

engineering for which he was qualified by education and experience. (BE #1, 7). Respondent filed a response to the Complaint on September 12, 2014. ¹ (BE #11). On December 3, 2014, the Board notified Respondent that the investigation of the Complaint had been put on hold pending the outcome of civil litigation involving the same issues raised in the Complaint. (RE #1, 3). On May 27, 2015, the Board's Investigative Committee concluded that the matter would be presented to the Board on September 24, 2015, with a recommendation that the investigation be closed and a letter of private reprimand be issued to Respondent. Respondent was not notified of the Board's intended action or the placement of the matter on the Board's agenda. The Board accepted the recommendation of the Investigative Committee, and Respondent was notified of same in correspondence from the Board, which stated further that the reprimand was confidential and not of public record. The letter of notification/reprimand was not provided for the record. (Tr. at 3134).

3. On November 3, 2015, Respondent asked the Board to reconsider the closure of his case and remove the private letter of reprimand from his file; the request was denied by the Investigative Committee because no formal action had been taken and the reprimand did not appear in Respondent's public file. (Tr. at 35-37, 44-45); (BE #3). Respondent appealed that decision to Montgomery County Circuit Court; Judge Eugene Reese remanded Respondent's request back for consideration by the entire Board. On March 31, 2016, the Board determined that it would reopen the Complaint and set the matter for hearing. (Tr. at 35-36, 45-46); (BE #3).

4. By Notice dated April 21, 2016, Respondent was notified via Certified and First Class Mail of the date and time of a public hearing to be held concerning his alleged violations of ALA. CODE § 34-11-11(a)(2) (1975 as amended) and ALA. ADMIN. CODE r. 330-X-14-.03(a) — precluding an engineer from undertaking any engineering assignment for which the

¹ On August 27, 2014, the Board's Assistant Executive Director, William R. Huett, notified Mr. Johnson and Respondent of receipt of the Complaint and requested that Respondent provide copies of any documents relative to "your construction on city of Daphne, Alabama property adjacent to your property at 1317 Lovette Lane, Daphne, Alabama," by September 15, 2014. (BE #1, 2).

engineer is not qualified by education or experience to perform or to carry out adequately and competently — and 330-X-14-.06(a)1., which were specified in detail in the Board's Charges accompanying the Notice. (BE #3, 4). The Board's Charges were signed by its Executive Director on April 21, 2016, and contained a single charge of practicing engineering in a field outside Respondent's area of expertise "when he planned, designed, and supervised construction of the alteration and modification of approximately sixty feet of the stream bed at the bottom of a historic gully known as the Old Daphne Wharf Right of Way, and described by the Army Corp of Engineers as Section 41, Township 5 South, Range 2 East, off Lovette Lane, Daphne, Baldwin County Alabama owned by the City of Daphne, Alabama, without permission from the city, thereby placing the City in violation of Section 404 of the Clean Water Act." (BE #4).

5. The Notice and Board's Charges complied in all respects with the requirements of ALA. CODE § 41-22-12 (1975 as amended) and ALA. ADMIN. CODE r. 330X-16-.03 (2015) and sufficiently apprised Respondent of the nature of the charges against him and of the date, time and place of the hearing.²

6. The Board solicited testimony from the following individuals at the hearing: Assistant Executive Director and Chief Investigator William R. Huett; Executive Director Regina Dinger; Board Investigator Kevin Putnam; Complainant Richard Johnson, Director of Public Works for the City of Daphne, Alabama; and Ashley Campbell, Environmental Programs Manager for the City of Daphne, Alabama. The Board offered sixteen exhibits at the hearing, which were admitted into evidence without objection.

² During the hearing, Board counsel contended that Respondent was also charged with violation of ALA. ADMIN. CODE r. 330-X-14-.06(a)5., "engag[ing] in any conduct that discredits or tends to discredit the profession of engineering or land surveying." (Tr. 67-70). However, this charge was not included in the Notice and Charges issued to Respondent (BE #4), as required by ALA. CODE SS 34-11-11 (e) and 41-2212(b) (1975 as amended), and ALA. ADMIN. CODE r. 330-X-16-.03(3) (2015). The undersigned thus makes no finding with regard to said charge.

