

**FLORIDA DEPARTMENT OF AGRICULTURE AND CONSUMER SERVICES
Office of Agricultural Water Policy
Mayo Building
407 South Calhoun Street
Tallahassee, Florida 32399**

Binding Determination

FDACS Clerk No. B17837

**Florida Statute 373.406(2); 373.407
Abdul Rahim, Lake County, Florida**

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.

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

Background:

The site was purchased by Mr. Rahim in 2015 and consists of approximately 79 acres, located within Section 33 of Township 22 South, Range 24 East, in Groveland, Lake County, Florida. Approximately 24 acres of the property is pasture and 55 acres is wetlands. The subject property is divided into approximately two halves by an artificial boundary as indicated on most of the maps. The property is classified as agriculture pursuant to 2019 Lake County Property Appraiser information. The property is not currently enrolled in an FDACS Best Management Practices program.

On November 13, 2018, the St. Johns River Water Management District (SJRWMD) received a complaint from the Florida Department of Environmental Protection (FDEP) Central District Office about filling in marsh wetlands. A second complaint was received through Lake County Code Enforcement.

On January 3, 2019, David Eunice, Regulatory Scientist IV with SJRWMD met Abdul Rahim on site to observe potential wetland violations and notified Mr. Rahim that he had

30 days to remove the fill from wetlands. Mr. Rahim informed SJRWMD that he intended to construct a fill road through the wetlands to allow cattle to access the approximately 10 acres of upland area on the west side of the property adjacent to Bay Lake Road. David Eunice told Mr. Rahim that he would check with SJRWMD agricultural staff to determine if the road would qualify for an agricultural exemption under Section 373.406(2), F.S.

On January 8, 2019, David Eunice informed Mr. Rahim that it was SJRWMD's position that the road would not qualify for an agricultural exemption. On February 20, 2019, SJRWMD sent a letter to Mr. Rahim informing him that the proposed work (construction of fill road) in wetlands would require an Environmental Resource Permit. On March 4, 2019, a Request for Binding Determination was sent to Bill Bartnick at FDACS. SJRWMD sent additional information on March 13, 2019; and Mr. Rahim sent site visit follow-up information on April 15, 2019 and April 17, 2019.

Site Inspection Findings:

On April 8, 2019, a site inspection was performed by FDACS employee Bill Bartnick from the Office of Agricultural Water Policy along with landowner Abdul Rahim. The entire property was inspected, and 16 photos were taken. A current aerial photograph of the property is included in **Attachment 1**.

The inspection began at the gated entrance on the west side of the property near Bay Lake Road which led to the (approximate) 10 acres of uplands and partial construction of the elevated access road. This is the 10 acres to which Mr. Rahim is seeking access from the eastern portion of his property. It was noted that the large central wetland was fully inundated with water and the vegetation consisted mostly of pickerelweed. Mr. Rahim offered that the area had been inundated for some time now. This was corroborated by observing some algal matting and other hydrologic indicators.

We then traveled down Bay Lake Road to look at the culvert at the southwestern property boundary corner. The culvert was partially crushed and the ditch was dry. There is a small cattle trail (estimated at 4 feet wide) which traverses wetland areas along the perimeter fence at Bay Lake Road. From here, we traveled down Empire Church Road to confirm that the landowner has no access from the south, or from the east along Spikey Lane. From Bay Lake Road, we accessed the un-named east/west road which runs along most of the northern property boundary. Reportedly, this is a county-maintained road. A borrow canal was noted along both sides of the road, terminating at the boundary corner. There is no perimeter fence along Mr. Rahim's northern boundary, but one does exist north of the road along the adjacent landowner's southern property boundary. One metal culvert (estimated at 14 inches) was noted underneath the road, about midway between the two existing ditches which date back to 1984. The culvert was noted to have very slight flow to the north. The water level on Mr. Rahim's property appeared to be higher than the water level on the adjacent landowner's property to the north, suggesting some type of obstruction at the culvert.

The rest of the property, including the upland pasture area to the east, was inspected. A small watering pond was noted, and Mr. Rahim commented that cattle get most of their drinking water from here since the property currently has no wells. Ancillary structures,

including a fertilizer and hay barn, and cattle pens, were observed along the way. The site inspection concluded by asking Mr. Rahim to provide more details about the construction of the proposed road through wetlands. He commented that it would be a fill road, mostly sand material, and no greater than approximately 20 inches high (at road crown) by 15 feet wide. Mr. Rahim also explained during the visit that culvert crossings would be constructed as part of the elevated access road for two ditches that are roughly in the center of the western half of the property.

