May 1, 2012

Vince Singleton
Technical Program Manager
St. Johns River Water Management District
4049 Reid Street
Palatka, Florida 32177

SUBJECT: 373.406(2) Binding Determination – Consolidated-Tomoka Land Company

Dear Mr. Singleton:

Per your request, enclosed please find our written report on the subject referral. In short, it is the Department’s opinion that the operation is engaged in production agriculture. However, all of the activities as detailed in the attached report do not, in our opinion, qualify for the exemption under subsection 373.406(2), Florida Statutes.

If you have any questions as you review the document, please feel free to contact me or Bill Bartnick at 850-617-1700.

Sincerely,

ADAM H. PUTNAM
COMMISSIONER

Richard J. Budell
Director

Enclosure

cc: Amelia A. Savage
Carol Forthman
Introduction:
Pursuant to Section 373.407, F.S., a water management district or landowner may request that the Florida Department of Agriculture and Consumer Services (FDACS) make a binding determination as to whether an existing or proposed agricultural activity qualifies for a permitting exemption under Section 373.406(2), F.S. However, in order for FDACS to conduct a binding determination, all of the following conditions must exist:

a. There must be a dispute between the landowner and the water management district as to the applicability of the exemption.

b. The activities in question must be on lands classified as agricultural by the county property appraiser pursuant to Section 193.461, F.S.

c. The activities in question have not been previously authorized by an environmental resource permit (ERP) or a management and storage of surface water (MSSW) permit issued pursuant to Part IV, Chapter 373, F.S., or by a dredge and fill permit issued pursuant to Chapter 403, F.S.

St. Johns River Water Management District (District) has requested that FDACS conduct a binding determination on Consolidated-Tomoka Land Company (CTLC), and the conditions described above are in place. Pursuant to this request, FDACS staff has performed a site inspection and evaluated District and CTLC provided documentation, and has rendered a conclusion. The basis for that conclusion is provided below.

Background:
The CTLC parcel is approximately 3,850 acres located in northeastern Volusia County, 8 miles west of Ormond Beach. It is located on the west side of Interstate 95, south of State Road 40 and north of LPGA Boulevard. It is in Sections 5-8, Township 15 South, Range 32 East; and, Sections 26, 27, 34-36, Township 14 South, Range 31 East. The parcel encompasses two named tracts that are separated by Priest Branch, which is a tributary of the Tomoka River. The tract north of Priest Branch is the “40 Tract”; and the tract south of Priest Branch is the “Priest Branch/LPGA Tract”.

Prior to the conversion of the property to hay production which began in 2006, most of the subject parcel was reportedly managed as timberlands. Based on historic aerial photographic interpretation and information provided by CTLC representatives, the property appeared to have been generally forested prior to conversion to hay production, with the exception of the larger wet prairie areas. The forested areas consisted of slash pine stands, cypress ponds/strands and mixed pine cypress stands,
in various stages of growth. Some forested areas were managed as natural stands and some pine stands were managed intensively as pine plantations. Both areas were subsequently harvested. According to the District, the wetlands consist of cypress stands, wet prairie, and mixed vegetative types. It should be noted that the CTLC parcel has no irrigation wells, thus it has no District issued Consumptive Use Permits.

On September 23, 2010, the District served CTLC with an Administrative Complaint and Proposed Order, alleging that CTLC constructed and operated a surface water management system without obtaining a District Environmental Resource Permit. In response, on October 7, 2010, CTLC filed a Request for Formal Administrative Hearing; and, on October 12, 2010, the District referred the case to the Division of Administrative Hearings. The case has been held in abeyance since that time. On February 1, 2012 the FDACS received a request for a binding determination from the District as to whether the wetland impacts cited by the District qualify for an agricultural exemption pursuant to Section 373.406(2) F.S. On February 14, 2012 the FDACS received additional information from Frank E. Matthews and Timothy M. Riley, attorneys with Hopping Green & Sams (HGS), the law firm representing CTLC. On February 15, 2012, District representative Vince Singleton confirmed via email that the drainage ditches on the subject parcel are not an issue, and as such, were not reviewed or evaluated in the context of this determination.

