IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Appellant,

vs. CASE NO. **75,128**

DAVID DAVIS,

Appellee.

_____/

ANSWER BRIEF OF APPELLEE

On Appeal From an Order of the County Court in and for Franklin County on a Question Certified as One of Great Public Importance

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STATEMENT OF THE CASE AND FACTS

The Appellee/Defendant, Captain David Davis, set out from the port of Apalachicola to trawl for shrimp in federal waters on August 8, 1989. Captain Davis had the turtle excluder devices on board his shrimp boat, but since he was going to shrimp in federal waters, they were not placed in the net. (R-3). The offshore waters were so rough on this expedition that Mr. Davis was not able to shrimp and he never put his shrimp nets in the water. (R-3). Concluding that his time, effort, and expenses were to no avail as the inclement weather continued, he decided to return to Apalachicola. (R-3).

While located within the offshore waters of the State of Florida, he was arrested by the Florida Marine Patrol for a violation of Emergency Rule 46ER89-3 which had been promulgated by the Florida Marine Fisheries Commission with an effective date of August 9, 1989.

A written plea of not guilty was filed on behalf of Mr. Davis along with a Motion to Dismiss which primarily challenged the authority of the Marine Fisheries Commission to enact the subject Emergency Rule. (R-2, 3-4).

On October 16, 1989 Judge Van Russell, County Court for Franklin County, Florida, heard arguments on the merits of the Motion to Dismiss and a transcript of that hearing is contained in the record at R-78-109. The primary argument by

the State in their response to the Motion to Dismiss and in the oral arguments made at the hearing was that the Emergency Rule (46ER89-3) was a regulation of the taking of shrimp and consequently, was authorized pursuant to Florida Statutes, 8370.027. (R-7; R-99). The State's exact statement on this position was: "This Rule regulates the taking of shrimp." (R-99).

The County Court rendered a detailed nine page Order on November 27, 1989 granting the Defendant's Motion to Dismiss and holding that:

> The legislature created the MFC for the purpose of preserving and managing the State's renewable marine fisheries and endowed it with rulemaking authority to accomplish that end. The protection of endangered species such as sea turtles is a noble endeavor, but it is not one contemplated by the legislature for the MFC. ... (R-60)

The question of the authority of the Marine Fisheries Commission to promulgate the subject Rule was certified as a question of great public importance by the County Court and the First District Court of Appeal and this Court has accepted jurisdiction pursuant to Fla.R.App.P. 9.030(a)(2)(B). (R-69,73,74,76).

The authority of the Marine Fisheries Commission to promulgate this Rule was not dealt with in the First District Court of Appeal case, Concerned Shrimpers v. MFC, 549 So.2d 1111 (Fla. 1st DCA 1989). The State finally agreed in its Motion to Stay before the First District Court of Appeal that this case did not deal with the question of authority of the

MFC. (First District Case No. 89-3183, Motion for Stay - pg. 2). In any event, the only issue which could have been raised in that appeal was whether the circumstances within the State of Florida, not Franklin County, justified an emergency rule at that time. The review was limited by law to review of the "findings of immediate danger, necessity and procedural fairness ... ." Section 120.54(9)(a)3, Florida Statutes (1987).

SUMMARY OF ARGUMENT

The Order of the County Court granting the Motion to Dismiss and invalidating Emergency Rule 46ER89-3 should be affirmed because the Marine Fisheries Commission did not have authority to enact this Emergency Rule. This is not a question of whether turtles should be protected or the manner in which they should be protected. It is a question of whether the Marine Fisheries Commission is the body of government to which the legislature intended to give authority to regulate endangered species (sea turtles) or whether that task was to be accomplished by another governmental entity.

The legislature in §370.027 specifically precluded the Marine Fisheries Commission from enacting rules regarding endangered species (sea turtles). The subject rule was enacted for the improper purpose of protecting endangered species (sea turtles) and the common definition of that term as used in the statute would include all of the sea turtles

found in Florida waters. The State essentially concedes this point in stating in its brief "sea turtles are on the brink of extinction as a result of shrimp trawling; ..."

Furthermore, examination of the terms of §370.025 and 5370.027, Florida Statutes, as well as other statutes dealing with sea turtles and endangered species, reveals that the legislature did not intend to delegate rulemaking authority over sea turtles to the MFC. The State's suggestion that it intends to manage sea turtles in order to allow them to be harvested or taken as a marine fishery and that this causes sea turtles to fall within the term "renewable marine fishery resources" should be rejected.

