

1 STATE OF MICHIGAN

2 STATE OFFICE OF ADMINISTRATIVE HEARINGS AND RULES

3 In the matter of: File No.: 06-57-0002-P
4 Missaukee Lakes Master Homes, Part: 301, Inland
5 LLC Lakes and
Streams
6 Agency: Department of
7 Environmental
Quality
8 Case Type: Land and Water
9 Management
Division

10
11 HEARING - VOLUME NO. II

12 BEFORE RICHARD A. PATTERSON, ADMINISTRATIVE LAW JUDGE

13 525 West Allegan Street, Lansing, Michigan

14 Thursday, December 20, 2007, 9:00 a.m.

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Eugene Jaworski
Jim Krone
Donna Lehman
John T. Lehman, Ph.D.
Richard Morrow
Richard O'Neal
Robyn Schmidt
Brad Wilkins

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1-800-632-2720

TABLE OF CONTENTS

PAGE

WITNESSES: RESPONDENT

ROBYN SCHMIDT

Direct Examination by Mr. Reichel	258
Cross-Examination by Mr. Hoffer	319
Redirect Examination by Mr. Reichel	361
Recross-Examination by Mr. Hoffer	367
Further Direct Examination by Mr. Reichel	374

RICHARD O'NEAL

Direct Examination by Mr. Reichel	374
Voir Dire Examination by Mr. Shafer	377
Direct Examination by Mr. Reichel (continued)	379
Cross-Examination by Mr. Shafer	413
Redirect Examination by Mr. Reichel	468
Recross-Examination by Mr. Shafer	471

JOHN AREVALO

Direct Examination by Mr. Reichel	473
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EXHIBIT INDEX

PAGE

	IDENTIFIED	RECEIVED
1		
2		
3		
4	Petitioner's Exhibit 1	9
	(John T. Lehman, Ph.D. CV)	
5	Petitioner's Exhibit 2	9
	(John T. Lehman report)	
6	Petitioner's Exhibit 3	9
	(John T. Lehman addendum)	
7	Petitioner's Exhibit 4	9
	(DEQ measurement of silt and hardpan)	
8	Petitioner's Exhibit 5	9
	(Lake Missaukee level readings)	
9	Petitioner's Exhibit 6	9
	(3-9-2006 Richard O'Neal message)	
10	Petitioner's Exhibit 7	9
	(5-31-2006 project review report)	
11	Petitioner's Exhibit 8	9
	(7-7-2006 Robyn Schmidt denial letter)	
12	Petitioner's Exhibit 9	9
	(petition for contested case hearing)	
13	Petitioner's Exhibit 10	9
	(10-19-2006 Dale Boughner letter)	
14	Petitioner's Exhibit 11	9
	(12-12-2006 Dale Boughner letter)	
15	Petitioner's Exhibit 12	9
	(12-21-2006 Dale Boughner letter)	
16	Petitioner's Exhibit 13	9
	(1-19-2007 Dale Boughner letter)	
17	Petitioner's Exhibit 14	9
	(1-10-2007 John Arevalo letter)	
18	Petitioner's Exhibit 15	9
	(1-29-2007 Dale Boughner letter)	
19	Petitioner's Exhibit 16	9
	(12-6-2006 Richard O'Neal letter)	
20	Petitioner's Exhibit 19	9
	(8-23-2006 petition for contested case hearing)	
21	Petitioner's Exhibit 20	9
	(permit history for Lake Missaukee)	
22	Petitioner's Exhibit 21	9
	(Missaukee Lake Association contact information)	
23		
24		
25		

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

Petitioner's Exhibit 22 9 9
(Missaukee Lake Improvement Board information)
Petitioner's Exhibit 23 9 9
(Missaukee Lake Association Water Quality page)
Petitioner's Exhibit 24 9 9
(5-8-2006 Lake Missaukee water quality monitoring
report)
Petitioner's Exhibit 25 9 9
(6-14-2006 Lake Missaukee water quality monitoring
report)
Petitioner's Exhibit 26 9 9
(8-31-2006 Lake Missaukee water quality monitoring
report)
Petitioner's Exhibit 27 9 9
(Lake Missaukee water quality report & recommendations)
Petitioner's Exhibit 28 9 9
(5-8-2007 Lake Missaukee water quality monitoring
report)
Petitioner's Exhibit 29 9 9
(7-11-2007 Lake Missaukee water quality monitoring
report)
Petitioner's Exhibit 30 9 9
(9-4-2007 Lake Missaukee water quality monitoring
report)
Petitioner's Exhibit 32 9 9
(Missaukee Lake water quality report and
recommendations)
Petitioner's Exhibit 33 9 9
(Missaukee Lake water testing history)
Petitioner's Exhibit 34 9 9
(water quality test measurements)
Petitioner's Exhibit 35 9 9
(Missaukee Lake Association Shorelines newsletter #2)
Petitioner's Exhibit 36 9 9
(Missaukee Lake Association Shorelines newsletter #3)
Petitioner's Exhibit 37 9 9
(opposition letter of Dana Tringali to LWMD)
Petitioner's Exhibit 42 9 9
(8-3-2005 deposition of Richard O'Neal)
Petitioner's Exhibit 45 9 9
(March 2006 Conservation Guidelines for Michigan Lakes
and Associated Natural Resources)

1			
2	Petitioner's Exhibit 46	9	9
3	(6-24-2005 information and guidelines for managing Lake Missaukee)		
4	Petitioner's Exhibit 47	9	9
	(Tom's Bay denial letter from Eric Hudy)		
5	Petitioner's Exhibit 48	9	9
	(6-24-2005 Richard O'Neal letter)		
6	Petitioner's Exhibit 49	9	9
	(8-25-2006 Tom's Bay Association dredging permit)		
7	Petitioner's Exhibit 51	9	9
	(8-27-2005 Missaukee Lakes Association annual membership meeting minutes)		
8	Petitioner's Exhibit 52	9	9
	(Lake Missaukee 2000 survey analysis report)		
9	Petitioner's Exhibit 53	9	9
	(6-20-2005 Lake Missaukee satellite image)		
10	Petitioner's Exhibit 54	112	112
	(images of sediment clumps)		
11	Petitioner's Exhibit 55	9	9
	(four-inch diameter acrylic tube)		
12	Petitioner's Exhibit 56	9	9
	(any and all exhibits submitted by Respondent or Intervenor)		
13	Petitioner's Exhibit 57	9	9
14	(Petitioner reserves the right to submit further exhibits)		
15	Petitioner's Exhibit 59	9	9
	(historical lake levels)		
16	Petitioner's Exhibit 60	370	370
	(Missaukee Lake depth chart)		
17			
18	Respondent's Exhibit 1.	9	9
	(John A. Arevalo resume)		
19	Respondent's Exhibit 2.	9	9
	(Robyn L. Schmidt resume)		
20	Respondent's Exhibit 3.	9	9
	(Richard P. O'Neal CV)		
21	Respondent's Exhibit 4.	9	9
	(permit application)		
22	Respondent's Exhibit 5.	9	308
	(file information re: corporations and LLC's)		
23			
24			
25			

1			
2	Respondent's Exhibit 6	9	9
	(2-1-2006 application correction request)		
3	Respondent's Exhibit 7	9	9
	(2-15-2006 Dale Boughner letter)		
4	Respondent's Exhibit 8	9	9
	(3-6-2006 public notice)		
5	Respondent's Exhibit 9	9	9
	(3-9-2006 Richard O'Neal e-mail)		
6	Respondent's Exhibit 10	9	9
	(4-10-2006 Wendy Fitzner letter)		
7	Respondent's Exhibit 11		
	(4-10-2006 notice of public hearing)		
8	Respondent's Exhibit 12	9	9
	(5-3-2006 Robyn Schmidt opening statement)		
9	Respondent's Exhibit 13	9	9
	(5-31-2006 project review report)		
10	Respondent's Exhibit 14	9	9
	(7-7-2006 permit denial letter)		
11	Respondent's Exhibit 15	9	9
	(7-18-2006 note to file by Robyn Schmidt)		
12	Respondent's Exhibit 16	9	9
	(8-17-2006 notes regarding informal review meeting)		
13	Respondent's Exhibit 17	9	9
	(9-29-2006 John Arevalo letter)		
14	Respondent's Exhibit 18	9	9
	(12-6-2006 Richard O'Neal e-mail)		
15	Respondent's Exhibit 19	9	9
	(12-19-2006 note to file by John Arevalo)		
16	Respondent's Exhibit 20	9	9
	(1-19-2007 John Arevalo letter)		
17	Respondent's Exhibit 21	9	9
	(excerpt from Compilation of Data for Michigan Lakes)		
18	Respondent's Exhibit 22	9	9
	(2-28-2007 project review report)		
19	Respondent's Exhibit 23	9	9
	(3-22-2007 John Arevalo letter)		
20	Respondent's Exhibit 24	9	9
	(Missaukee Lake depth chart)		
21	Respondent's Exhibit 25	9	9
	(Missaukee Lake photos)		
22	Respondent's Exhibit 26	9	9
	(March 2006 Conservation Guidelines for Michigan Lakes and Associated Natural Resources)		
23			
24			
25			

1			
2	Respondent's Exhibit 30	9	319
3	(photos)		
4	Intervenor's Exhibit 1.	9	9
5	(copies of dredging permits applied for on Missaukee		
6	Lake from MDEQ files)		
7	Intervenor's Exhibit 2.	9	9
8	(map showing locations and permit numbers for approved		
9	dredging permits on Lake Missaukee)		
10	Intervenor's Exhibit 3.	9	9
11	(aerial photograph of Lake Missaukee)		
12	Intervenor's Exhibit 4.	9	9
13	(water quality data from sampling on Lake Missaukee in		
14	2007)		
15	Intervenor's Exhibit 5.	9	9
16	(summary of water quality data for previous years on		
17	Lake Missaukee)		
18	Intervenor's Exhibit 8.	9	9
19	(proposal for decision and final order in Tom's Bay		
20	contested case)		
21	Intervenor's Exhibit 11	9	9
22	(10-19-2007 Dr. Eugene Jaworski letter report)		
23	Intervenor's Exhibit 12	9	9
24	(11-22-2007 Dr. Eugene Jaworski letter report)		
25	Intervenor's Exhibit 13	9	9
	(Missaukee Lake contour map)		
	Intervenor's Exhibit 14	9	9
	(topographic map of Lake Missaukee)		
	Intervenor's Exhibit 15	447	447
	(diagram)		
	Intervenor's Exhibit 16	9	9
	(all documents on Petitioner's and Respondent's lists)		
	Intervenor's Exhibit 17	9	9
	(dock lengths photo)		
	Intervenor's Exhibit 18	9	9
	(aerial photo)		
	Intervenor's Exhibit 20	9	9
	(Tom's Bay photo)		
	Intervenor's Exhibit 21	9	9
	(photo)		
	(Exhibits retained by Judge Patterson)		

1 Lansing, Michigan

2 Thursday, December 20, 2007 - 9:03 a.m.

3 JUDGE PATTERSON: You said you had a couple
4 housekeeping matters?

5 MR. SHAFER: Yes, your Honor.

6 JUDGE PATTERSON: Okay.

7 MR. SHAFER: One, your Honor, I just want to
8 explain to the court -- probably are asking yourself why Mr.
9 Mohny isn't here.

10 JUDGE PATTERSON: I did wonder about that.

11 MR. SHAFER: There's been a lot of testimony about
12 him. He had an unexpected cardiac catheterization last week
13 and they implanted a stent and he lives in San Diego --
14 outside of San Diego during most of the year. And the
15 stress of a trial and travel really wasn't on -- high on the
16 doctor's list of things to do immediately after that.

17 JUDGE PATTERSON: I've been there and done that,
18 so I know.

19 MR. SHAFER: So I apologize. We fully intended to
20 have him here. He was available the first time that we were
21 scheduled for trial.

22 JUDGE PATTERSON: It isn't that he doesn't care;
23 right?

24 MR. SHAFER: No, your Honor. And I didn't want
25 to -- I didn't want to leave the court. I'm making that

1 representation as an officer of the court.

2 JUDGE PATTERSON: Okay.

3 MR. SHAFER: And I did speak to Mr. Mohny
4 extensively last night concerning -- because I wanted to
5 make sure I fully represented his health condition to the
6 court appropriately this morning. The last thing, your
7 Honor, we'd like to move for the admission of Plaintiff's --
8 I'm sorry -- Petitioner's Exhibit 40, but only pages 114
9 through 164 of that as well as Exhibit 43 -- Petitioner's
10 Exhibit 43. And let me just explain to your Honor what that
11 is.

12 JUDGE PATTERSON: Let me find this.

13 MR. SHAFER: Exhibit 40, pages 114 through 164 are
14 the transcript pages in the Tom's Bay matter of the
15 testimony of Anthony Groves who's the water resources
16 director of Progressive AE -- A & E. They did a vegetation
17 analysis of Lake Missaukee. He testified extensively
18 concerning that. He was listed as the Intervenor's -- one
19 of the Intervenor's expert witnesses. Apparently he
20 couldn't be here today. We'd just as soon move to have his
21 testimony admitted. He was subject to full cross-
22 examination, so there shouldn't be any problem with that.
23 Exhibit 43, your Honor, is just his Curriculum Vitae. And
24 his testimony relates to the vegetation issues as well as
25 the potential infestation of Eurasian milfoil and dredging

1 areas.

2 JUDGE PATTERSON: I recall that. Any objection?

3 MR. REICHEL: Yes, your Honor.

4 JUDGE PATTERSON: Okay.

5 MR. REICHEL: We do object. First of all, it is
6 not at all clear how this witness' testimony in the prior
7 separate proceeding is relevant in the context of the
8 present case. Secondly, to the extent that the -- obviously
9 the DEQ was a party to that proceeding and had an
10 opportunity to cross-examine the witness generally, it was
11 not anticipated or not with respect to the use of that
12 testimony in the present proceeding. Third, if -- I would
13 note, first of all, that the Petitioners apparently intended
14 to -- initially to incorporate much larger portions of the
15 records in Tom's Bay. And I don't believe that there is any
16 need or relevance to admitting into substantive evidence any
17 of the record of that case -- the record of that case, this
18 tribunal's proposal for decision, the director's final
19 order, the latter a matter of public record. To the extent
20 that the parties want to argue about any similarity or
21 difference between the issues in that case -- or the
22 determinations in that case and the issues in the present
23 case they are obviously free to do so.

24 In summary, I don't believe that the testimony --
25 even this excerpt of the testimony is relevant, that we had

1 an opportunity to cross-examine this witness with respect to
2 any claimed asserted relevance in this case. And, finally,
3 although we don't advocate it, if we were to get into the
4 business of incorporating evidentiary materials from the
5 Tom's Bay proceedings, which we strongly oppose, we think
6 that if this tribunal were to go there, we should not be
7 engaged in some selective culling of elements of that for
8 introduction of substantive evidence in this case. For all
9 those reasons, we object.

10 MR. PHELPS: We join in all of those arguments.
11 And the bottom line from our perspective is that that
12 testimony is hearsay. It may be a sworn testimony, but it's
13 only admissible to impeach the witness -- and he's not
14 here -- or if he was otherwise unavailable. And he's not
15 unavailable. They could have -- if they wanted to have him
16 testify, they could have subpoenaed him, asked him questions
17 and we could have cross-examined him and all the concerns
18 that are raised would have been addressed. So it's
19 inadmissible on that basis.

20 MR. SHAFER: Your Honor, could I just address
21 those issues briefly?

22 JUDGE PATTERSON: Sure.

23 MR. SHAFER: First of all, the Intervenors were
24 the ones that listed him on their witness list. We listed
25 all witnesses listed on the other people's witness list as

1 our potential witnesses. There was no reason for me to --
2 I'm not even sure that you can issue a subpoena, but
3 probably you can.

4 JUDGE PATTERSON: You can't.

5 MR. SHAFER: Okay. So there you go in regard to
6 that. And let me also point out, your Honor -- and I don't
7 have the rule in front of me, but I believe you have an
8 internal rule here that says that if you want to present
9 written testimony -- and by the way, this is not hearsay.
10 It is sworn testimony by Mr. Groves subject to
11 cross-examination. But I believe your rule says that if you
12 want to submit written testimony, you can do that and that
13 they have to object to your Honor within five days of the
14 hearing. They had the entire transcripts of the Tom's Bay
15 matter in front of them long ahead of the hearing in our
16 exhibit packet, including Mr. Groves' testimony. No one
17 ever filed a formal objection to that. Now, if the attorney
18 general wants me to put in everything in Tom's Bay, I don't
19 have an objection to that. But all we're asking for is
20 their expert witness who they listed, who's not here, who
21 has given sworn testimony, who by the way did a vegetation
22 analysis of the entire lake, it's not just, you know -- it's
23 not just Tom's Bay -- I don't have to tell you all this.
24 You remember his testimony.

25 JUDGE PATTERSON: Vaguely.

1 MR. SHAFER: I mean, you heard his testimony. His
2 testimony is relative to the entire lake and the vegetation
3 survey that went on there. So, your Honor, I have no
4 interest of putting the entire Tom's Bay matter in. If the
5 court wants all that in as a way to placate the attorney
6 general, I have no objection to that. But the only thing
7 I'm concerned about right now is Mr. Groves' testimony.

8 JUDGE PATTERSON: Okay. I'm going to take the
9 offer under advisement. I want to review the testimony
10 before I rule on it.

11 MR. SHAFER: Thank you, your Honor.

12 JUDGE PATTERSON: Okay. Any objection to 43? I
13 guess that goes -- falls with the rest of it. So I'll take
14 both of those under advisement, --

15 MR. SHAFER: Thank you, your Honor.

16 JUDGE PATTERSON: -- review it and make a ruling.
17 Anything else?

18 MR. SHAFER: No, your Honor.

19 JUDGE PATTERSON: Okay. Counsel, do you rest your
20 case in chief at this point?

21 MR. SHAFER: Yes, your Honor.

22 JUDGE PATTERSON: All right. Who's next?

23 MR. REICHEL: The department, your Honor.

24 JUDGE PATTERSON: Okay.

25 MR. REICHEL: In the interest of trying to move

1 this case forward, I'm going to waive my opening statement.
2 I reserved it yesterday. I'd like to proceed to our first
3 witness.

4 JUDGE PATTERSON: Okay. Thank you.

5 MR. REICHEL: The department calls Robyn Schmidt.

6 REPORTER: Do you solemnly swear or affirm the
7 testimony you're about to give will be the whole truth?

8 MS. SCHMIDT: I do.

9 ROBYN SCHMIDT

10 having been called by the Respondent and sworn:

11 DIRECT EXAMINATION

12 BY MR. REICHEL:

13 Q Ms. Schmidt, could you please state your full name for the
14 record?

15 A Robyn Lynn Schmidt, R-o-b-y-n S-c-h-m-i-d-t.

16 Q How are you currently employed?

17 A By the Department of Environmental Quality, Land and Water
18 Management Division.

19 Q And what is -- could you briefly describe what your job
20 title is and your duties are?

21 A I'm an environmental quality analyst. I am responsible for
22 administering several parts of the Natural Resource and
23 Environmental Protection Act including Part 301, 303, 325,
24 323 and 353.

25 Q Okay. Do you still have in front of the witness stand a

1 book of DEQ's proposed exhibits there?

2 A I do.

3 Q Okay. I'd like you to turn to DEQ Exhibit Number 2, please.

4 A What color is it?

5 MR. PHELPS: I think it's the black we've got ours

6 in.

7 THE WITNESS: I don't have one.

8 MR. REICHEL: May I approach?

9 JUDGE PATTERSON: Sure.

10 MR. SHAFER: Do you need an extra binder?

11 Q Directing your attention to DEQ Exhibit 2, do you recognize

12 that document?

13 A I do.

14 Q Is that a copy of your resume?

15 A It is.

16 Q Did you prepare it?

17 A I did.

18 Q And to the best of your knowledge, is the information there

19 accurate?

20 A It is.

21 Q Okay. I don't want to go through it in great detail, but

22 briefly could you describe your formal education experience,

23 please?

24 A Yes, I have a bachelor's degree in biology, a minor in

25 conservation as well as a master of science degree from

1 Central Michigan University.

2 Q Okay. And with respect to your master's work at Central,
3 could you briefly tell the tribunal what kinds of subject
4 areas you covered?

5 A It was a degree that focused on wetlands so the wetland
6 ecology, especially plants, which was -- part of my research
7 was doing a survey on a bog on Beaver Island.

8 Q In addition to your bachelor and master's degree, have you
9 obtained any other training specifically in the area of
10 wetlands?

11 A I have.

12 Q Could you briefly describe that?

13 A I have taken the Army Corps of Engineers wetland delineation
14 course as well as continuing education such as wetland
15 course at UMBS, University of Michigan Biological Station.

16 Q In the regular course -- and how long have you been employed
17 as an environmental quality analyst in what is now called
18 the Land and Water Management Division of DEQ?

19 A Since January of 1999.

20 Q Okay. And since that time, has it or has it not been a
21 regular part of your duties to assess impacts on wetlands of
22 proposed activities in the district where you are based?

23 A It has.

24 Q Has it been a regular part of your duties with the DEQ to
25 review projects seeking permits under Part 301, Inland Lakes

1 and Streams?

2 A It has.

3 MR. REICHEL: At this time, your Honor, I would
4 move that Ms. Schmidt be recognized as an expert in the
5 subjects of biology, wetlands and in the administration of
6 Parts 301 and 303.

7 MR. SHAFER: No objections.

8 MR. PHELPS: No objection.

9 JUDGE PATTERSON: Okay. No objection, she will be
10 so qualified.

11 Q Turning to the specific subject of today's proceeding, I'd
12 like to direct your attention to tab 4 in that binder. Do
13 you recognize that document?

14 A I do.

15 Q And what is it, please?

16 A It's the original permit application submitted to our Permit
17 Consolidation Unit.

18 Q Could you briefly state on the record the process by which
19 the department processes or responds to applications for
20 permits under Parts 301 and 303?

21 A Yes. An applicant would submit an application form along
22 with all the information that's required for that project
23 including plans, which are dimensions, and describe the
24 project. That typically goes to our Permit Consolidation
25 Unit. They review it to make sure it's complete. If it's

1 not complete, they would send out a correction request
2 letter. Once that information is submitted and the
3 application is complete, it is either public noticed and/or
4 submitted and it's also sent to the field to a staff person
5 such as myself.

6 Q Okay. Thank you. In this case, I believe the record
7 already reflects that you were -- have been involved for the
8 Department of Environmental Quality in reviewing and
9 processing this permit application; is that correct?

10 A Yes.

11 Q Turning your attention to tab 6 in this notebook, do you
12 recognize what that document is?

13 A I do.

14 Q What is it?

15 A It is an application and correction request form dated
16 February 1st of 2006, to Missaukee Lakes Master Homes.

17 Q And is this the process you described earlier of Permit
18 Consolidation Unit staff identifying additional information
19 needed to make the application administratively complete?

20 A It is.

21 Q Please turn to tab 7. Do you recognize that document?

22 A I do.

23 Q And what is it, please?

24 A It's the response from Dale Boughner to our Permit
25 Consolidation Unit.

1 Q Okay. And there are various, behind that tab -- behind the
2 cover page there are various other documents that were
3 submitted in connection with it; is that correct?

4 A Yes.

5 Q Okay. So as the district staff person -- I believe you
6 testified you were the district staff person assigned
7 primarily to review this permit application; is that
8 correct?

9 A Yes.

10 Q Okay. And I take it you reviewed both the permit
11 application and the supplemental materials identified behind
12 tab 7; is that correct?

13 A Yes.

14 Q Directing your attention to -- while you're still at tab 7,
15 based upon your review -- I won't limit it to this, but
16 based upon your review of the permit application and the
17 response to the correction request, what was your
18 understanding of the stated purpose of the -- first, what
19 was the project that was being proposed and then secondly,
20 what was its stated purpose?

21 A The project proposed was a dredging project that would be in
22 Lake Missaukee. It proposed to dredge a channel 200 feet
23 long by 50 foot wide off of lot 8 in the subdivision. It
24 was supposed to be dredged 2-1/2 feet deep and the material
25 was to be hydraulically dredged as I mentioned and disposed

1 of across the street in a retention area. The project
2 purpose as described in the application was to allow for the
3 installation of a seasonal dock.

4 Q And directing your attention specifically to Exhibit 7,
5 first page under paragraph 6, did the applicant or its agent
6 further describe or characterize the project purpose and
7 alternatives considered?

8 A Yes.

9 Q And what was the substance of that statement by the
10 applicant?

11 A The dredge was to allow for installation of the dock and
12 then it would be used to tie a boat up to and, you know,
13 used for access to Lake Missaukee for navigation issues.

14 Q And with respect to -- was there any reference to swimming
15 in the permit application -- or, excuse me -- in this
16 statement of project purpose?

17 A Yes.

18 Q Did it indicate that the intent of the project was to swim
19 at the shore or did it instead talk about a boat being used
20 for the stated purposes?

21 A It stated that the boat was going to be used to access the
22 lake for fishing, swimming and other water sports.

23 Q You testified previously that a regular part of the
24 department's process administratively for handling permit
25 applications of this type is to provide a public notice. To

1 your knowledge, was that -- of the permit application. To
2 your knowledge, was that done here?

3 A Yes.

4 Q I'd like to direct your attention to tab 8. Have you seen
5 this document before?

6 A Yes.

7 Q Is this the public notice that the department issued for
8 this permit application?

9 A It is.

10 Q As a part of the public notice process, is an opportunity
11 provided for people to -- for members of the public to
12 request an actual public hearing?

13 A Yes.

14 Q And to your knowledge or based upon your review of the file,
15 was a public hearing requested?

16 A It was.

17 Q Okay. And did the department then schedule or notice a
18 public hearing?

19 A We did.

20 Q I'd like to direct your attention to tab 10. And could you
21 briefly describe to the administrative law judge what this
22 document is?

23 A This is a certified letter dated April 10th of 2006 to
24 Missaukee Lakes Master Homes notifying them that a public
25 hearing would be held on Wednesday, May 3rd, 2006 at the

1 Lake City High School sent by our Permit Consolidation Unit.

2 Q Okay. Please turn to tab 11. Are you there?

3 A Yes.

4 Q And what is that document?

5 A This is a copy of a public notice announcement that would

6 have been sent out to the people who requested a public

7 hearing, as well as a similar format would have been sent to

8 the Missaukee Sentinel paper.

9 Q For publication?

10 A For publication.

11 Q Okay. And this notice appears to notify the public of a

12 hearing on the application on Wednesday, May 3rd, 2006. To

13 your knowledge, was that hearing actually conducted?

14 A It was.

15 Q Please turn to tab 12. Do you recognize that document?

16 A I do.

17 Q Could you briefly describe what it is?

18 A This is a copy of a public hearing statement form that we

19 use to guide us to ensure that we administer the public

20 hearing correctly. It goes over an introduction of who was

21 the hearings officer, which was myself. It goes through the

22 background of the case and the statutes that are involved.

23 That would be reviewed and it lets people know what process

24 will be used to hear their comments and in what order.

25 Q And, in fact, during the course of the public hearing, did

1 you say something along these lines or make statements
2 consistent with what's contained here?

3 A Yes. We're required to read this at the beginning of the
4 hearing and then there's a closing statement at the end.

5 Q Okay. And, in fact, did the department receive comments
6 from the public during the hearing?

7 A We did.

8 Q Did you also receive any comments in writing on the permit
9 application?

10 A We did.

11 Q 1 or 2 comments, 10 comments, order of magnitude?

12 A Sure. We received approximately 63 written comments and we
13 had approximately 38 people at the public hearing.

14 Q Was that -- did you say people actually attending the
15 hearing or people who spoke at the hearing, the 38?

16 A The 38 people are people who attended the public hearing.

17 Q Okay. And some of them actually made public statements; is
18 that correct?

19 A Yeah, I'd say approximately 20 people.

20 Q Okay. I'm not going to ask you to go through in detail each
21 and every one of those comments. Suffice it to say, were --
22 first of all, were there comments received in writing and
23 orally during the hearing that expressed concerns about the
24 proposed project?

25 A Yes.

1 Q Were there comments submitted or comments made during the
2 public hearing in support of the proposed permit?

3 A Yes.

4 Q Did any representative of the permit applicant or its agent
5 speak at the public hearing?

6 A Yes.

7 Q And who was that?

8 A Dale Boughner.

9 Q Backing up to the public notice of the permit application
10 behind tab 8, I note that various entities are cc'd at the
11 bottom of this public notice of the permit; do you see that?

12 A Yes.

13 Q And that included notices to DNR or Department of Natural
14 Resources, Wildlife and Fisheries Division; do you see that?

15 A Yes.

16 Q Is that a regular part of your division's processing of
17 permit applications of this kind?

18 A It is.

19 Q And what is the purpose of providing them notice?

20 A So that if they have any concerns, they can contact the
21 district staff person and discuss those or submit comments.

22 Q And in this instance, in response to the public notice of
23 this proposed permit application, did your division receive
24 any comments from the DNR Fisheries Division?

25 A We did.

1 Q I'd like to direct your attention to tab 9. Do you
2 recognize that document?

3 A I do.

4 Q And could you briefly describe what it is?

5 A It's an e-mail from Rich O'Neal to myself on March 9th
6 regarding the Missaukee Lakes Master Home permit
7 application. And it discusses the Fisheries Division's
8 concerns with the dredging project.

9 Q Okay. In addition to the steps we've just described; that
10 is, the public -- your review of the application, the
11 notice, public hearing, solicitation of comments; did you as
12 a part of your review of the permit application engage in a
13 field review of this project site?

14 A I did.

15 Q I'd like to direct your attention to Exhibit 13. The first
16 two pages of that document have a heading, "Project Review
17 Report"; is that correct?

18 A Yes.

19 Q Could you briefly describe what this form is and how it's
20 used by department staff?

21 A Yes. It's a project review report that we fill out every
22 time we go into the field. And it goes through our findings
23 on the site. And it also walks us through the permit review
24 criteria in each statute.

25 Q Okay. This particular form, I take it, you completed in

1 connection with this permit application; correct?

2 A Yes.

3 Q And it has the date of May 31st, '06; correct?

4 A Yes.

5 Q So this indicates that you actually visited the site at that
6 time. Could you briefly describe what you did when you went
7 to the site and what observations you made?

8 A Yes. I went to the site on May 31st and I met with Dale
9 Boughner to take a look at the site. When we first get on a
10 site, we take a general view of the entire area. So
11 starting from where I parked, we walked down a hill towards
12 the lake. There was a house in an upland ridge along the
13 shoreline. As you walk towards the lake, the land did slope
14 towards the lake. When you got within approximately 10 feet
15 of the water's edge, there was a wetland that began. So
16 you'd drop down a short bank into the wetland area and then
17 you walk about 10 feet and there would be the water's edge.
18 And looking along the shoreline, I looked north and south
19 from the shoreline and it was representative of an upland
20 shoreline that dropped down into a wetland along the
21 shoreline. At the water's edge, there was emergent wetlands
22 offshore. Continuing offshore, there was a floating and
23 submerged plant community we would call marsh. On site I
24 discussed with Mr. Boughner the location of the dredging
25 channel. We visualized that from the shoreline. We talked

1 about where this would be as far as on this site, where the
2 dock would be installed. We reviewed the method for
3 dredging, as well as when we were on site, we discussed the
4 options and alternatives with the project knowing that they
5 requested a large dredge area. Given their proposed project
6 purpose, we discussed that typically we issue for a small
7 channel alongside of a dock for access rather than the
8 entire frontage. We did discuss a little bit about some
9 additional reasons he had for doing the dredging at the
10 site.

11 Q Okay. Based upon your observations, did you make any
12 specific notations about -- back up. So what sort of -- you
13 mentioned different types of wetland vegetation that you
14 observed there; that is, emergent vegetation and what other
15 types?

16 A Also observed floating and a few submerged plants.

17 Q Okay. And did you make specific notations about particular
18 species of wetland vegetation?

19 A I did.

20 Q And are those reflected in Exhibit 13?

21 A Yes.

22 Q And as part of the form, next to each there's a heading,
23 "Dominant Plants"; do you see that?

24 A I do.

25 Q And then there's an indicator status and behind several of

1 those plants or the species listed there's "OBL." What does
2 that stand for?

3 A It stands for obligate.

4 Q Could you explain briefly what that means?

5 A Yes. When we're doing a review for wetland delineation, we
6 can rely on a US Fish & Wildlife Service list of plants.
7 And each plant has been given a rating as far as its
8 affinity towards a wetland. So it's a scale. So obligate
9 plants are 99 percent found in a wetland situation. And
10 that can grade all the way up to an upland plant that is 99
11 percent going to be in an upland location.

12 Q Okay. So that classification or status is one way that the
13 department makes a determination about whether or not a
14 particular area, in this case an area near the shore and
15 offshore from the property on Lake Missaukee, is a wetland
16 as regulated under Part 303; is that correct?

17 A It is.

18 Q Now, based upon your observations, were you able to observe
19 approximately how far out from shore these different types
20 of wetland plants that you observed were present?

21 A Yes.

22 Q And could you describe what your observations were?

23 A Yes. We were discussing with Mr. Boughner the location of
24 the dredge and the distance offshore. I was able to
25 visualize the dredge channel, able to see floating

1 vegetation as well as some submerged vegetation offshore
2 because the shoreline actually slopes up a little bit
3 towards the house. So you're actually raised up off of the
4 water level. So you could see the shoreline and offshore
5 the vegetation types that were present.

6 Q Okay.

7 MR. SHAFER: Your Honor, I'm going to move to
8 strike that as non-responsive. It's nothing to do with the
9 question that was asked. The question was, "How far out did
10 it go?"

11 JUDGE PATTERSON: I don't think it was totally
12 unresponsive. It may have run somewhat beyond what the
13 question was, but it was descriptive. I'll overrule.

14 MR. REICHEL: Thank you.

15 Q With this issue of how far offshore, let me ask you some
16 more specific questions. In some of the materials that are
17 part of the permit file that we've already talked about
18 including Exhibit 7, which was the response to the
19 correction request submitted by the permit applicant,
20 specifically, if you can, go to that tab, to page 10.
21 There's some page numbers in the upper right-hand corner.
22 Do you see that?

23 A I do.

24 Q Okay. And there are some notations there. The
25 cross-hatched area near the -- this is a diagram sketched

1 apparently by Mr. Boughner; correct?

2 A Yes.

3 Q You see this cross area with the legend, "Approximately 20-

4 feet-wide wetlands"? Do you see that?

