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2 Today's date is Tuesday, May 24, 2004

3 scheduled time is 2:00 p.m.

4 at Comfort Inn Suites, Hayward, Wisconsin

5 We are doing this outside. Yay!

6 (Document marked for identification as Exhibit No. 148.)

7 DAVID KAFURA,

8 having been first duly sworn on oath, was interrogated and

9 testified as follows:

10 * * * * *

11 EXAMINATION

12 BY MS. AZAR:

13 Q. Good afternoon, Dave. I'm Lauren Azar; I'm representing
14 Mr. Hausman; and, as you know, this is a continuation of your
15 prior deposition that was taken last year, I believe, at this
16 point.

17 A. Last August, correct.

18 Q. Last August and so -- strike that. The instructions that
19 were given during your last deposition also continue at this
20 point in time. So, if we cannot try to talk over each other, if
21 you could give her verbal answers, if there's anything that you
22 need to clarify, as far as you don't understand a question, I'm
23 asking or if you've given an answer that you need to clarify,
24 just stop the deposition, we want to make sure all your answers
25 are as clear as possible. Do you understand that?

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2 A. Yes, I do.

3 Q. Mr. Kafura, we've handed you what's been marked as Exhibit

4 No. 48. Could you identify that exhibit, please?

5 A. That would be Exhibit 148. It is a like facsimile from

6 Michael, Best & Friedrich, letter to Joanne Kloppenburg.

7 Enclosed please find deposition subpoena for Dave Kafura, for

8 Tuesday May 24th, at 2:00 p.m.

9 Q. In response to that subpoena, we've asked you to bring some
10 documents, didn't we?

11 A. Correct.

12 Q. And you have produced some documents. Could you just

13 quickly describe, please, the four documents you produced in

14 response to the subpoena?

15 A. Yes, I will. Previously, on 4-19-05, I submitted documents
16 to Mike Cain and following up of previously requests. From what
17 I can tell on the documents that I have, since that time, include
18 the minutes from the Sawyer County Land and Water Conservation
19 Committee of April 5th, 2005. A Sawyer County Record article
20 from the Sawyer County Land and Water Conservation Committee
21 meeting. I'm guessing that that was Friday, let me backtrack --
22 probably March 4th of 2005. A summary document that I did
23 regarding a site review of Round Lake system on April 7th of
24 2005. And, finally, some minor notes that I took at the Round
25 Lake meeting of May 9th of 2005 that was held at the Hayward DNR

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2 service center.

3 Q. Thank you. Mr. Kafura, have you recently received a
4 videotape from Mr. Hausman concerning recent damage seen -- I'm
5 sorry -- experienced by some Round Lake property owners?

6 A. I received two VHS tapes from Mr. Hausman; I have not had a
7 chance to review them yet.

8 Q. Have you had an opportunity to personally go out and see any
9 of the recent damage that's been incurred by some of the
10 lakefront property owners on Round Lake?

11 A. On the April 7th meet -- or April 7th memo that I wrote, I
12 had received an E-mail from Mr. Hausman requesting that I come
13 look at some shoreline damage on Round Lake; and, since that day,
14 I had time; I went out and looked at the property, looked at
15 Mr. Hausman's property and also looked at some property adjacent
16 to his property and then proceeded to look at some other items on
17 the Osprey Lake system and down through the Double N culverts.

18 MS. AZAR: I'm going to go ahead and have your memorandum marked
19 as an exhibit.

20 (Document marked for identification as Exhibit No. 149.)

21 BY MS. AZAR:

22 Q. Mr. Kafura, why don't you explain to me what damage you've
23 personally witnessed on Mr. Hausman's property as well as
24 neighboring properties of Mr. Hausman?

25 A. As far as the April 7th, 2005 meeting at Mr. Hausman's

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property, I did not see anything significant on his property considering that, the -- the steel reinforcing and rock riprap had been installed, if I remember correctly, 2003; and so I did not see any damage related to -- to his direct property, where he has done a fix on it. Mr. Hausman pointed out to me, adjacent properties as you're looking at the lake, to his right, adjacent property and, to his left, adjacent property and, to the right, I believe that is a Steve Morales' property. It is a stretch of property that is pretty much natural and state has not developed, has not been significantly disturbed. There's a spot Mr. Hausman was concerned about where it looked like there was some bank sluff on Mr. Morales's property, went and looked at that particular area. This was not too long after ice had gone out on the lake, so you had the opportunity to -- to look at the actual lake bed and the shallow-water environment and, when you have wave action, wave action ends up doing a lot of sorting of the lake bottom; and you get some of the finer particles washing out being resuspended by wave and water activity. It was a good time to go out and look at this because, like I mentioned, ice had just gone out on the lake so you didn't have that stirring action; you didn't have that wind and wave action. And so what I had observed was a small, isolated area of bank failure where you could actually see on the bottom of the lake bed, find soil particles that were sitting on top of well wash gravel. It was a

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2 small area that I would say is significant. As I mentioned in my
3 memo, I did not observe a significant failure at that location.
4 There did look like there was a small depression with orientation
5 running, I'd say, at about a forty-five to maybe sixty-degree
6 angle away from the shoreline going back to the wood area on
7 Morales's property. To the left of Hausman's property, if
8 somebody could help me on the ownership of that property, I don't
9 recall who owns that property directly. Is that Bemis ^ sp?
10 Q. Yes, that's Mr. Bemis ^ sp?
11 A. On the Bemis ^ sp side, there is an area that I did not walk
12 over into in any significant degree to ascertain what type of
13 damage there was there. You could see, what I would say is -- is
14 a little bit of erosion on his shoreline; but, again, I didn't --
15 didn't have permission to be over on Mr. Bemis's ^ sp property;
16 and, with the boots I had on, to access the water below ordinary
17 high water mark, I didn't feel comfortable going in and getting
18 soaking wet so I didn't go any further.
19 Q. And did you witness any fissures on Mr. Bemis's ^ sp
20 property?
21 A. I don't remember seeing fissures like I had seen over on
22 Morales's property, but I believe that the videotapes that have
23 been submitted to me will show some of that.
24 Q. As far as the fissures, I believe you referred to it as a
25 small depression on the Morales's property?

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2 A. Hm-hm.

