

STATE OF MICHIGAN

STATE OFFICE OF ADMINISTRATIVE HEARINGS AND RULES

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

HEARING - VOLUME NO. III

BEFORE RICHARD A. PATTERSON, ADMINISTRATIVE LAW JUDGE

525 West Allegan Street, Lansing, Michigan

Friday, December 21, 2007, 9:00 a.m.

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Tom Evans, Ph.D.
Eugene Jaworski
Jim Krone
John Lehman, Ph.D.
Richard Morrow
Robyn Schmidt
Brad Wilkins

RECORDED BY: Marcy A. Klingshirn, CER 6924
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1 Lansing, Michigan
2 Friday, December 21, 2007 - 9:04 a.m.
3 JUDGE PATTERSON: Mr. Shafer?

4 MR. SHAFER: Thank you, your Honor.

5 JOHN AREVALO
6 having been recalled by the Respondent
7 and previously sworn:

8 CROSS-EXAMINATION

9 BY MR. SHAFER:

10 Q Mr. Arevalo, how many times were you out to the site that
11 we're talking about that we've been referring to in this
12 trial as "lot 8"?

13 A One time.

14 Q Okay. And during that one time, did you go out in a boat?

15 A No, sir, I did not.

16 Q Did you wade out into the water?

17 A No.

18 Q You were on shore the entire time?

19 A That's correct.

20 Q And you heard the testimony of Mr. O'Neal?

21 A Yes.

22 Q Correct? You were here in the courtroom. And I believe you
23 testified on direct examination it was you came up with the
24 idea to transmit to Mr. Boughner the proposed conservation
25 easement; correct?

1 A That's correct.

2 Q And you heard Mr. O'Neal testify that he was the one that
3 came up with the idea of a conservation easement; correct?

4 A That's correct.

5 Q Do you disagree then with Mr. O'Neal in that regard?

6 A I recall asking him. Namely, it was my idea. Is that
7 something he would be supportive of? Would that alleviate
8 some of the concern he had relative to the cumulative effect
9 should further projects come in?

10 Q Now, is -- to your knowledge, is lot 8 subject to a
11 conservation easement?

12 A At this time, you mean?

13 Q Correct.

14 A No, not as far as I know.

15 Q And so what is precluding my client from dredging on that
16 property?

17 A Lack of a permit from the DEQ.

18 Q So the DEQ can deny a permit to dredge even if there's no
19 conservation easement in regard to the property; correct?

20 A And has done so as we all know.

21 Q I'm sorry?

22 A We've done that, that's the reason why we're here.

23 Q Correct. But you don't need a conservation easement to
24 preclude dredging; correct?

25 A No.

1 Q Now, the conservation easement -- correct me if I'm wrong --
2 but it would have applied to all of the lots in Indian Lakes
3 West; is that correct?

4 A That's my recollection, yes.

5 Q And the purpose of the easement -- I didn't mean to cut you
6 off. Were you done with your answer?

7 A Yes.

8 Q Okay. The purpose of the easement is to protect
9 specifically wetlands; correct?

10 A All the offshore habitat that would be there, wetlands,
11 shallow water, whatever you want to call it.

12 Q But the conservation easement in and of itself is a concern
13 for wetlands conservation, is it not?

14 A No, not in this instance, not specifically.

15 Q Okay. And the easement that you proposed to Mr. Boughner
16 would have for all intents and practical purposes precluded
17 all development in the other lots in Indian Lakes West;
18 correct?

19 A What I would have suggested to him and to you and to your
20 client would be if he was willing to do something like that
21 and other people were to purchase those lots in the
22 remaining subdivision, that we would have been happy to look
23 at docks, be they permanent docks, seasonal docks, what have
24 you. And we would have accommodated that by establishing an
25 exception area or an exclusion area wherein those riparian

1 owners would have been able to exercise their riparian
2 rights and install dockage to allow wharfage.

3 Q Do you have any document to reflect that that was ever
4 communicated to my client?

5 A I may have discussed that. I don't recall the specifics.
6 But before we would have ever finalized it, that's something
7 we would have made sure of so that we don't have problems
8 down the road.

9 Q Okay. Now, I'll try my question again. Do you have any
10 documents that reflect that that information was ever
11 communicated to my client?

12 A I don't believe so.

13 Q And, in fact, the conservation easement that you transmitted
14 to my client precluded putting docks through the easement;
15 correct?

16 A It's a standard document. I don't have it in front of me.
17 The standard conservation easement document does preclude
18 all development. It's extremely common that we would share
19 that with somebody and their attorney, such as yourself, or
20 the party involved, would write back and say, "I have a
21 concern about that. I wouldn't mind doing an easement
22 potentially, but I have a concern about future development.
23 Let's talk about some changes to the easement." It's a
24 draft conservation easement. Before they're ever finalized,
25 we make sure all of those concerns were taken into account.

1 So it's not ever intended to be the final version.

2 Q Do you have any documents that reflect -- that were --

3 strike that. Do you have any documents that indicate to my

4 client that the terms of the conservation easement that was

5 communicated to them was negotiable?

6 A I think I already answered that.

7 Q And the answer is "no"; correct?

8 A That's correct. I don't have --

9 Q And the document --

10 A I don't have my letter in front of me, but I believe I

11 answered your question.

12 Q Okay. And the document itself precluded docks in the area

13 of the conservation easement; correct?

14 A Why don't we get out the document and look at it.

15 Q All right. Before we do that, let me ask you another

16 question. Because of your expertise in wetland area, all

17 the other lots in Missaukee Lakes West have wetland, do they

18 not, between the shore and the lake?

19 A I've not inspected each one, but I think you've made an

20 accurate characterization of it.

21 Q Do you have a general knowledge as to the size of Lake

22 Missaukee?

23 A It's approximately 2,000 acres.

24 Q And do you have an idea or information in regard to what

25 percentage is a littoral zone?

1 A I don't have figures for you that I could provide you at my
2 fingertips. I'd have to refer to reference materials.

3 Q Do you have any reasonable estimate as we sit here today
4 without looking at documents?

5 A I wouldn't care to speculate right now.

6 Q Mr. Arevalo, could you go to Exhibit 15 in the white binder?

7 A Yes.

8 Q Now, actually, before this, let me ask you some -- let me
9 ask you a few preparatory questions. You're obviously
10 familiar with Robyn Schmidt; correct? You're familiar with
11 Ms. Schmidt; correct?

12 A Yes.

13 Q And you were her direct supervisor at the time of the
14 consideration of the dredging permit for lot 8; correct?

15 A You're correct.

16 Q You were her direct supervisor during the entire period of
17 time; correct?

18 A Yes.

19 Q And would one of your job responsibilities be to oversee and
20 check her work product?

21 A In a broad sense, yes. With nine people and two offices
22 that are 80 miles apart, I don't have the luxury being there
23 day by day reviewing each document that the folks generate.
24 I'd love to do it, but I don't do it.

25 Q The opinions you reached, however, were based upon, in part

1 at least, the information that was communicated to you by
2 Ms. Schmidt; is that correct?

3 A Run that question by me again, please.

4 Q In reaching the opinions that you did -- and I'll give you a
5 specific opinion that the one you testified to yesterday
6 which was that it was appropriate to deny this dredging
7 permit -- you relied, in part, in reaching that conclusion
8 on the information provided to you by Ms. Schmidt?

9 A I would agree I relied in part. I always make up my own
10 mind when I go out because I certainly have changed
11 decisions that my staff have made.

12 Q And I would assume that you would like to ensure that your
13 employees prepare as accurate as possible documentation in
14 regard to consideration in regard to dredging permits;
15 correct?

16 A Yes.

17 Q And when you send out documentation, you want to be as
18 accurate as possible as well; correct?

19 A That's an accurate characterization, yes.

20 Q Okay. And you understand the difference between a falsehood
21 and a lie; correct?

22 A Perhaps you can explain it to me.

23 Q Sure. Would you agree with me a falsehood is something that
24 you may state that turns out to be false later on because
25 you had the wrong information. But a lie would be something

1 that is false and you knew it was false at the time you made
2 it.

3 A I can understand that difference and I would hope it would
4 be the former if it were to occur and not the latter.

5 Q And there was some false information in regard to the
6 materials -- strike that. There was some false information
7 communicated to you by Ms. Schmidt in regard to this
8 dredging permit application, specifically in regard to the
9 thickness of the muck; correct?

10 A I don't know as I'd agree. Why don't we refer to the
11 specific document you're talking about and perhaps I can
12 respond to it.

13 Q All right. We'll go through this one by one. On tab 15
14 down at the bottom, you see a sentence -- do you see the
15 sentence that says, "He," referring to Mr. Boughner, "wanted
16 to know if it would be possible to mitigate the wetland
17 loss. I stated that mitigation cannot be considered unless
18 the proposed project is permissible." Do you see that
19 statement?

20 A I do.

21 Q Is that a correct statement in regard to DEQ policy?

22 A That's correct.

23 Q And was this project permissible?

24 A No, it was not.

25 Q So mitigation would be irrelevant; correct?

1 A Unless the project was otherwise permissible.

2 Q Okay.

3 A It doesn't preclude him from asking the question and me
4 responding though.

5 Q Now, you heard Ms. Schmidt give a great deal of testimony
6 not only in regard to Part 301, but in regard to Part 303 as
7 well; correct?

8 A Yes.

9 Q And her initial analysis was based in part upon the fact
10 that she'd had to undergo consideration of Part 303 because
11 the original dredging project went through wetlands;
12 correct?

13 A I believe her PRR reflects that as well, correct.

14 Q And in the testimony you provided yesterday, you also went
15 through the various factors of Part 303; correct?

16 A Correct.

17 Q And your intent, I assume in testifying as such, is that you
18 want to communicate to Judge Patterson that it is a
19 requirement for this dredging permit application to consider
20 the criteria under Part 303 in addition to Part 301?

21 A Yes.

22 Q Okay. And that exists as of this day when we are sitting
23 here in this court; correct?

24 A What exists?

25 Q That in your opinion, this dredging permit application has

1 to pass muster both under 301 and 303.

2 A I believe we clarified that sufficiently and you're correct.

3 Q And you take that position irrespective of the fact that my
4 client agreed not to dredge in the area that was the
5 wetlands as delineated by the DEQ; is that correct?

6 A They asked what -- this was done in the spirit of what can
7 be done to reduce impacts to increase the likelihood that a
8 permit could be issued. And I recall them asking, "Would it
9 be a benefit to drop that area near shore that's dominated
10 with sedges that's been referred to as an 'emergent wetland
11 area'?" We discussed that. Since it was out of the -- it
12 was exposed bottomlands the date of the inspection. It
13 wasn't under water. And we said, "That's a good place to
14 start. It absolutely is wetland and that would be
15 beneficial to the project's chances of being permitted to
16 make any type of concessions relative to those impacts." It
17 was in that context that those statements were made.

18 Q Did my client agree to modify the dredging permit
19 application so that there would be no dredging in the
20 wetland area as delineated by the DEQ?

21 A They made a concession to not dredge within the area you
22 just mentioned. At the same time, they were advised we
23 still had significant concern with the remainder of the
24 project; that it was not limited to that narrow zone you're
25 describing.

1 Q So just so that I understand correctly, you agree with me
2 that my client agreed not to dredge in the area delineated
3 by the DEQ to be wetlands?
4 A I think we have that made clear.
5 Q Mr. Arevalo, can you go to tab 17 of the white binder?
6 A I'd be happy to. I have it in front of me.
7 Q Okay. It consists of two pages; correct?
8 A That's correct.
9 Q Is this the totality of what you communicated to my clients
10 on September 29th, 2006?
11 A In terms of documents generated, it would appear that way,
12 yes.
13 Q Okay. Now, sir, could you take out the big binder?
14 A Which color? The big brown one?
15 Q Burgundy.
16 A Okay.
17 Q Go over to tab 11. Do the first two pages appear to be
18 identical to what we have identified as Exhibit 17 of the
19 DEQ's materials with the exception of the various stickers?
20 A I haven't read them side by side. I would presume so.
21 Q All right. It's the same letter, is it not?
22 A It sure looks like it to me.
23 Q Okay. Now, after the first two pages on page 11, there's an
24 agreement for conservation easement. Do you see that
25 document?

1 A Yes, I do.

2 Q All right. Is that, in fact, the conservation easement that
3 was transmitted to my client along with your letter of
4 September 29th, 2006?

5 A It appears to be our standard draft conservation easement
6 and I would stress "draft." I don't know that it would be a
7 different copy. There's been different iterations through
8 the years. I would normally try to send the most up-to-date
9 one and we can tell by looking hopefully at the signature
10 for chief on page 5. And it says "Mary Ellen Cromwell."
11 She left as our chief at a certain point. I don't know if
12 this is the most up-to-date one or not. It's certainly not
13 up-to-date as of today.

14 Q That's fine. But is it a reasonable conclusion that was the
15 document that was transmitted to my client?

16 A I would think so.

17 Q Okay. Now, do you know why tab 17 of the DEQ's evidence
18 book does not contain the conservation easement?

19 A I have no idea. I haven't checked it. Would you like me
20 to?

21 Q You looked at tab 17. Did --

22 A Right. It looked like it was just the letter that preceded
23 this conservation easement document.

24 Q Okay. Now, if you could, take a look at page 1 of the
25 conservation easement. And take a look at paragraph 2 at

1 the bottom. And that would include the grantor, whoever
2 that may be, from altering or developing the easement
3 premises in any way; is that correct? That's what it
4 states?

5 A I believe I answered you earlier. This is a draft document.
6 It's the first cut. It's very common changes are made. The
7 draft document says what it says, but it is very common to
8 make allowances for things such as your client might prefer
9 such as additional dockage down the road, roadways in
10 wetlands, boardwalks in wetlands. All of those things have
11 been addressed by changes to this document and they could
12 have been changed here if he were willing to do a voluntary
13 conservation easement.

14 Q Did you communicate to my client any proposed changes at any
15 time in writing in regard to the text of this proposed
16 conservation easement that was sent to him?

17 A I've never met your client. I've worked strictly with the
18 caretaker and I think I answered that question for you
19 already about 20 minutes ago.

20 Q And so you'll agree with me on page 2, for example, of the
21 conservation easement as transmitted to Mr. Boughner that it
22 creates at subsection B, "creation" -- it precludes at
23 subsection B, "creation of paths, trails or roads" and at F,
24 it precludes "construction or placement of any structure";
25 correct?

1 A You are correct.

2 Q And under your statutes -- under the DEQ statutes,
3 "structure" includes docks and moors; correct?

4 A It does.

5 Q And this conservation easement would also at paragraph
6 three, "preclude cutting down, destroying or otherwise
7 altering or removing trees, tree limbs, shrubs or other
8 vegetation"; correct?

9 A It says what it says.

10 Q And you heard the testimony of Mr. O'Neal in regard to this
11 33-foot path -- this 33-foot strip that he wanted to have
12 protected; is that correct?

13 A I did hear that.

14 Q And in granting the -- if the DEQ were to grant the --
15 strike that. If the DEQ were to grant the dredging permit,
16 can it impose conditions upon the exercise of that permit?

17 A Provided the statute would allow that to occur.

18 Q Could the permit as issued by the DEQ have limited my
19 client's use of that 33-foot strip that Mr. O'Neal talked
20 about in a fashion that Mr. O'Neal wanted it to be kept in?

21 A Cutting of vegetation at that location either above or below
22 the ordinary high water mark in wetlands does not require a
23 permit from the State of Michigan. So absent a conservation
24 easement, your client can cut every bit of vegetation in
25 that wetland that he would like to.

1 Q Can you impose as a condition of the dredging permit that my
2 client applied for, the restrictions in regard to that
3 33-foot strip in the fashion that Mr. O'Neal wanted?

4 A No. I would not be comfortable with that. It's not
5 enforceable.

6 Q My client could agree to that.

7 A He can agree to a lot of things, but it's not enforceable
8 under the statute nor if he sells the property. And I think
9 we've established lots are for sale.

10 Q So you're not aware of a legal document called a "covenant"
11 running with the land that might preclude the limitation of
12 the use of property in regard to subsequent property owners?

13 A I'm very familiar with it. We can't enforce it ourselves as
14 an agency and it's highly unlikely that we would. We've had
15 that happen before. That's what spawned, essentially, these
16 conservation easements with State of Michigan because at
17 least it's a document that we can enforce ourselves. We
18 have no way of enforcing that realistically in the future at
19 this site or other sites.

20 Q Was the idea also to make lot 8 subject to this conservation
21 easement?

22 A Let me reread the letter. It's been quite awhile.

23 Q Please do.

24 (Witness reviews exhibit)

25 A Paragraph three clearly says, "exclusive of the subject

1 parcel."

2 Q So the answer would be "no," it would not have applied to
3 lot 8; correct?

4 A That's what it says.

5 Q And right now, the way things are without any dredging
6 permit or anything, my client has -- under the law has the
7 free use to be able to traverse through the wetland area in
8 front of lot 8; correct?

9 A You're correct.

10 Q And boat through that area; correct?

11 A That's correct.

12 Q Now, if you could, go over to tab 12 of the large binder --
13 burgundy binder. And I want you to go down to -- take a
14 look at the paragraph about two-thirds of the way down, it
15 starts with the word "considering."

16 JUDGE PATTERSON: I'm sorry, Counsel. Where are
17 you? I was reading --

18 MR. SHAFER: I'm sorry. Tab 12, your Honor.

19 JUDGE PATTERSON: Okay.

20 MR. SHAFER: In Petitioner's documents there's a
21 paragraph about two-thirds of the way down, it starts,
22 "considering that Mr. Mohny" --

23 JUDGE PATTERSON: Got it. Thank you.

24 Q Now, Mr. Arevalo, I want to call your attention to the
25 sentence at the end of that paragraph that says,

1 "If anything, the area to be dredged should be
2 kept as listed and if we are forced to start offshore
3 far enough to be beyond the," quote, "'wetlands,'"
4 unquote, "our permit should be for 200 feet beyond that
5 starting point."

6 You see that sentence?

7 A I do.

8 Q And you received that information; correct?

9 A That's correct.

10 Q And was this, in fact, the first time that a representative
11 of my client offered to change the area of the dredging so
12 that it would not impact upon the wetlands as delineated by
13 the DEQ?

14 A I can't tell you that that's the first time that was
15 discussed. He may have discussed that onsite. I don't know
16 that for a fact. It may have been a follow-up to a
17 discussion we had onsite. I don't recall the specifics and
18 the sequence.

19 Q Okay. Do you see the next sentence at the beginning of the
20 next paragraph, "Our requested permit would allow Mr. Mohny
21 to dredge less than 0.0007 percent of his riparian
22 property"? Do you see that?

23 A I do.

24 Q Did you ever do any calculations -- commit any calculations
25 in writing that indicated whether that figure was true or

1 false?

2 A No. Well, you know -- let me strike that. I may have. I
3 may have.

4 Q Do you recall what your conclusions were?

5 A Not at this time. I thought I remembered doing some
6 calculations and it turned out that I didn't agree with his
7 math. That's just my recollection.

8 Q Now, if you could, go over to tab 15 in the big binder, Mr.
9 Arevalo. This is a letter addressed to you; correct?

10 A Correct.

11 Q From Mr. Boughner?

12 A Yes.

13 Q And so kind of in a Clintonian phrase, the word "you" in
14 this document would refer to you; correct?

15 A I would think so.

16 Q Okay. Calling your attention to the second paragraph of
17 that document, "By knowing that Mr. Mohney was proposing to
18 dredge less than 0.007 percent of his riparian land, or as
19 you noted, 0.05 percent of his frontage" -- do you see that
20 part?

21 A Yes.

22 Q Does that refresh your recollection in regard to whether you
23 created any type of calculations in regard to the percentage
24 of Mr. Mohney's property or shoreline, for example, as to
25 what this dredging project would entail?

1 A It does.

2 Q Okay. And is that the number you came up with?

3 A I believe so.

4 Q 0.05 percent; is that correct?

5 A I answered you, yes.

6 Q Now, is it also -- the last sentence in that paragraph
7 states, "I simply want it in the record if we should go to
8 appeal and you maintained the position that his request was
9 far too large an area." Is that correct in that it was your
10 conclusion that the 0.05 percent -- the dredging of 0.05
11 percent of Mr. Mohny's frontage was too large an area?

12 A No, it was not. It was not. He did not meet permit
13 criteria, that's the point.

14 Q Now, if -- go on to the next page, the second paragraph from
15 the bottom, second sentence in,
16 "I therefore ask you to issue my permit, amended
17 as we discussed, so that the hydraulic dredging will
18 start on the lakeside of the," quote, "'wetlands,'"
19 unquote, "area you have identified and cover an area 50
20 feet wide by 200 feet long."
21 Do you see that sentence?

22 A I do.

23 Q And so would you agree that this was the formal request of
24 the applicant through its authorized representative to amend
25 the dredging area to take out the wetlands area?

1 A I would agree that its -- I would agree that the letter says
2 what you stated; that they've asked that a permit be issued.
3 In terms of characterizing that as being the only wetlands
4 on the site, I think I've established I do not agree that
5 those are the only wetlands that would be impacted by the
6 project. Namely, that there are wetlands farther offshore.

7 Q Did you ever communicate that to a representative of my
8 client, that you thought that there were wetlands further
9 offshore?

10 A I don't recall specifying that, just that we had concerns
11 pertaining to that.

12 Q Can you quantify for Judge Patterson the amount of wetlands
13 offshore?

14 A I cannot put a figure on it. As I stated yesterday, it was
15 obvious from shore where I stood that there were plants
16 visible out in the water, mainly pond weeds and lesser
17 amounts of water lilies as described by the expert which you
18 used. And as I stated, I didn't have the opportunity to
19 collect those and identify them to genus and species. But
20 after having the benefit of looking over information that
21 your expert provided, it's apparent to me that they're
22 obligate wetland species and that they would meet the
23 definition of a wetland plant. And I would suspect if
24 somebody had the opportunity to do some collection of plants
25 and also organisms out there within that area, that you

1 would find aquatic life there as well. And the rules in
2 Part 303 specify that the presence of wetland plants,
3 wetland hydrology and aquatic organisms would meet the
4 definition.

5 Q Now, irrespective of anything that my client's expert
6 submitted, though, what you're telling me is you came to the
7 conclusion there were wetland areas out in the lake
8 offshore; correct? And you based that upon your own
9 observations?

