IN THE SUPREME COURT OF FLORIDA

STATE **OF FLORIDA,**
Appellant,

v. CASE NO. 75,128

DAVID DAVIS,
Appellee.
_____/

INITIAL BRIEF OF APPELLANT

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

This is an appeal of an order of the county court in and for Franklin County dismissing charges of violation of Emergency Rule 46ER89-3 on the ground that the rule was not within the statutory authority of the Marine Fisheries Commission (MFC) to adopt. The rule requires the use of Turtle Excluder Devices (TEDs) in shrimp trawl nets in Florida waters. Defendant Davis was cited by the Marine Patrol for violation of Rule 46ER89-3. On motion to dismiss the citation, the county court held that the sole purpose for which the legislature created the MFC was to preserve the "renewable marine fisheries resources" of the state and that, since endangered and threatened sea turtles were not renewable marine fisheries resources, protection of these species was not a lawful purpose for the promulgation of the instant rule. The question of the authority of the MFC to promulgate this 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).

All species of Florida's sea turtle population are listed as either endangered or threatened. Fla. Admin. Code Rule 39-27. Approximately 11,000 sea turtles are killed in shrimp trawls in southeastern United States waters, a significant percentage of which occurs in Florida waters. Turtle excluder devices, which are 97% effective in preventing these drownings, are the only method available and enforceable to allow continued shrimping and protection of these valuable resources. Federal TED regulations

are in effect this year, however, the MFC has determined that the federal requirements are insufficient to protect the turtles in Florida waters. See SPECIFIC REASONS FOR FINDING AN IMMEDIATE DANGER TO THE PUBLIC HEALTH, SAFETY, AND WELFARE, Fla. Admin. Code Rule 46ER89-3, attached hereto as Appendix "A."

In response to an alarming increase in sea turtle deaths, the lack of federal enforcement of its turtle excluder device regulations, and the rule challenge to the Florida Marine Fisheries Commission permanent rule requiring TEDs, the MFC enacted Emergency Rule 46ER89-3. The validity of this rule was challenged through direct appeal of the actions of the Governor and Cabinet, sitting as the head of the Department of Natural Resources (DNR), to the First DCA. The rule was per curiam affirmed, Concerned Shrimpers v. MFC, 549 So.2d 1111 (Fla. 1st DCA 1989).

Sea turtles are on the brink of extinction as a result of shrimp trawling; for the remaining turtle population, the alternatives are running out. For the Kemps ridley turtle, extinction is *so* close at hand that the period of this review could well be critical to its ultimate survival.

SUMMARY OF ARGUMENT

The county court erred by holding that, in spite of the MFC's general responsibility for marine life and exclusive authority over fishing gear regulations, the MFC lacked authority to

require TEDs to prevent turtles from drowning in shrimp nets. The order under review should be reversed because: 1) endangered and threatened sea turtles are "renewable marine fisheries resources" because they were harvested until 1973 and, with adequate protection, could be harvested in the future; 2) the order improperly restricted the **MFC's** authority to currently harvestable marine fisheries; and 3) the **MFC** is empowered to impose gear restrictions to prevent the accidental killing of any threatened or endangered species but may not authorize the harvest of those species.

The county court erred because it substituted its interpretation of the statutory term "renewable marine fisheries resources" for that of the agency. An agency's interpretation of terms within its statute should be accorded deference. If the agency's interpretation of the statute is within the range of permissible interpretations, then a reviewing court should accept it. Here, the **MFC's** interpretation of "renewable marine fisheries resources" to include threatened and endangered species that could recover to be once again available for harvest is within the range of permissible interpretations and is entitled to that deference.

Emergency Rule 46ER89-3 is reasonably related to the purposes of the MFC statute which is to protect and enhance the marine and estuarine environment to allow sustained benefits and use for present and future generations. The county court erred because it adopted an overly narrow interpretation of the terms of

"benefits and use," interpreting that to require current harvest and economic use. Potential future harvest as well as aesthetic and recreational benefits and uses fall within the MFC's purposes.

The MFC is a part of the Department of Natural Resources, which department is charged with management of endangered and threatened marine life under the Florida Endangered and Threatened Species Act. Because turtles are being killed by shrimp trawl nets, and the MFC has exclusive authority over shrimp net restrictions and specifications, the only way DNR could protect the endangered and threatened Florida sea turtles was through rules promulgated by the MFC. The TED rule comports with Florida's endangered species act.

