

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

LEE MADDAN, )  
)  
Petitioner, )  
)  
vs. )  
)  
DEPARTMENT OF ENVIRONMENTAL ) Case No. 03-1499  
PROTECTION, )  
)  
Respondent. )  
\_\_\_\_\_ )

RECOMMENDED ORDER

A hearing was held in this case in Shalimar, Florida, on July 22-23, 2003, before Richard A. Hixson, Administrative Law Judge, Division of Administrative Hearings.

APPEARANCES

For the Petitioner: James E. Moore, Esquire  
Post Office Box 746  
Niceville, Florida 32588

For the Respondent: Charles T. Collette, Esquire  
Robert W. Stills, Jr., Esquire  
Department of Environmental Protection  
The Douglas Building, Mail Station 35  
3900 Commonwealth Boulevard  
Tallahassee, Florida 32399-3000

STATEMENT OF THE ISSUES

The issues for determination in this case are: 1) whether the Department of Environmental Protection (DEP) has dredge and fill permitting jurisdiction over a certain body of water known as Lake Blake in Okaloosa County, Florida; 2) if DEP's dredge

and fill permitting jurisdiction is established, whether Petitioner qualifies for an exemption from DEP's dredge and fill permitting jurisdiction; and 3) if not otherwise exempt from DEP's dredge and fill permitting jurisdiction, whether Petitioner's application No. 46-0199306-001-EE, seeking to place a modular home on a fill pad in Lake Blake, should be approved by DEP.

#### PRELIMINARY STATEMENT

On August 29, 2002, Petitioner Lee Maddan (Maddan) submitted an application (No. 46-0199306-001-EE) to DEP requesting authorization to place a modular home on a fill pad in Lake Blake in Okaloosa County, Florida. By letter dated September 27, 2002, DEP notified Maddan that "the pad represents unauthorized fill, which has been placed in jurisdictional waters and is currently under review by the Department's Enforcement Section." On August 30, 2002, Maddan received the notice of DEP's denial of his application. Maddan filed a timely request for administrative hearing which was forwarded to the Division of Administrative Hearings (DOAH) on April 28, 2003, and assigned DOAH Case No. 03-1499.

On May 13, 2003, the Director of District Management for the DEP Office of the Northwest District issued a Notice of Violation (NOV) and Orders for Corrective Action against James E. Moore, Santa Rosa II, Inc., Santa Rosa III, Inc., and

Lee Maddan, Respondents. (On June 9, 2003, DEP filed an amendment to the NOV removing James E. Moore as a Respondent). The NOV alleged two counts against the Respondents. Count I charged the Respondents with placing fill in the landward extent of the waters of the State and placing pedestrian foot bridges over the waters of the State without a Wetland Resource Permit. Count II alleged that DEP had incurred expenses in the investigation of this matter. The NOV sought total administrative penalty and economic benefit against the owners of \$2500, and total administrative penalty and economic benefit against Maddan of \$5000. The Orders for Corrective Action included removal of the fill, replanting of the affected area, and removal of the pedestrian footbridges.

On May 21, 2003, the NOV Respondents filed a timely Demand for Administrative Hearing which was forwarded to the Division of Administrative Hearings on June 2, 2003, and assigned DOAH Case No. 03-2040. Included in the Demand for Administrative Hearing was Respondents' Motion for Consolidation with DOAH Case No. 03-1499. By order entered June 9, 2003, and without objection, DOAH Case Nos. 03-1499 and 03-2040 were consolidated for hearing which was conducted on July 22-23, 2003.

On July 17, 2003, the parties filed a Joint Prehearing Stipulation stating those facts which have been admitted for purposes of these proceedings. Such stipulated facts have been

incorporated in this Order to the extent material and necessary to the resolution of these issues. The parties further stipulated to certain conclusions of law pertaining to the appropriate burdens of proof in these cases as well as the relevant provisions of law applicable in the DEP Northwest District of Florida. The stipulated conclusions of law have been incorporated in this Order.

