SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Appellant,

v. CASE NO. 75,128

DAVID DAVIS,

Appellee.

ANSWER BRIEF OF AMICUS CURIAE

CONCERNED SHRIMPERS OF AMERICA, INC., FLORIDA CHAPTER

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STATEMENT OF THE CASE AND FACTS

As required by Florida Rule of Appellate Procedure 9.210(c) the amicus curiae, Concerned Shrimpers of America, Inc., Florida Chapter (Concerned Shrimpers), specifies below portions of the various parties' Statements of the Case and Facts with which it disagrees.

Concerned Shrimpers accepts the Statement of the Case and Facts of the State of Florida (State) with the exceptions noted in this paragraph. The Statement of the Case and Facts accurately states the procedural history of this proceeding. It misleadingly describes the related case Concerned Shrimpers of America, Inc., Florida Chapter v. Florida Marine Fisheries Commission, 549 So.2d 1111 (Fla. 1st DCA 1989). That case was an appeal pursuant to Section 120.54 (9)(a)3, Florida Statutes (1987) of the agency's findings of immediate danger, necessity, and procedural fairness. The Commission's authority to enact the emergency rule and the Commission's compliance with its statutory standards were not, contrary to the impression the State tries to create, issues in that proceeding. The last paragraph of the State's Statement of the Case and Facts is not an accurate statement of the record. And it is not supported by citation to the record as required by Florida Rule of Appellate Procedure 9.210 (b)3. The entire Statement of the Case and Facts inaccurately presents as fact the Specific Reasons for Finding and Immediate Danger to the Public Health, Safety, and Welfare

which the Florida Marine Fisheries Commission (Commission) published when it promulgated Emergency Rule 46ER89-3.

Concerned Shrimpers disagrees with the entire Statement of the Case and Facts of amicus curiae, the Center for Marine Conservation, Florida League of Anglers, Florida Audubon Society, National Wildlife Federation, and Florida Wildlife Federation. The Statement of the Case and Facts has no basis in the record. It violates Florida Rule of Appellate Procedure 9.210(b)3 by not referring to the record. The Statement of the Case and Facts is nothing more than rhetoric about matters irrelevant to the separation of powers issue before this honorable court.

Concerned Shrimpers Accepts the Statement of the Case and Facts contained in the brief of amicus curiae, Greenpeace-U.S.A. and the Environmental Defense Fund.

SUMMARY OF ARGUMENT

The emergency rule that the 'trial court declared invalid required shrimp fishermen and other fishermen using trawls to install turtle excluder devices in their nets. The rule was enacted for the purpose of protecting endangered sea turtles. It was not enacted for and does not pretend to benefit the shrimp fishery in any fashion.

The trial court correctly ruled that passing a regulation for purposes of protecting endangered sea turtles is not within the statutorily delegated authority of the Marine Fisheries Commission. Regardless of how laudatory a goal might be an agency cannot promulgate a rule to achieve that goal simply because it believes the goal is good. Capeletti Brothers, Inc. v. Department of Transportation, 499 So.2d 855 (Fla. 1st DCA 1986), rev. denied 509 So.2d 117 (Fla. 1987).

A rule, like the emergency rule, which exceeds the agency's rulemaking authority is invalid. Any reasonable doubt about the existence of a particular power being exercised by the agency must be resolved against the exercise of the power. The courts in the first instance, not the agency, determine the extent of the jurisdictional grant of authority by the Legislature.

The Marine Fisheries Commission does not have statutory authority to pass a rule protecting endangered sea turtles. Each part of Section 370.027, granting the Marine Fisheries Commission rulemaking authority, specifically excludes endangered species from that grant of authority.

The authority of the Marine Fisheries Commission to pass any regulation, including regulation of gear, is limited to regulations for the purpose of enhancing the renewable marine fisheries resource of the state. Sea turtles are not a part of renewable marine fisheries resource. Their capture, other than accidentally in the course of fishing, is prohibited by statute.

The Commission does not have a broad authority to regulate marine life and the marine environment. Each statutory grant of authority is limited to actions to conserve or manage the renewable fisheries resource of the state.

The statutory history and the terms of the Marine Fisheries Commission's authorizing statutes demonstrate that the Legislature intended to restrict the Marine Fisheries Commission's authority to the renewable fishery resource.

The Commission has not somehow been vested with authority to regulate endangered species and sea turtles by virtue of being within the Department of Natural Resources. The Commission is an independent entity with exclusive and limited jurisdictional authority. In addition this is an argument that was not raised below and is therefore waived.

ARGUMENT

I. Introduction

The issue in this case is whether the Legislature delegated to the Marine Fisheries Commission the authority to pass regulations to protect endangered sea turtles.

