

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

THOMAS L. SHEEHEY, )  
 )  
 Petitioner, )  
 )  
 vs. ) Case No. 09-0948  
 )  
 MICHAEL CHBAT AND DEPARTMENT OF )  
 ENVIRONMENTAL PROTECTION, )  
 )  
 Respondents. )  
 \_\_\_\_\_ )

RECOMMENDED ORDER

This case was heard by David M. Maloney, Administrative Law Judge of the Division of Administrative Hearings, on September 14 and 15, 2009, in Shalimar, Florida.

APPEARANCES

For Petitioner Thomas L. Sheehey:

David Michael Chesser, Esquire  
Chesser & Barr, P.A.  
1201 Eglin Parkway  
Shalimar, Florida 32579

For Respondent Michael Chbat:

John L. Wharton, Esquire  
Frederick L. Aschauer, Jr., Esquire  
Rose, Sundstrom & Bentley, LLP  
2548 Blainstone Pines Drive  
Tallahassee, Florida 32301

For Respondent Department of Environmental Protection:

Amanda Gayle Bush, Esquire  
Department of Environmental Protection  
Office of the General Counsel  
3900 Commonwealth Boulevard, Mail Stop 35  
Tallahassee, Florida 32399-3000

STATEMENT OF THE ISSUE

Whether Michael Chbat's 2008 application for a Wetland Resource Permit (WRP) to construct a culvert extension across his property in Walton County, Florida, should be approved?

PRELIMINARY STATEMENT

This proceeding concerns a permit the Department of Environmental Protection (the "Department" or "DEP") denominated an "Amended Wetland Resource Permit", (the "Amended Permit"). It was issued by DEP on December 19, 2008, to Michael Chabat ("Chabat" or "Respondent Chabat").

Eighteen days after the Amended Permit's issuance, Thomas L. Sheehey ("Petitioner" or "Sheehey") filed with DEP a Petition for Formal Administrative Hearing challenging it.

The Department referred the petition to the Division of Administrative Hearings (DOAH) and asked that an administrative law judge be designated to conduct the proceeding. The petition was assigned Case No. 09-0948.

Chbat filed a motion to dismiss that was granted. Sheehey filed an amended petition on May 14, 2009. The case was set for

hearing on the amended petition in August of 2009 and re-set to commence on September 14, 2009.

Five days prior to the hearing, on September 9, 2009, Chbat and the Department filed a motion in limine. The motion sought an order that would prevent Petitioner from entering evidence that would support a bar both to Chbat's application and the issuance of the Amended Permit by operation of the doctrine of res judicata. The motion also sought to preclude any evidence that DEP was required to enforce a settlement agreement entered in March of 2007 between Mr. Sheehey and Mr. Chbat.

On the next day, September 10, 2009, the parties filed a Joint Pre-hearing Stipulation. The stipulation made reference to the subject of the motion in limine. Listed among the facts which remain to be litigated was: "Whether the Amended Wetland Resource Permit presents any new issues from those contested and settled in the original permit issued May 9, 2007, Number 66-0235320-001-DF." Joint Pre-hearing Stipulation, at 16. Along the same line, the stipulation listed among the issues of law which remained to be litigated: "Whether or not the Proposed Amended Permit is res judicata." Id. at 17.

The case proceeded to final hearing as scheduled on September 14, 2009. At the outset, DEP and Chabat's motion in limine was argued by the parties. A ruling was entered that res judicata was not applicable to the proceeding and that the

settlement agreement entered in March of 2007 could not be enforced in this proceeding to require the Department to reject Chbat's application or deny the Amended Permit. The settlement agreement, however, was not excluded from the record or as evidence; it was allowed to be introduced as background.

As the applicant with the burden of proof, Chbat proceeded first. Three witnesses testified in the case-in-chief: Michael Chbat, Petitioner; Mark Thomasson, P.E., accepted as an expert in stormwater engineering; and, Larry O'Donnell, an Environmental Manager in the Department's Wetland Resource Permitting Program.

Chbat offered ten exhibits into evidence. Marked for identification as Chbat Exs. 1-10, all were admitted. Two of the ten exhibits, Chbat 9 and 10, were depositions of Les Porterfield, P.E., president and owner of Porterfield Engineering; and Clifford Street, P.E., the Department's Supervisor for Engineering Support for Submerged Lands and Environmental Resources Program of the Northwest District, both of whom testified at the final hearing.

The Department proceeded next. It presented two witnesses: Mr. O'Donnell, who was re-called and accepted as an expert in the application of state rules and statutes in wetland resource permitting; and Mr. Street, accepted as an expert in stormwater

engineering. The Department offered two exhibits, Department Exhibits 1 and 2 which were admitted into evidence.

Petitioner proceeded after the Department. Testimony was accepted from four of the witnesses Petitioner presented: Thomas Eugene Cummins, a resident of Lot 5 in La Grange Bayou; Thomas Sheehey, Petitioner and resident of Lot 8 in La Grange Bayou; Mr. Porterfield, accepted as an expert in stormwater engineering and wetland permitting; and, Todd Wilkinson, vice president of Environmental Services, Inc., accepted as an expert in the application of state rules and statutes in wetland permitting and also in the field of marine biology. Mr. Sheehey also presented the testimony of Ms. Julie Dickinson, a DEP environmental supervisor with the Department's Wetland Program. The testimony of Ms. Dickinson, however, was stricken.

Petitioner offered 11 exhibits into evidence, marked for identification as Petitioner's Exhibits 1-11. All were admitted.

After the conclusion of Petitioner's case, Chbat re-called himself as a witness and presented the live testimony of Mr. Street in rebuttal.

The three-volume transcript of the hearing was filed on October 26, 2009. It was ordered that proposed recommended orders were due on November 30, 2009. A joint motion for extension of the time to file proposed recommended orders was

filed on the basis of errors in the transcript. On December 7, 2009, an order was entered giving the parties until December 11, 2009 to file their proposed orders. The next day a corrected volume of the transcript was filed. The parties all timely filed Proposed Recommended Orders, which have been considered in the preparation of this Recommended Order.

#### FINDINGS OF FACT

##### La Grange Bayou Estates

1. La Grange Bayou Estates is a residential subdivision in Freeport, Walton County, Florida.

2. The subdivision lies to the north of the shoreline of Choctawhatchee Bay. It can be viewed as divided roughly in half between bayfront lots south of an east-west road that transects the subdivision and lots that are north of the road.

3. The subdivision is platted and the plat is in the public records of Walton County. Filed with the Clerk of the Circuit Court in and for Walton County, Florida, on September 15, 1982, the plat ("the 1982 Plat") shows 29 residential lots in the subdivision as of that date. See Petitioner's Ex. 6.

4. Lots 1 through 16, according to the 1982 Plat, are the bayfront lots, south of a 40-foot wide road designated as a private road in the plat. That road is now known as Alden Lane.