7. Respondent was represented by counsel at the hearing and provided testimony regarding the allegations against him. Respondent offered eight exhibits for the record, which were also admitted, subject to the Board's objection to RE #7.

8. Mr. Huett testified regarding the procedural history of the case and the administrative process at the Board office. Once a Complaint is received by the Board, he is responsible to notify the complainant and respondent of receipt, and he assigns the investigation to the Board's Investigative Committee and to the Board's Investigator. (Tr. at 24-37); (BE #1, 2). Ms. Dinger testified further regarding the case's procedural history and the issuance of the Board's Charges and the April 21, 2016 Notice to Respondent informing him of the date, time and place for the hearing. (Tr. at 38-71); (BE #3, 4).

9. Mr. Putnam summarized his interviews with Mr. Johnson, Ms. Campbell and Respondent pursuant to his investigation of the Complaint, the documents he assimilated during the course of the investigation and his Investigative Report. (BE #5, 6; RE #2). In particular, Mr. Putnam testified that Respondent owned a home on Lovette Lane in Daphne, Alabama, which lot abuts Mobile Bay to the west and the Old Daphne Wharf right-of-way — a designated, federally protected wetland owned by the City of Daphne (the "City") — to the north. At the time Respondent built his home in 1991, the right-of-way was comprised of a natural gully with a stream bed. As a result of severe flooding that occurred in south Alabama on April 29, 2014, the City received numerous calls for assistance, including a number of calls from Respondent, who told Ms. Campbell that several trees located in the City's right-of-way had been undermined by the flooding and were leaning over or touching his house. Respondent wanted the City to come and remove the trees. When Ms. Campbell viewed the property, she was unable to definitively determine the property's boundary lines and could not, therefore, expend public monies for the tree removal absent an accurate survey. Mr. Putnam reported that Respondent said he was instructed by Ms. Campbell to "do whatever was needed to do to protect his home," and Respondent removed the trees at his own expense on or about May 4, 2014, two days prior to another large rain event. (Tr. At 82).

10. When Respondent built his home, the plans included an 18-inch pipe that ran from an upstream point underneath the residence, channeling water into the gully. (Tr. at 81). In 2005, the City installed a large, 48-inch pipe that collected drainage from residents and several other points upstream and terminated at Respondent's property line. Respondent consulted with City officials at that time in order to determine the best way to avoid flooding of his property; the City took no remedial action, but reportedly promised to extend the pipe all the way to the bay at some future date. On January 2, 2006 and March 10, 2010, Respondent sent letters to the City informing them that his property would be overwhelmed during a significant weather event due to the enormity of the pipe terminating at his property, advised them of their liability and sought corrective action from the City. (BE #12, 13). In 2006, Respondent constructed a four to six foot swale/dam upstream of his property, in the City's right-of-way, using pipe and rip rap to reroute the stream at the bed of the right-of-way. (RE #2).

11. During his inspection of the property on May 22, 2014, Mr. Johnson observed vestiges of Respondent's 2006 construction, which were demolished by the April 29, 2014 storms. On July 10, 2014, the City observed that Respondent had laid an additional fifty to sixty feet of 30-inch pipe within the City's right-of-way during the first two weeks of June 2014, which he covered with fill dirt, vegetation, sand bags and fabric. (Tr. at 90). The City issued a Notice of Violation to Respondent on July 10, 2014, ordering him to cease and desist any further activity in the right-of-way absent a properly issued permit. (BE #9; B-2 in RE #2). On August 11, 2014, the United States Army Corp of Engineers (the "Corp") ordered the City to cease and desist any further activity in the federally protected area (BE #10; B-5 in RE #2); the City issued a further Notice of Violation to Respondent on August 19, 2014 (BE #12; B-7 in RE #2). Respondent never obtained the requisite permits from the City or the Corp prior to performing any of the above-described construction; Respondent advised that he knew he was operating within the City's right-of-way on each such occasion, but denied knowing that the gully was also designated as federally protected wetlands. (Tr. at 80).

