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.

On behalf of Madison Oaks Farm, LLC., (hereinafter “M.O.”), Quest Ecology, Inc. (hereinafter “Consultant”), has requested that FDACS conduct a binding determination, and the conditions described above are in place.

Background:
The site consists of 18 contiguous parcels, comprising approximately 5,000 acres, located within 15 sections of Township 2 North, Range 6 and 7 East, in Jefferson County and Madison County. Except for an incidental error or two, the property is classified as agriculture pursuant to 2018 Jefferson and Madison County Property Appraiser information. It is not currently enrolled in an FDACS BMP program.

On November 20, 2017, the Suwannee River Water Management District (District) sent a Notice of Violation letter (Item No. 127314) to M.O.’s landowner, Mr. John Todd, advising him that the construction of a surface water management system consisting of roads and associated swales, ditches, open water ponds, and numerous wetland alterations associated with these activities are a violation of District rule and require a permit under their Environmental Resources Permit program.

On February 6, 2018, FDACS received a request for a binding determination from M.O.’s Consultant, alleging that many of the activities qualify for an exemption under Section
373.406(2), F.S. On February 28, 2018, FDACS sent a letter to both parties requesting that they clarify, in writing, which activities are specifically in dispute. This clarification was needed because many of the alleged violations were depicted on a map with yellow polygons, labeled “potential wetland or surface water violation.” On April 19, 2018, FDACS received a REVISED Request for Binding Determination from the consultant, which also included Appendix 3, the District’s April 16, 2018 letter, detailing which activities are in violation of District rule. Exhibit 1 (attached hereto) is a map depicting all 36 alleged violation areas that are in dispute.

Site Inspection Findings:

On February 13, 2018, a site inspection was performed by FDACS employee, Bill Bartnick. Mr. Todd and two of his consultants, Viviene Handy and Lee Cook, accompanied Mr. Bartnick during the inspection. During the site visit, nearly all of the wetland impact areas were inspected, as were the roads and channels, and most of the property was traversed by vehicle to foster our understanding of the agricultural operation and M.O.’s intent for the numerous open water ponds. Permission was granted and photos were taken as appropriate.

At the time of the site inspection, the operation consisted of a mix of improved pasture to support a 2,000-head cow/calf finishing operation, remnant timberlands, and a mosaic of bottomland and upland forests. Most existing pastures are cross-fenced, allowing cattle to be rotated throughout all viable pasture areas within the farm. Some of the more recent timbered areas are in the process of being converted to permanent pastures, evidenced by the clearing of stumps, spreading of composted manure/litter as fertilizer material, and the subsequent planting of an oats/rye winter cover.

The District issued M.O. an Individual Water Use Permit for five wells totaling approximately 1.2 MGD, that expires on February 12, 2036. The farm utilizes a modified flood irrigation method, whereby water is pumped from the open water ponds (via eight motor-driven pumps mounted on trailers) and distributed to upland pastures (via portable hoses) and allowed to cascade downhill towards the source water ponds. The water which does not infiltrate into the soil will generally flow back into the ponds. These ponds are also used as cattle watering areas, and this fact was corroborated onsite by noting the cattle ingress and egress areas into the ponds. Thus, the ponds currently serve a dual-use purpose. In terms of landscape position, a few of the ponds are in wetlands, some are located very close to the jurisdictional edge of wetlands, and others are set back from the wetlands at various distances. Based on aerial photography, the ponds appear to have been constructed or dug between 2014 and 2017.

Based on the onsite visit and aerial photography, it was determined that M.O. constructed five roads in the wetlands since 2014. According to Mr. Todd, these roads are for various uses, and include but are not limited to, moving cattle and equipment, allowing reasonable access to other parts of the property, removal of timber, and access to future timber stands. Most of these roads were elevated fill roads constructed through forested wetlands. More notably, two of the roads that were constructed in Parcel E have experienced little to no use to date. This was evidenced by the lack of tire tracks, overgrown weeds on road bed, and a general lack of maintenance.
Several channel restoration areas required inspection. Most, if not all of these in parcel areas B, C, and, F involved the removal of historic timber slash in the stream channels and on bank areas as a result of past timbering activities from the previous landowner. This was confirmed onsite by observing ongoing stump removal in the upland areas directly adjacent to at least two channel segments. There were no signs of recent, or new, channel excavation activities in these areas as no spoil piles were observed nearby. Further, it appears that the removal of this vegetative debris has generally contributed to the restoration of the channel’s hydrologic regime.