The policy of the Marine Fisheries Commission specified by the legislature is the enhancement of marine environment for the purpose of optimum sustained benefit of the State's renewable marine fishery resource. The term "enhancement of marine and estuary environment!! does not stand by itself in statutory construction. When viewed with the content of the remainder of the statute (§370.025(1)), it is evident that this is not an invitation for the Marine Fisheries Commission to enact rules regarding sea turtles.

When, for whatever reason, a species become endangered and cannot be taken or harvested, it cannot be said to have been abandoned by the State of Florida because at that very time it comes under the more powerful and pervasive control of the legislature. Apparently, it is at

that crucial point that the legislature wants control for itself or other specifically designated agency, not the Marine Fisheries Commission that was set up to concern itself with the harvesting and protection of our fishery stock.

ARGUMENT

The recent history of our government in the United States has demonstrated that neither the courts nor the people will tolerate an office, agency, or branch of government taking action without authority to achieve what it has determined to be a worthwhile goal. Our forefathers chose to found this Nation and this State on a government composed of separate branches with each of the branches being subdivided into various agencies, offices, and bodies, each being given a specific power and responsibility to perform certain defined tasks. Fla. Const. Art. II §3. Where one body of government begins to assume power to act in areas where it has been specifically prohibited, the checks and balances of our system are compromised and it becomes dysfunctional.

The Marine Fisheries Commission's enactment of rules regarding endangered species (turtles in this case) in order to do whatever is necessary to achieve the protection of sea turtles, is a perfect example of this age-old attempt by individuals, offices, or agencies to justify by the merit of the goal to be accomplished, acting beyond their grant of power. Simply stated, the merit of the goal to be

accomplished does not justify the means used to achieve it where the agency is without power in that area and particularly where, as in this case, the authority regarding a specific subject matter, to-wit: endangered species has been excepted from the grant of powers to the agency.

In light of the clear language of Florida Statutes §370.027 excepting endangered species from the subject matter which may be regulated by the Marine Fisheries, it is apparent that the Marine Fisheries Commission had to have some doubts over whether they had any authority to pass these rules regarding endangered species (turtles). Defendant suggests to the Court that the State of Florida Marine Fisheries Commission justified overstepping their authority by the coincidence of the nesting season for the Kemp's Ridley turtles, the prime time of the shrimp season and the lack of enforcement of the Federal TED's Rule. Certainly, the Marine Fisheries Commission has obtained the benefit of this Rule enacted without power and thus, it is suggested achieved their purpose since all three of the factors which led to the existence of the enactment of this emergency Rule are non-existent at this time.

Unfortunately, when an agency enacts a rule which carries criminal sanctions regarding a matter over which they have no authority, the rule nevertheless continues to be effective until one of the citizens in the small group of affected persons has the fortitude and financial backing to

challenge the authority of the governmental body. The message should be made clear to the Marine Fisheries Commission and other agencies that they are not to assert power they are not granted so that this factor can be considered in the rules which they promulgate in the future.

In this action the Marine Fisheries Commission now comes boldly before this Court in an attempt to obtain confirmation by this Court of its wrongful usurpation of power and utilizes every imaginable rationale to justify the action taken. These attempts should be rejected, as should the Marine Fisheries's attempts to include in this case the emotional merits of turtle excluder devices and the protection of turtles. This is not a question of whether turtles should be protected or how they should be protected. It is a question of whether the Marine Fisheries Commission is the body of government to which the legislature intended to give authority to regulate endangered species (sea turtles) or whether that job was to be accomplished by another governmental entity.

In a very analytical opinion, the County Court Judge in the holding of the case answered this question as follows:

> The protection of endangered species such as sea turtles is a noble endeavor, but it is not one contemplated by the Legislature for the MFC. It is, therefore,
>
> Ordered and adjudged that Defendant's Motion to Dismiss be and the same is hereby granted. (R-52-60)

THE LEGISLATURE SPECIFICALLY EXCEPTED ENDANGERED SPECIES FROM THE RULEMAKING AUTHORITY OF THE MFC.

