January 15, 2015

Mr. Mark Luchte  
Southwest Florida Water Management District  
7601 Highway 301 North  
Tampa, Florida 33637-6759

SUBJECT: Section 373.407 Florida Statutes, Binding Determination – Barrett Ranch

Dear Mr. Luchte:

Per your request, enclosed please find our written report on the subject referral. In short, it is the Department’s opinion that the operation in question is engaged in production agriculture and the wetland impacts are not exempt 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,

Richard Budell  
Director, Office of Agricultural Water Policy

cc: James Barrett  
Lauren Brothers
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.

Southwest Florida Water Management District (District) has requested that FDACS conduct a binding determination on Barrett, and the conditions described above are in place.

Background:
The site consists of one contiguous parcel, comprising 80.11 acres, located within Section 32, Township 38 South, Range 30 East, in Highlands County. This property is classified as agriculture pursuant to 2014 Highlands County Property Appraiser information. The Barretts purchased the property in 2002.

On December 26, 2002, District staff received a complaint involving the filling of an existing drainage ditch, and the dredging/filling of approximately 1.75 acres of wetlands for three cattle ponds on the property. In October 2004, District staff determined that the drainage ditch had been restored but the restoration of the 1.75 acres of wetland impacts had not been completed.

On October 26, 2013, District staff received another complaint involving impacts to wetlands and floodplain areas on the property. These impacts were allegedly associated with the construction of additional cattle ponds in wetlands and floodplain...
areas, and over-excavation of an existing drainage ditch in wetlands and floodplain areas.

The District met with Mr. Barrett and his son John Barrett on December 11, 2013 to discuss the alleged impacts that occurred on the property. District staff estimated that the dredging and filling of wetlands resulted in approximately 45 to 50 acres of wetland impacts on site. This includes the construction of approximately 23 cattle ponds located within wetlands and over-excavation of an existing drainage ditch in wetlands and floodplain areas.

The District further asserts that all of the impacts have also taken place within a closed basin floodplain which has reduced the volumetric storage within the floodplain area.

On November 12, 2014, FDACS received a request for a binding determination from the District.

Site Inspection Findings:
On December 11, 2014, a site inspection was performed by Vanessa Bessey and Raulie Raulerson with the FDACS, accompanied by Mr. James Barrett and Mrs. Barbara Barrett. During the site visit several of the wetland impact areas were inspected and photos taken as appropriate.

At the time of the site inspection, the operation consisted of a small residential trailer, a single family residence, a barn and workshop, improved pasture which was cross-fenced and sub-divided into approximately 14, five-acre pastures, and four horses. According to the Barretts, they sell their cattle in the fall and buy cattle back in the spring and as such, there were no cattle present on the property the day of the site visit. The Barrett’s property normally supports a mixed herd of approximately 15 head of cattle, 100 goats, and 4 horses.

Based on review of aerial photographs provided by the District, aerial imagery obtained by FDACS, and review of National Wetlands Inventory data (Figure 1) staff has determined that all of the ponds were constructed in areas that are considered wetlands. Further, based on 1999 aerial photography, the wetland areas appear to have not been impacted prior to the construction of the ponds which started in 2002.

FDACS staff also noted that the drainage ditch which runs from North to South through a wetland slough area on the property was over-excavated and the fill was placed in a wetland area.

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 Mr. James Barrett is engaged in the occupation of agriculture.

(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?"

NO. FDACS finds that the construction of cattle watering ponds within the footprint of wetlands is not a normal and customary practice for the types of agriculture being conducted in the area. Review of aerial imagery revealed that the areas where the ponds were constructed were wetlands and that they were not impacted prior to the dredging/filling activities which started in 2002.

FDACS also finds that the drainage ditch which runs from North to South through a wetland slough area on the property was over-excavated and the fill was placed in a wetland area.

(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?"

YES. FDACS finds that the construction of cattle watering ponds within wetland areas was for the sole and predominant purpose of adversely impacting the wetlands. Further, FDACS finds that the drainage ditch which runs from North to South through a wetland slough area on the property was over-excavated and the fill placed in the wetland area was for the sole and predominant purpose of adversely impacting the wetland.

Conclusion:
Based upon the aforementioned facts, site-specific characteristics, historical land use, and documented industry practices, FDACS has determined that the wetland impacts resulting from the construction of the cattle watering ponds, over-excavation of the aforementioned drainage ditch, and placement of fill in a wetland area do not qualify for an exemption under Section 373.406(2), F.S.

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

A determination by FDACS 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 this 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 FDACS, 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 FDACS (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, Mayo Building, 407 South Calhoun St. MS-E1, Tallahassee, Florida 32399, 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) FDACS 2008 Florida Cow/Calf Operations Best Management Practices
(2) Site Survey
(3) Aerial Photography
(4) USDA Soil Survey, Highlands County, Florida
(5) Site Visit Digital Photographs
(6) 2014 Highlands County Property Appraiser Information Card
(7) SWFWMD Exemption Determination Package dated 11/12/2014
(8) National Wetland Inventory Map

Filed with the Agency Clerk and rendered this 15th day of January, 2015.

Steve Donelan, Agency Clerk
Figure 1
National Wetland Inventory Map