The briefs of the State and the amicus curiae leave the reader with the impression that the issue in this case is whether endangered sea turtles deserve protection. That is not the issue any more than the issue is whether shrimpers and their families whose lives will be devastated by the impact of turtle excluder devices are entitled to compassion and reasonable consideration of their concerns. Consequently although the bulk of the amicus curiae's briefs were dedicated to bemoaning the plight of sea turtles, this brief will refrain from talking about the precarious financial condition and delicate family and social structure of the people affected by the emergency rule. It will instead address the legal issues.

The issue is not whether endangered sea turtles deserve protection. Concerned Shrimpers agrees that they do. The issue is something less glamorous and less amenable to a thirty second spot in the evening news. The issue is, however, fundamental and essential to our government of law. It involves whether the legislative or executive branch determines what actions will be crimes. This case presents a critical separation of powers issue.

A. The Decision Below

Judge Russell ruled that Florida Marine Fisheries Commission Rule 46ER89-3 (the emergency rule) is invalid because the Commission did not have authority to enact it and because it did not comply with the statutory guidelines imposed upon the Commission by the Legislature. (The trial court's order is Exhibit A of the Appendix to this brief.) Judge Russell examined the statutes establishing the Commission and guiding it in the exercise of its authority. He concluded that the legislative policy that the Commission is directed to implement is "the management and preservation of the State's renewable marine fisheries... ." State v. Davis, Order of Dismissal at 5, Case No. 89-663MM (Fla., Co. Ct., Franklin Co., November 27, 1989). Sea turtles, the judge concluded, are not a part of the renewable fishery resource.

He based this conclusion upon the common ordinary meaning of the words, upon the legislative prohibition against capturing or killing sea turtles, and upon the exclusion from the Commission's jurisdiction of endangered species. Because endangered sea turtles are not part of the fishery resource and are excluded from the Commission's jurisdiction, the judge ruled that the Commission had exceeded its authority by passing a regulation, however well intended, to protect them.

Recently an independent hearing officer of the Division of Administrative Hearings reached the same conclusion. Hearing Officer Kendrick ruled that proposed Commission Rule 46-31.002

requiring turtle excluder devices was invalid. He, like Judge Russell, determined that the Commission did not have authority to enact the rule. Concerned Shrimpers of America, Inc., Florida Chapter v. Florida Marine Fisheries Commission, Final Order, Case No. 89-4220R (Fla. Div. of Admin. Hearings, December 21, 1989). (A copy of the Final Order is Exhibit B of the Appendix to this brief.)

B. The Issue

The legal question that this case presents is whether the Legislature delegated to the Florida Marine Fisheries Commission the authority to protect endangered sea turtles by imposing gear regulations upon fishermen. The case presents a fundamental issue of the separation of power between the legislative and executive branches. This issue is so important to Florida's citizens that, unlike most states, Florida's Constitution, in Article 111, Section 2, expressly limits the exercise of one branch's power by another. Askew v. Cross Keys Waterways, 372 So.2d 913 (Fla. 1978). Chief Justice England's concurring opinion in that case aptly stated the importance of the principle.

> I sincerely hope that the significance of our decision today is not lost in a debate concerning its effect on the Environmental Land and Water Management Act. Justice Sundberg has revitalized a vastly more important doctrine--one that guarantees that Florida's government will continue to operate only by consent of the governed. He is saying, quite simply, that whatever may be the governmental predilections elsewhere, in Florida no person in one branch of our government may by accident or by assignment act in a role assigned by the Constitution to persons in another branch.

Id. at 925. The principle is doubly important here since the Commission's rule creates a crime for which Mr. Davis could be imprisoned. **§370.021(2),** Fla. Stat. **(1987).**

The State and the amicus curiae apparently concede that the purpose of the emergency rule is the protection of endangered sea turtles. The hearing officer in the rule challenge, like the judge below, found that was the rule's purpose.

The State bases its claim to authority on three theories. They are:

1. Sea turtles are a renewable marine fishery resource, and the emergency rule is merely a lawful effort to build up the sea turtle population so that sea turtles may once again be hunted and killed.

2. The Marine Fisheries Commission is not limited to regulating the State's fishery. It instead has a legislative mandate to regulate all marine life and the marine environment in general.

3. The Marine Fisheries Commission is really the Department of Natural Resources (DNR), and DNR must have authority to require turtle excluder devices if the Commission does not.

The arguments of the State and the amicus curiae have a subtle, disturbing message that must be recognized and confronted. It is that the end justifies the means. They are really arguing that because sea turtles should be protected the emergency rule purportedly protecting them should be upheld.