5. Wetlands over which the Department has jurisdiction ("jurisdictional wetlands") comprise much of the southern portion of bayfront lots and the drainage easement. Among the bayfront lots are both Lot 9 which belongs to Mr. Chbat and Lot 8 which belongs to Mr. Sheehey. A 50-foot easement lies between Lot 9 and Lot 8 and is described more fully below. The presence of jurisdictional wetlands on Mr. Chbat's lot over which he hopes to install the culvert extension requires that he obtain a WRP.

6. To the north of Alden Lane are lots numbered by the 1982 Plat as 17 through 29. The lots are served by Alden Lane and, in what is roughly the northeast quadrant of the subdivision, by two other roads. One of the roads is shown on the 1982 Plat as a "40' PRIVATE ROAD." Id. A 2006 aerial photograph introduced into evidence by Chbat designates the road "unnamed." See Chbat Ex. 5. The other is designated as a "graded county road," on the 1982 Plat. By 2006, it had come to be known as Beatrice Point Road. Id.

7. Beatrice Point Road transects a pond that runs roughly 340 feet (excluding about 30 feet of roadway) in a northeasterly direction from Alden Lane to the southern edge of an area north of the subdivision shown on the 1982 Plat to be un-platted. The pond is most likely the result of a "borrow pit" dug in order to

obtain fill for the construction of the roads when the subdivision was initially developed.

8. The southern boundary of the pond lies along approximately 140 feet of Alden Lane's northern edge. The pond is across the street from Lots 9, 10 and 11 of the subdivision. The pond is also not far northeast of the 50-foot easement (the "Drainage Easement") between Lots 9 and 8.

#### The Drainage Easement

9. The Drainage Easement is just to the west of Lot 9. It is noted on the 1982 Plat as a "50' EASEMENT (PRIVATE)." Id. The 50-foot wide Drainage Easement runs the length of the western boundary of Lot 9 and the length of the eastern boundary of Lot 8. The northeast corner of the Drainage Easement is approximately 30 feet from the southwest corner of the pond separated from the pond by the roadway of Alden Lane.

10. The eastern boundary of the Drainage Easement is 226.37 feet in length, or if taken to the middle of Alden Lane, 246.3 feet. The western boundary is 206.13 feet long or if taken to the middle of the road, 226.65 feet.

11. The purpose of the Drainage Easement, as is evident from its denomination in this recommended order, is drainage. As Mr. Street definitively put it at hearing, it is "now and always has been intended to drain stormwater to the [B]ay." Tr. Vol. III at 179.



12. Mr. Street's opinion of the function of the Drainage Easement is supported by drawings submitted by Mr. Chbat as part of the WRP application.

13. The drawings show that the Drainage Easement's function is facilitated by three culverts north of the Easement (referred to during the hearing as "pipes") each of which is intended to direct stormwater at its point of discharge toward the Drainage Easement. See Chbat Ex. 1.

14. One of the culverts ("the Drainage Ditch Culvert") serves a drainage ditch that is to the north of the Easement and Alden Lane. According to the drawings, the drainage ditch lies on the other side of the "un-named road" from the pond, that is, to the west of the pond, and is some 40-to-50 feet north of the Drainage Easement.

15. The Drainage Ditch Culvert extends from the ditch to the southern half of Alden Lane from where it appears from the application's drawings that stormwater would be conveyed to the western side of the Drainage Easement along it's border with Lot 8 and on toward the Bay. In fact, it is a functioning culvert that "conveys water from a swale on the side of the road into the [D]rainage [E]asement." Tr. 64. Once in the Drainage Easement, according to the drawings, the water should flow into the Bay out of a "cut," id., that is labeled on the drawings as an "existing trench." See Chbat Ex. 1. The trench, however,

has been filled in with sand by tidal activity or sediment deposited by stormwater or both. The trench has not been maintained, and it no longer exists.

16. The other two culverts (the "Pond Culverts") lie east of the Drainage Ditch Culvert. They catch overflow from the pond caused by stormwater and convey it under and through Alden Lane toward the Drainage Easement.

17. The westernmost Pond Culvert (the "Western Pond Culvert") appears to terminate in Alden Lane near its southern edge just north of the Easement. At the time of hearing, however, it was not functioning properly. "[I]t is full of sand and silted up . . .", tr. Vol. I at 58; "[t]he pipe to the west is clogged and it is not functioning." Tr. Vol. I at 64. It is also at an elevation that would keep it from serving drainage purposes in all but the most severe storm events. See Chbat Ex. 9 at 22.

18. The other Pond Culvert, (the "Eastern Pond Culvert") terminates in the northwest corner of Lot 9 at the border between Lot 9 and the Drainage Easement about 10 feet southeast of the terminus of the Western Pond Culvert. The Eastern Pond Culvert is the culvert with which the Amended Permit is concerned, that is, it is the culvert to be extended by the permit. Calling it a "pipe," Mr. Street offered the following about the assistance the Eastern Pond Culvert offers in

conveying stormwater into the Drainage Easement and down to the Bay:

There is currently a pipe that discharges into that easement. There . . . was an attempt to place the water from the . . . pond into the easement. And the natural flow of water on this entire property from the road to the [B]ay is north to south. At some point, at least 2004, that drainage easement contained a conveyance at its southern end that would safely discharge stormwater to the [B]ay.

Tr. Vol. III at 179-80.

Petitioner Sheehey and Lot 8

19. Thomas Sheehey is the owner of Lot 8, where he has a residence in which he makes his home. He has lived in the residence approximately five years. During that time, Mr. Sheehey has fished in the Bay and enjoyed the use of his kayak and his waverunner on the Bay. He also enjoys "sitting down having a cup of coffee and looking at it," tr. vol. III at 151, as well as watching his neighbors fish. The recreational uses to which he puts the Bay is the reason he chose to purchase a bayfront lot in La Grange Bayou Estates.

20. Over the period of time that he has resided on Lot 8, Mr. Sheehey has observed the effects of rain events on his lot and well as lots close to Lot 8. He has also taken pictures of his property and the near-by lots. Among the photographs were four taken after rain events or "after a wet period," tr. vol.

III at 88, at some point in the last four years. The four photos were introduced as a composite exhibit, Petitioner's Ex. 2, with each photograph marked as 2A, 2B, 2C or 2D. Mr. Sheehey could not specify when the pictures were taken in the past four years other than that if a picture had a certain dock in it, then it was taken after January of 2009.

21. Petitioner's Ex. 2A was taken from Mr. Sheehey's lot looking toward the Bay. It shows an area of the lot under water separated from the Bay by a ridge.

22. Petitioner's Ex. 2B is a picture taken from Lot 13 looking west across Lots 12, 11, 10, 9 "down through . . . 8." Tr. Vol. III at 86. Much of what is photographed is among trees and vegetation emerging from water standing above the surface of the soil.

23. Petitioner's Ex. 2C is a picture taken from Alden Lane looking south across Mr. Chbat's property. It shows a wide swath of water that extends from the road across most of the property to the Bay. The water is either in a swale or constitutes overflow outside the swale.