THE MARINE FISHERIES COMMISSION HAS THE STATUTORY AUTHORITY TO PROMULGATE RULES REQUIRING THE USE OF TURTLE EXCLUDER DEVICES IN SHRIMP NETS IN ORDER TO PROTECT ENDANGERED AND THREATENED FLORIDA SEA TURTLES

ENDANGERED AND THREATENED SEA TURTLES ARE A "RENEWABLE MARINE FISHERY RESOURCE"

The county court determined that endangered and threatened sea turtles were not a renewable marine fishery resource and therefore, preservation of those species could not form the basis for the passage of the instant emergency rule. Sea turtles are a marine fishery, albeit a fishery that has collapsed and is in a period of recovery from severe overexploitation. That such a

resource can be brought back from endangered status to a harvestable resource can be seen from one example of which this court is aware. The Florida alligator was once a threatened specie; it is now subject to harvest during a legal hunting season. That turtles were a harvestable resource in the past can be seen by examination of the history of amendments to Ch. 370, Fla. Stat. Harvest of the marine turtle fishery was regulated prior to 1974. Compare § 370.12(1) et seq. Fla. Stat. (1973) (prohibiting harvest during the spawning 'season, etc.); § 370.12(6)(d), Fla. Stat. (1973) (authorizing the Department of Natural Resources to establish minimum sizes for the marine turtle harvest). Commercial and recreational harvest of marine turtles was prohibited in 1974. § 370.12(1) Fla. Stat. (1987). The instant emergency rule attempts to facilitate recovery of the endangered and threatened turtle populations by substantially reducing accidental drowning in fishing nets. By preventing extinction of sea turtles, the MFC takes the most important step towards renewing the turtle fishery.

The county court found that the plain meaning of the term "renewable marine fishery resource" excluded the endangered and threatened sea turtles because those species are not harvested. This interpretation is unreasonable because it leads to absurd results. As a specie declines, the MFC can regulate its catch. When the population is in danger of collapse and cannot withstand any fishing pressure, under the court's reasoning, the MFC would lose its authority at exactly the point where the regulation is

most necessary. Just because sea turtles are not harvested now does not exclude them from the MFC's jurisdiction. As a past and future fishery resource, regulation to prevent their extinction comports precisely with the purposes of the MFC.

In any event, the court should not have applied the plain meaning rule but instead it should have deferred to the agency's interpretation. Where an agency is interpreting its statute in an area of its expertise, its interpretation should be given great weight and should not be overturned unless clearly erroneous. Pan Am World Airways, Inc. v. PSC and Fla. Power and Light, 427 So.2d 716, 719 (Fla. 1983) (interpretation of deposit requirements in published tariff); Island Harbor Beach Club v. DNR, 495 So.2d 209, 214 (Fla. 1st DCA 1986) (agency interpretation of statutory term "beach-dune system"); State Dept. of Health v. Framat Realty, 407 So.2d 238, 241 (Fla. 1st DCA 1981) (agency interpretation of statutory term "four lots per acre"). When an agency interprets its statute in a permissible way, "that interpretation must be sustained even though another interpretation may be possible or even, in the view of some, preferable," and one challenging an agency's interpretation must show the construction to be "clearly erroneous or unauthorized." Humhosco, Inc. v. HRS, 476 So.2d 258, 261 (Fla. 1st DCA 1985) (agency interpretation of statutory term "uniform methodology" not clearly erroneous or unauthorized). 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. This is a permissible interpretation which is not clearly erroneous or unauthorized and, therefore, it must be upheld. Since that construction is a permissible one, Emergency Rule 46ER89-3 is valid and the county court's order must be reversed.

PRESERVATION OF THE MARINE ENVIRONMENT

The county court's order should be reversed because it is based on an overly narrow view of the purposes of the Commission. That court found that the only purpose for creation of the MFC was for the preservation of the marine environment in relation to harvestable marine resources, and that any MFC rule must be directed to that purpose. The authority of the MFC is much broader.- it extends to all marine life, except endangered species. The legislative policy behind the Marine Fisheries Commission is:

> [the] management and preservation of [the state's] renewable marine fisheries 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 benefits and use to all the people of the state for present and future generations.

§ 370.025(1), Fla. Stat. The county court excluded protection of sea turtles from this intent because the "enhancement of the marine and estuarine environment" had to be "in such a manner as to provide for optimum sustained benefits and use." The court erroneously equated "benefit and use" to mean harvest and consumption. There are other benefits and uses for marine

animals, and there is no prohibition in the MFC's statute which would prevent the MFC from promulgating rules to effectuate these uses. Those benefits are eloquently evidenced by the amici in this case whose sole purpose is to preserve endangered species so that they can be studied, photographed, and otherwise enjoyed.