At hearing, DEP presented the testimony of five witnesses: Larry O'Donnell, the DEP Environmental Manager for the Permitting Section, a fact witness also accepted as an expert in the application of laws and rules applicable to dredge and fill permitting in the Northwest District of Florida; Stacy Owens, a DEP Environmental Specialist; Dr. John Tobe, DEP Environmental Administrator of the Wetland Evaluation and Delineation Section, accepted as an expert in wetland delineation and jurisdictional determination for waters of the State; Cliff Street, DEP Supervisor, Engineering Support, Submerged Lands and Environmental Resources Program of the Northwest District, accepted as an expert in stormwater permitting and the application of stormwater permitting laws, rules and regulations in the Northwest District; and Richard W. Cantrell, DEP District Director of the South Florida District. DEP also presented Exhibits 1-20 which were received in evidence. DEP's Motion Requesting Withdrawal from Admissions was granted.

For purposes of the consolidated hearing, Respondents in Case No. 03-2040, and Maddan here, presented the testimony of Lee Maddan. Respondents also presented Exhibits 1-19 and 21-28, which were received in evidence. Respondents further proffered Exhibit 29, the June 30, 2003, deposition of Dr. John Tobe, which exhibit was rejected on timely objection raised by DEP.

A transcript of the hearing was filed September 5, 2003. DEP filed its Proposed Final Order (Case No. 03-2040) and Proposed Recommended Order (Case No. 03-1499) on September 25, 2003. Maddan filed Proposed Findings of Fact and Conclusions of Law on September 26, 2003. The proposed findings of fact and conclusions of law filed by the parties have been considered in the rendering of this Order.

These cases were consolidated for the orderly expedition of the factual presentation at hearing, and many of the factual findings, particularly those relating to the assertion of DEP's dredge and fill permitting jurisdiction over Lake Blake, are common to each case. At this point in the proceedings, however, in light of the distinctive statutory requirements for each proceeding, the cases are hereby severed for the purpose of the entry of the Final Order in Case No. 03-2040, and the separate entry of the Recommended Order in Case No. 03-1499. All citations are to Florida Statutes (2002) unless otherwise indicated.

## FINDINGS OF FACT

### Parties

1. DEP is the agency of the State of Florida vested with the power and duty to enforce the provisions of Chapters 373 and 403, and the rules promulgated in Chapter 62, Florida Administrative Code. DEP is the only agency involved in these proceedings.

2. Lee Maddan (Maddan) is a long-time resident of Okaloosa County, and the Petitioner in Case No. 03-1499. Maddan is a Respondent in Case No. 03-2040. Maddan has personally observed activities occurring at the Lake Blake property for more than 38 years, including the excavation of the lake.

3. Santa Rosa Three, Inc. (the Corporation), is a Respondent in Case No. 03-2040, and holds fee simple title to the property containing Lake Blake, which is located in unincorporated Okaloosa County between Lewis Street and Clifford Street in Sections 2 and 3, Township 2 South, Range West. Santa Rosa II is also Respondent in Case No. 03-2040, and is a corporate predecessor in interest to the Corporation. Maddan holds equitable title to the Lake Blake property and is in the process of purchasing the fee simple title to the property from the Corporation. Maddan is and was at all material times hereto authorized by the Corporation to enter upon the Lake Blake property, to proceed to develop the land, to obtain permits in

his name and to do other acts to prepare the property for Maddan's purchase.

#### History of Lake Blake

4. Lake Blake is an artificially created water body in unincorporated Okaloosa County, having a water surface area slightly less than six acres. There is a small island in the center of the lake. The property surrounding Lake Blake presently consists of both uplands and wetlands. No other water body is visible from Lake Blake. For DEP jurisdictional determination purposes, Lake Blake is located in the Northwest District of Florida.

5. The oldest records of the Lake Blake property dating to 1826, indicate that the property was flat land with natural vegetation dominated by palmetto and galberry. The property historically had no flowing streams.

6. In the 1950's the then owner of the property began excavating a borrow pit on the property. The excavations continued until approximately 1979. As the borrow pit excavations continued a lake formed due to the intrusion of underground water as well as collected rainfall.

7. During the excavation period, and until approximately 1976, the land around the borrow pit was primarily pasture land with no trees or other vegetation. Up to 1976, there was no wetland vegetation growing on the property.

8. Prior to 1960, the natural stormwater flow from the property was to the southwest toward Cinco Bayou, a defined water body of the State of Florida which on a direct line is located approximately one-quarter mile from the property. Cinco Bayou is the body of water of the State nearest to Lake Blake.

9. During the 1960's, a road known as Lewis Street (also known as Mayflower Avenue) was constructed along the southern boundary of the property. At the time of the construction of Lewis Street, the borrow pit was separated into two parts, an eastern and western section. A concrete culvert divided the sections of the borrow pit.