24. The most recent of the four is Petitioner's Ex. 2D, which shows the dock referred to by Mr. Sheehey that was built in early 2009. It is a picture taken from Lot number 13 toward the west through Lots 12, 11, 10, 9. Like the others, it shows vegetation standing in water to the north of the Bay. Taken

together, the four pictures in Petitioner's Exhibit 2 demonstrate that significant portions of the lots depicted are under water following sufficient amounts of recent rain.

25. The four photographs that comprise Petitioner's Exhibit 2 are not the only photos taken by Mr. Sheehey that were introduced into evidence. Three other photographs of Mr. Sheehey's, Petitioner's Exhibits 7A, 7B and 7C, were admitted following testimony about them from a long-time observer of the flow of water from Alden Lane to the Bay.

A Long-time Observer

26. Thomas Eugene Cummins had lived in La Grange Estates "[t]wo months shy of 20 years," tr. vol. III at 7, at the time of his testimony. His house was the fourth to be constructed in the subdivision.

27. Over the two decades of his residence, the pond between Alden Lane and the property north of the subdivision has been in existence. Consistent with the drawings submitted to DEP as part of the application, when asked where the pond overflows today, Mr. Cummins answered "it drains under Alden Lane on to Mr. Chbat's lot." Tr. Vol. III at 8.

28. Asked by Mr. Chesser at hearing, "When the water comes out of the pond, is it possible to know where it spreads?"<sup>1/</sup> Mr. Cummins testified:

On really heavy rains, I have watched the normal color of the pond change from its dark blackish gray color into the reddish color that the clay has washed down into it, flow under Alden Lane and on to Mr. Chbat's lot, and then proceed west through the wetland on lots eight, seven, six, and my five, and turn reddish color even in my lot.

Tr. Vol. III at 9-10. Mr. Cummins knew the source of the "red color" of the stormwater: red clay introduced to La Grange Estates by the County half a decade earlier. Mr. Cummins testified:

Beatrice Point Road, which is the road that runs over the pond, about five years ago the county did some repair on the road and actually put red clay in certain spots to even it out.

Tr. Vol. III at 9. Prior to the county's work on the road referred-to by Mr. Cummins, there had been no red clay in the neighborhood. Alden Way, for example, has no red clay. It is a road composed of shell. The only red clay in the subdivision is that which is on Beatrice Point Road.

29. The water that runs onto Mr. Cummins' lot following a heavy rain rises to as much as 12 inches.<sup>2/</sup> The water rises as high as it does because it is held back by a naturally-occurring land formation between the Bay and Mr. Cummins property. This geo-formation was referred-to at hearing as the ridge line or the ridge.

## The Ridge

30. The Ridge was described by Mr. Cummins as a vegetated mass of earth that most of the time, even in heavy rains, sits above the water that collects on the bayfront lots of La Grange Estates.

31. The Ridge prevents a substantial amount of stormwater runoff from entering the Bay from the wetlands on the southern portion of the subdivision's bayfront lots. For that reason, the ridge is called "our upland,<sup>3/</sup>" tr. vol. III at 13, according to Mr. Cummins. Between Lot 9 and Lot 5, the ridge varies in width "anywhere between 10 feet . . . up toward Mr. Chbat's lot, down to [Mr. Cummins'] lot where its around 30 or 40 feet [wide.]" Id. (It may extend, in fact, across all of the bayfront lots.) The ridge meanders not far from the shoreline. Id. In some places it is as narrow as five feet. The height of the ridge varies as well from as low as one foot to as high as two and half feet.

32. Mr. Street also testified about the Ridge, referring to it in his testimony as a "ridge line":

Now, there is a ridge line, and there's been a lot of testimony about this ridge line, that it exists across all of the lots. My testimony was, essentially, related to the review that I did, which was primarily associated with lots eight and nine, and the drainage easement between them. And from what I can tell, the elevation of that ridge line is give or take three. Elevation

three, not a height of three. An elevation of three. It could be lower, and perhaps, is higher. And its subject to the vagaries of a number of factors, flow of stormwater, wave action, tidal influence, and the like. And these accretions and depositions of sand over time change that ridge line. And sometimes, it opens up. And sometimes it may not have a natural opening, depending on where you are along that entire stretch of beach.

\* \* \*

[T]o the extent there is an opening in that ridge line, water will flow naturally to the bay.

Tr. Vol. III at 180-181. An "east west flow of water," tr. vol. III at 181, along the bayfront lots, that is, a flow of water either in an easterly direction or a westerly one is contrary to the flow from Alden Lane north of the lots to the Bay south of the lots. Whether flowing east or west, the water in the southern portions of the bayfront lots is "controlled by the ridge line." Id. In other words, stormwater that flows from north to south across the bayfront lots, including Mr. Chbat's and the Drainage Easement, is going to collect and begin to flow from east to west or west to east at some point north of the Ridge before it drains into the Bay. The only exception to east-west flow, as made clear by Mr. Street, is when and if there is an opening in the Ridge that allows the water otherwise held back by the Ridge to flow southward into the Bay.



33. The east-west flow of the water along the Ridge was described at hearing as "unnatural." Id. In fact, it is not un-natural. The Ridge is the cause of the east-west flow and, as Mr. Street testified, the Ridge is the result of natural processes such as tidal influence, wave action, accretion and deposition of sand.<sup>4/</sup>

34. The Ridge is shown in Petitioner's Exhibit 7A,<sup>5/</sup> another photograph taken by Mr. Sheehey. The ridge as shown in the picture is well vegetated and above water to its north and higher than the Bay to its south. It is quite clear that if there is no opening in the ridge to the Bay, stormwater north of the ridge is forced to flow in east-west directions and is prevented from flowing into the Bay.

35. Petitioners' Exhibit 7B is a photograph of the southern terminus of a swale (see paragraphs 40 - 49, below) on Mr. Chbat's property. It shows the swale cut through the Ridge. Water, however, does not appear to be running from the end of the swale into the bay. It appears that the end of the swale is a few feet from the Bay separated by a narrow sandy area on the shore. Nonetheless, the photograph shows that there is potential for stormwater to flow from the swale when the swale has more water in it.

36. Petitioner's Exhibit 7C is a picture of the pond<sup>6/</sup> across the street from Mr. Chbat's Lot 9.

Mr. Chbat and Lot 9

37. Michael Chbat is the owner of Lot 9. He purchased the lot "[t]o build a house on it." Tr. Vol. I at 22. Because he has family close by (in Fort Walton Beach), Mr. Chbat expects to use a house built on the lot for weekend visits. His ultimate aspiration is to live in a house on Lot 9 after he retires from his position as a construction engineer with the City of Tallahassee.

38. At hearing, Mr. Chbat described Lot 9 on the day he bought it: "the lot was overgrown. It drained from north to south. It had water standing on it. And it had a pipe [the Eastern Pond Culvert] on the northwest corner discharging." Tr. Vol. I at 23.

