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

September 27, 2013

Mr. Vince Singleton
Technical Program Manager
St. Johns River Water Management District
4049 Reid Street
Palatka, Florida 32177

SUBJECT: 373.406(7) Binding Determination – Sieger

Dear Mr. Singleton:

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 impact is 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,

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

Richard J. Budell
Director, Office of Agricultural Water Policy

RB/bh

Enclosure

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

Binding Determination
Florida Statutes 373.406(2); 373.407
Sieger Property, Volusia County, Florida

FDACS Clerk No. A85125

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.

The St. Johns River Water Management District (District) and owner's legal counsel, Paul, Elkind & Branz, P.A., have requested that FDACS conduct a binding determination on the Sieger property, and the conditions described above are in place.

Background:

This is a 19.8 acre parcel owned by Brent and Tanya Sieger located in Section 36, Township 16 South, Range 29 East near DeLand in Volusia County, Florida. The property has a 4-inch well, perimeter fence, and has been planted with a mix of bahia and millet. A house is being constructed adjacent to Greens Dairy Road, and an earthen pad area has been prepared to accommodate a future 6-stall barn in accordance with the Sieger's written business plan.

On April 27, 2011, Volusia County Environmental staff conducted a site visit in response to a complaint. Staff observed piles of fill located within the property's central depressional area, and estimated the core wetland within this area to be less than one-half acre, based on hydric soil indicators. The complaint was closed on June 22, 2011, after observing that the piles of fill were removed; and, an authorization to construct a farm pond (Permit No. 20120309026) was issued on March 19, 2012, to contractor, Michael Chinelli. A final inspection was conducted by Volusia County on September 11,

2012, and permit closure was subsequently transmitted to the contractor via email on July 9, 2013.

On July 18, 2012, District staff visited the parcel and used aerial photo interpretation to allege that the Siegers' converted a 2.4 acre sinkhole marsh to a farm pond and upland pasture. Through the assistance of the District's Agricultural Assistance Team, the District then concluded that the activities did not qualify for an exemption from permitting.

On December 31, 2012, Paul, Elkind & Branz, P.A., sent a letter with supporting documentation to the District stating that the aforementioned activities were exempt from permitting requirements pursuant to Section 373.406(2), F.S. On February 7, 2013, District legal staff responded stating that the activities were not exempt.

FDACS received an exemption determination request letter from both parties on May 23, 2013. The landowner's attorney submitted additional information to FDACS on July 12, 2013.

Site Inspection Findings:

On July 9, 2013, a site inspection was performed by Bill Bartnick and Vanessa Bessey with the FDACS, accompanied by Dr. Sieger, attorney Darren Elkind, and horse consultant Melissa Morgan. During the site inspection, the operation was visited in its entirety, and digital photos and soil borings were taken at various locations on the property.

The site inspection began with a general tour of the property, starting with the perimeter areas, and then descending nearly 30 feet to the pond (**Exhibit 1**). Dr. Sieger showed us the earthen pad area where they plan to build a barn after the house is finished. He mentioned that they currently have five executed leases with individuals to pasture their horses once the operation is complete. The business name on the lease is "Lit'l Bit Stables", which is listed as a training and boarding facility. No horses were noted onsite on the day of our inspection.

When asked, Dr. Sieger stated that the depressional area work, which started in 2011, was done to construct a dual-use stormwater catchment and exercise pond for horses. He further stated that no fill was imported onto the site. Using a measuring wheel, the area from the pond edge to top of (constructed) bank was calculated to be approximately 44 feet. This area was well vegetated with bahia grass and stable, even though side slopes were estimated to be 1:1. The area landward starting from the top of the bank was planted with a mix of millet and bahia grass, and was also stable. From this point, ascending to the perimeter, the vegetation mostly consisted of a scattering of mature oaks and pines, with a mixed grass understory.

The site inspection then progressed to the pond. Two, two-inch PVC pipes were noted at the water's edge, which Dr. Sieger said were to be used for a fountain in the pond. The pond depth is estimated to be less than 20 feet, which is in accordance with the

Volusia County permit. Using a measuring wheel, the pond was conservatively estimated to be 0.57 acres in size. Based on plant indicators directly adjacent to the pond's water surface, there appeared to be little to no fluctuation in the water level. Using a soil auger, a hole was bored near the water's edge to observe soil characteristics. At a depth of 12-inches below land surface, water was encountered. No hydric soil indicators were noted and the soil removed in the core was mostly sand. A second hole was dug halfway up the bank. The hole was dry all the way down to 4 feet. The core was free of plant debris and was mostly sand. There was a slight change in color of the sand, possibly indicative of dredge material deposition (spoil) from the deepening of the depressional area core into a pond during the 2011 construction activities.

Subsequent to the site visit, FDACS requested a wetland determination analysis report from consulting firm, Clark Hull and Associates, LLC. The study was ordered by FDACS due to the wide disparity in estimated wetland acreage between Volusia County and the District. On July 15, 2013 the report was received, and was used by FDACS as additional information in order to render a conclusion. Mr. Hull used a series of historical aerial photographs of the site and concluded that, prior to the dredge and fill operation, the site was comprised of a small central wetland with emergent vegetation (presumably a relict sinkhole), surrounded by a scrub-shrub wetland. The central area had standing pools of water on a periodic basis.