10 A I believe I've tried to respond to that already on direct,
11 but I'll clarify that for you again. The majority of these
12 informal reviews that I conduct involve Part 303 strictly
13 located above the ordinary high water mark with occasional
14 occurrences of a fringe of wetland down by the water near
15 the ordinary high water mark. They rarely involve in my
16 district occurrences where you have wetland offshore in a
17 marsh or shallow water situation. It doesn't come up real
18 often. If we would have been pushed on the issue in terms
19 of is there a chance some of that area offshore, a portion
20 of it, all of it, what have you, meets the definition of
21 wetland, then I would have sat down and taken the time to
22 look at that situation. I would have responded at that time
23 that there would be areas that are offshore that would meet
24 the definition as well. I've tried to make it clear to the
25 caretaker that we had a concern with the dredge proposal in

1 its entirety. It was not limited to this area which you
2 keep describing as the only wetland present out there.

3 Q And that's what I'm saying. Irrespective of what my expert
4 did, you came to the conclusion that there was wetland
5 offshore because you were communicating that as you've just
6 testified to, to the representative of my client; am I
7 correct?

8 A Are you asking me if I communicated that there were wetlands
9 offshore beyond the 50 feet? I don't understand your
10 question.

11 Q I'll split it off. Irrespective of anything my client -- my
12 client's expert might have put in any report, you came to
13 the conclusion that there was offshore wetland in your
14 analysis in determining to -- I don't know what your correct
15 word is -- affirm the denial of the permit application?

16 A I wouldn't -- I didn't do an analysis first of all. I think
17 I've stated on the record I would agree that there are some
18 wetlands located offshore beyond the -- or the 10- or
19 20-foot strip you're discussing and I would leave it at
20 that.

21 Q Well, what I want to know is did you come to that opinion
22 before you submitted your document where you affirm Ms.
23 Schmidt's denial?

24 A What document are you referring to specifically affirming
25 her denial?

1 Q We can go through the documents, but at some point you write
2 a letter, do you not, where you basically say the decision
3 was correct to deny it; right?

4 A Right. You're correct.

5 Q Okay. All I'm asking you is you came to the conclusion
6 before writing that letter that there was wetlands out in
7 the lake; correct?

8 A Not necessarily; no. I agree it was appropriate that she
9 did her review under both Parts 301 and 303. I don't know
10 at that point we had quantified specifically how much
11 wetland was present; just that it was appropriate she did
12 the review under those two statutes.

13 Q Mr. Arevalo, I think you've already told me that before you
14 made your final decision, you were aware that my client's
15 representative agreed -- and we just went through it in
16 writing, had agreed to move the dredging project out so that
17 the wetland strip next to shore was not going to be
18 included; correct?

19 A We've established that, yes.

20 Q So what other wetlands would there be for this to be still
21 justified on a 303 analysis if it wasn't the wetland you
22 believe to be out in the lake?

23 A I already responded to you. Would you like me to reiterate
24 that for you?

25 Q Sure.

1 A Okay. We discussed what potential modifications might be
2 made to ths project including no project at all and strictly
3 using dockage and the caretaker responded that he was the
4 one responsible for putting in and taking out such a dock
5 and that that was problematic for him or that wasn't what
6 his client would prefer.

7 Q Why was it problematic for him, because of the muck?

8 A You'd have to ask him. My recollection was he said it
9 wasn't -- I don't remember how many times he said he put in
10 or took out the dock, but he said the client wanted this
11 project and we should evaluate the project that was
12 proposed. So we talked about such things as narrower
13 channels, smaller channels, everything you've seen in these
14 documents, that was the context of those discussions.

15 Q At the time you affirmed the denial of the permit
16 application, were you making determinations under Part 303?

17 A Both statutes.

18 Q If my client had agreed to modify the permit application so
19 that it did not include the wetland area delineated close to
20 shore -- the wetland area close to shore delineated by the
21 DEQ, why were you still considering Part 303 in your
22 determination?

23 A I don't know as there was ever a distinct point that that
24 occurred, you know. I've described to you the sequence of
25 events, but I don't know the specific time frame when that

1 would have occurred. I believe the question is, are there
2 or are there not regulated wetlands lakeward of that strip
3 that's identified on that sketch. That's the legal issue
4 here.

5 Q See, but that's the good because I get to ask my questions
6 and the attorney general can ask you whatever he wants. But
7 right now, I just want an answer to my question.

8 A Right.

9 Q And what my question is, when you affirmed the decision of
10 Ms. Schmidt, were you making an analysis on Part 303 in
11 part?

12 A Yes.

13 Q Based on what wetlands?

14 A I believe I answered you a few minutes ago. Initially she
15 described the project as impacting wetlands and also
16 requiring a permit under 301. It was readily apparent when
17 we visited the site that there was this wetland strip along
18 the shore that you've been discussing.

19 Q Correct.

20 A So the denial should have included 303 and 301. At no time
21 did anybody -- the agent or anybody else start questioning
22 "Is there a potential wetland issue there offshore as well?"
23 I don't remember it coming up.

24 Q So let me just see if I understand this correctly, and you
25 correct me if I'm wrong. My client agrees that it's not

1 going to dredge in the wetlands -- the wetland area
2 delineated by the DEQ. You make no analysis as to whether
3 there are any other wetlands other than that strip that
4 they've agreed not to dredge and you still justify your
5 denial on a 303 analysis in regard to the impact upon
6 wetlands. Do I have this correct?

7 A 303 and 301 both.

8 Q I'm not asking you about 301. I just want to make sure that
9 I understand that your decision to affirm this denial is
10 based upon a wetland analysis even though my client agreed
11 not to dredge in the wetland area delineated by the DEQ.

12 MR. REICHEL: Objection; argumentative and asked
13 and answered.

14 MR. SHAFER: I'd like an answer. It's not
15 argumentative. I'm just trying to find this out.

16 JUDGE PATTERSON: All right. I'll --

17 MR. REICHEL: I would further object that the
18 issue here in this tribunal is not to review Mr. Arevalo's
19 informal affirmation of the initial permit denial. The
20 issue for this tribunal is whether or not and under what
21 conditions a permit should issue today as it relates to the
22 criteria of Parts 301 and 303.

23 JUDGE PATTERSON: I'll allow him to answer. I'll
24 overrule the objection. I think in my mind at least it's
25 going to clarify the department's stance.

1 MR. SHAFER: Thank you.

2 Q Can you answer that?

3 A Please ask the question one more time.

4 MR. SHAFER: Ma'am, could you read the question
5 back? I kind of liked it the way I had it.

6 (Playback of previous question)

7 A Long question. Again, you know, let's go over this one more
8 time. He agreed not to dredge the area that the DEQ
9 delineated as wetland as you've described it. That doesn't
10 mean we would limit the analysis under 303 strictly to that.
11 I was never asked to go out and delineate any area beyond
12 there. If I could have easily done that, if it was a
13 terrestrial site where I could walk around, that's usually
14 what I'd do. I didn't have access to a boat. Frankly, I
15 didn't spend time out in the water as you've already
16 established. And I've answered your question. The review
17 is appropriate under 303 even beyond that area that's drawn
18 on the map as wetland. In terms of is every square inch of
19 that area all the way out to the 200-foot mark -- could we
20 document it's wetland? I would suspect you'd find enough
21 predominance of wetland plants there and you would find
22 aquatic life.

23 Q When did you come to the conclusion that there was an
24 additional area of wetland beyond this -- well, you know,
25 strike that question. Let me ask you another question. You

1 would agree with me that prior to your denial -- prior to
2 your affirmance (sic) of the denial, you or someone in the
3 DEQ delineated a wetland area on lot 8; correct?

4 A That I was someone who delineated wetland? I don't
5 understand what you're saying.

6 Q Prior to your denial -- prior to your affirmance of the
7 denial of the permit application, someone from the DEQ
8 delineated the wetland area associated with lot 8; true?

9 A The exact time frame, I'd have to check these documents. I
10 thought we agreed on a strip there along the shore as being
11 predominated by sedges. And as I stated earlier, it was
12 exposed bottomlands primarily when we were there. We asked
13 the caretaker if normally the water is higher -- you know,
14 how far up on shore does the water typically come up there
15 in the summer. He has a great deal of history at the site.
16 That was taken into account. And within that context, he
17 was asked would they be willing to make modifications to
18 eliminate dredging in that area as I've told you two or
19 three times already. And I told him that anything he would
20 do in that regard would be good. And then we were asked --
21 either we were asked or we took it upon ourselves to try to
22 define that area that we were discussing. We did so.
23 You've referred to it repeatedly. He apparently discussed
24 it with the applicant and the applicant agreed if that would
25 help resolve it, then strike that from the application and

1 make modifications.

2 Q So the answer to my question was "yes." Someone at the DEQ
3 delineated the wetland area prior to your decision to affirm
4 the denial; correct?

5 A I'd have to get out the documents again and look at the
6 specific dates. I don't know the sequence of what happened.

7 Q Go ahead. They're all in front of you.

8 A All right. Well, why don't you refer me to specifically
9 which documents or you can let me have the time --

10 Q You're the one that's asking. All I'm asking is did someone
11 at the DNR delineate the wetlands area prior to your
12 affirmance of the denial?

13 A Nobody at the DNR delineated anything.

14 Q I'm sorry. The DEQ.

15 A And my response is the same. I've just told you. We were
16 there onsite. In terms of if Robyn had identified that
17 prior to the visit and described it, we'd have to get out
18 her PRR and look at it. If you'd like me to do that, we can
19 do that.

20 Q A single lily pad is not a wetland area; correct?

21 A You're correct.

22 Q An area has to be a bog, swamp or marsh; is that correct?

23 A That's correct, and have aquatic life as well or have
24 aquatic life. That's one of the --

25 Q And are you testifying -- sir, can you take a look at DEQ

1 Exhibit 25? It's a color photograph.

2 A Okay.

3 Q And take a look at the second picture down, the one that

4 says "B." Do you see that?

5 A Not yet I don't.

6 Q I'm sorry. I'll wait 'til you get there.

7 A B like boy?

8 Q B as in boy, yes, sir.

9 A I'm looking at it.

10 Q It's a photograph that says "May 31st, 2006." Do you see

11 that?

12 A I sure do.

13 Q Beyond this 20-foot strip out, can you see a bog, swamp or

14 marsh somewhere out in the lake in front of lot 8?

15 A I was not there May 31st. May 31st is very, very early in

16 the growing season in Northern Michigan. I don't know that

17 this is the exact spot where the dock was proposed and the

18 dredging. It's in the vicinity, I'm sure. And given the

19 cloud cover that day, the reflection off the water, it would

20 be difficult to see pond weed out there in this photograph.

21 Q Perhaps you didn't understand my question. My question was,

22 do you see in that photograph a bog, swamp or marsh?

23 A I see what could very well be, given the shallow water

24 depths, an area that would meet our definition of a marsh.

25 Q And what illustrates that to you out in the water beyond the

1 20-foot exclusion zone?

2 A Based upon my experience working in the area for several
3 years, presence of these emergent plants in the foreground.
4 I answered you with respect to the time of year. I think
5 it's a reasonable assumption that there could be a marsh
6 located there offshore based on that photo. That was not
7 the day I did my inspection.

8 Q Okay. So your statement is it's a reasonable assumption
9 that there could be a marsh in this photograph. Is that
10 what you said?

11 A My response would be limited to the day I visited the site.
12 I would characterize it as -- or rather I would characterize
13 my visit. I would prefer not to comment on what I see in a
14 photograph that was taken by somebody else on a day I wasn't
15 present. The photo shows what it shows, you know. You
16 can't see much of anything given the cloud cover as I was
17 just discussing and the angle of the water.

18 Q And you were there on August 17th, 2006; is that correct?

19 A Correct.

20 Q And is your testimony then that when you were out at lot 8
21 on August 17th, 2006, never having left shore, you could see
22 beyond the 20-foot exclusion zone a bog, swamp or marsh?

23 A I could see aquatic vegetation. That would meet the
24 definition, not of a bog, but of a marsh. And I also
25 specifically recall, as I stated yesterday, that the sole

1 consideration was not strictly water depths because that was
2 the context of the original permit application and getting a
3 boat or jet ski out from shore. Mr. Boughner made it clear
4 that one of the desires of your client was to be able to get
5 on a jet ski right on shore and take off from there and go
6 out to deeper water. And I also recall some discussion as
7 to difficulty in operating a jet ski where there was
8 vegetation that might clog the motor, difficulty in
9 launching a jet ski from deeper water as was opined by the
10 caretaker when we offered up an alternative of, "Why don't
11 you just put a dock out there and then launch your jet ski
12 from that point."

13 Q Do you have any notes or other written material that show
14 that you felt there was definitional (sic) wetlands area at
15 the site beyond the 20-foot exclusion zone on August 17th,
16 2006?

17 A Nothing other than what you've seen already and we've gone
18 through.

19 Q All right. So getting back to one of my earlier opinions,
20 before you affirmed the denial, you had it in your mind that
21 there was wetlands in lot 8 in the lake beyond the 20-foot
22 exclusion zone; correct?

23 A I don't recall going through a lot of thought process in
24 terms of the extent of wetlands offshore or not. Normally
25 what I'd be doing at a visit like this would be -- looking

1 at it, if I could walk at all or, as I said, have access to
2 a boat, I could have inspected that entire 200-foot section.
3 I'm merely there to either affirm or deny what my staff put
4 together in the denial.

5 Q Would it be of important consideration in your decision that
6 there would be wetland area in the lake beyond the 20-foot
7 exclusion zone that would be part of the dredging site?

8 A I think I made it clear to you that ideally I would have
9 liked to have gone out in a boat and looked at that and we
10 could have characterized that area in-depth. I would have
11 much preferred to do that. I didn't have the opportunity to
12 do that. And so my discussion was limited to what I've told
13 you now several times.

14 MR. SHAFER: Could you reboot up that question,
15 please?

16 (Playback of previous question)

17 Q Did you understand that question?

18 A I did. That would be of consideration, of importance.

19 Q And that isn't noted anywhere in any document that I can
20 look at; correct?

21 A That wetlands were considered offshore?

22 Q That you felt that there was wetlands in the lake beyond the
23 20-foot exclusion zone?

24 A I think we've already answered that question for you.

25 Q And the answer is there are no documents?

1 A There's no documents that I'm aware of.

2 Q And how much vegetative material would there have to be in
3 an area offshore to constitute a wetland area so that it
4 would be a bog, swamp or marsh?

5 A The simplest answer is there can be wetland areas present
6 without aquatic vegetation if there's evidence of aquatic
7 life in wetland hydrology. I would note that that scenario
8 I'm describing for you would most commonly be within an
9 ephemeral wetland that's located above the ordinary high
10 water mark which might dry up seasonally yet might be
11 important for salamanders, amphibians and the like. And if
12 you were to be standing there with me, you wouldn't see
13 water in it. There may not be any plants in it, but you
14 would see other wetland indicators. Offshore in this
15 location, the identification of wetlands is much easier
16 because there are wetland plants growing out in the water
17 within at least some of the 200-foot area in question.

18 Q In your opinion, is the entire littoral zone of Lake
19 Missaukee a wetland area?

20 A I've not done an analysis of that but, again, if it were to
21 have aquatic life and be bolstered by the presence of
22 wetland plants, then we would and should describe it as
23 such.

24 Q When you were out there on August 17th, 2006, what
25 indicators of wetlands could you see from shore other than

1 vegetation?

2 A You're talking about beyond that strip you referred to?

3 Q Yes, I'm sorry. My mistake.

4 A I would characterize it just as being able to see some

5 vegetation out there floating beneath the surface and is

6 visible beneath the surface and leave it at that.

7 Q Okay. Can you go to tab 19 of the DEQ material? I believe

8 it's the white binder.

9 A 19?

10 Q Yes, sir.

11 A Okay.

12 Q This is a note that you made to the file?

13 A Yes.

14 Q You prepared that yourself?

15 A You are correct.

16 Q Now, if you go down to the second paragraph, going to the

17 second sentence where it just says, "Mr. Mohny does not

18 want," I'm assuming all the information you're getting from

19 Mr. Mohny is coming from Mr. Boughner; correct?

20 A I didn't have any contact with Mr. Mohny and I do not

21 believe that that information came from this hired

22 consultant/lobbyist Mr. Julian. I believe it was Mr.

23 Boughner, but I'm not sure.

24 Q Okay. And so the information -- well -- so Mr. Boughner

25 indicated to you that Mr. Mohny had -- and I'm just reading

1 from the end of the second paragraph, "has 4- to 5-year-old
2 children and wants them to go swim near shore." You see
3 that?

4 A Yes.

5 Q And is that something Mr. Boughner said to you?

6 A I believe so.

7 Q You don't have any reason to doubt that statement?

8 A Correct.

9 Q And it says, "We" -- beyond that it goes down and it says,
10 "We suggested that they" -- you know what? Let me strike
11 that. Let's start out with the sentence, "Mr. Evans stated
12 that in his opinion, building a lengthy permanent dock would
13 expose the property owner to liability should a snowmobiler
14 hit the dock and be injured." Do you see that statement?

15 A Yes.

16 Q So Mr. Evans -- actually, the gentleman who's standing here
17 next to Mr. Hoffer -- Mr. Evans was there as well?

18 A I recognize him. Thank you.

19 Q Okay. And you've talked to him before about this matter?

20 A Many times.

21 Q Okay. And so one of the proposals that the DEQ had
22 presented to my client or his representative as a prudent
23 and feasible alternative would be a permanent dock; correct?

24 A You're correct.

25 Q And to your knowledge, are there other permanent docks on

1 Lake Missaukee during the winter?

2 A I don't know how many there are or where they're located.

3 Q Do you know if there are any?

4 A I do not.

5 Q Do you know if there are any permanent 200-foot docks
6 located on Lake Missaukee?

7 A Do not.

8 Q Are you a snowmobiler?

9 A I've snowmobiled before, I do not own one.

10 Q Have you snowmobiled on a lake?

11 A Yes, I have.

12 Q Are permanent docks a hazard to snowmobiles?

13 A They can be lit to present less of a hazard. This issue has
14 come up before. It's not unique to this situation. We work
15 on a lot of other -- a lot of other lakes within the 22
16 county area, some of which have several lengthy permanent
17 piers and the snowmobile issue has come up countless times
18 before. It's not unique to here.

19 Q And so I would assume the answer is correct and then the
20 follow-up answer is, "And therefore you have to take extra
21 precautions in order to try to mitigate as best you can that
22 hazard"; correct? Fair statement?

23 A I would qualify my answer by saying he has no requirement to
24 put in a permanent dock of 200 feet if navigation were a
25 prime concern. And unless you have significant problems

1 with the water depth data that Ms. Schmidt collected during
2 a low water period, it appears that there's adequate water
3 depths as close to shore as 100 feet that most boats would
4 be able to suffice with. So if there were not an issue with
5 floating aquatic plants out there, I don't see as there
6 would be a big problem navigating from that point outward.
7 So it's not a pre-given conclusion he needs to put in a 200-
8 foot permanent pier nor a permanent pier of any length. He
9 can put in a floating dock.

10 Q Okay. Well, let's talk about that then. So then why did
11 you or the DEQ recommend or suggest to Mr. Boughner that
12 they put in a permanent dock of 200 feet?

13 A Only for their consideration as a way of avoiding the
14 possibility of a hearing; strictly for their consideration.

15 Q It's a recommendation the DEQ made, is it not?

16 A We are charged with coming up with feasible and prudent
17 alternatives in addition to any that the applicant or their
18 agent might come up with. He indicated he wanted to get out
19 to 200 feet. That was the genesis of that 200-foot length.
20 We're not a proponent for a permanent dock of 200 feet or
21 180 or 350. That was used strictly because that was the
22 point he was trying to go with this project.

23 Q Let's go down to -- let me ask you this: Other than the
24 water depth samples that were taken during the winter, did
25 you make any other type of analysis as to how far out in the

1 lake a dock would have to go whether it's floating,
2 permanent or seasonal in order to get to navigable waters of
3 Lake Missaukee given not only the muck, but the vegetation
4 as well?

5 A I guess I'm confused. I thought you were trying to
6 establish there was no vegetation out there. Why are you
7 discussing vegetation offshore?

8 Q Well, we can play these games, but you were the one that
9 talked about if there was vegetation there.

10 A Right.

11 Q So I'm just trying to help you in your response.

12 A Okay. I appreciate that. We rely upon the water depth data
13 that was provided that we were just discussing. And beyond
14 that, I don't know of other studies or however you referred
15 to that -- anything else related to water depth data in the
16 file other than these ones that were done by Ms. Schmidt in
17 terms of documents generated by the department.

18 Q And generally from your experience and knowledge the bottom
19 of lakes undulate. It's probably not the correct,
20 scientific term, but they go up and down; correct? They're
21 not flat?

22 A It would depend on the lake, but they're not perfectly flat,
23 no.

24 Q And the lake levels rise and they fall; correct?

25 A The water levels you mean?

1 Q Correct.

2 A That would be a fair statement.

3 Q And, in fact, we actually have an additional variable in
4 regard to these water level readings, do we not, because of
5 the ice; correct? Water expands when it freezes; correct?

6 A Correct.

7 Q So that when all that ice melts, there's going to be less of
8 a layer of water than there will be ice; correct?

9 A There are other factors, too. You've oversimplified the
10 situation.

11 Q Other things being equal, if we took that entire lake on the
12 day that they took the water samples with the ice and
13 magically melted the ice so that there would be zero
14 evaporation, the lake level readings would be less; correct?

15 A If they removed the ice off the lake the date she was there
16 and just took water depths, if I understand you correctly,
17 are you asking would there be less water?

18 Q No, I'm not trying to -- I'm not trying to be cute about
19 this. I'm not talking about taking the ice off. Because
20 you've seen the data, there was 8 to 12 inches of ice that
21 day; right?

22 A Correct; right.

23 Q I'm not talking about taking it off. What I'm talking about
24 if we could magically reduce that to water and put the same
25 amount of water in, the water level readings are going to be

1 less with real water because ice expands when it freezes;
2 correct?

3 A You're correct, but I don't understand the relevance
4 whatsoever; interesting point, but irrelevant.

5 Q Now, you stated also in that document, Exhibit 19, in number
6 three where it says, "We suggested that they consider either
7 one or two with a reduced dredge area" -- do you see that?