This court recently noted the grave danger that this attitude poses.

> Yet we are not a state that subscribes to the notion that ends justify means. History demonstrates that the adoption of repressive measures, even to eliminate a clear evil, usually results only in repression more mindless and terrifying than the evil that prompted them. Means have a disturbing tendency to <u>become</u> the end result.

<u>Bostick v. Florida</u>, 14 Fla. Law W'kly 586, 588 (Fla. Sup. Ct., November 30, 1989) (emphasis by the court). The danger is as great when a bureaucracy seeks to arrogate power to itself as when police ignore constitutional protections.

Arrogation of power is the true theme of the State's argument. The last sentence of the State's brief's argument section (page 10) inadvertently lets it slip. It says: "No other agency [except the Commission] could protect sea turtles from capture in shrimp nets because the Commission has exclusive authority over fishing gear specifications." That sentence speaks alarming volumes. It presumes that government is only by agency regulation. It ignores the fact that government is primarily by the people's elected representatives in the Legislature. Agencies govern only to the extent that the Legislature delegates the power to govern with guidelines for the agency's exercise of that power.

The trial court concluded that this case involves authority that the Legislature did not delegate. The State refuses to accept the fact that the Legislature retained the authority to

govern the interaction of fishing and endangered species, especially sea turtles.

C. Standard of Review

The trial court's judgment is presumed correct. The burden is on the State to demonstrate that the judge below erred. Applegate v. Barnett Bank of Tallahassee, 377 So.2d 1150 (Fla. 1980); Brandenburs Investment Corp. v. Farrell Realty. Inc., 463 So.2d 558 (Fla. 2d DCA 1985).

II. The Florida Marine Fisheries Commission Has Only The Authority That The Legislature Delegated To It.

An administrative agency possesses only the authority specifically delegated to it by statute. An agency cannot promulgate rules that go beyond that grant of authority or are contrary to the intent of the Legislature.[1/] A commission possesses no inherent authority to promulgate rules to achieve

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1/ Island Harbor Beach Club v. Department of Natural Resources, 495 So.2d 209, 219 (Fla. 1st DCA 1986), rev. denied 503 So.2d 327 (Fla. 1987) (agency cannot by rule expand its statutory authority). State Dept. of Business Res. v. Salvation Ltd.. Inc., 452 So.2d 65, 66 (Fla. 1st DCA 1984) (administrative agency cannot by rule enlarge, modify or contravene provisions of a statute): Department of Admin. v. Albanese, 445 So.2d 639, 641 (Fla. 1st DCA 1984); Department of Health & Rehab. Serv. v. Florida Psychiatric Society, Inc., 382 So.2d 1280, 1285 (Fla. 1st DCA 1980); Department of Transportation v. James, 403 So.2d 1066, 1068 (Fla. 4th DCA 1981); Florida Growers Coop Transport v. Department of Revenue, 273 So.2d 142, 144 (Fla. 1st DCA 1973).

purposes that its members find important." A rule which exceeds an agency's grant of rulemaking authority is an invalid exercise of delegated legislative authority. Ch. 87-385, §2, Laws of Fla., codified at and cited as §120.52(8), Fla. Stat. (1987); Capeletti Brothers, Inc. v. Department of Transportation, 499 So.2d 855 (Fla. 1st DCA 1986) rev. denied 509 So.2d 1117 (Fla. 1987).

The State has little choice but to acknowledge the principles stated above. To avoid the consequences of those principles the State argues that the trial "court should not have applied the plain meaning rule but instead it should have deferred to the agency's interpretation." Initial Brief at 6. This argument invokes a rule that does not apply to an agency's interpretation of its jurisdiction.

This court recently articulated that principle in United Telephone Company of Florida v. Public Service Commission, 496 So.2d 116 (Fla. 1986). That case involved two orders of the Public Service Commission. In that case like this one the issue was not the wisdom of the agency's action, but whether the Commission had authority to act at all. This court noted the general presumption of correctness that the Commission's orders received. Then it stated:

2/ See Capeletti Brothers, Inc. v. Department of Transportation, 499 So.2d 855, 857 (Fla. 1st DCA 1986), rev. denied 509 So.2d 1117 (Fla. 1987) (administrative rules cannot be contrary to or enlarge a provision of a statute no matter how admirable the goal might be).

> Such deference, however, cannot be accordedwhenthe commission exceeds its authority. At the threshold, we must establish the grant of legislative authority to act since the commission derives its power solely from the legislature.

