STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

JOSHEPH E. ZAGAME, SR.,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 12-1356
	)	
DEPARTMENT OF AGRICULTURE AND CONSUMER SERVICES,	)	
	)	
Respondent,	)	
	)	
and	)	
	)	
SOUTHWEST FLORIDA WATER MANAGEMENT DISTRICT,	)	
	)	
Intervenor.	)	
	)	

RECOMMENDED ORDER

A final hearing was conducted in this case on August 8 and October 15, 2012, in Leesburg, Florida, before James H. Peterson, III, Administrative Law Judge with the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Joseph E. Zagame, Sr., pro se
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For Respondent: Carol A. Forthman, Esquire
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For Intervenor: Rhonda L. Moore, Esquire
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STATEMENT OF THE ISSUE

Whether Petitioner's dredging and filling on his property in Center Hill, Florida, qualifies for an agricultural exemption under section 373.406(2), Florida Statutes,[1/] from the requirement to obtain an environmental resource permit from the Southwest Florida Water Management District.

PRELIMINARY STATEMENT

On February 10, 2012, Respondent, Department of Agriculture and Consumer Services (the Department), issued a Notice of Binding Determination (Preliminary Determination) to Intervenor, Southwest Florida Water Management District (the District), and Petitioner, Joseph E. Zagame, Sr. (Petitioner). The Preliminary Determination found that Petitioner was not entitled to an agricultural exemption under section 373.406(2), from environmental resource permit requirements for dredging and filling activities within wetlands on property controlled by Petitioner located at 7376 County Road 710, Sumter County, Florida (the Property).

Thereafter, Petitioner timely filed a request for an administrative hearing which was referred to the Division of Administrative Hearings.

On the first day of the final hearing held August 8, 2012, the order of presentation was altered for clarity of issues so that the Department and the District presented witnesses and exhibits first, followed by Petitioner. That first day, the Department presented the testimony of Department environmental specialist, Noel Marton, and Department environmental administrator, William Bartnick, and introduced two exhibits that were received into evidence as Exhibits FDACS-1 and FDACS-2.

On that first day, the District presented the testimony of Jeff Whealton, a regional environmental scientist with the District, and introduced one exhibit which was received into evidence as Exhibit I-1.

That first day, Petitioner presented the testimony of James Walts of Center Hill, Florida; Mr. Kenneth Barrett, a professional engineer; and Mr. James Modica III, an environmental consultant, and introduced four exhibits which were received into evidence as Exhibits P-1, P-2, P-3, and P-4.

At the end of the first day, Mr. Modica's testimony was interrupted because the hearing facility had to be closed for the day. Thereafter, an Order allowing additional discovery was issued on August 14, 2012, and, by separate Order, a second day of hearing was scheduled for October 15, 2012.

At the second day of hearing, Petitioner called Mr. Modica and Mr. Bartnick to testify. Petitioner, Mr. Joseph E. Zagame, Sr., also testified on his own behalf, and introduced 16 more exhibits which were received into evidence as Exhibits P-1A, P-3A, P-4A, P-5A, P-6A, P-7A, P-8A, P-9A, P-10A, P-11A, P-2B, P-1C, P-2C, P-3C, P-4C, and P-5C.

The final hearing was recorded and a transcript ordered. The parties were given 30 days from the filing of the final Transcript to file proposed recommended orders. The Transcript for the first day of hearing was filed on August 21, 2012, and the Transcript for the second day was filed on October 30, 2012. The entire Transcript consists of four volumes-- two volumes from the first day and two from the second day of hearing. The parties timely filed their respective Proposed Recommended Orders, which have been considered in the preparation of this Recommended Order.

FINDINGS OF FACT

1. The Property is comprised of 118 acres of contiguous parcels located within Section 23, Township 21 South, Range 23 East, in Sumter County, at the intersection of County Road 469 and County Road 710 in Center Hill, Florida. Title to the Property is held by Petitioner and his wife under various entities that they control.[2/]

2. The District is an administrative agency charged with the responsibility to conserve, protect, manage, and control water resources within its geographic boundaries, and to administer and enforce chapter 373, Florida Statutes, and related rules under chapter 40D of the Florida Administrative Code.

3. The Department is the state agency authorized under section 373.407, Florida Statutes, to make binding determinations at the request of a water management district or landowner as to whether an existing or proposed activity qualifies for an agricultural-related exemption under section 373.406(2).

