Pursuant to the existing Memorandum of Agreement Regarding Binding Determinations of Exemptions Under Subsection 373.406(2), Florida Statutes, between the St. Johns River Water Management District (District) and the Florida Department of Agriculture and Consumer Services Office of Agricultural Water Policy (OAWP), the landowner’s consultant (Modica and Associates) requested that OAWP evaluate agricultural activities located on property owned by Marion Acres LLC to determine whether these activities qualify for the statutory exemption. Per this request, staff has performed a site inspection, evaluated consultant-provided documentation, researched available historical data, and has rendered a conclusion based on the following information.

Background:

The site is an approximately 392-acre parcel, located in Sections 21 and 22, Township 14 South, Range 23 East, in Marion County north of Silver Springs. The land is classified as agriculture pursuant to 2011 Marion County Property Appraiser information. Marion Acres LLC holds title to the property, and acquired the parcel by warranty deed in December of 2007.

On April 14, 2010, the District sent Marion Acres LLC a violation letter alleging construction of new ditches in wetlands, maintenance of existing ditches, and water quality standard violations for offsite surface water discharges. The letter stated that a permit would need to be obtained as a means to resolve the violation. Incidentally, the previous landowner was sent a similar violation letter by the District, but it apparently went unheeded, hence the 2010 District letter to Marion Acres LLC. OAWP received the consultant’s written request for a binding determination and supporting information on July 5, 2011. This request was not validated until August 10, 2011, which was the date the aforementioned Memorandum of Agreement was executed.

Site Inspection Findings:

On September 2, 2011, a site inspection was performed by Bill Bartnick, Mark Mealo and Hugh Thomas with the OAWP, accompanied by Lonnie Bergeron, Elaine Imbruglia, Jim Modica, and Travis Johnson, all representing Marion Acres LLC. During this trip, all production area fields were inspected, digital photographs were taken, and soil probe samples were selectively taken as needed.

The operation consists of common bermudagrass and St. Augustine sod production in Area A; dual-use bahiagrass sod production and cattle grazing land in Area B; and native range and some semi-improved pasture in Area C as depicted in Attachment 1.
Area A is irrigated with groundwater from one well, using two center pivots with drop nozzles. Areas B and C are not irrigated, used for grazing by approximately 60 head of beef cattle, and are separated from Area A by an electric tape fence. On this day, a tractor/mower, fork lift, and sod harvester equipment were noted under the pole barn or otherwise operating on the premises.

Since the District's violation letter is somewhat vague in terms of which specific activities require permitting, OAWP will address its findings through the previously established designation of Areas A, B and C.

**Area A** – This area consists of a main east-west access road, pole barn, well pump house, and two production sod fields, each serviced by a center pivot irrigation system. Sod fields in this area all have an east-west bed orientation. The beds are approximately 150 feet wide, crowned at one foot above natural grade, and have very shallow water furrows separating each bed. Most of this area is actively farmed, with the exception of the northeast, northwest, and southwest corners. These corners are marginally productive, primarily because of the lack of irrigation as a result of the pivot arc. These corners also exhibit signs of remnant (historic) wetland character, as evidenced by the scattering of hydrophytic vegetation interspersed amongst the more recent advance of planted sod grass.

Based on a review of black and white, true color, and infrared aerial imagery for years 1949, 1957, 1964, 1972, 1999, 2004, and 2008, OAWP believes that most of Area A was historically farmed, and that the wetlands were either converted in totality or adversely impacted as a result of the historical farming activities prior to the institution of state wetland regulations.

**Area B** – This area consists of bahiagrass sod production, concurrently used by cattle for grazing. This area is more intensely ditched and drained than the other two areas. Some of the ditches are connected through a series of open ditches, corrugated culvert pipes, and/or screw-gate structure(s). The area also had an old mud bogging area that was no longer used, and is now restored.

Based on a review of soil survey information, black and white, true color, and infrared aerial imagery for years 1949, 1957, 1964, 1972, 1999, 2004, and 2008, OAWP believes that wetlands are in close proximity to the ditches. Moreover, most of the ditch construction work occurred in 2004; and these ditches were more recently maintenance dredged in or around 2010. The north-south ditch and associated laterals (to the east) are approximately 8 feet deep (from natural ground to ditch invert) and 10 feet wide (from top of bank). Turbid standing water was noted in the ditches, as was cattails and algal mats. There was another ditch feature that warrants discussion, which is a diagonal ditch on the northwest corner of Area B. This ditch also had turbid standing water, and outfalls on the western property boundary.

It should be noted that both ditches (north-south, diagonal) showed signs of recent maintenance dredging, as evidenced by the nearly vertical side slopes, and turbid standing water. In places, they also showed signs of cattle ingress; seemingly
haphazardly constructed to allow cattle access to drinking water, since no water troughs or upland dug watering ponds were observed in Area B.

Area C – This area, which is approximately 60 acres, consists of cattle pens on the northeast corner, and mostly native range. It is separated from Area B by an east-west barbed wire fence. Approximately 60 head of beef cattle were observed in a hammock area on this day. The area is mostly unaltered.

Statutory Analysis:

(a) "Is the person engaged in the occupation of agriculture, silviculture, floriculture, or horticulture on lands classified as agricultural pursuant to s. 193.461, F.S.?

YES. The OAWP finds that Marion Acres LLC is engaged in the practice of agriculture on the 392 acres of sod and pasture in Marion County, as evidenced by their current land use classification and the ongoing agricultural production activities.

(b) "Has the individual altered the topography of the tract of land for purposes consistent with the normal and customary practice of such occupation in the area?"

YES. With regard to Areas A and C, OAWP finds that the alterations were consistent with normal and customary practices for sod farming and cattle operations. The remnant wetlands in Area A have not been adversely impacted, when compared to the residual primary and secondary impacts caused as a result of historic farming practices.

NO. With regard to parts of Area B, especially the aforementioned ditching constructed around 2004 and the more recent maintenance dredging therein, OAWP finds that:

1. The average ditch depths exceed what is normal and customary for a sod farm in this area of the state, and are adversely impacting onsite wetlands; and
2. It is not normal and customary for ditches of this nature to be used for cattle watering purposes. Watering troughs and/or upland dug livestock watering ponds – not ditches - are routinely used to provide fresh water to cattle in pastures.

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

NO. With regard to Areas A and C, OAWP finds that the agricultural activities on the whole in these two areas were not for the sole or predominant purpose of impeding or diverting surface waters or adversely impacting wetlands. OAWP’s opinion is that irrigation system and drainage appurtenances in Area A are minor and do not serve this primary purpose. Area C currently has no alterations.

With regard to Area B, OAWP finds that in addition to the ditching activity not being normal and customary, it is predominantly for the purpose of diverting surface water.
Conclusion:

Based upon the aforementioned facts, site-specific characteristics, historical land use, and documented industry practices, OAWP has determined that Areas A and C would qualify for an exemption under subsection 373.406(2), F.S. The ditches associated with Area B would not qualify for an exemption under subsection 373.406(2), F.S.

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

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 names, 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.
Support Documents:
(1) NRCS Field Office Technical Guide, Section IV
(3) Aerial Photography, Dated 1949-2008
(4) Modica and Associates: 1999 infrared aerial photo with interpretation of wetland areas greater then ½ acre
(5) USDA Soil Survey of Marion County, Florida
(6) Site Visit Digital Photographs
(7) 2011 Marion County Property Appraiser Information Card

Filed with the Agency Clerk and rendered this ___ day of February, 2012.

Paul Palmiotto, Agency Clerk