39. He also described the state of the lot at the time of hearing. The Eastern Pond Culvert on the northwest corner was still there. The lot had been cleared to some extent to rid it of invasive species. Overgrown vegetation was trimmed or cleared to make room for a driveway permitted by the Department and "a parking pad in the front area of it, as well as an access pad in the uplands." Id. A dock had also been constructed from the property into the Bay. The most significant difference between the lot at the time of purchase and the lot at the time of hearing for purposes of this proceeding is that the lot now

has a swale (the Swale) that runs from the point of discharge of the Eastern Pond Culvert "all of the way to the bay area." Id.  
The Swale

40. The Swale was put in sometime after March 20, 2007, as the result of a Settlement Agreement fully executed on that date "By and Between Michael Chbat and Thomas L. Sheehey."  
Petitioner's Ex. 10.

41. The Settlement Agreement followed events that commenced in 2004 when Mr. Chbat filed an application (the "2004 Application") with DEP for a WRP primarily to construct a house and a boardwalk leading from the house on Lot 9 to a dock in the Bay. The 2004 Application also proposed the extension of the Eastern Pond Culvert with a "pipe" along the western boundary of Chbat's property in a manner substantially similar to the culvert extension allowed by the Amended Permit that is the subject of this proceeding.

42. On October 28, 2005, DEP proposed that the 2004 Application be granted. The permit (the "Proposed Original Permit") was assigned No. 66-0235320-001-DF. See Petitioner's Ex. 10, at 2.

43. The Proposed Original Permit was challenged by Mr. Sheehey when he "filed a Petition for Administrative Hearing contesting certain action authorized under the [Proposed Original] Permit . . . specifically the relocation of a drainage

pipe . . . ." Petitioner's Ex. 10, at 2. After referral of the petition to DOAH, Mr. Chbat and Mr. Sheehey wrote in the Settlement Agreement that they had "determined that it is in their best interests to settle this matter amicably pursuant to the terms hereafter". Id.

44. Among the terms is that Chbat would file an Amended Application. See id. The agreed-to amendment to the 2004 Application was attached to the Settlement Agreement as Exhibit "A," a drawing of a "Drainage Swale Plan," produced by Genesis Group for Mr. Chbat. The drawing depicts a swale that runs from the discharge point of the Eastern Pond Culvert nearly the full length of the western boundary of Lot 9 to the Bay. See Exhibit "A" to Petitioner's Ex. 10. The Swale was designed to take the place of the 2004 Application's proposal for a "pipe"<sup>7/</sup> attached to the point of the discharge from the Eastern Pond Culvert. The Settlement Agreement received the support of DEP because the Department believed that a swale would assist in improving the quality of the stormwater discharged to the Bay over the untreated discharge from the end of the "pipe."

45. Pursuant to the terms of the Settlement Agreement the 2004 Application was amended. The Department amended the Proposed Original Permit accordingly and final agency action was

taken with the issuance of a permit to Mr. Chbat (the "Final Original Permit") found in DEP Permit File No. 66-0235320-001-DF.

#### Installation of the Swale

46. The Swale was installed, but it did not work as intended. The result of the Swale's installation was more water on the lot rather than less.

47. Mr. Chbat described the after-effects of the Swale: "it started bringing more water to the lot . . .". Tr. Vol. I at 31. The increased amount of water is the result of several factors, one of which is tidal influence: the tide from the Bay pushes water into the Swale. "[A]bout halfway on the swale . . . that water from the bay was meeting the water from the pipe . . .". Id. The water from the Bay tide and the stormwater conveyed by the Swale would meet at "about the middle of the span of the swale." Id. The result was "a lot more water," id., on the lot.

48. Mr. Thomason confirmed Mr. Chbat's assessment that the reason the Swale did not function as effectively as necessary is tidal flow onto Lot 9 from the Bay particularly from high winds. But tidal flow onto Lot 9 and the interruption in the discharge of stormwater through the Swale are not the only problems. There is also a maintenance factor that accompanies tidal flow: sand deposition.

49. Mr. Thomason elaborated: "[D]uring storm events or [just normal] wave action in the bay, sand is brought back up on to . . . the sandy area at the end of [Lot 9] next to the [Bay.]"<sup>8/</sup> Tr. Vol. I at 62. The influx of sand onto Lot 9 is not just a problem for adequate functioning of the Swale. The Drainage Easement has "the same problem." Id. Both the Swale and the Drainage Easement are plagued by deposition of sand pushed landward by normal tidal influences and storm events. Maintenance of the Swale and the Drainage Easement, therefore, would assist the drainage of stormwater into the Bay.

50. The tidal influence and maintenance issues that Mr. Chbat encountered with the Swale led him to apply for a different and new permit. That application was filed in 2008. The 2008 Application

51. Mr. Chbat filed a "Joint Application for Works in the Waters of Florida" with DEP on August 1, 2008 (the "2008 Application"). See Chbat Exhibit 1.

52. The work to be approved was similar to the work originally proposed in the 2004 Application in that both applications proposed installation of a "pipe" to be fixed to the discharge point of the Eastern Pond Culvert that would run along the western boundary of Lot 9 toward the Bay.

53. A description of the work is contained in Section 10 of the 2008 Application: "Extension of an existing stormwater

pipe within a private lot approximately 150 feet. The slope for the proposed pipe extension will be at minimum so that stormwater will be treated further, and minimizing erosion."

Chbat Ex. 1 at 3.

54. After the filing of the 2008 Application, Mr. Chbat learned that Mr. Sheehey objected to the newest Chbat proposal because he believed 150 feet is not lengthy enough to clear the Ridge. See Chbat Exhibit 2. In order to cure the objection, Mr. Chbat proposed a modification to the 2008 Application. He attached a "sealed and signed drawing," id., to a letter dated September 18, 2008, that he submitted to DEP. The drawing shows the extension to be 177 feet, 27 feet more than initially proposed by the 2008 Application. The additional 27 feet was intended to ensure that the discharge would be directly into the Bay in order to "eliminate any possible run-off impact to adjacent properties." Id.

55. The modification was accepted by DEP." See exhibit number 1<sup>9/</sup> attached to the Amended Permit, Chbat Exhibit 4.

56. There was conflicting evidence in the proceeding on whether the outfall from a culvert extension of 177 feet will be bayward of the Ridge. The issue was put to rest by Mr. Street's testimony in rebuttal at the hearing. See Tr. Vol. III at 194 and 203-4. His testimony establishes that the point of

discharge at the end of the culvert extension will clear the Ridge so that the discharge will be directly into the Bay.

#### The Mound

57. The culvert extension is designed at an elevation and with cover (presumably sod). The extension runs through jurisdictional wetlands and segments them. It does not, however, isolate any portion of the wetlands. The wetlands on Mr. Chbat's property and those to the immediate east and west of it, therefore, will retain their status as jurisdictional wetlands should the extension be installed.

58. With its sod cover, the culvert extension will be a mini-berm (or a "mound" as Mr. Street called it) at an elevation of 17 to 18 inches above grade. Water that pools to its west will no longer be able to flow eastward of the mound (except rarely under the most extreme weather events.) Conversely, water that collects to its east will no longer be able to flow westward of the extension.

59. It would have to be a severe storm event for water to rise above the mound. Mr. Chbat has never seen water rise to 18 inches above grade and Mr. Cummins testified the highest water ever gets on his property is roughly 12 inches.