12. Mr. Putnam testified that Respondent admitted to "planning, designing and supervising the implementation of the construction of all the modifications done" to the City's right-of-way, but stated that he was not acting as an engineer when he did so, acting solely as a homeowner attempting to defend his property. (Tr. at 83-84, 117); (RE #2). Mr. Putnam stated that Respondent further admitted that "he was a mechanical engineer by discipline and though he had some education in civil engineering he had done a little civil site work over the years with regards to home building or industrial building. He admitted that he did not consider himself qualified to perform civil engineering." (Tr. at 80).

13. Mr. Johnson has been a licensed civil engineer with the Board since 2009. He testified that he first learned of the City's right-of-way when he researched Respondent's claims that the undermined trees threatening his home were located in the right-of-way. He concluded from his observation of the property on May 22, 2014, that the vestiges of Respondent's construction in 2006 were the basis for the destruction he saw in the historical gully and communicated this to Respondent in a telephone call. He promised that once the property lines were located, he could tell Respondent what the City was able to do regarding removal of the trees. (Tr. at 12226, 189). He said that when Respondent informed him that he was an engineer, he reminded Respondent of his obligation to obtain the requisite permitting from the City and the Corp and asked him to do nothing further until the City could determine the boundary lines. (Tr. 127-28, 146-48); (BE B-2 in RE #2).

14. After observing Respondent's additional construction of June 2014 during his visit to Respondent's home on July 10, 2014, Mr. Johnson said he called the Board office to confirm Respondent's registered discipline in engineering. He spoke with Ms. Dinger, who asked him further about the nature of his inquiry and explained that he was obligated to report any possible violations of the Board's law or rules to the Board. Because he believed the work performed by Respondent required experience in civil engineering, and Respondent did not obtain the necessary permitting for the project, Mr. Johnson said he felt obligated to report these facts to the Board, and he filed the Complaint on August 27, 2014. (Tr. at 134-38, 152-

53, 157, 183, 185-86, 190); (BE #7). On October 9, 2014, Respondent added Mr. Johnson as a party to his lawsuit against the City, claiming that the Complaint was filed in retaliation for Respondent's claims against the City, "with the malicious intent to sully his professional career and deprive him of his ability to make a living by practicing his profession as an engineer." (Tr. at 150-52); (BE #15; B-19 to RE #2). Ms. Campbell made the decision to selfreport Respondent's construction in the right-of-way to the Corp. (Tr. at 138-42); (BE #10, 11).

15. On further examination, Mr. Johnson clarified that the swale/concrete retaining walls (both upstream and downstream) constructed by Respondent in 2006 were located on Respondent's property and were not the subject of his Complaint to the Board. (Tr. at 158-60); (BE #8). Mr. Johnson stated that the only damage to the historic gully occurred in the area where Respondent's house was located. The area above and below the retaining walls was "pristine." (Tr. at 170-71, 195). Mr. Johnson opined that there was no emergency threat to Respondent's property that justified his construction in the City right-of-way in June 2014; neither did he believe, with respect to the historic gully, that "a mechanical engineer is qualified by education or experience to make a determination as to what might be an emergency situation to his house." (Tr. at 194, 197). The 30-inch HTPV pipe Respondent installed in June 2014 is "inadequate according to the design criteria for the City of Daphne." The City is seeking a permit from the Corp to install a 48-inch pipe — even though the closed system is only required to meet the maximum capacity of a 25-year event, the City is responsible to determine what inputs would exist for a 100-year event, in order to protect private property. (Tr. at 205-06).

16. Ms. Campbell testified that she visited Respondent's home in May and June 2014, and then at least once monthly thereafter until recently. She was first asked to determine whether the City could remove the trees on Respondent's property following the April 2014 storms. She informed Respondent that the City could not take the trees down until it determined the property lines; further, it appeared that "the work that had been done in the gully contributed to the failure of the gully and the system." (Tr. at 212-13); (BE #16). Ms.

Campbell stated that the City does not regulate channels or wetlands, so it could not give Respondent permission to do construction in that area. (Tr. at 214-15). When she contacted the Corp, it had no record of permitting action in that area; likewise, the Corp had no record of a permit for the City to install the 48-inch pipe in 2005. (Tr. at 218, 222). The City is currently working with the Corp to determine what remedial action needs to occur in the right-of-way and to obtain a permit for such work. (Tr. at 219-20, 232, 241).

