Introduction:
Pursuant to section 373.407, Florida Statutes, 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), Florida Statutes. 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, Florida Statutes.

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, Florida Statutes, or by a dredge and fill permit issued pursuant to Chapter 403, Florida Statutes.

Cory Beaton has requested that FDACS conduct a binding determination, and the conditions described above are in place.

Background:
The site consists of approximately 125 contiguous acres, located within Section 16 of Township 40 South, Range 40 East, in Martin County, Florida. The property is classified as agriculture pursuant to 2018 Martin County Property Appraiser information.

On February 8, 2019, South Florida Water Management District (District) staff noted potential wetland dredge and fill activities on the subject property during routine aerial surveillance.

On February 12, 2019, District staff performed a site inspection and verified approximately 2.75 acres of unauthorized dredge and fill activities on the subject property. The impact area was mapped and the wetland boundary adjacent to the impact area was delineated by the District.

On February 15, 2019, District staff issued a Notice of Violation (NOV) to Mr. Beaton for unauthorized dredging and filling of wetlands on the subject parcel. Wetland impacts total
approximately 2.75 acres. The NOV also listed unauthorized dewatering activities while excavating the pond. Since dewatering activities are considered consumptive use activities and are permitted via Consumptive Use Permitting, these activities will not be evaluated as part of this binding determination. Finally, the NOV directed Mr. Beaton to discontinue all work until authorization was obtained from the District.

On February 15, 2019, Mr. Beaton sent a response to the District regarding the NOV. Mr. Beaton indicated that he disagreed with the District’s classification of wetlands on his property. Further, Mr. Beaton indicated that all work performed on his site was for agricultural purposes and was therefore exempt from regulatory permitting.

On February 27, 2019, District staff responded to Mr. Beaton’s February 15, 2019 correspondence. District staff indicated that they did not agree that the activities were exempt from permitting and suggested that Mr. Beaton contact FDACS regarding a binding exemption determination in accordance with section 373.406(2), Florida Statutes.

On March 20, 2019, FDACS received a request from Mr. Beaton to perform a binding determination regarding the construction of a cattle watering pond and road on the subject property.

On April 18, 2019, FDACS received additional information from Mr. Beaton regarding the subject property.

On April 30, 2019, FDACS staff performed a site visit on the subject property.

On May 21, 2019, District staff informed Mr. Beaton that during a routine aerial inspection, it appeared that additional wetland dredge and fill had occurred on the subject property and that an unauthorized culvert had been installed.

On May 23, 2019, FDACS requested an extension to complete and issue the binding determination.

On May 28, 2019, FDACS asked the District to advise as to whether the items listed in the May 21, 2019 correspondence should be evaluated as part of this dispute. On May 29, 2019, District staff responded to FDACS that these additional activities should be made part of the binding determination.

On June 11, 2019, FDACS received a Grazing Plan and a Conservation Plan of Operations from the Natural Resources Conservation Service (NRCS) for the subject property. The Plans indicate there is a solar watering pump and watering troughs on the property.

On June 13, 2019, FDACS staff performed a second site visit on the subject property to revisit the area where the pond was constructed and to review the additional dredging and filling and unauthorized culvert on the property.

On June 26, 2019, FDACS requested additional information regarding Mr. Beaton’s access to the Historical Old Jupiter-Indiantown Road located to the north of the subject
property. On June 27, 2019, Mr. Beaton responded via email and explained that his access to the subject property via this road has been limited by various state and federal entities by the removal of his lock on the access gate.

On July 8, 2019, FDACS requested a second extension to complete and issue the binding determination.

On July 10, 2019, Mr. Beaton emailed FDACS a scanned copy of Martin County Board of County Commissioners Resolution Number 76-5.16. This resolution, which was part of the real estate closing package provided to Mr. Beaton in 2014, was provided by the title company and asserted the county’s interest in preserving Old Jupiter-Indiantown Road as a public road.

Site Inspection Findings:

On April 30, 2019, a site inspection was performed by FDACS employees, Vanessa Bessey and Hiram (Raulie) Raulerson from the Office of Agricultural Water Policy. Mr. Beaton was present, and all of the areas identified above were visited. Permission was granted and photos were taken as appropriate.

At the time of the site inspection, the subject property contained a small cow/calf operation. FDACS employees observed that fill material had been placed in a wetland to construct an access road to the property that was slightly above natural grade. A single culvert was noted under the road during the site visit. In addition, the cattle watering pond was observed that totaled approximately 0.6 acres and was, on average, 2 to 3 feet deep. Fill material was spread around the pond area at a depth of approximately 16 to 18 inches. The total area of the pond, including spread fill material, was estimated to be approximately 1.5 acres.

