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 Flagler Farms of Florida LLC, Carter Environmental Services (hereinafter referred to as "consultant") has requested that FDACS conduct a binding determination, and the conditions described above are in place.

Background:
The site was purchased by Flagler Farms of Florida LLC in 2017 and the disputed parcel consists of approximately 406 acres, located within Section 2 of Township 14 South, Range 29 East, and is southwest of Bunnell, in Flagler County, Florida. The property is classified as agriculture pursuant to 2019 Flagler County Property Appraiser information.

From November 13, 2017 to August 15, 2018, the St. Johns River Water Management District (SJRWMD) corresponded with personnel from Flagler Farms and conducted three site visits to investigate alleged violations of state permitting requirements, including excavation of ditches and other activities that impact wetlands.

On March 2, 2018, two representatives from the USDA-Natural Resources Conservation Service (NRCS) performed a site visit to quantify total wetland acreage under federal jurisdiction, and to estimate how many acres of converted wetlands exist in violation of the Swampbuster provisions of the National Food Security Act.
On August 28, 2018, SJRWMD sent a violation letter to Flagler Farms indicating that the project observed during their site visits was not in compliance with SJRWMD rules and that no additional work should occur until appropriate permits are secured.

On October 19, 2018, NRCS issued a Preliminary Technical Determination for Flagler Farms of Florida LLC as a result of Flagler Farms signing a *Highly Erodible Land Conservation and Wetland Conservation Certification* on January 19, 2018. The certification indicated that activity occurred on the property with the potential to affect wetlands.

On January 22, 2019, SJRWMD sent a second violation letter indicating that the project was still out of compliance and that additional ditching and unauthorized work had occurred. On April 2, 2019, SJRWMD issued a warning letter indicating that Flagler Farms or their agent must provide a response to the allegations therein within 10 days.

On April 5, 2019, Flagler Farms consultant sent a letter to FDACS disputing SJRWMD’s findings and requesting a binding determination. On April 19, 2019, SJRWMD provided additional documentation for review, and at the request of FDACS, the consultant for Flagler Farms emailed additional information, revising the project area to 406 acres, instead of the original request of 832 acres.

**Site Inspection Findings:**

On May 2, 2019, a site inspection was performed by FDACS employees Bill Bartnick and Stacey Simmons from the Office of Agricultural Water Policy with Flagler Farms agents Mark Bula and Wes Thigpen, along with consultants Ryan Carter and Dave Jeff. The 406 acres in dispute was inspected and 23 photos were taken. A pre-development (before cropland) aerial photograph of the property depicting SJRWMD, consultant, and USDA-NRCS photo-interpreted wetland lines is included in Attachment 1. A post-development (cropland) aerial photograph of the property showing current farming impacts is included in Attachment 2.

Wetland Numbers (Nos.) 1-4 and 6-10, identified in Attachment 1, were inspected and are the subject of this Binding Determination. Wetland 5 was not inspected since it is outside of the disputed parcel boundary. Wetlands Nos. 11, 12, and 13 were claimed and categorized as converted wetlands by USDA-NRCS pursuant to Section 514.11 of the National Food Security Act Manual (Fifth Edition, Amendment 1, 2015). However, these three wetlands are not recognized by SJRWMD as requiring compensation because they are isolated and less than ½ acre in size. Therefore, these three wetlands were also not inspected since there is no dispute pursuant to their status under SJRWMD regulations.

When asked about recent timbering activities in wetlands, Flagler Farms representatives stated that all of the upland and wetland trees were harvested before development of the row crop operation, and with the exception of Wetland 4, all of the wetland tree stumps were left intact. Subsequent to the site inspection, the consultant emailed timber sales receipts verifying that this parcel was harvested.
The inspection began at Wetland 7. On the way to Wetland 7, it was noted that the potato crop in the disputed area was recently harvested, and that much of this area was now planted in corn that had germinated and was approximately 3-inches tall.