8 A Correct.

9 Q What is the reduced dredge area that you proposed?

10 A I don't see an area -- a size defined. I think I made it
11 clear to you many, many times in an effort to avoid going to
12 a contested case hearing, we suggest they reduce impacts.
13 And this note to file is nothing other than suggestions that
14 they consider some of these ideas if they wish to propose a
15 less damaging project.

16 Q Did you at any time give the representatives of my client
17 any information as to the size of the dredge area that the
18 DEQ would consider permissible?

19 A I don't know of documents to that effect. We may have had
20 discussions. As I stated to you, we had numerous meetings
21 that were multiple contacts. So in terms of what was
22 discussed at each one of those, if it's not memorialized
23 with a document, I'd have to try to recall if any sizes were
24 discussed. So I would leave it as what I told you. They're
25 all open for discussion. They could come in with whatever

1 they want short of requesting an administrative hearing and
2 it was done in that spirit.

3 Q Are you aware of any documents that memorialize the amount
4 of dredging that the DEQ would have found to be permissible
5 at this site?

6 A I think I answered you. I don't recall that.

7 Q Can you go over to tab 20 in the white binder? Is that a
8 document you prepared dated January 19th, 2007?

9 A Yes.

10 Q I forgot to ask you a question about your other letter, but
11 I guess I can ask it right here. I'm kind of just curious.
12 Are you out of the Cadillac office?

13 A My official work station is the Gaylord field office. I
14 have an office in Cadillac as well. The staff are almost
15 split 50-50 between the two, so I try to spend as much time
16 as my schedule allows in the Cadillac office. Gaylord
17 office is my official work station.

18 Q Okay. Now -- so that would explain then why there is a
19 "received" stamp on here. I was just curious because, you
20 know, I write letters, too, and I don't have a "received"
21 stamp for my own office. But that's why there's a
22 "received" stamp on this; that you generated it in Gaylord
23 and then it comes to Cadillac. Is that generally correct?

24 A The way I would explain this having a Land and Water
25 Cadillac stamp is that it's something from Robyn's file and

1 Robyn is stationed in Cadillac. If it came to me in
2 Gaylord, it would have a "received" stamp in Gaylord.

3 Q Okay. Now, in this letter, is there any discussion
4 whatsoever about Part 303?

5 A I don't see anything in there pertaining to 303.

6 Q Okay. Now, there is a discussion about 301 -- correct? --
7 in the first paragraph?

8 A Correct.

9 Q And this is the letter that dealt -- well, this was the
10 follow-up letter in regard to the conservation easement;
11 correct?

12 A I don't know. It's in response to correspondence he
13 generated December 21st, 2006. So I would want to refresh
14 my memory by looking at that document before I would answer
15 you.

16 Q Okay. Can you do that?

17 A Which tab is it?

18 Q What are you looking for?

19 A Mr. Boughner's correspondence dated December 21, 2006.

20 Q We'll see if we can find that for you quick.

21 A Okay.

22 (Counsel reviews file)

23 Q Can you go to the big binder, tab 12?

24 A Okay.

25 Q And why don't you just take a minute to refresh your

1 recollection on that and when you're ready, let me know.

2 (Witness reviews exhibit)

3 A 10 in this purple notebook, is that what you're referencing?
4 That's not that document.

5 Q 12.

6 A 12. I'm sorry.

7 Q Did I say 12?

8 A I think you did. I maybe didn't hear you.

9 Q Maybe I misspoke, but it's 12.

10 (Witness reviews exhibit)

11 A I remember it. I think we looked at this previously this
12 morning.

13 Q Okay. Now, prior to transmitting this letter to Mr.
14 Boughner, I take it you had some conversations with Mr.
15 O'Neal?

16 A I had conversations with Mr. O'Neal throughout this process
17 in terms of when those occurred -- or if they were even
18 conversations and not e-mails, I couldn't confirm for you
19 without looking through all the documents.

20 Q Go down to the third paragraph. If you could, sir, take a
21 look at the last sentence.

22 A Which exhibit are you referring to?

23 Q I'm sorry. Exhibit 20 in the DEQ's white binder.

24 A Third paragraph, did you say?

25 Q Yes, sir.

1 A Okay.

2 Q Last sentence -- third paragraph, last sentence. It starts,
3 "The DNR indicated." Do you see that?

4 A I do.

5 Q I assume when it says, "The DNR indicated," that would refer
6 to Mr. O'Neal?

7 A Correct.

8 Q All right. And it says,
9 "The DNR indicated to the DEQ that had such a
10 voluntary conservation easement been granted, their
11 concerns about additional future impacts to the
12 remaining subdivision frontage would have been negated
13 and their objection to this project resolved."
14 Is that correct?

15 A Correct. That's correct.

16 Q And that's what Mr. O'Neal communicated to you?

17 A That's my recollection.

18 Q So what I want to know is had the conservation easement been
19 granted, would the DEQ -- would the objections to this
20 project by the DEQ then have been resolved as well?

21 A Yes.

22 Q Now, if you could, go to the second page.

23 A Same exhibit?

24 Q Yes, sir. Paragraph,
25 "Once we have evaluated this data and compared it

1 with historic lake level data, we can more accurately
2 respond to your inquiry concerning what amount of
3 dredging, if any, we believe would constitute a
4 feasible and prudent alternative and would reduce the
5 associated environmental impacts."

6 Do you see that sentence?

7 A I do.

8 Q You reviewed the historic lake level data, did you not,
9 after this letter was sent out?

10 A At some point, yes.

11 Q Did you ever get back to my client in writing after this
12 letter and specify the amount of dredging, if any, you
13 believed would constitute a feasible and prudent
14 alternative?

15 A I don't recall how many times I got back to him after this
16 letter. I'd have to look through the entire record. I
17 can't answer you definitively.

18 Q Okay. Do you recall if you ever sent out a document to Mr.
19 Boughner after this letter that described the amount of
20 dredging that the DEQ would consider to be a feasible and
21 prudent alternative?

22 A I don't recall providing such a document. We would not be
23 in a position in most instances to formulate a specific
24 project for someone. We can enter into discussions in terms
25 of what the water depth data revealed. We can discuss what

1 type of watercraft he would typically use. And generally
2 what would happen is it would be the applicant's
3 responsibility to say in light of the water depths, "Would
4 the DEQ consider a modification for a dredge area of
5 whatever size?" And then we would render an opinion on
6 that. It's quite common that the applicant will ask us to
7 essentially devise a site plan for them or tell them
8 specifically what would be permitted. We really shouldn't
9 be doing that.

10 Q So your testimony is after sending out this letter of
11 January 19th, 2007, you had no intention of ever getting
12 back with Mr. Boughner and communicating to him what amount
13 of dredging, if any, the DEQ would consider to be a feasible
14 and prudent alternative?

15 A No, that's not my testimony at all. If I could have given
16 him a firm figure of a project that we could permit, I would
17 have been happy to do so.

18 Q Did you do that ever?

19 A I don't recall, as I testified a few minutes ago, exactly
20 how many documents I generated after this. My recollection
21 was at some point a conscious decision was made by the
22 Petitioner to proceed to a hearing because they could not
23 get what they asked for.

24 Q Now, Mr. Arevalo, could you go over to tab 22 of the DEQ's
25 white binder? And are you -- look through the whole

1 document because I'm going to ask you some questions about
2 different parts of it. And I'm just going to ask you once
3 you look through it if you're generally familiar with this
4 document?

5 (Witness reviews exhibit)

6 A You're talking specifically about the PRR or the additional
7 sheets as well?

8 Q The additional sheets, sir. I'm going to ask you some
9 questions about that.

10 A Go ahead and proceed.

11 Q Have you seen this document before?

12 A I believe so. I don't recall specifically when I looked at
13 it. I've seen the raw water depth data before. The PRR
14 does not necessarily ring a bell to me at this moment. I've
15 seen it before, I'm sure, though.

16 Q Okay. Now I want to ask if you could go to the 5th page?
17 Do you know what that document is?

18 A It's entitled, "Water and Muck Depths Collected on 2-28-07"
19 signed by Robyn Schmidt and dated 3-13-07.

20 Q Now, at some point -- let me ask you this so you have all
21 the information and maybe you can look at these side by
22 side. Take a look at tab 23 in that same binder, if you
23 could. Do you see that letter?

24 A I do.

25 Q Okay. Go down to the -- one, two, three -- fourth

1 paragraph, second sentence in, "Because of the muck depths
2 range from 4 to 7 feet within 100 feet of shore." Do you
3 see that sentence?

4 A It looks like a typo to me. It looks like I was incorrectly
5 looking at the sum of the water and muck depths. It looks
6 like a typo to me.

7 Q Okay. Well, I'm going to ask you about that. So let's go
8 back to that chart. Is your testimony that you
9 misinterpreted this or the information you were provided had
10 the wrong figures?

11 A The former.

12 Q Okay. Let's go, though, back to the fifth page of tab 22.
13 And let's just look at line one. It says, "H2O 0.85 feet."
14 Do you see that?

15 A Yes.

16 Q And you've heard the testimony both from Mr. Boughner and
17 from Ms. Schmidt in regard to how that level was calculated;
18 correct?

19 A Correct. Well, strike that. No.

20 Q Oh, you didn't?

21 A I didn't hear any testimony by the caretaker whatsoever.

22 Q Okay. You heard Mrs. -- Ms. -- I don't know if she's
23 married or not -- you heard Ms. Schmidt's testimony in that
24 regard?

25 A I did hear her testimony.

1 Q Okay. And to the best of her ability, that was her belief
2 as to the water level to the top of the sediment; is that
3 correct? That's what that first column represents?
4 A Her testimony speaks for itself, you know. I heard it as
5 did you. I wasn't there when she collected it. I heard the
6 testimony.
7 Q The second column says, "Muck 0.10"?
8 A Correct.
9 Q And then there's a "0.815" to the right of that; correct?
10 A Yes.
11 Q And so that's adding those two figures; correct?
12 A That's what it looks like to me.
13 Q And that was wrong in doing it that way -- correct? -- in
14 order to determine the depth of the muck?
15 A I don't think that's what she intends to do. I wouldn't
16 characterize it as wrong. She's probably -- that probably
17 the measurement -- let me back up. We've done this type of
18 work before. And so we'll push whatever instrument you're
19 using as far in as we can 'til we meet resistance and can't
20 push it in any farther and you'll get that total distance,
21 which in this case would be 1.85. Then for our purposes in
22 this hearing and in others we've had where these issues --
23 similar issues have come up, we'd like to know what is the
24 water depth? What is the depth of muck? So that's what
25 she's attempted to do here. I wouldn't characterize it as

1 incorrect the way you've stated.

2 Q When you stated you push it in as far as you can go, that's
3 down to the hardpan as best you can; correct?

4 A It's as I stated. 'Til you can't push it in any farther.

5 Q Correct. And that's the second column in this page;
6 correct?

7 A No. Well, which item? There are two numbers there.
8 There's a "1.0 feet" and then "equals 1.85." I just
9 testified my presumption would be at 1.85 feet she could not
10 push the rod in any farther and that she estimated there
11 were 0.85 feet of water and 1 feet of muck.

12 Q So just so that I understand, your testimony today is that
13 you believe that Ms. Schmidt measured the 1.85 and then
14 subtracted out and then came up with the 1.0?

15 A I don't know what the sequence was. And if you'd like me to
16 graphically describe for you if you don't understand it, I
17 could.

18 Q Well, let me just ask -- let me just ask you this -- I'll
19 just ask you a really clear question. We were presented at
20 the beginning of trial with a corrected copy of the final
21 version of this because rather than adding -- rather than
22 subtracting figure one from figure two in regard to get the
23 depth muck, Ms. Schmidt had added it, which is the third
24 column there. Do you have any knowledge or information in
25 regard to why we were handed that corrected sheet? And if

1 you don't know, just tell me you don't know.

2 A Why don't we refer to the corrected sheet as an exhibit that
3 you're referencing.

4 Q Take a look at Exhibit 24 in the DNR materials and then --

5 A DNR materials?

6 Q I'm sorry. The DEQ materials. And then hopefully you also
7 have there with you one sheet of paper that says "Exhibit
8 60."

9 A No. In this white notebook under tab 24 there's an item. I
10 don't see it says anything about 60. Is that what you're
11 referring to?

12 Q No. No, sir.

13 A Okay.

14 Q Hopefully if we've done this correctly, the corrected
15 version should now appear as tab 24.

16 A 24? Tab 24 says, "Water and Muck Depths Collected on
17 2-28-07, Revised 12-11-07." Is that the document you're
18 referring to?

19 Q The one that says "Revised 12-11-07"?

20 A Down in the bottom right-hand corner.

21 Q Correct. Correct. Now I want you to take a look at tab --
22 I'm sorry -- Exhibit 60, the one single sheet of paper you
23 have there.

24 A Uh-huh (affirmative).

25 Q Go down to the bottom. Go to the very first number. Do you

1 see 0.85 and then .10?

2 A I see a discrepancy between those two.

3 Q And do you know -- can you account for how this discrepancy

4 occurred?

5 A I cannot.

6 Q Have you talked to Ms. Schmidt about this discrepancy?

7 A No, not that I recall.

8 Q Now getting back to your letter of March 22nd, 2007, which

9 is tab 23 of the DEQ materials and your statement, "Because

10 the muck depths range from 4 to 7 feet within 100 feet of

11 shore," wasn't that statement of yours based upon the

12 incorrect data in regard to the documents we just looked at?

13 MR. REICHEL: Objection.

14 MR. SHAFER: I'll change "incorrect data" to

15 "incorrect calculations."

16 MR. REICHEL: I'll withdraw the objection.

17 JUDGE PATTERSON: All right. Thank you.

18 MR. SHAFER: Sorry about that.

19 A Well, I already testified that the numbers I stated there

20 are incorrect. In looking at the exhibit you asked me to

21 refer to which is the revised information from the 12-11-07,

22 I see still that muck of 2.73 feet under item 2 is present

23 and I see a maximum depth of muck is 4.48 feet. So I would

24 have preferred to use that more revised figure but I did not

25 because it wasn't available to me at the time.

1 Q Correct. And all I'm trying to determine is that that
2 statement of yours was based upon the incorrect calculations
3 that are contained on Exhibit 60; correct? It directly
4 correlates with your statement of 4 to 8 feet -- I'm
5 sorry -- 4 to 7 feet; correct?

6 A Yeah. We established there's an error there. My position
7 still would have remained the same, that this site is not a
8 preferred place to be wading simply because of the muck
9 depths regardless of whether they are 2.73 feet or 4 feet or
10 7 feet. So my conclusions would have been the same.

11 Q And I appreciate that. But in your letter of March 22nd,
12 2007, your concern was that the muck depths were between 4
13 to 7 feet out to 100 feet from shore; correct?

14 A I think we've established that pretty clearly.

15 Q And those figures are incorrect; correct?

16 A I think we've established that as well.

17 Q Now, in that same letter of March 22nd, 2007, again, just
18 like the previous letter of yours we looked at, there's no
19 discussion of Section 303 in this letter, is there?

20 A Correct.

21 Q Now, if you go down to the second paragraph, third line
22 down, this is kind of in the middle of the sentence, but
23 rather than read the whole thing it says,

24 "DEQ's position is that the adverse effects to the
25 environment from dredging a channel approximately 180

1 feet long by 50 feet wide (in avoiding the wetland
2 identified by the DEQ near shore) are not minimal and
3 that a feasible and prudent alternative is available."

4 Do you see that sentence?

5 A I do. And I wish to clarify something for the record as
6 well. The reason that 303 is not referenced in this letter
7 is because it's in response to his letter where he was
8 discussing riparian rights as they pertained to Part 301.
9 So I would have no reason to be mentioning 303 necessarily
10 in a letter to him unless he asked a question pertaining to
11 303.

12 Q Thank you for --

13 A Now I'll answer your question.

14 Q Thank you for that clarification.

15 A You're welcome.

16 Q How did you come to the 180 feet long?

17 A I would presume that that's -- because at that point when
18 this letter was drafted March 22, '07, they had discussed
19 shortening that dredge area.

20 Q And you talk about here that there is wetland identified by
21 the DEQ near shore. Do you see that part?

22 A I sure do.

23 Q So prior to this letter of March 22nd, 2007, the DEQ, in
24 fact, had identified that wetland area; correct?

25 A I think we established that clearly earlier.

1 Q And in this letter or any subsequent letter, did you ever
2 discuss the wetland area beyond that 20-foot exclusion zone?

3 A Not that I recall.

4 Q Going down to the next paragraph,

5 "Two alternatives may be either a seasonal
6 floating dockage system combined with a seasonable
7 PWC" -- and I assume that means personal watercraft --
8 "cradle (or a seasonal hoist system for a PWC) or a
9 permanent dock system with pile clusters to prevent ice
10 damage. The first alternative would not require a
11 permit pursuant to Part 301."

12 You see that?

13 A Yes.

14 Q Would the second require a permit?

15 A It would, and you did not clearly state everything I said.
16 The seasonal dock alternative does not require a permit
17 provided it doesn't unreasonably interfere with the use of
18 water by others entitled to use the water. We have people
19 who propose seasonal docks, for example, on very shallow
20 areas on Lake Charlevoix that may be 300 feet or longer.
21 And those lake levels that are tied in with the Great Lakes
22 as they continue to fall, we're commonly seeing people who
23 want to do one of a few options, namely, extend seasonal
24 docks, build permanent docks, dredge or do a combo thereof.

25 Q So is the answer to my question that the second alternative

1 of the permanent dock would require a permit?

2 A A permanent dock requires a permit.

3 Q Now, if this dock traversed the wetland area in that 20-foot
4 strip that we've talked about, would a 303 permit be
5 required?

6 A A separate permit under that part would not be required, but
7 we would do the review taking into account the 303 criteria
8 as well.

9 Q So correct me if I'm wrong, but for any dock that would
10 traverse the wetlands area, this 20-foot zone that we've
11 talked about, whether it's permanent or seasonal, that would
12 require an analysis by the DEQ and approval by the DEQ?

13 A The seasonal pier would not require a permit under Part 301.
14 If a seasonal pier were put within an area that met the
15 definition of wetland, staff should take that into account
16 as we've heard testimony on previous at this hearing. But
17 because those type of open pile or floating structures pose
18 such minimal impact, it would not likely be justification to
19 deny or even require a permit under Part 303 for something
20 like that. But they should take those criteria into account
21 when they look at such a structure in wetland.

22 Q Well, I want to break that answer up. And I understand
23 about not a reason to deny. All I want to know right now is
24 would a seasonal dock traversing that 20-foot wetland area
25 that we've talked about, would that require an application

1 for a 303 permit?

2 A The response would be we would not typically see such an
3 application for that. We do commonly see applications for
4 boardwalks. They're most frequently located above the
5 ordinary high water mark, not below. So the first -- the
6 question would be does that constitute a dock below the
7 ordinary high water mark? How should we view such a
8 structure or should we look at it as a boardwalk which is a
9 structure as defined in Part 303? And should we require a
10 303 permit for the boardwalk the way you would describe --
11 the way you have described? So my response to you would
12 be -- if this individual or others approached us and said,
13 "I would like to put in a seasonal pier out on this
14 particular frontage. Do we need to come to you for a
15 permit?" my response would be that because the bulk of the
16 work is located below the ordinary high water mark, staff
17 should look at the 303 criteria and determine if there's
18 some reason there -- an environmental issue that would
19 warrant denial. But I don't know as I would want to see an
20 application under 303 for a seasonal pier there.

21 Q So your testimony is -- correct me if I'm wrong -- that a
22 landowner who has a piece of wetland as we've described,
23 this 20-foot strip, should not be under the understanding
24 that for him or her to put out a seasonal dock over that
25 wetland area, that they would have to apply for a permit to

1 the DEQ; correct?

2 A If the structure were located completely below the ordinary
3 high water mark -- you need to understand we're under a
4 great deal of pressure to do less regulation versus more.
5 And we're trying to look at what duties can we cut back on
6 as opposed to doing more regulation. And in that spirit,
7 although we might try to make the case that your reasonable
8 pier below the ordinary high water mark should require a 303
9 permit, I don't think that would be very palatable for
10 either the public or the legislature, and we're not in a
11 position to start notifying the hundreds or thousands of
12 people across this state that to put a seasonal pier below
13 the ordinary high water mark within an area that meets the
14 definition of wetland requires a 303 permit.

15 Q And then you go on on the third paragraph and you actually
16 talked a little bit about this. You had raised, I think,
17 Lake Charlevoix or something if I can recall your testimony.
18 You talked about that, "Irrespective of whether the dock is
19 seasonal or permanent, it can't unreasonably interfere with
20 the use of the water by others entitled to use the water or
21 interfere with water flow"; correct?

22 A Correct.

23 Q And is that like a fancy way of saying it can't be a
24 navigation hazard?

25 A The statute says what it says and it's quoted verbatim.

1 Q Now going on to the next paragraph -- and this is about the
2 swimming area -- correct? -- that they had requested?

3 A There were discussions pertaining to swimming or wading, and
4 that's what that paragraph refers to.

5 Q Okay. And so -- just so that I have clear in my mind that
6 before you made your final determination, you were aware of
7 the fact that part of this dredging project was in order to
8 afford a swimming area for small children so that they could
9 wade from shore into the water and be in a safe area;
10 correct?

11 A I was aware of that.

12 Q Thank you. Now, your reason -- well, let me ask you this:
13 At any time did -- at any time prior to your final ruling
14 affirming the denial, did the DEQ ever remit in writing to
15 any representative of my client a proposal for a prudent and
16 feasible alternative for the swimming area other than
17 placing a swim raft or a swim platform out in deeper water?

18 A Consistent with the statement I made earlier, it's not our
19 position to design projects for people. We would evaluate
20 anything they came in with. I don't recall giving a
21 specific size area in writing to them that could be
22 permitted. I do remember discussing the swimming platform.

23 Q Okay. And that was, in fact, one of the alternatives for
24 the proposed swimming area -- or the proposed dredging to
25 get a swimming area. One of the alternatives that the DEQ

1 came up with was a swim platform out in deeper water?

2 A I remember discussing a swim platform.

3 Q And prior to Ms. Schmidt's testimony yesterday, did anyone
4 ever communicate to any representative of my client that the
5 feasible and prudent alternative for small children to
6 utilize that swim dock in deeper water would be to get on a
7 powerboat from the dock, take the powerboat out to the swim
8 platform and have the small children get on the swim
9 platform?