The subject of this determination, therefore, is the wetland impacts cited by the District and delineated on maps attached as Exhibits 1 and 2. The District alleges that CTLC either dredged or filled all or portions of these wetlands and that those activities require an ERP.

Site Inspection Findings:

On February 23, 2012 a site inspection was performed by Bill Bartnick and Vanessa Bessey with the FDACS, accompanied by Clay Benedict (CTLC), Amelia Savage (HGS), and engineering consultant Del Bottcher, P.E. As part of the investigation, digital photos were taken at various locations along with soil auger borings.

The Priest Branch/LPGA Tract (south area on District Map, Exhibit 1) was accessed from LPGA Boulevard, using the Florida Power and Light transmission line right-of-way as the main means of south to north travel. The tract consists of large expanses of coastal bermudagrass hay fields, spotty bahiagrass hay fields, interspersed cypress flats and strands, and some remaining planted slash pine areas, most of which were relegated to portions of the hay field perimeter. Hay production is now the predominant agricultural land use and there are no irrigation wells or irrigation system on-site. According to Clay Benedict, who was hired in 2005 to serve as the production manager for W. Hay LLC, a CTLC subsidiary, the hay is generally cut and baled 2 to 3 times per year, and was last cut in December of 2011. Hay baler and cutting equipment, an equipment storage barn, and a few net-wrapped round hay bales were all observed on-site. Hay fields, both north and south of Priest Branch were well vegetated, albeit dormant given the season, and had a few sparsely vegetative areas scattered throughout. Field grades, swales, and overland flow outlets into existing wetland areas
were observed and noted to be in conformance with Dr. Del Bottcher’s “Evaluation of Practices” report dated February 14, 2012.

As part of their submittal documentation, The District contends that CTLC imported fill while conducting laser-leveling activities to prepare the land for hay production. When asked about this, Clay Benedict said that no earthen fill was imported; however, felled immature trees and shrubs were mulched using grinders brought in by an outside contractor; and, subsequently land spread throughout upland areas during the 2006 period. To test this claim, a number of 10-inch soil cores were evaluated throughout the hay production areas, using a soil probe. FDACS staff noted no altered soil horizons, which would suggest artificial fill, nor did they see any evidence of incorporated mulch material. FDACS staff asked those in attendance about the rationale for laser leveling hay fields, given the absence of an irrigation system. Dr. Del Bottcher answered by stating that the majority of soils (Farmon Soil Type) on the CTLC parcel are poorly drained (Hydrologic Group D), and experience high water tables for many months during the year. Therefore, laser leveling was conducted in this instance to shed water, not to facilitate irrigation system function.

The inspection then moved on to the existing forested wetlands on this tract. FDACS staff asked those in attendance whether trees were harvested in these wetlands, during the time that silvicultural activities were conducted. The answer was no. This was corroborated after walking into many of the cypress ponds, strands and flats and seeing an absence of stumps. FDACS staff also asked if a wetland jurisdictional determination was done pursuant to Rule Chapter 62-340, F.A.C., before CTLC cleared the land for hay production. The answer was no; however, Clay Benedict stated that he instructed his workers to not operate land clearing equipment in forested wetland areas that had either cypress trees or bay trees as indicator species. It appears from the site inspection that CTLC workers abided by these instructions, as almost all of the remaining cypress ponds, strands and flats maintain their natural contour and shape.

Nearly all of the cypress ponds, strands and flats inspected in this tract showed signs of past fires and fire-related impacts, some dead cypress trees in the wetland core, and an assemblage of slash pines (average range 5 to 7” diameter at breast height) encroaching into the wetland area. Clay Benedict stated, when asked, that there had been no controlled burns conducted since 2005. Some of this “pine encroachment” was contained at wetland perimeters, while others showed encroachment right into the wetland core. All wetlands observed this day had no standing water, even though it rained 1/4” the day before. Very little cypress regeneration was noted in the wetlands.