60. The Department approved the 2008 Application as modified to lengthen the extension to 177 feet and issued the



Amended Permit. But an incorrect and critical assumption was made during review of the application that related to the mound.

Review of the 2008 Application

61. During his review of the application, Mr. Street, as DEP's stormwater engineer, assumed from the drawings that the Drainage Easement is functional.<sup>10/</sup> The assumption was expressed in Mr. Street's testimony in the Department's case-in-chief:

Q [D]id you determine whether the pipe, as it would be mounded . . . [the culvert extension covered in sod] . . . would create problems for storm water flow?

A I looked at that. There were two conclusions that I drew. One was that the mound would create a higher water elevation on the Chbat property east of the mound, but would not create standing water west of the mound extending into the [Drainage E]asement . . . . Which on the drawings that I reviewed showed an existing trench at the south end of that easement. And it was my opinion that any water that fell west of the mound would exit through the easement.

Tr. Vol. II at 92 (emphasis added.)

62. Mr. Street's assumption that water would not pool to the west of the mound in the Drainage Easement and toward Mr. Sheehey's property was contradicted by Mr. Sheehey's stormwater engineer, Mr. Porterfield.

The Porterfield Testimony and Support for It at Hearing

63. The testimony at hearing of Mr. Porterfield, who conducted a site visit, established the opposite of what

Mr. Street assumed. The volume of stormwater runoff that pools east of the mound, that is, water on Lot 9, will not be as great as the volume as the water that pools west of the mound.

64. Water that would have flowed onto Lot 9 from the Eastern Pond Culvert will flow directly to the Bay via the culvert extension. The extension will also protect the Drainage Easement and Lot 8 from water that would have flowed from the Eastern Pond Culvert onto that property. But there is a significant difference between stormwater to the west of the extension and to the east. To the extension's west, the Drainage Easement and Lot 8 will have to contend with stormwater from the Drainage Ditch Culvert, the culvert north of Alden Lane that does not convey stormwater from the pond but that like the Pond Culverts has a discharge point directed at the Drainage Easement.

65. How often and to what extent pooling of stormwater will occur west of the mound due to its presence is difficult to determine on the state of this record.<sup>11/</sup> No studies or analyses of the likelihood and severity of storm events and the volumes of stormwater runoff that would be produced by them were conducted by any of the stormwater engineers in the case nor were any such analyses done with regard to pooling caused by the presence of the covered culvert extension. The testimony of

Mr. Porterfield, however, and other evidence, demonstrates that that additional collection of water west of the mound caused by the mound will occur following heavy rain.

66. Mr. Street was present in the hearing room throughout the entire hearing, including during the presentation of Mr. Sheehey's case. As Mr. Street candidly testified on rebuttal after he had heard all the evidence:

I would also maintain that the drainage easement which has signs of a historical usage as a drainage easement with a trench, in fact, that conveys water safely to the bay, that should be re-established and maintained. That's what it's there for."

Tr. Vol III at 181 (emphasis added.)

67. Thus, it became clear to Mr. Street after listening to all the evidence in the case that the Drainage Easement has not been properly maintained. The trench that was expected to carry stormwater toward the Bay no longer exists.

68. In short, the testimony of Mr. Street, for all his many strengths as a witness, falls short of supporting the position of the Department and Mr. Chbat. Having never visited the site,<sup>12/</sup> he approved the project on the basis of drawings that do not conform to the on-site physical reality. When presented with the evidence at hearing that the Drainage Easement is not functioning, he championed re-establishment and maintenance of the Drainage Easement.

69. Mr. Chbat placed part of the Swale's functionality problem on the tide pushing stormwater northward but his case also recognized the maintenance problem caused by deposition of sand that besets the Swale. Mr. Thomason, moreover, recognized that the Drainage Easement has the same maintenance issue.

Mr. Chbat's stormwater engineer testified

During storm events or just normal wave action in the bay, sand is brought back up on to. . . the sandy area at the end of [Chbat's] lot next to the water. And so that . . . tends to inhibit the natural flow down the swale . . . we have the same problem on the drainage easement . . . where sand builds up in that discharge.

Tr. Vol. I at 62 (emphasis added).

70. From this record, it is clear that neither the Swale nor the Drainage Easement functions properly. Their functional status, moreover, is due in significant part to lack of maintenance. It may be that maintenance ultimately will not solve the problem; maintenance efforts to keep the Swale and Drainage Easement clear of the sand deposited by tidal activity may require too much effort for them to be reasonably required. But that evidence was not produced. Indeed, the record was silent as to any maintenance efforts with regard to the Swale by Mr. Chbat or with regard to the Drainage Easement by the owner of the easement.

71. The record is also silent as to whether DEP voiced any concern about the maintenance issues that beset the Swale. It is clear that concern was not raised by the Department in regard to the Drainage Easement until the rebuttal phase of the hearing, since the assumption was made that the easement was properly maintained.

72. Whatever communication may have occurred with regard to maintenance issues among the parties, the Department issued the Amended Permit.<sup>13/</sup>

73. The Permit/Authorization Number for the Amended Permit is 66-235320-002-DF.<sup>14/</sup> Issued December 19, 2008, the Amended Permit has an expiration date of December 19, 2013. The expiration date coincides with the construction phase of five years on the face of the Amended Permit. See Chbat Ex. 4. Mr. Sheehey Challenges the Amended Permit

74. On January 6, 2009, Mr. Sheehey, pro se, filed with DEP a petition (the "Petition") seeking a formal administrative hearing with regard to "Amended Wetland Resource Permit 66-00235320-002-DF."

75. Although the Petition makes reference to the Amended Permit, it seeks in the first instance enforcement of the Settlement Agreement that relates to the Final Original Permit. The Petition states: "Petitioner believes that the Florida Department of Environmental Protection has jurisdiction over

this matter and should enforce the March 20, 2007 Settlement Agreement which requires that Permittee act in conformance with Exhibit 'A' of the Agreement [the drawing of the Swale]."

76. In the event that DEP declined to enforce the Settlement Agreement, the Petition sets out disputed issues of material fact that relate to issuance of the Amended Permit.

77. The Petition was referred to DOAH on February 19, 2009. One week before the final hearing, the Department filed the motion in limine that is discussed in the Preliminary Statement of this Recommended Order. The motion was granted to the extent that it sought to preclude Sheehey from introducing evidence that supported enforcement of the Settlement Agreement since the 2008 Application, which, while bearing similarity to the 2004 Application, is nonetheless an independent application that should be approved or denied on its own merits without regard to the 2004 Application, the Proposed Original Permit, the Settlement Agreement or the Final Original Permit.

78. The case proceeded to hearing on the remaining issues raised by the Petition: 1) whether Sheehey has standing to contest approval of the 2008 Application; 2) whether Chbat gave the notice required by Section 373.413, Florida Statutes, and 3) whether Chbat's application meets the criteria in statutes and rules for issuance of the Amended Permit.

