

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF ENVIRONMENTAL)
PROTECTION,)
)
Complainant,)
)
vs.)
) Case No. 03-2040
SANTA ROSA II, INC.; SANTA ROSA)
THREE, INC.; and LEE MADDAN,)
)
Respondents.)
_____)

FINAL 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 Complainant: 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

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

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 Respondents qualify 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 Respondents are guilty of the violations alleged in the Notice of Violation and Orders for Corrective Action issued by the Director of District Management for the Office of the DEP Northwest District on May 13, 2003.

PRELIMINARY STATEMENT

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 footbridges 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 a total administrative penalty and economic benefit against the owners of \$2,500, and total a administrative penalty and economic

benefit against Maddan of \$5,000. 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 Respondents filed a timely Demand for Administrative Hearing, which was forwarded to the Division of Administrative Hearings (DOAH) on June 2, 2003, and assigned DOAH Case No. 03-2040. Included in the Demand for Administrative Hearing was Respondents' Motion for Consolidation of this case with DOAH Case No. 03-1499, a previously-filed pending action involving DEP's denial of Respondent Maddan's application (DEP application No. 46-0199306-001-EE) for exemption from dredge and fill permitting jurisdiction in order to place a modular home on a fill pad in Lake Blake. 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 Final 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 have law have been incorporated herein.

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.

Respondents 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. Respondents 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 Final 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. The Department of Environmental Protection (DEP) is the agency of the State of Florida vested with the power and duty to enforce the provisions of Chapters 373 and 403, Florida Statutes,

and the rules promulgated in Chapter 62, Florida Administrative Code. DEP is the only agency involved in these proceedings.

2. Respondent, Santa Rosa Three, Inc. (the Corporation), is the fee simple title holder of certain property in unincorporated Okaloosa County, Florida, located between Lewis Street and Clifford Street in Sections 2 and 3, Township 2 South, Range West. The property includes the subject water body, Lake Blake. Santa Rosa II, Inc., is a corporate predecessor in interest to the Corporation.

3. Respondent, Lee Maddan (Maddan), is a long-time resident of Okaloosa County. Maddan is the Petitioner in DOAH Case No. 03-1499. Maddan has personally observed activities occurring at the Lake Blake property for more than 38 years, including the excavation of the lake. 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 of the State of Florida which on a direct line is located approximately one-quarter mile from the property. Cinco Bayou is the nearest surface waters of the State of Florida.

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 resulted from collected rainfall, as well as underground water intrusion in the original borrow pit. At the present time, additional diverted stormwater runoff collects 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 former owner, Ron Blake, excavate the lake and make it 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 at least seven 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 for use as part of its existing stormwater drainage system.

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 of 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 and 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 property and the lacustrine wetland. 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 dredge and fill 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 an abnormal drought conditions the area was then experiencing. Maddan, who has observed this area for many years, testified that the lake was near or only 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, for purposes of establishing 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 set 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 wetland.

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 the 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. Such discharged water from Lake Blake ultimately is conveyed through the Okaloosa County stormwater drainage system and released 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. Respondents primarily rely on Rule 62-312.050(4), Florida Administrative Code, 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. Respondents also cite 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, Respondents cite 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 of not only its "possible discharge" but because of its actual discharge on the surface waters of Cinco Bayou.

57. Respondents also cite 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 at least since 1976 has been utilized as part of Okaloosa County's stormwater drainage system, which is located landward of Cinco Bayou, it was not designed or constructed for stormwater treatment, flood attenuation or irrigation, and it is

not being operated or 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.

CONCLUSIONS OF LAW

59. 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

60. 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.

61. If DEP meets this burden, Respondents have the burden of establishing by a preponderance of the evidence that their activities in the surface waters and wetlands of Lake Blake are otherwise exempt from dredge and fill permitting.

62. If Lake Blake is determined to be jurisdictional, and Respondents' activities are not otherwise exempt from dredge and fill permitting, then DEP must prove the allegations of the NOV by the preponderance of the evidence that the Respondents are responsible for the violation. Section 403.121(2)(d).

Law Applicable in the Northwest District

63. 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

64. 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.

65. 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.

66. In construing these provisions, the interpretation of an administering agency, here DEP, 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

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

68. 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.

69. 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.

70. "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 does not mitigate against the exercise of DEP's dredge and fill permitting jurisdiction.

Exemptions

71. Respondents have not proved their entitlement to a specific exemption from DEP's dredge and fill jurisdiction. Respondents have not proved that any exemption cited is squarely applicable to Lake Blake.

72. 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) are satisfied.

73. 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 Respondents did not show were supported in the record.