There were also a number of features inspected in parcel areas I through N, that were ostensibly referred to as channels or stream restoration areas as well. The construction of the majority of these features involved the excavation of new (post 2014) parallel linear channels constructed in forested wetlands or excessive dredging of existing channels in the wetlands. These activities were different from the activities described above.

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?"

FDACS finds that M.O. 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?"

PONDS

YES. FDACS finds that the construction of open water ponds BP6, BP7, BP11, EP1, EP2, EP4, and RP1 are consistent with the normal and customary practice of agriculture in the area. The ponds were designed to provide both surface water irrigation and drinking water for the cows. Based upon site inspection details, these ponds were wholly constructed in the uplands and maintained an adequate and stable upland buffer landward of the wetland. The placement of these small ponds in relationship to the adjacent wetlands should allow for ample recharge (during irrigation events) due to the high-water table, without adversely affecting the wetland’s hydroperiod. Lastly, any fill impacts into the wetlands resulting from erosion were deemed de minimis. The construction of these ponds was for purposes consistent with the normal and customary practice of agriculture in the area.

NO. FDACS finds that the construction of open water ponds DP3, FP2, MP1, and MP2 do not qualify as a normal and customary practice of agriculture in the area. Notwithstanding our position above, these four ponds have a clear hydrologic connection to the adjacent wetlands, evidenced by the construction of flow-through
ditches and/or excavation of the pond directly into the wetland. The construction of these ponds to have flow-through ditches and/or excavation of the ponds directly into the wetland is not a normal and customary practice of agriculture in the area.

ROADS

YES. FDACS finds that the construction of access road Nos. ESR3, ISR1, and LMSR1 are normal and customary for the practice of agriculture in the area. Based on aerial photography, some of these road segments were noted as historical roads and they have been improved over time to support associated agricultural operations. Equally important, they also provide reasonable access to the northern most parcels, and generally follow property boundary lines.

Road No. ESR3 is an elevated fill road with culverts that goes through the uplands and wetlands. M.O. built up a preexisting low road with fill. The road gives M.O. access to a road that runs along the property’s northern boundary. The construction of road No. ESR3 was for purposes consistent with the normal and customary practice of agriculture in the area.

Road No. ISR1 is an elevated fill road constructed through the uplands and wetlands with low water crossings installed at several locations. The initial construction of the road was to obtain access to a northern section of the property to log timber. M.O. has cleared the timber and plans on converting the upland portion of the property into a pasture for cattle. M.O. will use the road to move cattle and equipment. The road is M.O.’s only reasonable access to that portion of the property. The construction of road No. ISR1 is for purposes consistent with the normal and customary practices of agriculture in the area. Road No. LMSR1 was initially constructed for the purpose of logging timber and now is being used as an access road to parcels of the property.

NO. FDACS finds that the construction of access roads No. ESR1, ESR2, QSR2, and STSR1 are not for purposes consistent with the normal and customary practice of agriculture in the area. This finding is based, in part, on the fact that the implied and express purpose for construction of these roads through the wetlands was to log sections of timber. The construction of roads through wetlands for the purposes of logging timber is not consistent with the normal and customary practice of agriculture in the area.

Furthermore, FDACS finds that M.O. is not engaged in the occupation of silviculture. Silviculture is a process, following accepted forest management principles, whereby the trees constituting forests are tended, harvested and reproduced. M.O. has cleared trees from one or more sections of the property with the intent to convert the land into pasture for cattle, but it is not engaged in tending, harvesting, and reproducing forests, therefore, M.O. is not engaged in silviculture. However, even if M.O. had been found to be engaged in the occupation of silviculture these roads still would not be consistent with the normal and customary practice of a silvicultural operation in the area. This is based on but not limited to the roads being constructed with excessive (more than 24-inches) fill above natural
grade, limited stream conveyance capacity, road surface area over the wetland more than 0.5 acres, fill from dredging channels in the wetlands, roadside ditches that connect to adjacent wetlands, and/or associated dredge and fill impacts to the wetlands.