3 Q. You described it as having a 45 to 60-degree angle -- and
4 I'm sorry, was that 45 to 60-degree angle from the lake front?
5 A. From the lake front, from the shoreline orientation?
6 Q. And how close to Mr. Hausman's property was that?
7 A. Ah, I couldn't tell you for sure; I did not measure over how
8 far it was. I mainly concentrated on the -- on the type of
9 shoreline that I was looking at and -- and what type of natural
10 setting that area was in.
11 Q. And was the depression on Mr. Morales's property heading
12 towards Mr. Hausman's property or away from it?
13 A. I would say it was running away from it.
14 Q. And you have not witnessed any of the fissures on
15 Mr. Bemis's ^ sp property. Have you witnessed any other fissures
16 along the lake front from boats or anything from Round Lake at
17 this point?
18 A. I have not. Other than early in 2003, the fissures that
19 were observed on -- on Mr. Hausman's property.
20 Q. You had mentioned that Mr. Morales's property is a natural
21 shoreline?
22 A. Hm-hm.
23 Q. It's not developed?
24 A. In this particular area, correct.
25 Q. Yet you also mention that there has been some shoreline

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2 failure though you stated that it was not significant; is that
3 correct?

4 A. That's correct.

5 Q. In your prior deposition, you talked about a shoreline
6 failure often happening on developed properties. Do you recall
7 that testimony?

8 A. Yes, I did.

9 Q. And do you recall your testimony that you wouldn't expect to
10 see shoreline erosion along lake fronts that had a natural
11 frontage?

12 A. I would not say that, no. I would say that you have a
13 natural erosional processes that go on. As far as natural
14 shorelines, you would not see the accelerated shoreline erosion.
15 Erosional processes are going on at all time, wind-wave action
16 and exacerbated with -- with development on the shoreline.

17 Q. And the fissures that you saw on Mr. Morales's property,
18 would you call that an accelerated erosion process?

19 A. I could not say that that was an accelerated erosion process
20 because I could not directly attribute to fissures to being
21 shoreline erosion.

22 Q. What would you attribute the fissures to?

23 A. In this particular case, because I couldn't get in there and
24 do full evaluation of what was this depressional fissure on this
25 property, I couldn't give you a true indication of what I would

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2 consider attributable to that activity.

3 Q. Is it possible that the fissures are -- depression, as you
4 called it, is attributed to saturated soils?

5 MR. DREGNE: Objection, object to form of the question; it calls
6 for speculation.

7 THE WITNESS: It is possible.

8 BY MS. AZAR:

9 Q. What are some other things that may be causing that?

10 A. Ah, elevated -- elevated ground water, ground water gradient
11 going towards the lake, any -- any physical processes that --
12 that would mobilize soil particles, you could have ice ridging,
13 ice damage that might cause removal of shoreline and bank
14 failure.

15 Q. Did you see any evidence of ice ridging or ice damage on the
16 Morales property?

17 A. I did not, not this year.

18 Q. So I want to go back to the possible causes of the small
19 depressions on the Morales property.

20 A. Hm-hm.

21 Q. You have mentioned elevated ground water. You mentioned
22 ground water movement towards the lake. You mentioned ice ridges
23 and ice damage. Any other possible causes for the depressions
24 you saw on the Morales property?

25 A. Just natural, natural erosion processes are a possibility,

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2 also.

3 Q. I guess I don't understand what that means. What is a
4 natural erosion process?

5 A. Natural erosion processes would be wind-wave action, water

6 action on the shoreline that over time would remove material and
7 so you could have a -- a chronic rather than acute situation
8 where you might have material that is being removed through
9 natural erosion processes that ultimately then show an indication
10 in a -- in a short period of time rather than a -- a short event.

11 Q. And did you see any evidence of wind erosion on the Morales
12 property?

13 A. I did not see any evidence of wind erosion. I would say
14 that there is evidence of -- of wind-wave action on the shoreline
15 of erosion.

16 Q. Wind-wave action on the shoreline.

17 A. Hm-hm.

18 Q. And do you expect -- strike that. Approximately how far
19 back was the small depression from the shoreline?

20 A. Ahm, it started right at the -- at the top of the bank; and,
21 without actual putting a tape on it, I would say it went back in
22 the neighborhood of ten foot, maybe more. Because there were
23 plenty of oak leaves and other organic detritus that was sitting
24 on the ground surface. So, without going right up there and
25 pulling out the leaf matter and organic matter off of it, you

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2 couldn't tell exactly how far back it would go without actually
3 removing the debris that was cover the depression or the fissure.

4 MS. AZAR: I'm sorry. Could you read back that answer?

5 (The answer was read as follows:

6 "Ahm, it started right at the -- at the top of the bank; and,

7 without actual putting a tape on it, I would say it went back in
8 the neighborhood of ten foot, maybe more. Because there were
9 plenty of oak leaves and other organic detritus that was sitting
10 on the ground surface. So, without going right up there and
11 pulling out the leaf matter and organic matter you couldn't tell
12 exactly how far back it would go without actually removing the
13 debris that was cover the depression or the fissure.")

14 BY MS. AZAR:

15 Q. Given the fact that the depression went back 10 feet from
16 the shoreline would you expect that to be caused by wave or water
17 action?

18 A. It is possible through undercutting action where you have
19 undercutting of the bank through wind-wave action and then --
20 in -- in the Morales situation, you can see the natural shoreline
21 with the toe ^ sp of the slope being undercut by wind-wave
22 action; and, when that undercutting is going on, there is
23 mobilization of the material at the toe ^ sp of the bank and you
24 could have then the sluffing ^ sp or the depression that is going
25 on by that activity.

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2 Q. And how big is the undercutting right now?

3 A. Again, I couldn't -- I didn't measure it and -- and give you
4 an idea how far back it is.

5 Q. You mentioned that you did not see any damage to
6 Mr. Hausman's property on his shoreline because of his steel
7 retaining wall -- strike that.

8 Can you explain to me how elevated ground water can cause the
9 kind of depression you saw in the Morales's property.

10 A. In -- in my opinion elevated ground water with saturated
11 soils -- and I'm going to refer back to I believe the Barr
12 Engineering report that was done on Mr. Hausman's property.
13 Specifically, in that report in the Barr Engineering report, you
14 will see an analysis of the soil that was done. Specifically,
15 I'll refer to what is known as the soil particle size analysis
16 that was done on the shoreline soils.