Remnant Wetland No. 65 was selected for further investigation as representative of small isolated areas denoted by the district as wetlands, in order to determine whether or not wetland indicators were present, despite the fact that it is now a hay field. This area was also selected to investigate the District’s claim that fill material was imported to the site. FDACS used a soil auger at a location north of the east/west dirt road to ascertain soil conditions. A spodic (darker) horizon was encountered at approximately 2 feet, and the water table was encountered at around 4 feet. No apparent wetland indicators were noted. A second hole was dug in the adjacent cypress wetland to a depth of 3 feet. This was done to establish “reference” conditions in case significant soil
differences were noted. Soil mottling was encountered in the reference wetland, which is characteristic of wetland soils.

We then travelled north through Priest Branch to the “40 Tract” (north area on District map, Exhibit 2). Priest Branch had a slight flow (east) at the point where the FPL transmission lines crossed the creek. In general, there appeared to be less slash pine encroachment into the wetlands, as compared to the Priest Branch/LPGA Tract. Similar to what was done above, remnant Wetland No. 24 was selected for further investigation in this area to determine whether or not wetland indicators were present, despite the fact that it is now a hay field. Using a soil auger, soils exhibiting light orange, dark orange, and clay material were encountered to a depth of 4 feet (water table). FDACS was unable to determine whether these soil characteristics would meet hydric soil indicators in Rule Chapter 62-340, F.A.C.

The site visit wrapped up with a tour of the barn. A bedded slash pine plantation was noted near this area. The trees were estimated to be approximately 12 to 15 years old.

Application of Statutory Criteria:

Pursuant to Section 373.406(2), F.S., all of the following criteria must be met in order for the permitting exemption to apply.

(a) “Is the landowner engaged in the occupation of agriculture, silviculture, floriculture, or horticulture?”

**YES.** The FDACS finds that CTLC is engaged in the occupation of agriculture and has an agricultural tax classification on the subject parcel.

(b) “Are the alterations (or proposed alterations) to the topography of the land for purposes consistent with the normal and customary practice of such occupation in the area?”

The conclusions below on this item were reached with the assistance of Jeff Vowell and Roy Lima, of the Florida Forest Service. It should also be noted that subsequent to the aforementioned site inspection, CTLC produced a general ledger that showed income realized from timber sales which dated from 1990 through 1998. FDACS believes that this is a critical time period, given that the 1998 and 2008 wildfires seriously impacted parts of the CTLC property. This coupled with the fact that slash pine trees under 10 years of age are not merchantable and cannot tolerate intense wildfire followed by widespread, long-term drought conditions, lends credence to CTLC’s decision to clear-cut and/or push and mulch dead trees. Given the circumstances, FDACS finds the clearing and felling of trees, in uplands or wet prairies, to be a normal and customary practice. This then requires a second tier (wetland-related impacts) analysis as described in the paragraph below.

Aerial photo-interpretation was used extensively to ascertain whether wetlands were adversely impacted as a result of the clearing and subsequent conversion to hay. FDACS staff used the U.S. Fish and Wildlife Service National Wetland Inventory
(NWI) Map as a base layer, and subsequently overlaid the District’s alleged wetland impact areas map (denoted as cross-hatched polygons) to ascertain whether there is a relationship between the two maps. This map was generated by FDACS and is depicted in Exhibit 3. FDACS staff also used the 1994-1995 as well as the 1999-2000 color infrared aerial photography (with and without photo-interpreted wetland overlays) provided by the District to establish a baseline set of silvicultural activities.

**YES.** For wetlands identified by the District but not corroborated by NWI map(s), FDACS finds that the alterations as a result of clearing and hay planting are normal and customary. This decision is based on the limited site visit evidence and the weak correlation to the NWI map, compared to the alleged wetland impact areas provided by the District; and, on other extenuating circumstances such as drought-induced mixed community succession and fire impacts. This subset of exempt wetlands, which totals approximately 117 acres, has been removed, as depicted in FDACS Exhibit 4.

For the remaining 101 acres of wetland impact areas on Exhibit 4, FDACS finds that those with greater than 50% aerial extent of tree canopy in either 1995 or 2000 (based on District provided aerial photography) had already experienced significant succession and either were not wetlands, or were marginal wetlands at the time of conversion to hay fields. As such, the alterations as a result of clearing and hay planting are also normal and customary.