**CHANNELS**

**YES.** FDACS finds that the works associated with Channels No. BC1, BC2, BC3, CC1, FC1, LC2, LMC1, MC4, and STC1 are normal and customary practices of agriculture in the area. Channels No. BC1, BC2, BC3, CC1, FC1, LC2, LMC1, involved the removal of slash in riparian areas, and no excessive dredging was noted. Further, M.O. appeared to have worked within the general meander of the natural stream channel to accomplish this task. The removal of debris from these channels are for purposes consistent with the normal and customary practices of agriculture in the area. Channels No. MC4 and STC1 are where M.O. cleared brush from the wetlands along the property line to install a fence. It does not appear that the wetlands were excavated or dredged in the installation of these fences. The installation of these fences is consistent with the normal and customary practices of agriculture in the area.

**NO.** FDACS finds that the works associated with Channels No. IC1, IC2, LC1, LMQC5, MC1, MC2, MC3, and NC2 are not consistent with the normal and customary practices of agriculture in the area. The works associated with these channels involved creating new ditches/channels, excessive dredging of existing channels, and/or fill and dredge impacts to wetlands. The works associated with these channels were not consistent with the normal and customary practices of agriculture in the 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?"

**PONDS**

**NO.** FDACS finds that the construction and placement of ponds BP6, BP7, BP11, EP1, EP2, EP4, and RP1 are not for the sole or predominant purpose of impeding or diverting the flow of surface waters or adversely impacting wetlands. These ponds sole or predominant purpose is to provide drinking water to the cattle and to be used for irrigating the pastures when needed. The placement of these ponds in relationship to the adjacent wetlands should allow for ample recharge (during irrigation events) due to the high-water table, without adversely affecting the wetlands hydroperiod. These ponds were constructed so that there are adequate and stable upland buffers between the ponds and the wetlands. Also, it appears that fill from the pond construction was not placed into the wetlands. It appears that any fill impacts into the wetlands as a result of these ponds are due to erosion and is de minimis.
YES. FDACS finds that the construction and placement of ponds DP3, FP2, MP1, and MP2 are for the sole or predominant purpose of impeding or diverting the flow of surface waters or adversely impacting wetlands. The construction of these ponds to have a clear hydrologic connection to the adjacent wetlands by the construction of flow-through ditches and/or the excavation of the ponds directly into the wetland is not necessary to water the cattle or irrigate the pastures. FDACS anticipates negative water quality loading effects to the wetlands resulting from these activities and such effects would not serve any reasonable agricultural purpose. The construction of a pond connected to the wetlands by flow-through ditches and/or the excavation of ponds directly into the wetland is for the sole or predominant purpose of impeding or diverting the flow of surface waters or adversely impacting wetlands.

ROADS

NO. FDACS finds that the construction and placement of roads No. ESR3, ISR1, and LMSR1 are not for the sole or predominant purpose of impeding or diverting the flow of surface waters or adversely impacting wetlands. Road No. ESR3 gives the land owner access to a county road that runs along the property’s northern boundary. The construction and placement of road No. ESR3 is for the sole or predominant purpose of moving cattle and equipment, and as a point of ingress/egress to the property. The construction and placement of road No. ISR1 is for the sole or predominant purpose of moving cattle and equipment, and to give M.O. reasonable access to a portion of its property for agricultural purposes. Road No. LMSR1 was initially constructed for the purpose of logging timber and now is being used as an access road to parcels of the property.

YES. FDACS finds that roads No. ESR1, ESR2, QSR2, and STSR1 were constructed and or placed for the sole or predominant purpose of impeding or diverting the flow of surface waters or adversely impacting the wetlands.