10 A I don't know --

11 MR. REICHEL: Objection; lack of foundation. I
12 don't think that's consistent with her testimony.

13 MR. SHAFER: I think that's exactly what she
14 testified to.

15 JUDGE PATTERSON: That's my recollection. I'll
16 overrule.

17 Q Was that ever communicated in writing to any representative
18 of my client that that was the proposed prudent and feasible
19 alternative for the small children swimming and wading?

20 A Why don't you re-ask that question then.

21 Q Sure. At any time prior to Ms. Schmidt's testimony
22 yesterday, was there any document ever given to my
23 clients -- any representatives of my clients by anyone from
24 the DEQ where the DEQ stated that the proposed prudent and
25 feasible alternative for small children being able to wade

1 out into the water in the dredge site would be to get on a
2 powerboat from the dock, have the powerboat drive out to the
3 swim dock, have the small children get off the powerboat
4 onto the swim dock so that they could then go swimming from
5 there?

6 A Very long question. Was that ever put in writing by the
7 DEQ?

8 Q That's my first question.

9 A Yeah. I'm not aware of that.

10 Q Was it ever communicated to my client that --

11 A Not that I'm aware of and I don't know as I would agree with
12 the statement that Ms. Schmidt made either. As I heard her
13 testimony, what I was thinking of myself would be either a
14 seasonal or permanent pier with a swim platform located
15 conveniently nearby where the children might get onto the
16 swim platform and use that. I don't know as I would have
17 recommended somebody take a boat out to a swim platform,
18 although I've seen that and done that before.

19 Q The idea for the small children -- let me ask you this: Did
20 you ever step in this muck?

21 A I've stepped in muck before.

22 Q Did you ever step in this muck?

23 A I've walked on the exposed bottomlands that were there. I
24 know there's muck present.

25 Q You've heard testimony -- actually Mr. O'Neal said it was

1 dangerous. Do you have any reason to disbelieve all of the
2 testimony so far that stepping into that muck can cause
3 problems for full-grown adults and that they can get stuck
4 in that muck?

5 A Owning water frontage or entering the water is inherently
6 dangerous as well, even if it were a beautiful hard bottom
7 right offshore.

8 Q So you're testifying that a sand bottom is just as dangerous
9 for children as stepping into the feet of muck that has a
10 suction-like tendency that is outside of lot 8; is that your
11 testimony?

12 A No, it is not. My testimony is water frontage or swimming
13 in a little wading pool or a swimming pool carries inherent
14 danger of drowning. If your question is is it difficult to
15 walk in muck, would I like to walk in muck, do I think muck
16 is the preferred wading or swimming frontage, my response
17 would be absolutely not.

18 Q Would you let children go into this muck, small children, 5
19 years old?

20 A Would I let them go into muck? If they wanted to go in
21 there, I would watch them and tell them it's a very -- I
22 think I agreed with you that it's not a good surface to walk
23 in, so let's just leave it at that, whether it's a child or
24 whether you wanted to walk out there.

25 Q Now, the kids now take their boat ride and they're out on

1 the swim platform, wherever that is, and they get into the
2 water. And as I see it, under the proposal of no dredging,
3 there are one of two alternatives. One, the water is too
4 deep and is over their head, they can't swim and then they
5 drown or they step in the muck. What else can they do?

6 A I think they should be wearing preservers for one thing. If
7 they're so little that there's a chance that they can't swim
8 or even if they can swim and they're that small, I think
9 there's precautions that could be taken and they should be
10 supervised.

11 Q When the DEQ determines a reasonable and prudent
12 alternative, is safety a consideration of prudence?

13 A The statute doesn't reference reasonable. It references
14 feasible and prudent alternatives.

15 Q I'm sorry. And I may have used the wrong phrase. But isn't
16 safety part of prudence?

17 A The statute specifically -- or the rules address navigation
18 issues which generally speak to safety. And it's in that
19 context. I don't recall that the statute or rules
20 specifically talk about swimming safety and those type of
21 issues.

22 Q Let me ask you this then based upon your answer. Did the
23 DEQ ever communicate in writing that one of the feasible and
24 prudent alternatives were now kids wearing life vests to
25 swim going out to the swim platform?

1 A I don't recall putting that in writing.

2 Q So as I understand it, your idea then, the feasible and
3 prudent alternative would then be for the children never to
4 do any wading whatsoever where they could contact bottom.

5 Do I understand your testimony correctly?

6 A That's not my intent at all. The landowner can do whatever
7 he wants or whatever -- with respect to allowing the
8 children to go wherever they want. That's not my business.
9 I think we established he purchased a piece of frontage
10 that's characterized with the attributes we've heard several
11 hours of testimony on. I presume he did his due diligence
12 when purchasing that property. It appears that given the
13 amount of frontage he has and the property he has that he
14 may have looked at other properties. I don't know that.

15 But be that as it may, he purchased this
16 particular piece of frontage. And had he approached our
17 department previously as many people do, either personally
18 or through their representatives or an attorney such as
19 yourself, we would always recommend to them, "Make your
20 purchase contingent upon getting any permits required from
21 the DEQ." And that would include 301 and 303. And so if he
22 would have expressed concern that the area offshore does not
23 appear to be the type of wading or swimming situation he
24 would like, then he would have been advised to make
25 application such as this one or for whatever he desired

1 before he closed. Unfortunately, quite a few people don't
2 necessarily do that. They purchase the property, then they
3 decide, "This doesn't look suitable to me." They know they
4 need a permit from the state, so they apply.

5 Q Would you agree with me that irrespective of whether we're
6 analyzing this under 301 or 303, someone has a burden to
7 establish either the existence or the absence of a feasible
8 and prudent alternative to the activities that the applicant
9 wants; correct?

10 A I think feasible and prudent alternatives have been
11 described already as a requirement for analysis. The
12 applicant can choose to do that themselves and then we have
13 the burden of either agreeing or disagreeing with those
14 feasible and prudent alternative analyses that have been
15 done or have not been done as appropriate.

16 Q Isn't the burden under 301 upon the DEQ and the burden
17 upon -- to establish the non-existence of such a feasible
18 and reasonable alternative under the applicant under 303?

19 A 303, absolutely, it's the burden of the applicant. 301,
20 under 301.06 it's spelled out in terms of what the
21 department's responsibilities are and when they shall issue
22 a permit or not. And then the rules for Section -- or I'm
23 sorry -- for Part 301 get into feasible and prudent
24 alternatives. And if you'd like me to tell you exactly what
25 that says, I can look at it.

1 Q No, all I'm asking you right now is is not the burden under
2 301 in regard to a feasible and reasonable alternative upon
3 the DEQ?

4 A Under Rule 4, the department shall not issue a permit unless
5 we determine that a feasible and prudent alternative is not
6 available.

7 Q Can't you just answer the question "yes"? Isn't the answer
8 just "yes"?

9 A I wanted to look it up.

10 Q The burden is --

11 A I wanted to look it up.

12 Q The burden's on the DEQ; right?

13 A I just answered you.

14 Q The answer is "yes."

15 A I just answered you.

16 Q So you can't say the word "yes" to any question that I ask?
17 Is that generally the --

18 A I think I already have.

19 Q Is that generally what's going on here?

20 A I'm not going to argue with you. I answered your question;
21 that the burden is upon the department under 301 to
22 determine if feasible and prudent alternatives exist or
23 not -- it reads that a feasible and prudent alternative is
24 not available.

25 Q I'm sorry. I didn't hear the last part of your statement.

1 A In each application for a permit, the department shall not
2 issue a permit unless the department determines two things,
3 B, as in boy, is that "A feasible and prudent alternative is
4 not available."

5 MR. SHAFER: Could I have a break?

6 JUDGE PATTERSON: Yes, you may.

7 (Off the record)

8 JUDGE PATTERSON: Whenever you're ready, Counsel.

9 MR. SHAFER: Thank you, your Honor.

10 Q Mr. Arevalo, I believe you stated that when you make site
11 visits such as this as you did on August 17th, 2006, you try
12 to collect samples of the vegetation of what you would
13 consider to be a wetland area. Do you remember that
14 testimony on direct?

15 A I do. Perhaps I should have stated that a little better. I
16 would prefer the staff always have very complete records of
17 everything that they observed, that they've identified all
18 the species to -- rather, all the plants to genus and
19 species if possible. I prefer they do that on a very
20 exhaustive basis. However, that's not always the case. So
21 if I go out to a site and I happen to observe something,
22 oftentimes I will make note of it and make sure it gets into
23 the file.

24 Q And when you were out there on August 17th, 2006, there
25 wasn't anything precluding you from going out on the lake

1 and getting samples of any of the vegetative material, was
2 there?

3 A Incorrect. As I stated earlier, we don't have ready access
4 to a boat. If a boat is needed, we can attempt to get one
5 through either another DEQ division or through DNR.

6 Q You were out there with a representative of the property
7 owner -- correct? -- Mr. Boughner?

8 A Correct.

9 Q And there was a flat bottom aluminum boat sitting right
10 there, wasn't there?

11 A There may have been. I wouldn't dispute that. In answer to
12 your previous question, was anything preventing me from
13 doing that, the only thing I would add would be my schedule
14 in terms of the allotted time I had for these visits. And
15 normally I'll have limited time available to do that.

16 Q As you sit here today, can you recall anything that was of a
17 pressure on your schedule that would have precluded you from
18 making a complete inspection and evaluation of the dredge --
19 proposed dredge site on that day?

20 A Yes, I had other work to do in Cadillac and was, in fact,
21 doing that and then broke away from that to go out to this
22 site and then I had to return back to the office.

23 Q So is what you're telling me that you would have preferred
24 to have more time to evaluate this site, but you couldn't
25 due to other work that you had to attend to?

1 A I always would prefer to spend more time than I have
2 available generally, yes.

3 Q Are you a riparian owner anywhere?

4 A No.

5 Q Do you ever put in a dock with a friend, relative?

6 A I have before.

7 Q Okay. And do you have any reason to dispute that because of
8 the consistency of this muck out in front of lot 8 it would
9 be dangerous, if not next to impossible, to put in a
10 seasonal dock in this area?

11 A I wouldn't agree with that. I would agree because of the
12 limitations of this site, you would want to talk to numerous
13 people who have put docks in either on that lake or other
14 lakes and then make an informed decision in terms of cost
15 maintenance. And then if you wanted to take it in every
16 season, what that would entail, and then I would go with the
17 best outfit I could come up with in terms of who I would
18 hire to construct and then remove such a structure.

19 Q With the consistency of the muck in this area in front of
20 lot 8, would you recommend people to go in and put a 100 to
21 200-foot dock -- seasonal dock in that muck given the
22 consistency of it?

23 A We already did. We already did. I think that's pretty
24 clear on the record.

25 Q You already did what?

1 A We already recommended that exact alternative.

2 Q Did you make any type of analysis as to the type of
3 potential hazard it could be if someone would -- about
4 someone trying to put in a seasonal dock in this area
5 because of the consistency of the muck?

6 A I've seen people put docks in in similar habitat. It's
7 nothing unusual. This isn't a unique piece of habitat that
8 we've never encountered before.

9 Q So you disagree with Mr. O'Neal's testimony that this muck
10 is dangerous? That's the word he used. He testified under
11 oath.

12 A I don't know as --

13 Q Swore to tell the truth. You disagree with that statement?

14 A I don't know as I would agree it's dangerous necessarily.
15 You know, could somebody get stuck in it? Could somebody
16 get hurt in it? Of course that's a possibility.

17 Q But you were not ever out in the muck in front of lot 8
18 during the application process for this dredging permit;
19 correct?

20 A I already answered that question that I have not.

21 Q We heard some testimony yesterday, I think it was from Mr.
22 O'Neal. And I just want to follow-up with you in regard to
23 this about the normal channel width of what the DEQ would
24 approve for a dredged channel. He testified that -- if I
25 get his testimony correct, and I may be paraphrasing this,

1 but I think what he said was that the DEQ doesn't generally
2 approve dredged channels of over 20 feet wide; is that
3 correct?

4 A I recall him saying that. I don't know as I would agree.

5 Q Okay. And that's what I want to ask you about. What I want
6 to ask you about is assuming that dredging is necessary,
7 forgetting about the swimming, just dredging is necessary in
8 order to get a channel to be able to get a boat from a dock
9 at lot 8 to navigable waters, does the DEQ have any type of
10 criteria or limitation as to the width of that dredge
11 channel?

12 MR. REICHEL: I'm going to interpose an objection
13 to lack of foundation.

14 MR. SHAFER: I'm just asking him does the DEQ have
15 the --

16 JUDGE PATTERSON: Yeah, I don't think we need a
17 foundation for that. I'll overrule.

18 MR. REICHEL: Well, lack of -- I'm not objecting
19 to asking what the DEQ's practice is. I'm objecting to that
20 portion of the question which presupposed that dredging is
21 necessary to get to a dock.

22 MR. SHAFER: And I'm not trying to presuppose that
23 in the question, your Honor.

24 Q I'm just asking, if there's going to be a dredge channel,
25 does the DEQ have any type of criteria or limitation in

1 regard to the width of the dredge channel?

2 A Yes.

3 Q And what is that, sir?

4 A Based on a case by case basis relative to the facts as they
5 are present on each site we go to. And I could give you
6 examples, if you prefer.

7 Q Sure.

8 A It's not at all uncommon that we see proposals for new
9 marina construction. Those sometimes can require dredging.
10 It's not unusual that we see maintenance dredge proposals.
11 It's more rare that we'll see new dredge proposals in
12 habitat such as is the subject of this contested case for
13 the first time on pieces of riparian frontage in the
14 Cadillac District. I can't speak to what happens elsewhere
15 in the state, but we don't see that that often as a first
16 time project.

17 What we will see is something that Mr. O'Neal
18 testified about yesterday and that is where you have this
19 type of frontage or just a soft bottom, let's say -- let's
20 not talk about the depths of muck necessarily, but where you
21 have a soft bottom offshore and historically there's been a
22 common access channel to some subdivision lots. We may see
23 a maintenance dredge proposal for something like that. We
24 may see during times of low water dredge proposals adjacent
25 to docks on lakes such as on Lake Charlevoix as I testified

1 to.

2 Q What about width, though? My question was specifically
3 about width. Does the DEQ -- if they're looking at -- and
4 let's go out of the realm of hypotheticals. Okay. Let's
5 talk about -- you heard the testimony about the type of boat
6 Mr. Mohny has and he has two personal watercraft. If the
7 DEQ is going to approve a dredge channel to be able to have
8 those type of watercraft have access to the navigable
9 portions of Lake Missaukee, does the DEQ have any type of
10 standards or criteria in regard to how wide that dredge
11 channel should be?

12 A Each one is looked at individually, so we don't have a hard
13 and fast width or depth that we could give you that one
14 could apply to all these various projects including the one
15 you've just described.

16 Q Okay. But one of the considerations would be draft, boat
17 draft?

18 A One of the considerations would be draft, but I would add we
19 can't always accommodate all of the people who buy a larger
20 boat or when lake levels go down. And, in fact, there have
21 been denials where people have been advised an alternative
22 is to dock your boat at a commercial marina because we can't
23 authorize either a dock extension or the dredging that
24 they're asking for based upon environmental concerns.

25 MR. SHAFER: I'm going to move to strike

1 everything after he gave his initial answer to my question,
2 which is draft is one thing.

3 Q Would the width of a boat make a difference as to the width
4 of a channel that the DEQ would say would be appropriate?

5 A The beam width and the draft are considerations, but the
6 statutes that are relevant are applied and based upon the
7 statutory criteria, a decision is made in each instance as
8 to whether or not we can authorize dredging or docks.

9 Q Okay. I want to get beyond authorizing dredging. What I
10 want to just focus on right now is assuming that the DEQ is
11 going to approve a dredging permit to allow a riparian owner
12 access -- boat access from a dock to navigable waters, does
13 the DEQ have any criteria as to once they say, "Okay. The
14 criteria is okay to approve it," how wide that channel can
15 be?

16 A As narrow as possible.

17 Q Anything other than that?

18 A No.

19 Q And for an 18-foot Seaswirl and two personal watercraft, do
20 you have any opinion utilizing those standards as to how
21 wide a dredge channel would have to be in order to be able
22 to safely navigate to navigable waters?

23 A At this specific site?

24 Q Sure.

25 A Well, you're asking a hypothetical as to whether or not it

1 can be approved. And if that were the case, the substrate
2 would be different than the substrate that's present here.
3 So I would have to make assumptions on what type of
4 substrate we're talking about and how likely it is that the
5 side slopes on that dredge channel would be able to maintain
6 themselves and not slump into the center of the dredge area,
7 for lack of a better term.

8 Q Well, let me ask you some questions in that regard. Thanks
9 for providing that information. One of the things you would
10 look at in regard to that concern would, in fact, be the
11 consistency and makeup of the substrate; correct?

12 A Correct.

13 Q Because the more friable it is, the easier it's going to
14 fill in?

15 A That's one of the factors. But what that material consists
16 of and wind direction and other factors would be the basis
17 to form an opinion on whether maintenance dredging would be
18 needed and when it would be needed.

19 Q Would you agree with Mr. O'Neal's testimony that the type of
20 accumulations that we see in this area of the west shore of
21 Lake Missaukee are generally in areas where you get less
22 wind and wave action?

23 A I would.

24 Q Okay. And so those considerations, wind and wave action for
25 this particular project, that really wouldn't be a

1 consideration in regard to whether or how fast a dredge area
2 would fill in; correct?

3 A There are other things as well like boat traffic can stir up
4 sediments to some extent. But as I previously stated, it's
5 in a calm -- relatively calm part of the lake that's
6 protected which is why it's developed into the kind of
7 habitat that it has.

8 Q Okay. And another factor -- and we talked about the
9 friability of the material. Someone would have to go out
10 there and make an examination of the material in order to
11 determine the likelihood or rate -- make an estimate of the
12 rate of when this material is going to fill in; correct?

13 A Ideally that would happen. It's not very common that that
14 happens.

15 Q When that happens, is that something that the DEQ would do
16 or is that something that the applicant would be expected to
17 do?

18 A It could be either way. Normally the applicant will present
19 a project and describe why it's necessary, what that bottom
20 type consists of. And if we had the ability to go out and
21 independently look at that, we would try to -- or if we felt
22 there were reason to do that we would try to. But we are
23 not always able to do that.

24 Q Based upon -- well, let me ask you this: Have you seen that
25 you've -- well, strike that. You've heard the testimony of

1 Dr. Lehman?

2 A Incorrect.

3 Q Oh, you have not heard that? Okay. Were you provided any
4 of his reports?

5 A Yes.

6 Q Have you read the reports?

7 A Yes.

8 Q And is there anything in those reports that gives you any
9 information in regard to the makeup or consistency of this
10 sediment that would affect an opinion as to whether or how
11 quickly a dredged area would refill with sediment?

12 A The information that he generated would confirm what I
13 anticipated with respect to that substrate type at that
14 location.

15 Q Which is?

16 A That it's soft and consists of organic material.

17 Q And so there would have to be maintenance that would have to
18 be done; correct?

19 A If somebody wanted to maintain that channel, I suspect over
20 time they would need to do some maintenance dredging there.

21 Q Okay. And maybe you've heard some testimony about this.
22 Apparently you were popping in and out, I guess, from some
23 of your answers. So I wasn't looking to see when you were
24 here and when you weren't, but maybe you heard some of this
25 testimony and maybe you didn't. But do you have an opinion

1 as to whether a narrower dredged channel would fill in any
2 more quickly than a wider dredged channel?

3 A For the record, I didn't hear any of Dr. Lehman's testimony
4 at all. I wasn't present at all during --

5 Q Okay. There was some testimony in regard to Ms. Schmidt and
6 Mr. O'Neal as well. I don't know if you heard that. So I
7 guess I'm just -- rather than talking about somebody else's
8 testimony, I just want to know what you feel about that.

9 A If a narrower channel would tend to fill in more rapidly
10 than a wider channel, is that your question?

11 Q Correct.

12 A Okay. I would think so.

13 Q Okay. Now, does the DEQ have any type of criteria? You
14 talked about previously the slope. Does the DEQ have any
15 type of criteria or guidelines as to the slope degree or
16 percentage that would be appropriate in dredging in this
17 type of muck that is there in front of lot 8?

18 A No.

19 Q Is that something -- well, let me ask you this and make sure
20 you -- let me lay a proper foundation. I take it you have
21 been involved in some dredge projects that were approved?

22 A Absolutely.

23 Q And in regard to your fiduciary responsibilities with the
24 DEQ, from time to time do you interact with the people who
25 physically do the dredging or the dredge operators?

1 A Yes, I do.

2 Q And have you seen and witnessed dredging done in inland
3 lakes in Michigan?

4 A Yes.

5 Q Do you provide any type of -- and I don't mean you
6 personally, but does the DEQ provide any type of guidance --
7 or, well, you just used the word "guidance" -- in regard to
8 the slope degrees that they would like to see in regard to
9 dredged areas depending upon the makeup of the material
10 that's being dredged?

11 A Generally, no, not on a dredge project.

12 Q Okay. So that's just up to the dredge operator?

13 A Well, they define the area that they're proposing to dredge.
14 Sometimes the side slope -- the profile site plans that they
15 give to us will show a side slope on it. But you have to
16 understand we get applications that are very, very crude in
17 nature and we get applications that are done to scale by
18 professional engineers. So we run the whole gamut in terms
19 of quality of plans. But by no means is it commonly done.

20 Q Okay. I guess what I was -- this was really leading to my
21 next question is, do you have any information, just your
22 general knowledge, as to whether there are any standards in
23 the industry? Not that the DEQ would have, but standards in
24 the dredging industry as to slope gradient for dredging
25 projects in order to ensure that there's not a quick

1 accumulation of the dredge material back in the dredge site?

2 A I'm not aware if that exists or not.

3 Q Okay. Mr. Arevalo, to your knowledge, did Ms. Schmidt or

4 anyone else associated with the DEQ provide to any

5 representatives of my client any concerns in regard to the

6 spoils site or the way the spoils were going to be contained

7 prior to the denial?

8 A I am not aware of concerns pertaining to the soils disposal

9 location.

10 Q Okay. Are you aware of any concerns that the DEQ had in

11 regard to any aspects of the handling of the spoils

12 material?

13 A No.

14 Q So that wasn't a basis for the denial?

15 A That's correct.

16 Q I've heard some testimony, and I'm not sure if it came

17 from -- it might have come from you or Mr. O'Neal or Ms.

18 Schmidt or a combination, but some statements about frogs,

19 reptiles and amphibians. Are there any documents that

20 you're aware of in this dredging permit application file

21 that express a concern of frogs, reptiles and amphibians

22 specifically?

