

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

PAUL AND KATHLEEN STILL,

Petitioners,

vs.

Case No. 15-5750

DEPARTMENT OF AGRICULTURE AND
CONSUMER SERVICES,

Respondent.

_____ /

RECOMMENDED ORDER

Pursuant to notice, a final hearing was held in this case on December 7, 2015, in Tallahassee, Florida, before E. Gary Early, a designated Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioners: Paul Still, pro se
14167 Southwest 101st Avenue
Starke, Florida 32091

For Respondent: Lauren Brothers, Esquire
Department of Agriculture
and Consumer Services
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STATEMENT OF THE ISSUE

Whether Petitioners' installation of ditch plugs on their property qualifies for an agricultural exemption from the

requirement to obtain an environmental resource permit pursuant to section 373.406(2), Florida Statutes.

PRELIMINARY STATEMENT

On September 14, 2015, Respondent, Department of Agriculture and Consumer Services (the Department), issued an Amended Binding Determination to Petitioners, Paul and Kathleen Still (Petitioners). The Binding Determination found that Petitioners' construction of ditch plugs in existing drainage ditches was not a normal and customary practice for silviculture being conducted in the area, and therefore did not meet the standards for an agricultural exemption under section 373.406(2).

Petitioners timely filed a request for an administrative hearing which was referred to the Division of Administrative Hearings. The final hearing was thereafter noticed to commence on December 7, 2015.

On December 2, 2015, a Joint Stipulation of Parties was filed. The stipulated facts have been used in the preparation of this Recommended Order, either verbatim or with changes for style or continuity.

The final hearing commenced as scheduled on December 7, 2015, and was completed on that date. Although the hearing was originally scheduled as a video teleconference in Tallahassee

and Gainesville, Florida, the parties and their witnesses agreed to appear in Tallahassee.

At the hearing, and at the request of the undersigned, the order of presentation was altered so that the Department presented witnesses and exhibits first, followed by Petitioner.

The Department called as witnesses: Patrick Webster, the senior professional engineer for the Suwannee River Water Management District (District); Jeffrey Vowell, assistant director for the Department's Division of Forestry, Florida Forest Service; Bill Bartnick, a Department environmental analyst; and Andy Lamborn, who was at all time relevant hereto, the county forester for Bradford County and Baker County. Department Exhibits 1 through 4 were received in evidence. Exhibit 1 included subparts (a) through (i), and Exhibit 3 included subparts (a) through (d). As such, the Department introduced 17 individual exhibits, which were pre-tabbed in the Department's exhibit binder as tabs 4 through 20.

Petitioner, Paul Still, testified on his own behalf, and recalled Mr. Webster; Mr. Bartnick; and Mr. Vowell as witnesses. Petitioners' Exhibits 1, 2, 4-7, 9, 10, 18, 20, 21, 23, and 24 were received in evidence.

A two-volume Transcript was filed on December 28, 2015. By agreement of the parties, Proposed Recommended Orders were due

on January 11, 2016; were timely filed by both parties; and have been considered in the preparation of this Recommended Order.

References to statutes are to Florida Statutes (2015), unless otherwise noted.

FINDINGS OF FACT

1. Petitioners, Paul and Kathleen Still (Petitioners), own a parcel of property comprised of 118 acres located within Section 33, Township 6 South, Range 21 East, in Bradford County, Florida, approximately six miles southwest of Starke, Florida (the Property).

2. 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 from environmental resource permitting, pursuant to section 373.406(2).

3. The Property is classified as agricultural by the Bradford County Property Appraiser. A county-maintained dirt road, Southwest 101st Avenue, forms the western boundary of the Property, and Lake Sampson forms the eastern boundary of the Property. Petitioners have owned the Property since 1996, and currently reside on the Property.

4. A drainage ditch runs through the Property from Southwest 101st Avenue to Lake Sampson. The evidence suggests that it was originally constructed in the 1960s, was dug through wetlands and uplands, and serves to drain the area west of Southwest 101st Avenue. The ditch had the effect of draining some of the wetlands that had previously existed on the Property.