17 In looking at that information, you'll see that the soil size
18 analysis or particle size analysis indicates that there is a high
19 degree of sand component in the sand size particle for this area.
20 That tells me that there is very little silt or sand -- or
21 silt -- correct that -- silt or clay component to the shoreline
22 soils. So you have a situation where saturated, sandy soils
23 because of adhesion-cohesion effects and the voids between the
24 sand particles do fill with water, that there is ability to have
25 failure because of that saturated soil component and then you

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2 actually lose some of the structure or -- ability of the soil
3 structure to hold its structure. When it's saturated, it gets
4 sluffy. It's like quick sand.

5 Q. Any of the damage that you witnessed on Mr. Hausman's
6 property back in 2002 in your professional opinion, could it have
7 been caused by elevated ground water or saturated soils?

8 A. First, I'll correct the question. It was in 2003. I wasn't

9 here in 2002.

10 Q. Thank you.

11 A. 2003, there is again I think there are -- there are many
12 factors that could have caused the situation on Mr. Hausman's
13 property. Yes, same situation that we observed that I re -- that
14 I stated for Morales's where the soils are saturated. That is a
15 possibility of the impact. I also believe, because of the
16 saturated soils and I believe I stated it in my deposition last
17 August, because of the no snow cover, high amounts of
18 precipitation in fall of 2002 and the -- the deep frost you have,
19 obviously, water when it freezes, water expanded by ten percent,
20 you can have failure going on because of the frost. You can have
21 failure from the high ground water or high saturated soil
22 situation.

23 Q. Thank you. The video that we sent -- that Mr. Hausman sent
24 to you, he also sent a copy to Mr. Aartila, correct?

25 A. I believe so. According to the cover sheet of the E-mail

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2 that I received indicated that we would be receiving copies of
3 videotape.

4 Q. Have you talked with Mr. Aartila about the video?

5 A. I have not.

6 Q. During your last deposition, you mentioned that you were the
7 Wisconsin Department of Natural Resources point person on this
8 project. Do you recall that testimony?

9 A. Yes.

10 Q. Has your role in this project changed?

11 A. To some degree it has changed. As of March there was
12 concern and -- and, as far as the attempt to deal with the Round
13 Lake situation, we were requested that Mr. Aartila, who is my
14 direct-line supervisor, be kept apprised of all contacts and so
15 that was a minor change from that standpoint and, from my own
16 personal situation, I referred everybody over to Mr. Aartila to
17 have conversations with Tom regarding the Round Lake situation.

18 Q. And what precipitated that change?

19 A. It was in March of 2005 we had a phone conference that
20 followed up our meeting in February of 2005 regarding concerns of
21 my activities with the parties involved on the Round Lake
22 dispute.

23 Q. And what were the concerns about your contacts with the
24 parties involved?

25 A. The concerns that were expressed to me was that I could not

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2 be quote, unquote, objective, in dealing with the Round Lake
3 water-level dispute between Mr. Hausman and Sawyer County.

4 Q. And who raised that concern?

5 A. Ahm, in the phone conference that we had it was raised
6 through, specifically, two individuals: Frank Dallam, who is our
7 dam safety engineer, and Mr. Mike Cain, who is our legal counsel
8 in Madison, had also received phone calls regarding concern over
9 my being able to be objective.

10 Q. Did Mike Cain say who he spoke with?

11 A. I believe Mike mentioned that he had talked with Matt Dregne
12 who had expressed a concern about that.

13 Q. Can you provide some more specifics on what their concerns
14 were?

15 A. Mr. Cain only made that statement regarding he had a phone
16 call from Matt Dregne that I can recollect. Mr. Frank Dallam had
17 relayed that he had concerns about my discussions with
18 Mr. Hausman and had also received concerns from Sawyer County
19 representatives that -- that I could not be objective in
20 reviewing the Round Lake situation.

21 Q. Do you know what Mr. Dregne told Mr. Cain with regards to
22 your purported lack of objectivity?

23 A. That was very vague, and I couldn't put exact words into the
24 situation. It was just an expression that was relayed to
25 Mr. Cain.

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2 Q. Mr. Kafura, I'm going to hand you what's been marked as
3 Exhibit No. 147 and I'll make a representation to you that
4 Exhibit 147 are meeting notes from Mr. Aartila and I'd like to --
5 I opened it, specifically, to the meeting notes ^ from your March
6 9th, 2005 meeting. Do you see that?

7 A. Yes.

8 Q. And down in the middle of that -- first of all, were you in
9 attendance at this meeting?

10 A. This was -- if it's the 3-9-05, it was actually a phone
11 conference.

12 Q. It was a phone conference, and were you in attendance on the
13 phone conference?

14 A. Yes, I was.

15 Q. Right in the middle of the page, it says: Matt was going to
16 get yelled at by Brad. Do you see that?

17 A. Okay. Yes, I see it.

18 Q. What was the discussion about that, and could you explain
19 what that means?

20 A. I have no idea what that part means. I am not even sure who
21 Brad is.

22 Q. That was going to be my next question. I'd like to point to
23 you to Page 3 of those same meeting notes. There's an asterisk
24 about two-thirds of the way down that states, quote: Currently,
25 DNR is discussing issue of what consists of a large and a small

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2 structure; do you see that?

3 A. Yes, I do.

4 Q. Can you tell me what the discussion was about that issue?

5 A. If I recollect correctly on this conversation, back I
6 believe -- I'm going to say -- if I recollect correctly, this
7 relates back to a letter that I believe that you authored to the
8 Department requesting or contending that the Little Round Lake
9 Dam or asking the DNR to address whether the Little Round Lake
10 Dam was a large or small dam and -- in February -- in our
11 February meeting at Black River Falls, it was a discussion item
12 of which I believe Frank Dallam was going to be working with

13 Madison staff, the one that I can remember specifically was
14 Meg Galloway ^ sp so I'm guessing that this single asterisk is
15 regarding that further discussion or moving forward with
16 addressing the concerns in your letter. I didn't specifically
17 listen to that because it does fall under more of the Chapter 31.
18 So that's my recollection.

19 Q. And do you know if DNR has made a decision with regards to
20 whether or not the Round Lake Dam is a small dam or a large dam?

21 A. I have no idea whether a decision has been made on that or
22 not.

23 Q. If you would allow me, I'm going to pull out a different
24 page from Mr. Aartila's notes here and it will save us a little
25 bit of time.

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2 (Discussion off the record.)