74. 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 nor maintained for stormwater treatment, flood attenuation, or irrigation.

75. Respondents have not proved by a preponderance of the evidence that any other exemption from DEP's dredge and fill jurisdiction squarely applies to Lake Blake.

Proof of Violation

76. DEP established by a preponderance of the evidence that the Respondents are responsible for the unpermitted fill within surface waters of the State and lacustrine wetland. Section 403.121(2)(d).

77. Unless specifically exempt, permits shall be required for filling or placing material in, or over surface waters of the state as provided in Rule 62-312.030, Florida Administrative Code. Fla. Admin. Code R. 62-312.060.

78. "Filling is the deposition, by any means, of materials in waters of the state." Fla. Admin. Code R. 62-312.020(11).

79. In spite of a non-jurisdictional letter being issued on April 24, 2001, Respondents were aware that Lake Blake was within DEP's dredge and fill jurisdiction prior to placing the fill which is the subject of the present proceeding as evidenced by the October 24, 2001, jurisdictional letter sent to

Respondents which stated, "this is a correction to the April 24, 2001 letter" Then on August 29, 2002, Respondent Maddan applied for a dredge and fill permit to place a modular home on a fill pad. By letter dated September 27, 2002, DEP informed Mr. Maddan that the fill pad was considered unauthorized fill placed in jurisdictional waters of the state, Lake Blake, and that the dredge and fill permit has been denied.

80. The placement of the two footbridges were activities for which a permit may have been obtained from DEP.

81. In accordance with Section 403.121(3)(c), a \$2,000 administrative penalty shall be assessed against Santa Rosa II, Inc., and Santa Rosa Three, Inc., for placing unpermitted fill within one-tenth of an acre of waters of the State, which includes wetlands. DEP also assessed an additional fine of \$500 for costs and expenses incurred by DEP. The total fines and penalties assessed against Santa Rosa II, Inc., and Santa Rosa Three, Inc., are \$2,500.

82. Because the placement of the two pedestrian bridges were activities in which a permit could have been obtained had the Respondents sought a permit, DEP would have assessed an additional \$500 administrative fine for economic benefit of non-compliance if the pedestrian bridges were allowed to remain in place.

83. DEP ordered that all unpermitted fill, including the two pedestrian bridges (also known as footbridges) be removed and restoration to the impacted areas take place within 30 days of the Notice of Violation.

84. Section 403.121(3)(c), provides that DEP shall assess a \$5,000 penalty against Lee Maddan as the contractor or agent of the owner that conducts unpermitted filling.

85. DEP has identified costs pursuant to Section 403.121(f) in the amount of \$500 which are substantiated by the record.

ORDER

Based upon the foregoing Findings of Fact and Conclusions of Law, it is ordered that a total of \$2,500 in administrative fines which includes the costs of this proceeding, and penalties is hereby assessed against Santa Rosa II, Inc., and Santa Rosa Three, Inc., jointly. Payment shall be made by cashier's check or money order payable to the State of Florida, Department of Environmental Protection, and shall include thereon OGC Case No. 02-2049, and the notation "Ecosystem Management and Restoration Trust Fund." The payment shall be sent to DEP, Northwest District Office, 160 Governmental Center, Pensacola, Florida 32501-5794. All unpermitted fill shall be removed within 30 days of the effective date of this Order. Paragraphs 20 through 22 of the Orders for Corrective Action contained in the Notice

of Violation issued May 13, 2003, are hereby adopted as the corrective actions mandated in the Final Order (Office of General Counsel Case No. 02-2049, DOAH Case NO. 03-2040.)

It is further ordered that a \$5,000 administrative fine is assessed against Lee Maddan, individually, and that payment shall be made within 30 days of the effective date of this Final Order. Payment shall be made by cashier's check or money order payable to the State of Florida, Department of Environmental Protection, and shall include thereon OGC Case No. 02-2049, and the notation "Ecosystem Management and Restoration Trust Fund." The payment shall be sent to DEP, Northwest District Office, 160 Governmental Center, Pensacola, Florida 32501-5794.

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



RICHARD A. HIXSON
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 10th day of October, 2003.

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NOTICE OF RIGHT TO JUDICIAL REVIEW

A party who is adversely affected by this Final Order is entitled to judicial review pursuant to Section 120.68, Florida Statutes. Review proceedings are governed by the Florida Rules of Appellate Procedure. Such proceedings are commenced by filing the original notice of appeal with the Clerk of the Division of Administrative Hearings and a copy, accompanied by filing fees prescribed by law, with the District Court of Appeal in the Appellate District where the party resides. The notice of appeal must be filed within 30 days of rendition of this Final Order.