10. At the time of the Lewis Street construction, a stormwater discharge pipe was installed by Okaloosa County and excess water flowed out of the borrow pit only at certain times in direct response to rainfall. The installation of the stormwater discharge pipe on Lewis Street was intended to drain excess rainfall from the borrow pit.

11. Okaloosa County never acquired ownership of the borrow pit for use as a stormwater retention pond. The water body that formed in the borrow pit would come to be called Lewis Street Pond, or Blake Lake, and eventually Lake Blake.

12. The natural flow of the stormwater from the property was further altered in the 1970's when a public elementary school



was constructed by Okaloosa County on Lewis Street. The public school is located between the property and Cinco Bayou.

13. Borrow pit operations formally ceased in September of 1980 when DEP's predecessor agency, the Department of Environmental Regulation (DER), entered an order requiring the cessation of mining operations. The physical operations had actually ceased a few years before the DER order.

14. Lake Blake originally resulted from collected rainfall, as well as underground water intrusion in the borrow pit. Over the subsequent years and at the present time, additional diverted stormwater runoff collected in the lake as a result of Okaloosa County's stormwater drainage system. Lake Blake today is an artificial body of water owned entirely by one person. Residential housing is located on property surrounding Lake Blake. The lake is occasionally utilized for recreational purposes, including fishing. The property surrounding the lake is not open to the general public, and the entrances to the property are fenced. For purposes of this proceeding, there are no threatened or endangered plants on the property.

Okaloosa County Stormwater Drainage System

15. Okaloosa County has constructed a stormwater drainage system that runs through the Lake Blake drainage area. As part of this stormwater drainage system, Lake Blake collects diverted stormwater discharge from surrounding areas which have been

previously developed. Residential neighborhoods are close to the area, specifically the Berkshire Woods Subdivision. Indeed, as a condition for the development of the Berkshire Woods Subdivision in 1976, the Okaloosa County Planning Commission required that a former owner of the property, Ron Blake, excavate the lake and have it made ready for stormwater drainage from the proposed development of the Berkshire Woods Subdivision. In addition to the residential areas and the public school to the south, there is a private school to the north across the road on Clifford Street which also diverts water to the lake from its campus and parking lots

16. Okaloosa County has installed several pipes which carry stormwater from the surrounding developed areas into Lake Blake. The only drainage out of Lake Blake is via the stormwater discharge pipe located at the southern boundary of the property on Lewis Street which was installed by Okaloosa County in the 1960's.

17. Okaloosa County's stormwater discharge system serving Lake Blake is integrated into a series of interconnecting underground stormwater pipes which route the flow of the water for approximately one-half mile before ultimately discharging water into Cinco Bayou.

18. Okaloosa County's stormwater discharge system which ultimately connects Lake Blake with Cinco Bayou is composed of

buried pipes. DEP considers buried pipes or culverts which convey stormwater as excavated water bodies. The installation of Okaloosa County's stormwater discharge system required the excavation of land. Under DEP's interpretation of its rules, specifically Rule 62-312.030(2), Florida Administrative Code, the underground installation of stormwater pipes is sufficient to establish a series of excavated water bodies which connect Lake Blake to Cinco Bayou.

19. Prior to the installation of Okaloosa County's stormwater discharge pipe on Lewis Street in the 1960's, there was no dredge and fill permitting jurisdiction which applied to the property containing Lake Blake. The stormwater discharge pipe has continuously existed on the southern boundary of the property since its installation in the 1960's to the present.

20. Lake Blake was not originally designed, constructed, nor permitted as a stormwater treatment or retention pond. Lake Blake incidentally resulted from the borrow pit excavations. Okaloosa County, however, has at least since 1976 utilized Lake Blake as part of its stormwater drainage system. Okaloosa County never acquired title to Lake Blake.

21. In 1981, the Okaloosa County Board of Commissioners (who were not the owners of the property) applied for, and were issued by DER, a Construction Permit (No. RC-46-80-2031, dated May 27, 1981, which expired November 27, 1981), for "Blake Lake

Modifications," which permit stated it was "to modify an existing stormwater drainage system." This permit allowed for, among other items, construction of "two earthen berms in Blake Lake" and "the diversion of lake flow from the western lake to the eastern lake." Although attempts were made to construct the two earthen berms, due to the white clay composition of the soil the berms were not successfully established.