United Telephone Company of Florida v. Public Service Commission, 496 So.2d 116, 118 (Fla. 1986). ~~See also~~ Radio Telephone Commun., Inc. v. South Eastern Telephone Company, 170 So.2d 577 (Fla. 1965). That principle governs here. The issue here is does the Commission have authority to enact a regulation to protect endangered sea turtles. It is not whether the regulation is wise. The agency's interpretation is not entitled to deference.

Any reasonable doubt about the lawful existence of a particular power being exercised by an agency must be resolved against its exercise. Radio Telephone Commun. Inc. v. Southeastern Telephone Comp., 170 So.2d 577, 582 (Fla. 1965); Edserton v. International Comp., 89 So.2d 488, 490 (Fla. 1956); State ex rel. Greenbers v. Florida State Bd. of Dentistry, 297 So.2d 628, 636 (Fla. 1st DCA 1974). Here there is much more than a doubt about the Commission's authority. The sections that follow discuss the various failings in the Commission's assertion of authority to enact the emergency rule.

III. The Marine Fisheries Commission Does Not Have Authority To Pass A Rule Protecting Endangered Sea Turtles.

The State admits, as the hearing officer found in Concerned Shrimpers of America, Inc., Florida Chapter, Case No. 89-4220R (Fla. Div. of Admin. Hearings, December 21, 1989), that the

purpose of the emergency rule is to protect endangered sea turtles. The Legislature has not authorized the Marine Fisheries Commission to pass rules for that purpose.

The Legislature delegated only a narrow area of rulemaking authority to the Marine Fisheries Commission. The Legislature also expressly excluded other areas from the Commission's rulemaking authority. Section 370.027, Florida Statutes (1987), lists the subject areas within the Commission's rulemaking authority. The Legislature expressly excluded rulemaking authority relating to endangered species in those subject areas. §370.027(2), Fla. Stat. (1987) (granting the Commission exclusive rulemaking authority "in the following subject matter areas relating to marine life, with the exception of endangered species"). The Game and Fresh Water Fish Commission has designated four of the five species of sea turtles affected by the emergency rule as "endangered." Fla. Admin. Code R. 39-27.003(6), (7), (8) and (9). The remaining species is designed "threatened". Fla. Admin. Code R. 39-27.004 (3). The Commission has not attempted to exclude endangered turtles from the scope of the emergency rule. The Commission improperly attempts to expand its statutory authority by adopting the emergency rule.

IV. <u>The Commission Does Not Have Rulemaking Authority To Protect Sea Turtles</u>.

The Legislature did not delegate rulemaking authority over sea turtles (endangered, threatened, or otherwise) to the Marine

Fisheries Commission. The terms of Sections 370.025 and 370.027, Florida Statutes, and the legislative enactment creating the Commission show this.

Section 370.025, Florida Statutes (1987), governs the Commission's exercise of its rulemaking authority. §370.027(1), Fla. Stat. (1987); State Marine Fisheries Comm'n v. Organized Fishermen of Florida, 503 So.2d 935 (Fla. 1st DCA 1987). The policy to be implemented in all Commission rules is the management and preservation of [Florida's] "marine fishery resources." §370.025(1), Fla. Stat. (1987) (emphasis added). Sea turtles are not part of Florida's marine fishery resource.

The standards of Section 370.025 demonstrate that the Commission's authority is only to enact measures to conserve and manage Florida's fisheries and fishery resources. The paramount concern of all Commission rules must be the continuing health and abundance of the state's "marine fishery resources." §370.025(2)(a), Fla. Stat. (1987). Commission rules must permit reasonable means and quantities of annual harvest. §370.025(2)(c), Fla. Stat. (1987). The Commission must manage stocks of fish as a unit, §370.025(2)(d), Fla. Stat. (1987); assure quality control of marine resources entering commerce, §370.025(2)(e), Fla. Stat. (1987); and develop fishery management plans, §370.025(2)(f), Fla. Stat. (1987). Similarly the nature of the subject matter areas over which the Legislature gave the Commission rulemaking authority demonstrates it may only enact rules to manage and preserve Florida's marine fishery resources.

The Commission's statutory mandate is to manage the commercial and recreationalharvesting of fish to maintain stocks of fishery resources and allow optimum use by harvesters.

Sections 370.025 and 370.027 must be read in pari materia with all of Chapter 370. Ferquson v. State, 377 So.2d 709, 710 (Fla. 1979). "Saltwater fish" is defined in Chapter 370 as "all classes of pisces, shellfish, sponges, and crustacea indigenous to salt water." §370.01(2), Fla. Stat. (Supp. 1988). This definition does not include turtles. A turtle is not a fish. A turtle is a reptile. The American Heritage Dictionary of the Enqlish Lansuase, New Collese Edition (1979).