17. Ms. Campbell opined that even the construction work Respondent performed on his own property would require a permit from the Corp; however, the Corp has not issued a Notice of Violation to Respondent. (Tr. at 226-27). She confirmed that under Section 404 of the Clean Water Act, there is an exemption from permitting for emergency actions to protect property. (Tr. at 230).

18. Ms. Campbell testified that the damage to the gully begins where Respondent made his fabrications on the City's property. (Tr. at 243). In response to questions from the undersigned regarding the damage that occurred to the historical gully, Ms. Campbell testified as follows:

THE WITNESS: ... When the storm hit on April 29th the smaller pipe was in place that was put in in the '90s I believe when Mr. Fannon built his house. That damage occurred that day.

MR. RYAN: What damage?

THE WITNESS: The erosional damage at that area right by the pipe adjacent to the house on the north side of the house. The water appeared to overtop this area and scour out the northern bank and cause the trees to lean over on the house. That's associated with that storm. Then after that we had our frequent summer rains and there was damage to the pipe that was installed in June. And now that pipe is in the air and all the sediment that was around it has gone downstream into Mobile Bay. And my main focus for the City is water quality and environmental aspects. So that's why I'm involved now with the after -- we're getting a nationwide permit currently to restore the area or to stabilize it. I won't say restore it. We're going to stabilize it due to the threats and the right-of-way.

(Tr. at 245-46). She clarified further that the pipe Respondent installed in June 2014 created "wetlands and stream channel impacts." (Tr. at 248). She said that pipe began failing within several months of installation — the soil around it has eroded, and the pipe is "actually up." (Tr. at 249). Upstream of the modification, the gully is stable; downstream, the sediment impacts

are beginning to build. (Tr. at 251-52). The estimated cost of construction to repair the gully is \$170,000.00. (Tr. at 250).

19. Respondent testified that his experience as a mechanical engineer was in heating and air conditioning, including piping, plumbing and site drainage. (Tr. at 253). Respondent said he has never done any engineering design work, calculations or drawings concerning his property and his efforts to protect it. The installation of the 18-inch pipe and retaining walls was part of the site work done on his property prior to the construction of his home. Respondent deemed the swale to be a ditch, which he dug in 2006, after the City installed its 48-inch pipe, in an effort to reroute water that would not run through his existing pipe during a substantial weather event. (Tr. at 258-61). "It was a swale, right. And it was, you know, it was a nice one with timbers on both sides, double fabrics on the inside, and then some riprap during the flow to kind of slow it down a little bit." (Tr. at 260). Respondent stated that an enormous amount of debris came through the City's pipe, which he had to periodically remove in order to keep the pipe open. (Tr. at 261-62, 280-81). During the 2014 storm, Respondent's 18-inch pipe was clogged by a tree stump, and the water overwhelmed the swale, creating a huge swath 70 feet long, 15 feet wide and 15 feet deep, carrying an enormous amount of sand into the bay. (Tr. at 263-64).

20. Respondent stated that he never spoke to Mr. Johnson until July 2014, and he never again set foot on the City's right-of-way after receiving its cease and desist letter of July 10, 2014. (Tr. at 266-70, 273, 283-84); (BE B-2 in RE #2). He said the suggestion to install a 30-inch pipe in the right-of-way came from a landscaper working with him to help stabilize the area with sandbagging after the storm of April 29, 2014. (Tr. at 275-78). Respondent stated that "[p]utting the ditch in and putting the pipe in are not engineering design work. That's just you do the best you can do with what you have got and who you've got to work with.. (Tr. at 285).

There's just no way that I ever considered what I was doing engineering work. It was just simple homeowner work, things that any homeowner, any layman, anybody that ever even saw a pipe or saw a ditch or saw anything

would do the same thing like putting a pipe in under a driveway. It's the same thing as what I was trying to do. I was just trying to do some flow work, trying to protect the property that I had and to save really what was left of the uplands area so that it wouldn't just keep sloughing off and take my home foundation with me because if it continued it could get that way, it really was. You know, the pipe, you know, they said it was failure and all that sort of thing, but it lasted for a year during many rains.