22. In 1984 DER issued another Construction Permit (No. 460853421 dated August 20, 1984, which expired August 15, 1987) to the Okaloosa County Board of Commissioners (who again were not the owners of the property) for the purpose constructing "two drainage channels . . . from a berm separating East and West Blake Lake." The drainage channels were thereafter completed and the east and west portions of the lake were eventually connected.

23. On August 14, 1984, Okaloosa County also filed a Notice of New Stormwater Discharge with DER which proposed a re-routing of an existing stormwater drainage system which then diverted stormwater from the Candlewood Subdivision and Navy Street into Lake Blake. The stated purpose of the re-routing of the stormwater drainage system away from Lake Blake was to address flooding problems in the Candlewood Subdivision. By letter dated August 21, 1984, DER informed Okaloosa County that "the stormwater discharge is exempt from stormwater permitting requirements of the Department pursuant to Florida Administrative

Code Rule 17-25.03(2)(c)." DER came to this conclusion in 1984 because the proposed project was "the modification of an existing County stormwater management system not serving a new development or increasing pollution loading."

24. Although Lake Blake was utilized by Okaloosa County as part of the existing Okaloosa County stormwater drainage system, which in 1984 qualified for a DER stormwater permitting exemption, nothing pertaining to this stormwater permitting exemption supports a finding that Lake Blake was originally constructed, permitted or designed solely for the purpose of stormwater treatment so as to qualify for an exemption from DEP's dredge and fill jurisdiction under Rule 62-312.050(4), Florida Administrative Code.

#### Dredge and Fill Permitting Jurisdiction

25. Prior to the installation of Okaloosa County's stormwater discharge pipes on the property in the 1960's, there was no dredge and fill permitting jurisdiction which applied to the property and Lake Blake. Under current law, the Northwest District of Florida is governed by separate jurisdictional determination provisions. In order to initially establish DEP's dredge and fill permitting jurisdiction over wetlands and surface waters in the Northwest District, DEP must demonstrate that the wetlands and surface waters are connected to the surface waters of the State. Since 1995, isolated wetlands in

all the rest of the State of Florida are regulated by DEP without regard to any connection to the surface waters of the State. In the Northwest District under Rule 62-312.030(2), Florida Administrative Code, "surface waters of the state are those waters listed below and excavated water bodies, except for those exempted by Section 62-312.050(4), F.A.C., which connect directly or via an excavated water body or series of excavated water bodies . . ." to waters of the State. Under Rule 62-312.045, Florida Administrative Code, however, "[i]solated wetlands that infrequently flow or otherwise exchange water with a described water body are not intended to be included within the dredge and fill jurisdiction of the Department."

26. By letter dated April 24, 2001, DEP advised Santa Rosa II, Inc., that the Lake Blake property was not subject to DEP's dredge and fill jurisdiction. The letter was sent in response to an application seeking to fill 2.5 acres of the southeastern portion of the lake for the construction of an apartment complex. The letter was issued by DEP's Northwest District, and signed by Martin Gawronski on behalf of Larry O'Donnell, the Environmental Manager for Permitting Section of the Northwest District. The letter was issued after a visit to the property by one or more DEP employees, and based on an informal determination that Lake Blake was not connected to the waters of the State.

27. In May of 2001, the United States Army Corps of Engineers determined that the Lake Blake property was not within its jurisdiction.

28. Subsequent to the issuance of the April 24, 2001, non-jurisdictional letter, certain employees of Okaloosa County (not specifically named in these proceedings) contacted DEP seeking reconsideration of DEP's decision. These Okaloosa County employees thereafter met with DEP employees at the property and communicated by telephone with DEP employees while DEP considered a re-determination of its non-jurisdictional decision.

29. The property owners were then notified that DEP was in the process of re-evaluating its non-jurisdictional decision.

30. By letter dated October 24, 2001, DEP advised Santa Rosa II, Inc., that DEP had made a "correction" to the letter of April 24, 2001, and had determined that the property was in fact subject to DEP's dredge and fill permitting jurisdiction, because the "pond" was "connected to jurisdictional waters" of the State. The October 24, 2001 letter, like the previous letter, was issued from DEP's Northwest District signed by Martin Gawronski on behalf of Larry O'Donnell.

31. Between April 24, 2001, and October 24, 2001, there were no man-made alterations made to the Lake Blake property. Between March and April 2002, Maddan filled in a portion of the

lake and lacustrine wetlands. Maddan also built two pedestrian footbridges over the lake to the small island in the middle of the lake.