23 A Perhaps the denial. I'd have to refer back to it.

24 Q Okay. So we could just look at that document?

25 A Correct.

1 Q All right. And I believe I already asked you this question.
2 You don't have any basis to give an opinion as to the
3 percentage of Lake Missaukee that is the littoral zone?

4 A I've stated previously, no. I guess I should add Mr. O'Neal
5 may have mentioned amphibians or reptiles in some of his
6 communication as well.

7 Q Okay. Were Mr. O'Neal's communications, to your knowledge,
8 ever sent on to my client or a representative of my client?

9 A I am not positive.

10 Q Would you agree with me that lot 8 as it currently exists --
11 in regard to lot 8 as it currently exists, you cannot get
12 out a boat to navigable waters because of the sediment that
13 has accumulated directly offshore there?

14 MR. REICHEL: Is the question any boat or a
15 particular boat?

16 MR. SHAFER: Sure.

17 Q 18-foot Seaswirl with a 3-foot draft?

18 A I haven't tried to do it myself, so I can't testify that
19 I've tried and failed to do it. I'll leave it at that.

20 Q Okay. But I guess the flip side is you don't have an
21 opinion whether it could be done then; right? You're not
22 saying that it could be done, because you just don't know?

23 A I'm not saying it could or could not be done. I would say
24 by virtue of the fact they've applied for a permit, they've
25 determined they either cannot do it or cannot do it easily.

1 Q Has the DEQ made any type of determination whether they were
2 correct in that analysis?

3 A Nothing other than the determination we made relative to
4 their permit application which is what we're charged to do.
5 I need to clarify something earlier.

6 Q Sure. Go ahead.

7 A A couple questions ago you asked were any of Mr. O'Neal's
8 comments provided to the applicant and/or their agents, I
9 believe you said. And some of those communications from Mr.
10 O'Neal were paraphrased in some of the communications that I
11 had. But I seem to recall that Mr. Evans FOIA'd the
12 complete file, so as a part of that FOIA, he should have had
13 all that communication in our file from the fish biologist.

14 Q Was that FOIA request before or after the denial?

15 A I believe it was after the denial, but I'd have to check.
16 It would have had to have been after the denial. I don't
17 recall he had involvement with the project prior to denial.

18 Q There really wouldn't have been any reason to do a FOIA
19 request --

20 A Right. I don't think -- yeah, I don't remember he was
21 involved with it at all previous to the denial, so it would
22 have to be subsequent to that.

23 Q And I'm not disagreeing with you.

24 A Okay.

25 Q I want to talk to you for a moment about the 301 standards.

1 You're generally familiar with those?

2 A Yes.

3 Q Okay. I have part of the statute, it's not an exhibit. I
4 don't know if you have it up there. I don't know if the
5 attorney general has one for you, but --

6 A I have a copy.

7 Q Okay. 301.06; is that correct?

8 A It depends what you want to talk about.

9 Q Well, I want to talk about the standards for issuing of a
10 permit.

11 A Okay. Then you're in the right spot.

12 Q Okay. Do we have any concerns in this application in regard
13 to industry?

14 A None.

15 Q Commerce?

16 A Not that I'm aware of.

17 Q Agriculture?

18 A Not that I'm aware of.

19 Q Local government?

20 A Same response.

21 Q Which is none?

22 A Which is none.

23 Q Okay. Aesthetics?

24 A Aesthetics are so difficult for us to really quantify that
25 when we're asked this under Section 301.06, we typically

1 afford it little weight simply because it's in the eye of
2 the beholder. So I would not necessarily state that we have
3 a big concern about aesthetics related to this project -- as
4 an overriding reason, rather, to deny it.

5 Q Okay. So correct me if I'm wrong, what we're really down to
6 on the 301 analysis is included uses for recreation, fish
7 and wildlife. Is that basically what we're dealing with?

8 A That in addition to the impairment of waters or other
9 natural resources of the state.

10 Q Okay. Now, my client isn't impairing or destroying any
11 waters; correct?

12 A Well, I believe waters, in a pretty broad sense in the
13 statute, is referencing an inland lake or stream.

14 Q Correct. But they're not destroying the lake or the stream.
15 Your argument is they're dredging up the sediment, which
16 would be, I assume, under your interpretation a natural
17 resource of the state?

18 A It's a natural resource of the state. I wouldn't separate
19 that substrate from the lake itself, so I wouldn't agree
20 with your statement necessarily.

21 Q So are you then telling me that you have no concerns about
22 impairment of the natural resources of the state?

23 A Incorrect. I share that concern as well. I disagreed with
24 your statement that we would look at the lake itself
25 separately from that substrate as you were discussing --

1 well, the exact wordage -- verbiage, rather, is waters of
2 the state or destroy any waters of the state. And you were
3 implying that that isn't a concern here because he's not
4 talking about removing water or destroying the lake itself.

5 Q All right. These sediments out there in front of lot 8,
6 will you agree with the testimony of Mr. O'Neal that these
7 are natural accretions?

8 A I would agree with that.

9 Q And if you don't know the answer to this and you don't have
10 any information, just let me know. But would you agree with
11 me that under the law of riparian rights my client actually
12 owns the rights to those natural accretions?

13 A That's correct.

14 Q Okay. Now --

15 A However, if you look at riparian rights and its reference to
16 title to accretions, my understanding of that would normally
17 be exposed bottomlands is what that's referring to when it
18 discusses title to accretions. I guess one could
19 extrapolate that out to material on the bottomlands. But
20 I'm not disputing with you that as a riparian owner in
21 Michigan, that he has a riparian interest area and it
22 includes those bottomlands offshore regardless of what they
23 consist of.

24 Q Okay. And, again, I don't want to get into legal semantics
25 because, you know, maybe you know this and maybe you don't

1 and the judge will know what the law is or find out. But
2 would you generally agree with me that a riparian owner owns
3 basically the bottom of the lake out to a center point of
4 the lake?

5 A That's what I just stated.

6 Q Okay. So is it your opinion that this proposed dredging
7 project would destroy any of the waters of the state?

8 A I don't know as I would use the word "destroy," per se.
9 Again, you're kind of playing with words. It has an impact
10 on the substrate, which is part of the lake. In terms of
11 whether it would destroy that permanently or short time, you
12 know, we could discuss that at length. But I believe I gave
13 you the opinion that it would impair the natural resources
14 of the state and that it has significant adverse impacts.

15 Q Okay. So do you have an opinion as to whether the proposed
16 dredging project would destroy any of the other natural
17 resources of the State of Michigan?

18 A And by "other resources," are you referring to air or what
19 are you referring to specifically?

20 Q I'm just reading the statute.

21 A Okay.

22 Q You know this a lot better than I do. I've been learning
23 all this jargon for the last two weeks and, you know, you
24 live it.

25 A If I had to break out that sentence within 301.06 --

1 Q And I'm just talking about "destroying" right now. We'll
2 get to "impaired" in a minute.

3 A Okay.

4 Q I just want to know about destroying other natural resources
5 of the state.

6 A All right. I would say it would destroy other natural
7 resources of the state.

8 Q What other natural resources of the state would it destroy?

9 A The biota that's contained within the proposed dredge area.

10 Q Which is -- what? -- the biological material?

11 A Correct. The insects, the plants, all of the organisms that
12 are in there.

13 Q Now, is there a shortage of insects in the Lake Missaukee
14 area?

15 A I don't think that's the question -- or that's not the
16 issue, rather. I don't know whether there's a shortage or
17 not. The fact is it provides habitat and that habitat would
18 be altered by the removal of the vegetation and the
19 substrate as you've heard in previous testimony.

20 Q If a dredging project destroyed one insect, would that be
21 sufficient or a reason to deny a dredging project under this
22 particular provision of the statute?

23 A If that insect were the Hungerford's crawling water beetle,
24 yes.

25 Q Because that is an endangered species?

1 A Right. Exactly.

2 Q Did you make any determinations as to whether there were any
3 endangered species in this proposed dredge site?

4 A There are none as far as I know.

5 Q Okay.

6 A And insects aren't the only concern. That's what you asked,
7 but those are not the only organisms of concern.

8 Q Well, you also said plants; right?

9 A Correct.

10 Q And Lake Missaukee has approximately 50 to 60 percent
11 vegetation density; correct?

12 A I don't recall who presented that information. I wouldn't
13 dispute it or confirm it. I haven't looked at that
14 specifically myself.

15 Q Okay. Vegetation can grow back; correct?

16 A If it's left unaltered, not treated with chemicals and the
17 habitat would support it, you would think it would be
18 possible that it would regrow.

19 Q Okay. And there is no proposal in this dredging project to
20 inject any chemicals in this project; correct?

21 A Not that I'm aware of. Dredging in instances will also
22 introduce other unwanted aquatic nuisance plants as well.
23 So with respect to plants growing back in terms of what
24 composition you may have there following dredging, that
25 would depend on a lot of specifics. But over time, some

1 plants would grow back. I don't know what their composition
2 would be.

3 Q Is there any document contained in this application file
4 that a concern was expressed by the DEQ that the dredge may
5 engender -- I'm trying to remember the exact words you
6 used -- an invasive -- what did you say? -- invasive
7 vegetation species?

8 A Just unwanted aquatic nuisance plants. I'm not aware if it
9 does or does not. Just a general observation since you
10 asked about plant regrowth following dredging.

11 Q Okay. But that wasn't the reason that turned down this
12 application, was it?

13 A I don't believe it was even cited in the denial. Sometimes
14 it can be a concern, though.

15 Q Thank you. Now I want to talk about the statute "unlawfully
16 impair." And before I ask you the question about that, I
17 guess what I want to know from your knowledge, having far
18 more experience in the application of this statute than I,
19 does unlawfully modify just "impair" or does it also modify
20 "destroy"?

21 A Is your question will it both unlawfully impair or
22 unlawfully destroy? Is that your question?

23 Q Right. What I want to know is, you know, to the best of
24 your knowledge -- and if you don't know, just tell me --
25 when you're looking at whether something is going to be

1 destroyed, do you have to look at to whether it's going to
2 be unlawfully destroyed or do you just look at whether it's
3 destroyed? And if you don't know, just let me know because
4 I don't know.

5 A Yeah, I don't get into that type of depth of analysis of
6 each one of these words within 301.06 when we make a
7 decision.

8 Q Okay. I mean any dredging project is going to destroy
9 something; correct?

10 A That's correct, in general; in general.

11 Q Correct. And so if the standard was destroying anything as
12 a basis to deny a permit, there would never be a dredging
13 permit that's granted; correct?

14 A It's not a stand-alone criterion, it's one of many.

15 Q Correct. Now -- so let's get back to recreation, fish and
16 wildlife. And you would agree with me that in regard to
17 considering that impact, your criteria under the regs, is
18 whether it's non-minimal or not or -- well, I guess I should
19 rephrase that. In making that determination under the regs,
20 you're looking at whether the effect is going to be minimal
21 or non-minimal; correct?

22 A Correct.

23 Q All right. And you made the determination that this was
24 going to be non-minimal?

25 A That's correct.

1 Q And, for example, the effect on recreation, what is the
2 magnitude that recreation has to be affected for an effect
3 to be non-minimal?

4 A Okay. That's a very difficult thing to quantify and, in
5 fact, I don't know as I could easily do that for you. The
6 best thing I could do is just refer to past contested case
7 decisions involving marina dockage or private piers and how
8 they might impact a person's ability to navigate on a
9 navigable water body. And it's generally understood that
10 when a pier, for example, is authorized under a permit,
11 there's going to be some level of impairment to the
12 navigating public. It's just that question of is it
13 significant or does it rise to the level that that, in and
14 of itself, would warrant denial.

15 Q Are you using the word -- because you've used it a number of
16 times in your testimony. Are you using the word
17 "significant" to be the same thing as non-minimal?

18 A Yes.

19 Q Okay. Was recreation -- as set forth in the statute, was
20 the impact upon recreation anything that served as a basis
21 of the denial or can we ignore that and move on?

22 A I don't recall we're making a big issue of that. If
23 everybody agreed that there were -- well, let's use an
24 example of a public swimming beach right nearby and there
25 was a large concern that the material would drift out of

1 this site because he was proposing to mechanically dredge it
2 and not use a hydraulic dredge, then maybe we would have
3 made a bigger issue about the potential for impairment to
4 recreation on an adjacent swimming beach.

5 Q Okay. And if you're going to dredge -- based upon that last
6 statement, if you're going to dredge, the preferred method
7 is hydraulic dredging; correct?

8 A Generally, yes, I would agree with you.

9 Q Because for one thing, it sucks up the sediment around there
10 and therefore if you had a concern that sediment may become
11 suspended in a water column, there's less of a chance of
12 that using hydraulic dredging; correct?

13 A I would agree that hydraulic dredging, when permissible, is
14 preferred.

15 Q Now -- so let's see. Let's talk about fish and wildlife and
16 maybe to shorten this, if we can just consider these
17 together -- well, I guess I'll ask you -- no, I'll ask you
18 the questions separately. Was a concern for wildlife one of
19 the reasons for denying this permit application?

20 A It was.

21 Q Okay. And what wildlife?

22 A It would be non-game species of wildlife. And in instances
23 like -- we would try to solicit comments from the Department
24 of Natural Resources Wildlife Division. But I believe I
25 testified earlier that more commonly we'll get responses

1 back from fisheries just because their program is more
2 closely linked with us. And Wildlife Division tends to have
3 less staff and so they're less available to give testimony
4 at hearings like this. And it's difficult to get them to
5 comment on files sometimes.

6 Q When you're talking about the fisheries analysis, is that
7 what Mr. O'Neal would have provided to you?

8 A Correct. Yeah, we would have preferred to have wildlife
9 comments. We would have preferred to get a habitat
10 biologist out there to look at this project. I believe I
11 saw a notation in the file where Robyn may have requested
12 that or contemplated that. But I don't recall that a visit
13 was made here by a DNR habitat biologist, nor did they
14 submit comments to the file.

15 Q Okay. Is there a single scrap of paper in this file that I
16 can look at anywhere where wildlife was considered as one of
17 the reasons to deny this permit application?

18 A Yes.

19 Q Okay. And what document is that?

20 A That would be the PRR that Robyn filled out wherein she
21 indicated that fish and wildlife were a concern.

22 Q Okay. Were a concern?

23 A However it's worded exactly in the PRR. I don't have that
24 in front of me.

25 Q Okay. But you had to make your own independent

1 determination of whether or not her decision was correct;
2 correct?

3 A Yes.

4 Q And what is it that led you to a conclusion that the effect
5 on non-game wildlife would be non-minimal?

6 A I should clarify. It's not just non-game wildlife. I'm
7 talking about the whole suite of organisms, whether they're
8 reptiles, amphibians, non-game wildlife, what have you. And
9 I would make that decision based upon my analysis of that
10 habitat and my knowledge of those type of habitats from my
11 professional work experience.

12 Q The only reason I used "non-game wildlife" is because that's
13 the phrase you used.

14 A Right.

15 Q Now, in reaching your conclusion to affirm the denial, what
16 was your conclusion in regard to the magnitude of the
17 wildlife that you were talking about that would have been
18 impaired by this proposed dredging project as modified by
19 the applicant to take out the 20-foot exclusion zone of the
20 wetland area?

21 A Well, the footprint of the project is known based upon the
22 description we've had here at the hearing and any organisms
23 that would utilize either that water column, the soils in
24 the lake or the plants growing in the lake. That would be
25 my concern, would be the removal of that habitat.

1 Q Let me ask you this question, and if this is outside your
2 area of expertise, just let me know because I read a bunch
3 of the materials that Mr. O'Neal has written. Mr. O'Neal, I
4 believe, seems to take a kind of holistic approach to the
5 lake ecosystem. And his concerns, from your
6 understanding -- I forgot if you said you saw his testimony
7 or not. Did you see his testimony?

8 A I did and I would agree that that's appropriate and that's
9 similar to the fashion that the DEQ should be looking at
10 these resources as well.

11 Q Okay. And so if you're taking a look at the holistic
12 approach of the ecosystem, you also have to take a look --
13 I'm assuming you have to take a look at the impact of the
14 entire ecosystem -- correct? -- of the lake?

15 A Ideally that should be done, but each application comes
16 in -- and quite frankly, the riparian owners do not
17 typically give a whit about what's happening on that water
18 body or that watershed as a whole. They have a desire to do
19 a project, that's why they come in. They're not terribly
20 concerned in most instances about impacts that are happening
21 elsewhere on that water body or within that watershed.

22 Q Well, I understand that they may not, but you're charged
23 with a duty in order to look at that impact; correct?

24 A Yes.

25 Q And, therefore, when you're deciding whether an impact is

1 minimal or non-minimal, you have to take a look at the
2 entire lake; correct?

3 A Correct.

4 Q Now -- so what is it in this particular dredge application
5 of only a 50-by-a-200-foot strip that led you to a
6 conclusion that it would have a non-minimal impact upon the
7 non-gaming (sic) wildlife of this entire lake?

8 A I didn't separate out the wildlife concerns from the fish.
9 If you'd like me to, we can. But, again, my concerns would
10 mirror what Fisheries Division has stated. The bulk of the
11 impacts we see in Northern Michigan are not large scale
12 dredging projects or wetland fill projects of a grand scale.
13 They are small; they are typically -- and by "small," I
14 would say they're oftentimes limited to a piece of riparian
15 frontage. They're more often limited to a subdivision lot
16 such as this.

17 So this, in terms of the area we're looking at,
18 the type of property we're looking at, describes to a T the
19 exact type of project that we see. And it's that
20 incremental, small, as you've described it, impact that's
21 akin to cutting off capillaries in the body as opposed to
22 cutting an artery or a vein. And it's the small, very
23 difficult to observe over a short time period type impact
24 that has been shown to be of concern with respect to overall
25 diversity and productivity in Michigan and on a larger

1 scale.

2 Q How long would you need to -- how long would need to elapse
3 in order for you to see those results?

4 A At this specific site?

5 Q Let's just take Lake Missaukee in general.

6 A Well, I can't give you a specific year. It depends on the
7 level of development that's occurring. Many of these things
8 I'm telling you about are related to human activities.
9 That's the way I'm describing. I'm not talking about other
10 natural occurrences that might happen.

11 Q All right. Let me ask you a couple of questions because I'm
12 a little confused on some of your testimony. Maybe I can
13 clarify this in my mind. I think in one regard you just
14 testified that this particular dredging project at this site
15 is typical of what you see in regard to the dredging
16 applications; is that correct?

17 A I know it was confusing. Let me try to clarify.

18 Q Sure.

19 A The fact that it's on a single family residential lot in an
20 established subdivision, that is similar. The aspect of
21 this project that's different than most is that the
22 quantity, the linear footage, rather, that the applicant
23 owns, that's a little bit of a different twist in this
24 permit application versus the others.

25 Q But didn't you also testify probably a couple of hours ago

1 that this was -- I don't want to mischaracterize your
2 testimony -- this was kind of a unique application that came
3 into the Cadillac office which is something you didn't
4 normally see which is a dredging site on, for lack of a
5 better term, a pristine site; that there had not been
6 previous dockage at and not a great deal of human activity
7 at that site? Am I correct about that or did I
8 misunderstand your testimony?

9 A Yeah, in part. Let me clarify that. First off, I did
10 testify that this part of Missaukee Lake is undeveloped and
11 I think the record reflects that. So that's somewhat unique
12 as well, you're correct. The other reason I may have stated
13 it's somewhat unique, with respect to reviews we do in a 22
14 county area, is we don't necessarily see dredge proposals
15 through that type of substrate on mesotrophic lakes such as
16 Lake Missaukee. More often -- in fact, a lot of the dredge
17 proposals are either at drowned river mouths associated with
18 water bodies that are connected to the Great Lakes or lakes
19 like Lake Charlevoix where water levels, because of their
20 connection to Lake Michigan, are dropping. We see proposals
21 for dredging or dock extensions at those sites. Those are
22 occupying quite a bit of staff time. I don't believe we're
23 seeing a lot of proposals for a new dredge proposal -- new
24 proposals, rather, for dredging in these type of substrates
25 offshore of single family residences in our district.

1 Q So would it be a fair statement that you didn't have any
2 other similar type of dredging projects that you could have
3 used as a baseline in order to compare them against when you
4 were deciding to deny or approve this particular dredging
5 permit? Because of the uniqueness of --

6 A Yeah. I've reviewed and we have reviewed -- "we" being the
7 Cadillac District, we have reviewed projects like this in
8 the past, so I would have a baseline to compare to this
9 site. But as I stated, in recent years, that hasn't been
10 the bulk of the proposals we've seen with respect to
11 dredging in the district.

12 Q Okay. Let me ask you a question. At some point you became
13 aware that Judge Patterson had reversed the decision of the
14 DEQ with regard to the dredging permit in Tom's Bay;
15 correct?

16 A Correct.

17 Q And that was a much larger dredging project than this one;
18 correct?

19 A Larger in size, correct.

20 Q And that was also a project that had abundant underwater
21 vegetation; correct?

22 A I remember there was vegetation offshore as well at Tom's
23 Bay.

24 Q Okay. And when you became aware that Judge Patterson had
25 reversed the decision of the DEQ, did you ever have any type

1 of meeting with Ms. Schmidt or other members of the DEQ in
2 order to evaluate how Judge Patterson's ruling might impact
3 upon the denial that had already been issued in regard to
4 this permit application?

5 A I don't remember having a specific meeting, but I like my
6 staff to be aware of not only proposals for decisions, but
7 directors' final orders and case law as it relates to the
8 work we do and even more specifically, to cases that are in
9 our district. But the staff don't always find the time or
10 they may not read those decisions. But I would like for
11 everybody to keep abreast of all of those things.

12 Q Are there any correspondence, e-mails, anything like that,
13 communication, written communication between you and Ms.
14 Schmidt transmitting a copy of the Tom's Bay decision to her
15 for her evaluation in this process?

16 A There may be. I can't tell you for sure.

17 Q Did you take it in consideration in regard to your
18 evaluation as to whether or not you should affirm the denial
19 that Ms. Schmidt had rendered?

20 A Yes.

21 Q And what was your opinion in regard to what impact, if any,
22 Judge Patterson's ruling in the Tom's Bay matter would have
23 on this dredging permit application?

24 A I believe that 303 should be taken into account if we can
25 document that the area offshore meets the definition of

1 wetland.