### Standing

79. The findings of fact relevant to Mr. Sheehey's standing are found in paragraph 9, above.

### Notice

80. Notice of the 2008 Application was published in The Defuniak Springs Herald-Breeze, a newspaper published in Defuniak Springs, Walton County, Florida. The notice was published on October 23, 2008.

81. The evidence presented by Mr. Sheehey concerning lack of legal notice consisted of testimony by Mr. Sheehey at hearing in response to questions from his counsel. See Tr. Vol. III at 134.

82. The testimony does not establish that Mr. Sheehey was a person who had filed a written request for notification of any pending application affecting his particular area. The testimony of Mr. Sheehey, moreover, establishes that he was given oral notice of the application by Mr. O'Donnell within four days of its filing.

### WRP Permitting Criteria

83. To obtain a WRP, an applicant must satisfy the criteria in Florida Administrative Code Chapter 62-312 and Section 373.414, Florida Statutes. These criteria govern a range of topics including water quality.

## Water Quality<sup>15/</sup>

84. Florida Administrative Code Rule 62-312.080 provides that no permit shall be issued unless the Department has been supplied with reasonable assurances that the proposed work will not violate water quality standards.

85. Water that enters the pond spends some amount of time in the pond (residence time) before flowing out. During residence time, solids drop out of the water so that the quality of the stormwater that flows out of the pond is reasonably expected to be better than the quality of the stormwater runoff when it entered the pond. Vegetation surrounding the pond, furthermore, enhances the quality of the water in the pond, whether the water's source is runoff or rain falling directly into the pond.

86. The water that flows out of the pond north of Alden Lane is "existing discharge." Tr. Vol. I at 65. It generally made its way to the Bay prior to the Swale. Some of it makes its way to the Bay via the Swale now; some of it outside the Swale as overflow. The culvert extension will convey that discharge to the Bay if the extension is installed. The quality of the water is not significantly less when it discharges to the Bay via the Swale or otherwise from the Chbat property than when it would enter the culvert extension should it be installed.



87. It is true that the Swale would have provided filtration and additional treatment to the discharge from the Eastern Pond Culvert as does the Chbat property in general. But that does not mean that the quality of the culvert's discharge is a concern. The Swale may have been an option preferable to the extension of the culvert as far as water quality goes but all parties agree that the Swale has failed as a conveyance (albeit Mr. Sheehey maintains that the Swale would work with proper maintenance.) That there is a discharge method that improves the quality of the discharge, such as a swale, does not mean that the discharge to the Bay via the culvert extension is of insufficient quality.

88. None of the parties tested the quality of the discharge from the Eastern Pond Culvert. The Department, nonetheless, offered evidence with regard to its quality.

89. The Department concluded that the quality of the pond and its discharge were not of concern. Had the pond been contaminated to an extent that would have given rise to concerns, moreover, the Swale or the culvert extension as a means of conveying the discharge to the Bay would not have made a "discernible difference." Tr. Vol. II at 80.

90. The Department provided evidence of assumptions made with regard to the quality of the water that led the Department to conclude that testing of the discharge was unnecessary.

Mr. O'Donnell, the Department's expert in the application of state rules and statutes in wetland resource permitting, detailed the assumptions at hearing:

My assumption was that that pond was dug some time in the past as a way to provide fill for roads. That it was never any part of . . . [a] stormwater treatment system. And that it conveyed upstream water through the pond and then on down into Choctawhatchee Bay. It was strictly a [borrow pit and a conveyance pond.] It was never permitted as a treatment system in any way that I was aware of in my diligence [in determining whether the extension should be permitted.]

Tr. Vol. II at 79. Once Mr. O'Donnell's testimony entered the record at the behest of Mr. Chbat, the burden shifted to Mr. Sheehey to prove that the applicant had not provided reasonable assurance of water quality. Mr. Sheehey did not offer evidence of any testing of the discharge. Nor did he offer testimony that rebutted Mr. O'Donnell's opinion. In fact, the testimony of Mr. Wilkinson (Mr. Sheehey's witness) supported Mr. O'Donnell's opinion with regard to water quality. See Tr. Vol. III at 112.

91. In sum, the Department made assumptions that are found to be reasonable based on Mr. O'Donnell's expertise and experience. Those assumptions were not shown to be unreasonable by Mr. Sheehey. The Department's conclusions about water

quality flow directly from Mr. O'Donnell's reasonable assumptions.

92. Reasonable assurances have been provided that the project will not violate water quality standards.

#### Public Interest Test

93. Choctawhatchee Bay is not designated as an "outstanding Florida water." The test that Mr. Chbat must meet therefore is whether the activity proposed by the permit application is "not contrary to the public interest." § 373.414, Fla. Stat.

94. In making that determination, the Department is directed by the statute to consider and balance seven criteria. See § 373.414(a) 1-7, Fla. Stat. Of the seven, three are at issue once water quality is determined to be of no concern.

95. Two of the three, "[w]hether the activity will be of a temporary or permanent nature," Section 373.414(1)(a)5., Florida Statutes, and "[t]he current condition and relative value of functions being performed by areas affected by the proposed activity," Section 373.414(1)(a)7., Florida Statutes, do not require in-depth consideration.

96. With regard to the nature of the project time-wise, the evidence establishes that the culvert extension is intended to be permanent.

97. With regard to current condition, the area affected by the proposed activity is a residential lot, a substantial portion of which is under water following heavy rain. To facilitate the conveyance of stormwater, the lot is served by the Swale. The Swale is not functioning optimally because of lack of maintenance and because of the Ridge. With regard to relative value from the standpoint of water quality, the function being performed by the lot and the Swale is little, at least as established by this record. While it is certainly true that the lot with or without the Swale will filtrate and otherwise treat stormwater runoff from the pond, the difference in the quality of the stormwater conveyed by the culvert extension from that which would enter the Bay without the extension is not significant. See the discussion above of Mr. O'Donnell's accepted opinions.

98. Of the seven statutory criteria to be weighed and balanced by the Department, the one that is central to this case is found in subparagraph 1., of subsection (1)(a): "[w]hether the [culvert extension] will adversely affect . . . the property of others." The "property of others" in this case is the property of Mr. Sheehey.

The Project's Effect on the Property of Mr. Sheehey.

99. For the reasons discussed in paragraphs 63-70, above, Mr. Chbat has failed to provide reasonable assurances that the

project will not have a detrimental effect on the property of Mr. Sheehey.

100. The extent of the detrimental effect to Mr. Sheehey's property is difficult to determine from this record but it is highly likely based on all the evidence of record that there will be a detrimental effect: additional flooding in heavy rain events.

#### CONCLUSIONS OF LAW

101. The Division of Administrative Hearings has jurisdiction over the subject matter of and the parties to this proceeding. §§ 120.569 and 120.57(1), Fla. Stat.

#### Standing

102. Mr. Sheehey has standing to contest the issuance of the Amended Permit.

#### Notice

103. The notice requirement in Section 373.413, Florida Statutes, is not applicable in this case.

104. Mr. Sheehey presented no evidence that he was a person who had filed a written request for notification of any application in his area pending with DEP. There is no question that he actively sought notice from DEP about applications with regard to Lot 9, but it was done by telephone and visits to the DEP office.