5. The drainage ditch ends in the Northwest corner of the wetland above ditch plug 3, at which point water flows east and then north, eventually flowing into Lake Sampson north of the Property. The wetland above ditch plug 3 was a natural wetland which was likely part of Lake Sampson before Lake Sampson was partially drained in 1887. At some point, a low berm was pushed around parts of this wetland. Prior to Petitioners' ownership, the berm was breached and the wetland drained. Ditch plug 3 was installed in this breach. Ditch plug 3 restored water to the same level as was present when the wetland was part of Lake Sampson.

6. The Property contains stands of planted and naturally-regenerating pine, natural cypress, and a stand of cypress trees planted by Petitioners. Cypress is present on 43 acres of the Property, with more than 50 percent of that area having been planted.

7. The density at which the cypress was planted will require that the stand be thinned. Most of the thinned cypress trees will be sent off to be turned into mulch. Some will be of a size that it can go into saw timber.

8. Silviculture has been defined in several ways:

A. The United States Department of Agriculture and the Department have, on their websites defined silviculture as "the art and science of controlling the establishment, growth, composition, health, and quality of forest and woodland vegetation to meet the diverse interests of landowners and a wide variety of objectives."

B. The United States Forest Service website defines silviculture as "the art and science of controlling the establishment, growth, composition, health and quality of forests and woodlands to meet the diverse needs and values of landowners and society on a sustainable basis."

C. Florida Administrative Code Rule 5I-2.003(29) defines silviculture as "a forestry operation dealing with the establishment, development, reproduction, and care of forest flora and fauna."

D. The Department's Silviculture Best Management Practices, adopted in rule 5I-6.002, defines silviculture as "a process, following accepted forest management principles,

whereby the trees constituting forests are tended, harvested and reproduced.”

9. Production of cypress for lumber and mulch is a silvicultural and agricultural activity. Petitioners’ production of cypress for lumber and mulch constitutes a silvicultural operation. The production of cypress is enhanced by periodic inundation to control hardwood species of competing trees.

10. Starting in 2004, Petitioners began to plan for the installation of ditch plugs on the Property, and shortly thereafter installed ditch plug 3, which is not in wetlands. That plug was short-lived, being removed prior to 2006 when Petitioners started getting groundwater infiltration into their shallow drinking water well.

11. At some time in 2006 or 2007, Petitioners reinstalled ditch plug 3.

12. In 2009, at the request of Petitioners, a preliminary field review was conducted by staff of the District to discuss the potential to install ditch plugs on the Property. Based on the preliminary investigation, it was determined that additional analysis would be needed to make sure that the proposed plugs would not have offsite and upstream drainage problems.

13. Ditch plugs 1 and 2 were installed in stages beginning in 2011. Construction of the ditch plugs was done in stages to

ensure that no offsite impacts would occur. There is no evidence in this case to suggest that the ditch plugs have resulted in any offsite and upstream drainage problems.

14. Petitioners assert that the ditch plugs were installed to return water to wetlands that had been drained so as to enhance the production of cypress in those wetlands.

Petitioners also admit that the ditch plugs will also have the effect of mitigating for sediment eroding from Southwest 101st Avenue.

15. On November 5, 2014, the District notified Petitioners that it had come to the attention of the District that the ditch plugs may have been installed on the Property without proper authorization.

16. At some time after November 5, 2014, Petitioners requested that the District provide notification of the applicability of one or more of the exemptions in section 373.406 to the installation of the ditch plugs on their Property.

17. On April 24, 2015, the District requested additional information in support of Petitioners' request, and advised Petitioners that the ditch plugs were not exempt under section 373.406(2) because the predominant purpose of the ditch plugs was to impede or divert the flow of surface water. The District further advised Petitioners that the ditch plugs may be eligible

for exemption under section 373.406(9), which exempts measures having the primary purpose of environmental restoration or water quality improvement on agricultural lands where these measures have minimal or insignificant adverse impact on the water resources of the state.

18. On June 4, 2015, as a result of the District's April 24, 2015, letter, Petitioners requested a binding determination as to the applicability of the section 373.406(2) agricultural exemption.

19. On June 18, 2015, the Department conducted a site visit. According to Mr. Lamborn, the county forester for Baker and Bradford counties, who wrote the Stewardship Forest Management Plan for the Property and has visited the Property several times, the Property is not a typical timber operation. Mr. Lamborn noted that Petitioners were the only landowners during his time as a county forester that identified soil and water conservation as their primary management goal for a forest stewardship plan.