5 A I do.

6 Q Based upon your observation of the site -- let's focus first

7 on observations that you made on May 31st of '06 -- was

8 wetland vegetation limited to an area approximately 20 foot

9 wide offshore?

10 A No.

11 Q Now, you described emergent vegetation; is that correct?

12 A Yes.

13 Q Was emergent vegetation within this 20-foot -- approximately

14 20-foot wide area?

15 A Yes.

16 Q But you've also testified, if I understood you correctly,

17 that there was submerged and floating wetland vegetation at

18 the site; correct?

19 A Yes.

20 Q And did that extend the distance of more than 20 feet from

21 the shore?

22 A It did.

23 Q Can you state in approximate terms how far offshore that

24 extended in relation to the proposed project as described to

25 you by Mr. Boughner?

1 A Yes. When viewing the location on site, the wetland
2 vegetation extended out into the dredged channel the 200
3 feet that he described. It was plentiful. We were able to
4 see it from shore. The floating vegetation was present; was
5 able to see a submerged vegetation layer as well throughout
6 that area. It was abundant as well as quite consistent with
7 the existing shoreline north and south of this lot.

8 Q Do you recall whether during that site visit you took some
9 photos?

10 A I did.

11 Q Directing your attention back to tab 13, near the back of
12 that there's a series of pages with the heading "Photo
13 Album"; do you see that?

14 A I do.

15 Q Is this a Xerox copy of photos that you took at the site
16 that day?

17 A Yes.

18 MR. REICHEL: Just a moment, your Honor.

19 (Counsel reviews file)

20 Q Did those photos, copies of which are included in the
21 exhibit, fairly and accurately depict the conditions that
22 you observed at the time?

23 A Yes.

24 (Counsel reviews file)

25 MR. REICHEL: I apologize for the delay, your

1 Honor.

2 JUDGE PATTERSON: That's all right. Take your
3 time.

4 MR. REICHEL: We have temporarily misplaced
5 enlarged color copies of those photographs. I'll tell you
6 what, in the interest of moving forward, perhaps at break
7 I'll dig those out and then we can come back to that.

8 JUDGE PATTERSON: Okay. All right.

9 Q Looking at the Xerox copies there which are in the exhibit
10 book, there's a legend under each of the photos; do you see
11 that?

12 A I do.

13 Q So do you know who supplied that legend or description?

14 A I developed this document.

15 Q Okay. At the first page in the photo album headed "Looking
16 east down shoreline" -- well, first, could you briefly walk
17 through each of these photographs and describe to the
18 administrative law judge the area depicted in the photograph
19 and any notable features that you observed as a part of your
20 review?

21 A The first photograph shows -- actually, it should say
22 "north" -- down the shoreline from the project site. You
23 can see in here the wetland along the shoreline, extending
24 off the shore emergents. You can see some floating
25 vegetation in there. However, since it lays right on top of

1 the water surface, it's a little difficult to see. You can
2 see that the wetland extends landward of the shoreline as
3 well as you can see that -- the edge of the upland in the
4 photographs where the bracken fern starts. And the second
5 photograph is looking offshore down the proposed dredge
6 channel location. Again, you have emergent shoreline. You
7 have emergent marsh offshore as well. The third photograph
8 is looking south of the project site. Again, you can see
9 that the emergent marsh and wetland shoreline continue in
10 that direction.

11 And the fourth photograph is, again, looking
12 offshore at the proposed dredge area. Again, you see the
13 abundance of emergent plants offshore at that location.
14 Second page is a view to the north just a little bit further
15 inland from the shoreline. You can see the defined boundary
16 between the upland and the wetland before the water's edge
17 and then the emergent plants in Lake Missaukee in that
18 photograph. The two bottom photographs are photographs of
19 the disposal site across the street from the project site
20 and upland.

21 Q Thank you. Okay. Directing your attention back to the
22 second page of this exhibit, tab 13, the back of the project
23 review report, the second page heading, "File Review," do
24 you see that?

25 A I do.

1 Q I think you touched on this before, but could you briefly
2 describe what the purpose of this part of the form is and
3 how you went about completing your review or summarizing
4 your review on this form?

5 A This form was developed so that field staff could fill them
6 out when we went onsite and to make our determination as to
7 whether or not the permit should be issued, denied or
8 modified. This is a way we go through step by step using
9 our onsite information as well as information provided with
10 the application to make a determination on whether to issue,
11 deny or modify the application.

12 Q Okay. And does this -- let me back up. Based upon your
13 review in working in this program, have you become familiar
14 with criteria established in statute and administrative
15 rules -- let me take this one step at a time -- under Part
16 301 for issuing or deciding whether or not to issue permits?

17 A I am.

18 Q And with respect to Part 303, Wetland Protection, are you
19 also familiar with criteria established in statute; that is,
20 Part 303; and the promulgated administrative rules for
21 deciding whether and under what conditions to issue permits?

22 A Yes.

23 Q Does this project review form assist you in summarizing your
24 review of at least some of those criteria -- decisional
25 criteria?

1 A Yes.

2 Q Okay. On the file review, what conclusion did you reach
3 with respect to the question of whether the project proposed
4 would adversely affect fish and wildlife?

5 A I found that there would be no impacts. Part of the review
6 process is to submit a request for review to the DNR to
7 review for threatened/endangered species impacts. They
8 provided comments that no impacts were expected from the
9 project.

10 Q Okay. I think I -- either I didn't state my question
11 clearly or you didn't hear me. My question really was about
12 item 10, "Would the project adversely affect fish and
13 wildlife?" as opposed to 9. Okay. So as part of your file
14 review, did you conclude -- offer a conclusion as to whether
15 or not the project would adversely affect fish or wildlife?

16 A Yes, I did find that it would adversely affect fish and
17 wildlife.

18 Q Okay. And on what did you base that conclusion?

19 A We received comments from DNR Fisheries saying that it would
20 impact fisheries as well as my site review. I found that
21 there was habitat that is consistent with fish habitat in
22 Lake Missaukee. The aquatic plants that were there would
23 provide harbor and feeding areas for fish. And also, the
24 habitat that's there would benefit wildlife such as wading
25 birds, amphibians, reptiles as well as maybe small mammals.

1 Q With respect to question 18 which deals with projects
2 proposed under Parts 301 or 325, the review project --
3 excuse me -- the review project -- file review asked you to
4 summarize your finding as to whether or not the project
5 would adversely affect, among other things, the public
6 trust. And what was your finding with respect to that?

7 A That it would adversely affect the public trust.

8 Q Okay. And on what did you base that finding?

9 A The public trust has four parts. Two of the parts are the
10 duty of the state to protect our natural resources, air and
11 water and other natural resources from impairment,
12 destruction or pollution. I found that this project would
13 destroy a natural resource along the shoreline of Lake
14 Missaukee. It would also impair the other surrounding
15 remaining wetlands in the area. So I found that it would
16 adversely affect the public trust.

17 Q As a part of your -- based upon your experience in reviewing
18 applications under Part 301, are you familiar with
19 administrative rule 814 promulgated under Part 301?

20 A I am.

21 Q And that requires the department to consider, does it not --
22 to assess the environmental effects of a proposed project;
23 correct?

24 A It does.

25 Q Does it also require the department to consider whether or

1 not the proposed project would have other than minimal
2 adverse environmental effects?

3 A It does.

4 Q And with respect to that decisional criteria under that
5 rule, what conclusion did you reach?

6 A Determined that it would have more than just a minimal
7 adverse impact on the natural resources of Lake Missaukee.

8 Q Okay. And perhaps jumping ahead here, while we're on that
9 subject, is one of the -- to your knowledge, is one of the
10 other criteria the department is required to consider under
11 Rule 814 whether or not there is a feasible and prudent
12 alternative to the proposed activity?

13 A Yes.

14 Q And with respect to this project, whether it's reflected on
15 this project review report or not, what conclusion did you
16 reach with regard to whether there was a feasible and
17 prudent alternative to the project that's proposed?

18 A There was a feasible and prudent alternative.

19 Q And what feasible and prudent alternative or alternatives
20 did you find existed for the proposed project?

21 A The proposed purpose for the project was to provide access
22 for boat dockage. To achieve that, it's quite common that
23 people would use a dock to extend into boatable water depth.
24 I've seen through my almost nine years people using seasonal
25 structures with support posts, floating docks, permanent

1 docks and permanent docks even with pilings that are
2 sufficient to hold up against ice that may form. There's a
3 number of different -- as well as swim platforms placed
4 offshore in deeper water that may be seasonally removed to
5 provide access for those type of activities.

6 Q And moving ahead from the project review report to tab 14,
7 do you recognize that document?

8 A Yes.

9 Q And is this July 7th, 2006 letter the department's decision
10 with respect to the permit application?

11 A It is.

12 Q And were you involved in the preparation of this document?

13 A Yes, I prepared this document.

14 Q Okay. Does this document further describe and explain your
15 findings or the department's findings with respect to the
16 criteria under Parts 301 of NREPA?

17 A It does.

18 Q Does this document also discuss the application of
19 decisional criteria under Part 303, Wetland Protection of
20 NREPA?

21 A It does, although I notice my page 2 is missing from the
22 exhibit.

23 MR. REICHEL: I apologize for not correcting this
24 earlier.

25 MR. SHAFER: Yes, you gave it to us earlier.

1 MR. PHELPS: Yeah; yup.

2 MR. REICHEL: May I approach, your Honor?

3 JUDGE PATTERSON: Sure. I have the second page.

4 MR. REICHEL: You have a full set?

5 JUDGE PATTERSON: Yeah.

6 MR. REICHEL: Okay.

7 Q Does what I've just handed you appear to be a complete copy
8 of that July 7th, 2006 permit denial letter; is that
9 correct?

10 A Yes.

11 Q Okay. Now, with respect to -- just before we go further,
12 just as a procedural matter, the permit application that
13 we've been discussing here today was formally submitted
14 under Part 301 of NREPA; is that correct?

15 A Yes.

16 Q It was not formally submitted as an application under Part
17 303; is that correct?

18 A Yes.

19 Q To your knowledge, is there a provision in Part 303 that
20 addresses the situation where someone has applied for or a
21 permit issues under Part 301 and whether or not a separate
22 wetland permit is required under Part 303?

23 A Yes.

24 Q And whether or not a separate permit is required based upon
25 your understanding and review of the statutes, where someone

1 proposes to dredge in a wetland in an application for Part
2 301 permit, does the department need to consider or does it
3 consider the criteria for issuing permits under Part 303?

4 A Yes.

5 Q Okay. And is that what you were doing here?

6 A Yes.

7 Q Okay. Is it your understanding that among the criteria in
8 deciding whether or not a permit should issue -- or whether
9 a project is permissible under the criteria of Part 303,
10 Section 30311(4) identifies certain conditions that need to
11 be satisfied if a permit can issue; is that correct?

12 A Yes.

13 Q And what finding -- well, first of all, what is your
14 understanding of those particular requirements and what was
15 your finding in that regard?

16 A 30311 is the permit review criteria. It requires that we go
17 through to show that there won't be an unacceptable
18 disruption to aquatic resources. And if there is, then we
19 have to look for feasible and prudent alternatives and
20 determine whether it's wetland dependent.

21 Q Okay. With respect to whether or not a project is wetland
22 dependent, what -- or the proposed project purpose is
23 wetland dependent, what finding, if any, did you make?

24 A That the proposed dredging was not wetland dependent.

25 Q And could you explain based upon your experience and/or your

1 knowledge of the rules promulgated by the department how it
2 is that you determined or found that this project purpose
3 was not wetland dependent?

4 A Wetland dependency is for projects that require one of the
5 conditions you find in a wetland, the hydrology, the plants
6 or the soils. If it can be achieved in a location without
7 wetlands or in uplands, then it's not wetland dependent.

8 Q And it's your conclusion that the proposed project here was
9 not wetland dependent in that sense?

10 A It was not.

11 Q Now, under the cite -- the quoted provision of 30311(4),
12 there is a requirement that the permit shall not be issued
13 unless the applicant also shows either of the following:
14 that the project is primarily dependent upon being located
15 in a wetland -- okay. You've testified as I understand it
16 that the applicant did not make such a showing here; is that
17 correct?

18 A Right; yes.

19 Q And do you know whether or not under the rules -- strike
20 that. Did the applicant make, to your knowledge, a showing
21 that there was no feasible and prudent alternative to the
22 proposed project?

23 A Can you restate that question?

24 Q I'm sorry. Based upon your review of the file material,
25 your observations of the site, information provided by the

1 applicant, in making the decision to deny the permit, did
2 you find that the applicant had shown or had failed to show
3 that a feasible and prudent alternative does not exist?
4 A I found that they failed to show that a feasible and prudent
5 alternative did not exist.
6 Q And the basis for that finding or conclusion was?
7 A That they --
8 Q I'm sorry. If you'd like me to restate the question?
9 A No, that's fine. Based on my experience with people trying
10 to achieve boat dockage in these kind of conditions, there
11 were other alternatives that were less impacting that they
12 failed to consider in this case.
13 Q Now, you've testified to that with respect to the stated
14 project purpose of obtaining access or being able to boat --
15 gain access to boats from the property; correct? In other
16 words, you've identified that an alternative or alternatives
17 exist that would include the construction of either a fixed
18 or a floating dock that could be used to gain access to a
19 boat for navigation from the shore?
20 A Yeah; yes.
21 Q Access from the shore to a boat. Excuse me. With respect
22 to swimming, is swimming, to your knowledge, a wetland
23 dependent activity?
24 A It is not.
25 Q So in other words, is it necessary to dredge a wetland in

1 order to swim?

2 A No.

3 Q After the permit was denied, did you receive further
4 communication from the permit applicant?

5 A Yes, Mr. Boughner came into the office to discuss the denial
6 with me.

7 Q Let's direct your attention to tab 15. Can you identify
8 what that is, please?

9 A This is a copy of my note to file dated July 18th of 2006,
10 regarding the Master Lakes -- Missaukee Lakes Master Homes
11 project.

12 Q And does this document the conversation you just described
13 with Mr. Boughner?

14 A It does.

15 Q Could you briefly summarize the substance of Mr. Boughner's
16 communication to you and your response?

17 A Mr. Boughner received the denial and came in to discuss what
18 statutory requirement, you know -- statutory review that we
19 conducted including Part 303 and 301. And we discussed, you
20 know, the criteria that were used to review it. We again
21 reviewed the possibilities for alternatives on the site. We
22 discussed a longer dock. We discussed a swimming platform
23 or a "T" at the end, sanding out in deeper water which we
24 both agreed would probably not work on this site and
25 dredging just off the end of the dock.

1 Q Could I interrupt you there briefly? I mean, when you talk
2 about sanding out in deeper water, could you explain what
3 you mean by that?

4 A In instances where there are wetlands along the shoreline,
5 we often work with people to extend a dock out over the
6 wetlands to the area that's not predominated by wetlands to
7 do any kind of sanding for access for swimming.

8 Q Okay. And your note to the file indicates that you
9 discussed at least that possibility with Mr. Boughner, but
10 concluded it was not implementable here; is that correct?

11 A No. Given the loose material -- the bottom sediments are
12 fairly loose and you have to anchor a filter, a fabric on
13 which to lay the pea gravel or sand. And in this type of
14 sediment, it would be difficult to anchor that appropriately
15 to put the material on it.

16 Q During the course of this July 18th discussion of 2006, did
17 Mr. Boughner raise the issue of any possible mitigation with
18 respect to the project?

19 A Yes, he did.

20 Q And what was the substance of his communication to you?

21 A It's not uncommon for people to offer mitigation for
22 projects because they seem to have picked that up somewhere.
23 So he mentioned that if we were able to work something out,
24 that it would be possible to mitigate on the site for any
25 impacts to the wetlands.

1 Q And did he propose to follow up on that possibility?

2 A We cannot require mitigation unless the project itself is

3 permittable. So we didn't really discuss it any further

4 from there.

5 Q But it is fair to say that he raised that as a possibility?

6 A He did.

7 Q Rather than you raising it; correct?

8 A That's correct.

9 Q I'd like to direct your attention to tab 17. Do you

10 recognize that document?

11 A I do.

12 Q These appear to be some handwritten notes. Is this your

13 handwriting?

14 A 16?

15 MR. SHAFER: I'm sorry. What tab are you on?

16 MR. REICHEL: 16. I'm sorry. I misspoke. My

17 apologies.

18 JUDGE PATTERSON: Okay.

19 A I do recognize them.

20 Q And what is this or what is this document?

21 A These are my field notes from an August 17th, 2006, informal

22 onsite review attended by John Arevalo, Dale Boughner and

23 myself.

24 Q Okay. Before we get into that, based upon your experience

25 with the department, in situations of this kind where field

1 staff has initially denied a permit, does the department
2 have a process by which department supervisors can engage in
3 an informal review of the decision with the permit applicant
4 to see if a possibility exists of resolving the issue?

5 A Yes.

6 Q And your supervisor is Mr. Arevalo?

7 A It is.

8 Q And was such a process undertaken here?

9 A It was.

10 Q Now, your notes refer to a meeting on August 17th of 2006;
11 is that correct?

12 A Yes.

13 Q And who participated in that meeting?

14 A John Arevalo, my supervisor; Dale Boughner, the agent for
15 the applicant; and myself.

16 Q Okay. And could you briefly describe what was discussed at
17 the meeting?

18 A We again reviewed the site conditions to determine if there
19 was any alternative option at the site that we could agree
20 on. And that was the chance for my supervisor to see the
21 site and talk to Mr. Boughner about the project purpose to
22 see if we could issue a modified, you know, permit.

23 Q Do you know whether or not after that meeting there was any
24 written follow-up by Mr. Arevalo to the permit applicant?

25 A There was.

1 Q I'd like to direct your attention to Exhibit 17 and please
2 tell me if you recognize that document.

3 A I do.

4 Q This correspondence dated September 29th, 2006, to Mr.
5 Boughner with a signature block by Mr. Arevalo, is this
6 written follow-up by Mr. Arevalo to that meeting?

7 A It is.

8 Q Based upon your recollection of the meeting, during the
9 course of the discussion that occurred in this follow-up
10 process, was the issue of the permit applicant's future
11 intentions with respect to other adjacent property in the
12 Indian Lakes subdivision brought up?

13 A It was.

14 Q And could you briefly summarize what, if anything, Mr.
15 Boughner indicated to you on that subject?

16 A He indicated that the lots were marked for sale, but to his
17 knowledge, that no one has approached them to purchase the
18 property, as well as Mr. Mohny's house had been for sale on
19 and off as well.

20 Q On that subject, with respect to the properties, first of
21 all, did the -- based upon your review of the permit
22 application which we've already talked about, was it your
23 understanding that the particular location for this project,
24 lot 8, was part of a larger subdivision called Indian Lakes
25 West; is that correct?

1 A Yes.

2 Q Was it your understanding or is it your understanding that
3 that larger area was under the control of Mr. Mohney?

4 A Yes.

5 MR. SHAFER: Objection; this is leading.

6 MR. REICHEL: I'll restate the question.

7 JUDGE PATTERSON: Okay. Yeah, it was leading.

8 Q What was your understanding of who controlled the remaining
9 property in the subdivision?

10 A Mr. Mohney.

11 Q Based upon your own visits to the site, have you observed
12 whether or not properties -- or signs indicating the
13 properties are for sale?

14 A Yes.

15 Q And jumping ahead a bit, as recently -- when were you last
16 at the site that you can recall?

17 A I was there last week, two weeks ago.

18 Q And at that time, were "For sale" signs still posted on the
19 other properties in the Indian Lakes West subdivision?

20 A Yes.

21 Q After this August 17th, 2006 meeting and the correspondence
22 dated September 29th, 2006, if you know, were there further
23 communications between the permit applicant's agents and the
24 department on the subject of the permit application?

25 A Yes.

1 Q And moving forward into the fall or the winter of that year,
2 2006, if you know, did the department have further
3 communications with staff of DNR Fisheries Division about
4 its concerns with respect to this proposed project?

5 A We did.

6 Q I'd like to direct your attention to tab 18. Do you
7 recognize that document?

8 A My tab 18 is blank.

9 Q I'm sorry?

10 A There's no documents behind tab 18.

11 MR. REICHEL: May I approach?

12 JUDGE PATTERSON: Sure.

13 Q Do you recognize the document?

14 A I do.

15 Q And what is it, please?

16 A It's an e-mail from Rich O'Neal to my supervisor, John
17 Arevalo, dated December 6, 2006, with a carbon copy to
18 myself.

19 Q Okay. And could you briefly summarize the substance of Mr.
20 O'Neal's communication to your division?

21 A Yes. We had further discussed with Mr. O'Neal the concerns
22 Fisheries Division had with the project. And he again
23 relayed that Fisheries Division had a concern, that they had
24 actually looked into impacts from shoreline activities on
25 lake systems and the marine shoreline and he was just again

1 reaffirming that he had a concern with the project.

2 Q Moving forward in time to early 2007 -- I believe there's
3 already been testimony on this -- was an effort undertaken
4 to collect some data at the site regarding water depth and
5 sediment thickness at the proposed project location?

6 A It was.

7 Q And were you involved in that activity?

8 A Yes.

9 Q I'd like to direct your attention to -- to Exhibit 22. Do
10 you recognize that document?

11 A I do.

12 Q It's a project review report with a date of field review of
13 February 28th, 2007; do you see that?

14 A I do.

15 Q And so could you briefly describe what occurred or what
16 activity you engaged in at the site on February 28th of this
17 year?

18 A On February 28th, I went out to the site to take water and
19 depth measurements. I was assisted by Sue Conradson, our
20 floodplain engineer. We met Mr. Boughner and Mr. Larry
21 Julian on the site. Mr. Boughner was nice enough to
22 excavate the holes out to at least 200 feet. And through
23 those holes, we were able to -- I was able to use the staff
24 gauge that's approximately 16 feet long to go down in the
25 hole and measure the water depth and then also push the rod

1 down until it was -- couldn't -- it met resistance and I
2 couldn't push it anymore. The water depth measurement was
3 taken off the increments in tenths on the staff gauge, as
4 well as when I pushed it down 'til I couldn't push it
5 anymore, again, that reading was read and recorded.

6 Q Okay. And Exhibit 22 appears to be -- well, did you make
7 any field notes?

8 A I did.

9 Q And are they included within Exhibit 22?

10 A They are.

11 Q I'd like to direct your attention to Exhibit 24. Before you
12 look at that specifically, after you compiled your field
13 notes, did you subsequently type up or have -- prepare a
14 table summarizing your observations of water and sediment
15 depth?

16 A I did.

17 Q And looking at -- can you recognize Exhibit 24?

18 A It's a copy of the far point (phonetic) diagram that I
19 developed with the water depth and muck depths collected on
20 February 28th of '07.

21 Q And very briefly, there are a series of black ovals
22 indicated. What do those depict?

23 A They're representative location of the hole ice -- holes
24 through the ice on site.

25 Q Okay. And there are numbers located to each of those. What

1 are those?

2 A Those are the hole numbers and number of holes that were on
3 site that we took muck and water depths.

4 Q Okay. And, again, if I understand correctly, these are
5 essentially sampling stations that were established by Mr.
6 Boughner who -- if I understand your testimony correctly,
7 who went out and marked on the ice locations in what was
8 understood to be the location of the proposed project; is
9 that correct?

10 A He drilled holes through the ice along the path of the
11 dredge channel, yes.

12 Q Okay. And so the -- in the -- along the left-hand margin of
13 the document as you look at it, there is a table, is there
14 not, with headings, "Water," "Muck" and "Total"; do you see
15 that?

16 A Yes.

17 Q And so what do those represent?

18 A Those represent the measurements that I took of the water
19 depth -- water and muck depths on those dates.

20 Q And the total was intended to be -- what? -- the sum of the
21 water and muck?

22 A When I went out, I did the water measurement and then I
23 pushed the staff gauge down as far as I could go. And that
24 was the total measurement taken. So I subtracted the water
25 depth from the total depth that I pushed the rod down

1 through to get the muck depth.

2 Q In the course of preparing for this proceeding, did you have
3 occasion to review the original version of what has been
4 marked as Exhibit 24?

5 A Yes.

6 Q And in the course of that review, did you identify any
7 apparent errors or discrepancies in it?

8 A I did.

9 Q Could you explain what that was?

10 A Yes. When I did the original document, I failed to subtract
11 the water depth from the total depth I took to get the muck
12 depth.

13 Q Okay. And did that result in -- so did that result in a
14 overstatement or understatement of muck depth at certain
15 locations?

16 A An overstatement.

17 Q And so did you then prepare a revised version of this table?

18 A I did.

19 Q And when you prepared that, did you put a legend on it near
20 the right-hand side indicating there was a revised version
21 and the date?

22 A I did.

23 Q And what date was indicated on that?

24 A It was revised December 11th of 2007.

25 Q So the revision was for collecting a -- it wasn't revising

1 what you observed in the field, was it?

2 A No.

3 Q Was it a mathematical error?

4 A It was just a mathematical error.

5 Q To the best of your knowledge, does the revised version of

6 this table, Exhibit 24, accurately reflect the conditions

7 that you observed or measured at the site in February?

8 A It does.

9 Q Now, the -- I believe you testified earlier that the permit

10 application proposed or described dredging sediments or muck

11 to a depth of 2-1/2 feet; is that your understanding?

12 A Yes.

13 Q Based upon your review of the data that you collected and as

14 depicted or summarized in table -- excuse me -- Exhibit 24,

15 were there areas in the project -- proposed project area

16 within this 200-foot zone extending offshore where the

17 sediment thickness or muck thickness exceeded -- that you

18 observed exceeded 2-1/2 feet?

19 A Yes.

20 Q So if the project were to proceed as originally proposed, is

21 it your understanding that -- and based upon your

22 observations that even after this dredging occurred there

23 would remain accumulated muck or sediment at certain

24 locations?

25 A Yes.

1 Q You've been present during the testimony so far in this
2 case, have you not?

3 A I have.

4 Q And including the testimony of Mr. Boughner; correct?

5 A Yes.

6 Q What is your understanding today of the depth to which the
7 permit applicant is proposing to dredge, if you have an
8 understanding?

9 A I understand that they want to dredge down to the hard
10 surface at the bottom of the lake within the channel.

11 Q And is it your understanding that it is the permit
12 applicant's intention or objective to -- within the project
13 area to remove all of the accumulated sediment and get down
14 to some sand substrate or how would you describe what you
15 understand to be their intention?

16 A Apparently, their intention is to dredge down to a hard
17 bottom which they have determined apparently is sand within
18 the channel area.

19 Q And have you been able to determine or is data available to
20 you to determine at what depth, first of all, that sand
21 exists at the bottom through each of these locations?

22 A No.

23 Q Based upon the technique that you used in collecting the
24 data that's summarized in Exhibit 24, were you able to
25 ascertain that when you pushed your staff gauge and could no

1 longer push it that, in fact, you had encountered sand?

2 A No.

3 Q So as of today, it's not possible to ascertain that if the
4 project -- restate this. If the permittee -- or if a permit
5 was issued to allow the applicant to dredge in the project
6 area -- or proposed project area until it encountered a sand
7 bottom, the -- it may be -- it might be necessary to
8 excavate or to dredge to depths even greater than those
9 identified as the muck thickness in this diagram?

10 A Yes. I did a calculation based on the measurements that I
11 took and it would take him an additional approximately 250
12 cubic yards to get down to what I found was hard bottom.
13 And, again, I can't say if that was sand or compacted muck
14 down there.

15 Q During your February of '07 site visit, did you also take
16 some photos or were photos taken of the site?

17 A I did.

18 Q And directing your attention to Exhibit 25, and specifically
19 the third and fourth pages, do those include copies of
20 photos that you took or were taken on February 28th of this
21 year?

22 A It does.

23 Q And do those photos when taken fairly and accurately depict
24 the conditions that you observed at that time and location?

25 A Yes.

1 Q Looking at the last photo in the sequence, there's a
2 structure in the background. What is that structure?

3 A That is the house located on lot 8.

4 Q As part of your review of this project and the proposal to
5 dredge at this particular location in the Indian Lakes
6 subdivision, did you become aware of any other previous
7 proposals to dredge in this Indian Lakes subdivision area?

8 A Yes.

9 MR. HOFFER: Your Honor, objection; irrelevant.

10 MR. REICHEL: Your Honor, I do think it's relevant
11 in a couple of respects. First of all, the, as we've
12 already indicated, evidence to the record establishes that
13 Mr. Mohney either directly or through one or more entities
14 owns and controls a long segment of shoreline on the west
15 end of Lake Missaukee, including the Indian Lakes West
16 subdivision except with respect to a lot or lots that have
17 been sold to individuals. I believe the -- strike that.
18 The fact of the matter is that one of the issues in this
19 case is what the impact of this proposed activity would be
20 in the context of this longer segment natural shoreline on
21 the west end of Lake Missaukee controlled by the permit
22 applicant. So it is important to consider -- to place the
23 current permit application in context, number one, to --
24 it's relevant to the consideration of possible cumulative
25 impacts of the proposed project on the lake.

1 And, third, I believe there's already evidence to
2 the record that a previous permit application was made. I
3 believe Mr. Boughner testified, although that he was not
4 involved in it, he was aware that something had occurred.
5 And further, it goes to the issue of whether or not feasible
6 and prudent alternatives exist; that is, whether there are
7 other properties that are controlled or owned by the permit
8 applicant in the area. So I think for all of those reasons,
9 inquiry into the status and previous permitting history of
10 property controlled by the permit applicant or immediate
11 vicinity is relevant.

12 MR. HOFFER: May I respond?

13 JUDGE PATTERSON: Sure.

14 MR. HOFFER: First of all, that permit was denied.
15 So as far as considering anticipated activities, unless
16 they're going to reverse their decision on that, they can't
17 anticipate that they're going to issue a permit that they
18 have already denied. And as far as reasonable and prudent
19 alternatives, if they denied it, then it can't be considered
20 a reasonable and prudent alternative.

21 MR. REICHEL: Well, just to clarify, Judge, my
22 point was not to suggest that the other -- or the previous
23 permit application itself represented a feasible and prudent
24 alternative, but it goes to the issue of both past activity
25 proposed by this applicant, the possibility of future

1 activity and the extent of shoreline control by the permit
2 applicant as it relates to whether or not other feasible and
3 prudent alternatives may exist.

4 MR. HOFFER: Your Honor, there's already testimony
5 as to who controls the property. There's no reason to have
6 this additional, you know, evidence in just for the purpose
7 of showing who owned the property. I think that that's
8 already been established and this isn't necessary for that
9 reason.

10 JUDGE PATTERSON: Again, I think it's relevant to
11 the consideration of cumulative impacts, so I'll overrule
12 the objection.

13 Q I don't know if you remember the question. Do you recall?

14 A I do know of some other dredging proposal in this
15 subdivision.

16 Q Okay. And as a part of your review of department files, did
17 you see documents reflecting a prior permit application in
18 this immediate vicinity?

19 A Yes.

20 Q I'd like to direct your attention to Exhibit 27. Have you
21 seen these documents before?

22 A I have.

23 Q Do you know whether or not these documents are excerpts of
24 the department file concerning DEQ file number 02-57-001-P?

25 A Yes.

1 Q Have you reviewed at least briefly the information -- any of
2 the information contained in these documents?

3 A I have.

4 Q Do you know whether or not as part of the -- I'd like to
5 direct your attention to -- these documents are not
6 numbered, but it's -- about two-thirds or three-quarters of
7 the way through this group of documents there is a letter
8 dated July 11th, 2002, to the DEQ regarding Indian Lakes
9 Development, LLC, dredging and docks permit; do you see
10 that?

11 A What was the date?

12 Q July 11th, 2002. It's on the letterhead of Charles R. Green
13 & Associates.

14 A Yes, I have it in front of me.

15 Q Okay. And turning from that page further into the document,
16 I believe three more pages, there is a map with the legend,
17 "Updated overall site plan of subdivision development."

18 A Yes.

19 Q Have you seen this document before?

20 A I have.

21 Q And what do you understand this document to depict?

22 A A proposed floating dock and dredging area offshore of the
23 common property between lots 10 and 11 in the Indian Lakes
24 West subdivision.

25 Q And do you know whether or not this permit application

1 actually sought what's called an after-the-fact permit?

2 A Yes, it did.

3 Q It did?

4 A It did.

5 Q And could you explain for the record what that means?

6 A When a project has already been completed or started, if

7 they apply for a permit, it's considered after the fact

8 because they've already started or completed the project

9 work.

10 Q Again, based upon your review of the file, is it your

11 understanding that in this instance, the file which is

12 excerpted of this exhibit -- that the project had already

13 been started at this proposed location and that a permit was

14 subsequently applied for?

15 A That's my understanding.

16 Q And do you know what the disposition of that permit

17 application was?

18 A It's been denied.

19 Q And in your understanding, who was the permit applicant in

20 2002?

21 A Indian Lakes Development, LLC -- Indian Lakes West, LLC.

22 Q As part of your -- strike that. In connection with the

23 permit application at issue here, the 2006 file that's

24 focused on lot 8, do you know whether or not the information

25 provided by the permit applicant, Missaukee Lakes Master

1 Homes, in Exhibit 4, the permit application, included
2 material identifying the relationship between the permit
3 applicant, Missaukee Lakes Master Home (sic), LLC, and other
4 corporate or limited -- corporations or limited liability
5 companies?

6 A It did.

7 Q And based upon your review of the DEQ file in this matter,
8 do you know whether or not in response to that permit
9 application department staff obtained and included in the
10 file publicly available information from the Department of
11 Labor and Economic Growth concerning certain corporations
12 and limited liability companies?

13 MR. HOFFER: Your Honor, I object to this as being
14 irrelevant.

15 MR. REICHEL: Your Honor, I think it is relevant.
16 What I'm getting to, just to be clear, is proposed -- DEQ
17 proposed Exhibit 5 which I represent or proffer contains
18 materials of the nature I've just described and obtained for
19 the DEQ's file on this permit application. I think it is
20 relevant to establish the ownership and control of the
21 immediately subject property; that is, lot 8; as well as
22 adjacent properties that are controlled by the permit
23 applicant or entities that he, himself, controls. And it
24 goes -- its relevance is along the same lines that I've
25 described earlier; to establish, for the record, information

1 available to the department, contained within its file,
2 reflecting both past development proposals and the
3 possibility of future development proposals in the immediate
4 vicinity of this project site.

5 JUDGE PATTERSON: I see -- I think it's relevant.
6 I'll overrule the objection.

7 Q Ms. Schmidt, I'd like to direct your attention to proposed
8 Exhibit 5. Do you know whether or not these are copies of
9 documents included within the DEQ's permit file in this
10 matter?

11 A They are.

12 Q And do they contain information regarding, directing your
13 attention to the second page, an entity called Indian Lakes,
14 LLC?