3 BY MS. AZAR:

4 Q. Mr. Kafura, I've pulled out a page in the middle of Exhibit
5 147 that starts with Meg, Mike and Frank at the top of the sheet;
6 and, at the middle, it says: Dave K. has been talking to County
7 about NN, need to talk to attorney, talk to Dave. Do you see
8 that?

9 A. Yes, I do.

10 Q. First of all, were you on or at this meeting or conference
11 call?

12 A. I do not believe I was on this one, no.

13 Q. Did Mr. Aartila talk to you about your talking with the

14 County on County Highway NN?
15 A. We had this discussion both in the phone conference of -- if
16 I may, going back to -- was that the -- March 9th phone
17 conference, I believe? If I can backtrack a little bit. In our
18 February 2005 meeting in Black River Falls, we had come up with
19 a -- a way to address not only the big issue but the smaller
20 issues that we have regarding the Round Lake system; and one of
21 the decisions that came out of that meeting was that I was to
22 draft a letter regarding the County Highway NN culverts to be
23 sent to the County. And that was the decision coming out of that
24 February meeting. That same week on a Friday morning, I was at
25 a -- I believe it was a Sawyer County Forestry Committee meeting,

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2 discussing ATV trails, unrelated to Round Lake, thank goodness;
3 but in that meeting Gary Gotthard ^ sp, who is the County highway
4 commissioner for Sawyer County was at this meeting and as the
5 local contact for Round Lake and issues regarding Chapter 30, I
6 talked to Gary directly after that meeting and gave him a heads
7 up that we had a meeting earlier that week and that we were going
8 to be sending out a letter regarding the Double N culverts and
9 keeping that a little bit outside of the whole grand Round Lake
10 situation, try to -- I guess if I can analyze it, it was more of
11 a splitting off little consumable chunks or digestible chunks to
12 deal with items that weren't in that bigger issue even though
13 they're related. So I gave him a courtesy discussion letting him
14 know that we would be moving forward with a letter about the NN

15 culverts.

16 Q. I'm sorry, what was the date of the meeting with

17 Mr. Gotthard ^ sp?

18 A. With Gary?

19 Q. Hm-hm.

20 A. Ah, I believe it was Friday, February 18th; but I can't be

21 positive. But I believe it was that same week that we met in

22 Black River Falls.

23 (Document marked for identification as Exhibit No. 150.)

24 (Document marked for identification as Exhibit No. 151.)

25 BY MS. AZAR:

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2 Q. Mr. Kafura, I'm going to ask you some questions with regards

3 to the Department's reaction to the culverts at NN. And you've

4 just been handed what has been marked as Exhibit No. 150. Would

5 you, please, review that, please?

6 A. Okay.

7 Q. Could you identify this document, please?

8 A. This document is an E-mail string from Mike Cain regarding

9 the Sawyer County application for after-the-fact permitting of

10 the Highway Double N culverts; and, responding back in August, I

11 mentioned that -- that it's all related to the Round Lake system

12 and -- and we shouldn't evaluate each one in a -- in a vacuum so

13 to speak but to move forward as I was looking at doing.

14 Q. So, in August of 2004, the DNR was going to evaluate the

15 culverts at NN in relation to the larger Round Lake system

16 issues, correct?

17 A. I believe that's what we're going after, yes.

18 Q. Just a few moments ago you discussed some discussions at the
19 DNR in 2005 at which time the Wisconsin Department of Natural
20 Resources was deciding to go forward with the culvert and NN
21 issue independently of the larger Round Lake system; is that
22 correct?

23 A. To address the permit application somewhat independently of
24 the bigger situation.

25 Q. And was that a change in the Department's thought processes

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2 on how to proceed with the after-the-fact permit application?

3 A. I don't think it was necessarily. This E-mail string that's
4 in Exhibit No. 150 was at the time that the application had come
5 in. We were working on that, evaluating it, determining whether
6 it was a completed application or not and also the petition for
7 the Round Lake system had come in for us to -- to respond to and
8 we had not been meeting yet to discuss the different items, but
9 as I think most people here know, we do have a time frame when a
10 Chapter 30 permit application does come in to make a
11 determination whether it's complete or incomplete to move forward
12 on. So we have a time frame for a permit application that comes
13 in that we have to respond to. And that's independent of the
14 Round Lake water-level petition.

15 Q. Okay. I'd like to turn your attention to what's been marked
16 as Exhibit 151.

17 Would you please review that?

18 A. Okay.

19 Q. Would you please identify that document?

20 A. This is a draft letter that -- that I authored in -- in --
21 as a product coming out of our February 2000 meeting in Black
22 River Falls for addressing the culverts at Highway NN.

23 Q. And has that letter been sent out yet?

24 A. It has not.

25 Q. Why hasn't it been sent out yet?

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2 A. The draft went out for people to comment on, comments that I
3 received from the team which includes Mr. Aartila, Mr. Cain,
4 Mr. Dallam and myself. The only comments that I received back on
5 the draft were from Mr. Dallam which I had no problems with on
6 his comments; and so at that point we were ready and then, after
7 this was drafted, we then had the -- I believe the March 5th, if
8 I remember correctly from Mr. Aartila's notes phone conference
9 that we had in which the change was suggested that we just do a
10 global letter and hold off on sending out the specific letters
11 regarding the NN culverts and -- and the dam structures.

12 Q. And why was that change suggested?

13 A. I believe there was a change in -- in -- in deciding that
14 the best route to go at that point was to get what we call the
15 global letter on the Round Lake situation was a higher priority
16 and should -- should move forward with that. Didn't mean that
17 this letter would not go out. It just meant that it would go out

18 at that time.

19 Q. You expect that this letter will be sent out?

20 A. I expect this letter in some form will be going out,
21 correct.

22 Q. Do you have an expected time of release?

23 A. I do not.

24 Q. Have you talked to the County about the three different
25 options that are discussed in this letter of March 2005?

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2 A. I have not.

3 Q. Do you have a personal preference as to which of the options
4 the County implements?

5 A. I do not.

6 Q. Does the Department have a preference?

7 A. I do not believe the Department has a preference.

8 Q. I'd like to go back to your -- the discussion that you had
9 with Mr. Gotthard ^ sp on February 18th, 2005. You had mentioned
10 that you were talking with Mr. Gotthard ^ sp about issuing this
11 letter, a draft of which has been marked as Exhibit 151. Do you
12 recall that discussion we just had?