32. DEP asserted its dredge and fill permitting jurisdiction based upon the existence of a series of underground pipes installed by Okaloosa County as part of its stormwater drainage system that conveys excess stormwater from Lake Blake to Cinco Bayou. Installation of the underground pipes required excavation.

33. Neither the April 24, 2001 letter, nor the subsequent October 24, 2001, letter issued by the Northwest District, is binding determination of DEP's dredge and fill permitting jurisdiction over the wetlands and surface waters of Lake Blake. The authority to make a binding DEP dredge and fill permitting jurisdictional determination is vested in Dr. John Tobe, Environmental Administrator of the Wetland Evaluation and Delineation Section and his staff.

DEP's Site Inspections/Jurisdictional Determination

34. In April of 2002, Stacy Owens, DEP Environmental Specialist, received a telephone call from Chuck Bonta with the Okaloosa County Code Enforcement Department, and an unnamed homeowner, complaining that Lee Maddan had built two unpermitted pedestrian footbridges at Lake Blake and was also filling in part of Lake Blake. Ms. Owens initially investigated whether



DEP had issued any permits for the placement of fill in Lake Blake or the surrounding wetlands, and determined that no permits had been issued. Ms. Owens further discovered that a prior Notice of Violation and Orders for Corrective Action had been issued by DER in 1980 against the Okaloosa County Board of Commissioners and Lloyd D. Junger (a lessor conducting mining operations). The 1980 case pertained to the discharge of turbidities from the Lewis Street Pond into Cinco Bayou. A final order in that case was entered on January 5, 1981, requiring Okaloosa County to make payment to DER and take corrective action.

35. On April 23, 2002, Ms. Owens followed up on these complaints by performing a site visit to Lake Blake. At this time Ms. Owens observed two unpermitted pedestrian footbridges, unpermitted fill in a finger of Lake Blake, and unpermitted fill within a 20-foot by 25-foot lacustrine wetland area.

36. On April 25, 2002, Maddan came to Ms. Owens' office to discuss whether permits were necessary for the placement of fill at Lake Blake. At that time Maddan showed Ms. Owens the previous letters of April 24, 2001, and October 24, 2001, which had been sent from the Northwest District of DEP. Maddan stated that in his opinion no dredge and fill permit was needed because Lake Blake was not within the jurisdiction of DEP.

37. Ms. Owens was then informed by employees of Okaloosa County that there were underground pipes connecting Lake Blake to Cinco Bayou. She obtained from Gary Bogan of Okaloosa County an aerial map of the drainage area for Lake Blake which identified the location of the culvert on Lewis Street which conveys excess flow from Lake Blake to Cinco Bayou.

38. On April 30, 2002, Ms. Owens performed another site inspection at Lake Blake. During this site inspection, she tracked the connection from Lake Blake to Cinco Bayou by personal observation.

39. After her second site inspection, Ms. Owens e-mailed her findings to Dr. Tobe, and inquired whether the underground pipes satisfied the DEP requirements for connection to a water body of the State for the purpose of establishing DEP's dredge and fill permitting jurisdiction. Dr. Tobe replied to Ms. Owens that an underground pipe connection would satisfy DEP's jurisdictional requirements.

40. On June 25, 2002, Dr. Tobe, Ms. Owens, and a DEP wetland delineation team visited the Lake Blake property for the purpose of making a jurisdictional determination. Maddan also accompanied Dr. Tobe and his team on the day of the site inspection. As a result of this inspection, Dr. Tobe completed and filed a Field Report for Lake Blake, Okaloosa County, dated June 25, 2002.

41. As indicated in his Field Report, Dr. Tobe and his wetland delineation team determined that for jurisdictional purposes, Lake Blake was connected to the waters of the State by reason of the culvert on Lewis Street that ultimately discharges into Cinco Bayou.

42. At the time of his inspection on June 22, 2002, Dr. Tobe did not observe water flowing from Lake Blake into the Lewis Street culvert. Dr. Tobe attributed this to abnormal drought conditions the area was then experiencing. Maddan, who has observed this area for many years, testified that the lake was near or slightly less than its normal water level on that date. Dr. Tobe conducted a further examination of the area to determine the ordinary high water line, and concluded that Lake Blake would at ordinary high water level flow into the Lewis Street culvert on a sufficiently regular frequency into Cinco Bayou, a water body of the State, in order to establish DEP's dredge and fill jurisdiction. In determining whether water exchange frequency is sufficient to establish jurisdiction, there is a DEP Interoffice Memorandum of October 31, 1988, setting out 25-year, 24-hour criteria which is used as guidance, but the criteria stated in this Memorandum have not been adopted as a rule, and are not singularly determinative of DEP's jurisdiction.