On June 13, 2019, a second site inspection was performed by FDACS employees Vanessa Bessey and Patricia Hobson, a certified Professional Wetlands Scientist. Mr. Beaton was present, and the previously inspected road and pond areas were revisited to confirm whether the work had been conducted in a wetland. Four holes were dug both adjacent to the area of fill in an undisturbed area as well as in areas where fill from the excavated pond had been deposited and spread up to 18 inches in depth on top of the native soils. The entire property is classified as hydric soils by the Natural Resources Conservation Service. The area in question appears to be mostly located in soil mapping units 21 (Pineda-Riviera fine sands) and 42 (Hallandale). In all four locations of the soil pits, indicators of the seasonal high-water table as evidenced by the presence of a stripped matrix, were observed within 5 inches or less from the soil surface, thus meeting the criteria for being a hydric soil. The area consists of a sparse overstory of slash pine (*Pinus elliottii*) which exhibited somewhat buttressed trunk bases as well as moss collars on some trees indicating periodic inundation. The groundcover was the dominant strata and was predominately vegetated with facultative wet or obligate species, which included *Rhynchospora tracyi* (obligate), *Pluchea odorata* (facultative wet), *Rhexia cubensis* (facultative wet), *Xyris elliottii* (obligate), *Syngonanthus flavidulus* (facultative wet), *Drosera spp.* (obligate), *Cyperus haspan* (obligate), *Amphicarpum muhlenbergianum* (facultative wet), *Sacciolepis indica* (facultative), *Stilligia aquatica*
(obligate), *Lachocaulon* spp. (obligate), *Hypericum* spp. (obligate), *Cladium jamaicense* (obligate) and *Blechnum serrulatum* (facultative wet). Occasional shrub species included wax myrtle (*Myrica cerifera*, facultative). Hydrologic indicators such as adventitious rooting and moss collars were observed on base of the wax myrtle shrubs. The conditions observed confirm the existence of a wetland.

Next, the additional areas of potential dredge and fill and culvert installation identified by the District on May 21, 2019 were inspected. The culvert was observed as well as a small, historic swale ditch which had been recently maintained. The swale ditch was located adjacent to the entrance road and appeared in aerials as early as 2017. Maintenance of the swale ditch included the removal of spoil and spreading it in the wetland.

Mr. Beaton has not enrolled his parcel in the Best Management Practices (BMP) for Cow/Calf Operations and FDACS observed little indication that he complied with the recommendations of the 2008 Water Quality Best Management Practices for Florida Cow/Calf Operations (Cow/Calf BMP Manual) or other similar measures for the construction of the road nor did he coordinate with the South Florida Water Management District or FDACS Office of Agricultural Water Policy staff to ensure consistency with the recommendations of the Cow/Calf BMP Manual or similar measures for the activities under review.

Prior to conducting the site visits, FDACS performed an extensive in-office review of available aerial photography. FDACS staff confirmed that the area in dispute was classified as a wetland according to the National Wetlands Inventory map. The aerial photography review undertaken by FDACS also confirmed that the pond area and road were not present until 2019. Based on the foregoing review, observations, and additional factors, FDACS finds that the subject activities occurred within a wetland. A current aerial of the property is included in Attachment 1.

**Application of Statutory Criteria:**

Pursuant to section 373.406(2), Florida Statutes, 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 in that Mr. Beaton is operating a cow/calf operation.

(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?"

In order for an activity to be exempt, the resulting alterations to the topography of the land must be for purposes consistent with the normal and customary practice of such occupation in the area. See § 373.406(2), Fla. Stat. (2019). Rule 5M-15.001, Florida Administrative Code, defines "normal and customary practice in
the area" as generally accepted agricultural activities for the type of occupation in the region. In this case the type of operation is a cow/calf operation.

**NO, with respect to dredging and filling in the wetlands to create a cattle watering pond.** The FDACS finds that the activities in the wetland area located on the subject parcel for the purposes of constructing a cattle watering pond are not normal and customary for the type of agriculture in this area. It is not consistent with normal and customary practices to convert wetlands into cattle watering ponds, by dredging and intentionally placing fill into the wetland. Further, Mr. Beaton has been approved for a solar pump and watering troughs on the property as indicated in the Conservation Plan of Operations and Grazing Plan prepared by NRCS. Having these features would eliminate the need for the cattle watering pond. This is especially true based on the small number of cattle.

FDACS routinely conducts site visits in the District's jurisdictional area and has enrolled over two million acres of land in FDACS cow/calf BMPs. Observations made during the enrollment of cow/calf operations in BMPs reveal that dredging and filling wetlands for a cattle watering pond is not a normal and customary activity for similar cow/calf operations in the area. Furthermore, the Cow/Calf BMP Manual prohibits dredging or placing fill within a wetland.

**YES, with respect to construction of the road.** The FDACS finds that, under the circumstances, the construction of an access road on the property, including the associated culvert and excavated ditch, is consistent with the normal and customary practices for the type of agriculture in this area.

Despite Martin County Resolution No. 76-5.16, Mr. Beaton indicated that the alternative access route via the north from the historical grade known as Historical Old Jupiter-Indiantown Road was restricted. This was confirmed via a telephone conversation with Mr. Beaton on July 24, 2019, and by photographic review. Mr. Beaton purchased the property in 2014 and appears to have started his cattle operation in 2016. He was told by the Florida Fish and Wildlife Conservation Commission to stop using Old Jupiter-Indiantown Road in 2018, which lead to the construction of the access road at issue in 2019. As a result of the restriction on his access from the northern border of the property, the only reasonable access available is from the south, and constructing an access road required impacting wetland areas on the site. According to the National Wetlands Inventory map for Mr. Beaton’s parcel, all of the southern extent of his property is listed as either forested wetland or emergent wetland. As such, there was no upland area to utilize for road construction alignment.