13 A. Yes.

14 Q. What was Mr. Gotthard's ^ sp response to your -- I believe
15 you refer to it as a courtesy discussion --

16 A. Hm-hm.

17 Q. -- on releasing this letter. What did Mr. Gotthard ^ sp --
18 how did he respond?

19 A. Well, first of all, the letter was not drafted at that time.
20 It was a courtesy contact with him to let him know that we were
21 going to be working on the NN culverts separately and that we
22 would be sending out a letter regarding that. My recollection
23 was that it was received positively by Gary.
24 Q. Did he have any other comments with regards to the DNR's
25 actions in relation to the culverts at NN?

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2 A. At that particular day, no.
3 Q. Were there other dates in which Mr. Gotthard ^ sp may have
4 had comments about?
5 A. Gary had called me, I believe it was, the following week and
6 relayed to me that he had a discussion with Hal Helwig who is the
7 County Board Chairman; and he had relayed to me that Mr. Helwig
8 was a little upset regarding the discussion, specifically, what
9 was relayed to me by Gary was Hal wanted to know why we weren't
10 going out and surveying in the stream and telling him where to
11 set the culverts; and I explained to Gary that was not our
12 authority nor was that within our responsibility to do and I gave
13 him an example such as -- I do work with County Highway
14 department on wetland issues; and I just explained to Gary that,
15 you know, we don't go out and do wetland delineations for the
16 County highway department. We'll go out and make a wetland
17 determination. I was using that as an analogy that we don't go
18 out and survey in the culverts and say this is where it's got to
19 be and so he understood where I was coming from, from that

20 standpoint. That was our discussion.

21 Q. Okay, I'd like to now return to Exhibit No. 147.

22 A. Do you need 150 or 151 any more?

23 MS. AZAR: Do not. And I'd like to -- Actually, let's go off
24 the record for a moment.

25 (Discussion off the record.)

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2 BY MS. AZAR:

3 Q. Mr. Kafura, I'd like to turn your attention to the page of
4 the notes from the February 16th, 2005 meeting. Do you see
5 those?

6 A. Yes, I do.

7 Q. I'd like to ask you to turn to Page 4 of that.

8 A. Starts with Tiger Cat two level orders.

9 Q. Yeah.

10 A. Okay.

11 Q. Approximately two-thirds of the way down the page it states:
12 Issue new order that more -- and then it's difficult to
13 understand the language that's there. Do you recall discussion
14 in the February meeting about issuing a new order?

15 A. We -- we talked in the February meeting about a wide range
16 of -- of different items that -- that might -- or the scope of
17 everything that -- that's -- that's a possibility, including
18 looking at -- at the issue of -- of maybe issuing or going
19 forward with a new water level order on Round Lake.

20 Q. And did the Department make any decisions about whether or

21 not they were interested in issuing a new order or not?
22 A. No. I believe at that point we were looking at all the
23 possible options. There was not any preference in going in one
24 direction or another. It was just talking about what are all the
25 options that -- that are available.

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2 Q. I'd like to turn your attention to Page 6. On the top
3 right, there are notes that say, quote: Developing a new order
4 based on physical reality; do you see that?

5 A. Yes, I do.

6 Q. What was the discussions with regards to what the physical
7 reality is?

8 A. I believe the discussions on -- on the physical reality was
9 an issue of whether the Little Round Lake dam was a true water
10 control structure. The discussion centered more around the
11 understanding or the assertion that the Little Round Lake dam was
12 a water-control structure during low or normal water levels but
13 it was not a water-control structure during high water levels.

14 Q. And does that mean the Little Round Lake dam cannot control
15 the water levels when the water levels are high?

16 A. That was the discussion.

17 Q. And is that DNR's position?

18 A. That was the assertion that was made during this meeting. I
19 think we all pretty much agree on -- of course, relative
20 nature -- what high means.

21 Q. And does the DNR -- strike that. I'd like to point your

22 attention to the bottom of Page 6?

23 A. Okay.

24 Q. It says Tiger Cat, 1984, quote: Make them maintain and
25 manage the levels?

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2 A. Okay.

3 Q. Quote: We may want them to eliminate diversion channel, end
4 quote. Do you see that?

5 A. Yes, I do.

6 Q. What was the discussion about that?

7 A. If you go back and understand that, as we're going through
8 this ream of documents historically all the way from 37 on for
9 the relationships between Tiger Cat and the Round Lake all the
10 way up to the current day, the Tiger Cat order of 1984 has
11 specific ordered or enforceable maximum and minimum levels
12 established in that order; and the question was: Is it being
13 maintained and managed under those levels that are set in the
14 1984 Tiger Cat order? The second item that's starred or
15 asterisked there it says: We may want to eliminate diversion
16 channel. It was a discussion that we had regarding the diversion
17 channel that goes under McClaine Road, I guess, commonly referred
18 to as the Placid Lake dam; and we were in a discussion regarding
19 the use of that channel to divert water out of that Tiger Cat
20 Flowage into Round Lake; and the discussion of how that would --
21 how would that happen based on the Tiger Cat order of 1984; and
22 let me extrapolate a little bit on it. The 1984 order has a

23 maximum and minimum level on the Tiger Cat where you cannot
24 discharge water out of the Tiger Cat when it gets below it's
25 ordered minimum, and the discussions that we had was: If water

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2 needed to be diverted or was attempted to be diverted out of the
3 Tiger Cat Flowage into Round Lake, because the watersheds are
4 essentially the same on a regional basis that if Round Lake were
5 low to the point where you actually had to divert water out of
6 the Tiger Cat, it was our assumption or our belief that if
7 Round Lake is going to be down, then certainly the Tiger Cat is
8 going to be down, and the 1984 Order would not allow diversion
9 out of the Tiger Cat into Round Lake because the assumption being
10 that if Round is down, Tiger Cat is going to be below that
11 ordered minimum. So the purpose of the diversion channel is, is
12 it of use or not.

13 Q. And why is it important to, quote, make them maintain and
14 manage the levels, end quote?

15 A. Because they were ordered in the 1984 Order for the Tiger
16 Cat Flowage.

17 Q. And it's DNR's position that if an order is valid, the DNR
18 should be ensuring the dam owner is, quote: Maintaining and
19 managing the water level in accordance with that order?

20 A. In accordance to that 1984 Order, correct.

21 Q. I'd like to turn your attention to Page 7. In the middle,
22 it says the County might consider making bridge, quote, end
23 quote. Do you see that?

