



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

December 22, 2010

Mr. Mark Luchte
Southwest Florida Water Management District
6750 Fruitville Road
Sarasota, Florida 34221

SUBJECT: 373.406(2) Binding Determination – McClary

Dear Mr. Luchte:

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 and that the wetland impacts in the North Area are exempt; however, the wetland impacts in the South Area are not exempt 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 of Agriculture

A handwritten signature in black ink, appearing to read "R. Budell".

Richard J. Budell, Director
Office of Agricultural Water Policy

Enclosure

cc: Richard McClary
8741 Fussel Road
Polk City, FL 33868

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
Richard and Jeanette McClary, Polk County

FDACS Clerk No. A76513

Pursuant to the existing *Memorandum of Agreement Regarding Binding Determinations of Exemptions Under Subsection 373.406(2), Florida Statutes*, between the Southwest Florida Water Management District (District) and the Florida Department of Agriculture and Consumer Services Office of Agricultural Water Policy (OAWP), the District requested that OAWP evaluate agricultural activities located on property owned by Richard and Jeanette McClary (McClary) to determine whether these activities qualify for the statutory exemption. Per this request, staff has performed a site inspection, evaluated District and owner-provided documentation, researched available historical data, and has rendered a conclusion based on the following information.

Background:

The site is a single, contiguous 7.53 acre parcel, located within Section 13, Township 26 South, Range 25 East, in Polk County, north of the intersection of County Road 557 and I-4. Approximately 5.28 acres of this property are classified as agriculture pursuant to 2011 Polk County Property Appraiser information. Richard and Jeanette McClary hold title to the property, and acquired the parcel by warranty deed in February of 1994.

On September 21, 2011, District staff received a complaint forwarded from the Florida Department of Environmental Protection concerning dredging and filling impacts to wetlands. On October 3, 2011, District staff met with Mr. McClary to assess the extent of alleged wetland impacts. On October 5, 2011, the District sent the McClary's a Notice of Unauthorized Activities letter. On October 31, 2011, the District sent OAWP a letter requesting a binding determination.

Site Inspection Findings:

On November 10, 2011, a site inspection was performed by Bill Bartnick and Noel Marton with the OAWP, accompanied by Mr. and Mrs. Richard and Jeanette McClary. During the site visit, four (4) areas of alleged wetland impacts were inspected. These areas include the West Pond (Area 1), the East Pond (Area 2), the Raised Access Road (Area 3), and the Raised Pasture (Area 4). These are identified on **Figure 1**. Based on aerial photography, these impacts first appeared around 2008.

At the time of the site inspection, the operation consisted of the McClary residence, a barn and workshop, improved pasture, two (2) head of cattle, three (3) hogs (penned), and approximately 22 pastured Nubian goats. No irrigation system was in place.

OAWP will address its findings using the information provided within the District's October 31, 2011 Request for Binding Determination letter, including, but not limited to,

aerial photographic maps, notes and documentation, as well as field notes from OAWP staff, and subsequently provided information from McClary entitled "Timber Harvesting Agreement" (Supporting Document No. 10).

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 McClary is engaged in the practice of agriculture on the 5.28 acres of classified agricultural land in Polk County, as evidenced by their current agricultural land use classification and the ongoing agricultural production activities.

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

YES. With regard to Area 1, OAWP staff were unable to identify the area of alleged impact discussed by the District. At the time of OAWP staff's site visit, Area 1 had mostly recruited with wetland vegetation and appeared to be a functioning wetland system. With regard to Area 3, the access road was elevated slightly above the anticipated seasonal high water table, is stable, and allows landowner access for fence maintenance along the southern property boundary. Additionally, timber has been harvested from the property, as documented by the aforementioned "Timber Harvesting Agreement". OAWP finds that this road allows access for property maintenance and future silvicultural activities.

NO. With regard to Area 2 and Area 4, OAWP finds that these activities are not a normal and customary practice for the area because:

1. The size of the wetland impact area associated with Area 2 and Area 4 significantly exceeds what OAWP considers to be normal and customary for either general or dairy goat production. Goat water needs are estimated to be 2 gallons/goat/day (see additional comments below); and,
 2. Dredging and filling of wetland areas solely for increased production area is not considered a normal or customary practice.
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(c) *"Are the alteration(s) for the sole or predominant purpose of impeding or diverting surface waters or adversely impacting wetlands?"*

NO. (As to impeding or diverting surface waters.) OAWP finds that the agricultural activities were not for the sole or predominant purpose of impeding or diverting surface waters. During the November 10, 2011 site visit, the owner, as well as OAWP staff verified that the post-development drainage patterns are consistent with the pre-development drainage patterns. No overtopping of the access road was reported, or noted, and the water levels on both sides of the road were similar.

YES. (As to adversely impacting wetlands.) The activities which have occurred in Area 2 and Area 4, as well as the final results as observed during the OAWP staff site visit, indicate dredging in wetlands (Area 2) and filling in wetlands (Area 4). The dredging is excessive as goats can more reasonably obtain their water from existing wetlands, or a water trough installed in the uplands. The fill (spoil from excavated area) was for the purpose of converting wetlands to cultivated area. Therefore, OAWP finds that the dredging and filling activities were for the predominant purpose of adversely impacting wetlands.

Conclusion:

Based upon the aforementioned facts, site-specific characteristics, historical land use, and documented industry practices, OAWP has determined that Area 1 and Area 3 would qualify for an exemption under subsection 373.406(2), F.S. However, Area 2 and Area 4 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.

A determination by the Department 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.

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.

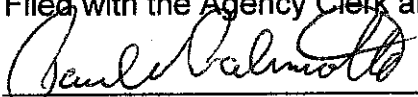
Your request for a hearing must be received at the address shown on this Notice within twenty-one (21) days of receipt of this Notice. If you fail to obtain a Release from this Notice or fail to request an administrative hearing within the twenty-one (21) day deadline you waive your right to a hearing 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) NRCS Field Office Technical Guide, Section IV
- (2) FDACS 2008 Florida Cow/Calf Operations Best Management Practices
- (3) FDACS 2008 Florida Silviculture Best Management Practices Manual
- (4) Aerial Photography, Dated 1984 to 2011
- (5) USDA Soil Survey, Polk County, Florida
- (6) Site Visit Digital Photographs
- (7) 2011 Polk County Property Appraiser Information Card
- (8) E-mail Correspondence from SWFWMD Staff
- (9) E-mail Correspondence from Dairy Goat Journal
- (10) Written Correspondence from McClary, Timber Harvesting Agreement

Filed with the Agency Clerk and rendered this 22nd day of December, 2011.



Paul Palmiotto, Agency Clerk

Figure 1