2 Q So I want to make sure I understand your testimony. Is your
3 testimony that the difference between what Judge Patterson
4 did in the Tom's Bay matter was because of -- a 303 analysis
5 would be required here and not in Tom's Bay?

6 A I don't think that's determinative at all. I wouldn't state
7 that. I wouldn't agree with that statement.

8 Q All right. Well, let me ask you this: Is it true that part
9 of your decision to affirm the denial was based on a 301
10 analysis?

11 A The decision to deny here is based upon both statutes, 301
12 and 303.

13 Q After you read Judge Patterson's opinion in the Tom's Bay
14 matter, did it change your opinion at all in regard to your
15 analysis and approach of the 301 application aspect of this?

16 A Of this file, not Tom's Bay?

17 Q Of this file.

18 A Of this file? If we can justify review under 303, it should
19 have been done ideally at Tom's Bay. It should be done in
20 this instance and all future instances.

21 Q So are you saying that the DEQ just screwed up in Tom's Bay
22 and they should have done a 303 analysis as well?

23 A Those aren't my words. I don't have that file in front of
24 me. Off the top of my head, I can't tell you if 303 was
25 checked on that PRR or if there were comments made about

1 wetlands. But if wetlands are present, the staff should
2 pick up on that issue. They should document that in the
3 file.

4 Q Okay. But getting back to my question -- and I want to
5 separate out your analysis under 301 and 303. All I'm
6 trying to find out is right now what impact, if any, did
7 Judge Patterson's ruling in the Tom's Bay matter have on you
8 in regard to your analysis under 301?

9 MR. PHELPS: Your Honor, I'm going to impose --
10 it's been so long since I've spoken. I'm going to interpose
11 an objection to really this whole line of questioning. It's
12 not relevant. Whether he's read the opinion, whether he
13 didn't, what he cares about it, it's not an issue in the
14 case, especially in the consideration of our time. I think
15 we ought to move on.

16 MR. REICHEL: And I would join in that objection.
17 To further elaborate, going back to what -- I raised a
18 similar objection before. I respectfully submit that the
19 function of this hearing consistent with prior decisions of
20 this tribunal is de novo determination of whether or not
21 proposed activity should be permitted or meets the
22 applicable criteria -- decision that you, as the fact finder
23 and ultimately the director, may be called upon to make.
24 The purpose of this hearing is not to review in excruciating
25 detail which document this individual as a supervisor, the

1 permit writer or denier -- precisely reconstructing his
2 thought process.

3 So, I mean, this tribunal is capable -- if, as
4 apparently is the case, the Petitioners contend that Tom's
5 Bay or some aspect of that should inform this tribunal's
6 decision in this case, they're free to argue that and I'm
7 sure they will. But I don't think it's relevant to question
8 this or other witnesses about precisely how they considered
9 or did not consider that.

10 MR. SHAFER: Except for the main point that the
11 court will obviously take into consideration the position
12 and opinions of the DEQ. This isn't being litigated in a
13 vacuum. They have their opinion. And what I'm trying to
14 find out, was their opinion affected at all by the fact that
15 they made an analysis in Tom's Bay. It's a much larger
16 area, much more vegetation, they denied it and you reversed
17 them. Did that fit in their consideration here? Did they
18 take that into consideration? And the answer is either
19 "yes" or "no."

20 JUDGE PATTERSON: Well, I think he's testified he
21 did and what happened in Tom's Bay is a matter of public
22 record. I tend to agree with counsel. I'll sustain the
23 objection, if we can move on?

24 MR. SHAFER: Thank you, your Honor. All right.

25 Q You testified that you really didn't separate out the fish

1 and wildlife in your analysis under the statute; is that
2 correct?

3 A Correct.

4 Q The impact? So what I'd like to ask you is this: I guess
5 I'll predicate the question first like this: What is the
6 magnitude upon the impact of the fish and wildlife of the
7 ecosystem of Lake Missaukee that would render that impact to
8 be non-minimal?

9 A I think we've discussed that at length. But in general,
10 with respect to wildlife if I can separate that out, it's
11 pretty well accepted that when habitat is lost, those
12 organisms are not simply going to go to other areas. Those
13 other niches are probably occupied by organisms already, and
14 so there would be increased competition. My point being the
15 same as I raised to you earlier, it's an incremental
16 situation where that amount of habitat is removed, it's
17 altered, it's fragmented and the impacts from that I think
18 we've heard quite a bit of testimony on already.

19 Q Well, let's talk about fish habitat. And, again, I forgot.
20 Were you here or not here during Mr. O'Neal's testimony?

21 A I was present.

22 Q Okay. So you heard -- we go through all of the spawning
23 cri- -- not criteria, but the spawning habits of the various
24 fish that are in Lake Missaukee; correct?

25 A I heard it.

1 Q And the spawning of the fish that are in Lake Missaukee is
2 more likely to occur in areas other than on this type of
3 sediment; correct?

4 MR. REICHEL: Objection; I don't think it's a fair
5 characterization of the far more specific testimony by Mr.
6 O'Neal on that subject.

7 Q Let me ask the question this way: This dredging project,
8 given the fact that it's going -- that as originally
9 proposed it would go down -- well, this dredging project, if
10 it goes down to the hardpan, would not affect the spawning
11 of fish at all; isn't that correct?

12 A Oh, that's incorrect.

13 Q So you think it would have a detrimental impact upon the
14 spawning of fish, even though we've gone through all the
15 fish and all of them spawn in areas other than muck?

16 MR. REICHEL: Objection; lack of foundation.
17 That's inconsistent. That's not supported by the record.
18 That's directly contradicted by the witness' testimony
19 yesterday.

20 MR. SHAFER: That's not directly contradicted by
21 the witness' testimony because I went through every one of
22 the DNR website sheets on all these fish. And we went
23 through rock bass and we went through walleye and they were
24 talking about, you know, hard surfaces and sunken logs and
25 things like that.

1 JUDGE PATTERSON: My recollection of Mr. O'Neal's
2 testimony was that was ideal spawning, but it was possible
3 that they could spawn in --

4 MR. REICHEL: And I specifically do not recall him
5 testifying that all of the listed fish that he was
6 questioned about spawned -- or none of them spawn in the
7 kind of habitat we're talking about here.

8 Q Mr. Arevalo, you didn't see any spawning beds when you were
9 out there in front of lot 8 on the muck, did you?

10 A I don't remember noting that.

11 Q Okay. Now, is it your testimony that because of this
12 dredging activity, fish will be displaced to other areas of
13 the lake and that there won't be other areas of the lake for
14 those fish to go into? Is that your testimony?

15 A Yes, it is. You made great issue of this list you referred
16 to yesterday and I think it was plain from testimony that
17 those aren't the only species that utilize that area or the
18 lake. There are other forage fish, there are other species
19 that are present that weren't on the website from DNR, which
20 obviously is geared towards sport fisherman and their
21 ability to identify habitat and hopefully catch those fish.
22 And so, yes, there are other fish species that may use that
23 area certain times of the year and then this habitat would
24 be altered and have the potential to impact their usage of
25 this site.

1 Q Now, you're a fisherman?

2 A Yes.

3 Q Fish like docks; right?

4 A I don't know whether fish like docks or not.

5 Q They like cover?

6 A They like cover.

7 Q Docks are cover. People fish right off of docks; right?

8 Strike that. People will cast from the lake right into

9 areas below the docks because they expect that's where the

10 fish are going to be?

11 A I've seen people fish off docks, if that's your question.

12 Q Okay. And you've also -- have you ever fished towards a

13 dock in order to fish for the fish that are under the dock?

14 A Not me personally.

15 Q You've never seen that done?

16 A I've seen people fish off docks. I've seen people fish

17 around docks.

18 Q So is it your testimony that this dredging project will

19 sufficiently disrupt the habitat of fish in Lake Missaukee

20 so that those fish will have no place else to go and die?

21 A That isn't the way I'd characterize it. I think --

22 Q Okay. What's going to happen? What's the concern?

23 A Yeah. Well, let me spell it out for you one more time. The

24 habitat is reduced. There's less available habitat. It's

25 an incremental change. The question is how significant is

1 that? And we have an obvious disagreement in terms of is
2 that something significant or is it, in fact, de minimis.
3 And I believe I've testified at length that I don't agree
4 that the habitat alteration posed by the dredging at this
5 site is de minimis.

6 Q What is the reduction of the fish population in Lake
7 Missaukee that you have estimated will occur as a result of
8 this dredging project?

9 A I haven't made any such estimates.

10 Q What is the reduction in the frog, amphibians and reptile
11 species in Lake Missaukee that will be reduced as the result
12 of this project?

13 A The available habitat contained within that two-tenths of an
14 acre area.

15 Q Have you made any type of analysis or calculation whatsoever
16 as to the percentage of the frog -- I forget what the words
17 are now. The frog, amphibian -- what's the other word?

18 JUDGE PATTERSON: Reptile?

19 Q -- and reptile species, how they would be affected -- the
20 magnitude of the effect of those by way of this dredging
21 project?

22 A I've already answered that. There are no documents or
23 studies that the DEQ prepared relative to this review to
24 quantify those things for you.

25 Q Okay. You would agree with me that this determination of

1 whether something under the DEQ statutes and regs is a
2 subjective standard -- correct?

3 A Repeat that again.

4 Q You would agree with me that the determination of whether
5 there's a de minimis or a non-de minimis impact is a
6 subjective standard?

7 A I wouldn't describe it that way. I would say the decision
8 should be based strictly upon the statute and input received
9 during the review process, such as comments we received from
10 Fisheries Division. Then the staff should use their best
11 professional judgment to make a determination relative to
12 those impacts.

13 Q But there are no objective criteria -- isn't that
14 correct? -- in regard to determining whether an effect is
15 minimal or non-minimal?

16 A Each review is done individually. Sometimes additional data
17 is supplied to the files and other reviews that may not be
18 in this file. So each one is looked at individually and a
19 decision is made in the fashion I just described to you.

20 Q What are the objective criteria that establish whether an
21 impact is minimal or non-minimal under this statute?

22 A There may be detailed fish survey data on a specific site
23 we're reviewing. We may have that type of data in a file
24 and base a decision in part upon that. In this instance, as
25 I described to you, we don't have survey data relative to

1 this specific site.

2 Q Are there any objective criteria that were utilized in
3 determining here in this dredging project application as to
4 whether the impact on the ecosystem of Lake Missaukee would
5 be minimal or non-minimal?

6 A I've nothing to add beyond what I've testified to already.

7 Q Getting back to the statute, the first sentence, "The
8 department shall issue a permit if it finds that the
9 structure or project will not adversely affect the public
10 trust or riparian rights," do you see that sentence?

11 A Yes.

12 Q Would you agree with me that riparian rights of others were
13 not any basis for the DEQ to deny this permit?

14 A Yes.

15 Q Okay. So we're left with the public trust; is that correct?

16 A That's correct.

17 Q Okay. Now, other than what you've already testified to --
18 as a way to try to short-circuit this, other than what
19 you've already testified to, are there any other impacts of
20 the public trust that you took into consideration in regard
21 to rendering your decision in order to affirm the denial of
22 the application?

23 A Repeat the question please.

24 Q Are there any other concerns of the public trust that you
25 want to convey to Judge Patterson that would help him inform

1 his decision as to whether or not in a de novo review, to
2 approve or deny this dredging project, other than what
3 you've already testified to?

4 A I have nothing further to add.

5 Q Thank you.

6 MR. SHAFER: If I could just have a minute, your
7 Honor? That's it, your Honor.

8 REDIRECT EXAMINATION

9 BY MR. REICHEL:

10 Q Mr. Arevalo, I'd like you to turn to exhibit -- in the DEQ
11 exhibits I believe it's the white book in front of you,
12 Number 17.

13 A 17?

14 Q Yes. As you may recall, Petitioner's counsel asked you,
15 among other things, a whole series of questions about these
16 communications about the possibility of a conservation
17 easement. Do you recall that?

18 A I do.

19 Q Do you recall whether or not -- strike that. I believe one
20 of the things he asked you was whether you or the department
21 had ever communicated to the permit applicant that
22 notwithstanding the form language of the conservation
23 easement, the draft that was provided to them, whether the
24 possibility existed of, for example, installing docks in
25 areas subject to the easement. Do you recall that line of

1 inquiry?

2 A I do.

3 Q Okay. Please take a look at Exhibit 17, the last paragraph
4 on the first page. This is a letter you authored; correct?

5 A Yes, it is.

6 Q Could you please briefly indicate by reviewing this
7 letter -- you don't have to read it, but indicate whether or
8 not in this correspondence you provided the applicant's
9 agent with any information about what activities would or
10 would not be potentially allowable in an area subject to
11 this hypothetical conservation easement?

12 A It specifically mentions precluding dredging, vegetation
13 removal with an exception -- and placement of structures or
14 fill material.

15 Q Okay. But in the first sentence, was there any -- did your
16 letter address whether or not in areas subject to the
17 conservation easement a seasonal structure would or would
18 not be permissible?

19 A It says it would not preclude installation of seasonal
20 structures to facilitate -- I don't need to read it all, but
21 it mentions that. Let me read it again, though, please.

22 Q That's fine. Take as much time as you need to refresh your
23 recollection.

24 (Witness reviews exhibit)

25 A All right. The intent here, and I believe the way it reads

1 is, the easement would permanently protect the remainder of
2 the subdivision lots and would not preclude installation of
3 a seasonal dock, the intent being, as I testified to
4 earlier, that if the applicant were to want to sell those
5 lots in the future or put additional dockage in there, I
6 wanted to make sure that they knew this wouldn't necessarily
7 preclude that.

8 Q So, again, under this scenario, assuming hypothetically that
9 a conservation easement of some form had been established,
10 succeeding property owners would not necessarily be
11 precluded from obtaining access to the water by way of
12 seasonal docks; is that correct?

13 A You're correct.

14 Q And I'd like you to look in the other notebook, the
15 Petitioner's exhibits. I believe the maroon one, whatever
16 color it is -- and Petitioner's Exhibit 11, please.

17 A And before we move away from that issue, I just wanted to
18 clarify for the record, when we give out a draft easement
19 like the one in question for people's review, we don't
20 suggest that they make changes to it. We would prefer that
21 they accept it as is because we have a staff person in this
22 office who reviews those. They're sent to the AG for a
23 review. We prefer to leave them unaltered. But as I
24 testified to earlier, we're amenable to looking at potential
25 changes. And I would add that even if somebody were to

1 establish an easement here and then come -- before they
2 signed it they said, "I don't want a seasonal dock. Could I
3 put in a permanent dock even though my letter here didn't
4 reference putting in permanent docks within that easement
5 area?" we certainly would be open to discuss that type of
6 thing.

7 Q Okay. Thank you for that clarification. If you would -- in
8 following up on that point, if you would, turn now to
9 Petitioner's Exhibit 11, please.

10 A It's a letter dated September 29, 2006, that I authored.

11 Q Correct. Right. And this is the letter -- as part of this
12 exhibit, there was -- I think it's been established there
13 was a copy of the draft conservation easement transmitted by
14 your office to the applicant's agent. Do you see that?

15 A Yes, I do.

16 Q And just following up on the line of inquiry perceived by
17 the Petitioner, if you look at the first page of the draft
18 conservation easement, paragraph 2, at the bottom, this is
19 the beginning of a sentence that says that, "The grantor
20 shall refrain from and prevent others from altering or
21 developing the easement premises." Okay. I want to direct
22 your attention to the introductory clause of that sentence.
23 What does that say?

24 A It references the specific portion of NREPA that deals with
25 conservation easements.

1 Q No, I'm sorry. Let me restate. I want you to look
2 specifically at paragraph two.

3 A Number two or --

4 Q Yes, paragraph number two.

5 A Okay. Yeah, it says, "As authorized -- except as authorized
6 under DEQ permit number (blank) issued on (whatever date)
7 whereas otherwise provided in this agreement, the grantor
8 shall refrain from."

9 Q Okay. And what I wanted to -- could you explain briefly
10 what the function of that "except as otherwise authorized"
11 clause is?

12 A It's specifically to address the scenario we've been
13 discussing this morning; that if somebody who was
14 contemplating an easement brought up that they had real
15 concerns about potential for development on other properties
16 that they own and they wanted to try to address that
17 somehow, that we have that latitude of making those
18 allowances in an easement document.

19 Q Okay. And, again, there was a great deal of discussion
20 about this whole issue of conservation easement. And if
21 you -- if you flip back to the DEQ exhibit book, tab 20
22 please, Mr. Arevalo? Okay. The first page, please, third
23 paragraph, last sentence beginning with, "The DNR indicated
24 to DEQ"?

25 A Yes, I'm looking at it.

1 Q Okay. That's fine. You went over this in some detail. But
2 I believe one of the questions that counsel asked you on
3 cross-examination was that -- whether or not if conservation
4 easement had been granted, the DEQ would have been in a
5 position to -- or you would have recommended the permit
6 issue for the project proposed. Do you recall being asked
7 that?

8 A I do.

9 Q Okay. And I believe your response was that the department
10 was prepared or you were prepared to recommend that such a
11 permit be issued; correct?

12 A My response was affirmative that we would have issued a
13 permit with the conservation easement.

14 Q Okay. And could you explain to Judge Patterson why that's
15 the case?

16 A The reason would be when -- particularly when Fisheries
17 Division has a specific concern about offshore habitat and
18 that's shared by the department, even though there's the
19 loss associated with doing that project as we've described
20 this morning, the potential for other impacts within that
21 subdivision would be removed and on balance we feel that
22 it's in the public interest to issue in that instance if
23 that remainder of that frontage were to remain essentially
24 undredged, although there might be dockage there at some
25 point in the future.

1 Q You were also asked a whole series of questions by counsel
2 about what particular considerations or environmental and
3 wildlife fisheries impacts informed the department's
4 decision to deny the permit application. Do you recall
5 being asked about that?

6 A Yes.

7 Q I'd like to direct your attention to Petitioner's Exhibit
8 13, I believe -- I'm sorry, 14 -- I'm sorry, DEQ exhibit,
9 the white notebook. I apologize.

10 A DEQ 14.

11 Q 14. This is the permit denial letter; correct?

12 A Yes, it is.

13 Q Okay. And I'd like to direct your attention to the second
14 page of that document and specifically I believe it's the
15 fourth paragraph of that document -- do you see that? --
16 beginning with the phrase, "Staff observed"?

17 A Yes.

18 Q Okay. Does this portion of the denial letter identify
19 particular concerns about impacts documented by staff?

20 A It does and it specifically referenced the -- it references
21 the shoreline near shore and offshore areas containing a
22 predominance of vegetation. And there's a description
23 including, "arrow arum and water lilies," which are species
24 that would be found in those offshore wetlands. And then it
25 goes on to describe the habitat values provided by that type

1 of vegetation.

2 Q And does the letter identify in addition to aquatic --
3 habitat for aquatic insects, fish, reptiles and amphibians
4 habitat values for any other biota?

5 A It mentions waterfowl and other birds and then comments
6 received from Fisheries Division.

7 Q From Mr. O'Neal which we've heard at length?

8 A Yes.

9 Q You were asked a whole series of questions about whether or
10 when the department communicated to the permit applicant's
11 agents the department's view that Part 303 applied to this
12 project. Do you recall whether or not -- or if you need to
13 refer to Exhibit 14, whether or not the denial itself
14 referred to Part 303?

15 A The denial itself referred to wetlands both within the area
16 subsequently described as being wetland by the DEQ and to
17 this offshore area as I just read to you a few minutes ago.

18 Q You were also asked a series of questions by counsel about
19 installation of docks and whether you had any knowledge
20 about how docks are put in. Do you recall being asked about
21 that?

22 A Yes, I do.

23 Q And in that regard, do you have based upon your experience
24 or observations of projects of other sites or contacts
25 with -- let me back up. I believe you testified on

1 cross-examination that you are aware that there are
2 companies or vendors who both will sell docks and in some
3 cases provide services to install them. Is that what you
4 testified?

5 A That's correct.

6 Q And that there may be various types or features of such
7 docks that are commercially available?

8 A That's correct.

9 Q If you know, do the range of potentially commercially
10 available dock options include docks that actually float on
11 the water?

12 A They do. In fact, we have issued permits for several such
13 structures on the Great Lakes and on inland lakes as well.

14 Q So, if you know, if that type of floating dock structure is
15 used at a site, does that necessarily require -- or would
16 installation of such a dock necessarily require dredging at
17 the dock site?

18 A They do not necessarily require dredging.

19 Q Would installation of that kind of a structure necessarily
20 require that the people installing it wade in the bottom?

21 A It does not require that they wade. Installation would not
22 require that they wade into the water along the entire
23 length of the structure to install it.

24 Q You were asked a number of questions on cross-examination
25 about wetlands identified at the site, I think at various

1 times wetlands delineated at the site. I believe that word
2 was used. Do you recall that line of inquiry?

3 A I do.

4 Q And in the context of your administration of Part 303, is
5 there a process by which either the department or other
6 private parties or contractors delineate wetlands?

7 A The department offers a service which is called our Wetland
8 Identification Program. We also provide on our website a
9 list of contractors who purport to have that ability. It's
10 entitled a "Wetland Consultant List" and it's available on
11 our website.

12 Q Okay. Again, there's been a good deal of discussion about a
13 strip approximately 20 feet wide adjacent to the shore that
14 was referenced in communications between the department and
15 the -- yeah, and, in fact, if I may direct your attention,
16 sir -- you have the DEQ book in front of you -- to the
17 permit application -- or excuse me -- the correction return
18 which I believe is Petitioner -- excuse me -- DEQ Exhibit --

19 A Is it 6?

20 JUDGE PATTERSON: Yeah, I think it is 6.

21 A Dated February 1st, 2006?

22 Q No, I'm sorry, not the return, the response, which is tab 7.

23 A I'm there.

24 Q Okay. This is a multi-page document. I'd like to -- there
25 are some handwritten page numbers in the upper right-hand

1 corner. Please turn to 10, if you can locate that.

2 A Okay.

3 Q And there's a diagram here that I believe was established
4 through testimony by Mr. Boughner that he prepared this
5 document. And there's a -- do you see a cross-hatched area
6 adjacent to the shoreline as depicted on this diagram?

7 A Yes.

8 Q And do you see a reference "wetlands area" and also
9 "approximately 20-foot-wide wetlands"? Do you see that?

10 A Yes, I do.

11 Q Based upon your knowledge of this file and your experience
12 within the department, do you understand this diagram to be
13 a wetland delineation?