"Fishery" is not defined by statute. It must therefore be given its plain and ordinary meaning. State v. Little, 400 So.2d 197, 198 (Fla. 5th DCA 1981); see also Southeastern Fisheries Association, Inc. v. Department of Natural Resources, 453 So.2d 1351, 1353 (Fla. 1984). A "fishery" is "[t]he industry or occupation of catching, processing, or selling fish, shellfish, or similar aquatic products;" "a fishing ground;" or "the legal right to fish in specified waters or areas." The American Heritage Dictionary of the English Language, supra. Black's Law Dictionary defines "fishery" as "a place prepared for catching fish" or "a right or liberty of taking fish." Black's Law Dictionary (1968).

Attorney General Robert Butterworth recently defined "fish" similarly. In responding to a question from the Executive Director of the Marine Fisheries Commission the Attorney General

stated that "fish" "in its broadest sense has been generally held to be a designation of almost any exclusively aquatic animal and to include oysters, clams and other shellfish." 1989 Op. Att'y. Gen. Fla. 089-32 (May 23, 1989).

Applying these definitions to the statute, the Legislature did not give the Commission authority to promulgate a rule to protect sea turtles. There is no turtle "fishery." The "occupation" or "industry" of catching turtles was prohibited in 1973, a decade before the Marine Fisheries Commission was created. The terms of Sections 370.025 and 370.027 are clear. The Legislature delegated the Commission rulemaking authority to conserve and manage the state's fishery resources, not to protect sea turtles.

Amicus curiae, Center for Marine Conservation, et al., craftily offers a possible red snapper fishery management plan in an attempt to characterize the interpretations of Judge Russell and Hearing Officer Kendrick as absurd. The example tellingly exhibits the refusal to accept the difference between the legislative and executive branches that infects the briefs of the State and the amicus curiae.

The "red snapper" theory postulates that the Commission may prohibit fishing for red snapper and that under the ruling below it would lose its authority to manage red snapper once catching it was prohibited. This equates the Commission's decision to impose a bag limit on a fishery resource with the legislative decision to prohibit the capture or killing of sea turtles. The

Commission only manages the resource as directed by the Legislature. The Legislature determines what resource the Commission will manage. By prohibiting the taking or killing of sea turtles, the Legislature has determined that they are not part of the State's fishery resource. It made a similar determination for manatees, porpoises, and manta rays. §370.12(2), (3), and (4), Fla. Stat. (1987). By the State's reasoning all these creatures would be part of the State's fisheries resource.

V. The Legislature Did Not Grant the Marine Fisheries Commission Broad Authority to Regulate Marine Life and the Marine Environment.

A. In Pari Materia

The State reads the Legislature's delegation of authority broadly. Focusing exclusively on one sentence of a statutory statement of the State's policy of management and preservation of the State's renewable marine resources, the State concludes that the Commission has been granted broad ranging authority to go out and do good in the marine environment.

That argument ignores the fact that the statement of policy is for the State not just the Marine Fisheries Commission. Different agencies have been granted different authorities to advance that policy. And some authority the Legislature has reserved to itself.

The State's argument refuses to consider the restrictions placed upon it by the statutes that grant its authority and

constrain its rulemaking. And the State refuses to construe the pertinent statutes as a whole, as proper statutory construction requires.

Section 370.025 (1), Florida Statutes (1987), relied upon by the State as granting the Commission broad authority does not delegate power at all. It simply states policy. Section 370.027, Florida Statutes (1987), is the provision that grants the Commission rulemaking authority.

That section's grant of rulemaking authority relating to "marine life," is limited by the terms of Section 370.025. §370.027(1), Fla. Stat. (1987); State Marine Fisheries Comm'n v. Organized Fishermen of Florida, 503 So.2d 935 (Fla. 1st DCA 1987); see also Marshall v. Hollywood, Inc., 224 So.2d 742, 749 (Fla. 4th DCA 1969), writ discharged 236 So.2d 114 (Fla. 1970), cert. denied, 91 S.Ct. 366 (all parts of an act must be read together to achieve a consistent whole). Section 370.025 specifically limits the Commission's rulemaking authority to marine fisheries and fishery resources. And individual standards by their language and nature emphasize the limitation. The health and abundance of the marine fisheries resource should be the paramount concern of the Commission's management and conservation measures. §370.025(2)(a), Fla. Stat. (1987). Conservation and management measures should permit reasonable means and quantities of annual harvest. §370.025(2)(b), Fla. Stat. (1987). Conservation measures should assure proper quality control of marine resources that enter commerce. §370.025(2)(e),

Fla. Stat. **(1987).** These are standards that relate to resources that may be harvested, not to a resource whose harvest is statutorily forbidden.