Section 370.027, Florida Statutes (1987), the statute under which Emergency Rule 46ER89-3 was promulgated, sets out the rulemaking authority of the Marine Fisheries Commission:

> (1) Pursuant to the policy and standards in s.370.025, the Marine Fisheries Commission is delesated full rulemakins authority over marine life, with the exception of endangered species, ...
>
> (2) Exclusive rulemakins authority in the followins subject matter areas relating to marine life, with the exception of endangered species, is vested in the Commission; ...:
>
> (a) gear specifications;
> (b) prohibited gear;
> (c) bag limit;
> (d) size limit;
>
> . (emphasis supplied).

As with all agency rules, Emergency Rule 46ER89-3 must be consistent with the statute under which it is promulgated. See, Department of Health and Rehabilitative Services v. Florida Psychiatric Society, Inc., 382 So.2d 1280, 1285 (Fla. 1 DCA 1980). The administrative bodies or commissions have no inherent power to promulgate rules. They possess only the power specifically granted to them by statute. Grove Isle, Ltd. v. State Department of

Environmental Regulation, 454 So.2d 571, 573 (Fla. 1 DCA 1984); Orange County v. Debra, Inc., 451 So.2d 868, 870 (Fla. 1 DCA 1983). A rule cannot amend, repeal or add to an enabling statute. Department of Health and Rehab. Services v. Florida Psychiatric Society, Inc., 382 So.2d 1280 (Fla. 1 DCA 1980).

The Legislature did not delegate to the Commission the authority to promulgate rules for the protection of endangered sea turtles. In fact, the legislature expressly excluded from the Commission's power rulemaking authority relating to endangered species. The Commission, by adopting Emergency Rule 46ER89-3, has attempted to expand its statutory authority.

An administrative rule cannot be contrary to or enlarge a provision of a statute no matter how admirable the goal might be. Capaletti Brothers, Inc. v. Department of Transportation, 499 So.2d 855, 857 (Fla. 1 DCA 1986), rev. denied 509 So.2d 1117 (Fla. 1987); Island Harbor Beach Club, Ltd. v. Department of Natural Resources, 495 So.2d 209, 219 (Fla. 1 DCA 1986), rev. denied, 503 So.2d 327 (Fla. 1987) (agency cannot by rule expand its statutory authority); State Department of Business Regulation, Division of Alcoholic Beverase and Tobacco v. Salvation Ltd., Inc., 452 So.2d 65, 66 (Fla. 1 DCA 1984) (administrative agency cannot by rule enlarge, modify or contravene the provisions of a statute). Emergency Rule 46ER89-3 is invalid because it attempts to

assert rulemaking authority over endangered species, a power prohibited to the Marine Fisheries Commission by the Legislature.

Any doubt about the lawful existence of a power which is attempted to be exercised by an agency must be resolved against its exercise. Radio Telephone Communications, 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 Board of Dentistry, 297 So.2d 628, 636 (Fla. 1st DCA 1974).

The suggestion by the State that the Court should have deferred to the Agency's interpretation does not apply to the situation in this case to allow the Marine Fisheries Commission to establish its own authority and jurisdiction. There is no presumption in favor of agency action involving exercise of jurisdiction where none has been granted by the Legislature. United Telephone Comp. of Florida v. Public Service Commission, 496 So.2d 116, 118 (Fla. 1986); Radio Telephone Commun., Inc., supra, 170 So.2d at 582. That an agency does not have the power which it presumes is particularly clear when, as in this case, the Legislature specifically excepts power concerning a certain subject matter from the other powers.

The State's argument that the legislature actually meant to except only the taking of marine species but failed

to use that terminology should be rejected. If the legislature had meant to except from the rulemaking power of the MFC only the "taking" of endangered species, certainly it would have used that terminology. This is evident from the last sentence of §327.027(1) where the legislature only wanted to except one part of the power of the MFC regarding residential, manmade saltwater canals. There the legislature simply specified that it was only the power to "regulate fishing gear" in those canals that was prohibited. §327.027(1), F.S.

Furthermore, it would not seem logical that the legislature would insert a specific exception in the statute just to remind an agency that it cannot pass a rule contrary to a Florida Statute that prohibits the taking of sea turtles, (9370.12, F.S.).