43. At this time, Dr. Tobe and his team also performed a wetland boundary delineation. Dr. Tobe found hydric soils and wetland plants dominating the area. The wetland delineation boundary was determined by the continual interpretation of vegetation, soils, and hydrologic indicators.

44. As a result of his inspection and wetland boundary delineation, Dr. Tobe concluded that unpermitted fill had been placed within the surface waters of the State, and in lacustrine wetlands..

45. Thereafter on July 18, 2002, DEP sent Maddan a Warning Letter (DF-SO-46-022) requesting that Maddan cease dredging, filling or construction activities at Lake Blake without obtaining a permit.

46. Subsequent to DEP's sending Maddan the Warning Letter of July 18, 2002, Stacy Owens visited the Lake Blake site on numerous occasions beginning in October of 2002, and continuing through July of 2003. On most of these site visits Ms. Owens observed water flowing from Lake Blake through the Lewis Street culvert. Ms. Owens documented water flowing from Lake Blake through the Lewis Street culvert on October 29, 2002, November 5, 2002, May 20, 2003, June 20, 2003, June 23, 2003, June 27, 2003, and July 8, 2003. The area was not experiencing abnormally excessive rainfall events at the times that Ms. Owens

documented water flowing from Lake Blake into the Lewis Street culvert.

47. Maddan testified that in his personal observation over many years, Lake Blake generally discharges excess stormwater into the Lewis Street culvert only as a result from a significant rainfall event.

48. Lake Blake discharges water into the Lewis Street culvert at regular intervals. The water discharged from Lake Blake ultimately is released through the Okaloosa County stormwater drainage system into the surface waters of Cinco Bayou, a water body of the State of Florida.

49. The Okaloosa County stormwater drainage system connecting Lake Blake to Cinco Bayou is a series of excavated water bodies.

50. Lake Blake is connected to the surface waters of Cinco Bayou, and regularly exchanges water with Cinco Bayou.

Exemptions from DEP's Jurisdiction

51. To assert dredge and fill permitting jurisdiction over this property, not only must Lake Blake be connected to the waters of the State, but the property must not be otherwise exempt from dredge and fill permitting jurisdiction under either statute or rule.

52. On August 29, 2002, under the authority of the Corporation, Maddan filed a "Joint Application for Works in the

Waters of Florida" with DEP requesting an exemption from DEP's dredge and fill permitting jurisdiction under Rule Chapter 17-312, re-codified as Rule Chapter 62-312.

53. Rule 62-312.050, Florida Administrative Code, sets out the recognized exemptions to DEP's dredge and fill permitting jurisdiction.

54. Maddan primarily relies on Rule 62-312.050(4) which provides that "[n]o permit under this chapter shall be required for dredging or filling in waters which are contained in those artificially constructed stormwater treatment and conveyance systems designed solely for the purpose of stormwater treatment and that are regulated by the Department or the water management district." Lake Blake, however, is the result of excavations in a borrow pit. Because of surrounding development, Lake Blake receives stormwater runoff; however, the lake was not "designed solely for the purpose of stormwater treatment," and cannot therefore qualify for this exemption.

55. Maddan also cites Rule 62-312.050(1)(g), Florida Administrative Code, which provides an exemption for the "construction of seawalls or riprap, including only that backfilling needed to level land behind the seawalls or riprap, in artificially created waterways where such construction will not violate existing water quality standards, impede navigation or adversely affect flood control." Even assuming that the

filling of the finger of Lake Blake meets the test of construction of a seawall, there is no evidence that such filling of Lake Blake was ever subjected to appropriate water quality tests, much less meeting such water quality tests as well as the other requirements of this exemption.

56. In addition to the exemptions established by Rule 62-312.050, Maddan cites statutory exemptions. The definition of "waters" which are regulated under Chapter 403 as set forth in Section 403.031(13), provides in pertinent part that "[w]aters owned entirely by one person other than the state are included only in regard to possible discharge on other property or water." Although Lake Blake is owned entirely by one person, this provision does not exempt Lake Blake because the lake actually discharges on the surface waters of Cinco Bayou.