AUTHORITY OVER MARINE LIFE IN GENERAL

The county court also erroneously restricted the MFC's rulemaking authority to regulations pertaining to "renewable marine fisheries resources." Section 370.027(1), Fla. Stat., confers on the MFC "full rule-making authority over marine life." Turtles are obviously marine life. The restriction to harvestable resources is one not found in the statute. The marine environment is comprised of interconnected parts and the ecology of that environment is what has been put in the charge of the MFC.

The above-quoted statutory language includes a qualifier to the effect that the MFC may not regulate endangered species. § 370.027(1), Fla. Stat. This rule at issue is not an impermissible regulation of endangered species. One specie of sea turtle is threatened rather than endangered. Fla. Admin Code Rule 39-27.004(3). In any event, the MFC has full rulemaking authority over the gear used in the taking of marine species. That authority was properly exercised by requiring turtle protection devices in shrimp trawls and was adopted in furtherance of the MFC's statutory charge - to enhance the marine environment for the use and benefit of future generations.

When the subject matter of a rule is within the jurisdiction of an agency, then that agency's rules should be sustained if they are "reasonably related to the purposes of the enabling legislation and are not arbitrary or capricious." Florida Waterworks Assn. v. Public Service Commission, 473 So.2d 237, 240 (Fla. 1st DCA 1985). No claim that this rule is arbitrary or capricious has been presented here. The rule is "reasonably related" to the Commission's purpose of preserving the marine environment for the sustained benefit and use of future generations by preventing the disappearance of endangered and threatened species and helping to create conditions favorable for the recovery of what was once an active fishery in Florida. The TED regulations are therefore within the MFC's power to enact, and the county court's order should be reversed.

FLORIDA ENDANGERED AND THREATENED SPECIES ACT

The authority of the MFC extends to all marine life except endangered species. At first blush, this restriction seems to prevent the promulgation of Rule 46ER89-3. However, this restriction must be read in pari materia with § 372.072, Fla. Stat. (The Florida Endangered and Threatened Species Act) in the context of the MFC's relationship to the Department of Natural Resources. These two acts together make it clear that this exception is intended only to prevent the Commission from authorizing the taking of endangered marine species, a result which otherwise could obtain because the Commission has exclusive rule-making authority over marine life. § 370.027(2) Fla. Stat.

Pursuant to the Florida Endangered Species Act, the Game and Freshwater Fish Commission, and the Department of Natural Resources ("DNR") are directed to list endangered and threatened species in Florida. § 372.072(2), Fla. Stat. All species of sea turtles have been listed as either endangered or threatened. Fla. Admin. Code Rule 39-27. DNR is responsible for "research and management of [endangered] marine species." § 372.072(4)(a)2, Fla. Stat. The Marine Fisheries Commission is part of DNR, § 370.026(1), Fla. Stat., and possesses exclusive authority to impose gear restrictions. § 370.027(2), Fla. Stat. At the request of the director of DNR, the Commission adopted the current rule as part of DNR's duty to implement the Endangered and Threatened Species Act. Letter from Tom Gardner, Executive Director of DNR to William Fox, Chairmen of the MFC attached hereto as Appendix "B". As head of DNR, the Governor and Cabinet finally adopt MFC rules, including 46ER89-3. The rule is not ~~ultra vires~~ because it serves to implement DNR's responsibility to protect threatened and endangered species through the MFC - a part of DNR. No other agency could protect sea turtles from capture in shrimp nets because the Commission has exclusive authority over fishing gear specifications.

CONCLUSION

Under the MFC's interpretation of its statute, the endangered and threatened sea turtles are included within the term "renewable marine fisheries resources," and that interpretation is entitled to deference by this court. Enactment of gear restrictions is within the exclusive power of the MFC and, therefore, the proper test for this rule is whether the TEDs requirement is reasonably related to the purposes of the MFC and DNR. It is. Therefore, Fla. Admin. Code Rule 46ER89-3 is within the statutory authority of the MFC and the order of the county court should be REVERSED.

Respectfully submitted this 19th day of December, 1989.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served by telefax and U.S. Mail delivery on J. Patrick Floyd, 408 Long Ave., P.O. Drawer 950, Port St. Joe, Florida 32456; by hand delivery on John D.C. Newton, 1711-D Mahan Dr., Tallahassee, Florida 32308; and by U.S. MAil on Jim Hintz, Esq., Assistant State Attorney, Franklin County Courthouse, Apalachicola, FL 32320; Winston K. Borkowski, 926 South Ridgewood Ave., Daytona Beach, Florida 32114; and David Gluckman, Rt. 5, Box 3965, Tallahassee, Florida 32301, this 19 day of December, 1989.

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