At the time the MFC was created and 9370.027 (1983) enacted, the legislature knew that the Florida Endangered and Threatened Species Act of 1977 (9372.02) had given power only to the Game and Fresh Water Fish Commission and the Department of Natural Resources. Clearly the legislature did not want the MFC to enact any rules dealing with that subject matter. Furthermore, it is certain the legislature was aware of other statutes it had passed specifically dealing with sea turtles and other endangered species (the manatees and mammalian dolphins (porpoises). 5370.12, F.S.

That the authority granted by §372.072 was directed only to the Department of Natural Resources and the G&FWFC and not to any other commission or agency is also made clear by the duties given the DNR in subsection (5). Thirty days prior to each annual session the Executive Director of the Department of Natural Resources is to provide to the legislature and the Governor and Cabinet a "revised and updated plan for management and conservation of endangered and threatened species." §372.072(5).

Appellee, Davis, objects to the State's reference to and attachment of a letter from the Executive Director of the DNR to William Fox of the MFC attached by the State as Appendix B of its brief. This is a self-serving document obviously prepared as an attempt to cover the insecurities of the Marine Fisheries Commission about whether it had power to enact rules dealing with endangered species. (Note that only "endangered species" are mentioned). The reference to and attachment of this letter and research material behind it constitute another improper attempt by the State to supplement the record and should be rejected. Frank v. Jensen, 118 So.2d 545 (Fla. 1960).

It is entirely logical that the legislature would not delegate authority to 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.

RULE 46ER89-3 WAS ADOPTED TO PRESERVE ENDANGERED SEA TURTLES

Appellant appears to have abandoned its argument made at the hearing on the Motion to Dismiss that the subject rule is simply a rule "regulating the taking of shrimp" over which the MFC has power. (R-99,100). It appears to now concede that the true purpose of the rule is the protection of endangered species (sea turtles) and then argues that the legislature actually meant "except (for rules regarding taking of) endangered species" but failed to insert the

language. In any event, it is clear from a reading of the Emergency Rule that the Commission's primary and overriding objective in adopting the Rule was the protection of the critically endangered Kemp's Ridley turtle. (R-50,51). The Commission portrayed the plight of the Kemp's Ridley turtle to justify its action in adopting the Emergency Rule. (R-50).

Even before the enactment of the subject Emergency Rule, the Marine Fisheries Commission in January of 1989 approved a similar emergency rule requlating endansered species (turtles) for the Northeast Florida coast line (46 ER89-1). It is admitted by the MFC that the purpose of that rule was also:

> ... to require the use of TED's in all offshore trawls and halt the record number of deaths of the critically endansered Kemp's Ridley turtle there. (cited from 46 ER89-3). (R-50) (emphasis supplied).

The term "endangered species" falls within the rule that words of common use are accorded their plain and ordinary meaning. Southeastern Fisheries Association, Inc. v. Department of Natural Resources, 453 So.2d 1351 (Fla. 1984). Certainly, it has not been suggested by the State in this case that this term is a technical term requiring expert interpretation.

"Endangered species" is defined by the American Heritage Dictionary of the English language as "a species in

danger of extinction." Consequently, it would appear from the Commission's description in the Emergency Rule of the plight of the sea turtles found in Florida that all would be within the common definition and usage of the term "endangered species." (R-50,51). Furthermore, the Appellant states on page 2 of its brief: "Sea turtles are on the brink of extinction as a result of shrimp trawling; ..."

Of the five species of sea turtles found in Florida waters, four are classified as endangered under §372.072, Fla. Stat. (1987) (Kemp's Ridley, Leatherback, Green Turtle, and Hawk's Bill). The Loggerhead turtle is the only one classified under the definition of "threatened species" as used in that section.

In holding that "[t]he protection of endangered species such as sea turtles is a noble endeavor, but is not one contemplated by the Legislature for the MFC.", Judge Russell, County Court Judge of Franklin County, recognized that the purpose of this rule was to preserve endangered sea turtles. (R-60)

In the final Order on the rule challenge to the permanent rule of the MFC regarding TED's (46-31.002 after a formal hearing on the matter the Hearings Officer held in "Conclusions of Law" as follows:

> 7. The proposed rule at issue in this case is not a "gear specification" intended to manage or preserve a marine fishery resource within the Commission's grant of rulemaking authority. Rather, the proposed rule was adopted to preserve the endangered sea turtles, a topic of the concern

> expressly excepted from the Commission's grant of rulemaking authority. (A-1 on page 18).