14 A It's an attempt by the applicant's agent to give their best
15 estimate as to where they thought wetlands were present. We
16 don't rely on that as a matter of fact. Unless there were
17 data sheets or something to support why the wetland was of
18 that width, we would collect our own data and accomplish our
19 own delineation if it were pertinent to the review.

20 Q Okay. And I'd like you to turn to tab 24 in the same book,
21 please. You were asked a series of questions about this.
22 But what I'd like to direct your attention to is, if you
23 could, turn -- what's at the bottom of the page as it's laid
24 out. There's a drawing of approximate shoreline and a line
25 with a legend "wetland." Do you see that?

1 A Yes, I do.

2 Q Do you understand this document to be a formal delineation
3 of wetlands by the DEQ?

4 A No, I don't. It's an approximation of where this wetland
5 is. It doesn't -- it's not drawn to scale as far as I can
6 see. It's strictly for reference purposes, general
7 purposes. I wouldn't even considerate it like a detailed
8 delineation.

9 Q Because there's been so much testimony, I guess I would just
10 like to make sure the record is clear on this. Based upon
11 your review of this file as well as your own observations at
12 the site to which you've testified, is it or is it not your
13 understanding that wetlands subject to regulation under Part
14 303 are limited to an either 10- or 20-foot-wide strip
15 adjacent to the shore?

16 A They're not necessarily limited to a strip that wide. It
17 could be much wider. In fact, it could be hundreds of feet
18 wide.

19 Q And, in fact, if I understood your prior testimony
20 correctly, it's your observation that -- well, did you
21 personally observe during your site visit evidence of
22 wetland obligate plants offshore beyond this either 10- or
23 20-foot zone?

24 A I testified to that previously, yes.

25 MR. REICHEL: Nothing further.

1 MR. SHAFER: Anything?

2 MR. PHELPS: Nothing.

3 MR. SHAFER: May I?

4 JUDGE PATTERSON: Sure.

5 RECROSS-EXAMINATION

6 BY MR. SHAFER:

7 Q Mr. Arevalo, can you go to tab 23 of the DEQ's materials,
8 please?

9 JUDGE PATTERSON: I'm sorry. 22?

10 MR. SHAFER: 23.

11 JUDGE PATTERSON: Thank you.

12 Q Second paragraph, we kind of covered this once before.
13 There's a parenthetical -- this is a letter that you wrote.
14 There's a parenthetical, "And avoiding the wetland
15 identified by the DEQ near shore." Do you see that part?

16 A Yes, I do.

17 Q What is the area of the wetland the DEQ identified to my
18 client?

19 A I believe it's referring to that narrower band of wetland
20 that there's been so much discussion about. That's what I'm
21 supposing.

22 Q This is your letter. I mean, don't you know what you were
23 referring to?

24 A I write a lot of letters and I just gave you my opinion. I
25 think that's what it's referring to.

1 Q And the attorney general had you go through the denial
2 letter and there's a 303 analysis in there; correct?

3 A There is.

4 Q And is it a fair statement that there is not a single piece
5 of paper in your file or letter from you following my
6 client's agreement not to dredge the immediate 20 feet
7 offshore that contains any discussion whatsoever of 303?

8 A I don't recall anything that we haven't already discussed in
9 that referencing 303 except as we've reviewed and the
10 documents we've discussed at the hearing.

11 Q Now, if you could, go to tab 17 of the DEQ materials and
12 then I also want you to open up tab 11 in the big binder.
13 On tab 17 of the DEQ materials, third paragraph down, it
14 says, "The DEQ is enclosing a copy of our standard
15 conservation easement." Do you see that?

16 A Yes.

17 Q And that's what you communicated to my client, that that was
18 your standard conservation easement; right?

19 A Correct.

20 Q And then the paragraph below that says, "It would not
21 preclude installation of seasonal structures to facilitate
22 private/non-commercial recreational use of the water." You
23 see that sentence?

24 A Yes, I do.

25 Q The attorney general ask you about that sentence?

1 A Yes, he did.

2 Q And that sentence is inconsistent with the actual language
3 of the standard conservation easement that you sent on to my
4 client; correct?

5 A Incorrect. We already went through that. And this -- the
6 document references the fact that alterations can be made if
7 we've agreed to that. And I believe I've testified
8 repeatedly that we commonly do make changes. It's rare that
9 the easement would be signed and returned and recorded
10 exactly as it is in that draft.

11 Q You weren't dealing with a lawyer, were you? You were
12 dealing with a lay person throughout this whole process.

13 A I had a suspicion he would have an attorney available to
14 him.

15 Q Did you ever meet a lawyer?

16 A Just you at the hearing.

17 Q Okay. Did you ever meet a lawyer in regard to this permit
18 application process irrespective of the chuckling I'm
19 getting from counsel here?

20 A Have I ever met an attorney other than you?

21 Q On behalf of this applicant during the process?

22 A No; no; no.

23 Q Now, if you go to tab 11, in paragraph two at the bottom of
24 page 1 --

25 A Which binder are you in?

1 Q The big one -- purple one.

2 A Okay.

3 Q -- it says, "Accept as authorized under MDEQ permit number"
4 and there's a blank there, "issued on" and blank. You see
5 that?

6 A Yes.

7 Q That would have been what was filled out -- and correct me
8 if I'm wrong -- but what would have been filled out there
9 if, in fact, my client had agreed to this -- would have been
10 the permit that you issued on the dredging project for lot
11 8; correct?

12 A Before we would have ever got that far, even if he wouldn't
13 have gone through the expense of having an attorney such as
14 yourself, it's common that an applicant would raise concerns
15 they have about this issue. And, for example, if they
16 expressed concern about a dock or any other problem they
17 have with the easement document, we would have taken into
18 consideration alteration of it. And, in fact, in the past,
19 I've commonly recommended to people who don't have attorneys
20 that they discuss this document with an attorney before they
21 return it to us.

22 Q Sir, my question was, if my client would have agreed to this
23 as written, that would have been his permit number in there;
24 correct?

25 A We would have put his permit number in there, yes.

1 Q That would apply to lot 8; correct?

2 A That's correct.

3 Q And you've already testified that the conservation easement
4 didn't apply to lot 8; correct?

5 A Well, let me read it.

6 (Witness reviews exhibit)

7 A Right. We would have typically put the subject permit
8 number in here. If for some reason with a closer reading of
9 this, if it was not necessary or we had to alter this
10 language, we have the capability to do so. But typically
11 these documents pertain to a review on a subject lot and the
12 subject lot would have been described under that permit
13 number and that's the place we would have put that permit
14 number in the easement document.

15 Q Which is lot 8?

16 A The subject lot is lot 8 in this review.

17 Q Do you guys ever give approvals for more than one dock on a
18 lot?

19 A Sure.

20 Q And do you think that's what Mr. Boughner had contemplated
21 when you sent this document to him?

22 A I have no idea what he contemplated.

23 Q But you expected he could read; right?

24 A Yes.

25 Q And on page 2 of the easement under subsection 2F, it

1 precluded construction or placement of any structure;
2 correct?

3 A Yes, that's what it says.

4 Q As we already covered on your original cross-examination, a
5 structure includes a dock; right?

6 A That's correct. And if he put a seasonal dock in on 8, it
7 doesn't require a permit from us. If he wanted a permanent
8 dock, we would have covered it under this permit number that
9 you described the blanks as applying to.

10 Q So if I understand this correctly, what you're telling me is
11 that because subsection 2D says "dredging," the person who's
12 subject of a conservation easement could do dredging on the
13 property?

14 A If it was described in the permit, yes.

15 Q A subsequent permit?

16 A No, under this permit here. If we could have reached
17 agreement -- let's say we could have permitted every single
18 thing he wanted. We would have described those permitted
19 activities in the permit and this document is designed to
20 exclude those activities, hence the blank that you were just
21 describing where it would have had the permit number entered
22 and he would have been allowed to do those permitted
23 activities and then the remainder of the frontage would have
24 been under easement.

25 Q The document says "no dredging" and your letter says "no

1 dredging"; isn't that true?

2 A The document that we're looking at does say "no dredging"
3 excluding what's covered under permit.

4 Q The letter says "no dredging"; correct?

5 A We weren't proposing to -- let me get back to the letter --

6 Q All I'm asking you is what your letter says. It says "no
7 dredging"? "Dredging would not be permitted in regard to
8 the area subject to the conservation easement"; correct?

9 A Exclusive of lot 8.

10 Q Correct. Those two things are consistent; right? No
11 dredging in the document, no dredging in the letter; right?

12 A Let me clarify for you in case you don't understand. We
13 indicated a willingness to permit the dredge as proposed on
14 lot 8. Exclusive of that, the intent was the remainder of
15 the subdivision lots in that area would have been covered
16 under easement.

17 Q Right. No dredging on the other lots; correct?

18 A Correct; correct.

19 Q And the document -- the easement document says "no
20 structures on the other lots"; correct?

21 A You're correct.

22 Q But your letter says something different?

23 A No. We've been through this repeatedly. I don't know how
24 many more times I need to explain to you that these
25 documents can be altered to tailor -- or rather tailor to

1 the specific instances here. It's the first draft version
2 that was sent to him. If he had concerns, whether he had an
3 attorney or not, we would have been happy to discuss all
4 those things with him. And I'm confident we could have
5 addressed any type of contingencies that he would have come
6 up with.

7 Q Is there anything contained in your letter of September
8 29th, 2006, that indicates to Mr. Boughner that the terms of
9 the conservation easement are negotiable?

10 A It doesn't specifically mention verbiage such as that,
11 merely that he consider looking it over and that he get back
12 to us.

13 Q Have you ever put in a floating dock?

14 A Not a floating dock, no.

15 Q So you have no idea in regard to the feasibility of putting
16 in a floating dock strictly from shore without getting into
17 the water?

18 A No, I do have an opinion on that based upon watching people
19 install floating docks that we permitted.

20 Q And you believe that they could establish they could put in
21 a 200-foot floating dock from shore without ever getting
22 into the water or the muck?

23 A They may need to do it by boat if they were going to install
24 a floater at this site because of the muck. I would imagine
25 they would want to get some type of system that was high

1 profile that would get the dock up out of the lake so it
2 wouldn't rest on that vegetation or in those soft
3 substrates.

4 Q And floating docks are more unstable than a hard dock;
5 correct?

6 A They could be built wider to -- if you're on a large lake,
7 for example, or something where storms blow up or on the
8 Great Lakes, we'll see proposals for floating docks that are
9 wider than they might otherwise need to be.

10 Q Did you ever give my client or representative of my client
11 any indication as to the width of the floating dock that you
12 suggested that they put in?

13 A Not that I recall.

14 Q The denial letter that the attorney general asked you about
15 a couple of moments ago by Ms. Schmidt, you agree with me
16 that that was before my client agreed not to dredge in a 20-
17 foot wetland area -- well, strike that question. Will you
18 agree with me that the denial letter was issued before my
19 client agreed not to dredge in the wetland area identified
20 by the DEQ?

21 A I believe that the document speaks for itself and we've been
22 over when we met onsite, when she had various conversations
23 with him and I believe your understanding is correct.

24 Q Do you still have 17 -- tab 17 there with regard to the DEQ
25 materials? Tab 17?

1 A White notebook? Let me open it up. I do.

2 Q Can you go to the second page? And it states,

3 "Absent a conservation easement with the State of

4 Michigan, there would be nothing to prevent future

5 permit applications for dredging similar, or larger

6 areas of this, the largest remaining undeveloped track

7 of Lake Missaukee lakefront."

8 Do you see that statement?

9 A I do.

10 Q That statement's true; correct?

11 A To the best of my knowledge, yes.

12 Q There would be nothing to prohibit an application; correct?

13 A Correct.

14 Q But there's something to prohibit the permit from being

15 issued; correct?

16 A That's correct.

17 Q Because it's all within the discretion of the DEQ; correct?

18 A You're absolutely correct.

19 Q And you guys could deny every single subsequent dredging

20 application permit; correct?

21 A You're correct.

22 Q Is it true that Mr. Evans offered on behalf of my client

23 mitigation to you in some regard?

24 A I don't remember a proposal in writing. We may have

25 discussed that. As I stated, we've had numerous contacts.

1 Q All right. How about at a meeting that you had with Mr.
2 Evans and Larry Julian December 2006? Does that ring any
3 bells?

4 A I think --

5 MR. REICHEL: Let me interpose an objection here.
6 This is well beyond the scope of my last redirect.

7 MR. SHAFER: No, your Honor. He was clearly -- on
8 redirect he was talking about 303 issues and he was
9 specifically asked questions in regard to the documentation.
10 So it is not beyond.

11 JUDGE PATTERSON: Okay. Go ahead.

12 Q Do you remember him offering mitigation?

13 A Why don't we refer to my notes from that. There were a lot
14 of documents here. As I said, he may have brought that up.
15 It's not at all uncommon. Applicants offer up mitigation
16 all the time. He may very well have. I wouldn't dispute
17 that.

18 Q Okay. If you can recall, did you indicate to Mr. Evans and
19 Mr. Julian that mitigation was irrelevant in regard to a 301
20 determination?

21 A In 301?

22 Q Correct.

23 A Normally mitigation isn't proposed with a project that
24 strictly involves Part 301. 301 does discuss mitigation in
25 a broader sense. The rules don't spell out or don't have a

1 specific portion related to mitigation the way 303 does.

2 Q Because the 303 statutes actually deal with the issue of
3 mitigation; correct?

4 A Normally, yes. That would be it.

5 Q And if the conservation easement had been granted and you'd
6 already testified that you would have withdrawn your
7 objections and the permit then could have been issued, you
8 would have issued the permit without any required
9 mitigation; is that correct?

10 A No, we would have considered under 303 and 301 the
11 conservation easement as a form of mitigation in a broad
12 sense. But that would have been the mitigation. Although
13 there still would have been that habitat loss and those
14 values and functions associated with the dredge area would
15 have been lost or impaired, we would have had that
16 conservation easement.

17 Q No requirements to replant any type of vegetation; correct?

18 A Mitigation doesn't have to require planting of vegetation.

19 Q But in this particular circumstance, if they would have
20 signed the conservation easement, you would not have
21 required, for example, replanting of any type of plants;
22 correct?

23 A Within the project area?

24 Q Anywhere.

25 A I don't know that. I don't know as we would have required

1 that.

2 Q Restocking of fish? You wouldn't have required that, would
3 you?

4 A Probably not.

5 Q There wasn't any document that was sent to my client that
6 states that there would have been any additional type of
7 mitigation as long as he signed the conservation easement;
8 correct?

9 A I believe the document speaks for itself. It says if he
10 would have gone for the voluntary easement, that we would
11 have been able to issue the permit.

12 MR. SHAFER: That's all I have, your Honor.

13 JUDGE PATTERSON: Mr. Phelps?

14 MR. PHELPS: Oh, nothing.

15 JUDGE PATTERSON: Thank you.

16 MR. REICHEL: Mr. Arevalo is our last witness.

17 And unless -- I hesitate to say this, unless there's
18 something else that comes up that we need to reply.

19 JUDGE PATTERSON: Okay. Done with your case in
20 chief?

21 MR. REICHEL: Yes.

22 JUDGE PATTERSON: Mr. Phelps, you've got about 45
23 minutes.

24 MR. PHELPS: Okay.

25 JUDGE PATTERSON: Let's go off the record for a

1 minute.

2 (Off the record)

3 JUDGE PATTERSON: During a brief recess, we
4 discussed continuing this hearing and it was agreed to
5 continue or reconvene the hearing January 3rd of 2008 at
6 9:00 a.m.; is that correct? All counsel have --

7 MR. REICHEL: Yes.

8 MR. PHELPS: Yes.

9 MR. SHAFER: Yes, your Honor.

10 JUDGE PATTERSON: All your witnesses are
11 available?

12 MR. PHELPS: Yes, your Honor.

13 JUDGE PATTERSON: Okay. We do have the issue of
14 the proffered testimony of Mr. Groves. Did you want to
15 address that now or do you want to wait on that?

16 MR. SHAFER: I'd just as soon wait on it. Let's
17 get as much testimony in as we can and we can address that
18 quickly when we come back.

19 JUDGE PATTERSON: Okay. Okay. I did review it
20 this morning and I'm ready, but that's fine. Mr. Phelps?

21 MR. PHELPS: All right. We're going to waive any
22 opening statements further on that and we'll call Richard
23 Morrow.

24 JUDGE PATTERSON: Okay.

25 REPORTER: Do you solemnly swear or affirm the

1 testimony you're about to give will be the whole truth?

2 MR. MORROW: I do.

3 RICHARD MORROW

4 having been called by the Intervenor and sworn:

5 DIRECT EXAMINATION

6 BY MR. PHELPS:

7 Q Mr. Morrow, do you own a cottage on Missaukee Lake?

8 JUDGE PATTERSON: Can you spell your last name,
9 please?

10 THE WITNESS: M-o-r-r-o-w.

11 JUDGE PATTERSON: I can spell Richard, but --

12 Q Do you own a cottage on Missaukee Lake?

13 A Yes, I do.

14 Q Where is that?

15 A It's 7600 West Forest Drive.

16 Q Can you give us just a quick sense geographically of where
17 that's at?

18 A It's on the south shore. It's on the south shore right off
19 of Pavilion Drive which would be right around in this
20 (indicating) area right here.

21 Q Okay. And the west end of the lake we're talking about in
22 this hearing is over in this area?

23 A Yes.

24 Q Okay.

25 MR. PHELPS: And, your Honor, I've got a, if it's

1 easier, copy of the lake.

2 Q How long have you lived on the lake or had a cottage?

3 A 33 years.

4 Q And give us an order of magnitude. How familiar are you

5 with Missaukee Lake in general?

6 A Quite familiar. Over the years we've been everywhere on the

7 lake, obviously, numerous times.

8 Q You've spent portions of each summer over the last 30-some

9 years on the lake?

10 A Yes.

11 Q You've spent time on the west end of the lake that's the

12 subject matter of this case?

13 A Yes, I have.

14 Q Have you been out on the lake dozens, scores, hundreds of

15 times?

16 A Hundreds of times.

17 Q Are you the president of the Missaukee Lake Association?

18 A Yes, I am.

19 Q How long have you served as president?

20 A Since 1997 when we formed.

21 Q Could you tell Judge Patterson about the association, how

22 many members it has, what its purpose is?

23 A Yes. We formed in 1997. We have 94 members in 2007.

24 That's already increased for 2008, but we're talking present

25 right now, so it's 94 members. The association formed

1 really out of a need to what we feel very strongly about is
2 protect the environmental integrity of the lake. We also
3 provide lake education and safety awareness programs with a
4 lot of youth as well as the school systems. And the third
5 facet of that would be communication. Until we formed our
6 association, there was a void with respect to lake owners
7 getting timely information on issues that may impact the
8 environmental integrity of the lake. So that's another void
9 that we filled. Subsequent to that, we have established a
10 website to help with respect to education and communication
11 to the general population, you know, people -- whoever wants
12 to get on our website, they're more than welcome to and we
13 share a lot of lake-generated information on that website.

14 Q Are those 94 members you mentioned, are they also lakeshore
15 riparian owners on Missaukee Lake?

16 A It's a mixture. We have many -- the majority of them would
17 be lakefront property owners, but we also have other lake
18 owners that would be in -- what we would call "back lot
19 owners." And there may even be a couple that are off in the
20 city or not even directly on the lake.

21 Q One of the purposes you mentioned for the association are
22 environmental issues on the lake?

23 A Yes.

24 Q Can you give a better -- more descriptive description of
25 what you mean by that?

1 A Well, one of the things that formed our association that
2 goes back to the 1960's -- there was a massive dredging
3 operation on the lake to form Redman's Island. And this was
4 the early 60's. Some of our members that had ownership of
5 their properties at that time were extremely upset to the
6 amount of environmental damage --

7 MR. HOFFER: Your Honor, I object on relevance and
8 beyond the scope of the question.

9 MR. PHELPS: It's certainly not beyond the scope
10 of the question. The question was what was the
11 environmental issues of the association and what is its
12 purpose and function. He's providing that background.

13 JUDGE PATTERSON: I don't see where it's
14 irrelevant. It's basically laying the foundation for the
15 association's purpose and background. I'll overrule.

16 Q You can continue.

17 A So this negative impact from the dredging to create Redman's
18 Island in the early 60's created such turbidity in the water
19 that neighbors adjacent to me as well as the people I bought
20 my property from could not see their feet in 12 inches of
21 water for two years. Because of that, there's a real
22 passion from the property owners that this never be
23 repeated.

24 Q What is the -- does the association have a formal position
25 on dredging at the lake?

1 A Yes, our position is, is to look at each --

2 MR. HOFFER: Your Honor, objection; foundation. I
3 don't know how this is the opinion of the Missaukee Lake
4 Association, how that was established -- vote, resolution?

5 MR. PHELPS: He's the president of the --

6 JUDGE PATTERSON: Well, I guess ask if he had a
7 they -- if they had a position, I think, if you can ask
8 that?

9 Q You're the president of the association?

10 A Yes.

11 Q Does the association have a position on dredging?

12 A Yes, we do.

13 Q Could you tell the tribunal what that position is?

14 A Yes, I will. Our position is, is to look at each specific
15 dredging application and we look at several factors. One is
16 we look at location, where is it going to be located? We
17 look at is the area open or enclosed area where the dredging
18 would commence? We look at what type of dredging would it
19 be? There's different types of dredging. We look at what
20 type of material would be dredged? We look at would this be
21 a first-time dredge or would this be a maintenance dredge
22 where someone had owned property, maybe had a boat condition
23 and had to go in and open it back up because of low lake
24 level water, for example -- classified typically as a
25 maintenance dredge? Again, material is a big issue, you

1 know. What is the material? And what is the probability or
2 likelihood on frequency of repeated dredges? Those are
3 extremely important factors that we look at in dredging.
4 The size, obviously, is also a major factor.

5 Q Have there been dredging projects on the lake that you've
6 supported?

7 A I don't like the word "supported," honestly. I would say --
8 I would much rather have you say that we don't oppose.

9 Q Are there projects that you haven't opposed -- dredging
10 projects on Lake Missaukee?

11 A Yes, there have. There's been -- this is going back
12 probably to 1998, but I know Missaukee County Park, they
13 have to periodically dredge the channel going into the boat
14 launch lagoon. They've done that two or three times since
15 probably '98. And what they're doing is they're picking up
16 sand and maybe some rocks. Because you look at the material
17 there that's being dredged, it's pretty benign. And, again,
18 it's in a very small, little channel. They've also used
19 some of that material for beach. They'll actually put the
20 sand that's dredged right on the beach to help build the
21 beach up. We've had -- we've not opposed dredging permits
22 for sandbars. We've had several applications on our lake by
23 various owners who have sandbars in front of their property
24 that have just -- it's a degeneration of the beach where
25 they go back and they want to push the sandbar back up onto

1 their beach. And we have not opposed those. And there's
2 been at least one or two of those.