4. Petitioner uses the Property for raising cattle, an agricultural use. The activities at the Property are operated under the name "Serenity Ridge Farms." Petitioner has had up to 65 head of cattle on the Property, but since 2011, has kept only approximately 30 head. The Property is classified as agricultural pursuant to section 193.461, Florida Statutes.

5. At the time Petitioner acquired the Property, there was an approximately 2.5-acre, more or less triangular, wetland at the southern end of the western parcel at the intersection of State Road (SR) 469 and County Road (CR) 710, Center Hill, Florida (the Site).[3/] This wetland was originally the northern part of a much larger wetland system but, years before, had been

severed from the larger system by the construction of the two roads which form a “V” at the southern boundary of Petitioner’s property.

6. Due to its severance from the larger system, the condition of the wetland on the Site was adversely affected. In addition, the Site had been used by others for dumping various types of debris over the years, including tires, appliances, and concrete.

7. In approximately 2007, Petitioner decided to clean up the Site and build a pond. Although the primary water needs for his cattle had been met with water troughs serviced by a four-inch well on the Property, he intended to use the pond as a supplemental source of water supply for his cattle.

8. In deciding to build the pond, Petitioner did not consult with the District. Nor did he confer with an engineer regarding the amount of water the pond should hold to meet the needs of his cattle. Rather, his decision as to the size and configuration of the pond was driven by the footprint of the area in the Site that Petitioner perceived as "full of garbage" and a "landfill."

9. In March 2007, Petitioner began cleaning up the Site. He noticed a stench from the garbage as the area was cleaned. During cleanup, 26 old tires, 14-cubic yards of old appliances, and pieces of concrete and steel were removed from the Site.

10. While there were no accurate wetland surveys of the Site prior to the initiation of Petitioner's clean-up efforts, historical photographs of the Site and remnant plants indicate that, at the time Petitioner undertook the cleanup, the wetland had been significantly impacted. The construction of roads SR 469 and CR 710, which occurred prior to 1973, severed and excluded the Site from the larger wetland area, preventing the free flow of water beyond the Site. Although remaining a wetland, the severance adversely impacted the wetland even before the dumping.

11. The likely dominant species in the wetland were Carolina Willow (*Salix spp.*) and Primrose Willow (*Ludwigia spp.*). While both Carolina Willow and Primrose Willow are obligate wetland indicator species,[4/] Primrose willow can be a nuisance species and Carolina willow can form a monoculture.

12. In June 2007, the District became aware of Petitioner's activities on the Site. The District opened a complaint file and advised Petitioner that he should not proceed without a permit.

13. Petitioner met with District staff on a number of occasions during his activities in an attempt to find a resolution with the District, but a resolution was never reached.

14. As a result of Petitioner's dredging and filling, a 1.12-acre pond was created and an area of approximately 1.3 acres of wetland was filled. There is no remaining wetland function at the Site.

15. In July 2008, the City of Center Hill sent a letter to the District's Environmental Regulation Manager. The letter, dated July 2, 2008, was signed by the City of Center Hill's Mayor, Chairman of the City Council, and City Clerk, and stated in pertinent part:

> As community leaders we have many responsibilities that include the stabilization and revitalization of the City of Center Hill. We are fortunate to have citizens who are concerned and active regarding the quality of life in the neighborhoods they reside in. The upkeep of our neighborhoods remains a critical element to the success of our community.
>
> Code enforcement cannot be successful without the support of our local citizens. It is the responsibility of each of us to keep our properties code compliant. This will ensure a safe and healthy City.
>
> As part of a large voluntary effort, we are pleased that Serenity Ridge Farms in eastern Center Hill implemented a clean-up on property adjacent to the intersection of SR 469 and CR 710 (E. Jefferson Street). The community has increased traffic visibility at this location after the removal of nuisance overgrowth. Additionally, the hauling of debris from the site eliminated a public health hazard that existed as a common dumping-ground for many years. In fact, the work at this location far exceeds any code compliance among the nearly 60

> cases that have come to our attention in recent years.
>
> Property owners like Serenity Farms are what make our City in Sumter County a great place to live. Hence we ask that our correspondence be included in your files and distributed to members of your staff as you see fit. The subject property has no code deficiencies in the City of Center Hill.

16. Despite the City's letter and efforts between Petitioner and the District, negotiations to settle the District's complaint by restoration or mitigation of the alleged adverse impacts of Petitioner's dredge-and-fill activities have been unsuccessful.

