



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

March 22, 2012

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

SUBJECT: 373.406(2) Binding Determination -- Geraci

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 parts are exempt, and parts 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

A handwritten signature in cursive script, appearing to read "R. Budell".

Richard J. Budell
Director

Enclosure

cc: Peter and Sheila Geraci
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
Peter and Sheila Geraci, Manatee County

FDACS Clerk No. A77995

Background:

The activity for which this determination is sought is the construction of "fire suppression ponds" created by dredging isolated wetlands, and excavation (widening and deepening) of a portion of Owen Branch Creek. Mr. Geraci contends that this work was conducted as part of his silviculture operation, and to facilitate the production of fish, and is therefore exempt under Section 373.406(2), F.S. Specifically, Mr. Geraci contends that the ponds are for fire suppression, and the excavation of the creek was to remove debris and sediment from Hurricane Charlie.

Previous Determination

On July 10, 2010, the Florida Department of Agriculture and Consumer Services (FDACS) rendered a non-binding opinion to the District regarding alleged agricultural activities on the Geraci property. At that time, FDACS found that under the Section 373.406(2) exemption as it existed in 2010, the dredging of the ponds in isolated wetlands and the dredging of Owen Branch Creek did not meet the requirements for the exemption.

Since that time, the District and Geraci have been unable to settle the matter. The unresolved matter is currently pending before the Division of Administrative Hearings. On January 18, 2012, the District again requested a binding determination from FDACS.

A more complete description of the activities that were reviewed is in the original non-binding determination, which is attached as **Exhibit 1**, and is incorporated by reference herein.

Introduction:

Under Section 373.407, F.S., a water management district or landowner may request that 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.

Southwest Florida Water Management District (District) has requested that FDACS conduct a binding determination on Peter and Sheila Geraci (Geraci), and the conditions described above have been met. Per this request, FDACS staff has reviewed the information upon which the original opinion was based, has evaluated District-provided documentation, and has rendered a conclusion. The basis for that conclusion is provided below.

Site Inspection Findings:

The District confirmed via email (February 2, 2012) that no changes have occurred to the Geraci property since the time that FDACS sent its July 20, 2010 non-binding report. Therefore, no new site inspection was performed.

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 Geraci is engaged in the occupation of agriculture.

- (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?"*

- (1) **NO. Fire Suppression Ponds:** In general, the practice of constructing "fire suppression ponds" is considered to be consistent with the occupation of silviculture. Such ponds are used primarily as helicopter dip-sites for initial, aerial attack during wildland fire suppression operations. They can also serve effectively for drafting water into tanks on mobile ground units throughout the fire suppression operation, including mop-up. Their construction and location have historically been limited to very large contiguous areas of heavy forest fuels, with a history of high fire occurrence and/or catastrophic fire, and with limited vehicle access and surface water availability. Given the size, location and nature of the Geraci property, the construction of such facilities is not a normal and customary practice.

The number of ponds that were constructed and their proximity to each other is excessive for the property. There is also a lake approximately 18 acres in size which is capable of serving as a water source for both ground and aerial supply. The lake is approximately one mile from the furthestmost point on the Geraci property, which would facilitate a turnaround time of less than 3 minutes for a helicopter water drop. Finally, based on aerial photography, there are several other surface water sources in close proximity to the Geraci property.

The revisions to Section 373.406(2), F.S., added to the exemption determination the consideration of whether the activities adversely impact wetlands. Because the ponds were the result of dredging isolated wetlands, the wetlands that were dredged to create the ponds were destroyed and thus adversely impacted.

- (2) Owen Branch Creek Excavation: The excavation work conducted within the existing natural stream channel of Owen Branch creek is not considered part of a normal and customary silviculture operation. This type of work, in association with silviculture, is limited to maintenance of man-made canals or upland field ditches to facilitate or improve drainage conditions.

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. As to impeding or diverting surface waters. The FDACS finds that the activities were not for the sole or predominant purpose of impeding or diverting the flow of surface waters.

YES. As to adversely impacting wetlands. The FDACS finds that the construction of the fire suppression ponds in wetlands was for the sole or predominant purpose of adversely impacting wetlands.

Conclusion:

Based upon the aforementioned facts, site-specific characteristics, historical land use, and documented industry practices, the FDACS has determined that the referenced activities above would not qualify for an exemption under Section 373.406(2), F.S. because the activities are not consistent with normal and customary practice in the area, and because the activities adversely impact wetlands.

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) NRCS Field Office Technical Guide, Section IV
- (2) Arc-Map Infrared Aerial Photography Maps
- (3) USDA Soil Survey of Manatee County, Florida
- (4) Site Visit Digital Photographs
- (5) Manatee County Property Appraiser Information Card
- (6) Florida Division of Forestry Silviculture Best Management Practices

Filed with the Agency Clerk and rendered this th 20 day of March, 2012.



Paul Palmiotto, Agency Clerk

Exhibit 1

**Non-Binding Recommendation and Opinion
Florida Statute 373.406(2) Exemption Claim
Peter Geraci, LG Land, Cattle and Timber Co., Manatee County
July 20, 2010**

Pursuant to the existing *Memorandum of Agreement Regarding Nonbinding Review of Exemptions Under Subsection 373.406(2)*, 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 Peter Geraci, LG Land, Cattle and Timber Company, hereinafter referred to as Geraci, to determine whether these activities qualify for the statutory exemption. Per this request, staff performed a site inspection, evaluated District-provided documentation, researched available historical data, and has rendered a conclusion based on the following information.