15 A Yes.

16 Q Do they also contain information regarding, in the first
17 page, Missaukee Lakes Master Homes, LLC?

18 A Yes.

19 Q And the third page, Michigan Reef Development Corporation?

20 A Yes.

21 MR. REICHEL: Your Honor, at this time we would
22 move --

23 Q And these documents, to your knowledge, were included in the
24 permit file for this application?

25 A Yes.

1 MR. REICHEL: Your Honor, at this time we'd move
2 for admission of DEQ proposed Exhibit 5.

3 MR. SHAFER: We still believe all this is
4 irrelevant.

5 JUDGE PATTERSON: Okay. And I'll make the same
6 ruling I did on the testimony. Overrule.

7 (Respondent's Exhibit 5 received)

8 Q Ms. Schmidt, again, you've been present during previous
9 testimony in this case and have been involved in some
10 subsequent -- or post-permit denial communications with the
11 applicant's agents. And I've already asked you some
12 questions on this, but I want the record to be clear. What
13 is your understanding of the modified project for which the
14 permit applicant is now seeking an application? First of
15 all, what is --

16 MR. HOFFER: Objection; asked and answered.

17 MR. REICHEL: Okay.

18 Q What is the -- what is the -- what are the dimensions
19 proposed for dredging on the bottom of Lake Missaukee?

20 A I have been here for testimony yesterday. I'm a little
21 unclear. My understanding is that the proposal is for a
22 200-foot-long channel, 50 foot wide and apparently now they
23 are proposing to dredge down to whatever hard surface is on
24 the bottom of the channel.

25 Q So some at this point indeterminate depth?

1 A I have no idea how deep they want to dredge if they're
2 thinking that they're going to get to sand because I don't
3 know where that is located in the --

4 Q Okay. Based upon your presence and opportunity to listen to
5 the testimony as well as any subsequent post-permit denial
6 communications to the applicant, what is your understanding
7 of the location where the dredge channel would commence in
8 relationship to the shoreline of lot 8?

9 A According to communications from the agent, he agreed to go
10 20 feet offshore to start the channel.

11 Q Okay. Again, you've testified before but I want the record
12 to be clear that even with that modification of the project
13 location, would the area proposed for dredging commencing 20
14 feet offshore -- would that or would that not involve
15 dredging marsh areas or wetlands regulated under Part 303?

16 A Dredging even starting 20 feet offshore would excavate into
17 a marsh that is regulated under Part 303.

18 Q Do these proposed modifications of the project lead you --
19 or would it lead you to a different finding with respect to
20 whether or not the project as proposed would be permissible
21 under the standards of Rule 814 of the Part 301 rules?

22 A It would not.

23 Q And with respect to the issue of potential adverse impact on
24 the environment, why -- on what would you base your finding
25 that the project -- the modified project would still not

1 satisfy that element of Rule 814?

2 A Since shipping the dredged area offshore still impacts
3 wetland, you still have the impacts to the habitat that it
4 provides by removing that structure. So you still have
5 impacts to fisheries; you still have impacts to the aquatic
6 macrovertebrate that would be using the area; you still
7 would have impacts to wildlife that may be feeding in the
8 area. So those impacts are still the same regardless if
9 they shifted it out 20 feet.

10 Q And I believe as part of the permit denial the department --
11 the initial permit denial, the department addressed an
12 issue -- raised questions as to whether or not the project
13 as proposed; that is, dredging this channel; would
14 require -- let me restate the question. I believe based
15 upon the record and the permit denial the department had
16 raised the issue that if the dredging were to proceed with a
17 50-foot by 200-foot channel, that over time, the dredging
18 area would fill in or additional --

19 MR. HOFFER: Objection; leading.

20 MR. REICHEL: Okay.

21 JUDGE PATTERSON: It was.

22 Q As a part of the review of the initial permit application
23 and the decision to deny it, did the department consider
24 what might occur after this channel were dredged?

25 A Yes.

1 Q And what considerations or observations did you make?

2 A Given the type of sediment that they'd be excavating into,
3 it would not hold the banks like it would if it was sand or
4 gravel. Since it's loose material, it's going to shift
5 around and it's going to refill the channel. And that's why
6 they requested a maintenance dredging of the channel for 10
7 cubic yards annually. And we can only issue our permits up
8 to five years, so it would be five years out.

9 Q Okay. Because this was the subject of some colloquy, just
10 so the record is clear, is it your understanding that the
11 permit applicant did, in fact, after the initial permit
12 application was submitted request or propose, quote, "annual
13 maintenance dredging"?

14 A They did.

15 MR. SHAFER: So I just want to get this clear. So
16 the attorney general tried to give the indication that my
17 client lied under oath about that and they have a witness
18 here that is acknowledging that that's exactly what they
19 requested and he objected to my document because it wasn't
20 in the file. Am I getting this right? Don't you have to
21 have a viable reason to ask a freakin' question and give an
22 inference to a judge that somebody's committed perjury?
23 This is ridiculous. This is absolutely ridiculous. She
24 just testified under oath that they requested the
25 maintenance requirement and he tried to give you the

1 indication yesterday that we were making it up. This is
2 crap.

3 JUDGE PATTERSON: Mr. Reichel?

4 MR. REICHEL: First of all, I don't think the
5 record will reflect that I was suggesting that any witness
6 was perjuring himself. That is not the case. I've
7 explained to counsel that based upon my review of the
8 documents from the file that were available to me, that in
9 the documents that I had reviewed in preparation for this
10 hearing, I had not seen a version of the document that
11 contained this request for additional dredging.

12 MR. SHAFER: He prepared the witnesses and he
13 directly came up to me and he said, "We want to use our
14 documents and not yours because there's something new in
15 there." And he prepared her. He knew about this ahead of
16 time.

17 MR. REICHEL: Well, first of all, I don't know if
18 this is the nature of an objection. But I would state for
19 the record that I did not -- I was not aware when I asked
20 that question, when I raised that objection to the admission
21 of the document, that a different version of the document
22 exists. It was after I raised that objection that I
23 ascertained that it did exist. I did not intend to suggest
24 and do not now suggest that anyone had committed perjury.
25 If my objection is, as it turned out to be, unfounded, I

1 will acknowledge that. It was not done with any malicious
2 intent and I would just leave it at that. I don't think
3 this is really pertinent to the examination of this witness.

4 JUDGE PATTERSON: All right. Go ahead and
5 continue.

6 MR. REICHEL: Thank you.

7 Q Does the modification of the project as proposed during the
8 course of this hearing lead you to any different conclusion
9 with respect to whether or not this project will be
10 permittable under that portion of Rule 814 of the Part 301
11 rules that requires consideration as to whether or not a
12 feasible and prudent alternative is available?

13 A It does not.

14 Q And with respect to the consideration of criteria under Part
15 303, does the modification of the project proposed by the
16 applicant during the course of this proceeding lead you to
17 any different conclusion as to whether or not the criteria
18 for issuance of a permit under Part 30311 are satisfied
19 here?

20 A It does not.

21 Q And, again, does this -- with respect to that portion of the
22 considerations under Section 30311(4), does the modification
23 of the permit lead to any different conclusion as to whether
24 or not the proposed activity is primarily dependent upon
25 being located in a wetland?

1 A It does not.

2 Q Does it lead to any different conclusion as to whether or
3 not a feasible and prudent alternative has been shown not to
4 exist by the applicant?

5 A It does not.

6 Q With respect to the existence of feasible and prudent
7 alternatives, I believe you testified already about the
8 availability of an alternative or alternatives using a fixed
9 dock or a floating dock. Part of the testimony that has
10 been offered by the permit applicant is that one of the
11 stated purposes or objectives of the project would be to
12 enable the permit applicant to use personal watercraft or
13 gain access to personal watercraft from the shore of
14 Missaukee Lake; is that your understanding?

15 A That's my understanding.

16 Q With respect to that issue, based upon your review of the
17 project site and your understanding of the situation, do you
18 believe that a feasible and prudent alternative exists that
19 would enable the permit applicant to gain access from the
20 shore; that is, to a location where it could -- or people
21 could board personal watercraft?

22 A Yes, I've seen in similar conditions people using a dock to
23 expand over the wetlands to get out to deeper water. It's
24 my understanding that you can actually have a floating hoist
25 on a dock that would enable jet skis to be parked out at the

1 deeper water end of the dock and access that way as well.

2 Q And based upon your review of the site information including
3 the measurements of water depth and sediment thickness that
4 you took in February of this year, is there -- would it be
5 possible; that is, feasible; for a person using a boat with
6 a 3-foot or 3-1/2-foot draft to navigate that boat to a dock
7 extending from the shore of lot 8?

8 A May I look at my depth measurements?

9 Q Sure.

10 A What tab was that?

11 Q 24.

12 A Yes, according to my measurements, at about 100 feet
13 offshore it's about 3 feet of water depth. And then at 200
14 feet offshore, it's nearly 4 feet of water depth.

15 Q And you were present, were you not -- strike that.

16 MR. REICHEL: I have nothing further at this time.

17 MR. PHELPS: I have no questions.

18 JUDGE PATTERSON: Can we take a break before you
19 do your cross?

20 MR. SHAFER: Sure. Sounds good.

21 (Off the record)

22 JUDGE PATTERSON: Mr. Hoffer, whenever you're
23 ready?

24 MR. REICHEL: Judge, excuse me.

25 JUDGE PATTERSON: Oh, okay.

1 MR. REICHEL: I have three housekeeping matters
2 I'd like to address.

3 JUDGE PATTERSON: Oh, right. Okay.

4 MR. REICHEL: The first of which is providing or
5 substituting color copies for the series of photos included
6 in DEQ Exhibit Number 25. May I approach?

7 JUDGE PATTERSON: Sure.

8 Q Ms. Schmidt, I just handed you a series of color copies of
9 photographs. Are these -- if you want to compare to the
10 photographs in your book there at tab 25, are these color
11 prints of the same photographs included in the exhibit?

12 A They are.

13 JUDGE PATTERSON: I assume since the exhibit was
14 stipulated to there's no objections?

15 MR. SHAFER: Correct.

16 JUDGE PATTERSON: All right.

17 MR. REICHEL: Thank you.

18 JUDGE PATTERSON: Thank you.

19 MR. REICHEL: Another housekeeping matter, during
20 the course of my direct examination of the witness, I did
21 ask her a series of questions about DEQ proposed Exhibit 27.
22 I'm not confident that I moved for -- this was the excerpts
23 from the 2002 permit file. I'm not confident that I moved
24 to admit that. I'm doing so now.

25 MR. SHAFER: I'm going to object --

1 JUDGE PATTERSON: I think you did and you
2 reaffirmed your objection to relevancy --

3 MR. SHAFER: Correct.

4 JUDGE PATTERSON: -- and I overruled that.

5 MR. REICHEL: Okay. I'm sorry. I just wanted to
6 make sure.

7 JUDGE PATTERSON: So, yeah, it was.

8 MR. REICHEL: Okay. And then finally there was
9 another identified exhibit that I neglected to inquire
10 specifically with the witness about and that is DEQ proposed
11 Exhibit 30. And with respect to that exhibit, I would like
12 to -- proposed exhibit, I would like to substitute for the
13 black and white versions that are in the binders color
14 copies.

15 Q Ms. Schmidt, I've handed you a set of what's been marked for
16 identification as DEQ proposed Exhibit Number 30. Do you
17 recognize these documents?

18 A I do.

19 Q What are they?

20 A Photographs that I took on October 5th, 2007.

21 Q And where were they taken?

22 A Along Arrowhead Trail in the Indian Lakes West subdivision.

23 Q Do these photographs fairly and accurately depict the
24 conditions that you observed at each of these locations on
25 October 5th this year?

1 A They do.

2 Q And very briefly, the first one, could you describe where
3 you took the first photograph?

4 A The first photograph is located on the left-hand side if
5 you're entering the subdivision. It's a sign that indicates
6 "Indian Lakes West, a private single family residential site
7 condo development."

8 Q Okay. What's the second photograph depict?

9 A This is the -- a photograph looking at the commons area
10 between where the proposal in '02 occurred.

11 Q And that, I believe you testified, was located between lots
12 10 and 11; is that correct?

13 A That's correct.

14 Q And what is depicted in the third photograph?

15 A This is looking down Indian Lakes -- sorry -- Arrowhead
16 Trail at the "For Sale" signs located along either side of
17 the roadway.

18 Q And what is depicted in the last photograph?

19 A This is a photograph looking down the right-hand side of
20 Arrowhead Trail at the "For Sale" signs.

21 MR. REICHEL: Your Honor, at this time I would
22 move for admission of DEQ proposed Exhibit 30.

23 MR. SHAFER: Your Honor, we'd object on relevance.

24 JUDGE PATTERSON: I'll overrule the objection. I
25 think they're relevant for reasons previously stated.

1 (Respondent's Exhibit 30 received)

2 MR. REICHEL: With that, I have no further
3 questions for direct exam.

4 JUDGE PATTERSON: Okay. Mr. Hoffer?

5 MR. HOFFER: Yes.

6 CROSS-EXAMINATION

7 BY MR. HOFFER:

8 Q Ms. Schmidt, could I begin by having you turn to
9 Respondent's Exhibit Number 24? And this is the chart that
10 you made of your observations and measurements at lot 8.

11 A Yes.

12 Q And this accurately represents your observations and
13 measurements of lot 8?

14 A Yes.

15 Q And would you look in the -- if you orient it in the upright
16 position, on the bottom right-hand corner there are two
17 words with arrows next to them. Do you see those?

18 A Yes.

19 Q Do you see the word "wetland"?

20 A Yes.

21 Q And do you see the word "shoreline"?

22 A Yes.

23 Q And directly in front of your first measurement you have a
24 measurement between the line that represents shoreline and
25 the line that represents wetland; correct?

1 A No -- oh, yes.

2 Q And what is that measurement?

3 A 10 feet.

4 Q Now, if I can direct your attention to Respondent's Exhibit
5 16, these are the handwritten notes you prepared of your
6 meeting with John Arevalo and Dale Boughner?

7 A Yes.

8 Q And in the upper right corner you say that you discussed a
9 20-foot permanent dock over the wetlands; is that correct?

10 A Yes.

11 Q Okay. And if you direct your attention to the same binder,
12 Exhibit 14, in the last paragraph on page 1, you state that
13 you noticed wetlands below the ordinary high water mark of
14 Lake Missaukee; is that correct?

15 A Yes.

16 Q Does this document provide a measurement of how far out
17 those wetlands extend?

18 A It does not provide a measurement.

19 Q Prior to your denial letter of July 7th, did you ever notify
20 Missaukee Lakes Master Homes or any of their agents of how
21 far you believe the wetlands to extend from the shore?

22 A Can you repeat that question?

23 Q Sure. Before your July 7th denial letter, did you in any
24 way indicate to any representative of Missaukee Lakes Master
25 Homes how far you believed the wetlands to extend from the

1 shoreline lakeward?

2 A No.

3 Q Okay. Do you recall in any of your notes prior to your
4 preparation for testimony today that you ever indicated that
5 wetlands existed lakeward of lot 8 any farther than 20 feet?

6 A Can you repeat that question?

7 Q Have you ever indicated in your notes that there exists
8 wetlands more than 20 feet lakeward of lot 8?

9 (Witness reviews file)

10 A I did not.

11 Q Thank you. Prior to your denial letter of July 7th, 2006,
12 did you ever indicate to Mr. Boughner or any other agent of
13 Missaukee Lakes Master Home that a permit would be required
14 under Section 303?

15 A Yes.

16 Q When did you do so?

17 A We discussed it while on site and -- as well as when he came
18 into the office we discussed that there's wetlands on the
19 site and we'd have to review those as well.

20 Q And this is prior to the denial letter?

21 A That's correct.

22 Q And are you familiar with -- you're familiar with the
23 permitting criteria for Section 303; correct?

24 A Yes.

25 Q And are you familiar with Section F of -- or, excuse me --

1 Section 30306(F)? It's a section that allows you to request
2 an environmental assessment from the applicant if you
3 desire.

4 A Can you repeat the question?

5 Q Are you familiar with the section under Part 303 that allows
6 you to ask the applicant for an environmental assessment of
7 the area?

8 A Yes.

9 Q And at any time prior to denying this permit based on your
10 findings, did you ever ask the applicant for an assessment
11 under that part?

12 A No.

13 Q Okay. Now, back to section -- or, excuse me -- Respondent's
14 Exhibit 24, this data was collected on February 28th of
15 2000; correct?

16 A No.

17 Q Or -- excuse me -- 2007; correct?

18 A Yes.

19 Q Okay. And to make these measurements, you used a device you
20 call a flood gauge; is that correct?

21 A No.

22 Q What do you call the device?

23 A Staff gauge.

24 Q A staff gauge? Okay. And on the bottom of the staff gauge,
25 what does that look like?

1 A It's a solid pole.

2 Q It's a solid pole? There's no foot on the pole or anything
3 of that nature?

4 A No.

5 Q And to take your measurements that are contained in the
6 first column there as water, you would lower the pole into
7 the hole in the ice until you saw the tip of the pole
8 disappear; is that correct?

9 A No.

10 Q How would you describe when you stopped the pole to take the
11 measurement that's in the first column?

12 A I lowered the staff gauge into the hole until at the top of
13 the -- 'til I got the bottom of the staff gauge on the top
14 of the sediment.

15 Q And how did you know when the bottom of the staff gauge went
16 on the top of the sediment?

17 A Visually.

18 Q Visually. So you looked down and you saw the tip of the
19 pole in contact with a solid mass or a opaque mass?

20 A No.

21 Q You saw the tip of the pole in contact with something?

22 A With the top of the sediment.

23 Q And were you able to, looking -- when you were looking at
24 the tip of the pole, you were looking through a six-inch
25 hole in the ice; is that correct?

1 A Yes.

2 Q And looking down through that six-inch hole, were you able
3 to tell the difference between the top of the nepheloid
4 layer and the top of the sediment?

5 A Yes.

6 Q Did you consider the presence of a nepheloid layer there
7 before you took that observation on that day?

8 A Yes.

9 Q Let's go back to your site visit. How did you determine the
10 difference between the top of the nepheloid layer and the
11 top of the sediment looking down through a six-inch hole?

12 A I did not.

13 Q Thank you. Let's return to your March 31st site visit and
14 your project review report, which I believe is Exhibit 13 of
15 the Respondent's. Now, in paragraph five of this exhibit,
16 do you see -- it reads, "A permit is required under";
17 correct?

18 A Yes.

19 Q And there are several options for you to check?

20 A Yes.

21 Q And Part 301 is checked?

22 A Yes.

23 Q And that indicates that a permit is required under Section
24 301; correct?

25 A Yes.

1 Q And Part 303 is not checked; is that correct?

2 A Yes.

3 Q And looking down at the field review, the plants that you
4 observed in paragraph 8, that's your recordings of your
5 observations of the plants there; correct?

6 A Yes.

7 Q And you understand the statutory definition of a wetland;
8 correct?

9 A I do.

10 Q And a wetland is defined as -- characterized by the presence
11 of certain plants; correct?

12 A No.

13 Q No? If you have one wetland obligatory plant in an area, do
14 you consider that area a wetland?

15 A No.

16 Q So whether or not an area is a wetland depends on the
17 numerosity of the obligate plants; correct?

18 A Yes.

19 Q Okay. And in your observations in paragraph 8, did you note
20 the numerosity of the plants that you observed?

21 A Yes.

22 Q And where is that notation?

23 A It's listed under the dominant plants at the site. Thusly,
24 there had to be a dominance or predominance of these plants
25 on the site.

1 Q But you didn't notate how many of them, just your
2 observation that they were dominant; correct?

3 A Yes.

4 Q And you don't indicate where they are dominant at; correct?

5 A They're dominant on the site. That's why it's listed in my
6 PRR.

7 Q But specifically where on the site is not indicated;
8 correct?

9 A It's in the offshore area reviewed for the dredge project.

10 Q But there's no measurement of where exactly these plants
11 were seen; correct? As far as five feet out, ten feet out,
12 there's no measurement of that sort; correct?

13 A Correct.

14 Q Okay. Now, Ms. Schmidt, how do you define "anticipated"?
15 What does that mean to you?

16 MR. REICHEL: Objection; anticipated in what
17 context?

18 MR. HOFFER: Anticipated in the context of the
19 Part 303 permitting criteria.

20 MR. REICHEL: Which particular -- I think the
21 question is --

22 MR. HOFFER: In terms of anticipated activities.

23 Q What does that mean to you? First of all, would you agree
24 that --

25 MR. HOFFER: Am I --

1 JUDGE PATTERSON: Pardon?

2 Q Would you agree that "anticipated" is different than
3 "possible"?

4 MR. REICHEL: Yeah, I'm going to interpose an
5 objection. If this is -- if counsel is asking the witness
6 to describe her understanding of the word "anticipated" in
7 the context of a particular provision of Part 303 or its
8 administrative rules, I think it's appropriate for him to
9 identify specifically the context in which this question is
10 being posed.

11 MR. HOFFER: Your Honor, I believe I've identified
12 that context. It's in the context of anticipated activity
13 under Part 303.

14 JUDGE PATTERSON: It's 30311(D)?

15 MR. HOFFER: Excuse me?

16 JUDGE PATTERSON: 30311(D), I think; is that
17 correct? Let me check. It's either "C" or "D."

18 Q We'll just say in -- specifically in your project review
19 report in paragraph --

20 JUDGE PATTERSON: Here it is, 30311(D).

21 Q -- 11D --

22 MR. HOFFER: Thank you, your Honor.

23 Q -- would you agree that "anticipated" as used in that
24 section is different than "possible"?

25 A No.

1 Q No. So if something is just possible, then when you're
2 reviewing a permit application, you would check that as
3 anticipated?

4 A Can you repeat that question?

5 Q If an event was merely possible to happen in the future -- I
6 mean, there's a lot of things that could possibly happen
7 here in the future. Do you regard events that are simply
8 possible as an anticipated event under Section 303?

9 A I believe they go hand in hand.

10 Q They go hand in hand? Does the DEQ have any documentation
11 or criteria that is used to determine whether a activity is
12 anticipated or not for the same purpose?

13 A We do not.

14 Q You do not. So that is a judgment that you make yourself?

15 A As professional staff, that's correct.

16 Q Okay. And in your position, you have a duty to the State of
17 Michigan; correct?

18 A Yes.

19 Q And you cannot permit an activity that you believe will
20 cause adverse effects -- correct? -- depending on the
21 criteria?

22 A Yes.

23 Q And you wouldn't regard a permit that wouldn't be -- that
24 you would not issue as being anticipated?

25 A Can you repeat that?

1 Q Sure, that wasn't very clear. Would you regard a permit
2 that is not possible to be granted -- the activity that's
3 asked for under that permit, would you regard that activity
4 as anticipated?

5 A Yes.

6 Q So you would regard the activity that's asked for under an
7 application that cannot be granted as anticipated?

8 A Yes, I am not the final decision maker.

9 Q But you are the first decision maker?

10 A I am the first decision maker.

11 Q And that's a decision you have to make?

12 A Yes.

13 Q And that's a decision you made in this case?

14 A Yes.

15 Q Okay. Is it possible that a meteor will strike Missaukee
16 Lake next year?

17 A Can you repeat that?

18 Q Is it possible that a meteor will strike Lake Missaukee next
19 year?

20 MR. REICHEL: Objection; argumentative,
21 speculative.

22 JUDGE PATTERSON: I'll overrule. You may answer.

23 A Anything's possible.

24 Q Anything is possible. Is anything anticipated? Is the
25 meteor strike anticipated?

1 A I have no knowledge of that, of the basis for which -- that
2 you can anticipate a meteor hitting the lake.

3 Q So whether you anticipate something happening or not depends
4 on your knowledge of that?

5 A No.

6 Q No. And do you have firsthand knowledge of the home sales
7 in the Indian Lakes West development?

8 A Can you repeat that?

9 Q Do you have knowledge of the home sales in the Indian Lakes
10 West development?

11 A Yes.

12 Q And what knowledge do you have?

13 A I understand that there are for sale signs on the properties
14 and that three of the properties are no longer owned by
15 Indian Lakes West subdivision or Mr. Mohney.

16 Q Okay. Are you aware of how many lots have sold in the last
17 five years?

18 A No.

19 Q Thank you. And when you visited the site on May 31st of
20 '06, did you attempt to enter the water?

21 A No.

22 Q You did not. So all of your observations that are recorded
23 on your project review report of 5-31-06 were taken from
24 shore; is that correct?

25 A Yes.

1 Q And all of your observations of the plants were taken from
2 shore; correct?

3 A Yes.

4 Q And these were taken from the upland section? You were kind
5 of a little bit raised from the water level; is that
6 correct?

7 A No.

8 Q No? Where were you standing when you made these
9 observations?

10 A I made multiple observations while on site at different
11 locations along the shoreline.

12 Q Okay. Did you have any binoculars or similar devices with
13 you?

14 A No.

15 Q And how far out did you say you were able to observe
16 submergent vegetation?

17 A I didn't note that measurement -- that distance.

18 Q Didn't note that distance. So if you didn't note that
19 distance, then you can't say how far out there is submergent
20 vegetation based on that visit; correct?

21 A No.

22 JUDGE PATTERSON: That's not correct or --

23 Q Yeah, can you clarify that? You do --

24 A Can you restate your answer -- your question?

25 Q Sure. If you don't know how far out the submergent

1 vegetation is, then can you say how far out the submergent
2 vegetation is?

3 MR. REICHEL: Objection to the question. It's
4 illogical.

5 MR. SHAFER: Well, he'll strike that.

6 JUDGE PATTERSON: Well, what -- I'm trying to just
7 clarify whether she denied it was correct or denied that --

8 MR. HOFFER: Yeah, I was trying to clarify the
9 question.

10 JUDGE PATTERSON: I was confused by that.

11 MR. HOFFER: Okay.

12 Q If you didn't note the distance of the submergent
13 vegetation, then you have no way of knowing how far out it
14 was; correct?

15 A No.

16 Q Do you know how far the submergent vegetation went out?

17 A Yes.

18 Q And how far was that?

19 A It was contained within the entire dredge area.

20 Q So you were able to observe submergent vegetation 200 feet
21 out lakeward?

22 A No.

23 Q And the proposed dredge area extends 200 feet lakeward, does
24 it not?

25 A Yes.

1 Q So then you weren't able to observe submergent vegetation
2 within the confines of the proposed dredge area?

3 A Can you repeat the question?

4 Q Sure. You weren't able to -- you state that you were able
5 to observe submergent vegetation 200 feet out; is that
6 correct or incorrect?

7 A That's incorrect.

8 Q So you weren't able to observe submergent vegetation 200
9 feet out?

10 A Correct.

11 Q And the proposed dredge site extends 200 feet out; correct?

12 A Correct.

13 Q So there were areas in the proposed dredge site that you
14 were unable to tell whether or not there were submerged
15 vegetation?

16 A No.

17 Q The fact that you didn't observe submergent vegetation 200
18 feet out, is that because either you could see the bottom
19 200 feet out and there was no vegetation present or because
20 you couldn't see the bottom?

21 A Can you repeat that?

22 Q Sure. When you looked out and you can't say whether there
23 is submerged vegetation at 200 feet out, is that because you
24 looked out, you could see the bottom 200 feet out and there
25 was no vegetation there or was it because you looked out 200

1 feet and you just couldn't tell?

2 A I can't answer the question because it's compound. I can't
3 answer that "yes" or "no" because it's a compound question.

4 Q Could you see the absence of vegetation at 200 feet out?

5 A No.

6 Q Could you see the presence of vegetation 200 feet out?

7 A Yes.

8 Q And when you saw this vegetation 200 feet out, where were
9 you standing?

10 A Along the shoreline.

11 Q Were you standing on the same level as the surface or were
12 you standing upland?

13 A I was standing in the upland.

14 Q And you're standing upland. How far above the lake surface
15 do you believe that you were approximately?

16 A I didn't measure that.

17 Q You didn't measure that? What would be your best guess,
18 your estimate?

19 A Three feet.

20 Q Three feet? So your best estimate is that you were standing
21 three feet above the surface and you're telling me standing
22 three feet above the lake surface at a distance of 200 feet
23 out, you were able to see vegetation on the top of the
24 sediment?

25 A No.

1 Q Okay. Now, when you made the site visit on the same day,
2 did you examine the soils deposit site as well?

3 A The same day as what?

4 Q The same day as your project review report -- your 5-31-06
5 review report.

6 A Just visually.

7 Q Just visually? Did you discuss the spoils deposit site at
8 that time with Mr. Boughner?

9 A I did.

10 Q And did you note any objections to the spoils deposit site
11 at that time?

12 A No.

13 Q Did you make any recommendations as to the soils deposit
14 site at that time?

15 A We discussed having a channel to decant the water back to
16 the lake.

17 Q Okay. Now, if I can direct your attention back to the
18 denial letter that is Respondent's Exhibit 14, on the bottom
19 of the first page, do you agree that it states, "The DEQ
20 finds the following" and then "A feasible and prudent
21 alternative is available"?

22 A Could you repeat that?

23 Q Does the first page of this denial letter reflect the DEQ's
24 finding that a reasonable and prudent alternative is
25 available?

1 A No.

2 Q Do you see on the bottom of the page a sentence which
3 starts, "The DEQ finds the following"?

4 A Yes.

5 Q Can you read that sentence and the next two sentences?

6 JUDGE PATTERSON: I'm sorry, Counsel. What page
7 are we on?

8 MR. HOFFER: We are on page 1 of the July 7th,
9 2006 denial letter, which is Exhibit 14 of the Respondent's,
10 down at the bottom where the sentence starts, "The DEQ finds
11 the following."

12 A What would you like me to read?

13 Q Can you read from, "The DEQ" to two lines down, "available"?
14 Can you read everything in between there?

15 A "The DEQ finds the following: The adverse impacts
16 to the public trust and the environment are not
17 minimal. A feasible and prudent alternative is
18 available."

19 Q So you represented that the DEQ found that a reasonable and
20 prudent alternative is available?

21 A No.

22 MR. REICHEL: Objection; lack of foundation.
23 Counsel keeps substituting the word "reasonable" for
24 "feasible."

25 MR. HOFFER: I'll rephrase.

1 JUDGE PATTERSON: Okay.

2 Q So you represented that the DEQ found a feasible and prudent
3 alternative is available?

4 A Yes.

5 Q Okay. Now, can you please turn to the third page of the
6 denial letter? In the first paragraph -- actually, can you
7 just read the first paragraph for me?

8 A "The Land and Water Management Division believes
9 that feasible and prudent alternatives exist which
10 would lessen or eliminate the negative impacts of the
11 project as proposed. As an alternative, we suggest
12 that you consider extending the proposed seasonal dock
13 to achieve minimum water depth required for typical
14 watercraft on Lake Missaukee. The dock, however,
15 cannot impact public navigation on Lake Missaukee or
16 impact adjacent riparian interest areas."

17 Q Okay. The paragraph I just had you read, that indicates
18 that the dock needs to be long enough to achieve boatable
19 waters -- correct? -- that you're proposing as an
20 alternative a longer dock that would extend out into
21 boatable waters; correct?

22 A Can you repeat that?

23 Q As an alternative, you suggest extending a dock that would
24 be of sufficient length to reach navigable water; is that
25 correct?

1 A Yes.

2 Q In the next sentence, you say that although you have to
3 extend it out into navigable water, it can't be so long as
4 to impede public navigation; correct?

5 A Yes.

6 Q So there exists a possibility that the length of dock you
7 would need to extend out to navigable water would be so long
8 as to impede public navigation?

9 MR. REICHEL: Objection; lack of foundation.

10 MR. HOFFER: I'll rephrase.

11 JUDGE PATTERSON: Okay.

12 Q The second -- or the last sentence here states that the dock
13 cannot be so long as to impede public navigation; correct?

14 A Yes.

15 Q And there exists the possibility that the length of dock
16 required to reach navigable water could impede public
17 navigation; correct?

18 MR. REICHEL: Objection; lack of foundation.

19 There is no evidence to support the predicate of the
20 question that in order to achieve access to boatable waters
21 that it would impede public navigation.

22 MR. HOFFER: Your Honor, I'm not asking that --
23 I'm not suggesting that this says there has to be such a
24 situation, but just that one exists. It's a theoretical as
25 opposed to, you know, stating that an actual situation

1 exists.

2 MR. REICHEL: Well, again, I still think there's
3 no foundation on the record for this or in the department's
4 writing that she's been cross-examined about. Further to
5 the extent he's asking the witness to speculate, I don't
6 think it's relevant.

7 JUDGE PATTERSON: Counsel, are you just asking if
8 it's possible that a dock could impede navigation under any
9 circumstances?

10 MR. HOFFER: Yeah.

11 Q Can a dock be so long as to impede navigation?

12 A Yes.

13 Q Okay. How long of a dock do you think would impede
14 navigation?

15 JUDGE PATTERSON: In this instance?

16 Q In this instance.

17 A I believe it would have to get out beyond the -- to extend
18 beyond the wetland area on this site.

19 Q So anything that extends beyond wetlands will therefore
20 impede navigation; correct?

21 A No.

22 Q So how long would a dock be on this site where it would
23 begin to impede navigation?

24 A It would have to extend a considerable distance past the
25 wetland on this site, not just at the edge of the wetland.

1 Like, it's not something --

2 Q So to impede navigation, this dock would have to extend past

3 the wetland?

4 A Yes.

5 Q Okay. And how far out at this site would one have to go to

6 reach boatable waters --

7 A Can I reference my water depths?

8 Q -- without any dredging? Yes, you may reference.

9 A Can you repeat your question?

10 Q How far out would a boat -- or a dock have to extend from

11 lot 8 to reach navigable water?

12 A 100 feet.

13 Q And that is based on?

14 A My depth measurements taken on February 28th of 2007.

15 Q And what do you note the depth being there?

16 A At 100 feet it's two feet seven-eighths.

17 Q And you're aware that the water level fluctuates on Lake

18 Missaukee; correct?

19 A Yes.

20 Q And are you aware that it can fluctuate over a foot?

21 A No.

22 Q If the water could fluctuate over a foot, how far out would

23 a boat (sic) have to extend to achieve navigable water?

24 A 200 feet.

25 Q 200 feet?

1 A Uh-huh (affirmative).

2 Q And that is based on what?

3 A My water depth measurements taken on February 28th of 2007.

4 Q And what is the depth at 200 feet?

5 A 3.9 feet.

6 Q Okay. And are you -- your depth measurements also reflect
7 that the bottom undulates; correct? It's not a smooth
8 gradient from the shoreline out into the lake?