17. The District's governing board authorized initiation of litigation against Petitioner on December 14, 2010.

18. On January 4, 2011, Petitioner submitted an after-the-fact application to the District for an environmental resource permit for the pond, along with an approximately $1,500 permit application fee. After conducting a site meeting to review the impact of Petitioner's activities, District staff made a request for additional information. The request for additional information (RAI) requested an amount of engineering that, according to Petitioner, would make compliance cost prohibitive. As Petitioner explained in his testimony:

> My quick estimate, and what the engineering, required all of that, surveys[,] to[p]ographic surveys, could have been anywhere from 50 to [$]75,000, maybe more.

While the actual costs to comply with the Districts RAI have not been determined, Petitioner's testimony that the RAI requirements were cost prohibitive is credited.

19. On November 14, 2011, the District wrote a letter to the Department formally requesting a binding determination from the Department as to whether the activities on the Property qualify for the agricultural exemption afforded by section 373.406(2).

20. After receiving the District's request, Department staff conducted a site visit of the Property on December 28, 2011.

21. The approximately 1.12-acre open water area resulting from Petitioner's dredging and filling ranges from 4 to 6 feet deep at the center, depending on the groundwater level. At the time of the District's site visit, the central pond depth was approximately four feet. December is the dry season in this area of Florida and in 2011 there was a drought. The Department's survey of the Site shows a water depth of six feet.

22. There has been some recruitment of wetland vegetation in the shallower areas of the pond. In fact, some of the emergent vegetation is of higher quality than that which existed prior to the dredging and filling, and there is evidence that wildlife is utilizing it.

23. In addition, Petitioner's activities included the construction of berms below the bisecting roadways that help filter direct road run-off that previously washed into the Site.

24. The Site, however, has not been restored to a wetland in any significant way. No regeneration is expected at sustained depths of greater than two feet. The maximum recommended depth for planting is one-and-one-half feet.

25. The pond is fenced off, preventing the cattle from direct pond access.

26. Petitioner has spent over $12,000 landscaping and putting in an irrigation system around the pond area. The irrigation system is designed to water the landscaping, including sapling live oaks and sod. Neither landscaping a pond nor irrigating landscaping around a pond is typical for cattle ponds. Petitioner has stated that he would someday like to build a retirement home overlooking the pond.

27. The irrigation system, like the watering troughs on the upland portions of the Property, is serviced by a four-inch diameter well.

28. Generally, a four-inch well can produce 60-100 gallons per minute. The pond as constructed contains approximately 100,000 gallons in the first four inches of water alone.

29. The District's standard permitting allocation for water withdrawal for cattle is 12 gallons of water per day.

Under the Department's best management practices rule,[5/] the allocation is up to 30 gallons per head of cattle per day.

30. On February 10, 2012, the Department rendered its Preliminary Determination which concluded that Petitioner's activities did not meet the requirements for an agricultural exemption. Under the heading "Application of Statutory Criteria," the Preliminary Determination stated:

> 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 [Department's Office of Agricultural Water Policy] finds that [Petitioner] is engaged in the practice of agriculture on 118 acres of agricultural land in Sumter County, as evidenced by their current agricultural land use classification, the ongoing agricultural production activities observed on site, and the aforementioned cattle sale receipts.
>
> (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.** [The Department] finds that the construction of a cattle watering pond within the footprint of a wetland is <u>not</u> a normal and customary practice for the area because:
>
> 1. Cattle watering ponds are not normally constructed within wetlands; and

2. Cattle watering troughs were observed in other upland locations throughout the property, precluding the need for a cattle pond in this location.

(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 Department] finds that the construction of a pond in the wetland was not for the sole or predominant purpose of impeding or diverting surface waters. During the December 28, 2011 site visit, [the Department's Office of Agricultural Water Policy] staff verified that the post-development drainage patterns are consistent with the pre-development drainage patterns. Secondly, the wetland is not connected to offsite drainage systems, as it was severed in its entirety by the construction of SR 469 and CR 710. This occurred prior to [Petitioner] taking ownership of the property. Lastly, the entire farm's drainage system is gravity driven, and is devoid of discharge pumps.