Wetland 7 had a rim ditch and associated roadway constructed south of the wetland. The ditch was estimated to be 8 feet wide (top of bank) by 4 feet deep, had piped inlets from in-field water furrows, and is used to convey surface water runoff from adjacent farm field(s) to the county-maintained ditch directly east. Reportedly, most of the spoil from the rim ditch was used to construct the roadway; however, some incidental spoil was noted piled along the southern wetland edge or boundary.

Wetland 1 was inspected next. It had a similar rim ditch on the south and east sides of the wetland, connecting to what appeared to be an existing outfall ditch to the north, based on 1984 infrared aerial photography. Similar to Wetland 7, spoil was noted piled along the southern wetland boundary, however these piles of spoil were more significant in size.

Wetland 10 was inspected next. This wetland had a new east/west outfall ditch that connects to a north/south ditch that runs along the western property boundary. Based on Google Earth aerial imagery, the new east/west outfall ditch was constructed after 2017. However, a historic (based on aforementioned 1984 photography) outfall ditch that previously ran due north no longer exists as Flagler Farms filled this in to accommodate the farming operation. The replacement east/west outfall ditch was well vegetated with approximately 1-inch of standing water.

Wetland 4 was inspected next. This wetland had rim ditches constructed on the north and east sides of the wetland, has large debris piles stacked in the wetland, shows signs of recent de-stumping as a result of timbering activities, and has significant sedimentation entering the wetland from the cleared area south of the wetland.

Wetland 3 was inspected next. This wetland had a rim ditch estimated at 12 feet wide by 3 feet deep and encircles the wetland. The ditch has no piped inlets from adjacent in-field water furrows, (that mostly drain away from wetland based on topography) thereby providing little to no function in terms of conveying farm field runoff. Some spoil from construction of this ditch was noted in the wetland.

Wetland 8 was inspected next. This wetland showed minimal signs of disturbance with no new ditching that was apparent.

Wetland 2 was inspected next. This was the diagonal wetland strand that traversed most of the disputed parcel. The eastern side had a historic ditch that appeared to be largely unmaintained given the existing vegetation. The western side had a rim ditch that was constructed directly adjacent to the wetland, was approximately 6 feet wide by 4 feet deep, and had at least 10 center pivot crossings. Piped inlets from adjacent in-field water furrows that drain west to east were noted every 60 feet along the rim ditch perimeter. Spoil in the wetland was noted. Water in the rim ditch was flowing north. The existing road that conveyed water from both the eastern and western rim ditches was inspected as well though it is not part of the subject dispute. Both ditches converged at the road and continued as one, flowing underneath the road via a 36-inch diameter pipe. From this
point, we followed the north/south ditch to where it connected to the historic diagonal ditch mentioned below as part of Wetland 6. Flow was again noted at the confluence of the two ditches. Incidentally, a remnant fallow area was inspected just east of Wetland 2 and north of the road. This area was estimated to be 1.2 acres and appeared to be mostly if not all uplands. Dog fennel was present, and the topsoil was dry.

Wetland 9 was inspected next. It appeared undisturbed with a rim ditch on its eastern side, ultimately connecting to the historic diagonal ditch.

Wetland 6 was inspected last. This area was intact with little to no disturbance. Representatives from Flagler Farms have no plans to develop this area, since it appears to be mostly jurisdictional wetlands under the state delineation methodology. Lastly, the historic diagonal ditch was inspected, as it is a part of Wetland 6. This ditch has existed since 1984, and recent routine maintenance was noted.

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 1984 to 2019. With few exceptions noted later in this report, there does not appear to be any significant changes to the historic surface water management system (ditch orientation and maintenance) since 1984 based on aerial photography review. The aerials provide evidence to support that the disputed area was farmed historically, then renovated to pasture to support a cattle operation, and more recently converted back to row crops.

**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 Flagler Farms of Florida LLC is engaged in the occupation of agriculture. This finding is based on the fact that the landowner has ongoing farming activities and has received an agricultural classification for the property from the Flagler 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?"

