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 Winter Haven Corporation, Modica and Associates, Inc. (hereinafter “Consultant”), has requested that FDACS conduct a binding determination, and the conditions described above are in place.

Background:

The site consists of approximately 1,841 acres, located within Sections 17, 20, 21, 28, 29, and 30 of Township 29 South, Range 27 East, near Lake Wales in Polk County. The property is classified as agriculture pursuant to 2018 Polk County Property Appraiser information. It is not currently enrolled in an FDACS Best Management Practices program.

On March 21, 2018, the Consultant conducted a site visit with Southwest Florida Water Management District (District) staff to pursue an exemption verification for proposed maintenance dredging of historical ditches associated with a long-standing cattle ranch operation. Both parties agreed to the proposed ditch maintenance activities north of the Peace Creek Drainage Canal, hence there is no dispute there. Of the eight ditches proposed for maintenance dredging south of the Peace Creek Drainage Canal, the District agreed, via email on May 2, 2018, that all of ditch area 8 and parts of ditch areas 3 and 6 (as identified in the aerial on page 19 of the Consultant’s Exemption
Determination Package dated May 9, 2018) would qualify for an exemption under Section 373.406(2), F.S.

On May 9, 2018, FDACS received a request for a binding determination from the Consultant, alleging that maintenance dredging of all eight ditches south of the Peace Creek Drainage Canal qualify for an exemption under Section 373.406(2), F.S. On May 17, 2018, the District provided a response letter and other documentation stating that the activities proposed on the Winter Haven Corporation property do not qualify for an exemption in Section 373.406(2), F.S., because they constitute the construction of new ditches. Further, the District stated that the proposed activities are not consistent with the normal and customary practice of agriculture, and are for the sole or predominant purpose of diverting the flow of surface waters which will adversely impact wetlands. On June 4, 2018, the Consultant submitted a Binding Determination Addendum letter which included a series of 1980 black and white aerial photographs, sourced from the Florida Department of Transportation. On June 13, 2018, the District submitted their response to the Consultant’s addendum.

Site Inspection Findings:

On May 30, 2018, a site inspection was performed by FDACS employees, Bill Bartnick and Camilo Gaitan. On behalf of the Consultant, Jim Modica and Elaine Imbruglia accompanied FDACS staff. During the site visit, nearly all the proposed ditch maintenance areas south of the Peace Creek Drainage Canal were inspected by vehicle to foster an understanding of the agricultural operation and the historic ditch network. Permission was granted and photos were taken as appropriate.

At the time of the site inspection, the operation south of the Peace Creek Drainage Canal consisted of established bahiagrass pastures, interspersed isolated and contiguous herbaceous wetlands, and a few upland hammocks. The existence of the historic ditch network, as depicted in Exhibit 1, was corroborated during the onsite inspection. Except for a few, deeper ditches noted onsite, most of the ditches that were observed were relatively shallow - commonly referred to as V-ditches - and likely originally formed with a motor grader and blade implement. Most of the wetlands and ditches were dominated by Juncus spp. (common name bog rush), and had standing water due to recent rains. Cattle were present throughout the property, and the Consultant reported that the land is currently leased to a Florida cattle producer. The herd size is approximately 300 head of cattle, varying throughout the year because of calving. No wells were noted, and cattle seemingly get most of their drinking water from the onsite wetlands and ditches.

Prior to conducting the site visit, FDACS performed an extensive in-office review of all available aerial photography, since both the Consultant and District provided a plethora of aerial photographs. The dates of the aerial photography ranged from 1941 to 2018.

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. FDACS finds that the landowner 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?”

YES. FDACS finds that the proposed maintenance of historic ditch Nos. 1, 2, 4, and 6 (not including the one eastern appendage, and the east/west ditch that was included in the addendum submitted by the Consultant on June 4, 2018) are consistent with the normal and customary practice of agriculture in the area. There is no dispute with the majority (north-south alignment) of ditch No. 3 and the entirety of ditch No. 8 as the District has deemed the maintenance of these features acceptable.