YES. (As to adversely impacting wetlands.) [The Department] is aware that the wetland was already of questionable quality (see letter from the City of Center Hill) when the pond was constructed, given that the wetland was severed and excluded from the larger wetland system by the construction of SR 469 and CR 710. Nevertheless, [the Department] finds that the activity was for the sole or predominant purpose of adversely impacting the wetland, as the character of the wetland was destroyed.

31. In sum, the Preliminary Determination concluded that Petitioner's dredging and filling activities did not qualify for

the agricultural exemption provided under section 373.406(2) because the activities are not normal and customary and they adversely impacted wetlands.

32. At the final hearing, however, the evidence indicated that Petitioner's activities were normal and customary for cattle operations in the area.

33. While the water needs of Petitioner's cattle are usually served by a four-inch well, the pond constructed at the Site has been an effective supplemental source of water for Petitioner's cattle operations. When the well ran dry, Petitioner used pump trucks to siphon water from the pond and fill the upland troughs. Petitioner plans to put a pump in the pond to supply water to his cattle, but has not yet done so.

34. Man-made, belowground cattle-watering ponds are very typical in Florida, especially in south and southwest Florida because of the high water tables in the southern part of the peninsula.[6/]

35. Further, "[i]t is not uncommon practice for Florida cattle ranchers to excavate cattle ponds, remove muck from existing cattle ponds, and/or grade side slopes of ponds in low lying depressional areas to provide a safe and reliable water source for their cattle."[7/]

36. The fact that it is common for cattle ponds to be built in low-lying areas was further demonstrated by aerial

photographs presented by Petitioner's witness, Mr. Modica, of areas near the Property, including an approximately six-acre pond off Palm Avenue (the Sanchez property), a pond at a site labeled Emory Lane, and a pond off CR 48. While the ponds are considered by the District to be out of compliance on the grounds that they may have adversely affected wetlands, their existence shows that dredging and filling in low areas for cattle ponds is common practice in the area.[8/]

37. Although the pond is larger than needed because the footprint of the dumping area was large, and Petitioner may have some non-agricultural plans for the Site in the future, under the facts and evidence as outlined herein, it is found that the pond constructed by Petitioner was for purposes consistent with common practices for cattle operations in the area.

38. On the issue of whether there was adverse impact to a wetland, the evidence showed that Department changed its position several times while drafting the Preliminary Determination.

39. Of the five drafts of the Preliminary Determination, on the question (c) "[a]re the alterations (or proposed alterations) for the sole or predominant purpose of . . . adversely impacting wetlands?" one draft stated:

> UNSURE. (As to adversely impacting wetlands.) Documentation shows a 2.47 acre wetland impact area. This dredge and fill

> activity was for the purpose of converting the wetland to an open water and pasture area. However, this remnant wetland area was severed and excluded from the larger wetland system, as it was originally impacted by the construction of SR 469 and CR 710. Although wetland conditions prior to Zagame's actions cannot be determined with certainty, a letter from the City of Center Hill indicates questionable wetland condition, which obfuscates remaining quality and function.

40. Another draft, in answering the same question, stated:

> NO. (As to adversely impacting wetlands.) In the opinion of the [Department], the impacted remnant wetland was of questionable quality (see letter from the City of Center Hill) having been previously severed and excluded from the larger wetland system, by the construction of SR 469 and CR 710.

41. Considering those factors addressed in the above-quoted drafts of the Department's drafts of the Preliminary Determination, as well as the evidence of the condition of the wetland when Petitioner began his cleanup operations, it is found that the predominant purpose and effect of Petitioner's activities was to construct a cattle pond and clean up a dumping ground, not to adversely impact a wetland.

CONCLUSIONS OF LAW

42. The Division of Administrative Hearings has jurisdiction over the parties and the subject matter of this proceeding, pursuant to sections 120.569, 120.57(1), and 373.406(2), Florida Statutes.

43. This review of Petitioner's qualification for an exemption is de novo, as the Department's Preliminary Determination is proposed agency action. The request for a hearing effectively rendered the agency action non-final and triggered the de novo hearing. Dep't of Transp. v. J.W.C. Co., 396 So. 2d 778, 787 (Fla. 1st DCA 1981).

44. In this case, Petitioner is asserting that his activities qualify for the exemption from Environmental Resource Permitting pursuant to section 373.406(2), Florida Statutes. Exceptions to the regulatory authority conferred by chapters 373 or 403 are to be narrowly construed against the person who is claiming the statutory exemption. Samara Dev. Corp. v. Marlow, 556 So. 2d 1097, 1100 (Fla. 1990).