9 A Correct.

10 Q It rises in certain places?

11 A Yes.

12 Q And lowers in certain places?

13 A Yes.

14 Q And it's possible that there will be places that the bottom
15 sediment rises to where it impedes navigation?

16 A Yes.

17 Q Thank you. Now, you indicated that the project would
18 imperil the surrounding wetlands in the area; correct?

19 A Could you repeat that?

20 Q You stated that the project as proposed would imperil the
21 surrounding wetlands in the area, that it would be an impact
22 on the surrounding wetlands in the area; is that correct?

23 A What are you referencing?

24 Q I'm referencing your Part 303 criteria and your earlier
25 testimony that dredging at this part in the wetland could

1 have a negative effect on adjacent wetlands. Do you recall
2 that?

3 A Yes.

4 Q And what specific negative effects do you cite?

5 A The elimination of a habitat would then leave a gap within
6 the wetland along the shoreline which would therefore
7 eliminate habitat for waterfowl, macroinvertebrates,
8 fisheries and small mammals.

9 Q And how do you measure the amount of impact this will have?

10 A Can you repeat that question or clarify?

11 Q I mean, when you're determining whether a gap in habitat is
12 minimal or non-minimal, what type of measurements do you
13 take?

14 A When we do the site inspection, we note all of the natural
15 resources that are at the site. So we would note the plants
16 that are there, the habitats that they make up and that
17 would be the measurements that we would take to determine
18 the impacts to the natural resources.

19 Q So which measurements determine whether a gap in the habitat
20 is significant or not? Let me rephrase. Does the DEQ have
21 any criteria to determine when a gap in the wetland is
22 significant or is not significant?

23 A No.

24 Q No. Does the DEQ have any other documents generally to
25 determine whether an adverse impact is minimal or

1 non-minimal?

2 A Yes.

3 Q And what are those guidelines?

4 A The permit review criteria found in each statute.

5 Q So let's look at those. That's Respondent's Exhibit 13.

6 How about paragraph 18, line A, "Would the project adversely

7 affect riparian rights"? Do you have criteria for that

8 decision?

9 A Yes.

10 Q What are those criteria?

11 A Riparian rights are defined in the statute and any adverse

12 impact to those given riparian rights would be reviewed for

13 to determine that answer.

14 Q So you're saying that any impact on riparian rights is

15 viewed as significant?

16 A No.

17 Q So there's a difference between "any" and "significant"?

18 A Yes.

19 Q And what criteria do you use to determine whether they just

20 impact those riparian rights or whether they significantly

21 impact those rights?

22 A Can you repeat that?

23 Q What criteria do you use to determine whether a project will

24 just affect riparian rights or will significantly negatively

25 affect riparian rights?

1 A We use professional judgment. We incorporate -- we have
2 guidance documents that help us direct reviews for certain
3 common projects. We use -- the professional reviews done at
4 other sites, knowing what possible impacts there could be to
5 riparian rights, would all be incorporated into review for
6 impacts -- adverse impacts for riparian rights.

7 Q So professional judgment, that is basically the same as
8 discretion; correct? It's in your discretion?

9 A Yes.

10 Q And professional judgment is subjective; correct?

11 A Yes.

12 Q Okay. So when you look at all the impacts of the proposed
13 project, what guidelines do you use to determine whether
14 those impacts, even if they exist, are significant? So once
15 you've identified an impact, how do you determine whether
16 that impact is significant?

17 MR. REICHEL: Objection to the form of the
18 question. It's not clear which -- the phrase "significant
19 impact" is being used in a broad sense -- which of the
20 particular decisional criteria under either Parts 301 or 303
21 this question is directed to and where in those criteria the
22 term "significant" appears or does not appear.

23 MR. SHAFER: He'll rephrase.

24 JUDGE PATTERSON: Okay.

25 MR. HOFFER: I'll rephrase.

1 Q And to clarify, the permitting criteria is minimal or
2 non-minimal; correct?

3 MR. REICHEL: Again, objection. I mean, you're
4 asking the witness to refer to the criteria as minimal or
5 non-minimal. Unless the question is stated with a degree of
6 specificity that directs the witness' attention to a
7 particular criterion under either 301 or 303 or their
8 associated rules, I think the form of the question is
9 objectionable and can only engender confusion of the record.

10 JUDGE PATTERSON: I agree.

11 MR. HOFFER: Okay. Let's rephrase.

12 Q In your Rule 281.814(a), what criteria do you use to
13 determine whether the adverse impacts to the environment
14 will be minimal?

15 A Can I review a copy of Part 301?

16 Q Sure. This is actually the administrative rule just to --

17 MR. REICHEL: May I approach?

18 JUDGE PATTERSON: Sure.

19 MR. REICHEL: I'm handing the witness an
20 excerpt -- for the record, I'm handing the witness an
21 excerpt from the promulgated rules under Part 301.

22 A Can you repeat your question?

23 Q Sure. Under Rule 281.814(a), what criteria do you use to
24 determine whether the impacts -- to determine whether the
25 adverse impacts to the environment will be minimal?

1 A I'm sorry. Can you repeat the first part of that? I didn't
2 catch the first part.

3 Q Well, first, under this rule, you have to -- under rule
4 281.814(a), you first have to identify an adverse impact;
5 correct?

6 A No.

7 Q You have to determine whether a adverse impact to the
8 environment will be minimal; correct?

9 A Yes.

10 Q And before an adverse impact to the environment can be
11 minimal or non-minimal -- or can be non-minimal, you first
12 have to identify an adverse impact; correct?

13 A Yes.

14 Q Okay. So once you've identified an environmental impact,
15 how do you determine whether or not that impact is minimal?

16 A What was your question?

17 Q Once you've identified an impact or an adverse impact on the
18 environment, how do you determine whether or not that impact
19 will be minimal?

20 A As I've previously stated, we go out and we review the
21 natural resources on the site that will be impacted. We use
22 professional judgment to compare that to other projects that
23 we've permitted and use any consistency guidelines that are
24 offered for that project.

25 Q Okay. Can you describe your consistency guidelines?

1 A Yes.

2 Q What are they?

3 A It is a guide developed by the division to administer the
4 statutes when reviewing certain common projects.

5 Q Okay. So you compare the projects to other projects that
6 have either been permitted or non-permitted; correct?

7 A Yes.

8 Q Were there any consistency guidelines with respect to this
9 project?

10 A Yes.

11 Q And what were your findings?

12 A That the project was not minimized and the impacts to -- the
13 fact that there was wetlands within the dredge area would
14 automatically require that we minimize the impacts to that
15 wetland resource and -- which did not occur with the
16 applicant's submission of plans nor would they modify the
17 plans to minimize those impacts to the resources.

18 Q But your consistency guidelines relate to this project
19 compared with other projects -- right? -- or other
20 applications?

21 A Yes.

22 Q Okay. So did you compare this application to any other
23 applications or granted permits?

24 A Yes.

25 Q Which projects did you compare this project to?

1 A Through my professional work in the division reviewing
2 dredging projects, which is nearly 100, those are all of the
3 projects that I have reviewed this project against.

4 Q So you reviewed this project against the -- or in comparison
5 to the Tom's Bay project?

6 A I did not work on that project.

7 Q You did not work on that project. That project is part of
8 your files?

9 A It is part of our division files; correct.

10 Q And you review those files as part of your consistency
11 determination; correct?

12 A No.

13 Q At the time of your denial letter, are you aware of what the
14 status was of the Tom's Bay application?

15 A Yes.

16 Q And what was that status?

17 A A permit had been issued after a contested case decision.

18 Q What date was that final determination and order issued?

19 A I don't know.

20 Q You don't know? Can you turn to Petitioner's Exhibit 39?

21 A Okay.

22 Q Can you identify -- there's a subject heading on top, the
23 second paragraph. Can you identify the name and a file
24 number there?

25 A Yes.

1 Q And what is that?

2 A Petition of Tom's Bay Association, file number

3 04-57-00091-P.

4 Q Okay. And what is the heading below the line?

5 A "Final determination and order."

6 Q And on page three, do you see a signature?

7 A I do.

8 Q Whose signature is that?

9 A Director of the DEQ, Stephen Chester.

10 Q And do you see a date?

11 A I do.

12 Q What is that date?

13 A July 24th of 2006.

14 Q And do you recall the date of your denial letter to --

15 excuse me -- in Missaukee Lakes Master Homes?

16 A Yes.

17 Q And was that July 7th, 2006?

18 A It was.

19 Q So the final determination in Tom's Bay came out after your

20 denial of the Missaukee Lakes Master Homes application;

21 correct?

22 A Yes.

23 Q Okay. Did you discuss this project with Mr. Arevalo after

24 the denial letter?

25 A Yes.

1 Q You had meetings with Mr. Arevalo and the applicants --
2 correct? -- or their agents?

3 A Can you say that again? I'm sorry. There was a --

4 Q You had a -- after the denial letter, you had meetings with
5 Dale Boughner; correct?

6 A Yes.

7 Q Okay. And did you also meet with John Arevalo or any other
8 DEQ staff?

9 A Yes.

10 Q And did you ever discuss the Tom's Bay decision as part of
11 your discussions?

12 A Yes.

13 Q Did you ever consider that in relation to this application?
14 Did you ever consider the Tom's Bay final determination and
15 order in relation to this application?

16 A Yes.

17 Q And what were those discussions? What was said? What was
18 the determination that you came up with as to how the Tom's
19 Bay matter affected this petition or this application?

20 A I didn't think that it had any bearing on this application
21 review.

22 Q Have you reviewed the file on Tom's Bay?

23 A No.

24 Q Are you aware as to whether or not there was submergent
25 vegetation present in Tom's Bay?

1 A No.

2 Q No? Are you aware as to whether a Part 303 permit was
3 required in Tom's Bay?

4 A Yes.

5 Q And what is your knowledge?

6 A A Part 303 permit was not required under Tom's Bay permit.

7 Q Are you aware of any permits on Lake Missaukee within the
8 last 10 years where a Part 303 permit was required other
9 than the present application?

10 A Can you repeat that, please?

11 Q Sure. Were there any applications within the last 10 years
12 to the DEQ for dredging permits on Lake Missaukee that
13 required a 303 determination other than this application and
14 the Indian Lakes application?

15 A No.

16 Q And your answer is there is no -- none were required; is
17 that correct?

18 A No.

19 Q What does your answer "no" mean?

20 A You asked me if I was aware of any permit applications that
21 required a permit for dredging under 303 and I said "no."

22 Q Okay. Thank you. And on your 5-31-06 site visit, you spoke
23 with Mr. Boughner about reasons for the proposed project;
24 correct?

25 A Yes.

1 Q And did Mr. Boughner at that time discuss swimming with you?

2 A Yes.

3 Q And did he discuss the use of personal watercraft?

4 A Yes.

5 Q Okay. Now, as part of this project, you considered the

6 impact on wetlands; correct?

7 A Yes.

8 Q Did you consider lake succession as part of your impacts on

9 wetlands?

10 A No.

11 Q And you would agree that as the wetlands -- or that lake

12 succession is a process by which wetlands turn into

13 non-wetlands; correct?

14 MR. REICHEL: Objection; lack of foundation.

15 Q Are you familiar with the concept of lake succession?

16 A Yes.

17 Q And as -- part of the concept of lake succession is the idea

18 that wetlands can fill in and become non-wetlands?

19 MR. REICHEL: Again, objection; lack of

20 foundation.

21 MR. HOFFER: We're just asking her if she knows.

22 JUDGE PATTERSON: Okay. Go ahead. I'll overrule.

23 A I'm sorry. Can you repeat the question?

24 Q Sure. Are you aware that part of lake succession is

25 wetlands filling in and turning in to terrestrial uplands?

1 A Yes, the scale for which that happens is so extensive that
2 it's rarely considered within a review application for my
3 daily job.

4 Q Do you think that the time frame in which that occurs is
5 noticeable in one's lifetime?

6 A No.

7 Q Have you ever seen a soil map of the area around Lake
8 Missaukee?

9 A Yes.

10 Q And do you recall the information contained on that soils
11 map?

12 A No.

13 Q No? If you were able to look at that soils map now, would
14 you be able to -- would you possibly be able to determine
15 what substrate underlies the muck at lot 8?

16 A I'm unsure of what it would show there, so I can't answer
17 that question.

18 Q Okay. Ms. Schmidt, you are not an engineer; correct?

19 A No, I'm not an engineer.

20 Q And you've never conducted structural studies?

21 A Structural studies?

22 Q The strength of structures or tendency to stay up or fall
23 down?

24 A No.

25 Q How are you able to determine how long the dredged channel

1 would stay if conducted as proposed before it would fill in?

2 A Based on the information provided in the application,
3 discussions with Mr. Boughner, onsite inspection of the
4 conditions on the sites and knowledge of similar projects
5 and conditions at other lakes.

6 Q Okay. And when you were onsite, your views of the bottom
7 sediment were from shore; correct?

8 A Yes.

9 Q And you described the bottom sediment as loose and
10 unconsolidated; correct?

11 A Yes.

12 Q And when you made those observations, how did you determine
13 the difference between the bottom sediment and the nepheloid
14 layer?

15 A I didn't.

16 Q Didn't. Thank you. And you claim that the project site is
17 dense in macrophytes; correct?

18 A Yes.

19 Q And have you ever navigated a boat through dense
20 macrophytes?

21 A Yes.

22 Q And would you describe that as difficult? Well, let me
23 rephrase. Would you say that navigating a motor powered
24 boat through dense macrophytes can be difficult?

25 A Yes.

1 Q And those macrophytes can tangle in the propeller; correct?

2 A Yes.

3 Q Wasn't one of the alternatives that you proposed to Mr.

4 Boughner for this application -- wasn't one alternative that

5 he dredge a narrower channel?

6 A Yes.

7 Q And you believe that these dredge areas will fill in?

8 A Yes.

9 Q And isn't it likely that a narrower channel will fill in

10 more readily than a larger channel?

11 A Yes.

12 Q And that would require maintenance dredging in the future,

13 wouldn't it?

14 A Yes.

15 Q And it's possible that a narrower channel could require more

16 maintenance dredging than a larger channel?

17 A Yes.

18 Q Okay. Part 301 requires you to determine whether a project

19 is feasible -- whether feasible and prudent alternatives

20 exist; correct?

21 A Yes.

22 Q And how do you determine whether a project is feasible?

23 A That term has been defined through a court case and it's

24 being possible to feasible -- or possible to be accomplished

25 or conducted.

1 Q Okay. And how do you determine prudent?

2 A Prudent is also a defined term and prudent is something
3 that's reasonably -- could be reasonably, you know,
4 completed or conducted.

5 Q And safety would be a consideration for prudent, wouldn't
6 it?

7 A Yes.

8 Q And if two projects were otherwise identical, the safer
9 project would be preferred; correct?

10 A No.

11 Q Okay. In this permit application, what did you find the
12 feasible and prudent alternative to be in regards to
13 swimming?

14 A A swim platform offshore in deeper water.

15 Q And how deep would that swim platform need to be?

16 A It depends on what depth they want to be able to swim in.

17 Q How would you expect children to reach that swim dock?

18 A A ladder.

19 Q From shore.

20 A From shore?

21 Q Yes.

22 A They would have to either go out in a boat or something like
23 that.

24 Q And where would they get in that boat?

25 A From the dock or as they've been doing, launching from the

1 county park and going over.

2 Q And they would have to then paddle or motor out to the swim
3 dock; is that correct?

4 A That would be one way of getting out there, yes.

5 Q And what about wading? What is your reasonable and prudent
6 alternative for wading?

7 MR. REICHEL: Objection; lack of foundation. It's
8 not established on this record that the primary project
9 purpose necessarily includes wading at this site.

10 MR. HOFFER: Your Honor, wading is within the
11 riparian rights enumerated by the Michigan court cases.

12 MR. REICHEL: Well, of course, I'm not sure that
13 wading is. Riparian rights, as a matter of law, first under
14 the regulatory scheme are subject to the public trust.
15 Secondly, riparian rights are by definition under
16 established case law permitted to reasonable use under the
17 circumstances. There is not under Michigan law, I submit,
18 any proposition that establishes that any riparian property
19 owner has an absolute right to modify a lake bottom or
20 dredge a wetland in order to have their children wade at
21 that particular location.

22 MR. HOFFER: Your Honor, we're not saying whether
23 they had the right to dredge for it, but whether they have
24 the right to that activity generally.

25 MR. SHAFER: Do you want the citations for wading

1 as being a riparian right? Because I can give them to you
2 right now.

3 JUDGE PATTERSON: No, I don't need that, Counsel.

4 MR. SHAFER: Thank you, your Honor.

5 JUDGE PATTERSON: I'll overrule the objection.

6 A Can you repeat your question?

7 Q Sure. What did you find to be a reasonable and prudent
8 alternative for wading? First, do you understand what
9 "wading" means?

10 A I do. I didn't determine any alternative for wading.
11 It's -- the shoreline that this person bought is a wetland
12 shoreline that's not sandy. It's not really conducive to
13 swimming. I think it's unsafe for swimming. And so
14 anything like that that they would want to do along the
15 shoreline is hindered by the fact that they have a wetland
16 shoreline.

17 Q And do you consider using public boat launches and beaches a
18 reasonable and prudent alternative for exercising one's
19 riparian rights?

20 A Is it a feasible and prudent alternative? Yes.

21 Q Can you one final time turn to Respondent's Exhibit 14? On
22 page 2, near the middle of the page, do you see, "The DEQ
23 finds the following" and then four indented paragraphs?

24 A Yes.

25 Q Okay. Can you read me the second paragraph?

1 A "The proposed project will cause an unacceptable
2 disruption to the aquatic resource. The activity is
3 not dependent upon being located in a wetland and a
4 feasible and prudent alternative exists."

5 Q And you said earlier that whether or not something is
6 dependent on being in a wetland has to do with whether
7 wetland hydrology is required -- a part of the wetland
8 hydrology is required?

9 A Yes, that was part of my answer to a previous question.

10 Q And part of wetland hydrology is water, isn't it?

11 A Yes.

12 Q And water is required for swimming, isn't it?

13 A Yes.

14 Q Okay. Can you read me the next paragraph?

15 A "The probable impact of each proposal in relation to the
16 cumulative effect created by other existing and anticipated
17 activities in the watershed."

18 Q And what does that mean?

19 A It's a criteria that we review for -- to look at the
20 cumulative effect within that watershed of existing and
21 anticipated activities.

22 Q What is each proposal?

23 A It would be what the applicant is proposing in the
24 application.

25 Q In making these findings on page 2 of the denial letter, did

1 you undertake any experiments?

2 A No.

3 Q You were here for Dr. Lehman's testimony yesterday; correct?

4 A Yes.

5 Q And you didn't undertake any experiments similar to the

6 experiments undertaken by Dr. Lehman?

7 A No.

8 Q And you didn't undertake any experiments to determine the

9 productivity of the wetland?

10 A No, we don't do chemical analysis of the water to determine

11 whether or not we'd issue a permit.

12 Q Do you look at the presence or absence of -- or, excuse

13 me -- macroinvertebrates?

14 A Yes.

15 Q Did you do that in this case?

16 A Yes.

17 Q When did you do that?

18 A When I was on site.

19 Q What did you find?

20 A The habitat there is consistent with the habitat where

21 macroinvertebrates would live on the plants and in the soil

22 as well as those insects that would hang on the top of the

23 water surface.

24 Q But you weren't able to find any actual invertebrates, were

25 you?

1 A Invertebrates?

2 Q You weren't able to find any living creatures in the
3 sediment; correct?

4 A I didn't look at the sediment for macroinvertebrates.

5 Q You never examined the sediment?

6 A Nope.

7 MR. HOFFER: That's all we have for now.

8 JUDGE PATTERSON: Okay. Redirect?

9 MR. REICHEL: I do have some redirect.

10 JUDGE PATTERSON: Okay.

11 MR. REICHEL: I note it's 12:15. Do we want to
12 take a break for lunch here or --

13 JUDGE PATTERSON: Do you want to do that before?
14 That's fine. Let's do that.

15 (Off the record)

16 JUDGE PATTERSON: Go ahead.

17 REDIRECT EXAMINATION

18 BY MR. REICHEL:

19 Q Ms. Schmidt, I'd like to go over a few of the issues that
20 were raised on cross-examination by Petitioner's counsel.
21 You were asked a series of questions about your observations
22 at the site of wetland vegetation offshore at varying
23 distances. Do you recall that, being asked about where you
24 saw or didn't see submerged wetland plants? Do you recall
25 the series of questions?

1 A Yes; yes.

2 Q Okay. So the record is clear on this, first of all, when
3 you -- in your site review and in your review of this, when
4 you talk about wetland vegetation at this site that you
5 observed, are there more than one category or type of
6 wetland vegetation?

7 A Yes.

8 Q And could you describe again what those are?

9 A The vegetation in a marsh and a lake like this will have
10 different plant types based on, you know, where they're --
11 so there will be emergent plants that grow up from the
12 ground through the water or in the near shore area that will
13 grow up through. There will be stuff that's submerged which
14 is attached in the bottom of the lake bed and will grow up
15 not through the water surface. There will also be floating
16 vegetation which is rooted to the bottom and then the leaf
17 part of it will extend up to the top of the surface of the
18 water.

19 Q Okay. So when you've testified in this matter that you
20 observed wetland plant types or vegetation at 200 feet
21 offshore, what category or categories that you just
22 described were you referring to?

23 A I was referring to the floating type of wetland plants.

24 Q And so when you talked about seeing things at 200 feet
25 offshore, were you referring to observing submerged plants?

1 A No.

2 Q I'd like to direct your attention to DEQ Exhibit Number 24.

3 You were asked some questions about that on

4 cross-examination. As you recall, this is the table

5 reflecting the data that you compiled on February 28th of

6 this year; is that correct?

7 A Yes.

8 Q Counsel asked you some questions about a portion of this

9 exhibit at the bottom where there is a line with the legend

10 "wetland" next to it. Do you see that?

11 A Yes.

12 Q And the space of 10 feet between that line and another line?

13 A Yes.

14 Q Okay. Could you explain what you were attempting to depict

15 with regard to this portion of this exhibit?

16 A When I was out there in February of this year, it was snow

17 covered. So I was doing my best to approximate where --

18 when I described the site conditions, I said you would walk

19 from the upland down towards the lake, it would drop and

20 then you would get this bank -- short bank before you would

21 drop into the wetland landward of the water's edge. And

22 that's what I was trying to share with the shoreland

23 approximate. And then I was trying to show where I could

24 see some emergence, you know, the best I could through the

25 snow where that line would be for the wetland. But this

1 (indicating) is not my wetland delineation for the site.
2 That was done in May.

3 Q You were also asked on cross-exam a series of questions
4 having to do with the possibility that extending a dock from
5 the shore of lot 8 at some length might possibly interfere
6 with public navigation of the lake. Do you recall being
7 asked about that?

8 A Yes.

9 Q Okay. Just to clarify your testimony on that point, is it
10 your testimony or observation that extending a dock 200 feet
11 out from the shore would interfere with navigation?

12 MR. HOFFER: Objection; leading.

13 MR. REICHEL: Okay.

14 Q Have you reached a conclusion as to whether or not extending
15 a dock 200 feet offshore would or would not interfere with
16 public navigation on Lake Missaukee?

17 A Yes.

18 Q And what is that conclusion?

19 A It would not impact public navigation on the lake.

20 Q And with respect to -- strike that. You were also asked on
21 cross-examination about the alternative of possibly dredging
22 a narrower channel through sediments than the 50-foot wide
23 channel proposed in the permit application. Do you recall
24 being asked about that?

25 A Yes.

1 Q And do you recall being asked about whether or not, if that
2 alternative were pursued, it might require more maintenance
3 dredging; do you recall that?

4 A Yes.

5 Q Let me break this down into two parts. Would the -- if the
6 channel were narrower, I believe you testified on
7 cross-examination -- I think you said -- testified to the
8 effect that that might lead to the narrower channel filling
9 in or re-filling in with sediments more quickly than a wider
10 channel. Is that the substance of your testimony?

11 A Yes.

12 Q So if that were the case, what effect would that have on how
13 often or how frequently maintenance dredging might be
14 required?

15 A It would likely be required more frequently.

16 Q Okay. But with respect to under that scenario of a narrower
17 channel, to the extent maintenance dredging would be
18 required, would the volume of dredging, material to be
19 dredged and the area affected by the dredging be greater or
20 lesser in comparison to the wider --

21 MR. HOFFER: Objection; foundation.

22 MR. REICHEL: What was the objection?

23 JUDGE PATTERSON: Foundation --

24 MR. HOFFER: Foundation.

25 JUDGE PATTERSON: -- or lack thereof.

1 Q Let me ask you this: If the alternative of a narrower
2 channel; that is, a channel narrower than 50 feet wide; were
3 pursued and maintenance dredging were to occur, how
4 extensive of an area would be affected by the maintenance
5 dredging in comparison to dredging to maintain a 50-foot-
6 wide channel?

7 A The area would be less because the channel would be narrower
8 and that would impact less habitat every time they had to
9 dredge to maintain that.

10 Q You were also asked some questions on cross-examination
11 about wetland dependence -- do you remember being asked
12 about that? -- of various activities?

13 A Yes; yes.

14 Q I believe you were asked something to the effect of whether
15 swimming or wading would depend upon the presence of water.
16 Do you recall being asked that?

17 A Yes.

18 Q On that issue and in your experience in applying the Part
19 303 decisional criteria, is it or is it not the case that
20 swimming or wading depends upon water in a wetland? Or
21 maybe I should restate that question.

22 A Yeah.

23 Q In order to swim or wade -- to swim or wade, you need water;
24 correct?

25 A Yes.

1 Q Does that water have to be in a wetland?

2 A No.

3 MR. REICHEL: Nothing further.

4 MR. PHELPS: Nothing further.

5 MR. HOFFER: Redirect?

6 RECROSS-EXAMINATION

7 BY MR. HOFFER:

8 Q Ms. Schmidt, did you speak to the attorney general over
9 lunch about your testimony?

10 A Yes.

11 Q And were you in any way told how he would prefer the answers
12 to be?

13 A No.

14 Q No? What did you talk about?

15 A Talked about how well he thought I was doing and what topics
16 we might cover for redirect.

17 MR. SHAFER: Your Honor, is that appropriate in
18 this type of a proceeding? In the courts that I practice
19 in, that's not appropriate when a witness is on the stand,
20 under oath and is still testifying, you can't talk to a
21 witness during a break. Now, if that's appropriate here,
22 that's fine.

23 JUDGE PATTERSON: I don't see anything
24 inappropriate abb that, no.

25 MR. SHAFER: Okay.

1 JUDGE PATTERSON: Happens all the time.

2 Q And you did talk about your anticipated testimony after the
3 lunch; correct?

4 A Is "testimony" defined on what I was exactly going to say?

5 Q Just in general, the topics.

6 A I already said that we talked about what topics might come
7 up during the redirect.

8 Q And was that the extent of it, just what topics might come
9 up during redirect?

10 A Yes.

11 Q Okay. Ms. Schmidt, how tall are you?

12 A 5'7".

13 Q And if I can direct you back to Exhibit Number 24 -- are you
14 there?

15 A Yup.

16 Q Okay. On the bottom right-hand corner there is text that
17 says, "Revised December 11th, 2007"; correct?

18 A Correct.

19 Q And that shows that you revised this on that day; right?
20 You were the person that revised this?

21 A Yes.

22 Q And there was an earlier version of this document; correct?

23 A Yes.

24 Q And that version was incorrect in some regards?

25 A Yes.

1 Q And those -- specifically it was incorrect in that it
2 depicted the muck as being much thicker than the muck
3 actually is?

4 A Yes.

5 Q Okay. And anybody else in the department that was using
6 your information up until December 11th, they would have
7 been using this unrevised version; correct?

8 A Yes.

9 MR. HOFFER: Your Honor, can I approach?

10 JUDGE PATTERSON: Sure.

11 MR. HOFFER: I'm wondering if everybody still has
12 a copy of the former versions because I'd like to admit this
13 into evidence but I'd like to have everyone's copy, too.

14 JUDGE PATTERSON: I don't think I have a copy of
15 the original.

16 MR. HOFFER: Would it be too much trouble --

17 JUDGE PATTERSON: Well, unless it's attached.

18 MR. SHAFER: It was originally in the DEQ's 24. I
19 don't know if your -- if you just took the revised one and
20 just added to that or you switched it out.

21 MR. REICHEL: I think we switched them out. We
22 have extra copies.

23 JUDGE PATTERSON: That's all I have is the revised
24 one.

25 MR. REICHEL: We can make those available. We

1 have no objection to that.

2 JUDGE PATTERSON: Okay.

3 Q And the document I just handed you, what is that?

4 A It's a copy of the diagram I put together to compile the
5 information I collected on February 28th, 2007, onsite.

6 Q And this is similar to the document that is now Exhibit 24;
7 is that correct?

8 A Yes.

9 Q And the only difference being the muck depth calculation?

10 A And the addition of the revision date.

11 Q Okay.

12 MR. HOFFER: Well, your Honor, I'd like to move to
13 admit this into evidence.

14 MR. REICHEL: No objection.

15 JUDGE PATTERSON: Okay. No objection. What was
16 it marked?

17 MR. SHAFER: Do we have a number?

18 JUDGE PATTERSON: What was the number on that?
19 Was it marked?

20 MR. SHAFER: No, not yet.

21 MR. HOFFER: 60 now? Petitioner's Exhibit 60?

22 MR. SHAFER: Is that what we're up to?

23 MR. HOFFER: Yeah, that would be Petitioner's
24 Exhibit Number 60.

25 (Petitioner's Exhibit 60 marked and received)

1 Q Okay. And very quickly for us, can you describe just the
2 mistake that was made and how the muck depth was
3 miscalculated?

4 A I failed to subtract the water from the muck depth that I
5 marked down in my field notes.

6 Q Okay. And can I direct your attention now to Defendant's --
7 or the Land and Water Management Division's Exhibit Number
8 25? Ms. Schmidt, do you have the color copies of that
9 version?

10 A Yes.

11 Q Okay. And on the first page there's a photograph labeled B;
12 is that correct?

13 A Yes.

14 Q And this depicts the lakeward area of lot 8; is that
15 correct?

16 A Yes.

17 Q And this accurately represents what you saw on May 31st; is
18 that correct?

19 A Yes.

20 Q And the surface of the water, is that smooth?

21 A It appears to have some waves or ripples in it.

22 Q And do waves -- waves and ripples can interfere with your
23 ability to see through the water surface, can't they?

24 A Yes.

25 Q And in this picture, do you see any submergent vegetation?

1 A No.

2 Q And past the -- you see in the front where there's the
3 bulrushes, I believe, they are? Is that what you would
4 characterize the vegetation near shore there?

5 A In part.

6 Q In part. Okay. Past that area, do you see any emergent
7 vegetation?

8 A Yes.

9 Q Can you circle it on the file copy?

10 A Maybe you need to define what edge of brushes that you were
11 speaking of so I can clearly answer the question.

12 Q Sure. Past this (indicating) area here.

13 A Thank you. What was your question?

14 JUDGE PATTERSON: I'm sorry. Where did he point?
15 I didn't see.

16 MR. HOFFER: Past here (indicating).

17 JUDGE PATTERSON: Okay. That's what I assumed,
18 but I wanted to make sure.

19 Q And past that area, can you identify any emergent
20 vegetation?

21 A No.

22 Q Okay. And you're familiar -- and outside of that same area,
23 do you see any floating vegetation?

24 A No. And as I mentioned in my previous testimony, it was
25 difficult to get a photograph of the floating vegetation

1 because it lays in the plane of the lake.

2 Q And you're familiar with the general characteristics of
3 emergent vegetation -- correct? -- on how to identify it in
4 the field?

5 A Yes.

6 Q And you're familiar with how to identify submergent
7 vegetation in the field; correct?

8 A Yes.

9 Q And do you often confuse emergent vegetation with submergent
10 vegetation?

11 A I do not.

12 Q Okay. Now, on to the testimony regarding swimming and
13 wading, you testified that it's not necessary to swim or
14 wade in a wetland; correct?

15 A Yes.

16 Q Now, if a person's entire shoreline is covered with wetland,
17 does that person have the ability -- that person does not
18 have the ability to swim or wade without swimming or wading
19 in a wetland; is that correct?

20 A I don't agree with that statement.

21 Q You don't agree?

22 A No.

23 Q You don't agree that if there is a wetland entirely lakeward
24 of a person's shoreline that a person can't wade out without
25 wading through the wetland?

1 A To that question, yes. I mean, he would have to wade out
2 through the wetland.

3 MR. HOFFER: Thank you.

4 JUDGE PATTERSON: Redirect?

5 MR. REICHEL: Just on that very last point.

6 FURTHER DIRECT EXAMINATION

7 BY MR. REICHEL:

8 Q Is it also -- the scenario that counsel last asked you
9 about, would it be possible for a person to get in -- to
10 gain access to the water through a dock or through a
11 flotation device?

12 A Yes.

13 Q Without actually wading through the wetland?

14 A Yes.

15 MR. REICHEL: Nothing further.

16 JUDGE PATTERSON: Thank you.

17 MR. REICHEL: Department calls as its next witness
18 Richard O'Neal.

19 REPORTER: Do you solemnly swear or affirm the
20 testimony you're about to give will be the whole truth?

21 MR. O'NEAL: I do.

22 RICHARD O'NEAL

23 having been called by the Respondent and sworn:

24 DIRECT EXAMINATION

25 BY MR. REICHEL:

1 Q Mr. O'Neal, could you please state your full name for the
2 record?

3 A Richard Paul O'Neal. Last name is O, apostrophe, N-e-a-l.

4 Q Thank you. How are you currently employed, sir?

5 A I'm a fisheries biologist with the Michigan Department of
6 Natural Resources.

7 Q And could you briefly describe to the administrative law
8 judge what your responsibilities are in that position?

9 A My responsibilities are managing basically fisheries
10 resources within public waters.

11 Q In your current position, Mr. O'Neal, are you assigned to a
12 particular geographic area of the state?

13 A I have a specific area that I do. It includes several
14 watersheds including the Muskegon River watershed.

15 Q And where is this project site located in relation to any of
16 those watersheds?

17 A It's located within the Muskegon River watershed.

18 Q I'd like you to turn to DEQ Exhibit Number 3 in the book of
19 exhibits.

20 MR. REICHEL: May I approach just to make sure he
21 has the right book?

22 JUDGE PATTERSON: Yeah; sure.

23 Q Do you recognize that document, sir?

24 A Yes.

25 Q And what is it?

1 A It's my Curriculum Vitae.

2 Q Is this something that you prepared?

3 A Yes.

4 Q Is it accurate to the best of your knowledge?

5 A Yes.

6 Q Okay. Let me ask you briefly to review your educational
7 background. What does that include?

8 A I have a master's degree in fisheries biology and limnology
9 and a bachelor's degree in chemistry.

10 Q And how long have you been professionally employed as a
11 fisheries biologist?

12 A I've been with the Department of Natural Resources for a
13 little over 20 years. And I've worked for Michigan State
14 University for about 5 years.