Background:

The site is an approximate 1,200-acre agriculturally zoned parcel located in Sections 1 through 3, Township 36 S, Range 22 E, in Manatee County approximately 5 miles north and east of Myakka City. Peter and Shelia Geraci hold title to the land and this parcel has been in family ownership since 1950. Subsequent to this date (approximately 1969), the property was conveyed to Mr. Geraci as a gift from his father. Upon surveying most of the property on a previous site visit conducted by OAWP and DOF in 2002, and from observations made on this day, it was noted that the Geraci property consists mostly of native range and forested areas with approximately 300 acres of planted slash pines. At issue here is the construction of the "fire suppression ponds" within isolated wetlands, and excavation (widening and deepening) of a portion of Owen Branch creek. Mr. Geraci contends that this work was conducted as part of his silviculture operation, and to facilitate the production of fish, and is therefore exempt under Chapter 373.406(2), F.S.

Site Inspection Findings:

On July 8, 2010, a site inspection was performed by Jeff Vowell, Division of Forestry (DOF), Roy Lima (DOF), and Noel Marton (OAWP), accompanied by Peter Geraci, and Dale Merryman (Merryman Consultants). During this inspection, digital photographs were taken of the "fire suppression ponds" and Owen Branch creek.

The forested areas on the property continue to be managed through a process of burning, harvesting, and planting as part of routine silviculture activities. In general, the pine stands were estimated to be 2 to 11 years old, and planted at a spacing that would be typical for the industry. Mr. Geraci contends that the fire suppression ponds were constructed to protect the timber on the property, and will serve as helicopter dip sites to facilitate wildland fire suppression. He further contends that the excavation work in

Owen Branch creek was to remove wind-blown timber and sediment from the creek, which resulted from Hurricane Charlie. The following addresses these activities as they relate to silviculture operations.

- (1) Fire Suppression Ponds: In general, the practice of constructing "fire suppression ponds" is considered to be consistent with the occupation of silviculture. Such ponds are used primarily as helicopter dip-sites for initial, aerial attack during wildland fire suppression operations. They can also serve effectively for drafting water into tanks on mobile ground units throughout the fire suppression operation, including mop-up. These types of facilities have been constructed on public and private property in other parts of the state by both public and private entities. However, their construction and location have historically been limited to very large contiguous areas of heavy forest fuels, with a history of high fire occurrence and/or catastrophic fire, and with limited vehicle access and surface water availability. Typically, such areas are on forest industry lands where they are considered cost-effective and justifiable to protect large corporate assets. Given the size, location and nature of the Geraci property, the construction of such facilities is very atypical. In addition, the number of ponds that were constructed and their proximity to each other is excessive - particularly in light of the lake that is also located on the property. The lake, which is approximately 18 acres in size, would appear to be capable of serving as a water source for both ground and aerial attack. The location of the lake is approximately one mile from the furthestmost point on the Geraci property, which would facilitate a turnaround time of less than 3 minutes for a helicopter water drop, which is more than satisfactory. Finally, based on aerial photography, it appears that there are several other surface water sources in close proximity to the Geraci property that could serve as helicopter dip-sites, and maintain an effective turnaround time.
- (2) Owen Branch Creek Excavation: The excavation work conducted within the existing natural stream channel of Owen Branch creek is not considered part of a silviculture operation. This type of work, in association with silviculture, is limited to maintenance of man-made canals or upland field ditches to facilitate or improve drainage conditions.

Statutory Analysis and Conclusions:

- (a) *"Is the person engaged in the occupation of agriculture, silviculture, floriculture, or horticulture?"*

YES. The OAWP finds that Geraci is engaged in the practice of agriculture and silviculture on the 1,200-acre site in Manatee County, as evidenced by their land use classification and the production activities observed.

- (b) *"Has the individual altered the topography of the tract of land for purposes consistent with the practice of such occupation?"*

NO. Mr. Geraci is engaged in the occupation of agriculture and silviculture on the property visited by OAWP and DOF personnel during this site visit. As previously noted, fire suppression ponds are common in areas where there are very large contiguous blocks of heavy forest fuels, a history of high fire occurrence and/or catastrophic fire, limited vehicle access and surface water availability. The fire suppression ponds that were constructed on the Geraci property are very atypical – the DOF personnel on this site visit have not observed these types of facilities on any other non-industrial private forestlands in the state. In conclusion, the fire suppression ponds on the Geraci property are not consistent with the occupation of silviculture.

The excavation work on Owen Branch creek is not considered part of a silviculture operation. DOF personnel involved in this site visit have never observed this type of work anywhere in the state within the context of a silviculture operation. While the excavation work may have been conducted for the purpose stated, it is not consistent with the occupation of silviculture.

Conclusion:

Based upon the aforementioned facts, site-specific characteristics, historical land use, and documented industry practices, it is OAWP and DOF staff's opinion that the two referenced activities on Geraci do not qualify for an exemption under subsection 373.406(2), F.S.

Support Documents:

- (1) NRCS Field Office Technical Guide, Section IV
- (2) Arc-Map Infrared Aerial Photography Maps
- (3) USDA Soil Survey of Manatee County, Florida
- (4) Site Visit Digital Photographs
- (5) Manatee County Property Appraiser Information Card
- (6) Florida Division of Forestry Silviculture Best Management Practices