(Tr. at 289-90).

21. Respondent testified that he has extensive experience in drainage site work, but none in civil engineering. (Tr. at 291). He said he never considered speaking with a civil engineer before making the modifications in the City right-of-way. (Tr. at 296). Respondent clarified that fifteen feet of the right-of-way washed out during the April 2014 storm, and his property is ten feet to the right-of-way. At one point, there are only three feet between his property and the erosion in the right-of-way. (Tr. at 297, 299). Respondent stated he knew he was in the City right-of-way when he installed the 30-inch pipe in June 2014 as an overflow pipe above the existing 18-inch pipe, but he considered it to be an emergency situation because another storm would come along and overwhelm his property again at some point in the future. (Tr. at 302-03).

22. With regard to Respondent's experience in civil engineering, the following interchange occurred with Board member Nathan Johnson:

BD. MEMBER JOHNSON: Nathan Johnson.

Mr. Fannon, you testified you worked I guess about 30 years as a general contractor?

THE WITNESS: A mechanical contractor.

BD. MEMBER JOHNSON: On lots of different projects?

THE WITNESS: Yes.

BD. MEMBER JOHNSON: And during that time I assume you saw rolls of drawings that probably -- for buildings which include architectural plans, civil plans, had civil engineer seals on them, electrical engineer seals on them; is that correct?

THE WITNESS: Yes, sir.

BD. MEMBER JOHNSON: so to say that you didn't know designing and sizing pipes was not civil engineering. You've at least seen it on plans I assume, ditches design that your firm or other projects you worked on where the construction had to be constructed to implement the designs of a civil engineer; is that correct? You have seen those plans?

THE WITNESS: Yes, sir. But in this occasion we determined that a 30-inch pipe was the largest one we could put in and get over the bed. We didn't size the pipe based upon flow. We sized it based upon the area that we had to work with and the amount of soil or sand that was still in the area...

BD. MEMBER JOHNSON: Okay. I think Mr. Albritton asked you a question, have you ever designed any pipe sizes or drainage. And your answer and I was -- you've done a lot of drainage work is what I gathered from your response, not that you've designed it, but you've constructed it; is that correct?

THE WITNESS: I have designed.

BD. MEMBER JOHNSON: You've designed it?

THE WITNESS: Yes. I guess that wasn't clear. But, yes, I've designed structures and drainage.

BD. MEMBER JOHNSON: And who was your supervising civil engineer that you worked for in that type of design?

THE WITNESS: Well, I didn't have a supervising civil engineer. But, you know, we had the calculations and the charts and how much you could have. It was work with a design build group. And we were doing the mechanical work.

BD. MEMBER JOHNSON: And you prepared plans based on those designs?

THE WITNESS: Well, there was a civil engineer involved. You know, we did the drainage off of the roof. He did the drainage in the parking lots. We, you know, bored pipes underneath the street and did all that for him and things. So we worked together. I mean, he wasn't a supervising civil engineer.

BD. MEMBER JOHNSON: so part of the problem here you're your misunderstanding that this was not a design, is that you have done this before?

THE WITNESS: I have been involved in it before, yes, sir.

BD. MEMBER JOHNSON: And designing drainage pipes, drainage ditches?

THE WITNESS: Correct.

BD. MEMBER JOHNSON: Erosion control?

THE WITNESS: No.

BD. MEMBER JOHNSON: No erosion control?

THE WITNESS: No.

BD. MEMBER JOHNSON: Have you obtained permits based on these plans?

THE WITNESS: Yes, sir.

BD. MEMBER CHRISTY: Frazier Christy.

On this, quote, civil work that you did, whose stamp is on those drawings?

THE WITNESS: Mine.

BD. MEMBER JOHNSON: As a mechanical engineer you were stamping civil drawings?

THE WITNESS: Well, it was a drainage from roof drains and from, you know, some area drains where our mechanical equipment was and those type of things.

BD. MEMBER CHRISTY: But not the parking. You weren't stamping the parking lot and the 24 inch and the 48 inch pipes you didn't design those?

JUDGE BILLINGSLEY: Let Mr. Christy finish his question and, Mr. Fannon, you may answer.