Prior to and after the site visit, FDACS performed an extensive in-office review of all available aerial photography. The dates of the aerial photography ranged from 1984 to 2019. There has been no significant change in the surface water management system since 1984 based on aerial photography review.

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. FDACS finds that the landowner is engaged in the occupation of agriculture. This finding is based on the fact that the landowner has an estimated 20 to 30 head of cattle and has received an agricultural classification for the property from the Lake County Property Appraiser's office.

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- (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?"*

NO. FDACS finds that the proposed construction of an elevated access road in wetlands is not a normal and customary practice of such an operation in the area. The proposed road will reportedly be used by cattle and for light vehicular use to access the estimated 10 acres of aforementioned uplands to the west, which currently have very limited forage resources, and will result in a permanent impact to approximately 1 to 2 acres of wetlands. There is an unnamed public road directly north of the property by which cattle now have access to the 10 acres. The road is also shared and is accessible to all adjacent landowners. Furthermore, given that this area is mostly dominated by shrubs, unimproved pasture, and exotic tropical soda apple interspersed in the understory, the existing forage resources would likely not be able to sustain more than 5 cows at any time without degrading the resource. This further limits the justification for a permanent road.

Given the small herd size, limited grazing in the westernmost upland area, and existing access to key perimeter points, the proposed road is not normal and customary. Cattle operations of a similar size, nature, and acreage observed in the area do not build roads over wetlands under these circumstances.

FDACS's conclusion is also supported by the standards provided in the 2008 Water Quality Best Management Practices (BMPs) for Florida Cow/Calf Operations Manual. Though cattle operations in Florida are not required to enroll in BMPs, those that do obtain a presumption of compliance with state water quality standards for pollutants addressed by the practices. Additionally, the BMPs specifically state that "elevated access roads should not be located within 25 feet of wetlands," so the construction of such access roads is not a normal and customary practice for those operations enrolled in the BMPs. The elevated access road in this case would not conform to the BMPs.

(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. FDACS finds that the proposed fill road is not for the sole and predominant purpose of impeding or diverting the flow of surface waters or adversely impacting wetlands. Historically, there have been two ditches within the wetland that allow for the water to move north or south on the property. The proposed road would include the use of culverts in the ditches to minimize any impediment to existing water flow.

Conclusion:

Based upon the aforementioned facts, site-specific characteristics, historical land use, and documented industry practices, FDACS has determined that the proposed construction of an elevated fill road through wetlands does 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. 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.

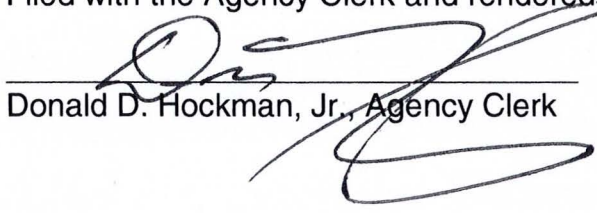
If you fail to request an administrative hearing within the twenty-one (21) day deadline you waive your right to a hearing and this binding determination will be considered the Final Order constituting final agency action.

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) Chapter 5M-15, Florida Administrative Code
- (3) Aerial Photography ,1984 to 2018
- (4) Site Visit Digital Photographs
- (5) 2019 Lake County Property Appraiser Information Card
- (6) U.S. Fish and Wildlife National Wetlands Inventory Map
- (7) 2008 Water Quality Best Management Practices for Florida Cow/Calf Operations
- (8) Additional information from SJRWMD and Mr. Rahim

Filed with the Agency Clerk and rendered this 25th day of June, 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 26th day of JUNE, 2019 to: Abdul Rahim, airahim2@gmail.com, P.O. Box 1597, Minneola, Florida 34755 and Suzanne Archer, sarcher@sjrwmd.com, St. Johns River Water Management District, Maitland Service Center, 601 South Lake Destiny Road, Suite 200, Maitland, Florida 32751

Bill Bartnick
Environmental Administrator
Florida Department of Agriculture and
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Attachment 1