15 Q During the course of your professional training or
16 educational training, have you studied in the field of
17 limnology?

18 A Yes.

19 Q Has your work experience included reviewing issues involving
20 limnology?

21 A Yes.

22 Q And for how long?

23 A For my entire career.

24 MR. REICHEL: At this time, your Honor, I would
25 move that Mr. O'Neal be recognized as an expert witness in

1 the subjects of fisheries, biology and limnology.

2 MR. PHELPS: No objection.

3 MR. SHAFER: Could I just ask a couple of
4 questions on voir dire?

5 JUDGE PATTERSON: Sure.

6 VOIR DIRE EXAMINATION

7 BY MR. SHAFER:

8 Q Mr. O'Neal, I see that it says -- in your Curriculum Vitae,
9 Exhibit 3, it says BS and MS in fisheries, biology and
10 limnology from Michigan State University; is that right?

11 A That's correct.

12 Q Were both the BS and the MS both in biology and limnology?

13 A Yes.

14 Q Have you ever published any articles on limnology separate
15 and distinct from fish biology?

16 A No, I've not -- I guess I don't know exactly how to answer
17 that question, "separate and distinct." I do make some
18 summaries -- limnological summaries that are separate on
19 some waters, yes. And I don't know what you mean by
20 "published," I guess.

21 Q Well, you have some articles here that are published in your
22 Curriculum Vitae.

23 A Yes. Yes, I do.

24 Q These are all peer -- are these peer reviewed or are they
25 non-peer reviewed?

1 A These are peer reviewed, yes, in the department.

2 Q So I guess what my question is, do you have any articles
3 that have been published in regard to limnology that do not
4 deal specifically with fish biology?

5 A No.

6 Q And your position -- I believe you testified earlier your
7 position with the DNR is a fish biologist?

8 A Fisheries biologist, yes.

9 MR. SHAFER: Your Honor, I have no objection to
10 having him admitted as an expert in fisheries biology.
11 Limnology, I think, is a different story. I don't think he
12 has the expertise in that. But that's my objection.

13 MR. REICHEL: Well, by way of brief response, your
14 Honor, the witness has testified that he has specific
15 academic training in limnology. He testified on direct
16 examination that over the course of his 20 years'
17 professional experience he routinely deals with limnological
18 issues. I think applying by -- the standard for the
19 qualification of an expert under Michigan Rule of Evidence
20 702, I think it's clear that by virtue of his education and
21 experience, he has specialized knowledge on the subject of
22 limnology, which could assist this tribunal in reaching
23 determinations that it needs to make.

24 JUDGE PATTERSON: I agree with counsel. I think
25 he's stated enough qualifications to meet the standard of

1 the MRE. Obviously, you know, credibility is always an
2 issue and that can be pursued on cross-examination.

3 MR. SHAFER: Thank you, your Honor.

4 DIRECT EXAMINATION

5 BY MR. REICHEL: (continued)

6 Q Mr. O'Neal, as a part of your work with the Department of
7 Natural Resources, Fisheries Division, do you know whether
8 or not the DNR is consulted on fisheries and wildlife issues
9 by other state -- or specifically by the DEQ with regard to
10 fish and wildlife issues?

11 A Yes, we are.

12 Q And is that a regular part of your responsibilities within
13 the DNR?

14 A Yes.

15 Q During the course of your work with the DNR, have you or
16 other department staff developed any documents that --
17 reflecting guidance that your department uses in evaluating
18 impacts to fishery or wildlife resources of inland lakes?

19 A Yes.

20 Q I'd like to direct your attention to -- in the same
21 notebook, to Exhibit 26. Are you there, sir?

22 A Yes.

23 Q Okay. Do you recognize this document?

24 A Yes.

25 Q Could you briefly explain to the administrative law judge

1 what this document is and what its purposes are?

2 A This document was developed specifically for use by the
3 Department of Natural Resources personnel for looking at and
4 evaluating lake issues in regard to conservation of
5 resources in the lakes. The document also provides
6 information to other parties, agencies and the general
7 public as to what we think are important issues in regard to
8 conserving resources on our lakes.

9 Q Mr. O'Neal, what role did you play in the preparation of
10 this document?

11 A It was one of the authors and also part of the committee.

12 MR. SHAFER: I'm sorry. What?

13 Q I'm sorry. Part of a committee? Could you speak up,
14 please?

15 A Part of a committee.

16 Q Okay. Could you explain what you mean by that?

17 A If you look in the acknowledgments on page 34, this was a
18 committee that was put together jointly by the Fisheries
19 Division and Wildlife Division of the Department of Natural
20 Resources to develop these guidelines. And they included
21 individuals from both Fisheries and Wildlife Division.

22 Q And I'd like to direct your attention to page lower case
23 Roman numeral iii of the document. I'm not going to ask you
24 to read this all into the record, but this is the table of
25 contents; correct?

1 A Yes.

2 Q Does this identify the topics that are addressed in this
3 publication?

4 A Yes.

5 Q And do those topics include, first of all, review of
6 information about the ecological features and processes on
7 inland lakes?

8 A Yes, general discussion, yes.

9 Q I note there's also a section headed, "Stresses and Threats
10 to Natural Resources on Michigan Lakes." Do you see that?

11 A Yes.

12 Q Okay. And then there's another section identifying,
13 "Resource Conservation Opportunities and Management
14 Guidelines"; correct?

15 A Yes.

16 Q Perhaps this is too broad of a question, but could you
17 briefly describe if you can what, if any, overarching
18 principles with respect to conservation of lakes and
19 associated resources are reflected in this document in terms
20 of approaches to managing these resources and dealing with
21 proposals to modify them?

22 A Okay. As with all of our water resources in the state lakes
23 and streams, we are using an ecosystem based approach to
24 managing our resources. And this document reflects and is
25 consistent with other documents within the department on

1 that issue.

2 Q Could you briefly describe what you mean by an ecosystem
3 based approach?

4 A Basically a broad -- a broad-based approach to looking at
5 conserving our lakes, looking at all the issues that are
6 important in a lake, biological -- including biological and
7 socioeconomic issues and all the stresses and threats that
8 affect those resources.

9 Q As a part of its ecological approach, to what extent, if
10 any, do the department guidelines reflect consideration of,
11 for example, food webs within inland lakes?

12 A That is clearly part of the ecology of the lake, yes.

13 Q To what extent do these guidelines reflect a consideration
14 of cumulative impacts of various activities on lakes?

15 MR. SHAFER: Objection; vague. If you want me to
16 elaborate, I will.

17 MR. REICHEL: I don't think the question -- I was
18 trying deliberately not to lead the witness, but I could
19 make it more specific.

20 JUDGE PATTERSON: Okay.

21 Q Mr. O'Neal, do the guidelines that are developed by the DNR
22 in this area -- do they consider or not consider
23 considerations of cumulative impact of individual activities
24 on lake ecosystems?

25 MR. SHAFER: Same objection. And I'll tell you

1 exactly what I want --

2 JUDGE PATTERSON: Okay.

3 MR. SHAFER: -- exactly what my concern is. If he
4 wants to ask a question about, you know, what has happened
5 in the past and whether a specific event will have a
6 cumulative effect up to that point, that's one question.
7 We've also heard testimony and we've seen documents in here
8 that, you know -- "Let's consider hypothetical things that
9 may occur in the future." And all I'm trying to do is let's
10 limit the question. If he understands cumulative effect to
11 be what has occurred in the past plus one proposed process,
12 that's fine. I've got no problem with that.

13 JUDGE PATTERSON: Okay. If you can pursue that --

14 MR. REICHEL: I think that's a subject for
15 cross-examination, I believe. At this point -- excuse me,
16 your Honor. If I may respond further?

17 JUDGE PATTERSON: Uh-huh (affirmative).

18 MR. REICHEL: The substance of this question was
19 not to talk at this stage about this particular project, but
20 rather to proceed in a logical fashion foundationally to
21 have the witness explain for the record some of the guiding
22 principles that the DNR generally uses in evaluating the
23 impacts of activities or proposed activities on inland lakes
24 and their associated resources. That's all I'm seeking to
25 elicit.

1 MR. SHAFER: Your Honor, none of that addresses
2 the concern. I have my understanding of what "cumulative"
3 means. And until I came into this trial, I thought I
4 understood exactly what "cumulative" means. But apparently
5 other people have a different opinion. And all I'm trying
6 to do is I want to figure out what this guy means. And if
7 there are different interpretations, he ought to limit his
8 question because it's vague otherwise.

9 JUDGE PATTERSON: Well, I think cumulative impact
10 is something we regularly deal with. Let me ask this: Mr.
11 O'Neal, do you understand the question?

12 THE WITNESS: I think so, yes.

13 JUDGE PATTERSON: Okay. Go ahead and answer it.
14 I'll overrule the objection.

15 A Yes, very simply there's a specific section dealing with
16 cumulative impacts on the resources.

17 Q Okay. And is that -- can you point out where in this table
18 of contents that appears or one place it's --

19 A It's under "Stresses and Threats to Natural Resources" and
20 it begins on page 18.

21 Q Directing your attention to that portion of this document,
22 page 18, I'm not going to ask you to read into the record
23 this entire section of the document, but as one of the
24 authors or co-authors of this document, can you briefly
25 overview what, if any, information from public, scientific

1 literature the department -- or this document cites on the
2 issue of whether or not small changes -- or what the impact
3 of small changes -- individual small changes are to a lake
4 ecosystem?

5 A Well, I guess the most -- the shortest answer to that would
6 be simply to read on page 20 under the summary of "Jennings,
7 et al. (1999)," the last part of it or that general
8 paragraph indicating that incremental -- accumulate over
9 time and occur spatially and temporally in a system and
10 those types of -- those types of effects generally are not
11 viewed as important individually, but cumulatively they are
12 important. And that's how we regulate -- regulate the
13 effects of those is by looking at individual projects on a
14 whole system basis.

15 Q Okay. And, again, there are various publications cited in
16 this document. Can you give the tribunal an example of
17 scientific literature referenced here that reflects
18 consideration of the cumulative effects of small changes on
19 lake ecosystems?

20 A Oh, yes. I guess one on page 19, the one by -- citation by
21 Radomski and Geoman regarding the relationship between
22 developed shorelines and emergent vegetation in Minnesota
23 lakes.

24 "Developed shorelines averaged 66 percent less
25 vegetative cover relative to undeveloped shorelines.

1 And overall, loss of centrarchid-walleye lakes was
2 estimated at 20-28 percent based on present housing
3 densities and projected losses for 2010 may be as high
4 as 45 percent based on lakeshore housing growth
5 estimates. Significant aquatic vegetation losses were
6 visible at dwelling densities of 9.6 per mile. Both
7 biomass and mean size of northern pike, bluegill, and
8 pumpkinseed were correlated with emergent and
9 floating-leaf vegetation. Biomass and mean size of
10 fish were positively correlated with increasing
11 vegetative coverage with the exception of mean size for
12 northern pike."

13 Q And, again, I was just asking you to list an example. There
14 are other references cited in this document; correct?

15 A Yes, there's fish and there's frogs.

16 Q By virtue of your professional training and experience, are
17 you familiar with professional organizations or a
18 professional organization called the Ecological Society of
19 America?

20 A Yes.

21 Q To your knowledge, has Ecological Society of America
22 developed any publications related to this same subject of
23 managing lakes holistically and to consider the cumulative
24 impact of small -- individually small changes?

25 A Yes, there's a brief discussion on that on page 3 and 4.

1 It's just a discussion of basically ecosystem management
2 issues that the Ecological Society of America endorses.
3 There's eight different points there.

4 Q Yes, I understand. Are you familiar with an organization
5 called the American Fisheries Society?

6 A Yes.

7 Q And to your knowledge, has the American Fisheries Society
8 developed any publications that deal with the subject of the
9 importance of holistic management of inland lakes?

10 A Yes, they also have a specific publication regarding
11 cumulative impacts. Actually, one moment. I'll find it
12 here.

13 (Witness reviews exhibit)

14 A On page 18 again, the citation in the second paragraph,
15 Rasmussen in 1997 indicates the policy that was developed by
16 the American Fisheries Society regarding cumulative effects.

17 Q That is cumulative effects of small modifications to
18 habitat?

19 A Yes.

20 Q All right. Let me turn now to the subject of this
21 particular proceeding. Mr. O'Neal, were you made aware of
22 the permit application that has resulted in this contested
23 case proceeding?

24 A Please repeat.

25 Q I'm sorry. Was your division made aware of and given an

1 opportunity to comment on the permit application submitted
2 by Missaukee Lakes Master Homes for the permit that's a
3 subject of this contested case?

4 A Yes.

5 Q And who within the department undertook the review of the
6 permit application?

7 A I did.

8 Q And the results of that, did you provide any -- or
9 communicate any comments to the DEQ, Land and Water
10 Management Division?

11 A Yes.

12 Q I'd like to direct your attention to tab 9 in that binder.
13 Do you recognize that document?

14 A Yes.

15 Q Could you briefly describe what it is and what its purpose
16 was?

17 A It's an e-mail from myself to Robyn Schmidt regarding this
18 permit application.

19 Q Okay. And what -- based upon your review of a permit
20 application, what, if any, concerns did you identify from a
21 ecological standpoint with respect to impacts on Missaukee
22 Lake?

23 A Could you say that again, please?

24 Q Sure. Based upon -- you were given access to the permit
25 application and asked to comment on it. And I'm asking you

1 to at least briefly describe what, if any, concerns you
2 identified and communicated to DEQ about possible adverse
3 ecological effects of this proposed activity.

4 A Okay. Basically my statement here was that, "Proposes to
5 dredge a significant portion of the littoral zone complex of
6 Lake Missaukee." And, "The area important -- is very
7 important as habitat for fish and other aquatic life in Lake
8 Missaukee." And that would include, as far as habitat goes,
9 any type of aquatic vegetation that is in the water
10 including any sediments that are present at the site.

11 Q Okay. Could you elaborate further on the significance or
12 why you were expressing concern from an ecological
13 standpoint about the proposal to dredge sediments at this
14 location?

15 A Okay. Well, number one, any type of removal of habitat from
16 a lake is going to have some effect on the resources. The
17 plants are part of the base of the food chain so any removal
18 of plants or any part of their -- part of plants is going to
19 have some effect on the food chain. And that includes the
20 organic detritus that is in the sediments there. So
21 basically you're removing production from the lake when you
22 do that, disrupting -- in addition to that, there is --
23 basically the structure of plants provides habitat, you
24 know, cover for fish and frogs and things like that. And
25 also the bottom sediments provide that type of cover also

1 for certain creatures. So from a habitat and from a food
2 perspective -- and also there's spawning that occurs in
3 those areas. So it's important -- these areas are important
4 for life history of many aquatic animals.

5 Q Okay. Was your -- apart from this project -- or this
6 proposed project or your comments on it, were you otherwise
7 familiar with or had you ever looked at projects on Lake
8 Missaukee?

9 A Yes.

10 Q And what knowledge or understanding had you gained about --
11 if any, about the nature of the portion of the lake where
12 this site is located? And by that I mean the west end of
13 the lake.

14 A Well, the west end of the lake is relatively undeveloped --

15 MR. SHAFER: Your Honor, I'm going to object to
16 the foundation. I'm sorry. I didn't hear a foundation laid
17 in regard to this. Maybe I missed a question. If I did, I
18 apologize.

19 MR. REICHEL: Okay. Let me back up.

20 Q Mr. O'Neal, either in connection with your review of this
21 permit application or other activities that you performed
22 for the DNR, have you gained some familiarity with Lake
23 Missaukee and the -- fisheries and other resources in the
24 lake?

25 A Yes.

1 MR. HOFFER: Your Honor, if I can interrupt for
2 just a moment? Turning off the projector would help out the
3 court reporter very much. I'd like to do so.

4 JUDGE PATTERSON: Oh, okay.

5 (Off the record interruption)

6 Q So, for example, Mr. O'Neal, at the time you provided these
7 comments, had you ever been to Lake Missaukee?

8 A Yes.

9 Q Had you ever looked at maps of Lake Missaukee?

10 A Yes.

11 Q Had you ever had occasion to observe the nature and extent
12 of shoreline development in various parts of the lake?

13 A Yes.

14 Q Okay. And based upon that experience, at the time you were
15 providing these comments, what was your understanding or
16 knowledge of the nature and ecological significance of that
17 portion of Lake Missaukee, the western end of the lake that
18 includes the site of this proposed project?

19 MR. SHAFER: Objection; lack of foundation. He's
20 never said he's been to lot 8.

21 JUDGE PATTERSON: No, but he said he'd been to
22 Lake Missaukee and reviewed maps and shoreline.

23 MR. REICHEL: And to be clear, I was asking about
24 that portion of the lake, lot 8, which includes -- excuse
25 me -- the west end of Missaukee Lake which includes lot -- I

1 wasn't specifically yet asking about lot 8.

2 JUDGE PATTERSON: I'll overrule the objection.

3 Q Do you recall the question, sir?

4 A Again, quickly --

5 Q Okay. Based upon your experience with the department that
6 you testified to, what, if any, understanding had you
7 reached with regard to the nature and ecological
8 significance of the western end of Lake Missaukee?

9 A The western end of Lake Missaukee is basically the lee shore
10 of the lake and it's a very extensive, undeveloped shoreline
11 with a lot of emergent vegetation and both floating-leaf and
12 submerged vegetation throughout the entire bay. That area
13 of the lake encompasses about 20 percent roughly of Lake
14 Missaukee, maybe a little bit more of that type of habitat
15 in a couple other bays of the lake. So the type of habitat
16 that's included in that part of the lake is about 20 to 25
17 percent of that type of habitat in all of Lake Missaukee.
18 The remaining part of Lake Missaukee is fairly well
19 developed in residences primarily, the shoreline areas.

20 Q Okay. So going back to Exhibit 9, I've asked you about what
21 concerns you expressed to the DEQ. What recommendations, if
22 any, did you offer to the DEQ with respect to the proposed
23 permit?

24 A Okay. I recommended that -- I said,

25 "I do not recommend dredging be allowed at this

1 site. An alternative to allow access to the open lake
2 across wetlands would be to construct a dock. I
3 recommend not more than 25 percent of the shoreline be
4 disturbed for dock placement at individual sites."

5 Q Okay. With respect to the last recommendation, on what did
6 you -- what was the basis for that recommendation?

7 A The 25 percent recommendation?

8 Q Correct.

9 A That's a recommendation that is laid out in our conservation
10 guidelines.

11 Q And, again, without going back through the substance of that
12 document, what is your understanding of why that is a
13 guideline that your department uses in evaluating or
14 commenting on projects of this kind?

15 A Well, we recognize that there is going to be development on
16 lakes and riparian owners have the right to use the lake and
17 trying to come to some kind of understanding as to how much
18 development should occur within a lake and with any
19 particular habitat component without really affecting the
20 ecology of the lake and various organisms. And 25 percent
21 is the number we came up with and there's really not
22 anything that -- there's no, I guess, basis for that in
23 science, but it's a number that we felt would preserve
24 sustainable resources over a period of time for future
25 generations basically.

1 Q To what extent is that guideline, if any, an attempt by your
2 department to balance competing considerations of riparian
3 use and ecological effects?

4 A Well, obviously, the best thing for the resources is to not
5 disturb anything. But we know that that's not going to
6 occur and we recognize that riparians have -- want to be
7 able to use the lake. So, you know, there's going to be
8 some -- there's going to be some changes that are going to
9 occur on lakes as a result of development.

10 Q After you provided these comments to the DEQ, did you learn
11 whether or not the permit had been denied?

12 A Yes.

13 Q Okay. Did you -- after you learned of that permit denial,
14 did you have occasion to visit the site?

15 A I did visit the site, yes.

16 Q And do you recall approximately when you visited the site?

17 A I believe it was September 19th.

18 Q Of?

19 A 2007.

20 Q 2007 or 2006?

21 A 2006. I'm sorry. I got my years mixed up, yeah.

22 JUDGE PATTERSON: I'm sorry. '06 or '07?

23 THE WITNESS: '06, yes.

24 Q Okay. And when you visited the site, do you recall who else
25 was there with you, if anyone?

1 A Robyn Schmidt was with us.

2 Q And can you describe what the purpose of your visit to the
3 site was?

4 A Basically we went there to just look at the site that was
5 proposed for development and also to talk with Mr. -- I
6 forget his -- the caretaker.

7 Q Mr. Boughner? Boughner?

8 A Yes, Mr. Boughner, yes. But basically just to get a look at
9 the site.

10 Q Okay. And, in fact, was --

11 A At that specific site.

12 Q Okay. Was Mr. Boughner actually present when you were
13 there?

14 A Yes.

15 Q And so when you talk about the site, you're talking about
16 lot 8 specifically?

17 A Yes.

18 Q And when you visited the site, did you have occasion to
19 observe the nature of the shoreline conditions in the
20 proposed project area?

21 A Yes.

22 Q And how would you summarize your observations?

23 A Basically there was a zone of emergent vegetation near the
24 shore, some mixed, submerged vegetation. And as far as I
25 could see out there was scattered submerged vegetation at

1 that site also.

2 Q Did you see any evidence of floating vegetation?

3 A I don't recall if there was floating, but there probably

4 was. I'm not sure.

5 Q Okay. And what -- did your physical visit to this site

6 cause you to alter one way or the other your -- and your

7 observations, then alter your conclusions about the possible

8 impacts of the proposed activity or any recommendations for

9 actions on the permit?

10 A No.

11 Q So after observing this site firsthand, did you have any --

12 if you recall, did you have any further communication with

13 the DNR -- excuse me -- the DEQ later in 2006 about this

14 proposed project?

15 A I may have.

16 Q I'd like to direct your attention to Exhibit 18. Do you

17 recognize that document?

18 A Yes.

19 Q Could you briefly describe what it is?

20 A It's an e-mail from me to John Arevalo.

21 Q And what was the purpose of this communication as you

22 recall?

23 A Let me read it.

24 (Witness reviews exhibit)

25 A And what was your question again?

1 Q My question was, what was the purpose of that communication
2 to Mr. Arevalo and Ms. Schmidt?

3 A I'm not sure, but I believe it was in response to his
4 question to him if I had changed my opinion on my
5 recommendations and to further clarify them at this site.

6 Q Okay. And could you briefly summarize what your response
7 was?

8 A Basically I did not really -- I did not change my
9 recommendations. I recommended not -- preferred not to see
10 the area dredged.

11 "However, if site development is allowed I offer
12 the following recommendations: Not more than 25
13 percent of individual habitat components at the site
14 are -- not more than 25 percent of the individual
15 habitat components at the site are altered and allow a
16 buffer strip of 33 feet. Dredging should be minimized
17 to the greatest extent, possibly with dock extension
18 and narrow channel."

19 Q Okay. Let me take that in pieces. You referenced a 33-foot
20 buffer strip. Could you explain what you intended by that
21 or what -- where you imagine -- what this -- where you
22 propose this buffer strip be located?

23 A The buffer strip comes directly out of the guidelines. So
24 it's a buffer strip from the ordinary high water mark of the
25 lake upland towards the dry land basically. And that buffer

1 strip is to allow filtering of any water that moves down
2 into the area, surface water, and provide various types of
3 leaf litter and log and tree fall to allow that to occur
4 into the lake because that's part of the habitat.

5 Q Okay. But just to be clear, this recommendation with regard
6 to the buffer strip had to do with the management of the
7 area upland of the lakeshore; correct?

8 A That's correct.

9 Q And with respect to the issue -- let me back up. At the
10 time that you communicated this to the DEQ, did you
11 understand -- did you understand that one of the objectives
12 of the project was to -- proposed project was to enable
13 boating on Lake Missaukee from this site?

14 A Yes.

15 Q And was it your recommendation that no activity be allowed
16 that would permit boating at the site?

17 A No.

18 Q What course of action with respect to the stated objective
19 of achieving access to boats at the site did you recommend
20 or suggest, if any?

21 A Using a dock, if that was required for the type of boat that
22 they wanted to use or to use a rowboat. They could use a
23 boat in that fashion from -- or a canoe from the site. But
24 I believe that the caretaker indicated that they had a
25 powerboat that they wanted to --

1 Q Okay. And you need to speak up a little bit more, sir.

2 A I'm sorry. I'll get closer.

3 Q If you need to pause for a drink of water, please do so.

4 A Okay.

5 Q Okay. With respect to a dock, based upon your review of the
6 site and the stated desire of the permit applicant to be
7 able to gain access to a powerboat from the shore, was there
8 a specific -- or a type of alternative that you identified
9 or could identify that would enable that project purpose to
10 be achieved without dredging a 50-foot wide strip of
11 sediment?

12 A Basically I was recommending to extend a dock out into the
13 lake to where they would have sufficient water to bring a
14 boat up to it without any dredging.

15 Q So just to be clear, that the dock would essentially be
16 placed over but not remove -- entail physical removal of
17 sediments?

18 A That's correct.

19 Q Now, you've been present during the hearing to this point,
20 have you not?

21 A Except I left at 5:00 o'clock last night, so there was some
22 additional testimony after that.

23 Q Okay. Let me ask you this: Based upon your presence at
24 this hearing, have you reached any understanding as to
25 whether or not the permit applicant is proposing a modified

1 version of its original dredging proposal? Do you
2 understand what I mean or should --

3 A I --

4 Q Okay. Let me ask you this: Based upon listening to the
5 testimony so far in this proceeding that you've been -- are
6 attending, what is your understanding of what the permit
7 applicant is currently proposing to do at this site?

8 A Okay. I believe the two changes that I think I've heard
9 correctly here is that, number one, they would not dredge
10 the immediate shoreline area where emergent vegetation
11 occurs. And the second one is that they would do more
12 extensive dredging in the area where they had proposed to
13 dredge before to a greater depth, to the bottom of the
14 lake -- hard bottom.

15 Q And having -- and would the proposal also entail
16 construction of a dock as you understand it, if you know?

17 A It sounded like a -- yes, it sounded like they were
18 proposing a 60-foot dock, but I'm not sure.

19 Q Okay. I want you to assume that that is the proposal.

20 A Okay.

21 Q Given that modified proposal, with respect to your review or
22 consideration of that proposal, in your opinion, would that
23 modified proposal result in adverse environmental effects at
24 this site?

25 A Yes.

1 Q And I think you covered this, but could you again describe
2 the nature of the adverse environmental effects that you
3 believe would occur as a result of that proposed activity?
4 A The proposed activity requests or implies they will dredge
5 bottom materials from the lake and that would include
6 anything that's growing within the bottom and -- which would
7 be removing aquatic plants and other organic debris that is
8 important to the food web of the lake and also important
9 habitat to aquatic organisms.
10 Q In addition to hearing testimony yesterday by Dr. Lehman, in
11 preparation for this hearing, have you had an opportunity to
12 review a couple of -- a report and an addendum that he
13 prepared in this matter?
14 A Yes.
15 Q Okay. If you have it in front of you, I'd like to direct
16 your attention to the larger binder of the Petitioner's
17 proposed exhibits and specifically Petitioner's Exhibit
18 Number 3 -- I'm sorry -- Number 2.
19 A Okay. I have it.
20 Q Okay. Have you reviewed this document prior to your
21 testimony here today?
22 A Yes.
23 Q I'm not going to ask you to go through it page by page, but
24 I'd like to direct your attention to certain aspects of it.
25 If you turn to page 8 which lists -- under the heading, "C,

1 Conclusions" over there --

2 A Okay.

3 Q Okay. I'd like to direct your attention first to conclusion
4 C1, which states: "The proposed dock site is unremarkable
5 in physical, chemical and biological characteristics and
6 relatively depauperate in macrophyte density compared with
7 adjacent shoreline." Based upon your review of the site and
8 your experience and training in biology and limnology, do
9 you agree with Dr. Lehman's conclusion, number one?

10 A No.

11 Q Could you explain why or in what respect you disagree?

12 A Well, first of all, I really don't understand why he would
13 be comparing adjacent shoreline. I don't know exactly what
14 "adjacent shoreline" means, but to me, that's kind of
15 irrelevant. The "relatively depauperate" is kind of a very
16 vague term. But if there's any macrophytes there and --
17 they are important to the food web and to habitat for fish.
18 And as far as "unremarkable in physical, chemical and
19 biological characteristics," I think that this site is --
20 really is different than the rest, you know -- a very large
21 portion of the greater majority of Missaukee Lake in that
22 shoreline areas in that has a lot of emergent vegetation and
23 it has a good, deep, rich organic sediment base. So
24 "depauperate" is -- I mean, if macrophytes are there, I
25 think they're important. They look like they were plentiful

1 to me and there was plentiful fish and -- fish and wildlife
2 habitat there.

3 Q Okay. When you talk about fish and wildlife habitat, what
4 kinds of -- in addition to fish, what other sorts of
5 wildlife do you believe that this site -- project site would
6 support or has habitat?

7 A Well, clearly the bigger animals, the reptiles and
8 amphibians, in particular turtles also in the sediments.
9 But the sediments also contain a whole host of organisms
10 besides macroinvertebrates. There's bacteria and rotifers
11 and there could be plankton in the sediments also and along
12 the top of the sediments. So the very fact that there was
13 organic material that was stated in here, it's mostly all
14 plant material. It provides a food source for organisms.
15 And apparently much of that was already broken down or
16 partly broken down already by organisms from the statements
17 that were made in here.

18 Q Could you explain what you mean by that last comment?

19 A Well, let me look at it first. I have to go back and look.

20 (Witness reviews exhibit)

21 A On page 6, under "B2, Sediment Characteristics," underneath
22 the table, "Samples contained fibrous plant debris, grains
23 of clear quartzite and general detritus"; mostly plant
24 debris. Detritus is generally plant debris also in most
25 cases.

1 Q I'd like to -- again, I don't want to go through every part
2 of this in the interest of time, but let me direct your
3 attention back to page 8 and specifically "Conclusion C8,"
4 which states, "There are no natural resources of note that
5 would be impaired or destroyed by installing the proposed
6 dock at this lone site." Do you see this?

7 A Yes.

8 Q And do you -- based upon your observations of the site, your
9 professional training and experience, do you agree or
10 disagree with that conclusion?

11 A I disagree.

12 Q Could you explain why and in what respects you disagree with
13 that conclusion?

14 A Based on my knowledge of lakes and this type of habitat, it
15 provides a very good habitat for natural resources in the
16 lake and in Lake Missaukee.

17 Q And the conclusion here talks about installing the proposed
18 dock; is that correct?

19 A Yes.

20 Q In disagreeing -- again, I believe you heard Dr. Lehman's
21 testimony yesterday which in substance I think fairly stated
22 that it was his belief that the dredging proposed would not
23 impair or destroy natural resources. Is that what you took
24 away from his testimony?

25 A Testimony; yes.

1 Q Again, with respect to that issue, do you agree or disagree
2 with that conclusion and if so, why?

3 A I disagree with the conclusion that organic debris would
4 have no effect -- was that your question?

5 Q Well, no. That Dr. Lehman's stated testimony which
6 included, I believe, a conclusion that the dredging proposed
7 by the permit applicant would not impair or destroy natural
8 resources, if any.

9 A I would disagree with that, yes.

10 Q And, again, the basis for your disagreement? Is that what
11 you --

12 A Well, apparently you have -- well, based on my knowledge of
13 Michigan lakes and this type of habitat, it provides
14 excellent habitat for various organisms and resources. And,
15 number two, he did not conduct any resource evaluations
16 himself other than to look for macroinvertebrates by some
17 means or another.

18 Q And when you say --

19 A Macroinvertebrates are not the only resource that are in
20 Lake Missaukee.

21 Q I'd like to direct your attention now to Petitioner's
22 Exhibit 3, which is headed, "Addendum to Fact-Finding Report
23 and Analysis, October 7th, 2007." Do you see that?

24 A Yes.

25 Q Have you had an opportunity to review this document before

1 testifying here today?

2 A Yes.

3 Q And directing your attention to page 4, the last paragraph
4 where he is responding to a statement that you made in one
5 of your e-mails, let me just read this. Dr. Lehman's last
6 paragraph states:

7 "Mr. O'Neal expresses his view that the proposed
8 50-foot-wide by 200-foot-long project footprint
9 represents a," quote, "'significant,'" unquote,
10 "portion of the 10,000-foot shoreline in question. He
11 refers to," quote, "'individual sites,'" unquote,
12 "whereas I am only aware of one site proposed in the
13 permit application. The rationale for his judgment is
14 not supported with objective criteria. I would view
15 with deep skepticism any claim that the proposed
16 dredging project could disrupt the lake ecosystem in
17 any discernible way."

18 Having read that, sir, how would you respond to
19 those assertions by Dr. Lehman?

20 A Well, I would disagree, of course.

21 Q Could you explain why you disagree?

22 A Number one, because -- there's two points, I guess. The
23 first is that any removal or any removal of habitat in the
24 lake is going to affect, to some degree, the ecosystem of
25 the lake and the resources and the organisms that are there.

1 And beyond that, I stated earlier that we don't manage -- we
2 do not manage our water bodies based on single sites and
3 that's been very clearly pointed out in the literature to
4 date. Recent literature is that this is what everybody
5 tries to do. They try to take out a little bit at a time
6 and say that it is insignificant. But, indeed, recent
7 literature that's available says that that is not the case.

8 Q That what is not the case?

9 A That looking at a small portion of a shoreline and talking
10 about the lake ecosystem, they're just not consistent. When
11 you talk about a lake ecosystem, you have to talk about all
12 the effects that are occurring to that ecosystem.

13 Q And does that, in your view, include consideration of
14 anticipated future --

15 MR. SHAFER: Objection; leading.

16 Q In looking at the issue of cumulative effects, do you
17 believe it is appropriate to consider among other factors
18 not only historic development activities, but potential
19 future development activities?

20 A Yes.

21 Q And with respect to the latter issue, have you expressed
22 to -- any concern on that subject to the DEQ?

23 A On the latter you mean future development or --

24 Q Yes.

25 A Okay. I've expressed concern for both historic and future,

1 yes. I did -- expressed -- discussions? I mean, is that
2 what you're -- I'm not sure what you're asking, I guess.