The Hearings Officer therefore ruled that the proposed Rule was invalid. (A-1 at page 21). It is interesting to note that in that proceeding present counsel for the State from the Attorney General's office represented the Marine Fisheries Commission and the case involved nearly the same entities which have filed briefs of Amicus Curiae in this case. (A-1)

The Commission's emergency rule does not portend to be necessary for the protection of threatened sea turtles or for the protection of any Florida fishery. The Commission does not claim that the "threatened" status of the loggerhead turtle justifies this emergency rule. It cannot be disputed that Emergency Rule 46ER89-3 was designed to protect endangered species (sea turtles) as the term is used in §370.027, Fla. Stat.

ENHANCEMENT OF MARINE ENVIRONMENT FOR THE PURPOSE OF OPTIMUM SUSTAINED BENEFIT OF THE STATE'S RENEWABLE MARINE FISHERY RESOURCE

The State continues to argue that the term "enhancement of the marine and estuary environment" used in §370.025(1) provides some evidence of general intent to include sea turtles. However, as the trial court pointed out in his Order, a close analysis of the content of this provision establishes the following:

> In other words, the legislative policy to be effectuated by the MFC is the management and preservation of the State's renewable marine fishery resources. The goal of this policy is to attain the optimum sustained benefits and use of the State's renewable marine fishery resources. The emphasis placed on protection and enhancement of the marine and estuarine environment is for the purpose of achieving that goal.
>
> There is nothing in the surrounding statutory language to support the State's contention that the phrase in question contemplates a mechanism for the protection of sea turtles or other endangered species. (R-7)

Although 5370.027 states that the Commission has rulemaking authority relating to "marine life," this is limited by the terms of $370.025. §370.027(1), Fla. Stat. (1987); State Marine Fisheries Comm'n V. Orsanized Fisherman of Florida, 503 So.2d 935 (Fla. 1st DCA 1987); see, also, Marshall V. Hollywood, Inc., 224 So.2d 743, 749 (Fla. 4th DCA 1969), writ discharsed 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 limits the Commission's rulemaking authority to marine fisheries and fishery resources. The meaning of, and need for, the provision relating to "marine life" is apparent from an examination of Commission rules. 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 power over all marine life for any purpose it chooses.

The fact that proposed Rule 46ER89-3 regulates fishing gear does not validate the rule. Although §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 subject emergency rule is plainly a gear regulation to protect sea turtles. (46ER89-3) Most of the sea turtles within its scope are endangered species. The rules 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 emergency rule here does not relate to the protection of any fish or fishery resource. Its objective is totally different and far

of the legislature's purpose in creating the Marine Fisheries Commission.

FURTHERMORE, THE LEGISLATURE DID NOT DELEGATE RULEMAKING AUTHORITY OVER SEA TURTLES TO THE MFC

That the Legislature did not delegate rulemaking authority over sea turtles to the Marine Fisheries Commission is evidenced by the terms of 5370.025 and 370.027, Florida Statutes, and by the legislative enactment that created the Marine Fisheries Commission (5372).

The Commission's exercise of its rulemaking authority is governed by the policies and standards set forth in 1370.025, Florida Statutes. §370.0271(1), Fla. Stat. (1987); State Marine Fisheries Commission v. Organized Fisherman of Florida, 503 So.2d 935 (Fla. 1 DCA 1987). That statute (5370.025) provides the limits of the rulemaking authority for the Marine Fisheries Commission as follows:

> (1) The Legislature hereby declares the policy of the state to be manasement and preservation of its renewable marine fishery resources, based upon the best available information, emphasizing protection and enhancement of the marine and estuarine environment in such a manner as to provide for optimum sustained benefit and use to all the people of this state for present and future generations.
>
> (2) All rules relating to saltwater fisheries adopted by the department pursuant to this Chapter or adopted by the Marine Fisheries Commission and approved by the Governor and Cabinet as head of the department shall be consistent with the following standards:

(a) The paramount concern of conservation and management measures shall be the continuing health and abundance of the marine fisheries resources of this state.

(b) Conservation and management measures shall be based upon the best information available, including biological, sociological, economic, and other information deemed relevant by the commission.

(c) Conservation and management measures shall permit reasonable means and quantities of annual harvest, consistent with maximum practicable sustainable stock abundance on a continuing basis.

(d) When possible and practicable, stocks of fish shall be managed as a biological unit.