In about 2015, according to Mr. Todd, roads No. ESR1 and ESR2 were constructed in the forested wetlands with the intent to log a section of timber and turn the section into a pasture for cattle. As of the date of this determination, M.O. has failed to log the timber and these roads are not being used for agricultural or silvicultural purposes, this is evidenced by the lack of tire or livestock tracks on the roads, overgrown weeds on roads, and a general lack of maintenance of the roads. These roads are not points of ingress/egress to the property, nor do they run along the boundary of the property. The construction of roads No. ESR1 and ESR2 are for the sole or predominant purpose of impeding or diverting the flow of surface waters or adversely impacting the wetlands.

In the construction of road No. QSR2, M.O. built up an existing road through the wetlands and uplands with fill which had been excavated from ditches that connect to adjacent wetlands. The construction of the road resulted in fill impacts to the wetlands. The road is not being used to move cattle or equipment. The road is not a point of ingress/egress to the property, nor does it run along the boundary of the property. These roads are not serving an agricultural purpose. The construction of
road No. QSR2 is for the sole or predominant purpose of impeding or diverting the flow of surface waters or adversely impacting the wetlands.

Road No. STSR1 was originally built to log timber, however, M.O. was unable to do so due to the wet conditions. At the time of FDACS onsite visit, M.O. was not using the road to move cattle or equipment. The road does not give M.O. access to another section of the property, nor is it a point of ingress/egress to the property. The construction of road No. STSR1 is for the sole or predominant purpose of impeding or diverting the flow of surface waters or adversely impacting the wetlands.

**CHANNELS**

**NO.** FDACS finds that the works associated with Channels No. BC1, BC2, BC3, CC1, FC1, LC2, LMC1, MC4, and STC1 are not for the sole or predominant purpose of impeding or diverting the flow of surface waters or adversely impacting the wetlands. Channels No. BC1, BC2, BC3, CC1, FC1, LC2, LMC1, involved the removal of slash in riparian areas, and no excessive dredging was noted. These works were for the purposes of restoring the water flow within existing channels and removing debris from these channels. The works associated with Channels No. MC4 and STC1 was for the installation of property line fences and no excessive dredging was noted. The works associated with these channels are not for the sole or predominant purpose of impeding or diverting the flow of surface waters or adversely impacting the wetlands.

**YES.** FDACS finds that the works associated with Channels No. IC1, IC2, LC1, LMQC5, MC1, MC2, MC3, and NC2 are for the sole or predominant purpose of impeding or diverting the flow of surface waters or adversely impacting the wetlands. The works associated with these channels involved creating new ditches/channels, excessive dredging of existing channels, and/or fill and dredge impacts to wetlands. Excessive dredging of channels and the creation of new channels can affect the hydroperiod of the wetlands and the hydrologic transport of sediments and other pollutants into the wetlands. These effects serve no reasonable agricultural purpose. The works associated with these channels are for the sole or predominant purpose of impeding or diverting the flow of surface waters or adversely impacting the wetlands.

**Conclusion:**

Based upon the aforementioned facts, site-specific characteristics, historical land use, and documented industry practices, FDACS has determined that map features identified by BP6, BP7, BP11, EP1, EP2, EP4, RP1, ESR3, ISR1, LMSR1, BC1, BC2, BC3, CC1, FC1, LC2, LMC1, MC4, and STC1 do qualify for an exemption under Section 373.406(2), F.S. The balance of the features in dispute have been determined to be not exempt under the same statute.
Nothing herein relieves the landowner from applying for and obtaining any applicable federal, state, or local authorization. This determination does not constitute a finding as to compliance with applicable Best Management Practices.

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) Section 373.406, Florida Statutes
(2) Chapter 5M-15, Florida Administrative Code
(3) Rule 62-330.0511, F.A.C.
(4) Aerial Photography (Google Earth)
(5) USDA Soil Survey, Jefferson and Madison County, Florida
(6) Site Visit Digital Photographs
(7) 2018 Jefferson and Madison County Property Appraiser Information Card
(8) Quest Ecology, Inc. Exemption Determination Package dated April 19, 2018
(9) National Wetland Inventory Map
(11) Form 62-330.0511(1) - Notice of Intent to Construct a Minor Silvicultural System

Filed with the Agency Clerk and rendered this 7th day of June, 2018.

Donald D. Hockman, Jr., Agency Clerk