45. As the party claiming that he qualifies for the exemption, Petitioner carries the "ultimate burden of persuasion" with regard to such qualification. J.W.C. Co., 396 So. 2d at 787.

46. Petitioner must show by a preponderance of the evidence that his activities are exempt from regulation. See § 120.57(1)(j), Fla. Stat. ("Findings of fact shall be based upon a preponderance of the evidence, except in penal or licensure proceedings or except as otherwise provided by statute and shall be based exclusively on the evidence of record and on matters officially recognized.")

47. The basic permitting authority of the water management districts is set forth in section 373.413, Florida Statutes, which provides:

> Except for the exemptions set forth herein, the governing board or the department may require such permits and impose such reasonable conditions as are necessary to assure that the construction or alteration of any stormwater management system, dam, impoundment, reservoir appurtenant work, or works will comply with the provisions of this part and applicable rules promulgated thereto and will not be harmful to the water resources of the District.

(emphasis added).

48. Impoundment is defined in section 373.403(3) as: "any lake, reservoir, pond or other containment of surface water occupying a bed or depression in the earth's surface and having a discernible shoreline." The pond constructed by Petitioner is therefore, an impoundment and, unless exempt, is subject to the requirement of obtaining an environmental resource permit.

49. Section 373.406(2) provides an exemption from Environmental Resource Permitting for certain agricultural activities.

50. Prior to 2011, section 373.406(2), provided:

> Nothing herein, or in any rule, regulation, or order adopted pursuant hereto, shall be construed to affect the right of any person engaged in the occupation of agriculture, silviculture, floriculture, or horticulture to alter the topography of any tract of land for purposes consistent with the practice of

> such occupation. However, such alteration may not be for the sole or predominant purpose of impounding or obstructing surface waters.

51. In 2011, section 373.406(2) was revised by chapter 2011-165, Laws of Florida, shown with the new language underlined and old language stricken, as follows:

> Notwithstanding s. 403.927, nothing herein, or in any rule, regulation, or order adopted pursuant hereto, shall be construed to affect the right of any person engaged in the occupation of agriculture, silviculture, floriculture, or horticulture to alter the topography of any tract of land, including, but not limited to, activities that may impede or divert the flow of surface waters or adversely impact wetlands, for purposes consistent with the normal and customary practice of such occupation in the area. However, such alteration or activity may not be for the sole or predominant purpose of impeding ~~impounding~~ or diverting the flow of ~~obstructing~~ surface waters or adversely impacting wetlands. This exemption applies to lands classified as agricultural pursuant to s. 193.461 and to activities requiring an environmental resource permit pursuant to this part. This exemption does not apply to any activities previously authorized by an environmental resource permit or a management and storage of surface water permit issued pursuant to this part or a dredge and fill permit issued pursuant to chapter 403. This exemption has retroactive application to July 1, 1984.

52. Section 373.406(2) has not changed since the 2011 revisions. By its terms, the exemption provided in section 373.406(2) has retroactive application. Furthermore, as Petitioner is, in essence, an applicant for the exemption,

current law should apply. See Lavernia v. Dep't of Prof'l Reg., Bd. of Med., 616 So. 2d 53 (Fla. 1st DCA 1993)(law for determining applications is the statute in effect at the time of final determination).

53. For many years prior to 2011, the Department had the authority to review and give non-binding opinions at the request of a water management district concerning whether claimed alterations qualified for an agricultural exemption under section 373.406(2). However, along with other revisions in 2011, chapter 2011-165, Laws of Florida, authorized the Department to make binding determinations, at the request of a water management district or a landowner, regarding whether alterations or activities qualify for an exemption. See § 373.407, Fla. Stat.

54. Two threshold issues for an exemption under section 373.406(2) are: (1) is the land classified as agricultural pursuant to 193.461, Florida Statutes, and (2) is the person whose activities are in question engaged in agriculture. The parties stipulated that both of these threshold requirements were met in this case.

55. The other two criteria, which are the ones at issue in this case, are whether the activity (1) is for purposes consistent with normal and customary agricultural practices for

the area and (2) is not for the sole or predominant purpose of adversely impacting wetlands.

56. As noted in the Findings of Fact, above, as a matter of fact, it has been found that Petitioner's activities were normal and customary and were not for the sole or predominant purpose of adversely impacting wetlands. The factual findings are consistent with applicable law.