(e) Conservation and management measures shall assure proper quality control of marine resources that enter commerce.

(f) State marine fishery management plans shall be developed to implement management of important marine fishery resources.

(g) Conservation and management decisions shall be fair and equitable to all the people of this state and be carried out in such a manner that no individual, corporation, or entity acquires an excessive share of such privileges;

(h) Federal fishery management plans and fisherv management plans of other states or interstate commissions should be considered when developing state marine fishery management plans. Inconsistencies should be avoided unless it is determined that it is in the best interest of the fisheries or residents of this state to be inconsistent. S. 370.025, Fla. Stat. (1987) (emphasis supplied).

The terms of fjfj370.025 and 370.027 make it clear that the Legislature delegated to the Commission rulemaking authority over the State's "marine fisheries resources."

Although "fishery"1/ is not defined in Chapter 370, "saltwater fish" is defined in Section 370.01(2), Florida Statutes (Supp. 1988) as "all classes of pisces, shellfish, sponges and crustacea indigenous to salt water." §370.01(2), Fla. Stat. (Supp. 1988). If the legislature intended to include turtles in this definition it could have done so easily.

This definition does not include turtles. The Marine Fisheries Commission has been delegated rulemaking authority over fish and fisheries. It has not been delegated authority to protect sea turtles.

The policy imposed upon the Marine Fisheries Commission by the Legislature in §370.025(1), F.S., is the "management and preservation" of the State's "Renewable Marine Fishery Resources." Again, since the term "Renewable Marine Fishery Resources" is not defined in the statute, its common, ordinary meaning must apply. Shell Harbor Group v. Department of Business Resulation, 487 So.2d 1141, 1142 (Fla. 1 DCA 1986).

1/ Under its commonly understood meaning, "fishery" is the business of catching fish" or "the legal right to catch fish in certain waters or at certain times." Webster's New World Dictionary, Second College Edition (1982). Black's Law Dictionary defines "fishery" as "a place prepared for catching fish" or "a right or liberty of taking fish." Applying this definition to the statute, see Shell Harbor Group, Inc. v. Department of Business Regulation, 487 So.2d 1141, 1142 (Fla. 1 DCA 1986), a "fishery" does not include sea turtles.

The common ordinary definitions of these words produces the ordinary meaning of the term "Renewable Marine Fishery Resources" to be "fish or sea life available to be taken from the waters of the State on a regular or recurrent basis." (R-57). Certainly, this does not include sea turtles, the deliberate catching of which has been prohibited in the State of Florida since 1974. (§370.12(1), F.S.). Consequently, there is no sea turtle fishery in the State of Florida.

The State's argument that because sea turtles were harvested prior to 1973 they will fall within the term "Renewable Marine Fishery Resources" must be rejected. The statute which created the Marine Fisheries Commission was not enacted until 1983 and certainly the terms used to reference its power when not given specific definitions, must be applied to conditions existing at the time of the passage of the Act. Although sea turtles may have been a Renewable Fishery prior to 1973, it certainly was not in 1983, over 9 years after taking of turtles was barred by the Legislature.

The legislative enactment creating the Marine Fisheries Commission confirms that the Legislature did not intend to delegate to the Commission rulemaking authority to protect sea turtles. The Marine Fisheries Commission was created in 1983. See Ch. 83-134, Laws of Fla. In the same law creating the Marine Fisheries Commission, the Legislature conditionally repealed twenty eight (28) existing statutes,

or portions thereof, pertaining to saltwater fisheries. See Ch. 83-134 Laws of Fla. §§6-8. 2/

The Legislature repealed these statutes as of dates certain, unless the Commission had not adopted rules on the subject matter of the statute as of the date of repeal. In that event, the statute will remain in force until the Commission adopted appropriate rules.

Although the Legislature, in Chapter 83-134, repealed all existing statutes dealing with saltwater fisheries, it left intact Section 370.12, Florida Statutes. Section 370.12(1) provides:

> (a) No person may take, possess, disturb, mutilate, destroy, cause to be destroyed, sell, offer for sale, transfer, molest or harass any marine turtle nest or eggs at any time.
>
> (b) 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 caught will be returned alive to the water immediately.

2/ 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.