105. During one of those visits, the Department gave Mr. Sheehey notice of the 2008 Application. Furthermore, notice was published in a local newspaper. Such notice was not shown by Mr. Sheehey to be untimely.

Burden of Proof as to the WRP

106. As the applicant for the WRP, Mr. Chbat has the burden of showing affirmative entitlement to its issuance. Dep't of Transp. v. J.W.C. Co., 396 So. 2d 778, 789 (Fla. 1st DCA 1981). In the context of this case, Chbat must provide reasonable assurances that applicable statutory and rule conditions support the issuance of the WRP.

107. If Mr. Chbat makes a prima facie case, the burden shifts to Mr. Sheehey to present evidence of equivalent quality that reasonable assurances have not been made. See J.W.C., 396 So. 2d at 789. Mere speculation about what might occur, does not satisfy Mr. Sheehey's burden of presenting evidence contrary to Chbat's prima facie case. See, e.g., Chipola Basin Protective Group, Inc. v. Dep't of Env'tl. Reg., Case No. 88-3355 (DER Dec. 30, 1988).

108. "Reasonable assurances" means "a substantial likelihood that the project will be successfully implemented." See Metro. Dade County v. Coscan Fla., Inc., 609 So. 2d 644, 648 (Fla. 3d DCA 1992).

109. An applicant must provide reasonable assurances that take into account contingencies that might reasonably be expected. But an applicant is not required to eliminate all contrary possibilities, however remote, or to address impacts that are only theoretical and not reasonably likely. Hoffert v. St. Joe Paper Co., Case Nos. 89-5053 and 89-6381, (DOAH Oct. 26, 1990; DER Dec. 6, 1990); Alafia River Basin Stewardship Council, Inc. v. S.W. Fla. Water Mgmt. Dist., Case No. 98-4925 (DOAH July 2, 1999; SWFWMD July 27, 1999).

110. Competent, substantial evidence based on detailed site plans and engineering studies, coupled with credible expert engineering testimony, is a sufficient basis for a finding of reasonable assurances. See Hamilton County Board of County Commissioners v. Dep't of Env'tl. Prot., 587 So. 2d 1378 (Fla. 1st DCA 1991). But such evidence is subject to rebuttal by expert engineering testimony based on material differences between site plans and personally-observed physical reality.

Deference to Agency Interpretation

111. The interpretation of an agency of its own rules and of statutes the agency is required to implement is entitled to deference. Such interpretations are not to be disregarded unless clearly erroneous. Sullivan v. Fla. Dep't of Env'tl. Prot., 890 So. 2d 417 (Fla. 1st DCA 2004); Bd. Of Podiatric Med. v. Fla. Med. Ass'n., 779 So. 2d 658, (Fla. 1st DCA 2001).

## Wetland Resource Permit

112. Pursuant to Section 373.414, Florida Statutes, an applicant for a WRP is required to demonstrate that the proposed activities will not be harmful to water resources and will comply with applicable rules. This statutory section is implemented in DEP's Northwest District through Florida Administrative Code Chapter 62-312 and, in particular, through Florida Administrative Code Rule 62-312.080.

113. Chbat and the Department presented competent, substantial evidence<sup>16/</sup> demonstrating reasonable assurance that the proposed project will comply with the provisions of Florida Administrative Code Rule 62-312.080(1), that is, that the project will not violate state water quality standards.

114. Pursuant to Florida Administrative Code Rule 62-312.080(2) and Section 373.414(1), Florida Statutes, Mr. Chbat is required to demonstrate reasonable assurances that the proposed project is not contrary to the public interest based on a balancing of the seven factors listed in Section 373.414(1)(a), Florida Statutes.

115. Mr. Chbat has failed to show the project is not contrary to the public interest because of the effect the project is likely to have on Mr. Sheehey's property.



116. Mr. Sheehey demonstrated through Mr. Porterfield's testimony that in heavy rains Lot 8 is likely to suffer greater flooding because of Mr. Chbat's project.

117. Mr. Porterfield's testimony was countered by Mr. Thomason's testimony. In a case like this, it would not be unusual to look to the testimony of DEP's storm water engineer to "break the tie" between testimony given by the stormwater engineer of the applicant and the stormwater engineer of the applicant's opponent.

118. In testifying for DEP, Mr. Street was accepted as an expert in storm water engineering. The credentials that entitled him to that expertise were beyond challenge both from the standpoint of his education and his experience. His demeanor on the stand was forthright. From the substance of his testimony and his demeanor, he is found to be an expert whose testimony is credible and whose opinions are entitled to great weight. But there was a shift in Mr. Street's position between when he testified in the case-in-chief for the Department, based on his review of the drawings submitted by Mr. Chbat, and when he testified on rebuttal after he had heard all of the evidence in the case. Mr. Street moved from a position of "the Drainage Easement will protect Mr. Sheehey's property," to "the trench in the Drainage Easement needs to be re-established and the easement maintained" in order to protect Mr. Sheehey's property.

119. In the final analysis, Mr. Street's testimony on rebuttal supports the position of Mr. Sheehey that the mounded culvert extension will cause build up and impoundment of water on Lot 8 that would ordinarily move off the lot.

RECOMMENDATION

Based on the foregoing, it is recommended that the Department of Environmental Protection deny<sup>17/</sup> the Amended Permit for the failure of Mr. Chbat to provide reasonable assurances that the project will not adversely affect Mr. Sheehey's property.

DONE AND ENTERED this 14th day of January, 2010, in Tallahassee, Leon County, Florida.



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DAVID M. MALONEY  
Administrative Law Judge  
Division of Administrative Hearings  
The DeSoto Building  
1230 Apalachee Parkway  
Tallahassee, Florida 32399-3060  
(850) 488-9675  
Fax Filing (850) 921-6847  
www.doah.state.fl.us

Filed with the Clerk of the  
Division of Administrative Hearings  
this 14th day of January, 2010.

ENDNOTES

<sup>1/</sup> Mr. Cummins was not tendered as an expert of any kind. As would be expected, Mr. Wharton, Chbat's counsel, objected to the question about water overflow from the pond: "I think that calls for an opinion. Is it possible to know where the water

spreads. It's not even a question of his personal observation." Tr. Vol. III at 8. The objection was over-ruled with the statement from the administrative law judge, "you can ask if the witness has observed the water and to describe it." Id. The witness' testimony was based on long-time personal observation. It is, moreover, of a quality that clears the threshold for the admission of evidence in an administrative proceeding in which the substantial interests of a party are determined by an agency: "Irrelevant, immaterial, or unduly repetitious evidence shall be excluded, but all other evidence of a type commonly relied upon by reasonably prudent persons in the conduct of their affairs shall be admissible, whether or not such evidence would be admissible in a trial in the courts of Florida."

§ 120.569(1)(g), Fla. Stat. (emphasis added.) The testimony from Mr. Cummins demonstrates that his observations and the inferences he drew from those observations are of a type allowed to be of record by the Administrative Procedure Act.