57. Maddan also cites Section 403.812, which provides that "[t]he department shall not require dredge and fill permits for stormwater management systems where such systems are located landward of the point of connection to waters of the state and are designed, constructed operated and maintained for stormwater treatment, flood attenuation, or irrigation." Although Lake Blake has been utilized by Okaloosa County's stormwater drainage system which is located landward of Cinco Bayou, the lake was not designed nor constructed for stormwater treatment, flood attenuation or irrigation, and it is not being operated nor

maintained for stormwater treatment, flood attenuation or irrigation.

58. Lake Blake does not qualify for an exemption from DEP's dredge and fill permitting jurisdiction.

Dredge and Fill Permit Denial

59. On September 30, 2002, Maddan was notified of DEP's denial of his application to place a modular home on a fill pad in Lake Blake.

60. Because Maddan took the position that DEP did not have dredge and fill jurisdiction over Lake Blake, or alternatively that Lake was exempt from DEP's jurisdiction, an analysis of whether Maddan's application might be approved under Rule 62-312.060(5), Florida Administrative Code, has not been done. DEP has not performed any analysis of water quality standards nor public interest assessment required by the rule, and Maddan offered no evidence which would be necessary to make such determinations.

CONCLUSIONS OF LAW

61. The Division of Administrative Hearings has jurisdiction over the parties and subject matter of this proceeding. Sections 120.57(1) and 403.121(2).

Burden of Proof

62. DEP has the burden of proof to establish by a preponderance of the evidence its dredge and fill permitting



jurisdiction by showing that Lake Blake is connected to the surface waters of the State of Florida.

63. If DEP meets this burden, Maddan has the burden of establishing by a preponderance of the evidence that his activities in the surface waters and wetlands of Lake Blake are otherwise exempt from dredge and fill permitting.

64. If Lake Blake is determined to be jurisdictional, and Maddan's activities are not otherwise exempt from dredge and fill permitting, then Maddan must prove entitlement to approval of his application No. 46-0199306-001-EE.

Law Applicable in the Northwest District

65. The law applicable in the Northwest District of Florida that governs this case has its source in Section 373.4145, entitled "Interim part IV permitting program for the Northwest Florida Water Management District." Thereby the 1993 Legislature provided that, "[w]ithin the geographical jurisdiction of the Northwest Florida Water Management District, the permitting authority of the department under this part shall consist solely of the following . . . ." Among other things, this specifically included Chapter 17-312, Florida Administrative Code (now codified as Chapter 62-312), which governed the Department's wetland resource (i.e., dredge and fill) permitting at the time and which, by reason of the statute, therefore continues to govern the Department's wetland

resource permitting in the Northwest District of Florida. See Sections 373.4145(1) and (1)(b); see also, e.g., Fla. Admin. Code R. 62-312.010 (" . . .the provisions of this part shall only apply to activities in the geographical territory of the Northwest Florida Water Management District. . .").

Enforcement and Waters of the State

66. With respect to the enforcement of permitting activities in waters of the state, Rule 62-312.030, Florida Administrative Code, provides in relevant part:

(1) Pursuant to Sections 403.031(12) and 403.913, F.S., dredging and filling conducted in, on, or over those surface waters of the state as provided in this section, require a permit from the Department unless specifically exempted in Sections 403.813, 403.913, F.S., or Rule 62-312.050, F.A.C.

(2) For the purposes of this rule surface waters of the state are those waters listed below and excavated water bodies, except for waters exempted by Rule 62-312.050(4), F.A.C., which connect directly or via an excavated water body or series of excavated water bodies to those waters listed below:

(a) Atlantic Ocean out to the seaward limit of the state's territorial boundaries;

(b) Gulf of Mexico out to the seaward limit of the state's territorial boundaries;

(c) Bays, bayous, sounds, estuaries, lagoons and natural channels and natural tributaries thereto;

\* \* \*

Section 373.4145(1)(b) further provides in pertinent part:

. . . [F]or the purpose of chapter 17-312 [now 62-312], Florida Administrative Code, the landward extent of surface waters of the state identified in rule 17-312.030(2) [62-312.030(2)], Florida Administrative Code, shall be determined in accordance with the methodology in rules 17-340.100 [now 62-340.100] through 17-340.600 [now 62-340.600], Florida Administrative Code, as ratified in s. 373.4211. . . .