> (c) No person, firm, or corporation may possess any marine turtle or parts thereof unless it is in possession of an invoice evidencing the fact that the marine turtle or parts thereof has been imported from a foreign country or outside the territorial waters of the state, or are possessed under special permit from the Division of Marine Resources for scientific, educational, or exhibitional purposes. 3/

In addition, the Legislature left intact other statutes providing protection for sea turtles. See §§161.053(5)(c) (protection of nesting turtles, hatchlings, and habitat), 161.161(1)(i) (protection of nesting beaches), 161.163 Fla. Stat. (1987) (designation of nesting beaches).

The terms of Section 370.12(1) provide further proof that the Legislature did not intend to delegate to the Commission rulemaking authority for the protection of sea turtles. In Section 370.12(1) the Legislature has addressed the accidental capture of sea turtles in the course of normal fishing activities. Emergency Rule 46 ER89-3 is in conflict with this provision. The statute must control over the rule. Further, the specific provision of Section 370.12 controls the general provision of 370.027. 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.

3/ Section 370.12, Florida Statutes (1987) also provides for the protection of manatees and mammalian dolphins.

The State argues that turtles are a "renewable marine fishery" as used in §370.025, F.S. First, even if we presumed for argument that they are a "renewable marine fishery," this would not cure the invalidity of 46ER89-3 because the specific prohibition to enact rules regarding endangered species (§370.027(1)) remain.

The trial court ruled that the "ordinary meaning of the term 'renewable marine fishery resource' is fish or sea life available to be taken from the waters of the State on a regular or recurrent basis." (R-57) The State does not object to this definition. However, it suggests that sea turtles should be included because the MFC is making an effort "towards renewing the turtle fishery." (Appellant's Brief, pg.5,6). There is nothing in the record to suggest that the MFC is attempting to regulate sea turtles for the purpose of allowing them to be harvested. Furthermore, it is doubtful that the MFC would want to be on record as supporting such a position.

The State argues that "The MFC construes the term 'renewable marine fishery resource' to include marine species that could be renewed so as to become harvestable in the future." (Appellant's brief, pg.5,6). Based on their argument, the MFC would be entitled to enact rules regarding manatees, whales, and porpoises as long as it said their purpose is to allow them to become harvestable. This is contrary to the terms and meaning of 0370.12, Fla. Stat.

The status of fish as being able to be taken or harvested is the factor that gives the MFC the power pursuant to6370.027 and 6370.025 to enact regulations concerning that fish and regarding other limited subject matter to protect and enhance that fishery. They cannot enact rules to protect and preserve endangered species such as manatees or turtles which cannot be taken or harvested on a single occurrence must less on a continuing basis. 6370.12, F.S.

When §370.12(1) was enacted in 1974 prohibiting the taking or harvesting of marine turtles, the legislature took them out of the group of species which are Florida's marine fishery. By the time 1370.025, F.S. was enacted in 1983 there certainly was no marine fishery in Florida for turtles for the legislature to have intended to be included in the term "renewable marine fishery resource." If and when the legislature decides to allow the taking or harvesting of sea turtles, then at that time Florida's turtles would become a "renewable marine fishery resource" under the policy guidelines of §370.025, F.S. Until that time it is clear that the job of enacting rules regarding turtles is reserved for a body of government other than the MFC.

When for whatever reason, a species becomes endangered and cannot be taken or harvested, it cannot be said to have been abandoned by the State of Florida because at that very time it comes under the more powerful and pervasive control of the legislature. Apparently, it is at

that crucial point that the legislature wants control for itself or other specifically designated agency, not the Marine Fisheries Commission that was set up to concern itself with the harvesting of our fisheries stock.

CONCLUSION

Based on the foregoing argument, this Court should affirm the decision of the County Court which granted the Motion to Dismiss and invalidated Emergency Rule 46ER89-3.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy hereof has been provided by U. S. Mail to Jonathan A. Glogau, Esquire, Assistant Attorney General, Special Projects Section, 111-36 South Magnolia Drive, Tallahassee, Florida, 32301; John D. C. Newton, 1711-D Mahan Dr., Tallahassee, Florida, 32308; Jim Hintz, Esquire, Assistant State Attorney, Franklin County Courthouse, Apalachicola, Florida, 32320; Winston K. Borkowski, 926 South Ridgewood Avenue, Daytona Beach, Florida, 32114; and David Gluckman, Route 5, Box 3965, Tallahassee, Florida, 32301, on this the 22nd day of December, 1989.

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