The road itself was constructed using typical materials and conforms with basic standards used on other similar cattle operations. The road was constructed slightly above grade.

Given the foregoing, construction of the road is consistent with the normal and customary practices of a similar cow/calf operation.
NO, with respect to spreading spoil material excavated from historic swale ditches in a wetland. FDACS finds that the maintenance activities performed on the historic north-south swale ditch located within a wetland on the subject parcel are not for purposes consistent with the normal and customary practices of a cow/calf operation in the area. While the maintenance of historic swales and ditches in wetlands would be permissible, it is not a normal and customary practice to then spread the excavated material back into the wetland area.

FDACS routinely conducts site visits in the District's jurisdictional area and has enrolled over two million acres of land in FDACS cow/calf BMPs. Observations made during the enrollment of cow/calf operations in BMPs reveal that spreading spoil from the maintenance of historic ditches within a wetland is not a normal and customary activity for similar cow/calf operations in the area. Furthermore, the Cow/Calf BMP Manual prohibits placing fill within a wetland.

(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?”

In order for an activity to be exempt, it cannot result in changes to the topography of the land for the sole or predominant purpose of impeding or diverting the flow of surface waters or adversely impacting wetlands. See § 373.406(2), Fla. Stat (2019). Rule 5M-15.001, Florida Administrative Code, defines “sole or predominant purpose” as the function of the activity in question, and Florida courts have interpreted “sole or predominant purpose” to mean the objective effect or function of the activity. See A. Duda and Sons, Inc. v. St. Johns River Water Mgmt. Dist., 17 So.3d 738 (Fla. 5th DCA 2009).

YES, with respect to dredging and filling to convert wetlands into a cattle watering pond. FDACS finds that the alterations associated with the construction of a cattle watering pond are for the sole and predominant purpose of adversely impacting wetlands as evidenced by the impeding and diverting of the water flow to create the ponds. Dredging and filling within a wetland can have no other purpose than to change the topography of the wetland. The sole or predominant effect of these activities is to adversely affect the wetland.

No, with respect to construction of the road. The predominant purpose of building the road and associated culvert and ditch is to provide necessary access to the whole of the property; however, the road also adversely affects the subject wetland.

The adverse effects are evidenced by the blocking of the water flow and filling in of a portion of the wetland. Regarding the construction of access roads, the Cow/Calf BMP Manual recognizes that access roads can impact wetland areas and requires producers to carefully plan the location of the road and associated drainage features prior to road construction utilizing soil survey maps, topographic maps, and aerial photographs. Additionally, the manual requires that road banks and critical segments be stabilized to reduce soil erosion, turbidity problems, and
direct runoff. Mr. Beaton failed to take these measures required for farms enrolled in BMPs or other similar steps to reduce the impact of the road.

The road impacts the property in a way that impedes or diverts water flow and adversely affects the wetlands. Such impacts could have been further minimized through proper coordination with the permitting agencies and consistent implementation of the recommendations of the Cow/Calf BMP Manual or other similar measures.

Balancing the forgoing with Mr. Beaton’s lack of alternatives for access and the fact that construction of the road included the culvert and building the road only slightly above grade, the predominant function of the road (and associated culvert and ditch) is to provide access, not to adversely affect the wetland.

**Yes, with respect to spreading spoil material from the historic swale ditches over the wetland.** Depositing fill within a wetland can have no other function than to change the topography of the wetland. The sole or predominant purpose of spreading the spoil from the historic swale ditches over the wetlands was to adversely impact the wetland by raising its elevation which resulted in the waterflow being impeded or diverted.

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**Conclusion:**

Based upon the aforementioned facts, site-specific characteristics, historical land use, and documented industry practices, FDACS has determined that the activities associated within the wetland; namely, construction of a cattle watering pond and the routine maintenance of the north-south swale, do not qualify for an exemption under section 373.406(2), Florida Statutes. However, the access road, including the associated culvert and excavated ditch do 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) Aerial Photography, including National Wetlands Inventory
(3) Site Visit Digital Photographs
(4) 2019 Martin County Property Appraiser Information
(5) Chapter 5M-15, F.A.C.
(7) NRCS Hydric Soils of Florida
(8) SFWMD Cost Code 11250 File
(9) FDACS BMP enrollment map, October, 2018.
(10) NRCS Conservation and Grazing Plans

Filed with the Agency Clerk and rendered this 29th day of August, 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 30th day of August, 2019 to: Mr. Cory Beaton, cbeaton87@aol.com and Anthony Waterhouse, twaterho@sfwmd.gov, South Florida Water Management District, 3301 Gun Club Road, West Palm Beach, FL 33637-6759.

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