Until the jurisdiction expanding interpretation advanced in support of its emergency rule, the Commission's rules have recognized the limited nature of its authority to regulate the marine environment. Rules regulating non-harvestable marine life relate to the marine fisheries resource. For example, Commission Rules **46-17.001** et seq, Florida Administrative Code, protect and preserve grassbeds and other marine resources associated with the hard clam fishery resource. Similarly, in Rules **46-18.001, et** seq., as part of the management scheme for the bay scallop fishery, the Commission enacted rules to protect grassbeds where scallops are harvested. The Commission has regulatory authority relating to "marine life" other than fish only to the extent that regulation is necessary to preserve and manage a fishery or fishery resource. Section **370.027** does not give the Commission carte blanche over all marine life for any purpose it chooses.

B. Statutory History

In **1983,** the Legislature created the Marine Fisheries Commission and provided for the eventual replacement of **28** existing statutory provisions regulating fisheries with rules to be promulgated by the Commission. Ch. **83-134,** Laws of Fla. The Legislature achieved this shift from statutory regulation to administrative regulation by conditional repeal of statutes regulating the fisheries. That is, the **28** statutory provisions

were repealed as of a specified date unless the Commission failed to promulgate rules on the subject matter of the statute by the date of repeal. In the event the Commission had not promulgated rules on the subject, the statutes would remain in effect until the Commission promulgated such rules.[3]

The legislation limits the Commission's authority in two ways that the Commission has ignored. First, the law is in no way a generalized grant of regulatory power over the marine environment. The Commission is not charged generally with conservation of all marine life. It has no power, for example, to prohibit pollution, regulate the speed of boats, regulate the construction of oil platforms, coastal construction, drilling, dredging, etc. The Commission is not an ombudsman for the marine environment. Rather, its authority is limited to protecting and managing marine fisheries resources in statutorily prescribed ways.

Second, the **1983** legislation specifically left ~~intact~~ Section **370.12** which protects species of marine life ~~other than~~ fish. In **1983** the law provided, as it does today, that:

> No person, firm, corporation may take, kill, disturb, mutilate, molest, harass, or destroy any marine turtles, unless by accident in the course of normal fishing activities. Any turtle accidentally

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[3] The following statutes were conditionally repealed by Chapter **83-134: §§ 370.07(4), 370.071, 370.08(1)-(3), (5)-(12), 370.082, 370.0821, 370.11, 370.1105, 370.111, 370.112, 370.1121, 370.1125, 370.113, 370.114, 370.13, 370.135, 370.14, 370.15, 370.151, 370.153, 370.155, 370.156, 370.157, 370.16(14)-(17), (36), (38), 370.17, 370.171, 370.172.** These statutes regulate fisheries.

> caught will be returned alive to the water immediately. A violation of this paragraph is a misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083.

§370.12(1)(b), Fla. Stat. (1983); §370.12(1)(b), Fla. Stat. (1987). Section 370.12 also provides for the protection of manatees, porpoises, and manta rays.

C. Construing the Statute

Legislative intent must be discerned from a consideration of the act as a whole and the state of the law in existence bearing on the subject. State v. Webb, 398 So.2d 820, 824 (Fla. 1981); Certain Lands v. City of Alachua, 518 So.2d 386 (Fla. 1st DCA 1987). The terms of Section 370.12 establish that the Legislature did not intend to delegate authority to protect sea turtles to the Commission. The Legislature addressed the accidental capture and inevitable unintentional killing of sea turtles in the course of normal fishing activities. This preempts any attempt by an administrative agency to regulate the accidental capture of sea turtles in such circumstances. The statute must control over the rule. An agency rule cannot be contrary to, nor enlarge the provisions of a statute. See Seitz v. Duval County Sch. Bd., 366 So.2d 119, 121 (Fla. 1st DCA 1979).

Further, the specific provision of Section 370.12 controls the general grant of authority of Sections 370.027 and 370.025. See Palm Harbor Special Fire Control Dist. v. Kelly, 516 So.2d 249, 251 (Fla. 1987). The specific statute acts as an exception to the general. Id.

The statutes discussed above must be interpreted in a way that harmonizes and gives effect to all of the statutes. Id. The only interpretation that does this is that the Legislature did not give the Commission rulemaking authority to protect sea turtles.

It is entirely logical that the Legislature would not delegate authorityto protect sea turtles to the Marine Fisheries Commission. Unlike the species under the Commission's authority, sea turtles inhabit both land and sea. Numerous factors affecting sea turtle mortality are found on land. Examples include natural and human predation, destruction of nesting beaches, beach development, and beach lighting. The Commission apparently does not claim authority to promulgate rules to protect sea turtle nests or nesting beaches. Nor would the Commission claim to have authority to address factors relating sea turtle mortality such as ingestion of plastic and other foreign material or oil and tar pollution in marine waters.

