we can
4 say. I don't even think they had dates on them.

5 MR. GLEISNER: I understand. I just
6 want to get some relevance here or some
7 understanding of what they are since you produced
8 them to me.

9 BY MR. GLEISNER:

10 Q Okay. 1-F, same thing.

11 MR. GLEISNER: Or maybe I should say to
12 you, Edwina, same stipulation?

13 MS. KAVANAUGH: They would be the things
14 that were told -- that I was given that are the
15 compilation of training documents on navigability.

16 BY MR. GLEISNER:

17 Q Okay. Then I want to get two reports out of the
18 way, if I may, and then I'll be done.

19 MS. KAVANAUGH: Okay.

20 BY MR. GLEISNER:

21 Q Exhibit 5 --

22 MS. KAVANAUGH: Okay.

23 BY MR. GLEISNER:

24 Q -- is called the Kapur report.

25 MS. KAVANAUGH: Okay.

1 BY MR. GLEISNER:

2 Q Have you seen that before?

3 A I would say I have knowledge of this report, but
4 its contents are -- I would -- I would not be able
5 to speak professionally about the contents of this
6 as there is a lot of modeling and other associated
7 elements of this.

8 Q Not highly relevant to your job --

9 A Correct.

10 Q -- as a navigability specialist? And, finally,
11 Exhibit 7, copy of the Gestra report. You
12 testified earlier you didn't know what that was.
13 Have you seen it, refresh your recollection?

14 A I have seen this and probably reviewed its
15 contents. But as far as in-depth analysis of
16 this, no, I did not do an in-depth analysis of
17 this report.

18 Q And you didn't use it -- I'm just asking for
19 completeness. You didn't use it in terms of its
20 soil borings or in terms of its assessment of what
21 would happen when you put this large amount of
22 asphalt in there? This was not relevant to your
23 navigability study?

24 A I did not use this geotechnical report of soil
25 borings for any navigability determination.

1 Q Bingo. Exhibit 6 is a set of site plans that
2 accompanied the Kapur report. And I would like
3 you to take a look at that.

4 MS. KAVANAUGH: So it accompanied
5 Exhibit 5?

6 MR. GLEISNER: Yes. Thank you, yes,
7 Counsel, that's correct.

8 MS. KAVANAUGH: Okay.

9 BY MR. GLEISNER:

10 Q And have you seen it?

11 A What's your question?

12 Q The question is: Have you seen this and relied on
13 it in any way in doing navigability assessments?

14 A These appear to be portions of the plan that I --
15 were submitted and I have reviewed, but the exact
16 dates and what process of the review -- I looked
17 at what exactly is in this Exhibit 6. I can't
18 give exact detail of when I would have seen
19 them --

20 Q Okay.

21 A -- and when in the process of me reviewing the
22 navigability.

23 Q Good. Thank you very much.

24 (Proceedings concluded at 5:35 p.m.)

25

1 STATE OF WISCONSIN)
2) SS:
3 COUNTY OF MILWAUKEE)
4

5 I, JESSICA R. WAACK, a Registered Merit
6 Reporter, Certified Realtime Reporter, Registered
7 Diplomate Reporter and Notary Public in and for the
8 State of Wisconsin, do hereby certify that the above
9 examination of ANDY HUDAK was recorded by me on
10 August 25, 2011, and reduced to writing under my
11 personal direction.

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

17 In witness whereof I have hereunder set
18 my hand and affixed my seal of office at Milwaukee,
19 Wisconsin, on September 1, 2011.
20

21 _____
22 Notary Public
23 In and for the State of Wisconsin
24

25 My Commission Expires: September 1, 2013.

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