57. Under the facts and circumstances of this case, it is appropriate to analyze the impact to the wetlands criteria first. The 2011 revisions to section 373.406(2) specifically exempt from regulation those agricultural alterations or activities "that may impede or divert the flow of surface waters or adversely impact wetlands, for purposes consistent with the normal and customary practice of such occupation in the area . . . [as long as] such alteration[s] or activit[ies] [are] . . . not . . . for the sole or predominant purpose of impeding ~~impounding~~ or diverting the flow of ~~obstructing~~ surface waters[9/] or adversely impacting wetlands."

58. The words "predominant" and "purpose," as used in section 373.406(2), Florida Statutes (2007), prior to the 2011 revisions were construed in Duda and Sons, Inc. v. St. Johns River Water Management District, 17 So. 3d 738 (Fla. 5th DCA 2009). As the context of those terms as used in the current version of section 373.406(2) is the same, the interpretation of

those terms in Duda and Sons, Inc., supra (Duda I), is still relevant. There, the Fifth District Court of Appeal agreed with the water management district and administrative law judge's interpretation of the term "purpose" within the context of section 373.406(2) to mean the action's objective effect or function, as opposed to the subjective intent of the landowner in undertaking the action. Duda I, 17 So. 3d at 742. The Fifth District Court of Appeal, however, rejected the water management's definition of the term "predominant" as "more than incidental," and explained:

> "Predominant" does not mean "more than incidental." There are many gradations between "predominant" and "incidental." An item can be "more than incidental" but not "predominant. For example, if an individual had four equal sources of income totaling $100,000/year, all four sources of income would be "more than incidental." However, none of the four would be a predominant source of income. Similarly, an alteration of topography may have more than an incidental effect of impounding or obstructing surface waters even though that was not the predominant effect.
> The lack of merit in the District's argument is further demonstrated by the fact that pursuant to *section 373.406(6)*, the District has already exempted from regulation any activity which has "only minimal or insignificant individual or cumulative adverse effects on the water resources of the district" for both agricultural and non-agricultural activities. [footnote omitted] The District's interpretation of *section 373.406(2)*, if accepted, would render the agricultural exemption virtually meaningless. As conceded by the District at

> oral argument, an alteration of topography that had the effect of only incidentally impounding or obstructing surface waters would, in almost all cases, already be exempt from regulation pursuant to *subsection (6)* -- regardless of whether the property owner was engaged in the occupation of agriculture.[10/]
>
> * * *
>
> In its brief, Duda contends that the primary purpose of its drainage ditches was to lower the level of the groundwater table so as to enhance agricultural productivity. *Section 373.406(2)* provides an exception to the agricultural exemption for the impounding or obstructing of surface waters -- not ground water. [footnote omitted] Accordingly, if Duda constructed a drainage ditch for a purpose consistent with the practice of agriculture and if the predominant effect of the drainage ditch was to lower the groundwater table level, then the construction of the drainage ditch would be exempt from the District's permitting requirements even if the ditch had a more than incidental effect of impounding or obstructing surface waters.

Duda I, 17 So. 3d 743-744. Cf. Fla. Admin. Code R. 5M-15.001(3)(effective 10/14/2012, subsequent to Duda I and one day prior to the last day of the final hearing)("Sole or predominant purpose [means] [t]he primary function of the activity in question").

59. Similarly, in this case, while there may have been more than an incidental effect on a wetland, the evidence showed that Petitioner's activities were not for the sole or predominant purpose of adversely impacting a wetland, but rather

were primarily undertaken to construct a cattle pond and clean up a dumping ground.

60. This conclusion is made with due regard for the elevated legal status and protection that Florida's wetlands have deservedly received under state and federal laws enacted in the 1980's and 90's.[11/]

61. In recognition of these wetland protections, in a subsequent appeal involving a substantive enforcement action against A. Duda and Sons, Inc., in A. Duda and Sons, Inc. v. St. Johns River Water Management District, 22 So. 3d 622, 623 (Fla. 5th DCA 2009)(Duda II),[12/] the Fifth District Court of Appeal observed:

> . . . *Duda I* did not address the interplay between *section 373.406(2)* and language from the Warren S. Henderson Wetlands Protection Act, chapter 84-79, Laws of Florida, now codified at *sections 403.927 (2)* & *(4)(a)*, Florida Statutes. Those provisions virtually eliminate the agricultural exemption as it applies to alterations impacting wetlands. Under *section 403.927*, agricultural activities that impede or divert the flow of surface waters even incidentally are not exempt from regulation if they impact wetlands. *Id.*