**YES.** For Wetland Nos. 6, 7, 8, 9, and 10, FDACS finds that the construction of rim ditches to convey farm field runoff and the installation of a functionally equivalent ditch (for Wetland 10) are normal and customary practices for potato farming operations in the area. Placing incidental spoil in Wetland 7 to the degree spoil was deposited in this case is normal and customary for similar farms in the area.

**NO.** For Wetland Nos. 1, 2, 3, and 4, FDACS finds that the construction of the new ditches is not a normal and customary practice for similar farms in the area. The subject ditches have no apparent function related to the agriculture activities on
the property. The deposit of spoil in Wetland Nos. 1, 2 and 3, and the de-stumping activities in Wetland 4 are not normal and customary practices for potato farming operations 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?"

**NO.** For Wetland Nos. 6, 7, 8, 9, and 10, FDACS finds that the alterations are not for the sole and predominant purpose of impeding or diverting the flow of surface waters or adversely impacting wetlands. Performing routine maintenance of existing, historical ditches (and the functionally equivalent ditch for Wetland 10) and placing incidental spoil in wetlands to the degree spoil was deposited in this case, do not constitute adverse impacts to wetlands.

**YES.** For Wetland Nos. 1, 3, and 4, and for the new rim ditch on the western side of Wetland 2 (including the spoil piles in the wetland), connecting to the new north/south ditch the activities are for the sole or predominant purpose of impeding or diverting the flow of surface waters or adversely affecting wetlands. FDACS checked rainfall records for two nearby weather stations (Pierson, Putnam Hall) from February 2, 2019 through May 2, 2019. The period of record for these two stations show, on average, that only 6-inches of rain fell during this time. The only flow noted on site at the time of the inspection was in the Wetland 2 western rim ditch and north/south ditch, both tributary to the diagonal ditch. There was no standing water in any of the fields, and none of the wetlands showed signs of inundation, which is indicative of the below-average rainfall to date. Due to the depth and location of the western rim ditch in very close proximity to Wetland 2, its connection to the north/south ditch, and continual flow, FDACS finds that the hydraulic drawdown associated with these features constitutes a long-term adverse impact to the wetland.

**Conclusion:**

Based upon the aforementioned facts, site-specific characteristics, historical land use, and documented industry practices, FDACS has determined that the agriculture activities associated with Wetland Nos. 6, 7, 8, 9, and 10 do qualify for an exemption under Section 373.406(2), F.S. However, the activities associated with Wetland Nos. 1, 2, 3, and 4 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 ,1984 to 2019
(4) Site Visit Digital Photographs
(5) 2019 Flagler County Property Appraiser Information Card
(6) U.S. Fish and Wildlife National Wetlands Inventory Map
(7) 2015 National Food Security Act Manual, Section 514
(8) Forest Products Accounting dated December 7, 2017
(9) Excel rainfall record spreadsheet for Pierson and Putnam Hall locations
(10) Submittal package from consultant dated April 5, 2019
(11) Additional information from SJRWMD and consultant
Filed with the Agency Clerk and rendered this 25th day of June, 2019.

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 20th day of JUNE, 2019 to: Dave Jeff, dave@carterenv.com, Carter Environmental Services, 7 Waldo Street, St. Augustine, Florida 32084 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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(850) 617-1700
Project Area +/- 405.93 ac.

CES Wetlands +/- 90.19 ac.

SJRWMD Wetlands +/- 88.77 ac.

NRCS Digitized Wetlands +/- 48.33 ac.

Legend:
- Project Area +/- 405.93 ac.
- CES Wetlands +/- 90.19 ac.
- SJRWMD Wetlands +/- 88.77 ac.
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Source: CARTER ENVIRONMENTAL SERVICES, INC.

Information represented on this map is for planning purposes only.

CARTER ENVIRONMENTAL SERVICES, INC.

Wetland Assessment Map
Flagler Farms
Flagler County, Florida

Project: 5.18421
Date: May 13 2019
Figure: 7