THE WITNESS: Excuse me.

BD. MEMBER CHRISTY: You're not designing the drainage of storm drainage system?

THE WITNESS: No. We would take our drains to a culvert.

BD. MEMBER CHRISTY: Civil engineer?

THE WITNESS: That's correct.

BD. MEMBER CHRISTY: You weren't stamping civil drawings? You were stamping plumbing drawings?

THE WITNESS: Plumbing drawings, right.

BD. MEMBER JOHNSON: What ditch did you design that was sitting in a building?

THE WITNESS: We did several hazardous material warehouses. And the hazardous materials all have special cast iron grates over them. And they have recess below them.

BD. MEMBER JOHNSON: Channels?

THE WITNESS: Channels, right. They're out of concrete, and we designed those.

BD. MEMBER JOHNSON: No further questions from me.

JUDGE BILLINGSLEY: Mr. Fannon, does plumbing come under the umbrella of a mechanical engineer?

THE WITNESS: Yes; yes, ma'am.

(Tr. at 306-11).

PROPOSED CONCLUSIONS OF LAW

1. The Alabama Legislature has created the Alabama Board of Licensure for Professional Engineers and Land Surveyors for the purpose of safeguarding life, health and property and promoting the public welfare with regard to the practice of engineering and land surveying within the state. ALA. CODE SS 34-11-2(b) and (c) (1975 as amended). The practice of engineering is itself defined as:

Any professional service or creative work, the adequate performance of which requires engineering education, training, and experience in the application of special knowledge of the mathematical, physical, and engineering sciences to such services or creative work as consultation, investigation, evaluation, planning, design and design coordination of engineering works and systems, planning the use of land and water, performing engineering surveys and studies, and the review of construction or other design products for the purpose of monitoring compliance with drawings and specifications; any of which embraces such services or work, either public or private, in connection with any utilities, structures, buildings, machines, equipment, processes, work systems, projects, and industrial or consumer products; equipment of a control, communications, computer, mechanical, electrical, hydraulic, pneumatic, or thermal nature, insofar as they involve safeguarding life, health, or property; and including other professional services necessary to the planning, progress, and completion of any engineering services.

ALA. CODE § 34-11-1 (7) (1975 as amended). ALA. CODE § 34-11-14 lists persons and acts exempt from this chapter. There is no exclusion for homeowners.

2. The term "supervision of construction," as it relates to the Board's Charges, is defined under its rules as "the general oversight of an engineering project as it relates to the implementation of a design during construction." ALA. ADMIN. CODE r. 330-X-2-.01(18); (BE #4).

3. The Board is empowered to reprimand, censure, fine or place on probation any licensed PE or to suspend, refuse to renew or revoke the certificate of any licensee for violation of the rules of professional conduct prescribed by the Board.

ALA. CODE § 34-11-11(a)(2) (1975 as amended). See also ALA. ADMIN. CODE r. 330-X14-.06(a)1. (2015). In particular, PES must act adequately and competently and use proper care in performing engineering services and may act only in fields in which they are qualified by education or experience. ALA. ADMIN. CODE r. 330-X-14-.03(a) (2015).

4. There is little information in the record regarding the differences between the disciplines of civil and mechanical engineering or whether the construction of a swale or the installation of pipe to divert water flow constitutes the practice of engineering. While those issues may be clear to the Board members who practice those disciplines on a daily basis and participated in the hearing, they are less clear to the undersigned, and neither the Board's rules nor its law provide guidance in this area. However, two things do appear clear — first, Respondent appears to maintain that because he did not calculate water flow or soil erosion for the historical gully or take paper and pen to create a formal "design" for the 30-inch pipe he installed in June 2014 in the City's right-of-way, he was not performing engineering, and engineering work — either mechanical or civil — was not required to install an overflow pipe. Second, he contends that he was operating solely as a homeowner protecting his property under an emergency threat of additional damage when he installed the pipe in June 2014, and was thus exempt from applicable municipal and federal permitting requirements. Accordingly, Respondent claims that he did not practice outside of his area of expertise in mechanical engineering in making the modifications in the City's right-of-way and violated none of the Board's rules of professional conduct.