62. The 2011 revisions to the agricultural exemption found in 373.406(2), however, were made after the Fifth District's observations in Duda II. Contrary to Duda II's suggestion that an agricultural exemption is unavailable for alterations that impact wetlands, the initial sentence of the 2011 revisions

begins "Notwithstanding s. 403.927," and then specifically includes "activities that may . . . adversely impact wetlands" within the activities contemplated for exemption from regulation. See § 373.406(2), Fla. Stat. (first sentence).

63. Further, denial of an exemption for Petitioner's activities under the facts and circumstances in this case would not promote wetland protection. Rather, it would require the application of regulations in a manner that would interfere with improvements made to a remnant wetland dumping ground that has been entirely severed from its adjacent wetlands since prior to 1973. Despite vast and important legislation protecting wetlands, an exemption is contemplated for qualifying activities that do not have a predominant purpose of adversely affecting wetlands.

64. As the evidence demonstrated that the predominant purpose of Petitioner's activities was the construction of a cattle pond along with the clean up, and not to adversely affect wetlands, as long as those activities are for purposes consistent with the normal and customary practice of such occupation in the area, Petitioner should be entitled to the exemption.

65. This Recommended Order undertook analysis of the adverse impact to wetlands first in order to avoid duplicative use of wetland criteria in determining whether Petitioner’s

activities qualify for the exemption. The Department's Preliminary Determination, however, uses the fact that Petitioner's activities were in a wetland in both the "adverse impact to wetland" analysis as well as its "normal and customary practice" inquiry.

66. In fact, even in its draft of the Preliminary Determination where the Department found that Petitioner's alterations were not undertaken "for the sole or predominant purpose of . . . adversely impacting wetlands," the Department found in its "normal and customary" analysis that "cattle watering ponds are not normally constructed within wetlands."

67. The undersigned finds that duplicative use of the fact that wetlands were impacted is contrary to the inquiry contemplated under the 2011 revisions to section 373.406(2), which by their terms, anticipate that a wetland would be involved in an agricultural activity for which an exemption from wetland regulation is requested.

68. Even if it were appropriate to consider that the activity occurred in a wetland under the "normal and customary" inquiry, as noted in the Findings of Fact, above, the evidence demonstrated, as a matter of fact, that cattle ponds in low-lying areas are normal and customary for cattle operations in the area.

69. The Department further suggests that Petitioner's activities were not normal and customary because they are inconsistent with best management practices adopted by the Department. As part of the revisions made in chapter 2011-165, Laws of Florida, the definition of "agricultural activities" found in section 403.927(4)(a) was also revised, shown with new language underlined and old language stricken, as follows:

> "Agricultural activities" includes all necessary farming and forestry operations which are normal and customary for the area, such as site preparation, clearing, fencing, contouring to prevent soil erosion, soil preparation, plowing, planting cultivating, harvesting, fallowing, leveling, construction of access roads, ~~and~~ placement of bridges and culverts, and implementation of best management practices adopted by the Department of Agriculture and Consumer Services or practice standards adopted by the United States Department of Agriculture's Natural Resources Conservation Service, provided such operations are not for the sole or predominant purpose of impeding ~~do not impede~~ or diverting ~~divert~~ the flow of surface water or adversely impacting wetlands.

70. The Department argues that reference to best management practices in section 403.927(4)(a) means that activities that do not meet those standards are not "normal and customary" within the meaning of section 373.406(2). In light of the plain terms of the statute,[13/] however, the Department's argument is unpersuasive. Rather than restricting which practices are "normal and customary," the conjunctive "and"

actually expands the list of "agricultural activities" previously set forth in section 403.927(4)(a) to also include best management practices.[14/]

71. While not all aspects of Petitioner's pond are typical, the evidence demonstrated that Petitioner's activities resulted in a cattle pond that was useful to his cattle operations and were for "purposes consistent with the normal and customary practice of such occupation in the area" within the meaning of section 373.406(2).

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is recommended that the Florida Department of Agriculture and Consumer Services enter a final order finding that the activities on Petitioner's property addressed in this case are exempt pursuant to section 373.406(2), Florida Statutes.