20. Mr. Vowell has never seen ditch plugs used in a silvicultural operation in the manner that Petitioners have used them on their Property.

21. Mr. Bartnick testified that the Department has never issued an agricultural determination providing an exemption for ditch plugs in wetlands.

22. In coming to its Binding Determination, the Department reviewed, among other information, correspondence between the District and the Petitioners; the Silvicultural Best Management Practices manual (2008); current and historical aerial photography of the Property; a USDA Soil Survey map; the 2015 Bradford County Property Appraiser Information Card; the National Wetland Inventory Map; and the Florida Forest Service Stewardship Management Plan. The review of the request for a Binding Determination substantially complied with the requirements of Florida Administrative Code Chapter 5M-15.

23. On September 14, 2015, the Department applied the three-part test in rule 5M-15.005, and issued its Binding Determination which concluded that Petitioner's activities did not meet the requirements for an agricultural exemption. Under the heading "Application of Statutory Criteria," the Binding Determination provided that:

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-Florida Forest Service finds that Mr. Paul Still is engaged in the occupation of silviculture.

(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-Florida Forest Service finds that the construction of the ditch plugs are not a normal and customary practice for silviculture being conducted in the area. Normal and customary silviculture would typically not include the plugging of existing ditches. In fact, silviculture in Florida often necessitates some level of drainage to make wetter sites more accessible and therefore more productive. Based on his experience, Mr. Lamborn explained that "conservation of soils and water resources", as the main component of a Stewardship Plan is not customary. Moreover, the 2008 Silviculture Best Management Practices manual does not list ditch plugs installed in wetlands or in large ditches connected to wetlands, as a viable practice. The reference to ditch plugs in the 2008 Silviculture Best Management Practices manual is for "road-side" ditches and has to do with the entrapment and dispersion of sediment and the reduction of ditch-flow velocity, not hydrologic restoration.

(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?"

Because the exemption in section 373.406(2), F.S., requires an affirmative answer to all these criteria, and we have already found that the alterations are not consistent with normal and customary practice of such occupation in the area (see (b) above), there is no need to address this issue.

24. In sum, the Binding Determination concluded the installation of ditch plugs in Petitioners' particular

circumstance did not qualify for the agricultural exemption under section 373.406(2), because such is not a normal and customary practice for silviculture being conducted in the area.

25. Petitioners asserted that the Department's determination reflected a "bias" towards pine production, and did not consider the requirements of cypress production. Much of the testimony regarding customary silvicultural practices was provided by Mr. Vowell. Mr. Vowell has worked with hundreds of small, private, non-industrial forest owners, and was clearly well-versed in pine production. He described his experience with the production of cypress as "very little."

CONCLUSIONS OF LAW

26. 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 (2015).

27. This review of Petitioner's qualification for an exemption is de novo, as the Department's Binding 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).

28. In this case, Petitioners are asserting that their activities qualify for the exemption from Environmental Resource

Permitting pursuant to section 373.406(2). 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).

29. As the parties claiming that they qualify for the exemption, Petitioners carry the "ultimate burden of persuasion" with regard to such qualification. J.W.C. Co., 396 So. 2d at 787.

30. Petitioners must show by a preponderance of the evidence that their 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.")

31. The basic permitting authority of the water management districts is set forth in section 373.413, 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.

32. Section 373.406(2) provides an exemption from environmental resource permitting for certain agricultural activities, and provides that:

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 or diverting the flow of 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.

33. Where there is a dispute between a landowner and a water management district as to the applicability of the exemption under section 373.406(2), the Department has exclusive authority, pursuant to sections 373.406(2) and 373.407, to determine whether an activity is exempt from environmental resource permitting.

34. Rule 5M-15.003 provides that:

In order for the Department to conduct a binding determination under Section 373.407, F.S., the following conditions must exist:

(1) The activities in question must be on lands classified as agricultural by the county property appraiser pursuant to Section 193.461, F.S. Proof of classification status may be provided by the requesting party or confirmed by the Department through the county property appraiser.

(2) The activities in question must not previously have been authorized by an environmental resource permit or a management and storage of surface water permit issued pursuant to Chapter 373, Part IV, F.S., or by a dredge and fill permit issued pursuant to Chapter 403, F.S. The water management district shall provide a statement as to whether the activities in question were previously authorized by any of these types of permits.