3 We've had a significant dredging application which
4 we did not oppose for -- called North Shore Lagoon. North
5 Shore Lagoon is a -- I could show you on the map. It's kind
6 of a very contained area on the map. It's very difficult --
7 I'm sure you guys can't see it from here, but it's a very
8 small, contained area that has had considerable dredging
9 activity done on it.

10 THE WITNESS: It actually would be this
11 (indicating) area right here.

12 JUDGE PATTERSON: Oh, okay.

13 THE WITNESS: It's a very small area.

14 A But that's had significant dredging, it's had a channel
15 opened up. And that sand from the channel was put on the
16 beach and then they've had subsequent -- two more dredging
17 operations in there where they actually close off the
18 opening to the lake and had massive dredging removal. But
19 there was no chance of sediments getting out into the main
20 body of the lake because it was shut off. So we didn't
21 oppose that.

22 Q Well, let's turn from those areas of the lake and let's talk
23 about the west end of the lake where --

24 A There's one more I think I need to mention.

25 Q Okay.

1 A It's been mentioned here today and that's Tom's Bay. We
2 took a hard look at Tom's Bay. It was a significant dredge
3 operation. We looked at the location. And, again --

4 THE WITNESS: Your Honor, I can show you on this
5 map where Tom's Bay is.

6 JUDGE PATTERSON: I know very well where it is.

7 THE WITNESS: Okay. I'm sorry.

8 A But Tom's Bay is this area right in here (indicating). This
9 is Redman's Island. And so Tom's Bay is for dredging on
10 this west shore as you first go in to Tom's Bay. And we
11 took a hard look at that. And we looked at really would the
12 impact on -- you know, wildlife is another thing that we
13 look at, too, that I did not mention, is what would the
14 impact be on wildlife? Is this a first time dredge? No, it
15 was dredged back in the early 60's, so this would be like a
16 45-year maintenance dredge. We looked at the propensity for
17 the dredge spoils to get in the main body of the lake. And
18 because of its very narrow channel getting in there, we felt
19 that was not a threat. We knew that wetlands that probably
20 were originally there had been dissected over the years with
21 the various boating and swimming activities that have went
22 on for 40 years. So we didn't look at wetlands as being a
23 major desecration because of the use of that land for a
24 40-year period in normal boating, swimming or recreation
25 activities. We looked at wildlife habitat and really didn't

1 see that much there and so we did not oppose it.

2 Q Okay. Turning to the west end of the lake, how many times
3 would you estimate you've been over on that end of the lake?

4 A Well, that's an interesting question. The west end of the
5 lake is kind of divided into two bays as you can see. You
6 have what they call "Indian Lakes West" which is, for
7 instance, this (indicating) bay right in here. And then
8 there's a Indian Lakes North development in this bay over
9 here. I've been in both bays many times, but there's one
10 thing you have to do is when you do go into -- let's talk
11 Indian Lakes West because that's what we're talking about.
12 This bay has a lot of unconsolidated sediments in it. The
13 average depth of those unconsolidated sediments is about
14 7-1/2 feet. And that's -- I'm just talking the
15 unconsolidated sediments.

16 MR. HOFFER: Your Honor, I'm going to object for
17 lack of foundation for that.

18 MR. PHELPS: For what? He's been to the lake.

19 MR. HOFFER: There's no foundation for the
20 statements he just made -- the statements.

21 Q Mr. Morrow, have you -- well, we're going to come back to
22 the sediments. I want you to tell the tribunal about your
23 observations of the environment on that Indian Lakes West
24 cove. And why don't we start with vegetation. What have
25 you seen on that end of the lake, and in particular, on the

1 area offshore of lot 8 between the shoreline and 200 feet
2 out?

3 A That area is a typical wetland. You've heard a lot of
4 discussion on the vegetation that's submergent as well as
5 the vegetation that's above the water. To me, it's
6 indicative of really that whole area. You know, it's not
7 like the vegetation starts and stops, it's continuous, you
8 know. It's a continuous growth of vegetation in that basin.
9 There's a lot of wildlife. There are eagles. We've got two
10 eagles -- actually, two eaglets on the lake now. During the
11 summer months, you will find two loons on the lake. You
12 look at the -- it's not uncommon to see a swan in that area
13 early in the spring -- or two, because usually they're in
14 pairs. It's a very pristine area. It's undeveloped. It's
15 a beautiful area to observe. However, the one thing that
16 most all lake property owners understand is that you don't
17 go driving your boat through there pulling water-skiers.

18 Q Why is that?

19 A There's a propensity that if they would fall, they would get
20 stuck in these deep, vast, unconsolidated sediments. That
21 is a concern that my children had growing up. Don't ever
22 take them over there water-skiing. Stay out of the area
23 because of the nature of these sediments.

24 Q If you'd turn to the Intervenor's Exhibit 19 -- proposed
25 exhibit?

1 A Okay. I got it.

2 Q And Exhibit 19 is a series of color photographs, four of
3 them. Did you take those photographs?

4 A Yes, I did.

5 Q And along the right margin I've got them numbered one, two,
6 three and four.

7 A Right.

8 Q Tell us what's in photograph one.

9 A Photograph number one was taken July 27th, 1997. I took it.
10 It's one of a series --

11 JUDGE PATTERSON: I'm sorry. What was the date
12 again?

13 THE WITNESS: It's July 27th, 1997.

14 JUDGE PATTERSON: Okay.

15 A This is one of a series of pictures that I took depicting
16 the natural conditions that existed on the west end of our
17 lake at that time. Picture number two --

18 Q Let's stay on one a minute.

19 A Okay.

20 Q Is this in the Indian Lake West cove area you previously
21 described?

22 A Yes, this is. In fact, it's probably difficult for you to
23 see, but about right in the center of the picture there are
24 some white birches that are clustered and they kind of
25 sprang out from the top -- or, actually, from the base of

1 the trees up and they swing like kind of to the left.

2 Q Pretty much right in the middle of the picture?

3 A Yes; right. That right there (indicating) would be in front
4 of lot 8.

5 Q Okay. And you see this series of what looks like lily pads
6 in the foreground of the picture?

7 A Yeah, that's just typical. It's very typical of the
8 vegetation there in that basin.

9 Q And are these the same lily pads we see in the foreground of
10 photograph one on Exhibit 19? Are they representative of
11 lily pads you've seen in the front of lot 8 between --

12 A Yes, absolutely.

13 Q And is that in the area between the shoreline and about 200
14 feet out?

15 A Yes.

16 Q What other vegetation have you personally seen in that area
17 from the shore to about 200 feet out in front of lot 8?

18 A There's submergent vegetation but, you know, I'm not a
19 biologist. I can't tell you what it is. I've spent a
20 considerable amount of time being educated with Dr. Jaworski
21 on at least some of these lily -- lily -- what I call lily
22 pads. But, you know, I'm not an expert on wetland
23 delineation.

24 Q Right. Well, photograph two, tell us what that's a picture
25 of.

1 A Photograph two was taken in May of '99. This was one of
2 several pictures that I took. If you look at the natural
3 shoreline, you can see it's been scalped. At that time,
4 there was a large crane brought in to actually take the
5 vegetation from water's edge up the uplands and remove it
6 and also take the high banks that existed along this area at
7 one time and remove them. And that was done pretty much the
8 length of the development called "Indian Lakes West"; not
9 the entire lake, but a great deal of it.

10 Q Did that include area that we've come to know as lot 8?

11 A It included the area in front of lot 8, yes.

12 Q By "in front" you mean along the lakeshore?

13 A Yes.

14 Q And if you could, why don't you tell us what pictures three
15 and four represent and when they were taken?

16 A Both pictures three and four were taken on July 27th, 1997.
17 And both of these pictures -- all of these pictures have GPS
18 coordinates on them the date they were taken. They also
19 have my name, taken by me, the lake and they're there really
20 to serve as benchmark data for references as required on the
21 property.

22 Q Picture three, the plant life we see in that picture, is
23 that representative of the aquatic -- the vegetation that
24 you've seen in front of lot 8?

25 A Yes, it is.

1 MR. HOFFER: Objection; leading.

2 MR. PHELPS: The question "is" is not leading.

3 JUDGE PATTERSON: I'll overrule.

4 Q Are all of these -- well, you've testified you've taken all
5 of these photographs?

6 A Yes.

7 Q And they fairly and accurately represent this copy -- this
8 photocopy that I've made fairly accurately represents the
9 pictures themselves?

10 A Yes, they do.

11 MR. PHELPS: Your Honor, we move that Exhibit 19
12 be admitted.

13 MR. REICHEL: No objection.

14 MR. HOFFER: Your Honor, we're going to object
15 first on foundation and second on whether these accurately
16 represent the grounds now.

17 JUDGE PATTERSON: Well --

18 MR. PHELPS: Well, they don't represent where
19 they --

20 JUDGE PATTERSON: What's your foundational
21 objection?

22 MR. HOFFER: Well, we'll just object on relevance
23 and the fact that these don't represent the area as exists
24 right now. And -- as the attorney general made a big deal
25 about this is a de novo review of the determination made by

1 the staff on site which was based on the conditions that
2 exist right now.

3 JUDGE PATTERSON: Well, I think obviously Mr.
4 Morrow has testified that they were taken in 1999, which
5 is --

6 MR. HOFFER: Which is the relevance, yeah.

7 JUDGE PATTERSON: And I wasn't any good at math.
8 That's why I went to law school. Is that eight years?
9 Yeah. Well, you can argue that and pursuant it on
10 cross-examination. But I think obviously it doesn't
11 necessarily represent what's there today.

12 MR. HOFFER: Thank you, your Honor.

13 (Intervenor's Exhibit 19 marked and received)

14 Q And to clarify that, in case it wasn't clear, Mr. Morrow,
15 the lily pads that you see in the foreground of picture one,
16 are those representative of vegetation that you personally
17 saw in the front of lot 8 at the time that this permit was
18 being considered?

19 A Yes.

20 Q Now, you started talking a little bit about this
21 unconsolidated sediments in the west end of the lake. Do
22 you recall that?

23 A Yes.

24 Q I want you to describe for the court, tribunal I guess we'll
25 call it, what is in -- what this (indicating) jar

1 represents, the contents of this jar.

2 A One of the things that I think really has to be defined is
3 the unconsolidated nature or the fineness of the sediments
4 in this basin. What I did here back on December 9th, I went
5 out with a spud and I chopped a hole through the ice in
6 front of lot 8 approximately 150 out. And I was careful
7 when I spudded the ice not to disturb the sediments
8 underneath because I did not want to disturb them. And I
9 wanted to grab a sample --

10 MR. HOFFER: Your Honor, objection. This wasn't
11 identified in any disclosures before the start of trial.

12 MR. PHELPS: I haven't even talked about whatever
13 he's objecting about. May I continue with the witness?

14 JUDGE PATTERSON: Yeah, go ahead.

15 Q You can continue.

16 A So I wanted to capture the soft, loose sediments that our
17 association feels is extremely detrimental to their property
18 if, in fact, dredging is to commence because of their fine
19 nature. So I went down, I took and inverted the jar there
20 and pushed it down through the ice to the depth of
21 approximately 16 inches and then slowly turned it
22 horizontally so the water could start filling in and the
23 sediments until such time it was practically full and then I
24 stopped and pulled it back out of the hole and put a cover
25 on it. The one thing that I think we should all note is the

1 presence of life in this water and these sediments. You can
2 see there are various little species of swimmers in there.
3 I'm not sure what they are, but maybe Dr. Jaworski could
4 tell us what they are. But I thought it was important to
5 show that after I heard testimony by Dr. Lehman earlier
6 that -- his points where he had sampled did not show any
7 life. But I'm not sure if he was looking for this type or a
8 different type of life than what is in that jar.

9 Q And you took GPS coordinates of where this was taken?

10 A Yes; yes.

11 Q And give us a -- well, was it in front of lot 8?

12 A This is directly in front of lot 8.

13 Q Lakeward obviously?

14 A Lakeward, yes.

15 Q And approximately how many feet out from the shore?

16 A Approximately 150. I couldn't get all the way to shore
17 because there's springs there. So the springs don't allow
18 the ice to form right at shore. So I could probably only
19 get within maybe 18 to 20 feet of shore because of the
20 springs. So from the springs out, I estimated -- you know,
21 I started at what I thought was 50 feet and then went out an
22 additional 100.

23 Q After you dipped the jar and scooped up the sediment you put
24 a lid on it?

25 A Yes.

1 Q Have you done anything to change the contents that you
2 pulled out of the lake since that time?

3 A No. In all honesty, I took the sample for the sediments.
4 It wasn't 'til the first day of the hearing that I went
5 back -- and I had the jar screwed on tight. I went back
6 home and after I saw the other sample, we conferred and
7 said, "Well, I have to bring our sample in." I put it on my
8 table and all of a sudden I looked because all the sediments
9 had settled and now it was clear. And I saw all these
10 swimmers. I said, "Holy smokes. There is life out there."
11 So --

12 Q Have you provided that jar to Dr. Jaworski to take a look
13 at?

14 A Yes, I have, here, only here.

15 Q Right. Now take a look at Defendant's proposed Exhibit 21
16 that's in your book.

17 A Yes.

18 Q I just handed it out to everyone else. And then tell the
19 tribunal what this is a picture of.

20 A I don't have 21.

21 Q You can have my copy.

22 A Yes. This is a picture of the site or the sample was
23 obtained -- you can see it's directly in front of Missaukee
24 Lakes Master Homes at the approximately 150 out from shore.
25 You can see the shoreline is not frozen. You can see the

1 springs have kept the shoreline open.

2 MR. HOFFER: Your Honor, objection; foundation.
3 This photo isn't in evidence yet.

4 JUDGE PATTERSON: I don't think it's been offered
5 yet.

6 MR. HOFFER: I don't either.

7 MR. PHELPS: Yeah, it doesn't need to be. He's
8 testifying as to what it is which would be the usual way --
9 what you do before you move to admit an exhibit.

10 Q So you can continue, Mr. Morrow. What is in the picture?

11 A Okay.

12 Q First of all, did you take this picture?

13 A Yes, I did.

14 Q And that's lot 8 in the background?

15 A Yes, it is.

16 Q And that's this house or cottage that's been referred to as
17 Mr. Mohney's cottage?

18 A Yes, it is. So that's the sample site. Like I say, it's
19 approximately 150 feet out from the shore, but it is
20 identified with the GPS coordinates. The depth of the
21 sample as I mentioned was 16 inches and that is the
22 sediments there in front of me.

23 Q And the jar with the blue lid, is that the same jar on the
24 table in front of you?

25 A Yes, it is. It was -- remained capped until I came back.

1 Q And that jar, has that been in your custody all the time?

2 A Yes. Yes, it has.

3 Q The writing down at the bottom of the photograph, is that
4 your writing?

5 A Yes, it is.

6 Q Those are the GPS coordinates where you took the sample?

7 A Yes, they are.

8 MR. PHELPS: Okay. Your Honor, at this time I
9 move to have Exhibit 21 admitted.

10 MR. HOFFER: And we're going to continue the
11 objection if this is going to be offered in as substantive
12 evidence. I mean, it wasn't -- there was no disclosure of
13 this exhibit that I'm aware of.

14 MR. PHELPS: And, your Honor, admittedly it wasn't
15 disclosed and it wasn't until they brought in this sample of
16 their own that it took any importance to us. So I had Mr.
17 Morrow bring this down. And in all candor, they had several
18 photographs that they've admitted into evidence that I had
19 not seen prior to this hearing. And the reality is, they
20 are nothing more than a photograph. He's already testified
21 to its authenticity, so there's hardly any prejudice from
22 having it admitted.

23 JUDGE PATTERSON: That's what I just was going to
24 bring up if the standard is prejudice. Are you claiming
25 you're prejudiced in some way by this?

1 MR. HOFFER: We'll withdraw the objection.

2 JUDGE PATTERSON: Okay. No objection, 21 will be
3 entered.

4 Q All right. Mr. Morrow, I'd like to turn to Missaukee Master
5 Homes. When did you first become aware that it was
6 interested in dredging the lake and installing a dock?

7 A We first became aware of the applicant's decision to dredge
8 in front of lot 8 when Mr. Boughner got ahold of me, invited
9 me over to Missaukee Lakes Master Homes, the residence
10 there -- or I'm not sure if it's Harry's residence or not,
11 but he invited me over to discuss dredging -- the proposed
12 dredging as he previously testified.

13 Q Okay. After that meeting what did you do in response to the
14 proposed dredging?

15 A I immediately called a emergency board meeting with our
16 board of directors because we are very much opposed to
17 dredging in this ecological (sic), sensitive area of the
18 lake. As I mentioned earlier, the 1962 dredging has really
19 soured our lake property owners on dredging pristine areas
20 of the lake that are non-contained. There's nothing to
21 contain sediments from spreading out into the lake. We feel
22 absolutely very confident that the dredged area will fill
23 back in very rapidly and in essence be a total waste of
24 time.

25 Q Have you observed yourself plumes of fine sediments that

1 float around?

2 A Yes, I have. It is not uncommon. In fact, it's quite
3 common sometimes on days where we have a lot of boat traffic
4 with what I call the "weekend people." The people that come
5 in are not familiar with the lake and may get down into the
6 west end of the lake where they shouldn't be. You cannot
7 tell when you're driving your boat through that water when
8 you're going to run into these sediments. It's a huge
9 layer. It's a huge sea of sediments that are relatively
10 close to the surface of the water. So the closer they go
11 in, there becomes a point where they start disrupting them.
12 That creates plumes. Plumes float with the wind -- the
13 water, they become -- and I'm talking the light, silty
14 fines. I'm not talking the heavy, consolidated sediments.
15 I'm talking the top upper layer of these sediments which is
16 extremely fine. And it seems like I can't see these
17 sediments anywhere on our lake except in that west end of
18 the lake. If you go out in front of my place, you won't
19 find those. You won't find them.

20 Q What happens when these boats drive through that fine
21 sediment on the west end of the lake?

22 A What will happen after a weekend -- and it takes a weekend
23 for them to start appearing on the shoreline. You'll see
24 them. They're dark.

25 Q What appears?

1 A Sediments. We will find sediments on the sandy beach.

2 Q Okay. Do they float through the water?

3 A Yeah, they float and they deposit on the shoreline. And

4 that is the concern that the lake property owners have is

5 that if we engulf (sic) in another dredging operation in a

6 non-contained area, that we're going to have a repeat of the

7 same condition we had years ago. And that's why it's so

8 passionate with our members, that, man, you know, "Don't

9 destroy our lake. Don't environmentally pollute our lake.

10 You know, don't" -- we have nothing against developments,

11 don't get me wrong. We have absolutely nothing against

12 development. We just don't want the lake polluted. We

13 don't want environmental damage to the lake.

14 Q And have you been consulting with Dr. Jaworski about

15 environmental issues and wetland issues relative to the

16 lake?

17 A Yes.

18 Q How long has that been ongoing?

19 A We hired Dr. Jaworski to do a environmental assessment of

20 our lake in -- I believe it was 1999 where he came on and

21 did an in-depth look at the entire lake. And it's something

22 that we really needed -- the lake needed. And Dr. Jaworski

23 was able to educate me personally a little bit more on

24 wetland plants and just lake ecology in general. So we used

25 that report -- really it was well-distributed for

1 educational purposes, for our membership so they could
2 become more familiar with what's going on in the lake. And
3 it was a very, very good report.

4 Q And Mr. Jaworski will testify about his findings and
5 conclusions, but based on those findings and conclusions do
6 you and the other members of your association -- are you
7 concerned that the proposed dredging will adversely impact
8 either the fish population or --

9 MR. HOFFER: Objection; leading.

10 JUDGE PATTERSON: Yeah, can you rephrase?

11 Q The question is, are you concerned based on Mr. Jaworski's
12 findings that there will be adverse impact to the fish
13 population at the lake if the dredging is allowed to go
14 forward?

15 A Yes, very much so. The thing that -- and I think Mr.
16 Arevalo testified a little bit to it as well, but when you
17 look at the area, we've had Dr. Jaworski into Indian Lakes
18 West on several occasions. And I'm not going to put words
19 in his mouth, but being with him, he would point out to
20 me --

21 MR. HOFFER: Your Honor, I'm going to object to
22 this. This sounds like it's going to be a lay opinion on an
23 expert matter.

24 MR. SHAFER: It's also hearsay.

25 MR. HOFFER: And it's hearsay.

1 JUDGE PATTERSON: It also sounds like hearsay, I
2 was going to say.

3 MR. HOFFER: Yeah.

4 MR. PHELPS: I think he was simply --

5 A He showed me the minnows -- the types of minnows.

6 Q Well, that's what I was going to say. It's not hearsay. I
7 don't want you to tell me what his opinions are or the
8 tribunal. But you were personally with Mr. Jaworski?

9 A Yeah; right.

10 Q Okay. And I think you can describe what you and Mr.
11 Jaworski did when you were on the west end of the lake.

12 A Right. He would point out wetland vegetation and types of
13 minnows that we would see, you know, that type of
14 information.

15 Q Did you see that -- did you see aquatic life on the west end
16 of the lake?

17 A Absolutely.

18 Q Did you see aquatic life in the site of the proposed dredge
19 area?

20 A Absolutely.

21 Q And what kind of aquatic life did you see? You mentioned a
22 couple things, but I want to give you a chance to say
23 anything that you saw.

24 A Real small minnows like. I don't know what -- you know, I
25 call them minnows.

1 Q Sure.

2 A Small minnows swimming in the vegetated areas. We saw one
3 fish that actually was a larger fish that took off fast, you
4 know, left a little cloud behind it -- typically what we
5 saw; a lot of vegetation.

6 MR. PHELPS: Your Honor, I'm getting ready to go
7 onto another subject matter and it looks like it's about
8 2:00, so --

9 JUDGE PATTERSON: Yeah, I think I have to quit.
10 Go off the record.

11 (Hearing adjourned at 1:57 p.m.)

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