DONE AND ENTERED this 1st day of February, 2013, in Tallahassee, Leon County, Florida.

JAMES H. PETERSON, III
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 1st day of February, 2013.

ENDNOTES

[1/] Unless otherwise noted, citations to statutes and rules are to their current, 2012, versions.

[2/] The Property contains several parcels, some owned by Ramaela of Clermont Limited Partnership (Ramaela) and some owned by Menaleous Land Group LLC (Menaleous). Ramaela's partners are two trusts. Petitioner is trustee of one of Ramaela's partners and is a managing member of Menaleous.

[3/] The wetland was located on the Ramaela property, but for purposes of the exemption determination at issue, has been treated as part of the entire 118 acres of Property.

[4/] See Fla. Admin. Code R. 62-340.450(1).

[5/] See Fla. Admin. Code R. 5M-11.

[6/] This finding is extracted from the testimony of the Department's Environmental Administrator William Bartnick, who added, "but the [cattle ponds] I've seen are almost always constructed in uplands and our manual says 50 feet away from the well and edge [of wetlands]." See Transcript from August 8, 2012, p. 132. While Mr. Bartnick's testimony reflected in the finding is credited, his observations regarding the locations of ponds were contradicted by more persuasive evidence indicating that cattle ponds are commonly located in low-lying areas.

[7/] See Exhibit P-1A (Department's Non-Binding Written Summary and Opinion on Louis M. Sanchez, dated April 25, 2003, p. 2).

[8/] Mr. Modica also testified that he had four ponds that had been dug in wetlands on his own property in the area and that there were a number of ponds dug in wetlands on the Disney Wilderness Preserve (previously, the Walker Ranch property) that the Nature Conservancy which manages the property had matured into stable systems that they decided not to restore. While details as to the date of construction of these ponds was not provided, Mr. Modica's testimony provided additional support for the proposition that dredging of cattle ponds in wetlands has been a common practice for the area in the past.

[9/] Impeding or diverting surface waters is not at issue. In its Preliminary Determination, the Department found that the construction of a pond in the wetland was not for the sole or predominant purpose of impeding or diverting surface waters. The evidence in this case supports that conclusion, as well as the Department's finding in its Preliminary Determination that "the post-development drainage patterns are consistent with the pre-development drainage patterns . . . [and that] the wetland [was] not connected to offsite drainage systems, as it was severed in its entirety by the construction of SR 469 and CR 710, . . . prior to [Petitioner] taking ownership of the property."

[10/] The exemption for minimal or insignificant impacts on water resources referenced by the Fifth District was unchanged by the 2011 revisions and is still found in the present version of section 373.406(6), Florida Statutes.

[11/] As accurately noted in the Department's Proposed Recommended Order, in 1984, Florida adopted the Henderson Wetland Protection Act, which expanded the scope of wetland regulation in the state to include agricultural wetlands connected to state waters. Ch. 84-79, Laws of Fla. Congress passed the Food Security Act of 1985 (PL 99-198; 16 U.S.C §§3801-3862), section 3821 of which required that farmers receiving USDA benefits to refrain from cultivating wetlands. In 1986, the Florida legislature adopted section 373.414(1), Florida Statutes, which directed water management districts to adopt rules relating to the regulation of isolated wetlands. Ch. 86-186, § 4, Laws of Fla. And in 1993, the Florida legislature transferred and amended dredging and filling criteria from chapter 403 to chapter 373, Florida Statutes, which accomplished a substantial reorganization of wetland regulation in Florida, and placed all wetlands, including isolated wetlands, under the dredge and fill regulatory authority of the Department of Environmental Protection and water management districts. See Ch. 93-213, Laws of Fla.

[12/] Duda I, supra, involved a final order entered by an administrative law judge (ALJ) denying the appellant's challenges to certain adopted rules, statutory interpretations, and policies. Duda II was an appeal from a final order from the water management district adopting the ALJ's recommended order which required appellant to either restore impacted wetlands or apply for after-the-fact permits.

[13/] "One of the most fundamental tenets of statutory construction requires that the courts give statutory language its plain and ordinary meaning, unless words are defined in the statute or by the clear intent of the Legislature." Duda I, 17 So. 3d at 742.

[14/] This conclusion is consistent with the Department's new rule that defines "normal and customary practice in the area" as "[g]enerally accepted agricultural activities" without reference to best management practices. See Fla. Admin. Code R. 5M-15.001(2).

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this case.