Mr. Hull estimated the historical size of the central wetland at 0.67 acres and the total acreage, including the peripheral shrub/scrub wetland at between 1.31 and 2.9 acres with a possible 25% margin of error due to the inability to examine the site prior to the dredging and filling. He accepted that the District's calculation of 2.4 acres was reasonable and this figure was used in the evaluation of the exemption.

An exemption, being a deviation from the statutory scheme, must be strictly construed against the applicant. See, *Pal-Mar Water Management District v. Martin County*, 384 So.2d 232 (Fla. 4th DCA 1980). Failure to qualify for the exemption should not be construed to mean that an Environmental Resource Permit cannot be obtained for the activity.

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. The FDACS finds that while Sieger had no horses onsite at the time of the site visit, he previously maintained cattle and goats on the property. This, coupled with the presence of a prepared earthen pad for construction of a six-stall horse

barn, leads FDACS to conclude that Sieger is engaged in the occupation of agriculture.¹

(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?"*

[Normal and customary practice in the area is defined as – "Generally accepted agricultural activities for the type of operation and the region." 5M-15.001(2) Florida Admin. Code.]

NO. For the 0.57 acre pond. The pond is approximately 0.57 acres in size. The expressed use of the pond as a stormwater catchment is not an agricultural use. Furthermore, the original wetland served the purpose of receiving and retaining water during flood conditions, so no additional dredging would be required for this purpose. There has been no documented need for an exercise area for the horses that could not be met in a smaller area with an upland pond or a pool. The facility will house only six horses at capacity. There is no evidence that the creation of such a pond is normal and customary for a small equine facility.

FDACS Best Management Practices for Equine Operations (2011 Edition) firmly states that there should be no dredging and filling of wetlands. In addition, safety factors may require that the pond be fenced to prevent unsupervised entry of the horses into the pond. To be normal, a practice must fit the scale and the scope of an operation. Thus, it is not normal to dig a 0.57 acre pond up to 20 feet deep to provide for only 6 horses.

In summary, the construction of a 0.57 acre pond for six horses, dredged in a wetland, is not a normal and customary agricultural practice in the area.

NO. For the pond spoil/fill placed on the surrounding wetland area, landward of the pond. FDACS estimates that a minimum radial distance of 44 feet (landward of the pond edge) was involved in earthmoving construction activities. This estimate is based on the presence of an artificially created berm feature and a soil boring profile that suggested fill overburden. Filling of wetlands has no agricultural purpose and is not a normal and customary agricultural activity. While the fill added some grassed area to the facility, it is not normal and customary to increase pasture area by filling wetlands.

¹ §193.461(3)(b), Florida Statutes: "only lands which are used primarily for bona fide agricultural purposes shall be classified as agricultural. 'Bona fide agricultural purposes' means good faith commercial agricultural use of the land."

- (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?"*

[Sole or predominant purpose is defined as "the primary function of the activity in question." 5M-15.001(3), Florida Administrative Code

Yes. For the 0.57 acre pond. The dredging of the pond removed all of the functional qualities of the previously existing wetland. Aerial photographs, as shown on the Clark Hull report, demonstrate that the wetland has been functioning at that site with fluctuating water levels for many years. The evidence further shows that the open water in the pond is ephemeral and seldom has exceeded 33% of the core wetland. The wetland previously provided habitat consisting of submerged and emergent vegetation that is considerably more diverse than an open water pond. This vegetation has been replaced with a few marginal plants and open water which does not provide comparable environmental benefits. Because the activity was not normal and customary, FDACS concludes that the predominant purpose was to adversely impact the wetland.

YES. For the pond spoil/fill placed on the surrounding wetland area, landward of the pond. FDACS estimates that a minimum radial distance of 44 feet (landward of the pond edge) was involved in earthmoving construction activities. This estimate is based on the presence of an artificially created berm feature and a soil boring that suggested fill overburden. In addition, historical aerial photographs of the wetland show a distinct wetland signature in this area. The fill has destroyed all wetland function, including its ability to store excess water, which was provided by the original ephemeral wetland. Because the activity was not normal and customary, FDACS concludes that the predominant purpose was to adversely impact the wetland.

Conclusion:

Based upon the aforementioned facts, site-specific characteristics, historical land use, and documented industry practices, the FDACS has determined that the 0.57 acre pond and the surrounding fill 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.

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.

Notice of Rights:

If you wish to contest the Department'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, 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 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 Department (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, 1203 Governors Square Blvd. Suite 200, Tallahassee, Florida 32301, 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 the binding determination will become final agency action upon filing with the agency clerk.

Any party to these proceedings adversely affected by this Final Order is entitled to seek judicial review of this 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, Suite 509, 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) District and Landowner Request for exemption determination on May, 2013
- (2) Site Visit Digital Photographs
- (3) Volusia County Soil Survey
- (4) Water Quality/Quantity Best Management Practices for Florida Equine Operations, 2011 Edition
- (5) Volusia District Permit No. 20120309026
- (6) Aerial and National Wetland Inventory Maps
- (7) Clark Hull & Associates LLC Report dated July 15, 2013

Filed with the Agency Clerk and rendered this 26th day of September, 2013.


Paul Palmiotto, Agency Clerk

Exhibit 1

