



FLORIDA DEPARTMENT OF AGRICULTURE AND CONSUMER SERVICES
COMMISSIONER ADAM H. PUTNAM

November 14, 2011

Mr. Robert Hay
Checkpoint Farms
732 Mulberry Street
Sebastian, Florida 32958


SUBJECT: 373.406(2) Binding Determination – Checkpoint Farms

Dear Mr. Hay:

Per your request, enclosed please find our written report on the subject referral. In short, it is the Department's opinion that the operation in question is engaged in production agriculture; however, the proposed water supply pond, as conceptually designed, would not qualify for the exemption under subsection 373.406(2), Florida Statutes.

If you or your staff have any questions as you review the document, please feel free to contact me or Bill Bartnick at 850-617-1700.

Sincerely,
ADAM H. PUTNAM
COMMISSIONER


Richard J. Budell
Director

Enclosure

cc: Vince Singleton
Carol Forthman

FLORIDA DEPARTMENT OF AGRICULTURE AND CONSUMER SERVICES
Office of Agricultural Water Policy
1203 Governors Square Blvd., Suite 200
Tallahassee, Florida 32301

Binding Recommendation and Opinion
Florida Statute 373.406(2) Exemption Claim
Checkpoint Farms, Brevard County
October 19, 2011

FDACS Clerk No. A75920

Pursuant to the existing *Memorandum of Agreement Regarding Binding Determinations of Exemptions Under Subsection 373.406(2), Florida Statutes*, between the St. Johns River Water Management District (District) and the Florida Department of Agriculture and Consumer Services Office of Agricultural Water Policy (OAWP), the owner of Checkpoint Farms, Mr. Robert Hay requested that OAWP evaluate agricultural activities located on his property in Brevard County, Florida, to determine whether these activities qualify for the statutory exemption. Per this request, staff has performed a site inspection and evaluated owner provided documentation and has rendered a conclusion based on the following information.

Background:

The site is an approximately 20-acre parcel, located in Section 4, Township 30 South, Range 38 East, in Brevard County, north of Sebastian. The land is classified as agriculture pursuant to 2011 Brevard County Property Appraiser information. Robert Hay holds title to the property, and acquired the parcel by warranty deed on August 31, 2007.

On February 17, 2011, Mr. Hay met with Mr. John Julianna from the District on the subject property to discuss the use of an approximately 2-acre depressional area located on the southern end of his property for a proposed irrigation pond. Mr. Hay stated his intention to use the irrigation pond to irrigate approximately 17 acres of Tifton 85 bermuda grass for hay production. Subsequently, Mr. Julianna requested additional information from Mr. Hay which was provided to the District at a meeting on March 31, 2011. On April 14, 2011 the District provided a memorandum to Mr. Hay that provided options regarding the proposed agricultural activity on his property. In summary, the memo describes the Consumptive Use and the Environmental Resource Permit (ERP) requirements for the proposed project. The District considers the approximately 2-acre depressional area on the southern end of the property to be jurisdictional wetlands and therefore would require an ERP permit if the proposed irrigation pond is located partially or wholly within the wetland area. OAWP received Mr. Hay's written request for a binding determination and supporting information on September 14, 2011.

Site Inspection Findings:

On October 5, 2011, a site inspection was performed by Vanessa Bessey and Linda Crane with the OAWP, accompanied by Mr. Robert Hay, Mr. Andre Conklin with Andrew Conklin Environmental Services, LLC., and Mr. Joe Walters with the Brevard County Extension Office, all representing Checkpoint Farms. During this field visit, the entire farm was investigated with special attention given to the depressional area at the

southern end of the property. As part of this investigation, digital photographs were taken and soil was turned up in select locations.

The operation currently consists of approximately 20 acres of improved grasses consisting predominately of bahia grass. The site contains a 4-inch artesian well that is valved. According to a letter from Mr. Brad Gary of Adger Smith Wells, Inc., the casing of the well is in poor condition and could not withstand having a pump installed on it. An irrigation system has been installed on the property and consists of underground lines and two water cannons. However, the irrigation system is not operational because there is no current water source.