**NO.** For all other alleged wetland impact areas on Exhibit 4 with less than 50% aerial extent of tree canopy in either 1995 or 2000 (based on District provided aerial photography), FDACS finds that these wetlands could have been reasonably determined to meet wetland delineation criteria (based on historic aerial photographs) and should have been delineated and flagged by a qualified professional before land clearing activities were conducted. Therefore, clearing and planting of hay in these areas are not normal and customary.

**NOTE:** It is anticipated that the District and CTLC consulting staff will work together subsequent to this determination and use the information above to calculate the final exempt and non-exempt wetland acreages. If such an agreement cannot be reached, a request for an additional determination should be submitted.

(c) "Are the alterations (or proposed alterations) for the sole or predominant purpose of impeding or diverting the flow of surface waters or adversely impacting wetlands?"

**NO.** For the wetlands for which the activities were determined to be normal and customary, the FDACS finds that the alterations were not conducted for the sole or predominant purpose of impeding or diverting the flow of surface waters or adversely impacting wetlands.
YES. For the wetlands for which the activities were determined to not be normal and customary, the alterations were for the sole or predominant purpose of adversely impacting wetlands.

Conclusion:
Based upon the aforementioned facts, site-specific characteristics, historical land use, and documented industry practices, the FDACS has determined that the activities that have been found to be normal and customary based on the criteria identified in item (b) above qualify for an exemption under Section 373.406(2), F.S.; all other wetland-related impacts do not meet the exemption.

Nothing herein relieves the landowner from applying for and obtaining any applicable federal, state, or local authorization.

A determination by the Department that an activity is not exempt from permitting does not preclude the landowner and the water management district from agreeing to modifications to the activity that would render it exempt.

Notice of Rights:
If you wish to contest the Department’s action, you have the right to request an administrative hearing to be conducted in accordance with Sections 120.569 and 120.57, Florida Statutes, and to be represented by counsel or other qualified representative. Mediation is not available. Your request for hearing must contain:

1. Your name, address, and telephone number, and facsimile number (if any).
2. The name, address, and telephone number, and facsimile number of your attorney or qualified representative (if any) upon whom service of pleadings and other papers shall be made.
3. A statement that you are requesting an administrative hearing and dispute the material facts alleged by OAWP, in which case you must identify the material facts that are in dispute (formal hearing); or that you request an administrative hearing and that you do not dispute the facts alleged by the Department (informal hearing).
4. A statement of when (date) you received this Notice and the file number of this Notice.

Your request for a hearing must be received at: The Office of Agricultural Water Policy, 1203 Governors Square Blvd. Suite 200, Tallahassee, Florida 32301, within twenty-one (21) days of receipt of this Notice. If you fail to request an administrative hearing within the twenty-one (21) day deadline you waive your right to a hearing and the binding determination will become final agency action upon filing with the agency clerk.

Any party to these proceedings adversely affected by this Final Order is entitled to seek judicial review of this Final Order pursuant to Section 120.68, Florida Statutes, and Rule 9.110, Florida Rules of Appellate Procedures. Judicial review proceedings must be instituted by filing a Notice of Appeal with the Department’s Agency Clerk, 407 South
Calhoun Street, Suite 509, Tallahassee, Florida, 32399-0800, within thirty (30) days of rendition of this order. A copy of the Notice of Appeal must be filed with the Clerk of the appropriate District Court of Appeal accompanied by any filing fees prescribed by law.

Supporting Documents:
(1) USDA Soil Survey, Volusia County, Florida
(2) Site Visit Digital Photographs
(3) SJRWMD Exemption Determination Submittal received February 1, 2012
(5) GIS map with soils, National Wetland Inventory, impacted wetland delineated areas
(6) UF-IFAS Bermudagrass Production in Florida, SS-AGR-60, July 2011
(8) CTLC General Ledger of Timber Sales (1990 – 1998)

Filed with the Agency Clerk and rendered this 26th day of April, 2012.

Paul Palmiotto, Agency Clerk
Consolidated-Tomoka's Unpermitted Activities
South Area
Exhibit 2

Consolidated-Tomoka's Unpermitted Activities North Area