The water management districts assumed management and storage of surface waters (MSSW) permitting authority in 1984 and began protecting isolated wetlands in Florida. Surface water alteration activities that occurred prior to that date were essentially “grandfathered” and not required to meet MSSW regulations. Based on aerial photo-interpretation, the technical evidence reveals that the footprint of these ditch or conveyance features was generally well established in 1984, regardless of whether they were man-made or formed by natural phenomena. Furthermore, the historical sequence of photographs further reveals that these ditches were routinely maintained, on average, every five to ten years. This is an important fact as abandoned ditches (those not regularly maintained) in wetlands can become a functional part of the wetland, considered jurisdictional, and new impacts (post 1984) to wetlands can be subject to mitigation/compensation requirements pursuant to water management district rule. FDACS’ opinion is that these ditch features were in place and functional in 1984, and have been regularly maintained ever since.

NO. FDACS finds that the proposed maintenance of historic ditch Nos. 5 and 7; the right-angle appendages associated with ditch Nos. 3 and 6; and, the east/west ditch which is part of ditch No. 6 mentioned above are not consistent with the normal and customary practice of agriculture in the area. The substantive parts of ditch No. 5 first appear in 1995, were never regularly maintained, and were haphazardly realigned in subsequent years without following normal engineering considerations related to ditch design. The east/west ditch which is part of ditch No. 6 appears to have been constructed to support a road used in a row crop operation dating back to the 1980s. Since the operation is now in cattle production and there are no permitted wells to convey irrigation water to pastures, the ditch is not performing any function. Furthermore, the ditch is parallel to topographic contour lines and, even if maintained, would provide no meaningful drainage relief. Thus, it is not normal and customary. Ditch No. 7 first appears in 1994 and has been permanently abandoned since 2006. Finally, the appendages mentioned
above for ditch Nos. 3 and 6 were either constructed or enlarged after 1984, were not regularly maintained, and are atypical in terms of providing meaningful drainage relief.

(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.** FDACS finds that the alterations associated with the proposed maintenance of historic ditch Nos. 1, 2, 4, and 6 (not including the one eastern appendage, and the east/west ditch) are not for the sole or predominant purpose of impeding or diverting the flow of surface waters or adversely impacting wetlands. The ditch network identified on site for these features reflected a similar alignment when compared to the historical aerial photographs, namely those dated from 1984 to present.

**YES.** FDACS finds that the alterations associated with the proposed maintenance of historic ditch Nos. 5 and 7, the right-angle appendages associated with ditch Nos. 3 and 6, and the east/west ditch which is part of ditch No. 6 mentioned above are for the sole or predominant purpose of impeding or diverting the flow of surface waters or adversely impacting wetlands. Ditch Nos. 5 and 7 did not appear in the aerial photography until approximately 1994, and showed prolonged periods of ditch abandonment. The wetlands associated with both ditches are currently functional in terms of hydrology. These ditches now contain a preponderance of hydrophytic vegetation, similar to what is in the wetland. Excavating them would adversely impact the wetlands. The right-angle appendage and east/west ditch associated with ditch No. 6 provide no meaningful drainage function and would likely divert the flow of surface waters by interrupting sheet flow.

**Conclusion:**

Based upon the aforementioned facts, site-specific characteristics, historical land use, and documented industry practices, FDACS has determined that all or parts of ditch Nos. 1, 2, 4, and 6 as depicted in Exhibit 1 by a green color do qualify for an exemption under Section 373.406(2), F.S. The Consultant and landowner are advised that maintenance dredging beyond the original ditch invert and cross-sectional area may constitute a new wetland impact and violation of District rule.

*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 this binding determination will be considered the Final Order constituting final agency action.

Any party to these proceedings adversely affected by the Final Order is entitled to seek judicial review of the 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, Mail Stop H-4, 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. Aerial Photography, 1941 to 2018
4. USDA Soil Survey, Polk County, Florida
5. Site Visit Digital Photographs
6. 2018 Polk County Property Appraiser Information Card
(8) District Response Letter and Documentation dated May 17, 2018; and June 13, 2018

Filed with the Agency Clerk and rendered this ____ day of ____________, 2018.

________________________________
Donald D. Hockman, Jr., Agency Clerk

CERTIFICATE OF SERVICE

I hereby certify that a copy of this Binding Determination has been furnished by e-mail and U.S. mail on this ______day of ______, 2018 to: Elaine Imbruglia, eca@modica.cc, Modica and Associates, Inc., 302 Mohawk Road, Clermont, Florida 34711 (on behalf of Winter Haven Corporation) and Mark Luchte, Mark.Luchte@swfwmd.state.fl.us, Southwest Florida Water Management District, 7601 Highway 301 North Tampa, FL 33637-6759.

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