3 Q Well, what I'm asking is -- fair enough. In looking at the
4 issue of -- back up. You've testified just a moment ago you
5 disagreed with Dr. Lehman's statement that the proposed
6 dredging project -- or that he's skeptical of any claim the
7 proposing dredging project could disrupt the lake ecosystem
8 in any discernible way. Okay. And I guess I'm asking by
9 way of follow-up to that whether, to what extent, if any --
10 you've testified you disagree with that. I'm asking you in
11 terms of explaining why you disagree to what extent, if any,
12 your disagreement relates to issues of potential future
13 activity in the vicinity.

14 A Yes, that is a concern. Future activity is a concern at
15 this site as it is at all the other lakes and water bodies
16 in Michigan. There has clearly been an increase in
17 development of Lake Missaukee since the 1940's through the
18 present time and there is clearly indication that this part
19 of the lake, which is not very developed at this point, is
20 intended to be developed. And that was laid out, I believe,
21 in the permit application itself showing the plats that are
22 available. Beyond that, there may be some issues I heard
23 about what the frontages were there, but the plat indicated
24 this -- or the permit application indicated this was a 70-
25 foot-wide piece of shoreline. And if you develop the

1 shoreline at 75 foot width, you'd have, like -- 70 foot
2 width, I think you'd have about 75 dwellings per mile; very
3 high density dwelling development. Beyond that, there was
4 also -- no, I think that's it. That's something -- I was
5 going to get into something else.

6 Q That's fine. Direct your attention back to this last
7 paragraph in Exhibit 3, again, authored by Dr. Lehman. He
8 states, "Moreover, the claim that the sediments," quote,
9 "'will not readily settle,'" unquote, "is contrary to facts
10 established through experimentation." First of all, what do
11 you understand -- do you have an understanding of what Dr.
12 Lehman is referring to or attempting to refer to with the
13 statement "will not readily settle"?

14 A What I was referring to --

15 Q Well, let me back up.

16 A -- or what he was referring to?

17 Q Okay. Let me back up. If you could, flip back over to --
18 in the other exhibit book to Exhibit 9 of the DEQ exhibits.

19 A Exhibit 9 or --

20 Q Yeah, 9. Do you see it, the e-mail?

21 A Oh. Oh, I think I'm in this other one.

22 Q Yes. I'm sorry.

23 A I'm sorry.

24 Q No. I didn't make that clear. Please look at the other
25 binder, the white one in front of you. Okay. So what -- I

1 want to ask you to look back at the second paragraph in your
2 e-mail of March of '06.

3 A Yes.

4 Q You make the statement, quote, "Also, the sediments are
5 composed of fine organic materials that will be easily
6 suspended and will not readily settle in retention basins."
7 Could you explain what you were referring to there?

8 A I was referring to -- because organic sediments are finer
9 and they don't fall out of a water column as quickly as, for
10 instance, sand will fall out. When you do a hydraulic
11 dredge and pumping to a retention basin, usually there is
12 some water return to the lake. So basically it was in
13 reference to the retention basin that -- and usually when I
14 indicate that, it's indicating that you would have to
15 either -- deal with that issue in some other way.

16 Q Okay. But the focus of your comment there was really
17 focused on the issue of settlement of particulate matter in
18 the basin or area used to dewater sediments --

19 MR. SHAFER: Objection; leading.

20 MR. REICHEL: Okay.

21 Q Was the focus of this comment on the retention basin used
22 to --

23 MR. SHAFER: Objection; leading.

24 JUDGE PATTERSON: I'm not sure that was a leading
25 question. I'll overrule.

1 Q Was the focus of this question on the issue of suspended
2 sediments in a retention basin or in the open water of the
3 lake?

4 A In the retention basin.

5 Q Mr. O'Neal, during the examination of some of the
6 department's witnesses and, indeed, during the direct
7 examination by the Petitioner of Dr. Lehman, there were a
8 series of questions posed about -- I believe the term used
9 was senescence of inland lakes or the prospect of inland
10 lakes filling in over time with accumulated organic
11 material. Do you recall that?

12 A Yes.

13 Q During the course of your review of this project, have you
14 ever had occasion to look at any maps that have been
15 developed historically of Lake Missaukee?

16 A Yes.

17 Q I'd like to direct your attention now in the DEQ exhibit
18 book, the white one, to -- I believe it's Exhibit 21. Do
19 you know whether or not the boundaries or extent of Lake
20 Missaukee have been mapped going back to at least 1942?

21 A Yes.

22 Q And do you know whether or not the -- since 1942 to the
23 present there has been any substantial change in the
24 dimensions of Lake Missaukee?

25 A I would say "no."

1 Q And to the extent that the phenomenon of senescence of
2 inland lakes occurs, what range of time lines in a order of
3 magnitude would you expect to be needed to get from the
4 state the lake is in today to being filled in?

5 A I really don't have a good estimate on that. It would be
6 quite long.

7 Q If you don't know -- would it be -- let me ask you this:
8 Would it be more than 100 years?

9 A Based on what I see in the lake -- based on what I've seen
10 in the lake from the mapping that was done in 1941 to the
11 present time, there's been very little difference in the
12 depth of Lake Missaukee or the outer shoreline. So there's
13 been very little change in the past -- how many years is
14 that? -- since 1941. So it's 60, 70 years, so we're talking
15 a very long time, 1,000. I don't know. I wouldn't want
16 to --

17 Q That's fine. If you can't answer the question further --

18 MR. REICHEL: That's all I have at this time.
19 Thank you.

20 MR. PHELPS: No questions.

21 MR. SHAFER: Your Honor, do you want me to start
22 or do you want to take a break?

23 JUDGE PATTERSON: Why don't we take a break.

24 (Off the record)

25 JUDGE PATTERSON: Whenever you're ready.

1 MR. SHAFER: Thank you, your Honor.

2 CROSS-EXAMINATION

3 BY MR. SHAFER:

4 Q Mr. O'Neal, could you turn to Exhibit 26 of the DEQ's packet
5 up there? That's the report that you co-authored?

6 MR. REICHEL: Mr. O'Neal, it's in the white
7 binder.

8 THE WITNESS: Oh, I'm sorry.

9 A This report, yes.

10 Q You co-authored that; correct?

11 A Yes.

12 Q And I think you also testified you were part of the
13 committee for that?

14 A Yes.

15 Q Do you agree with the statements that are contained in the
16 document?

17 A Say that again.

18 Q Do you agree with the statements that are contained in the
19 document?

20 A Yes.

21 Q Okay. Could you go to page 5, sir? I'd like you to read
22 aloud to the judge the first full sentence at the very top.
23 It starts out with the word "with."

24 JUDGE PATTERSON: Roman numeral IV or Arabic 5?

25 MR. SHAFER: Page 5.

1 A Where again, now? Right at the top?

2 Q First full sentence at the top of the page, it starts out
3 with the word "with."

4 A "With participation from local governing bodies, lake boards
5 may make lake improvements."

6 Q Read the next sentence, too.

7 A "Lake improvements may be made in lakes or
8 adjacent wetlands, and lake boards may take steps
9 necessary to remove the undesirable accumulated
10 materials from the bottom of a lake or wetland by
11 dredging, ditching, digging or related work (sic)."

12 Q So when you're talking --

13 JUDGE PATTERSON: I'm sorry. Counsel, where are
14 you at? I'm not finding it.

15 MR. SHAFER: I'm sorry. The top of page 5, your
16 Honor.

17 JUDGE PATTERSON: Okay.

18 MR. SHAFER: Arabic 5.

19 JUDGE PATTERSON: Yup.

20 MR. SHAFER: It starts -- the very first full
21 sentence.

22 JUDGE PATTERSON: Oh, okay.

23 MR. SHAFER: It says, "With participation."

24 JUDGE PATTERSON: Got it. I thought it was the
25 start of a paragraph.

1 MR. SHAFER: Sorry about that, your Honor.

2 Q So some accumulations, some sediment is actually

3 undesirable; correct?

4 A Incorrect.

5 Q What do you mean by the sentence?

6 A This is a statement that -- of what lake boards are allowed

7 to do.

8 Q Okay. And lake boards find some accumulation undesirable;

9 isn't that correct? Is that what your sentence says?

10 A I don't know. You'd have to ask them.

11 Q Sir, you've been qualified as an expert in limnology. Are

12 you telling me that you have no information whatsoever in

13 any of your experience, training or education that indicates

14 that some sediment accumulations are undesirable?

15 A I suppose some people would view them as undesirable, yes.

16 Q Now, sir, if you could, go over to page 18 of your report.

17 At the paragraph up at the top, about halfway down, probably

18 about eight lines down there's a sentence that starts,

19 "Increased erosion."

20 A Okay.

21 Q Okay. Can you read that out loud?

22 A "Increased erosion of sediment causes accelerated filling of

23 our lakes."

24 Q Is that a true statement, sir?

25 A Pardon?

1 Q Is that a true statement?

2 A "Increased erosion of sediment causes accelerated filling of
3 our lakes," yes.

4 Q Okay. Now, could you go over to the big binder and can you
5 go over to Exhibit 27? Now, I want to call your attention
6 to the bottom of page 2 and the top of page 3, although I
7 guess I'll wait 'til you get there.

8 A Okay. Say -- I mean, I got the binder.

9 Q Exhibit 27, sir.

10 A Where, now? I've got 27.

11 Q First of all, have you ever seen this document before?

12 A You know, I'm not sure if I did. I may have. Where did it
13 come from?

14 Q I'll just represent to you this is a water quality report
15 that was provided to the Homeowners Association.

16 A Oh, okay. You know, I'm not sure if I saw this or not.

17 Q Okay. That's fine. Can you go to the bottom of page 2 and
18 at the very bottom of the page there's a sentence that
19 starts, "Conditions in Missaukee Lake."

20 A Yes.

21 Q You see that?

22 A Uh-huh (affirmative).

23 Q Can you read that and the following sentence aloud?

24 A "Conditions have remained steady throughout the last several
25 years."

1 Q No. I'm sorry. Where are you? Oh. I'm sorry. Okay. I
2 was one sentence past that. That's fine. Continue.

3 A "Conditions in Missaukee Lake should not be allowed to
4 deteriorate below present levels."

5 Q Okay. Read the next sentence as well.

6 A "Efforts to reduce nutrient sediment loading
7 should begin, with the realization that they will help
8 prevent further deterioration but probably not improve
9 water quality."

10 Q Sir -- and is dredging a way to reduce the sediment loading
11 in a lake?

12 A It's one way, yes.

13 Q Okay. Sir, can you go over to Exhibit 32, same big binder?
14 Go over to page 3. And I'll just represent to you, sir,
15 this is the same type of water quality analysis, just for
16 2007 rather and the other one was 2006. Do you see, sir, in
17 that -- in the middle of that first paragraph the exact same
18 findings and recommendations there that were contained in
19 the 2006 report that you just read aloud to the judge?

20 A The two sentences starting with "Conditions"?

21 Q "Conditions in Missaukee Lake," yes, sir. And you don't
22 have to read them aloud, but is it virtually identical to
23 what is contained in the 2006 report?

24 A It looks like it's the same, yeah.

25 Q Okay. And, sir, is that concern -- the attorney general

1 used a different word than I used, but I call it lake
2 succession. The filling in of a lake, you're generally
3 familiar with that concept. What is the term you use for
4 that? Is lake succession an appropriate --

5 A Ontogeny of a lake.

6 Q I'm sorry?

7 A Ontogeny of a lake.

8 Q Okay. Ontogeny of a lake? That's a new one on me. That is
9 the general process by which sediments accumulate over a
10 lengthy period of time and fill in a lake; is that correct?

11 A It can -- yes, it can be.

12 Q Okay. And is there not, sir, a rule of thumb that for
13 inland lakes in the State of Michigan, sediment accumulation
14 is approximately one-half centimeter per year?

15 A Not aware of that.

16 Q You're not aware of that? Sir, do you believe that sediment
17 accumulation in Lake Missaukee could be observed over a
18 person's lifetime?

19 MR. REICHEL: Object to the form of the question.

20 Is the question --

21 A I think it would take --

22 JUDGE PATTERSON: Wait; wait. Wait until we
23 resolve the objections.

24 MR. REICHEL: Excuse me.

25 THE WITNESS: I'm sorry.

1 MR. REICHEL: The question is ambiguous. Is the
2 question any accumulation of sediments can be observed over
3 a person's lifetime?

4 Q Could it be observed. Could a person determine that there
5 is an addition of accumulation of sediment in Lake Missaukee
6 over a person's lifetime; 60 years, for example?

7 A I think it would require a fairly extensive study to show
8 that, yeah.

9 Q Have you ever fished in Lake Missaukee?

10 A Uh-huh (affirmative).

11 JUDGE PATTERSON: "Yes" or "no"?

12 THE WITNESS: Yes. I'm sorry.

13 Q Have you fished on the lake -- I'm sorry -- on the west
14 side?

15 A No.

16 Q We're talking about right here (indicating)?

17 A Not right there.

18 Q Have you ever walked out on that area?

19 A Walked out?

20 Q Say as a boy, did you ever walk out into the west end
21 approximately where lot 8 is located?

22 A I was to the site if that's what you're asking me.

23 Q No, sir. What I'm asking you, as a boy, were you ever out
24 in the area approximately where lot 8 is located?

25 A No.

1 Q Now, I want to go to Exhibit 9 of the DEQ's materials there,
2 sir, if I could. And just to humor me, if you could, open
3 up at the exact same time Exhibit 6 from the big binder.
4 Sir, does that appear to be, based upon the date and time,
5 the same e-mail?

6 A Let's see. It looks like the date on there is.

7 Q And the time?

8 A 3:56. It looks like the same date and time.

9 Q Okay. Can you explain to me -- and maybe you can't, maybe
10 it's just a computer thing. But can you explain why they're
11 different in format?

12 A Format? In what regard format?

13 Q Well, I mean, just take a look at the top of Exhibit 6. It
14 says "From, To, Date, Subject" and then it goes down,
15 "Richard O'Neal." If you look at the other exhibit, there's
16 four separate categories there, "From, To, Date, Subject."
17 It's not identical. I'm just trying to figure out why
18 textually the letter looks the same, but there's two
19 different versions of it.

20 A I have no idea.

21 Q Okay. Setting that aside, what materials, if any, were you
22 provided before you submitted -- in regard to this dredging
23 project were you provided before you submitted this e-mail?

24 A What materials?

25 Q Written materials. Any type of written materials in regard

1 to this project. What written materials did you review in
2 relation to this dredging project before you sent this
3 (indicating) e-mail?

4 A Oh. I reviewed the permit application.

5 Q And from your understanding, what was the permit application
6 trying to dredge?

7 A I'd have to look at the permit applications.

8 Q Okay. You don't have your file there or anything?

9 A No.

10 Q Okay. Did you have an understanding -- irrespective of the
11 fact you don't have your file in front of you, did you have
12 an understanding that this was dredging for one lot -- in
13 front of one lot?

14 A Yes.

15 Q This wasn't for the entire west shoreline; correct?

16 A That's correct.

17 Q It wasn't for the entire Indian Lakes West development;
18 correct?

19 A That's correct.

20 Q And you're generally familiar with what the Indian Lakes
21 West development is?

22 A From what I have seen in a permit application, yes. The
23 plat of all properties are there.

24 Q Before you sent out this e-mail, did you make a site
25 inspection?

1 A Not on my -- no, that I'm aware of.

2 Q Okay. Prior to preparing this e-mail, Exhibit 6, how long
3 before that would you estimate that you had physically been
4 to the west section of Lake Missaukee where lot 8 is
5 located?

6 A Roughly two years.

7 Q And what was the purpose for going there?

8 A There was another permit application there.

9 Q Okay. That was the 2002 -- was that the 2002 Indian Lakes
10 dredging application?

11 A Probably; yeah. It's the only one that I know of.

12 Q Okay. And for that, did you examine the area of the -- for
13 lack of a better term, the commons area where the dock was
14 supposed to go in?

15 A I went and looked at the site. Yeah, it's been -- I don't
16 recall exactly where it was at, but it was right in that
17 area.

18 Q Okay. So just so that I can understand now, before sending
19 this e-mail on March 9th of 2006, you did not actually get
20 out in the water in front of lot 8 and make any examination
21 of any of the biological ecosystem in front of lot 8;
22 correct?

23 A After reviewing --

24 Q Before sending this e-mail.

25 A Well, I was there before that, yes, in 2002 or whatever it

1 was, yeah.

2 Q Correct. Do you know if you went out in front of -- into
3 the water in front of lot 8 as opposed to the commons area
4 that was far down the development?

5 A I don't know, no.

6 Q You don't know that?

7 A No.

8 Q Okay. Now, at any time -- at any time prior to preparing
9 either of your e-mails in this matter, did you do any type
10 of fish count or fish analysis in order to determine the
11 amount of fish you thought might be affected by this
12 dredging project?

13 A No.

14 Q Before submitting -- let me -- I'll ask the question this
15 way: You've heard Dr. Lehman testify in great detail about
16 the various scientific experiments he did?

17 A Yes.

18 Q Okay. Did you undertake -- before sending out either of
19 these e-mails and expressing any conclusion at any point in
20 regard to this dredging project, did you undertake any of
21 those type of scientific experiments?

22 A No, we can't do all that.

23 Q Why not?

24 A Too much time. You can't do an experiment on every permit
25 application that comes in.

1 Q Okay. Is it also a function of money?

2 A It's a function of personnel; it's a function of money; it's
3 everything.

4 Q Okay. And as we sit here today, I understand that you have
5 had some disagreements with Dr. Lehman's ultimate
6 conclusions. Do you have any reason to have any
7 disagreements with the data he compiled in regard to the
8 experiments that he conducted?

9 A I have some questions, yeah.

10 Q Okay. And what are your questions?

11 A Well, can we open up the exhibits?

12 Q Sure. Go to the big binder, Exhibit 3 -- actually, Exhibit
13 2.

14 A Okay. In the description B2 of "Sediment Characteristics."

15 Q Could you give me a page?

16 A This is page 5.

17 Q Oh, B2. Okay. I thought you said "E2." Okay.

18 JUDGE PATTERSON: I thought he said "E." Never
19 mind. I'm sorry. B2?

20 MR. SHAFER: Yes, sir. Yes, your Honor.

21 A So "Ponar grab samples of surficial sediments were collected
22 at three sites for inspection for use in sinking rate
23 experiment." And then beyond that he also looked at
24 invertebrates. So he used both of those -- he used the
25 Ponar samples to look at both invertebrates and also

1 sediments. His description yesterday indicated that he was
2 completely unsure of what portion of the sediments the Ponar
3 actually sampled. So we don't know if he sampled the
4 surface sediments; we don't know if he sampled the middle
5 portion of the sediments and we don't know if he sampled the
6 bottom of the sediments. And he indicated that -- in the
7 testimony yesterday, that there was a very loose material
8 over the top of the -- very loose aggregation with a lot of
9 water at the top and as it went down, it got more compact.
10 So we have no way of knowing actually what part of the
11 sediment colony he sampled.

12 Q Okay. You have been -- you were provided with this report
13 awhile ago I would assume?

14 A About a week or so; a week, maybe week and a half.

15 Q Okay. Have you attempted to replicate any of the
16 experiments that he conducted?

17 A No.

18 MR. REICHEL: Mr. O'Neal, you need to give a
19 verbal response.

20 THE WITNESS: "No." I'm sorry.

21 A "No." I didn't say it loud enough so I'm sorry.

22 Q I'm sorry. But they can be replicated, can they not?

23 A They could be replicated.

24 Q Okay. I mean, that's the function of science in order to
25 replicate certain findings so that we know whether something

1 is true in fact or whether something just might be an
2 aberration, an experiment; correct?

3 A Correct.

4 Q Now, I believe your testimony -- and you can correct me if
5 I'm wrong -- was that you saw scattered submerged vegetation
6 at the site of lot 8 and you had no recollection of any
7 floating vegetation. Is that a correct synopsis of your
8 testimony?

9 A Correct; yes.

10 Q Okay. And floating vegetation, in fact, that would be
11 something that would be important in your analysis of how
12 the ecosystem may, in fact, be affected by way of this
13 dredging permit application; correct?

14 A It's one component, yes.

15 Q Okay. And you want to make sure that you have all the
16 correct information before you're rendering any opinions;
17 correct?

18 A Correct.

19 Q Now, from your onsite inspection, did you create any type of
20 files, notes, records, data, anything?

21 A I did not on this one. I was basically using DEQ's reports.

22 Q Okay. But you didn't do anything yourself in regard to
23 memorializing your observations?

24 A No.

25 Q Now, I've read your testimony in the Tom's Bay matter. And

1 correct me if I'm wrong, but your opinion basically is that
2 Lake Missaukee is at maximum vegetation density; is that
3 correct?

4 A Actually, I think it's at a reduced density at this point,
5 but -- because of other effects in the lake. But, yes, it
6 has existing habitat. I don't know really know what you
7 mean by "maximum vegetation density." It's a very vague
8 question.

9 Q Well, you were asked a number of questions. You know, we'll
10 get later on into your testimony in regard to Tom's Bay.
11 But as I recall your testimony there, there was a
12 question -- or there were a series of questions in regard to
13 planting additional vegetation as a form of mitigation. And
14 your opinion was you didn't think that would take because
15 the lake was basically at maximum vegetation density. Is
16 that a fair synopsis of your testimony?

17 A In the area that they were proposing to plant, there was
18 already vegetation there, yes.

19 Q Okay. Now, the fact that vegetation would exist in a
20 certain area would be indicative, would it not, of the fact
21 that the nutrients in the soil or the sediment or the bottom
22 are sufficient to sustain vegetative life?

23 A Correct.

24 Q And that conversely, if there is no vegetation there, that
25 the sediments and soils simply in that area are not

1 indicative of sustained vegetative existence; is that
2 correct?

3 A There can be some variability from year to year.

4 Q And so, for example, here, in this matter, if there is no
5 floating vegetation, that would lead you as a scientist to
6 conclude that the sediment that is at the bottom of the lake
7 at that area is not conducive to sustaining floating
8 vegetation; correct?

9 A If you look at it over a period of time, that may be
10 correct, yes.

11 Q All right. And the same thing would apply to submerged
12 vegetation, would it not?

13 A I guess.

14 Q Sir, you talked about previously depths -- I can't even
15 speak today -- depth measurements that have been made over
16 the years to Lake Missaukee, in fact, going back to 1940.
17 Do you recall that testimony?

18 A Yes.

19 Q And it is true, is it not, that those measurements are made
20 to the hardpan; correct?

21 A I don't believe so. I believe they're made to the surface
22 sediment.

23 Q Do you do that for the DNR?

24 A No.

25 Q Do you know how -- have you ever -- strike that. Have you

1 ever been out when they're making measurements that are
2 supposed to be recorded in order to determine the bottom of
3 a lake for measurement and mapmaking purposes?

4 A I've done it before.

5 Q Have you been involved in the process for the DNR to do
6 that?

7 A No, we haven't made any lake maps for a long time.

8 Q Okay. Sir, you talked about the fact that one of the things
9 you thought could be done here was to extend a dock; is that
10 correct?

11 A Yes.

12 Q And let me ask you this question: When you were out at this
13 site in regard to this one specific dredging permit
14 application, did you ever go out into the water?

15 A No.

16 Q Okay. You didn't walk on the muck?

17 A (No verbal response)

18 Q You have to say --

19 A I'm sorry. "No."

20 Q It has to be a verbal answer. You didn't get in a boat?

21 A No.

22 Q Did you ever come to a conclusion in regard to your visits
23 and your opinions expressed in this matter as to how long a
24 dock would have to be in order to get a boat to navigable
25 waters?

1 A We were going to -- I was going to rely on DEQ to determine
2 that.

3 Q Okay. I think you talked about you're a fisherman?

4 A Yes.

5 Q Okay. And you're a boater?

6 A Use a boat, yeah.

7 Q And docks, if they're too long out in the lake, can be a
8 navigation hazard?

9 A They can be, yeah.

10 Q Now, Mr. O'Neal, in regard to potential future development
11 in Lake Missaukee in general -- I'm not limiting my question
12 to the west side. I'm not limiting my question to Indian
13 Lakes. Do you know what the development is going to be, for
14 example, 10 years in the future?

15 A Not exactly.

16 Q And, Mr. O'Neal, one of the things that you would be
17 concerned about in regard to your specific work in regard to
18 this dredging project would be the habitat for fish in this
19 area; correct?

20 A Yes.

21 Q And correct me if I'm wrong or you can add, subtract,
22 whatever, but two main factors you would be looking at would
23 be areas for foraging and areas for spawning -- correct? --
24 and maybe cover as well?

25 A Yes.

1 Q Okay. Would those be -- and I'm not trying to put words in
2 your mouth, but would those be the three primary components
3 you're looking at in regard to determining fish habitat?
4 A No, actually food production also. Food may not necessarily
5 be taken at that point but another point in the lake.
6 Q I guess I'm not following you then.
7 A Food doesn't have to necessarily be eaten there that's
8 generated at that point.
9 Q Okay. Fish could put it in its mouth and then take it, swim
10 away?
11 A Actually, the organic material is probably transported by
12 other means to another portion of the lake in many cases.
13 Q Okay. Now, in regard to this area in front of lot 8, I
14 think you have generally heard a bunch of testimony, even
15 though you didn't get out there, that pretty much out to at
16 least 200 feet it is this accumulated sediment, what
17 everybody's been calling here "muck"; is that a fair
18 statement?
19 A It's organic material, yeah.
20 Q Okay. Organic material. And you're generally familiar --
21 because of your background and experience and training in
22 fish biology, you're familiar with the spawning habitats of
23 the type of fish that are in Lake Missaukee; correct?
24 A Some of them, yeah.
25 Q Okay. And are you familiar -- the DNR actually has these

1 website sheets of the various type of inland fish and, in
2 fact, deals with the spawning habitats; correct?

3 A It may. I haven't looked -- I don't think I've looked at
4 it.

5 Q Okay. Did you ever assist in preparation of these websites
6 that deal with these fish?

7 A No. I did not.

8 Q All right. Okay. Do you have any reason to disagree about
9 the fish spawning habitats of inland lakes that are posted
10 by the Michigan Department of Natural Resources on its
11 website?

12 A I don't know. I haven't reviewed it.

13 Q Okay. And I'll ask you some questions about this and then
14 we can figure this out. "Largemouth bass, male constructs
15 the nest on rocky or gravelly bottoms"; is that correct?

16 A Yeah, probably.

17 Q Smallmouth bass, "Smallmouth bass reside in Great Lakes bays
18 where waters are cool and clear and the bottom is rock or
19 gravel"; is that a fair statement -- true statement?

20 A Primarily, yes.

21 Q "Ideal smallmouth habitat contains protective cover such as
22 shoal rocks" -- I don't know if I'm pronouncing this
23 correct -- "talus slopes and submerged logs"; is that true?

24 A Ideal habitat? Probably, yeah.

25 Q "Since the male will guard the eggs and the newly hatched

1 fry, the nest is never far from deep water or cover where
2 he" -- I assume that's the male -- "can retreat when
3 frightened." Is that a true statement from your experience
4 in fish biology?

5 A I believe so, yes.

6 Q Rock bass, there are rock bass in Lake Missaukee, are there
7 not -- some?

8 A I believe so, yeah.

9 Q Okay. "True to their name, rock bass live in rocky areas in
10 the lake shallows"; is that correct?

11 A They live -- they use more habitats than just those areas.

12 Q Okay. What type of habitats would they use?

13 A They use the whole lake at some point or another in their
14 life.

15 Q Okay. Walleye, there's walleye in the lake; right?

16 A Yes, there is; yeah.

17 Q And, in fact, the DNR has stocked Lake Missaukee with
18 walleye over the years; correct?

19 A Correct.

20 Q And there are actually fish that the DNR doesn't like --
21 correct? -- that they have taken out of Lake Missaukee?

22 A Well, not -- that's not the correct statement.

23 Q Okay. What is the correct statement?

24 A Correct statement is at one point they thought that removing
25 some suckers and some bullhead would relieve some of the

1 food pressure on some of the other fish, bring it down to a
2 lower level, the food competition, so that some of the other
3 species might grow a little faster.

4 Q Okay. And is that -- is the reason for that that fishermen
5 want bigger fish to catch?

6 A Generally, yes; yup.

7 Q And, again -- and I'm not -- I don't mean to keep going back
8 to the Tom's Bay testimony, but I am familiar -- that's the
9 only familiarity I have with you in regard to your opinions.
10 The more cover, the bigger the fish are; is that a fair
11 statement? Maybe that's a bad question. Maybe it's a bad
12 question. Density of cover would assist in fish in general
13 being a larger size?

14 A No, that's part of a complex on that. Each lake is a little
15 different.

16 Q Okay. Let's go back to the walleye. "In April and May,
17 walleye spawn over rock shoals"; correct statement?

18 A Correct.

19 Q Yellow perch, there are perch in Lake Missaukee; correct?

20 A Yes.

21 Q "Perch are prolific breeders"; true statement?

22 A True.

23 Q "Perch spawn in the spring leaving eggs in gelatinous
24 strings of dense vegetation roots and fallen trees in the
25 shallows"; is that a true statement?

1 A True.

2 Q Are there any northern pike in this lake, in Lake Missaukee?

3 A Some; some.

4 Q Okay. "Pike eggs and new hatchlings would stay inactive
5 attached to vegetation for their first few days of life"; is
6 that a true statement as well?

7 A Yes.

8 Q Okay. Are there any fish that are in Lake Missaukee that
9 would have as their ideal habitat for spawning the type of
10 muck that you see in front of lot 8 that is only sparsely
11 vegetated?

12 A I think some of those species that you have there would
13 spawn there, yes.

14 Q Is it the ideal place for them to spawn?

15 A Wherever they spawn is the ideal place.

16 Q If the dredging was conducted here, could they spawn in
17 other places in the lake?

18 A Well, I would say "no."

19 Q So these fish would just spawn in this one area, and if this
20 area was disturbed, they wouldn't spawn?

21 A There's a possibility that could occur, yes.

22 Q Okay. If the dredging doesn't go all the way down to
23 relieve all the muck, they could still spawn on the muck;
24 correct?

25 A They could.

1 Q And they could spawn on the sand, if it goes down to sand or
2 whatever the hard bottom might be; correct?

3 A Correct.

4 Q Because, in fact, most of the fish that we went through in
5 the DNR website documents, they like hard bottoms as opposed
6 to muck -- correct? -- to spawn?

7 A And other fish like soft bottoms.

8 Q Like what?

9 A There's lots of other fish in the lake like minnows.

10 Q Okay. Minnows are --

11 A There's also reptile -- okay. Go ahead.

12 Q Minnows are prolific breeders as well; correct?

13 A Some are, yes.

14 Q And minnows can spawn in the sand as well, can they not?

15 A I'm not sure. I'm not sure of all the spawning habits.

16 Q Okay. Fair answer. Now, I want to go back to Exhibit 6,
17 your first e-mail of March 9th, 2006. And you say you do
18 not recommend dredging be allowed at this site. And were
19 you specifically referring then to lot 8?

20 A Yes. Oops. I think I'm in the -- what -- Exhibit --
21 what? -- 6, is it?

22 Q I'm sorry. Exhibit 6 on the small binder.

23 A The white one?

24 Q Yeah. I keep forgetting that that one's white up there. I
25 apologize.

1 A Respondent's one, is that the --
2 MR. REICHEL: Yes.
3 Q Yes.
4 A My Exhibit 6 is -- are you sure you're not talking about
5 Exhibit 9?
6 Q I was looking at it upside down. Exhibit 9. You got
7 Exhibit 9?
8 A Yes.
9 Q Okay. Middle of the first paragraph, you do not recommend
10 dredging at the site. And then you state the alternative
11 is -- to allow access to the open lake across the wetlands
12 would be to construct a dock -- the recommended -- oh, "I
13 recommend not more than 25 percent of the shoreline be
14 disturbed for dock displacement at individual sites." You
15 see that sentence?
16 A Yes.
17 Q Okay. Now, if you were dealing with lot 8 only, what do you
18 mean by "individual sites"?
19 A The way it's described in the Conservation Guidelines is
20 that you'd like to limit development of any particular lake
21 component to not more than 25 percent. So the way to do
22 that on a long-term basis is to limit site development --
23 individual site development to 25 percent or less.
24 Q Okay. So to get around your concern -- correct me if I'm
25 wrong -- my client can play a game, annex three more lots

1 there and the dredging area would be less than 25 percent of
2 his property. And does that get rid of your concern?

3 A Not necessarily.

4 Q Why not?

5 A Because this is a fairly general statement and what we're
6 talking about is looking at long-term -- okay? -- and
7 there's still some individual site issues with these types
8 of projects. And one of the primary ones is the type of
9 sediment that's being proposed to dredge.

10 Q Well, there's been some testimony -- or actually there's
11 some documentation in the record that Mr. Mohny by one
12 company or another either owns or controls 9900 linear feet
13 of shoreline on Lake Missaukee. 50 feet wide is far less
14 than 25 percent of 9,900 feet; correct?

15 A Correct.

16 Q Now, if you could, sir, can you go back to Exhibit 26 of the
17 white book? And go to page 29, please. And I want to ask
18 you some questions about the paragraphs that are under the
19 heading "Overall Development."

20 A Okay.

21 Q Okay. Do you see that? First sentence, "Alteration or
22 development of Michigan lakes should not exceed 25 percent
23 of any habitat component." Do you see that sentence?

24 A Yes.

25 Q What do you mean by "habitat component"?

1 A Habitat component would be, you know -- animals require --
2 what we call habitat is what it requires for its entire life
3 history in order for it to live from the time it's spawned
4 until the time it dies. So if the fish requires spawning
5 gravel or muck or food or vegetation or vegetation of a
6 specific type or anything like that, then that's part of the
7 component. It's a habitat component. For instance,
8 emergent vegetation in the form of bullrush would be a
9 habitat component. Shoreline areas, buffer zones are
10 habitat components; wooded tree areas along the shoreline
11 are habitat components.

12 Q So your testimony is that -- well, let me ask you this:
13 I've read this -- this document and there's a separate
14 document that basically talks about Lake Missaukee --
15 correct? -- another report that you prepared?

16 A Yeah.

17 Q And that report -- let's be honest. It really isn't a
18 document to Lake Missaukee; correct? It's really -- it's
19 really kind of a summary of this document; correct?

20 A Yes. It was presented as guidelines that would be used to
21 manage Lake Missaukee.

22 Q Correct. But in reality, if you read that document, other
23 than the title, there is nothing specific in that document
24 relating to Lake Missaukee itself; correct?