The authority to determine the most appropriate, fair, and consistent means of protecting a species should lie within one body. Because the Marine Fisheries Commission could not develop and implement consistent policy objectives for the protection of sea turtles on land as well as sea, the Legislature did not delegate the Commission rulemaking authority over sea turtles. The Legislature retained that authority for itself.

The recent enactment of Chapter 89-113, Laws of Florida, demonstrates both that the Legislature retained a great deal of

authority to protect the marine environment and that the Commission's authority is, in the view of the Legislature, limited. Chapter 89-113 restricts the release of balloons inflated with lighter-than-air gases because it poses "a danger and nuisance to the environment, particularly to wildlife and marine animals." Ch. 89-113, §1, Laws of Florida. The law creates exceptions for balloons that the Commission has determined by rule are biodegradable or photodegradable. Chapter 89-113, Section 2, Laws of Florida, specifically empowers the Commission to adopt rules that establish criteria for biodegradable or photodegradable balloons. If the Commission had the broad authority over the marine environment and marine life that it claims, the specific delegation of additional rulemaking authority would not have been necessary.

D. The Policy Choice Reflected In The Emergency Rule Is Properly Left To The Legislature.

Apart from the specific statutory provisions discussed above, there is a statutory omission which fundamentally undermines the Commission's case. Consider the character of the proposed rule. It is nothing less than a value judgment by which the Commission purports to weigh the importance of protecting sea turtles against the interests of Florida shrimpers and other fishermen. But the Legislature made that policy decision in Section 370.12 (1)(b), Florida Statutes (1987), when it decided to allow the accidental taking or killing of sea turtles in the course of normal fishing. This exclusion contrasts markedly with

the provisions in Section 370.12 for other marine animals. There is no such exclusion for manatees, porpoises, or manta rays.

There is nothing in the statutes authorizing or directing the Commission to change the Legislature's decision to allow the accidental capture or killing of sea turtles and no guidelines to circumscribe the Commission's discretion. The Legislature has simply not delegated to the Commission the authority to decide how much protection turtles deserve and at what cost to the shrimp industry. There is an essential political dimension to such a judgment and it is therefore imperative that an agency making them have clear statutory authority and guidelines. The Commission has neither.

The Legislature has reserved to itself the power to prescribe regulations to protect sea turtles. Whether the members of the Commission view the statutory regulations as adequate is irrelevant. The Commission has no authority to promulgate a rule simply because its members find the rule desirable. The Commission cannot exercise jurisdiction that it does not have.

It is ironic that an agency charged with the protection and management of marine fisheries now threatens the continued existence of the shrimp fishery in favor of a species over which it has no jurisdiction. The Commission turns the statutory scheme on its head and serves a great injustice on the shrimp fishery.

VI. The Commission's Status Within The Department Of Natural Resources Does Not Grant It Authority To Enact The Emergency Rule.

The State argues that it is part of the Department of Natural Resources (DNR) and therefore has authority to pass the emergency rule pursuant to DNR's statutory authority. This argument fails for two reasons.

A. Waiver

The State did not make this argument below. It has waived the argument. It cannot on appeal ask this court to overturn a trial judge on a theory that was not raised before the judge. Dober v. Worrell, 401 So.2d 1322 (Fla. 1981); In re Beverly, 342 So.2d 481 (Fla. 1977); Abrams v. Paul, 453 So.2d 826 (Fla. 1st DCA 1984).

B. The Commission is Not Imbued with DNR's Authority

The State's argument blithely ignores the peculiar nature of the Marine Fisheries Commission and the strict statutory segregation of the Commission from DNR. It also gives new and far fetched meaning to "in pari materia." The State reads the specific exclusion of endangered species from the Commission's jurisdiction "in pari materia" with the Endangered Species Act (Section 372.072, Fla. Stat. [1987]) to conclude that the words "with the exception of endangered species" really means only that the Commission cannot authorize the taking of endangered species. The plain language of the statute does not support the argument. Section 370.027(1) delegates "full rulemaking authority over

marine life, with the exception of endangered species, ..." The exception is not limited. It is complete. And nothing in Chapter 372 delegates rulemaking authority to the Commission. The State does not explain how its interpretation is necessary to harmonize the two statutes. That interpretation is definitely not needed to protect endangered sea turtles since they are protected by statute.

The statutes creating the Commission strictly separate it from DNR. The fact that the Commission's rules, like those of many agencies, must be approved by the Cabinet in one of its many capacities does not meld the two agencies.