(3) There must be a dispute between the landowner and the water management district as to the applicability of the exemption. The dispute must be documented as provided in Rule 5M-15.004, F.A.C.

35. All three conditions of eligibility were met for the Department to issue a Binding Determination.

36. Rule 5M-15.005(1) provides that:

(1) In order for alterations or activities to be exempt from permitting under Section 373.406(2), F.S., all of the following criteria must be met, as determined by the Department:

(a) The landowner must be engaged in the occupation of agriculture, silviculture, floriculture, or horticulture;

(b) Alterations to the topography of the land must be for purposes consistent with the normal and customary practice of such occupation in the area; and,

(c) The alteration or activity may not be for the sole or predominant purpose of impeding or diverting the flow of surface waters or adversely impacting wetlands.

37. The Department did not evaluate the ditch plugs under the third criterion. Under the facts of this case, it is found that the predominant purpose for installation of the ditch plugs by Petitioners was for enhancing the production of cypress trees, and not for impeding or diverting the flow of surface waters or adversely impacting wetlands.

38. The Department determined that the Petitioners were engaged in silviculture.

39. The dispositive issue in this case is whether the installation of ditch plugs, and their corresponding alterations to the topography of the land, were for purposes consistent with the normal and customary practice of such occupation in the area.

40. The term "normal and customary practice in the area" is defined in rule 5M-15.001, as "[g]enerally accepted agricultural activities for the type of operation and the region."

41. Rule 5M-15.006(3)(d) directs the Department, as one of the steps to develop a binding determination, to "[c]onsult best management practices applicable to the operation and adopted by rule of the Department in Title 5M, F.A.C."

42. The Silviculture Best Management Practices (BMP) manual, adopted in rule 5I-6.002, are a set of practices that can be used in lieu of regulations and which are designed to assist a landowner in the development and establishment of a silvicultural operation.

43. The BMP manual provides that:

This manual establishes the Best Management Practices (BMPs) for silviculture operations in Florida. These practices are designed as the minimum standards necessary for protecting and maintaining the State's water quality as well as certain wildlife habitat values, during forestry activities. As such, they represent a balance between overall natural resource protection and forest resource use.

44. Ditch plugs referred to in the BMP manual relate to the construction and maintenance of forest roads. Ditch plugs, as referenced in the BMP manual, are designed to facilitate road drainage by reducing the volume and velocity of ditch flow by directing the flow from the road surface onto vegetated areas where it can be dispersed. However, Mr. Vowell testified that controlling sediment loads that arrive at lakes and streams is a

major focus of the silvicultural BMPs, and that it does not make any difference where the sediment load comes from.

45. Ditch plugs 1 and 2 perform the function of entrapment and dispersion of sediment and the reduction of ditch-flow velocity described in the BMP manual.

46. The ditch plugs on the Property were not associated with the construction or maintenance of forestry roads. Their predominant purpose was to enhance the production of cypress trees. However, they had the complementary purpose of capturing sedimentation associated with Southwest 101st Avenue.

47. The undersigned is convinced that the ditch plugs installed by Petitioners will not only result in the enhancement of cypress tree growth on the Property, but will result in water quality improvement to Sampson Lake. However, while those factors may warrant an exemption under section 373.406(9), they are not the factors for consideration under section 373.406(2).

48. This case depends on whether the installation of ditch plugs was "consistent with the normal and customary practice of such occupation in the area" defined as "[g]enerally accepted agricultural activities for the type of operation and the region."

49. The evidence in this case establishes that, regardless of the efficacy of the activity as applied to this case, the installation of ditch plugs is not the normal and customary

practice of silviculture in Bradford County or the surrounding area. While such a determination may favor silvicultural practices that require drier lands for access to property for forestry and timbering purposes, and growth of species other than cypress, that does, nonetheless, reflect generally accepted practices in the region.

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 not exempt pursuant to section 373.406(2), Florida Statutes.

DONE AND ENTERED this 2nd day of February, 2016, in Tallahassee, Leon County, Florida.



E. GARY EARLY
Administrative Law Judge
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Filed with the Clerk of the
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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.