Thus, Chapter 62-312 and Rules 62-312.100 through 62-312.600, Florida Administrative Code, are the controlling provisions governing dredge and fill activities in surface waters and wetlands located in the geographical jurisdiction of the Northwest Florida Water Management District, i.e., located in the Department's Northwest District of Florida.

67. This repealed statute continues to apply to dredge and fill permitting in the Northwest District of Florida because Rule 62-312.060(5)(b), Florida Administrative Code, specifically requires that the Department "evaluate [any] proposed dredging or filling" in the geographical territory of the Northwest Florida Water Management District in accordance with Section 403.918 and Section 403.919, Florida Statutes (1991). See Section 373.4145 ("Interim part IV permitting program for the Northwest Florida Water Management District"), adopting Chapter 17-312 [62-312], Florida Administrative Code.

68. In construing these provisions, the administering agency's interpretation of its own statutes and rules is "entitled to great deference and (must) be approved . . . if it is not clearly erroneous." Florida Interchange Carrier's Ass'n v. Clark, 678 So. 2d 1267, 1270 (Fla. 1996); 1000 Friends of Florida, Inc. v. State Department of Community Affairs, 824 So. 2d 989 (Fla. 4th DCA 2002).

#### Jurisdiction

69. DEP has established by a preponderance of the evidence that Lake Blake is within DEP's dredge and fill permitting jurisdiction.

70. DEP established by a preponderance of the evidence that Lake Blake is directly connected to Cinco Bayou by a series of underground pipes exiting a culvert in Lake Blake and that water frequently flows from Lake Blake to Cinco Bayou.

71. Bayous and excavated water bodies which connect directly or via an excavated water body or series of excavated water bodies to bayous are surface waters of the state. Fla. Admin. Code R. 62.312.030(2)(c). Under the evidence presented, DEP's interpretation that the excavated stormwater drainage system constitutes a "series of excavated water bodies" cannot be deemed "clearly erroneous" and is therefore entitled to great deference.

72. "Isolated areas that infrequently flow into or otherwise exchange water with a described water body [as described in Rule 62-312.030, Florida Administrative Code] are not intended to be included within the dredge and fill jurisdiction of the Department. Fla. Admin. Code R. 62-312.045. Given its natural meaning, "infrequent" is defined as "seldom happening or occurring: RARE" or "placed or occurring at wide intervals in space or time." Carter v. Penisular Fire Insurance Company, 411 So. 2d 960, 962 (Fla. 3d DCA 1982). Given this ordinary meaning, it cannot be fairly concluded from the evidence that Lake Blake exchanges water with Cinco Bayou infrequently or only on rare or widely spaced occasions. Accordingly, the application of the intent expressed in Rule 62-312.045, Florida Administrative Code, does not mitigate against the exercise of DEP's dredge and fill permitting jurisdiction.

#### Exemptions

73. Maddan did not prove his qualification for a specific exemption from DEP's dredge and fill jurisdiction. Maddan did prove that any exemption cited is squarely applicable to Lake Blake.

74. Rule 62-312.050(4), Florida Administrative Code, sets forth specific requirement to qualify for an exemption from dredge and fill jurisdiction. These provisions cannot apply because Lake Blake was not constructed for stormwater treatment

nor "designed solely for the purpose of stormwater treatment" as specifically required by the rule. Even assuming Okaloosa County's stormwater treatment system may be grandfathered in to qualify for an exemption from stormwater permitting, an exemption for stormwater permitting does not equate to an exemption from dredge and fill jurisdiction unless the specific requirements of Rule 62-312.050(4), Florida Administrative Code, are satisfied.

75. Rule 62-312.050(1)(g), Florida Administrative Code, referring to "the construction of seawalls or ripraps" is inapplicable under the evidence, and moreover, requires meeting water quality standards which Maddan did not show were supported in the record.


76. Section 403.812 likewise is inapplicable because Lake Blake was not designed or constructed for stormwater treatment, flood attenuation or irrigation, and the lake is not being operated or maintained for stormwater treatment, flood attenuation, or irrigation.

77. Maddan did not prove by a preponderance of the evidence that any other exemption from DEP's dredge and fill jurisdiction squarely applies to Lake Blake.

RECOMMENDATION

Based upon the foregoing findings of fact and conclusions of law, it is recommended that a final order be entered upholding denial of Maddan's Permit Application No. 46-0199306-001-EE.

DONE AND ENTERED this 10th day of October, 2003, in Tallahassee, Leon County, Florida.



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RICHARD A. HIXSON  
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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the final order in this case.