Furthermore, the conduct of the witness and his demeanor during the hearing were such that his testimony was not only accepted as truthful as far as what the witness had observed, but supported by experience with regard to the conclusion reached. That conclusion is that at times of sufficient rain or during "wet periods," water from the pond flows past or under Alden Lane onto Mr. Chbat's property toward the bay and then across Lot 9, the Easement, and Lot's 8, 7, and 6 and in the wettest time onto Lot 5, the lot owned by Mr. Cummins.

2/ The morning of the second day of hearing, after considerable rainfall over Walton County experienced by all participants the day before, the water on Mr. Cummins' lot was at eight inches above the soil.

3/ Although referred to colloquially by residents as "our upland," the evidence-of-record establishes that the Ridge is within DEP's jurisdictional wetlands.

<sup>4/</sup> Mr. Street's use of the word "unnatural" to describe the east-west flow is taken to mean that it is contrary to the otherwise natural north-to-south flow of water across the surface of Lot 9, the Easement and Lot 8.

<sup>5/</sup> Petitioner's Ex. 7A with 7B and 7C comprise a composite exhibit: Petitioner's Ex. 7.

<sup>6/</sup> The photograph of the pond does little to add to the Findings of Fact in this order.

<sup>7/</sup> The pipe originally proposed by the 2004 Application is substantially similar to what is referred to in this proceeding as the extension of the culvert.

<sup>8/</sup> Mr. Thomason's testimony with regard to the deposition of sand at the end of the Swale close to the Bay, see tr. vol. I at 74, e.g., where he refers to it as "deposition of sediment" is similar to Mr. Street's testimony that one of the natural causes of the Ridge is deposition of sand. The Swale, moreover, receives sediment carried by stormwater as well as sand deposited through tidal influences.

<sup>9/</sup> Exhibit Number 1 to the Amended Permit is to be distinguished from Exhibit Number 2 to the Amended Permit. Exhibit Number 1 is entitled "PIPE EXTENSION PLAN." Exhibit Number 2 is entitled "MITIGATION PLAN; it continues to show a length of 150 feet. When the 2008 Application was amended to lengthen the pipe extension to a 177 feet only a "single revised page was submitted." Tr. Vol. I at 57. The MITIGATION PLAN was not revised to show the additional 27 feet because the mitigation proposed remained the same.

<sup>10/</sup> The assumption is at odds with the Department's acceptance that the Swale did not function as planned. A large part of the Swale's lack of functionality is due to deposition of sediment which could be overcome by maintenance. One would expect that deposition of sand in the Drainage Easement would occur for the same reasons as it occurs in the Swale, which is borne out by the evidence in this case.

<sup>11/</sup> Mr. Street elaborated on some of the factors that would have to be considered to conduct such an analysis. See Tr. Vol. II at 115.

<sup>12/</sup> Department personnel did visit the site at some point after the 2004 Application was filed.

<sup>13/</sup> It is not clear from the record why the permit issued in response to the 2008 Application is denominated as "amended." Perhaps, an amended permit was issued because of the revision to the Pipe Extension Plan drawing now attached to the Amended Permit as Exhibit 1 that added an additional 27 feet to the extension of the culvert. Or perhaps the permit is denominated "amended" to communicate that it is an amendment to the permit issued following the 2004 Application. If so, it is a misnomer. The 2008 Application drawings of the work, while similar to the what was permitted by the Proposed Original Permit, is a new

application independent of the 2004 Application, the Proposed Original Permit and the Final Original Permit.

<sup>14/</sup> The permit/authorization Number for the Amended Permit is one digit different from number assigned to the Original Permit file.

<sup>15/</sup> Water quality, however, is not a real issue to any party in the case. There have been no "water quality" violations raised by the Department with regard to the quality of the pond or its discharge. The record is devoid of any attempt made by any resident of La Grange Estates, including Mr. Sheehey, to improve the quality of the discharge from the pond even after residents noticed the red tinge of the discharge following the county's use of red clay to improve the roads in the subdivision. The project was not designed by Mr. Chbat's stormwater engineer to address water quality issues. Mr. Sheehey's real issue is one of water quantity: whether the volume of water on his property will be increased by the installation of the culvert extension.

<sup>16/</sup> The evidence which consisted of the testimony of Mr. Thomason and Mr O'Donnell was competent but thin. It is regarded as substantial enough, however, to shift the burden to Mr. Sheehey to show the project's violation of state water quality standards. Mr. Sheehey failed to carry that burden.

<sup>17/</sup> Although the recommendation in this order is to deny the Amended Permit, the record of this proceeding reveals ways of reaching an outcome satisfactory to all parties. The aspirations of the parties in this case are not in conflict. Mr. Chbat wants to be able to build a residence on his lot and have the lot be habitable from the stand-point of water on the lot. Mr. Sheehey does not oppose Mr. Chbat's interest in building a home on Lot 9. He wants simply to protect his lot from additional flooding beyond what it experiences now as the result of the overflow of stormwater from a borrow pit that should drain to the Bay via the Drainage Easement but does not. The Department is willing to issue permits sought by Mr. Chbat so long as the wetlands and the Bay are protected. Likewise, the Department has no intent to exacerbate the flooding on Mr. Sheehey's property.

A potential solution is modification of the Amended Permit following a site visit by DEP's stormwater engineer. During such a visit, Mr. Street should double-check his determination that a culvert extension of 177 feet in length will allow outfall bayward of the Ridge. He should determine whether the

"trench" in the Drainage Easement can be re-established. The Department should consider whether and to what to what extent the Drainage Easement can be maintained. (Presumably an association of which both Mr. Chbat and Mr. Sheehey are members is the owner of the Drainage Easement.) Furthermore, the Department should consider allowing cuts in the Ridge at appropriate places to facilitate drainage from Lots 8 and 9 and the Drainage Easement so long as drainage through the cuts will not damage jurisdictional wetlands or the Bay.

COPIES FURNISHED:

Frederick L. Aschauer, Jr., Esquire  
Rose, Sundstrom & Bentley, LLP  
2548 Blainstone Pines Drive  
Tallahassee, Florida 32301

Amanda Gayle Bush, Esquire  
Department of Environmental Protection  
Office of the General Counsel  
3900 Commonwealth Boulevard, Mail Stop 35  
Tallahassee, Florida 32399-3000

David Michael Chesser, Esquire  
Chesser & Barr, P.A.  
1201 Eglin Parkway  
Shalimar, Florida 32579

Thomas L. Sheehey  
87 Alden Lane  
Freeport, Florida 32439

Michael W. Sole, Secretary  
Department of Environmental Protection  
Douglas Building  
3900 Commonwealth Boulevard  
Tallahassee, Florida 32399-3000

Tom Beason, General Counsel  
Department of Environmental Protection  
Douglas Building, Mail Station 35  
3900 Commonwealth Boulevard  
Tallahassee, Florida 32399-3000

Lea Crandall, Agency Clerk  
Department of Environmental Protection  
Douglas Building, Mail Station 35  
3900 Commonwealth Boulevard  
Tallahassee, Florida 32399-3000

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.