The Commission is a unique statutory creature created for the limited purpose of regulating the State's fishery resource. It is not a division of DNR. The DNR staff may not change the Commission's budget. §370.026(4), Fla. Stat. (1987). The Commission has exclusive rulemaking authority in limited subject matter areas. In those areas where the Commission's exercise of its authority conflicts with DNR's, the Department's authority is withdrawn. §370.027(2), Fla. Stat. (1987). The DNR staff cannot change any proposed rule or recommendation of the Commission. §370.027(3)(a), Fla. Stat. (1987). Even the Cabinet itself cannot change a rule proposed by the Commission. §370.027(3)(a), Fla. Stat. (1987). In the limited areas where the Commission has jurisdiction, its authority is exclusive. §370.027(2), Fla. Stat. (1987). These powers and restrictions do not describe a division of DNR. They describe a unique and

independent agency whose actions must be authorized by its empowering legislation.

VII. The Commission's Authority To Regulate Gear Is Limited.

The fact that proposed Rule 46-31.002 regulates fishing gear does not validate the rule. Although Section 370.027(2) gives the Commission regulatory authority relating to "gear specifications," that authority is conferred for the purpose of protecting and preserving "fishery resources," not endangered species and not sea turtles. The proposed rule is plainly a gear regulation to protect sea turtles. Most of the sea turtles within its scope are endangered species. The rule does not distinguish between endangered and threatened sea turtles. The Commission is acting substantially beyond the authority that the Legislature has delegated to it.

Any fair reading of Chapter 370 confirms that the purpose of the authority to prescribe gear specifications is the conservation and management of the fish being harvested, not some species not even defined as fish. The proposed rule here does not relate to the protection of any fish or fishery resource. Its objective is totally different and far afield of the Legislature's purpose in creating the Marine Fisheries Commission.

CONCLUSION

There is more than a reasonable doubt that the Commission lacks the authority to promulgate proposed Rule 46-31.002. This doubt must be resolved against the agency. This is especially

true where, as here, an agency rule imposes a criminal penalty which may include imprisonment.

Finally, when, as here, an agency makes a policy choice between two competing interests, it is essential that the authority under which that choice is made clearly authorize the action. The statutes here provides no such authority.

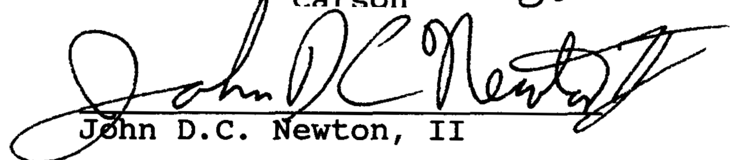
The Legislature did not intend for the Commission to make the value judgment between protecting sea turtles and the continued welfare of the shrimp fishery. Therefore, the judgment below must be affirmed.

Respectfully submitted,

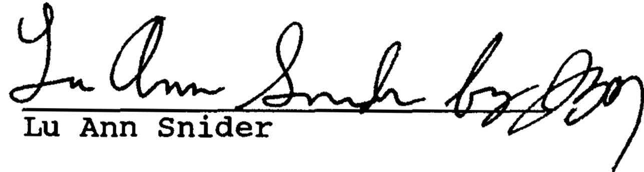
CARSON & LINN, P.A.
Mahan Station
1711-D Mahan Drive
Tallahassee, Florida 32308
904/878-2057

James C. Adkins

Leonard A. Carson



John D.C. Newton, II



Lu Ann Snider

CERTIFICATE OF SERVICE

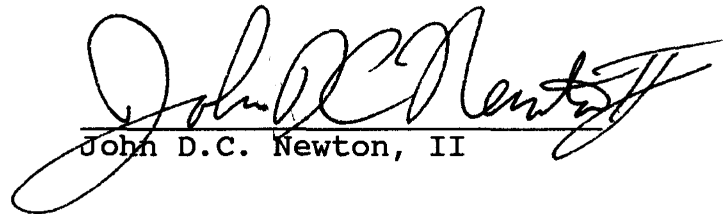
I HEREBY CERTIFY that a true copy of the foregoing has been furnished by United States Mail this 26th day of December, 1989, to:

J. Patrick Floyd, Esquire
Post Office Drawer 950
Port St. Joe, Florida 32456

David G. Guest, Chief
Special Projects
Sovereign Lands Litigation Group
111-36 South Magnolia Drive
Tallahassee, Florida 32301

David Gluckman
Gluckman & Gluckman
Route 5, Box 3965
Tallahassee, Florida 32301

Winston K. Borkowski, Esquire
Owen & Storch
926 South Ridgewood Avenue
Daytona Beach, Florida 32114



John D.C. Newton, II

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