On this day, the depressional area appears to have been recently mowed and contains no standing water. There is evidence of scattered hydrophytic vegetation and bahia grass within the depressional area. Mr. Hay is proposing to construct an approximate 150' x 150' pond (approximately $\frac{3}{4}$ acre in total size, including berms) in the depressional area to provide irrigation for approximately 17 acres of Tifton 85 bermudagrass to be planted for hay production. The estimated size of the pond was calculated to meet the requirements of three complete irrigation cycles (one hour each) to provide sufficient water for freeze protection. However, the size of the pond was not calculated for a Tifton 85 bermuda grass crop. Based on OAWP staff discussions with Mr. David Millard, the District Conservationist in Brevard County, the size of the proposed pond was estimated based on a more tropical crop that would require routine freeze protection. Therefore, in order to meet the supplemental irrigation requirements for Tifton 85 bermuda grass, the proposed irrigation pond can actually be smaller than the current design size.

Statutory Analysis:

(a) *"Is the person engaged in the occupation of agriculture, silviculture, floriculture, or horticulture on lands classified as agricultural pursuant to s. 193.461, F.S.?"*

YES. The OAWP finds that Checkpoint Farms is engaged in the practice of agriculture pursuant to s. 193.461 F.S.

(b) *"Has the individual altered the topography of the tract of land for the purposes consistent with the normal and customary practice of such occupation in the area?"*

NO. The OAWP finds that the proposed pond would not be a normal and customary practice for the following reasons:

1. The size of the proposed pond has been estimated to be 150' x 150' to provide irrigation and freeze protection for the proposed Tifton 85 hay field. The estimated size of the pond was calculated to meet the requirements of three complete irrigation cycles (one hour each) to provide sufficient irrigation for freeze protection should a future crop require it. It is not normal and

customary to provide freeze protection for a hay crop such as Tifton 85 bermudagrass.

2. Based on a conversation with Mr. Dave Millard, OAWP staff estimates that a pond smaller than the currently proposed design size would be adequate to supply supplemental irrigation to the hay crop.

NOTE: Alternatives exist that would eliminate or reduce the proposed impact to the depressional/wetland area. These alternatives include: a) Placement of the pond in the uplands, b) Placement of the pond in the depressional/wetland area with a reduction in size that equates to an impact footprint of equal to or less than ½ acre, or c) Installation of a new ground water well.

c) *"Are the alteration(s) for the sole and predominant purpose of impeding or diverting surface waters or adversely impacting wetlands?"*

OAWP is unable to answer this question at this time since the proposed agricultural activity has not occurred, and is speculative based on the future actions of Mr. Hay.

Conclusion:

Based on the aforementioned facts, site-specific characteristics, historic land use, and industry practices, it is OAWP staff's opinion that installation of a 150' x 150' irrigation pond within the approximately 2-acre depressional/wetland area would not qualify for an exemption under subsection 373.406(2), F.S.

Nothing herein relieves the landowner from applying for and obtaining any applicable federal, state, or local authorization.

Right to Administrative Hearing:

If you wish to contest OAWP's 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, 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 OAWP, 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 the

OAWP (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 address shown on this Notice within twenty-one (21) days of receipt of this Notice. If you fail to obtain a Release from this Notice or 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.

You may appeal the final agency action by filing: (1) a Notice of Appeal with the OAWP at the address shown in this Notice, and (2) a copy of the Notice of Appeal with the applicable district court along with the filing fee within 30 days of the action becoming final.

Supporting Documents:

- 1) 2011 Brevard County Property Appraiser Information Card
- 2) Andrew Conklin Environmental Services reports dated January 9, 2009; March 16, 2009; and June 30, 2011
- 3) Application to Brevard County for Agricultural Classification of Lands
- 4) Site Visit Digital Photographs
- 5) FDACS 2005 Florida Vegetable and Agronomic Crops Best Management Practices Manual
- 6) Aerial, Soil, Wetland and Topographic maps prepared by OAWP
- 7) SJRWMD report dated October 10, 2011

Filed with the agency clerk and rendered this 7th day of November.