24 A. Yes, I do.

25 Q. What was the discussion about that?

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2 A. I don't remember specifically. I believe --

3 MR. DREGNE: Could I just interpose? That looks like widening
4 rather than making.

5 MS. AZAR: Okay.

6 MR. DREGNE: There's a dot over that first O.

7 MS. AZAR: Matt probably knows the best.

8 MR. DREGNE: I just see a dot which makes me think it's an I.

9 And that loop looks like a U rather than a K.

10 BY MS. AZAR:

11 Q. Looking at the next page, it says: County might consider
12 blank bridge?

13 A. Okay.

14 Q. Do you recall what the discussion was?

15 A. I do not recollect what that discussion was.

16 MS. AZAR: We can go off the record.

17 (Discussion off the record.)

18 BY MS. AZAR:

19 Q. Mr. Kafura, we've handed you what's been marked as
20 Exhibit No. 144; and I'll make the representation to you that
21 these are Attorney Mike Cain's notes from his file; and,
22 specifically, we're starting on Page 1, which are his notes also
23 from the February 16th, 2005 meeting at which you were in
24 attendant according to your testimony just previously provided.

25 On that first page -- strike that.

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2 On the second page of Mr. Cain's notes it says, quote: Needs to
3 be revised to develop reasonable levels in operational require,
4 period, which recognize that the dam doesn't control the levels
5 at high water levels, end quote. Do you see that?

6 A. Hm-hm. Yes, I do.

7 Q. We had just been talking about whether or not DNR was
8 considering creating a new order increasing the water levels.
9 Does this refresh your recollection at all as far as what
10 happened at that meeting?

11 MS. KLOPPENBURG: Just interject, I'm wondering if that word
12 require is regime?

13 MS. AZAR: Operational regime?

14 MS. KLOPPENBURG: Yeah.

15 MS. AZAR: That's great with me.

16 THE WITNESS: Again, these were some of the items that we're
17 talking about as the whole realm of possibility or options that
18 we have for addressing Round Lake.

19 Q. All right, but no decisions were made?

20 A. I do not believe that any decision on which route to go was
21 made.

22 Q. And, at the bottom of that page, it states: Possibly
23 removing the Round Lake Dam; do you see that?

24 A. Under the options?

25 Q. Yes.

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2 A. Yes, I do see that.

3 Q. Do you know if the County's amenable to removing the Round
4 Lake dam?

5 A. I do not.

6 Q. Do you know if anybody has spoken with the County about
7 removing the Round Lake dam?

8 A. I do not know if anybody has. I have not.

9 Q. On the next page, if I'm reading this correctly, it says:
10 DNR would oppose dredging of channels for 450 feet. Do you see
11 that?

12 A. Yes, I do.

13 Q. What was the discussion about?

14 A. I believe at that point we were talking about, again, in
15 this February 16th meeting we had many documents relating from
16 1937 forward that have to do with Tiger Cat, Round Lake, Osprey
17 Lake, the whole works; and we were in discussion; I believe, as
18 we went through some of these orders or permits that were issued,
19 there were two permits that were issued, I believe one in 1968
20 and one in 1969. 1968 permit was issued for dredging in front of
21 the Little Round Lake dam; and then, in 1969, a permit was issued
22 for dredging on Osprey Creek; and one of the discussions was:
23 Well, would -- you know, would we entertain dredging permits?
24 And one of the questions came up: Is the scope of the dredging,
25 is it minor dredging, is it full dredging? And one of the

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2 comments here that I assume that Mike has is that we wouldn't
3 look at approving a dredging of the full length of the diversion
4 channel from the Little Round Lake, above the Little Round Lake
5 dam all the way down to Osprey Lake.

6 Q. And was there a discussion whether DNR would be amenable to
7 dredging less than 450 feet?

8 A. I don't recall whether we talked about minor dredging or
9 less than this.

10 Q. I'd like to point you to the page that's marked DNR 4261, on
11 the bottom right.

12 A. Are you looking at the map?

13 Q. Yes.

14 A. Mine's not numbered.

15 MR. DREGNE: Are you still on Exhibit 144? I don't have numbers
16 on mine.

17 (Discussion off the record.)

18 BY MS. AZAR:

19 Q. I'm sorry, the document that you have that's been marked as
20 Exhibit 144 does not have markings on it; but I'm referring to
21 the -- this would be the fifth page from the end. It's a map.
22 On the bottom left-hand side, it says: Possibly dredging
23 approval here. Do you see that?

24 A. Yes, I do.

25 Q. What was the discussion with regards to dredging there?

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2 A. I believe, at this point, the discussion item I believe at
3 this point this appears to be an elementary drawing that Mike had
4 made. We had maps there, photos of the whole works; so I believe
5 Mike drew this to help him relate to the system. At the time
6 that Mike made this marking with the X markings on the diversion
7 channel, I believe that is related to a document that I think is
8 an October of 2002 report from -- is it Dan Carthel? I believe
9 it's a Dan Carthel report is what we were looking at; and, if I
10 remember correctly, there were elevations of this stream channel;
11 and I believe this marking is -- is an indication of an area
12 downstream of the Little Round Lake dam that based on the
13 elevations, I believe, was an elevated area of sediment deposit.
14 (Discussion off the record.)

15 BY MS. AZAR:

16 Q. Dave, do you have any corrections to the testimony you just
17 gave?

18 A. Yes. It's a -- it's a hatching mark of the diversion
19 channel that was manmade downstream of the Little Round Lake dam.

20 Q. So that's reflective of something in Mr. Carthel's report
21 and not necessarily a recommendation or a position of the
22 Wisconsin Department of Natural Resources?

23 A. I would say that's correct. We were looking at reports and
24 documents and --

25 Q. All right. Let's get this one marked.

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2 Q. Would you please identify that document?
3 A. Sure. I had Dale Simon who is a -- Byron Simon, we refer to
4 him as Dale, is a central office employee who with his expertise
5 and field experience provides assistance to us and had offered to
6 come up and help on some projects in Sawyer County. I have a
7 number of old projects that are sitting in Hayward, refer to it
8 as the revolving-door days of the Hayward WNS ^ sp and John
9 Spangeburg ^ sp who was my predecessor had been here for a couple
10 of years and, after he left the position, a number of people
11 filling in temporarily to assist with hot-button items here in
12 Sawyer County; and Dale had actually been here for some time to
13 assist in that revolving door, filling in the vacancy; and there
14 were a couple of projects that he had been involved with -- along
15 with our conservation corps here in Sawyer County and they were
16 sitting there and needed to be dealt with. I had dealt with the
17 contractor on Lilly Blad ^ sp and Orsilac ^ sp and the question
18 became whether the structures that he had placed were below the
19 ordinary high water mark on Lac Courte Oreilles and I needed to
20 get those taken care of and addressed, and Dale was willing to
21 come up from Madison to work on some of these and at the same
22 time he does do a lot of ordinary high watermark work assistance
23 with field staff and in tougher situations or in cases that could
24 be contentious. So I also asked him if he would have the
25 opportunity to meet with us and just look at a couple spots on

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2 Round Lake.