25 A I don't believe there is, no.

1 Q Okay. Thank you. And I've read both documents and I didn't
2 see anything in there that talked about limiting 25 percent
3 of shoreline as being a component. So my question to you is
4 then, your analysis that you want to limit per lot to 25
5 percent that -- that is based upon the fact that you
6 considered the shoreline a habitat component; is that
7 correct?

8 A That's correct.

9 Q All right. Now, I'm going to get back to Exhibit 9 in a
10 minute, but let's go to Exhibit 18.

11 A In which one?

12 Q I'm sorry. The white one. All right. You see that Exhibit
13 18? That's your second e-mail; is that correct?

14 A Yes.

15 Q All right. I want to ask you if you could go to the very
16 end of the second paragraph. And the last sentence, it
17 says, "Adjacent properties should use common" -- well, I
18 guess I should go back a sentence from that. "Dredging
19 should be minimized to the greatest extent possibly with
20 dock extension and narrow channel." So if there's going to
21 be any dredging, you want the channel to be as narrow as
22 possible; is that true?

23 A What I want is to have the least amount of dredging
24 possible, yes.

25 Q Okay. Understanding that some amount of dredging is

1 probably going to be necessary in any project in order to
2 get to navigable waters, if nothing else, if you have
3 sediment in front of a lot that goes out a great distance
4 that -- if there's going to have to be some dredging, you
5 want it to be as narrow as possible?

6 A I want it to be as little as possible.

7 Q Okay. One of the ways also to be little as possible would
8 be narrow as possible?

9 A May or may not be.

10 Q Okay. Fair answer. Do you have any experience in hydraulic
11 dredging?

12 A I witness hydraulic dredging.

13 Q Okay. Do you have any experience in following up hydraulic
14 dredging in order to determine the re-emergence of
15 accretions in that area, you know, kind of like backfilling
16 up?

17 A Only from maintenance dredging that occurs every year, you
18 know, at many places.

19 Q Okay. So to some extent or another, dredging is going to
20 engender some type -- usually it's going to engender some
21 type of maintenance -- correct? -- some type of maintenance
22 dredging?

23 A Usually, yes.

24 Q Okay. And is that one of the things that you're asked to do
25 in regard to your evaluations for the DEQ, not necessarily

1 on this project, but in regard to other projects that, you
2 know -- how much maintenance is going to be necessary in the
3 outgoing years, whether it's five years or whatever, in
4 order to determine what the appropriate dredging you should
5 allow or at least recommend?

6 A It can be.

7 Q Okay. Would it be a fair statement the more dredging the
8 more likely the more maintenance that's going to be -- in
9 the future?

10 A I think it would depend on where at the location; depends on
11 each location.

12 Q Okay. All right. Now, at the end of this second paragraph
13 where -- it says, "Dredging should be minimized to the
14 greatest extent possible with regard to dock extension and
15 narrow channel." And then you have a sentence, "Adjacent
16 properties should use common channels." Do you see that
17 sentence?

18 A Yes.

19 Q So is what you were saying that the properties around lot 8
20 to the north and the south -- you would recommend additional
21 dredging there so that there would be a common channel
22 between two adjoining lots?

23 A Actually, we'd like to have -- I mean, in a situation where
24 dredging occurs, we'd like to have as many users in one
25 location as possible to reduce the dredging as much as

1 possible. That's what I was suggesting there.

2 Q All right. In regard to your suggestion there, were you
3 recommending that if dredging is allowed, that dredging be
4 permitted in narrow channels between adjoining lots so that
5 two adjoining property owners could use a common channel
6 going out?

7 A Actually, if I were going to make a recommendation, if there
8 were going to be two property owners, I would say that the
9 property owners should use the common channel.

10 Q Okay. Isn't that what that last sentence says? I mean,
11 isn't that what you would recommend in that circumstance?

12 A Well, I would recommend a common channel for two adjoining
13 property owners or some other configuration. Actually, if
14 more people could use one channel, that would be the best.

15 Q Okay. Now, do you have any experience, life experience,
16 professional experience, whatever, in regard to how wide a
17 channel would be in order to safely get a boat out to
18 navigable water?

19 A Typically I know DEQ doesn't permit a channel wider than 20
20 feet for normal boat passage. But I can get through a
21 narrower channel with a small boat.

22 Q Okay. And one of the factors in regard to that would be
23 water quality as well; right? Because you want to be able
24 to see if you're going to go out of the channel. As you're
25 driving your boat out, you want to make sure you stay in the

1 channel and don't incur \$4,000 worth of damage to your
2 outdrive?

3 A In most cases, they use buoys to do that.

4 Q Okay. Before you submitted this e-mail, Exhibit 18, did you
5 do any type of analysis if you counted up all of the
6 adjoining lots in Indian Lakes West and had a single
7 channel, 20 feet wide, going out between the lots -- so,
8 like, every other lot you'd have one channel going out on
9 the lot line. Do you understand what I'm saying so far?

10 A (Nodding head in affirmative)

11 Q Okay. Did you make any type of determination as to
12 ultimately across Indian Lakes West total what the
13 cumulative width of all of that dredging would be in order
14 to make common channels for all those lots?

15 A No.

16 Q It's a fair statement, is it not, sir, it would be far wider
17 than 50 feet?

18 A Oh, I see what you're --

19 Q Do you want to see a map of Indian Lakes West?

20 A Are you saying if everybody dredged -- if all the channels
21 are dredged there?

22 Q What I'm saying is, in your opinion of common channels, so
23 that there would be a single channel 20 feet wide for every
24 two lots -- I'm just trying to conceptualize this myself. I
25 share a dock with my neighbor. So what I'm assuming you're

1 saying is, have the people share a dock, have a common
2 channel go out so that both boat owners could go out on a
3 common channel.

4 A Right.

5 Q And if I'm putting words in your mouth, just let me know
6 because I want to make sure I understand what you're saying.
7 Isn't that a fair statement of what you are saying in this?

8 A No, it's not. I recommend no dredging. Okay?

9 Q I understand that. I understand.

10 A So what I'm saying is, "If you're going to give this, reduce
11 dredging as much as possible, use common channels where
12 necessary or some other alternative that you might come up
13 with." Okay? Those are my intents in those kinds of
14 comments. All right. I'm not -- I wasn't telling anybody
15 to do it any specific way. I was indicating my thoughts on
16 what -- "We'd like to keep dredging reduced as much as
17 possible if you issue a permit." Okay? And the reason I
18 did that is because DEQ will issue permits regardless of
19 what I say. Okay? What I say doesn't always affect what
20 they do. So I'm telling them what I'd like.

21 Q Well -- but your opinion is an important component, is it
22 not? I mean, you're supposed to be looking at the fish
23 biology involved in this in order to protect that to the
24 greatest extent possible; correct?

25 A Correct.

1 Q Do you have the Intervenor's book up there?

2 A Which is?

3 MR. LUNDGREN: I think it's green.

4 MR. PHELPS: Do you have a green one or an orange

5 one?

6 MR. SHAFER: I guess we're doing this by color.

7 A I have it.

8 Q Okay. Can you go to 15 -- Exhibit 15, page 2? Do you see

9 that diagram?

10 A Yes.

11 Q I'm going to represent to you, because there's been some

12 prior testimony concerning -- that the hatched areas are

13 common areas. Okay?

14 A Okay.

15 Q And would you agree with me that with the exception of the

16 common areas there are 14 lakeside lots?

17 A Yes.

18 Q Which if they had -- each had -- if you used common

19 channels, that's seven channels; correct?

20 MR. PHELPS: Your Honor, I'm going to -- I'm not

21 really objecting, but this is an exhibit that they would not

22 stipulate to using. So if they're now stipulating to using

23 it, that's fine. But I don't want him using an exhibit he's

24 objecting to us using.

25 MR. SHAFER: We won't object. I think we have

1 diagrams in other books, but I'm not going to object to
2 this.

3 JUDGE PATTERSON: Okay.

4 MR. PHELPS: Then 15 is admitted as well?

5 MR. SHAFER: Correct.

6 (Intervenor's Exhibit 15 marked and received)

7 Q Seven channels; correct? If we took common channels for
8 those 14 lots, it would be seven channels.

9 A Yes.

10 Q Okay. 7 times 20 is much bigger than 50; correct?

11 A Correct.

12 Q Mr. O'Neal, in regard to your analysis of this requested
13 dredging project, did you take into account at all the
14 riparian rights of swimming and wading out into the lake?

15 A I don't recall if that was in the permit.

16 Q Okay. But you understand that swimming and wading and
17 boating, getting out to navigable waters, those are riparian
18 rights; correct?

19 A They can be, yeah.

20 Q Okay. Now, were you asked or did you consider any potential
21 alternatives to the riparian right exercise of swimming and
22 wading out into the water as opposed to the dredging project
23 that my client proposed?

24 A I'm not sure what you mean. I'm not really -- ask me the
25 question again.

1 Q Sure. Maybe I can make it a little clearer. If, for
2 example -- and I can show you some documents and we can talk
3 about that later. But if, for example, one of the purposes
4 of the dredging was to have a safe swim area for small
5 children so that they could wade out from the beach area
6 into the water in order to be able to swim in shallow
7 water -- okay? I want you to assume that was one of the
8 reasons that my clients wanted to dredge. Were you asked to
9 evaluate or did you consider any feasible or prudent
10 alternative to the dredging project that would have
11 permitted that?

12 A I don't recall even talking about swimming with the person
13 when we were there. So I don't think swimming was even an
14 issue. It was mostly just the boat dock.

15 Q Okay. You don't recall that ever coming up, swimming or
16 wading out?

17 A I don't recall swimming coming up, no.

18 Q Okay. Now, also on Exhibit 9, your second to the last
19 paragraph, "Also, the sediments are composed of fine organic
20 materials that will be easily suspended and will not readily
21 settle in retention basins," do you see that sentence?

22 A Yes.

23 Q And it's your testimony that your concern was not about the
24 organic materials that may be displaced during the dredging
25 in the lake, but your concern was in the retention basins?

1 A Yes.

2 Q Okay. Are you aware of one single piece of paper that was
3 ever communicated to my clients from either the DNR or the
4 DEQ that there was any problem with their proposal for
5 spoils management?

6 A I don't recall. That was just a comment that I usually put
7 in if a retention basin is proposed.

8 Q Now, I want to go back for a second and ask you some
9 questions about the 25 percent calculation. And I wrote
10 down your testimony and hopefully I got it correct. But the
11 purpose of this 25 percent requirement is so -- because you
12 believe or the DNR believes that that limitation would not
13 have an effect of the ecosystem of the lake? Is that a fair
14 synopsis of what you had testified to?

15 A No.

16 Q Okay. What did you say then or what did you mean?

17 A Basically there would be some effects, but we feel that at
18 least by preserving 75 percent of the habitat composing the
19 lake that we will at least have sustainable resources for
20 all of those habitat components and the species that survive
21 on those for future generations. That's what that means.

22 Q Okay. And based upon my client's dredging permit
23 application, they weren't going to -- planning on dredging
24 more than 25 percent of the accumulated sediments on the
25 west side of Lake Missaukee, were they?

1 A They were dredging more than that at their proposed site,
2 yes.

3 Q They weren't -- that's not my question. My question is,
4 they weren't going to dredge more than 25 percent of the
5 accumulated sediments on the western shore of Lake
6 Missaukee, were they?

7 A Correct.

8 Q But your concern is that they were going to utilize more
9 than 25 percent of the shoreline; is that correct?

10 A Yes.

11 Q So would it be a fair statement that if they only used 25
12 percent of the shoreline -- their shoreline, whatever lot 8
13 is -- and there's been some dispute concerning that, but if
14 they limit their dredging project to 25 percent of the
15 shoreline, then the DNR wouldn't have an objection to this
16 dredging project?

17 A We would still recommend that we could use a dock because we
18 think it's a better alternative, but at least they'd be
19 within compliance on that. So, again, we would recommend
20 not to do that.

21 Q Is the DNR general policy basically to be against any
22 dredging projects in inland lakes?

23 A No, I think we can allow some dredging in some areas.
24 That's basically what we're saying is there's allowable
25 dredging, you know, within a reasonable amount.

1 Q And the DNR -- correct me if I'm wrong and maybe you're
2 familiar with this and maybe you're not, but the DNR itself
3 does conduct certain limited dredging in inland lakes;
4 correct?

5 A Correct.

6 Q And what are some of the reasons for that?

7 A Public access.

8 Q Riparian access as well?

9 A I don't believe -- I'm not aware -- what do you mean by
10 that?

11 Q Well, all I'm asking you is -- what I'm trying to get at is
12 you're talking public access and I don't know exactly what
13 you mean by "public."

14 A At our public access sites.

15 Q Okay. Sir, you have certain fiduciary duties in regard to
16 your job functions to the DNR; correct?

17 A What do you mean?

18 Q Well, you would be obligated, would you not, if you thought
19 a proposed project -- whether it would have a significantly
20 adverse -- strike that -- a non-minimal impact on the lake
21 ecosystem, you would be obligated to recommend against that
22 project; is that correct?

23 A I guess it would depend on the circumstances.

24 Q What circumstances --

25 A I don't know, you know. It varies.

1 Q But you believed that this project as contemplated, as you
2 understood it, would have a non-minimal effect to the lake
3 ecosystem; correct?

4 A Yes.

5 Q And that was the reason you were recommending against denial
6 of dredging?

7 A I was recommending against dredging, yes.

8 Q I'm sorry. I did that as a double negative, didn't I? You
9 recommended against dredging; correct?

10 A Correct.

11 Q Sorry about that. Mr. O'Neal, if you could, go over to in
12 the DEQ's -- the white binder Exhibit 20. And before I ask
13 you some questions about this document, let me ask you this
14 question: To your knowledge, was anyone else at the DNR
15 involved in the DNR's response in regard to this dredging
16 permit application? And I mean the response to the DEQ.

17 A I'm not aware of anybody. There may have been.

18 Q Okay. Are you familiar, sir, that at one point the DEQ sent
19 out to my client a conservation easement?

20 A I believe that they -- I know that they approached him with
21 it. I don't know how they did that.

22 Q Okay. But you're aware that that occurred?

23 A I'm not aware of the specifics, but I'm aware that it
24 occurred, yes.

25 Q Did you recommend that conservation easement to the DEQ?

1 A I would recommend conservation easements and we do recommend
2 those, yes.

3 Q I understand that. But in this specific instance, were you
4 the one that recommended sending my client a conservation
5 easement?

6 A Yes. I did, yes.

7 Q Okay. And correct me if I'm wrong, but the purpose of the
8 conservation easement would have been to permit the dredging
9 project as it was proposed and then have a conservation
10 easement on the rest of Indian Lakes West so that there
11 would be no further dredging among other things; correct?

12 A Yes.

13 Q Sir, if you could, take a look at Exhibit 20 in front of
14 you, the white book, and go down to the third paragraph.
15 And take a look at the -- I'm just going to read aloud the
16 last sentence. It says,

17 "The DNR indicated to the DEQ that had such a
18 voluntary conservation easement been granted, their
19 concerns about additional future impacts on the
20 remaining subdivision frontage would have been negated
21 and their objection to this project resolved."

22 Do you see that sentence?

23 A Yes.

24 Q And just for purposes of clarification, if you go to page
25 19, the signature there is John Arevalo. You see that?

1 A Yes.

2 JUDGE PATTERSON: Sorry. Did you say page 19?

3 MR. SHAFER: I'm sorry. Page 2. It said "January
4 19" up there.

5 JUDGE PATTERSON: Okay. All right. Just for the
6 record.

7 MR. SHAFER: Page 2.

8 Q The signature is John Arevalo; correct?

9 A Yes.

10 Q And you know who Mr. Arevalo is; correct?

11 A Yes.

12 Q And you were communicating with Mr. Arevalo in regard to
13 this project; correct?

14 A Yes.

15 Q Now, in regard to that statement that I just read on page 1
16 of Exhibit 20, where it says, "The DNR indicated," I'm
17 assuming that's you; is that a fair statement?

18 A Yes; probably. I'm guessing that probably --

19 Q Okay. I don't mean to cut off your answers. And does that
20 sentence fairly represent your position -- let me ask it a
21 better way. Does that statement accurately represent the
22 position you expressed to Mr. Arevalo?

23 A I believe so. I don't remember exactly what we talked
24 about, yeah. So I recommended a conservation easement,
25 yeah.

1 Q So I want to make sure if I understand this correctly. If a
2 conservation easement would have been granted to prohibit
3 dredging, not at lot 8, but at the other lots in Indian
4 Lakes West, you would have felt that this particular
5 dredging project as promulgated would not have such a
6 significant effect on the ecosystem of Lake Missaukee that
7 would have warranted you to recommend -- still recommend
8 denying this permit application; is that correct?

9 A Would you say that again? That was a very long sentence.

10 Q Sure. Would you agree with me that as long as my client
11 provided the conservation easement that you requested, you
12 would have withdrawn your objections to this specific
13 dredging project; is that correct?

14 A If we had gotten a conservation easement on the remaining
15 property, yes, then I would have withdrawn my objection to
16 that dredging permit, although I would recommend still that
17 they put a dock out.

18 Q Okay. But so -- just so that I understand, your concern
19 about the impact on the ecosystem -- the devastating impact
20 upon the ecosystem is not related to the dredging project at
21 lot 8, it's related to the fact that there may be similar
22 dredging projects in the future that would be applied for by
23 the other lot owners in Indian Lakes West; is that correct?

24 A Yes, and --

25 MR. REICHEL: Objection; lack of foundation.

1 MR. SHAFER: He answered it.

2 A Well, I didn't finish answering it -- and other areas of the
3 lake, so, yeah.

4 Q Okay. In regard to -- getting back to Exhibit 18 in the
5 white book, if we could, at the end of that first paragraph
6 there, you talk about extensive shallow water rich organic
7 sediments. Do you see that?

8 A Yes.

9 Q Did you undertake any type of chemical analysis at any time
10 in order to determine the richness of the organic sediments
11 in the western side of Lake Missaukee?

12 A I undertook no chemical analysis.

13 Q Now, the attorney general asked you a question about this
14 buffer strip, 33 feet. Actually, let me strike that
15 question and let me ask you a couple more. Because you've
16 been here through most of the testimony, you've heard some
17 of the testimony concerning this so-called wetlands area
18 close to shore?

19 A Okay.

20 Q Okay. Did you ever express any type of particularized
21 concerns to anyone at the DEQ in regard to that area
22 specifically in regard to whether or not it should be
23 dredged or what an alternative might be to that?

24 A I know we talked. I certainly -- and you are -- I assume
25 you're speaking about the area that encompasses emergent

1 vegetation?

2 Q Correct.

3 A Okay. From the water's edge out?

4 Q Correct.

5 A Okay. I did talk to them about that and it is a concern,

6 yes.

7 Q Okay. And before you sat through the testimony here over

8 the last two days, did you become aware before you sent

9 either of the e-mails that my client had agreed to not

10 dredge that first 20 feet lakeward from the shoreline in

11 order to conserve that area?

12 A No, I don't recall that. I may have, but I don't recall.

13 Q Okay. For the protection of the ecosystem in that area,

14 would it be a good thing -- if dredging was going to be

15 allowed, would it be a good thing for my client not to

16 dredge that initial 20 feet?

17 A Of course.

18 Q All right. Now, getting back to Exhibit 18 -- and I want to

19 understand what you were referring to about this 33 feet.

20 Now, I guess what I understand now is what you're talking

21 about is you want some type of protection from 33 feet from

22 the high water mark, like, towards the house. Is that what

23 you're talking about?

24 A Correct.

25 Q And from your perspective, what is it you want?

1 A Well, what I generally recommend on that is a buffer strip
2 from that point up to the shoreline that would basically be
3 untouched; no mowing, all the trees to grow, those kinds of
4 things. It provides a filter for any water -- surface water
5 runoff; provides vegetation to fall into the lake of all
6 kinds; provides habitat on shore for various types of
7 animals and birds and things. That's what we're looking for
8 there is to provide that buffer strip.

9 Q Okay. Now, you've been out to the site?

10 A Yes.

11 Q And, I mean, recently in regard to this particular project
12 one time; correct?

13 A One time, yes. It's been awhile.

14 Q Okay. And you saw the house?

15 A I did see the house, yeah.

16 Q And there's no mowing anywhere on this parcel, is there?

17 A I don't recall if there is. There may not be.

18 Q Okay. So setting aside mowing, what else is it you want my
19 client to do in regard to the protection of that area, that
20 33-foot strip, just so I'm clear?

21 A Just leave it alone.

22 Q Okay. There's nothing we have to add in order to satisfy
23 your concerns in that regard?

24 A Yeah. Generally what we recommend and use in other areas is
25 that, you know, property owners want to have a place where

1 they can get down to the lake and use it. So use that 25
2 percent of that for your picnic table or whatever you want
3 to have, viewing, get to your dock, whatever, and leave the
4 rest of it alone to provide that filtering capacity.

5 Q Okay. So people could, like, walk through it, but you don't
6 want any type of major activity?

7 A Mowing, right; yes; correct.

8 Q Okay. In regard -- you had a file on this I'm assuming at
9 some point?

10 A On Lake Missaukee?

11 Q On this particular dredging project.

12 A I had the permit application and my e-mails.

13 Q Okay. Let me ask you this question: Have you seen any
14 communication sent from either the DNR or the DEQ to my
15 clients explaining exactly -- before you just testified to
16 this over the last two minutes, explaining exactly what the
17 DNR wanted in regard to that 33-foot buffer strip?

18 A I don't know.

19 Q Have you seen any documentation concerning that directed to
20 my clients, not directed to Mr. Arevalo, from you?

21 A I don't recall, no.

22 Q Mr. O'Neal, how do you measure the importance or
23 significance of a specific food web component?

24 A With very detailed studies.

25 Q For example, how would you assess the role of nematodes

1 (pronouncing), if I'm pronouncing that correctly?

2 A Of what?

3 Q Nematodes.

4 A Nematodes (pronouncing)?

5 Q Nematodes, there you go.

6 A I assess their role as they're an important part of the
7 aquatic community.

8 Q Is there some way to measure their importance or
9 significance?

10 A Well, I think they're significant if they're present. If
11 you have a good natural community in the lake and they're
12 there, then they're important.

13 Q Okay. What about blue-green --

14 A Otherwise you could conduct extensive studies on their life
15 history and how they interact with other species.

16 Q Okay. How would you measure the significance of blue-green
17 algae, for example?

18 A I guess how it's used in the food chain.

19 Q All right. Are any food web interactions important?

20 A Are any important?

21 Q Yes. Are some of them important?

22 A I would assume that they're all important.

23 Q Okay. In regard to the management of the lake systems --
24 inland lake systems of this state, does your department
25 undertake any type of investigations or analyses in order to

1 determine whether what you are doing is either beneficial or
2 detrimental to the lake?

3 A What do you mean to be more specific?

4 Q Sure. For example, you gave the example earlier of there
5 were certain fish that were thought to be crowding out the
6 food sources of some other fish and therefore, particularly
7 in Lake Missaukee we have some documents in the record -- in
8 regard to Lake Missaukee, there was actually activity by the
9 DNR to take those fish out of the lake. And what my
10 question is -- and just using that as an example, are there
11 any type of studies or analyses subsequently undertaken by
12 the DNR in order to determine whether that type of external
13 activity, non-natural, is either benefitting the lake
14 ecosystem or is being a detriment to the lake ecosystem?

15 A Well, first of all, we generally would use any literature
16 that's available on the subject. And then, yeah, on that we
17 generally do surveys on lakes to look at least at the fish
18 populations. And our surveys are actually becoming more
19 extensive now, set up on a fiscal basis statewide looking at
20 various habitat, you know, the whole fish community and
21 things like that. So we do have the means to do that, yes.

22 Q Okay. Historically, has the DNR ever undertaken any type of
23 studies or analyses of the effects of any type of dredging
24 activities on the inland lakes?

25 A You know, I can't answer that question.

1 Q Because you don't know, I assume?

2 A Yes, I don't know.

3 Q Okay. That's a fair answer. You're familiar obviously with
4 the Tom's Bay dredging matter?

5 A Yes.

6 Q Given your last answer, I'm assuming there's been no
7 investigation in order to determine at least the short-term
8 effect of the dredging in Tom's Bay; correct?

9 A Not by me.

10 Q Okay. Do you know if it's being done or is going to be done
11 by anybody?

12 A I don't know. I don't know. No, I don't know.

13 Q Okay. And I assume you would agree with me that lakes
14 incrementally change over time without human intervention?

15 A They can, yes.

16 Q And sometimes that change might be good and sometimes it
17 might be bad; correct?

18 A Could be, yes.

19 Q And as an official with the DNR entrusted with the
20 conservation of the inland lakes of this state, how would
21 you make a determination or a judgment as to whether a
22 natural change of a lake is either good or bad?

23 A A natural change of a lake would just be accepted.

24 Q So if there's a natural accumulation of sediment so that
25 ultimately it looks like the lake is ultimately going to

1 disappear and become a meadow, the DNR would have no
2 interest in stopping or arresting that process?

3 A I would not.

4 Q Does the DNR have a policy in regard to that?

5 A Not specifically addressing that, but I think we do have a
6 dredging policy.

7 Q You've heard some testimony previously in regard to the term
8 "the public trust."

9 A Yes.

10 Q Are you generally familiar with your work in regard to what
11 that means, the public trust?

12 A Yes.

13 Q Does it serve the public trust for lakes of this state
14 ultimately to succumb to accumulations of sediment and
15 basically die as a lake?

16 A Certainly.

17 Q It is within the public trust to do that?

18 A Certainly.

19 Q Okay. And you would agree with me that Lake Missaukee
20 experiences natural disturbances, for example, from storms;
21 correct?

22 A Yes.

23 Q And ice?

24 A Yes.

25 Q And the ecosystem rebounds regardless?

1 MR. REICHEL: Objection; vague; lack of
2 foundation.

3 Q Have you ever done any type of analysis or study in regard
4 to the effects of, for example, storms having on a lake?

5 A I haven't, no.

6 Q Do you believe that Lake Missaukee is at a carrying capacity
7 with respect to aquatic vegetation?

8 A Not really sure that that's a proper question.

9 Q Okay. Well, let's start out with the --

10 A I think the -- I think the --

11 Q Okay. Go ahead. I'm sorry.

12 A Go ahead.

13 Q Well, I was going to ask you from a scientific perspective
14 what is the carrying capacity of a lake?

15 A Carrying capacity of a lake is basically at its -- under its
16 normal -- under normal circumstances, under normal lake
17 conditions, a lake will support a certain level of different
18 types of habitat and different types of animals and plants,
19 different communities. Those things can vary annually.
20 Okay? And what's been shown is that -- through development,
21 through scientific studies, is that we can change those
22 things.

23 Q As humans, you mean?

24 A Yes.

25 Q And the lake level also varies from time to time; correct?

1 A Absolutely.

2 Q And I take it -- and maybe I'm wrong. But in your capacity
3 with the DNR, you've probably had an opportunity to see lake
4 level readings of various lakes?

5 A Sometimes, yeah, I do look at those.

6 Q Okay. Have you, just for example -- and I have no idea
7 whether you have or not. But have you seen any lake level
8 readings for Lake Missaukee?

9 A No.

10 Q But when lake levels go down, ecosystem is lost; correct?

11 A Ecosystem changes.

12 Q And some ecosystem -- well, ecosystem to the lake for fish,
13 for example, is lost; correct? If there was some area that
14 was under water, now it's not under water, it's not
15 available to the fish?

16 A Possibly.

17 Q How would it -- forgetting "possibly," how would it be
18 available to the fish if it's not under water any longer?

19 A Well, if it comes back up again it will.

20 Q Well, I'm not talking about when it comes back up, I'm
21 talking about when it's low.

22 A Oh, when it's low then there would be less water.

23 Q And that isn't known to affect the ecosystem of the fish
24 community in inland lakes, is it?

25 A I don't know if any studies on lake levels and their natural

1 lake level fluctuations and their effects -- decreasing
2 effects on fish -- I don't know of any specific studies on
3 that.

4 Q For example, if the lake level in Lake Missaukee drops by a
5 foot from the high time to the low time -- and maybe you can
6 do this mathematically and maybe you can't -- but the loss
7 of lake ecosystem to fish is going to be significantly
8 larger than the loss of the muck of this dredging project;
9 correct?

10 A I guess I really can't answer that.

11 Q Okay. This specific sediment that is in front of lot 8,
12 what plankton live in there -- or do plankton live in there?

13 A I assume that they do.

14 Q Okay. You haven't done an investigation, though?

15 A No.

16 Q Mr. O'Neal, if you can, go to Exhibit 2 of the big packet.
17 Go over to page 8. And do you remember the attorney general
18 asking you some questions about these conclusions that Dr.
19 Lehman had reached?

20 A Yes.

21 Q Okay. I'll wait 'til you get there. Okay. You see those
22 conclusions?

23 A Yes.

24 Q I want to ask you specifically about C1. In your opinion,
25 what is it that is remarkable about lot 8 and the

1 accumulated sediments that are directly in front of it
2 compared to the lots to the north and to the south of that
3 site?

4 A I think they're very similar.

5 Q Okay. Nothing specifically remarkable about that particular
6 site; fair statement?

7 A True.

8 MR. REICHEL: You need to respond verbally, sir.

9 THE WITNESS: I'm sorry. I didn't say it loud
10 enough.

11 A Yes.

12 Q Are you able to provide a statement or opinion to the judge
13 in regard to what might be measurably different in the
14 ecosystem of Lake Missaukee other than the amount of muck if
15 this dredging project is allowed to proceed?

16 A Say the whole thing again.

17 Q Sure. Can you provide an opinion -- a quantitative opinion
18 as to what might be affected in the ecosystem of Lake
19 Missaukee if this dredging project is allowed to proceed?

20 A Do you mean right now or at some later time or, I mean, what
21 are you asking? You want a quantitative -- I haven't made a
22 quantitative estimate if that's what you're asking. But
23 could one be made? Probably.

24 Q Okay. Of what?

25 A Well, you could measure the amount of vegetation that would

1 be taken out. You could measure the amount of organic
2 material that's present at the site that would be taken out.

3 Q And none of that's been done in this case; correct?

4 A No. Just from what we know and how much dredging there's
5 going to be.

6 Q Okay.

7 MR. SHAFER: If I could just have a minute, your
8 Honor?

9 JUDGE PATTERSON: Sure.

10 MR. SHAFER: That's all I've got, your Honor.

11 JUDGE PATTERSON: Redirect?

12 MR. REICHEL: Hopefully very briefly, Mr. O'Neal.

13 REDIRECT EXAMINATION

14 BY MR. REICHEL:

15 Q You were asked by counsel whether you had performed, quote,
16 "scientific experiments," unquote, similar to those
17 described by Dr. Lehman in his Exhibit 2. Do you recall
18 being asked about that?

19 A I think so, yes.

20 Q And your testimony was that you did not. I guess my
21 follow-up question to that, sir, is, is it necessary or was
22 it necessary to perform, for example, the tests of water
23 chemistry that Dr. Lehman performed in order to reach the
24 conclusions that you have testified to about the adverse
25 impact of dredging sediment at this site?

1 A It could be useful to some extent and actually we have -- I
2 forgot we did -- we do standard water quality sampling and
3 we did do that in 2004, I believe.

4 Q I'm sorry. Speak up, please.

5 A I forgot that. And I wasn't thinking about water quality
6 samples. We had conducted water quality samples also in
7 2004. In particular of one parameter, oxygen concentrations
8 in a water body can help determine the effects of dredging
9 in regard to the release of nutrients. But in a lake like
10 Lake Missaukee that is oxygenated mostly down to the bottom,
11 then it's usually not that big of a concern. We've known
12 that for quite some time.

13 Q So I guess my question, though, is that -- do the opinions
14 that you've expressed with regard to the adverse impacts of
15 the proposed dredging project -- do they depend upon -- or
16 in order to form those opinions, did you need to conduct,
17 quote, "experiments," that counsel asked you about?

18 A The water quality samples I think were not necessary. The
19 sediment samples provide some information, but I don't
20 really see what strong bearing they have on the issue. We
21 know they were organic sediments and we know that they're
22 generally finer particles associated with that and suspend
23 more than what the sand does.

24 Q You were also asked a series of questions about your
25 communications with the DEQ having to do with the subject of

1 a possible conservation easement. Do you recall being asked
2 about that?

3 A Yes.

4 Q Let me ask you this: In your experience in commenting on
5 projects that involve the dredging of inland lakes and
6 streams, particularly wetlands, in making a recommendation,
7 a course of action with respect to a permit, is one of the
8 factors that you or the DNR can consider where filling --
9 excuse me -- where dredging a wetland is proposed is what,
10 if any, mitigation would be implemented to address that
11 dredging activity?

12 A Yes.

13 Q And with respect to your comments to the DEQ with regard to
14 this idea of a conservation easement, how, if at all, did
15 the suggestion of a conservation easement fit into that
16 scheme?

17 A Basically that's what it would be is a mitigation for the
18 dredging that would occur.

19 Q And, again, to the extent that you provided comments to the
20 DEQ on this subject, the conservation easement or the
21 concept that was being discussed, how extensive an area of
22 marsh along the shore of Lake Missaukee would have been
23 permanently protected in comparison -- under that scenario
24 in comparison to the amount that would be dredged if the
25 project proposed by the applicant were allowed to proceed?

1 A I didn't quite get all that.

2 Q I'm sorry.

3 A Again, I think I'm starting to get a little tired.

4 Q Okay. Let me try to put it more simply. You understand
5 that the project proposed here entails apparently an area of
6 50 foot wide, approximately 200 feet long, there's some
7 uncertainty as to the depth of dredging, but roughly those
8 dimensions. The concept of a conservation easement that
9 you've communicated with the DEQ about, if I understand you
10 correctly as mitigation, how extensive an area would have
11 been preserved from -- permanently protected from dredging
12 or disturbance under that concept?

13 A Actually, I thought it was going to be the entire shoreline
14 of 10,000 feet originally.

15 Q Okay. And from a resource protection and conservation
16 standpoint, how does the comparison of those two
17 alternatives weigh for you in attempting to protect or
18 conserve the resources of Lake Missaukee as a whole?

19 A Well, clearly it would protect the majority of the rest of
20 the bay or at least the rest of the shoreline in that
21 immediate area.

22 MR. REICHEL: That's all I have.

23 MR. SHAFER: Maybe a couple questions.

24 RECROSS-EXAMINATION

25 BY MR. SHAFER:

1 Q In regard to this conservation easement, nothing was going
2 to be mitigated in regard to this dredging project; correct?

3 A Correct.

4 Q The idea was to allow it to go forward in its full and
5 complete proposal and then have a conservation easement for
6 other property; correct?