5. The undersigned sympathizes with the frustration and fear Respondent felt when his pleas for remedial action from the City went unanswered following the installation of its 48-inch pipe in 2005 and when his property became threatened by undermined trees and erosion following the storms of April 29, 2014. However, no emergency was in play during the two

weeks in June 2014 when Respondent knowingly laid approximately forty to sixty feet of pipe in the City's right-of-way. ³ Merriam Webster defines an "emergency" as "a serious, unexpected, and often dangerous situation requiring immediate action." ["www.merriam-webster.com/dictionary/emergency"](http://www.merriam-webster.com/dictionary/emergency). By contrast, "imminent" means "happening very soon"; ready to take place. www.merriam-webster.com/dictionary/imminent. It may have felt like an emergency to Respondent when he determined to install the additional pipe, and I am certain the threat of additional storm damage was very real to him, but there was no emergency. Respondent himself testified simply that "Another storm would be coming along in no time at all ... [a]t some point in time ... [i]n the future." (Tr. at 303).

6. Further, Respondent laid between forty and sixty linear feet of 30-inch pipe in the right-of-way — the record varies on the exact length. It took him and his crew weeks to do it. It was a substantial project, requiring the use of a trackhoe upstream of Respondent's home. The crew then covered the installed pipe with fill dirt, vegetation, sandbags and fabric. (Tr. at 90, 133, 161). This was no weekend, homeowner's project using gardening equipment. Respondent testified:

A. No. We were trying to do best we could with what we had to work with. There was no way to get fill down into that area. It's a low area, probably 14, 15 feet below the road. When they put the four-foot diameter pipe in there it cut off any access to it coming up the stream. So we had to use what we had down in there and that was the sand. And the guy's name was Rick. He was right. We got the 30-inch diameter pipe in, had about 14 to 16 inches of cover over it and leveled it all out, put pine straw in, put bushes in, put some 200 Jasmine plants in. And within a couple of years it probably would have covered the entire area and stabilized it. Q. What was his name again?

A. Rick -- I can't remember his last name. I'm sorry.

Q. Did Rick the landscaper -- who came up with the size of the pipe?

A. It was kind of him because he was thinking, you know, looking at the amount of sand we had and amount we lost and how deep we could get the pipe, you know, with just a trackhoe. There's no way to get a backhoe down there, just a trackhoe and how much we could slough the sand of and have a place for spoils and then get the pipe in and cover in back and all that stuff. He came up with a 30-inch pipe.

(Tr. at 276-77).

³ Respondent testified that he did not know the gully was a designated federally protected wetland (Tr. at 80), but he always knew the location of the boundary lines in the right-of-way and knew that in June 2014, he was laying his pipe within the City's right-of-way (Tr. at 83, 88-89, 108, 299).

7. Both Mr. Johnson, a licensed civil engineer (Tr. at 119), and Ms. Campbell, a certified professional in erosion and sediment control, who routinely performs drainage inspections and stream restorations (Tr. at 233), testified regarding the failure of Respondent's additional construction in June 2014. In particular, Mr. Johnson testified that when he first viewed the construction, he opined that it was destined to "fail and fail badly" (Tr. at 134); Ms. Campbell testified that it began failing within a couple of months of installation (Tr. at 249). The reason for its failure may have been due precisely to Respondent's failure to perform the requisite calculations.

8. Respondent stated that he had done a little civil site work over the years regarding drainage system design (plumbing work) and industrial building, but he at no point represented that he was qualified to perform civil engineering. (Tr. at 80). Wikipedia defines mechanical engineering as "the discipline that applies the principles of engineering, physics, and materials science for the design, analysis, manufacturing, and maintenance of mechanical systems. It is the branch of engineering that involves the design, production, and operation of machinery." https://en.wikipedia.org/wiki/Mechanical_engineering. Civil engineering is defined as "a professional engineering discipline that deals with the design, construction, and maintenance of the physical and naturally built environment, including works like roads, bridges, canals, dams, and buildings." https://en.wikipedia.org/wiki/Civil_engineering. It is noted that overlap may occur between the disciplines. In addition, the Board's definition of the "practice of engineering" in ALA. CODE § 34-11-1 (7) (1975 as amended) includes "planning the use of land and water."