3 I had been contacted previous to this by -- what's his name?

4 Eric Torkenson ^ sp, Eric Tortenson ^ sp on the one side of Round
5 Lake. He had some ice ridging and was going to have a contractor
6 in to do some work on the shoreline, and we needed to go over and
7 look at that particular property and take a look and see whether
8 we had some ordinary high watermarks that we could interpret on
9 his property. There was some discussions about going in and
10 surveying some of these; but, with the time limits that we had
11 and Dale having to head over to Rhinelander way, we didn't go in
12 and do any actual surveying in of ordinary high watermarks; we
13 just looked at some of the characteristics that we found over on
14 Torkenson's ^ sp property.

15 Q. What characteristics were you looking at?

16 A. Specifically, we were looking at erosional processes where
17 you end up with physical characteristics on the shoreline where
18 you have wave and wind activity on the shoreline that creates an
19 erosional line. And, also, you look at the -- at the -- at the
20 vegetation characteristics that you'll see on -- on a shoreline
21 for determining ordinary high watermark so between
22 interpretations of the vegetation and the physical processes
23 that -- that created erosion on the shoreline, you can make
24 ordinary high watermark determination^s.

25 Q. Besides the Tortelson's ^ sp, did you look at any other

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2 properties with regards to ordinary high watermarks on Round
3 Lake?

4 A. Not on this particular date, no.

5 Q. Had you made ordinary high watermark determinations on
6 Round Lake at other times?

7 A. Not in a formal setting on Round Lake. I have been on other
8 properties. There is a place on -- is it Linden Road up on the
9 west side? Up on the north side, there's a public road, public
10 access there that has natural vegetation, natural shoreline that
11 makes for an easy go in and determination ordinary high watermark
12 in that particular situation.

13 Q. I'd like to draw your attention to what's been marked as
14 Exhibit No. 154. There are three photographs, they do have
15 numbers on the bottom right?

16 A. Yes.

17 Q. PHO 87, PHO 81 and PHO 89. I'd like you to review those
18 photos.

19 A. Okay.

20 (Recess)

21 BY MS. AZAR:

22 Q. Mr. Kafura, I'd like to point you to what has already been
23 marked as Exhibit 125; and pointing your attention to figure 8 in
24 Exhibit 125, would you take a look at that?

25 A. Yup.

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2 Q. Would you please identify what that photo is?

3 A. It would appear to be a photograph taken off the deck of
4 Mr. Hausman's garage at the A-frame showing the front area
5 shoreline, former riprap project and also stakes that have been
6 established in the water.

7 Q. And were you at Mr. Hausman's property on that day?

8 A. On the day that the stakes were set, yes, I was.

9 Q. And did you assist in the setting of the stakes?

10 A. I assisted in the review of where the stakes should be set
11 based on the evulsion case law and request to recoup his property
12 that was lost under an alleged short-term storm event.

13 Q. And so the stakes that are in this photo, namely, in figure
14 8 of Exhibit 125 are the stakes that you approved the location
15 of?

16 A. Yes.

17 Q. And, when Mr. Hausman built -- strike that. So what do the
18 stakes represent?

19 A. The stakes represent the best guess -- best interpretation
20 of where the shoreline of Mr. Hausman's property was prior to the
21 2002 storm event in which he alleges loss of shoreline. These
22 stakes were set based on requests to recoup that land and, under
23 his riprap permit application, along with copious amounts of
24 photo documentation of his shoreline prior to the storm event and
25 then after the storm event.

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2 Q. And Mr. Hausman has, since those photos were taken has built
3 a steel retaining wall along his shoreline; is that correct?

4 A. Correct.

5 Q. And the steel retaining wall was built in conformance with a
6 DNR permit, correct?

7 A. That is correct.

8 Q. How was the height of the retaining wall established?

9 A. The height of the retaining wall was established based on
10 what we felt was the existing ground contours on Mr. Hausman's
11 property coming out from his A-frame. As you can see in the
12 Figure 8, there is a little structure out in front of his
13 property. I believe we used the ground elevation that is
14 indicated on this photo and extend that waterward into the lake
15 as what we felt would be the top of the steel wall to match up
16 with the existing ground elevation.

17 (Document marked for identification as Exhibit No. 154, replacing
18 the photos previously marked as Exhibit No. 154.)

19 BY MS. AZAR:

20 Q. Mr. Kafura, earlier you indicated that you'd received a
21 videotape from Mr. Hausman recently but had not yet had an
22 opportunity to review it, correct?

23 A. That is correct.

24 Q. Have you also received an E-mail from him in relation to
25 some damage along the shoreline near his property?

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2 A. He had mentioned that in an E-mail, correct.

3 Q. I'm handing to you or have handed to you what's been marked
4 as Exhibit No. 154. I'd like to make a representation to you

5 that these are fissures that are occurring on the Bemis ^ sp
6 property. The fissures -- I'll further make the representation
7 to you that Mr. Hausman who took this photo was almost standing
8 on his property line and is looking West when taking the photo.
9 So that the fissures that you're seeing that are at approximately
10 a 45-degree angle from the lake shore are heading straight
11 towards Mr. Hausman's property; do you see that?

12 A. Yes, I do.

13 Q. And the fissures are -- and I also make the representation
14 that if the fissures continue, they will hit Mr. Hausman's
15 property behind his steel retaining wall. Do you understand what
16 I'm describing to you right now?

17 A. Yes, I do believe I do.

18 Q. In your last deposition, you indicated that Mr. Hausman's
19 property would not likely be further damaged from the high water
20 levels on Round Lake because of the steel retaining wall he had
21 installed on his property. Do you recall that testimony?

