FLORIDA DEPARTMENT OF AGRICULTURE AND CONSUMER SERVICES  
Office of Agricultural Water Policy  
Mayo Building  
407 South Calhoun Street  
Tallahassee, Florida 32399  

Binding Determination  
Florida Statute 373.406(2); 373.407  
Conrad Davis, Volusia County, Florida  

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 Conrad Davis, Atlantic Ecological Services (hereinafter "Consultant"), has requested that FDACS conduct a binding determination, and the conditions described above are in place.  

Background:  
The site consists of approximately 3.24 acres, located within Section 3 of Township 17 South, Range 33 East, in New Smyrna Beach, Volusia County, Florida. The property is classified as agriculture pursuant to 2018 Volusia County Property Appraiser information. The property is not currently enrolled in an FDACS Best Management Practices program.  

On May 18, 2018, two staff members with the St. Johns River Water Management District (SJRWMD) met Consultant representative Jody Sisk on site to observe potential wetland violations. On June 19, 2018, St. Johns River Water Management District (staff member Allen Baggett) sent Conrad Davis a letter stating that the construction of a watering pond and placement of fill material in a wetland and/or surface waters require an ERP. On August 13, 2018, FDACS received a request for a binding determination from the Consultant, alleging that the watering pond is a customary agricultural use and therefore exempt under Section 373.406(2), F.S. On August 23, 2018, SJRWMD provided additional information to both parties.
Site Inspection Findings:
On August 17, 2018, a site inspection was performed by FDACS employee Stacey Simmons from the Office of Agricultural Water Policy and Consultant representative Jody Sisk. During the site visit, all of the areas identified in Attachment A were visited. Permission was granted and photos were taken as appropriate.

At the time of the site inspection, the property was mostly cleared except for some large, live oak trees. A board fence surrounds the perimeter. Currently, there is no livestock onsite, although Mr. Davis reportedly intends to execute a future lease turning the site into a weaning area for young calves or goats. No wells were noted onsite.

The watering pond was inspected in detail. The pond appears to be mostly constructed within the boundary of the historic mosquito ditch. It is estimated to be no deeper than 4-feet at the center. There is one 18-inch corrugated black plastic culvert on the western side (inflow) of the pond, and a similar culvert on the eastern side (outflow) of the pond. Water was flowing within the ditch and through the two culverts, and there were no noticeable signs of obstruction as a result of the pond. Spoil from the pond was used to stabilize both the western side culvert and to form a slope on the western bank of the pond.

Prior to and after the site visit, FDACS performed an extensive in-office review of all available aerial photography. The dates of the aerial photography ranged from 1994 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. This finding is based on the fact that the landowner has constructed a perimeter board fence to contain livestock, and has received a "miscellaneous agriculture" classification from the Volusia County Property Appraiser's office.

(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 a watering pond in or very near wetlands and within the historic mosquito ditch is not a normal and customary practice of such occupation in the area. Since the pond is approximately 0.24-acres in size and, on average, four-feet deep, then it would be expected to hold nearly 300,000 gallons of water. This amount of water far exceeds the amount necessary for the
quantity of animals that could be supported on the acreage of this property; therefore, it is grossly oversized. Furthermore, the pond was constructed in 2017, after the adoption of the 2008 Water Quality Best Management Practices for Florida Cow/Calf Operations manual. Page 32 of said manual states that livestock watering ponds should be constructed by embankment or excavation, and include a buffer landward of the wetland. The pond may have met the normal and customary criteria if it was wholly constructed in uplands.

(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 done in the historic mosquito ditch were not for the sole and predominant purpose of impeding or diverting the flow of surface waters or adversely impacting wetlands.

Conclusion:

Based upon the aforementioned facts, site-specific characteristics, historical land use, and documented industry practices, FDACS has determined that the construction of a 0.24-acre watering pond and resulting fill in a wetland and/or surface waters 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. 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, 1994 to 2018
(4) Site Visit Digital Photographs
(5) 2018 Volusia County Property Appraiser Information Card

Filed with the Agency Clerk and rendered this 29th day of August, 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 4th day of September, 2018 to: Jody Fisk, jody@atlanticeco.com, Atlantic Ecological Services, 201 Basque Road, St. Augustine, Florida 32080 (on behalf of Conrad Davis) and Suzanne Archer, sarcher@sjrwmd.com, St. Johns River Water Management District, Maitland Service Center, 601 South Lake Destiny Road, Suite 200, Maitland, Florida 32751

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