7 A Yes, perhaps mitigation was the -- I guess I look at it as a
8 form of mitigation. "Mitigation" applied literally probably
9 means replacement.

10 Q But irrespective of the conservation easement, you would
11 believe and it's your opinion that this project as proposed,
12 as you understand it, having sat through the testimony for
13 the last two days, would still have a non-minimal impact
14 upon the environment -- the ecosystem of Lake Missaukee so
15 that you would still recommend against the project; correct?
16 If that was too long of a question, just let me know.

17 A If I was given a conservation -- if they were given a
18 conservation easement, I would still recommend against the
19 project. Is that what you're asking me?

20 Q Okay. What I'm asking you is setting aside the conservation
21 easement -- okay?

22 A Forgetting about that?

23 Q Forgetting about the conservation easement, your opinion is
24 that the effect on the ecosystem of Lake Missaukee by this
25 dredging project is sufficiently non-minimal so that it

1 should not be undertaken; correct?

2 A Correct.

3 Q Do sediment samples tell you as a scientist more about the
4 composition of accumulated sediment than having a visual
5 observation of them through water from shore?

6 A Yes.

7 MR. SHAFER: That's all I've got.

8 JUDGE PATTERSON: That's it.

9 THE WITNESS: Thank you.

10 MR. REICHEL: So I can call my next witness?

11 JUDGE PATTERSON: Who do you have?

12 MR. REICHEL: Mr. Arevalo.

13 JUDGE PATTERSON: How long do you think that will
14 take? It's 10 to 5:00 now.

15 (Off the record)

16 REPORTER: Do you solemnly swear or affirm the
17 testimony you're about to give will be the whole truth?

18 MR. AREVALO: I do.

19 JOHN AREVALO

20 having been called by the Respondent and sworn:

21 DIRECT EXAMINATION

22 BY MR. REICHEL:

23 Q Mr. Arevalo, please state your full name for the record.

24 A John Alan Arevalo.

25 Q How are you employed, sir?

1 A I'm a district supervisor with the Land and Water Management
2 Division with the Department of Environmental Quality.

3 Q And what particular geographic area do you supervise?

4 A The 22 county area described as the Cadillac District.

5 Q Okay. I'd like you to look at the white notebook which
6 contains the DEQ exhibits in front of you and turn to tab 1,
7 please.

8 A Which tab number?

9 Q 1, please. Okay. Is this a copy of your resume, sir?

10 A Yes, it is.

11 Q Did you prepare this document?

12 A Yes.

13 Q To the best of your knowledge, is this accurate?

14 A Yes.

15 Q Okay. Very briefly, could you describe your formal
16 educational background, what university you attended and
17 what degree you obtained?

18 A I have a bachelor of science degree from the University of
19 Michigan, School of Natural Resources, with a focus on
20 aquatic ecology, fisheries. I took one graduate level
21 course on aquatic entomology.

22 Q Since completing your degree at the University of Michigan,
23 have you obtained any additional training related to the
24 subject of wetlands?

25 A I have. I developed an interest through the years in

1 identification of particularly difficult genera of sedges or
2 Carex such -- I've taken some advance course work with Dr.
3 Reznicek at University of Michigan -- he's out of the
4 University of Michigan, rather, in Maine and in Michigan.
5 I've taken extensive training on the job with the
6 department. Also, I've taken course work with Dr. Voss at
7 the U of M biological station. I've also done training for
8 my staff, other DEQ staff and DNR staff on the
9 identification of wetlands.

10 Q And do you have any professional certifications in the area
11 of wetland science?

12 A I do. I'm a certified professional wetland scientist
13 through the Society of Wetland Scientists.

14 Q And how long have you been professionally employed in the
15 area dealing with wetlands?

16 A That would be since August of 1986 when I hired on with the
17 Department of Natural Resources.

18 Q Which then was the predecessor of what's now the DEQ;
19 correct?

20 A Yes.

21 Q Over the course of the years with the DNR and the DEQ, have
22 you had experience in administering what are today referred
23 to as Parts 301 and 303 of the Natural Resources and
24 Environmental Protection Act?

25 A Yes.

1 Q How extensive experience -- or how big of a professional
2 responsibility has that been for you?

3 A I would estimate in the years that I did the field work
4 which would be prior to me accepting my current position,
5 which was -- we're talking about the period prior to
6 December of 2002, I would estimate I did approximately 200
7 site inspections per year involving 301, Inland Lakes and
8 Streams statute; 303, the Wetland Statute and the Great
9 Lakes Submerged Lands statute, those three being the primary
10 statutes we would conduct reviews under.

11 Q And in the course of your professional experience, have you
12 had occasion to review or look at scientific issues having
13 to do with aquatic ecology?

14 A Yes, I have.

15 Q And how frequently or how extensively have you had
16 professional experience in dealing with such issues?

17 A We through the years have had a good deal of interaction
18 with the Department of Natural Resources with particular
19 focus on their fisheries staff, to a lesser extent wildlife
20 staff. And then if there are -- if there's been research
21 papers written or if there are policy statements that are
22 produced by the DNR relative to issues that would concern
23 us, mainly the aquatic environment, I would become aware of
24 those as we have contact with the DNR. I would also add
25 that since the departments were split in 1995 and we were

1 not physically housed with them, that's been more of a
2 challenge. But we've attempted to keep abreast of those
3 issues as best we can.

4 Q And in your present position as district supervisor, do you
5 supervise other staff in the administration of Parts 301 and
6 303?

7 A I supervise nine professional staff who do that type of work
8 identical to Ms. Schmidt.

9 MR. REICHEL: At this time, Judge, I would move
10 that Mr. Arevalo be recognized as an expert in the subjects
11 of aquatic ecology and wetland science.

12 MR. SHAFER: No objection, your Honor.

13 MR. PHELPS: No objection.

14 JUDGE PATTERSON: Okay. No objection, he will be
15 so qualified.

16 Q Mr. Arevalo, following up on this last point, you testified
17 that one of your responsibilities is supervising other
18 professional staff including Ms. Schmidt. In the course of
19 your supervisory responsibilities, do you ever have occasion
20 to review decisions made by your staff with respect to
21 permit denials under Parts 301 and 303?

22 A Absolutely.

23 Q Is that a regular part of your activity?

24 A Yes, it is.

25 Q And do you have personally or does the department have a

1 process for informally conferring work with permit
2 applicants in situations where permits have been denied?

3 A Yes, we do.

4 Q Turning to the permit application that brings us here today,
5 did you participate in any informal review of the initial
6 permit denial in this case?

7 A Yes.

8 Q And more specifically, did you have occasion to meet with
9 Mr. Dale Boughner or any other representatives of the permit
10 applicant?

11 A Yes, I did so on August 17th, 2006.

12 Q And could you briefly describe where you met and what the
13 nature of the discussion was?

14 A I was in Cadillac doing other duties. Robyn and I drove
15 over for the purposes of conducting informal review. I met
16 the caretaker on site. He parked there at the driveway
17 where the house is located on lot 8. We proceeded to view
18 the lakefront area and we had some discussion with respect
19 to the project purpose, the project location, alternatives
20 considered, the usual things I would discuss at such an
21 informal review.

22 Q Okay. You're aware, are you not, since you were here for
23 Ms. Schmidt's testimony, that up through and to the point of
24 the initial permit denial in July of 2006, she had made
25 certain findings about conditions at this project site;

1 correct?

2 A Correct.

3 Q Among other things, is it your understanding that she had
4 made a determination that there were present at the project
5 site, the area proposed to be dredged, wetlands that were
6 regulated under Part 303; is that your understanding?

7 A Yes, it is.

8 Q During the course of your visit to the site in August of
9 2006, did you have occasion to observe the shoreline and the
10 area offshore from the project site?

11 A Yes.

12 Q And what, if any, observations that you made at that time
13 either confirmed or conflicted with the findings made by Ms.
14 Schmidt, both in her project review report and the permit
15 denial?

16 A I would say it's been a long time since I've been there. To
17 refresh my memory, if she took photographs of this site, I
18 would prefer to refer to those before commenting.

19 Q Absolutely. I'd like to direct your attention to in the
20 white book so-called, DEQ Exhibit 25, which I'll represent
21 to you are a series of photographs that were testified to
22 earlier.

23 A I have them before me now.

24 Q As you can see, the first five of those photographs have a
25 date indicating May 31st, 2006, and I'll represent to you

1 that Ms. Schmidt has testified that these are photographs
2 she took on that date at or in the vicinity of the project
3 site.

4 A My recollection from my visit is that when you walked
5 between the house and the lake, you walked out onto an area
6 where one could discern there was less vegetation along the
7 shore than there was in the areas immediately to the north
8 of there. So I guess as I look at this photo A, for
9 example, it looks like a view to the north which is
10 consistent with what I recall. And I would also add that my
11 recollection of the shoreline there is consistent with what
12 I would expect for the level of activity that's occurred
13 there behind his house. It isn't heavily developed, but you
14 can see people have been accessing the water via that site.

15 Q Okay. And getting back to my -- the basic point I wanted to
16 establish is whether or not based upon your observations you
17 agree or disagree with Ms. Schmidt's conclusion that there
18 existed offshore of lot 8, as in the project site, wetlands
19 regulated under Part 303.

20 A For clarity, I would say there are absolutely wetlands
21 within the area offshore. Normally the department would
22 focus upon woody species or herbaceous species such as the
23 sedges that we talked about and described as emergent
24 wetland in previous testimony. In terms of the plants
25 growing in the water or floating out in the water, they rank

1 on the National Wetland Plant list, which is the list that
2 our staff uses prepared by the US Fish and Wildlife
3 Service -- they rank as obligate plants. Normally I would
4 prefer that we collect plants and identify them to genus and
5 species and I push the staff to do that whenever possible.
6 Because we do not typically have access to a boat every time
7 we go out, in fact, very rarely, we did not collect plants
8 offshore. I did read the materials that were provided by
9 Dr. Lehman, for example, and the species he identified out
10 there and they certainly are obligate wetland plants. And I
11 could observe vegetation growing offshore from where I
12 stood. I did not go out there and collect plants or
13 quantify them.

14 Q And indeed, was that or was that not the primary purpose for
15 your visit?

16 A It was not. It was essentially to agree or disagree with
17 what my staff had found and then try to determine were there
18 any points of discussion in terms of lessening impacts for a
19 project that might ultimately be permissible and negate the
20 need to come to this administrative hearing.

21 Q Okay. On the first point of what you just described; that
22 is, agreeing or disagreeing with the staff's finding; what
23 was your conclusion?

24 A I agreed it was appropriate to deny the permit application
25 as proposed.

1 Q Okay. With respect to your discussion onsite with the
2 applicant's agent, what, if any, information was imparted to
3 you about the purpose of both the scope of the proposed
4 project and its purpose?

5 A I specifically remember asking why was the proposal for a
6 200-foot dredge channel and why not longer or shorter? What
7 was it about that 200 foot depth that was so significant?
8 And I seem to recall discussions about a hydraulic dredge
9 contractor he had talked to who I was familiar with. And
10 normally we would ask if you have detailed soundings in
11 terms of the depth offshore. But my recollection was it was
12 a combination of -- water depths were an issue where he
13 wanted to get out to where he had what he felt would be
14 sufficient depth for the boat that the applicant owns. And
15 I seem to recall he said something about it wasn't strictly
16 just a water depth issue, that there were plants present as
17 well during the growing season out there in the water that
18 made navigation more difficult.

19 Q Did you prepare any written follow-up to that onsite
20 meeting, if you recall?

21 A I believe I wrote a letter to them summarizing the results
22 of that meeting.

23 Q Okay. I'd like to direct your attention to, in that same
24 white book, DEQ Exhibit 17. If you would, locate that,
25 please.

1 A Yes, this exhibit is a letter dated September 29, 2006 that
2 I wrote to Mr. Boughner.

3 Q And to the best of your knowledge, does this letter
4 accurately summarize your understanding of the substance of
5 your communications at the August 17th meeting?

6 A It does.

7 Q There's reference in this letter on the first page to, in
8 the second paragraph, statements -- let me just read it to
9 you quickly. This is addressed to Mr. Boughner by you.
10 "You also made clear the extent of his ownership and the
11 unspoiled character of much of it; further, that the
12 applicant may be interested in ensuring it stays that way
13 for their heirs." Do you recall Mr. Boughner saying
14 something to that effect to you during this August 2006
15 meeting?

16 A I do. I recall asking why are some of the lots for sale or
17 whatever or does he intend to sell them. And I specifically
18 remember him saying that he's not particularly interested in
19 selling and, in fact, has tried to discourage people from
20 buying it by asking for very, very high prices because he
21 loved the property, he liked to drive around it with his
22 family, he did not come there frequently, but he really
23 loved it and was interested in preserving it as is.

24 And when he said that, my initial thought was I
25 wasn't positive that there was a land conservancy active in

1 that area and I had no idea of whether he was interested in
2 looking at something like that. But that kind of prompted
3 me to think if that were truly what he was interested in,
4 perhaps he would be interested in looking at that. And then
5 later it dawned on me that perhaps an area offshore similar
6 to what we've had conservation easements granted before in
7 other reviews might be instrumental here in addressing some
8 of the concerns of Fisheries Division with DNR and also our
9 own concerns relative to future development within that sub.

10 Q Following up on your last question (sic), you alluded to
11 previous experience; that is, prior to this exchange with
12 this permit applicant; of there being discussion or
13 consideration of conservation easements to protect marsh
14 areas along inland lakes; is that correct?

15 A Yes, it's not terribly common, but it has happened and --
16 specifically in another case that we had an administrative
17 hearing on.

18 Q Okay. And functionally, what would be the purpose of such a
19 conservation easement in relation to a proposal such as that
20 made here to dredging area that contains wetlands? What
21 would be the purpose of the easement?

22 A Okay. And you're talking specifically in the context of an
23 easement below the ordinary high water mark of the lake?

24 Q Correct; yes.

25 A I believe we've heard testimony previous to this that you

1 still will incur -- or rather the environment will incur the
2 effects and impacts associated with doing that dredging or
3 whatever the project is. So that's a given. That's going
4 to occur. But what the conservation easement would ensure
5 is that beyond that area that's impacted, the resource will
6 stay as is and continue to provide whatever functions and
7 values it currently provides because we know we will not be
8 back looking at future applications in those areas.

9 Q Did you have any further communication after that letter
10 that you can recall with the permit applicant's agents?

11 A I did. I had multiple contacts with them. In fact, at one
12 point I remember they did hire a lobbyist from Lansing who
13 was a prior state representative. He got involved briefly
14 and we had a meeting in the Cadillac office. So in answer
15 to your question, yes, there were multiple contacts.

16 Q Okay. On that topic, please turn to tab 19 in that book,
17 please. Can you identify this document?

18 A It's a note to file that I typed dated December 19, 2006,
19 describing that meeting I was mentioning a few moments ago.

20 Q Okay. And what, if anything, does this memorialize about
21 the response by the permit applicant to the discussion that
22 you had had back -- and the correspondence that you had had
23 back in September?

24 A It mentions that the caretaker did have opportunity to
25 discuss with the property owner. He was not interested in

1 doing the voluntary conservation easement. And it mentions
2 specifically that he had young children and he was concerned
3 about them being able to swim near shore.

4 Q Let me back up. I mean, what did you -- what purpose or
5 purposes did you understand the permit applicant to be
6 seeking based upon your communications with him -- or his
7 agent, I should say?

8 A By requesting the meeting you mean?

9 Q No, with respect to the project.

10 A Okay. Well, we always refer to what the project purpose is
11 described as in the application materials. And I recall
12 that initially it was access to waters for the boat that he
13 had and we looked at the boat briefly that he had in the
14 garage. And I believe he may have had some jet skis there
15 the day of the inspection. That's always pertinent in terms
16 of what type of watercraft you have, what type of water
17 depths do they require. My recollection was initially that
18 was the focus of the permit application.

19 Q Okay. But I take it that subsequently or at least by the
20 time of this meeting it was communicated to you that there
21 was also an interest specifically in swimming near shore?

22 A That's correct.

23 Q Did you, on this occasion or other occasions, discuss with
24 the permit applicant's agent your views on the availability
25 of any alternatives to the proposed project that would

1 enable the applicant to achieve some or all of its project
2 purposes?

3 A I would always ask my staff to do that in a denial letter
4 when they discuss what we believe are feasible and prudent
5 alternatives. And if I could think of other alternatives
6 that were not brought up in that denial, I would do so. In
7 terms of the exact time frame when that would have happened
8 as it relates to this note to file here, I can't give you
9 the specific dates.

10 Q Fair enough. But by having reviewed the file and heard
11 testimony today, you are aware, are you not, that in the
12 denial letter from July of 2006, department staff -- your
13 staff identified as an alternative to the proposed project
14 the installation of a dock, either permanent or seasonal,
15 from the shore rather than dredging as a means of aiding
16 people to go from the shore to a watercraft at the end of
17 the dock; correct?

18 A Yes, I'm aware of that and would agree.

19 Q Your Exhibit 19 identified as a follow-up on the last thing
20 review of lake level. And what action, if any, did you
21 direct your staff to take by way of follow-up to this
22 meeting?

23 A I seem to recall that I asked Robyn if she could put
24 together some historic data on water level just because we
25 have such a large district, I can't be totally up to date on

1 which ones have water control structures and what their
2 winter and summer levels are. So I asked if she could put
3 that information together. My recollection was that the
4 Tom's Bay file may have contained some of that information
5 relative to water depths.

6 Q Okay. And do you recall whether -- after your meeting in
7 late 2006 with Mr. Boughner and others, did you receive any
8 correspondence from them?

9 A I'd have to check. They came back to me multiple times.

10 Q That's fine. And I don't want to go through blow by blow,
11 but let me just highlight a couple of things. If you could,
12 turn, please, to DEQ Exhibit 20.

13 A I have that before me.

14 Q Okay. Briefly, do you recognize this as a letter that you
15 wrote to the permit applicant's agent?

16 A Yes, I do.

17 Q And what, if any, other data did you identify in this letter
18 as being needed to further evaluate this project or the
19 proposal?

20 A Paragraph four specifically mentions that we would like to
21 have some accurate water depth data. And I remember asking
22 Mr. Boughner if he could provide the information. He seemed
23 to recall they took some measurements of water depths or Mr.
24 Crist from Michigan Hydraulic Dredge had done so, but he
25 could not get his hands on them. So I suggested that our

1 staff go and collect those.

2 Q Okay. And I believe you've heard testimony or you're
3 otherwise aware that, in fact, Robyn Schmidt went to the
4 site in late February of '07 and in the presence of Mr.
5 Boughner collected some -- or other agents of the Petitioner
6 collected some data regarding water depth and sediment
7 depth?

8 A I'm aware that we went out and collected water depths, yes.

9 Q Yeah. In terms of -- and you've indicated you had multiple
10 communications with the permit applicant or its agents. I'd
11 like to direct your attention now to DEQ Exhibit 23, please.

12 A It's a letter dated March 22, 2007, to the agent signed by
13 me.

14 Q And does this reflect your consideration or the department's
15 consideration of information regarding lake level and water
16 and sediment depth?

17 A It does.

18 Q And what conclusion, if any, did you reach at that stage as
19 of March of 2007 with respect to the availability of any
20 possible feasible and prudent alternatives to the activity
21 proposed by the applicant?

22 A Paragraph three specifically discusses some alternatives
23 with respect to watercraft. And then paragraph four delves
24 into the swimming and wading issue.

25 Q Now, you've been present during the proceeding today. I

1 take it you have -- you've had the opportunity to hear
2 testimony or some description of what the nature of the
3 project or a modified project currently being proposed by
4 the applicant is. Is it your understanding that the
5 applicant, as a variant of the original project described in
6 the permit, has proposed to commence dredging in an area
7 apparently at least 20 feet lakeward of the existing
8 shoreline and continues to propose to dredge an area
9 approximately 50 feet wide by approximately 200 feet long?

10 A I'm aware of that. I wasn't present with respect to
11 discussion about dredging down to a, quote, unquote, "harder
12 bottom." All I was aware of prior to showing up to the
13 hearing today was what the original permit application
14 showed in terms of average depth that was proposed to be
15 dredged. I believe it was two and a half feet.

16 Q Given the understanding -- or I want you to assume for
17 purposes of this question that the current proposal by the
18 permit applicant is, again, dredging an area 50 feet wide by
19 200 feet long and dredging to a depth that would enable the
20 applicant to reach some hard surface rather than organic
21 sediments and that the dredging would commence in an area
22 approximately 20 feet lakeward of the existing shoreline.
23 Given those assumptions, have you or can you reach any --
24 could you express your opinion as to whether or not that
25 proposed activity would meet the criteria that the

1 department needs to apply, first of all, under Part 301 and
2 Rule 814 of the Part 301 rules?

3 A In my opinion, it does not. In looking over -- excuse me.
4 I should qualify that. I would rely upon the data that was
5 collected by my staff in terms of what depths you have to
6 the point where she felt resistance with that rod -- and
7 I'll describe that as being synonymous with what you said,
8 with the hard bottom -- and the water depths given the date
9 she was there and the water elevation on the lake that we
10 know was present on the date she did the inspection. And I
11 would use that data to determine -- for the purposes of
12 navigation when applied to the type of watercraft that these
13 individuals were proposing to use in making a decision on
14 whether or not we should even be looking at a dredge
15 proposal to allow those watercraft to go in and out. Then
16 the secondary issue, if you look at their other intended
17 purpose, to provide good swimming area, in light of that,
18 you'd have to review that project differently because
19 obviously they were preferring to get down to a hard bottom
20 within that whole area so that somebody could wade or swim
21 more readily than they could with those soft materials. But
22 regardless, my findings are consistent with my staff and
23 that is they do not meet statutory criteria for permit
24 issuance under either 301 or Part 303 because feasible and
25 prudent alternatives exist and they've not demonstrated why

1 they cannot utilize a less damaging alternative.

2 Q Okay. Without going through each and every one of the
3 criteria, as I believe you're aware, Mr. Arevalo, under Rule
4 814 of the rules under Part 301, the department is charged
5 with considering the environmental effects of a project that
6 would include dredging in an inland lake; correct?

7 A That's correct.

8 Q And among the considerations that the department is charged
9 with is determining whether or not the proposed activity
10 would have a non-minimal adverse environmental effect or
11 words to that effect; is that one of the criteria?

12 A Yes, it is.

13 Q And with respect to that decisional criterion, based upon
14 your review of the available information, what conclusion
15 would you reach with respect to this current modified
16 project proposal?

17 A I do not believe it would pose a minimal adverse effect to
18 the aquatic environment.

19 Q And in that regard, without going through chapter and verse,
20 what particular facts or information form that conclusion?

21 A That would be based upon my review of the site, my review of
22 the file and the project review report, also the comments
23 that were solicited from the Department of Natural Resources
24 and then my work experience doing these type of reviews over
25 the last 21 years and looking at alternatives as well.

1 Q Okay. With respect to the second -- or a second enumerated
2 criterion under Rule 814; that is, whether or not a feasible
3 and prudent alternative is available; what conclusion do you
4 reach, if any, with respect to this proposed -- this
5 modified proposed project that I described earlier?

6 A As I previously stated, that they have other feasible and
7 prudent alternatives that are available and could be
8 employed to both reach deeper water, whether that's 100 feet
9 offshore where the water depths are approximately 4 feet or
10 whether they propose to go out 200 feet. They can go out
11 with either a seasonal dock or a permanent pier. The former
12 does not require a permit from us as we pointed out.

13 Q Very briefly, one of the other -- I would like to walk
14 through briefly your -- whether or not you've reached any
15 conclusions or can offer an opinion as to whether or not
16 this modified proposed project satisfies the decisional
17 criteria of Part 303 and its associated administrative
18 rules. As you're aware, that statute and rule provide a
19 number of decisional criteria. And are you familiar
20 generally with those criteria set forth in Section 30311 of
21 the NREPA?

22 A Quite.

23 Q Okay. And would you agree, sir, that those criteria
24 include, among other things, whether or not the proposed
25 project would be in the public interest; is that correct?

1 A That's correct.

2 Q And further, among other things, whether or not an
3 unacceptable disruption of aquatic resources would occur, is
4 that another criterion?

5 A Yes, it is.

6 Q And further, directing your attention to Section 303(4),
7 "A requirement that a permit shall not be issued
8 unless the applicant shows either of the following:
9 The proposed activity is primarily dependent upon being
10 located in the wetland; B, feasible and prudent
11 alternative does not exist,"
12 are those among the criteria that you would need to consider
13 in deciding whether or not to permit this proposed project?

14 A Yes.

15 Q Again, with respect to the question of whether or not this
16 proposed project would result in an unacceptable disruption
17 of aquatic resources, what conclusion or finding would you
18 make?

19 A I find it would have an unacceptable disruption. I should
20 clarify. I didn't get the opportunity to comment earlier
21 when you were asking how we could make that determination.
22 We would also look at where this site is in the landscape.
23 And my knowledge of Lake Missaukee is primarily related to
24 the side that's over by Lake City, the more heavily
25 developed area. It does not have a lot of intact frontage.

1 And I know by reviewing this site and reference materials
2 and discussions that we've had that this area of the lake,
3 which is the subject of this permit application, is, in
4 fact, one of the largest intact pieces that's left on the
5 lake. And by virtue of that, it has higher resource value
6 and it's worthy of protection, certainly. And I know there
7 have been inferences to the previous contested case
8 pertaining to Tom's Bay. And I know that the proposal for
9 decision in that matter referenced the fact that this site
10 that's the subject site of this contested case was one of
11 the largest intact sections. And one might presume that's
12 to provide justification for why the impacts at Tom's Bay
13 should be reviewed in that light, that there was lots of
14 this type of habitat left in reference to this specific area
15 that we're talking about today.

16 Q And just to be clear, in that last phrase when you say "this
17 specific area," you were talking about what area?

18 A I'm talking about the general area that's under the
19 ownership of this permit applicant.

20 Q On the west end of Lake Missaukee?

21 A That's correct, the 9900 feet.

22 Q Again, have you reached -- or what conclusion, if any, would
23 you reach with respect to whether the proposed activity in
24 this modified permit proposal that I've posited -- whether
25 or not it's primarily dependent upon being located in the

1 wetland?

2 A According to the administrative rules, it is not a wetland
3 dependent activity. And the best example I can give would
4 be peat mining, which we've talked about at other contested
5 cases. And the reason -- the rules spell out what
6 constitutes being wetland dependent, but essentially it
7 requires physical siting in a wetland. That's why the peat
8 example is so good.

9 Q And when you talk about the rules, is there a particular
10 rule or rules that you were referring to?

11 A Yes. If you look at Administrative Rule -- it's Rule 2A.
12 It's 281.922(a).

13 Q And the general subject of that rule is permit review
14 criteria?

15 A That's correct. And you'll notice a description of both
16 feasible and prudent alternatives and pertaining to the
17 statute how the department would make such a determination.

18 Q Okay. And directing your attention -- do you have a copy of
19 the rule in front of you?

20 A I do.

21 Q Okay. Directing your attention to Rule 922(a)(8), what does
22 that indicate?

23 A That an applicant -- it's the applicant's burden to
24 demonstrate that there are no feasible and prudent
25 alternatives, otherwise, it's presumed a feasible and

1 prudent alternative involving a non-wetland location will
2 have less adverse impact on aquatic resources than one which
3 does involve wetland.

4 Q And does this same rule or other parts of this rule go on to
5 further elaborate or provide decisional standards for
6 determining whether or not a feasible and prudent
7 alternative exists?

8 A Yes, it does.

9 Q And without going through every bit of the rule, let me
10 direct your attention to subrule -- or subparagraph 10 of
11 this same rule. What does that address? I'm sorry. Let me
12 back up. For subrule 9, what does -- what role -- what does
13 that provide with respect to identification or determination
14 of whether a feasible and prudent alternative exists?

15 A It references that the department may look offsite for
16 alternatives to accomplish the basic purpose of the
17 activity. Normally we would not be looking offsite if the
18 applicant has a feasible and prudent alternative on property
19 or offshore of property that he owns. We would not as just
20 a -- it's not a policy or anything like that. But if there
21 are less damaging feasible and prudent alternatives on their
22 property that they own, we would not direct them to look
23 offsite.

24 Q And with respect to -- I'd like you to look briefly at the
25 next subrule, subrule 10 of that same rule. What in

1 substance does that subrule provide?

2 A It mentions that an alternative could be feasible and
3 prudent even if it doesn't accomplish every aspect of what
4 the applicant is stating they need. In this example, one
5 might say they're saying they have to have a satisfactory
6 area for children to wade or swim immediately offshore.
7 Another example would be, "I have to have my home built on
8 this specific lot in a wetland because my mother lives next
9 door," you know, those type of things.

10 Q Okay. In this case, I believe you've testified -- or
11 looking at this consideration, is it or is it not your
12 opinion that a feasible and prudent alternative in the form
13 of a dock extending out into Lake Missaukee to which the
14 applicant's watercraft could navigate would be an
15 alternative that would achieve major components of the
16 stated project purpose?

17 A Yes.

18 Q In the interest of time, I don't want to go through each and
19 every one of the criteria, but directing your attention back
20 to Section 30311 of NREPA, to what extent does that statute
21 require the department to consider the impact of a
22 particular proposal in relation to cumulative effects
23 created by other existing or anticipated activities in the
24 watershed?

25 A It requires that we look at that as one criteria. We've

1 heard testimony previously today that that can be difficult
2 to quantify and really get a handle on, what -- for example,
3 what type of anticipated activities we may see there.

4 Q But that is a factor that the department is required to
5 consider; correct?

6 A That's correct.

7 Q Okay. Mr. Arevalo, in an earlier line of questioning I had
8 asked you about decisional criteria under Part 301 and its
9 rules. And I asked you specifically a series of questions
10 about Rule 814. Do you know whether or not a provision of
11 the statute itself also specifies factors the department
12 must consider in deciding whether or not to issue a permit
13 under Part 301?

14 A Yes, it does. It would be Part 30106.

15 Q Okay. And --

16 A Or section, rather. I'm sorry.

17 Q Yes. To your knowledge, do those decisional criteria
18 include -- or let me ask you this: Can you briefly
19 summarize what -- your understanding of what those
20 decisional criteria are?

21 A They're quite extensive, but they, most importantly for us,
22 include fish and wildlife uses. But they do include
23 recreation; aesthetics, which are very difficult to measure
24 obviously; local government; agriculture; commerce, all of
25 those other components.

1 Q Would it be fair to say that in the circumstance of this
2 particular case, in this particular permit application, a
3 primary focus of the department and your staff has been and
4 continues to be on potential impacts of this proposed
5 activity on fisheries and wildlife?

6 A Correct, and other natural resources associated with that
7 aquatic environment.

8 Q Correct. I want to wrap this up. This is somewhat of an
9 odd question, I'll ask it anyways. Mr. Arevalo, is there
10 any other particular consideration or decisional criterion
11 under Part 301 or 303 that you would like to emphasize or to
12 state on the record at this time as among those factors that
13 would lead you to conclude that -- or support your
14 conclusion that issuance of the permit for the proposed
15 modified activity is not consistent with Parts 301 or 303?

16 A That was a long question.

17 Q I'm sorry.

18 A Yeah. Perhaps you could shorten that up a bit.

19 Q No, let me withdraw the question.

20 A Okay.

21 Q I'll just leave it at that.

22 MR. REICHEL: I have no further questions at this
23 time.

24 MR. PHELPS: I don't have any question, but before
25 we close, I want to put a real short statement on the

1 record. So if we're done with --

2 JUDGE PATTERSON: Okay.

3 MR. PHELPS: Your Honor, I just want to supplement
4 my objection this morning to the Tom's Bay testimony. Over
5 the break I had a chance to go back and look at the rules.
6 And, indeed, sworn testimony is hearsay under Rule 801 and I
7 wanted to put that specific rule on the record. And the
8 exception I believe Petitioner's counsel was referring to
9 was Rule 804, which under limited circumstances --

10 JUDGE PATTERSON: You're referring to the MRE?

11 MR. PHELPS: MRE 804.

12 JUDGE PATTERSON: Okay. Yeah. Okay.

13 MR. PHELPS: MRE 801, the proposed transcript is
14 hearsay and under 804(A) and (B), there is an exception for
15 former sworn testimony that allows it in in limited
16 circumstances. And that does not apply because it requires,
17 first, that the declarant be unavailable. There's been no
18 showing that Mr. Groves is unavailable. But even more
19 importantly than that, even if he's not -- unavailable,
20 former testimony is only admissible against -- when the
21 party against whom it is offered had an opportunity to
22 cross-examine that testimony. My clients were not parties
23 to the Tom's Bay case and therefore they had no opportunity
24 to cross-examine that witness at all.

25 And with respect to the DEQ -- or even if my

1 clients had been a part of that case, 804(B)(1) states that
2 they have to have similar motive to develop the testimony by
3 direct, cross or redirect examination. And obviously
4 there's not a similar motive as the issues in this case are
5 completely different and wouldn't have even been on
6 anybody's mind at the time of the Tom's Bay testimony.
7 That's all.

8 MR. SHAFER: Your Honor, just a couple of points,
9 although I'll address this more tomorrow morning. I don't
10 know how he can say with a straight face that the declarant
11 is unavailable after your Honor tells me that you can't
12 issue a subpoena. So given the fact that he's their expert
13 witness and I can't compel him here, I don't know how they
14 can say that the declarant is unavailable. In regard to the
15 DEQ, they had full opportunity to cross this gentleman
16 because he was in favor of the dredging permit application
17 there. They had every opportunity and every reason
18 whatsoever to destroy this individual so that the dredging
19 project would not be approved. It's the exact same
20 criteria. It's the exact same matter. The concerns were
21 the same. And, more importantly, this isn't a jury trial.
22 This is a bench trial. You can read the transcript, you can
23 admit it and you can decide whether it has any relevance
24 here whatsoever or not. You can throw it out. You can
25 figure that parts of it are relevant and take that into

1 consideration.

2 MR. PHELPS: And, once again, that's not correct.
3 It's not the same criteria. Part 303 did not apply in Tom's
4 Bay. There wasn't the same issues and the same --

5 JUDGE PATTERSON: Yeah, I did notice.

6 MR. PHELPS: Different criteria.

7 JUDGE PATTERSON: My intention was to review
8 that -- the proffered testimony before we resume tomorrow.

9 MR. SHAFER: Thank you, your Honor.

10 JUDGE PATTERSON: If you want to argue it further
11 in the morning, I hopefully will be ready to move.

12 MR. SHAFER: That's fine.

13 JUDGE PATTERSON: That's the plan. We'll see how
14 it goes.

15 (Hearing adjourned at 5:39 p.m.)

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