22 A. Yes, from waterward erosion.

23 Q. Based on the photo that you're seeing right now and assuming
24 that the representations I'm making to you right now are true,
25 would you have a different interpretation of the possibility of

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2 Mr. Hausman's property being further damaged from the high water
3 levels?

4 MR. DREGNE: Objection, lack of foundation, subject to the
5 objection.

6 THE WITNESS: Looking at this photograph, I could not make a
7 definitive statement that the fissures that I'm looking at in
8 Exhibit 154 would have impact on Mr. Hausman's property without
9 going out and doing a site review, site inspection.

10 BY MS. AZAR:

11 Q. Okay. For the purposes of this deposition, Mr. Kafura, I'd
12 like you to assume what I just told you is true.

13 A. Okay.

14 Q. I understand that you can't make a representation because
15 you haven't seen this in person, but I want you to assume that
16 the fissures that you're seeing right now are heading towards
17 Mr. Hausman's property and would hit Mr. Hausman's property
18 behind his retaining wall.

19 A. Okay.

20 Q. With those assumptions, would you reach a different
21 conclusion about the possibility of Mr. Hausman's property
22 incurring further damage because of the high water levels on
23 Round Lake?

24 MR. DREGNE: Same objection.

25 THE WITNESS: Ahm, I would have to say that, based on those

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2 assumptions and looking at the photograph and the corrective
3 action or the permit that was issued for Mr. Hausman, I would not
4 expect that this would go further and significantly impact
5 Mr. Hausman's property behind the steel retaining wall. That's
6 based on the assumptions.

7 BY MS. AZAR:

8 Q. So you would assume that the fissures are going to stop at
9 the property line?

10 A. I would say that they would stop somewhere at the property
11 line or -- or, therefore, at -- near the property line because of
12 the steel retaining wall. That is my assumption.

13 Q. And why would you make that conclusion?

14 A. I would make that conclusion because, in our work with
15 Mr. Hausman on installing of the steel retaining wall, we took
16 into considerations and precautions to ensure that the piling or
17 the steel was driven deep enough and that there were weep holes
18 installed on the steel wall to reduce hydraulic pressure that
19 might be on a -- unanticipated or a negative consequence by
20 installing that steel wall to allow water movement to -- from the
21 upward area to the lake.

22 Q. And are you presuming that there's no lateral movement of
23 soil?

24 A. I'm going to assume that, yes.

25 Q. So your opinion right now that you just gave was assuming

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2 that there's no lateral movement of soil, correct?

3 A. That is correct.

4 Q. And, if there is indeed lateral movement of soil that's not
5 directly perpendicular to the lake front, indeed, you may see
6 some movement of Mr. Hausman's property from behind the retaining
7 wall, correct?

8 MR. DREGNE: Same objection.

9 THE WITNESS: That is a possibility.

10 BY MS. AZAR:

11 Q. Given that the fissures are emanating at a 45-degree angle
12 from the lake front doesn't that suggest that there is indeed
13 lateral movement of soil?

14 A. It may -- may suggest that there's lateral movement of the
15 soil; but the further I look at that photograph I do see a
16 difference in elevation from the landward side of the fissure
17 compared to the waterward side of the fissure, and to assume that
18 this fissure or movement of soil particles is in a lateral or
19 45-degree angle is something that I don't think you can make a
20 call on without going out there and actually doing a physical
21 inspection. Again, looking at this photograph, I see a
22 significant change or -- or a change in elevation from one side
23 of the fissure to the other side of the fissure.

24 Q. Okay, then to revisit the opinion you just gave without
25 conducting further analysis of the movement of soil, you cannot

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2 make any conclusions with regards to whether or not the fissures
3 that are emanating on the Bemis ^ sp property will indeed proceed
4 onto the Hausman property, correct?

5 A. Repeat that.

6 MS. AZAR: Would you read that back, please?

7 (The question was read as follows:

8 "Okay, then to revisit the opinion you just gave without

9 conducting further analysis of the movement of soil, you cannot
10 make any conclusions with regards to whether or not the fissures
11 that are emanating on the Bemis ^ sp property will indeed proceed
12 on the Hausman property, correct?")

13 THE WITNESS: I would say that's correct.

14 MS. AZAR: Off the record for a minute.

15 (Discussion off the record.)

16 BY MS. AZAR:

17 Q. Mr. Kafura, I'd like to call your attention to Exhibit
18 No. 146 and I am currently looking on Page 4 of Exhibit 146.

19 MR. DREGNE: Are you referring to the page marked Page -- you're
20 just counting back four pages?

21 MS. AZAR: I'm counting back. It says Page 2 at the top.

22 MR. DREGNE: Okay.

23 BY MS. AZAR:

24 Q. Specifically, it's Page 2 of a conversation Mr. Aartila
25 apparently had with Al Reinemann on March 11th, 2005; and it

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2 states Dave Kafura showed up at steak and lobster feed at
3 Hausman's. Do you see that?

4 A. Yes, I do.

5 Q. Have you ever had steak or lobster at Jim Hausman's house?

6 A. No, I have not.

7 Q. Do you know why Mr. Reinemann would have stated that?

8 A. I do not. I have not met Mr. Reinemann or ever talked with
9 Mr. Reinemann.

10 Q. And did this issue come up during your conversation with
11 Mr. Aartila?
12 A. Yes, it did.
13 Q. And what did Mr. Aartila say about it?
14 A. Ah, oh, I believe we made some light about it as far as I
15 kiddingly told him that, gees, I don't remember having steak and
16 lobster at Mr. Hausman's and now I'm really upset because, if I
17 did, I don't remember it. No, I have not had steak and lobster
18 at Mr. Hausman's. So we -- we made light of the comment.
19 MS. AZAR: Okay. Anything else, Jim?
20 MS. AZAR: If we could go off the record for a minute.
21 (Discussion off the record.)
22 MR. DREGNE: Are you done?
23 MS. AZAR: We are.
24 (Discussion off the record.)
25 MS. AZAR: Going back on the record, what's been marked as

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1 ROUGH DRAFT ASCII
2 Exhibit No. 154, I'd just like to make the correction that Jim
3 Hausman did not make that photo, Barr Engineering did; and with
4 that we are done with our deposition of Mr. Kafura. Matt, do you
5 have anything?
6 MR. DREGNE: No.
7 MS. AZAR: Thank you very much, Mr. Kafura.
8 (The deposition concluded at 3:50 p.m.)
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