9. Respondent testified that he was "trying to do some flow work" (Tr. at 289) when he installed the 30-inch pipe, but "didn't size the pipe based on flow" (Tr. at 307). However, based on Respondent's previous experience with design build groups, Board member Nathan Johnson had difficulty comprehending that Respondent didn't recognize the designing and sizing of pipes as civil engineering (Tr. at 306) and that "part of the problem here is your misunderstanding that this is not design work" (Tr. at 309). Respondent may not have

"formalized" his design in the City right-of-way in 2014, but his intent was to divert the water flow, and the means he used to do so were much more sophisticated than those available to the average homeowner and should have required a consultation with a civil engineer and a permit.

10. The Board's regulations clearly state that it is a violation of the engineering Code of Ethics to engage in engineering fields in which the PE is not qualified by education or experience. ALA. ADMIN. CODE r. 330-X-14-.03(a) (2015). Any violation of the professional Code of Ethics also constitutes a violation of ALA. CODE § 34-11-11(a)(2) (1975 as amended) and ALA. ADMIN. CODE r. 330-X-14-.06(a)1. (2015). The reason is clear — licensees who act outside of the boundaries of their profession endanger the health, safety and welfare of the public, as set forth in ALA. CODE § 34-112(b) (1975 as amended):

In order to safeguard life, health, and property, and to promote the public welfare, the practice of engineering in this state is a learned profession to be practiced and regulated as such, and its practitioners in this state shall be held accountable to the state and members of the public by high professional standards in keeping with the ethics and practices of the other learned professions in this state. ...

CONCLUSION AND RECOMMENDATION

1. It is incumbent upon a licensee to be familiar with the requirements under Alabama law and the Board's own rules and regulations governing the practice of the profession of engineering. ALA. CODE § 34-11-1, et seq. (1975 as amended); ALA. ADMIN. CODE r. 330-X-1-.01 et seq. (2015).

2. As shown above, on the basis of the evidence of record and the testimony presented, it is hereby concluded that Respondent's conduct constitutes violations of ALA. CODE § 34-11-11 (1975 as amended) and ALA. ADMIN. CODE r. 330-X-1.03(a) and -.06(a)1. (2015), by engaging in engineering fields in which Respondent is not qualified by education or experience.

3. Accordingly, it is hereby recommended that Respondent pay a fine in the amount of Two Thousand Five Hundred Dollars (\$2,500.00) for these violations, in accordance with the

provisions of ALA. CODE § 34-11-11 (i) (1975 as amended) and ALA. ADMIN. CODE r. 330-X-16-.06(1) (2015), and that Respondent also pay the cost to the Board for these proceedings, in accordance with ALA. CODE § 34-11-11(m) (1975 as amended) and ALA. ADMIN. CODE r. 330-X-16-.06(1) (2015), within thirty (30) days of the date of a Final Order issued by the Board.

ORDER

The **BOARD**, after deliberation and review, agrees with and adopts as final the Findings of Facts, Conclusion of Law, and Conclusion proposed by Administrative Law Judge, Dana H. Billingsley. The Board finds the Respondent **GUILTY** of the allegations made against him and hereby **ORDERS** the following:

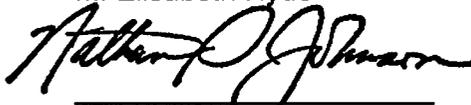
1. Respondent shall pay the Board a fine of \$2,500 (Two Thousand five hundred dollars) via a check or money order made payable to the PE/PLS Fund within thirty (30) days of the date of this Order.

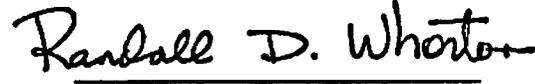
2. Respondent shall pay the Board \$6,478.75 (Six thousand four hundred seventy-eight dollars and seventy-five cents) for the cost of the hearing via a check or money order made payable to PE/PLS Fund within thirty (30) days of date of this Order.

ENTERED into on September 21, 2016

RECUSED
Marc S. Barter


A. Frazier Christy

M. Elisabeth Hyde

Nathan G. Johnson

Richard G. Grace

Randall D. Whorton