



# The Florida Senate

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Committee on Natural Resources

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## FLORIDA FISH AND WILDLIFE COMMISSION PENALTIES

### SUMMARY

The Florida Fish and Wildlife Conservation Commission (FWCC) currently adopts rules both as a constitutional agency and under statutory authority in order to fulfill its constitutional and statutory mission of regulating wild animal life, freshwater aquatic life, and marine life. This report examines the historical rulemaking authority of the agency, from the creation of the former Game and Fresh Water Fish Commission (GFC), and the creation of the Marine Fisheries Commission (MFC), through the creation of the FWCC in 1999. This report also examines the penalty provisions assessed by the Legislature which are applied for violations of FWCC rules and state laws, and which are enforced by the law enforcement staff of the agency.

### BACKGROUND

Florida has a long history of protecting fish and wildlife including the "Act to Protect the Food Fishes of the State and to Regulate Fisheries" which was enacted by the Legislature in 1879. In 1887, the "Act to Protect Fresh Water Fisheries" created misdemeanor penalties for the taking of fish from freshwater lakes or streams not privately owned. The "Act for the Preservation of Wild Deer, Birds and Other Game" was enacted in 1891 to establish hunting seasons. In 1909, the Legislature enacted its first game preserve laws to encourage establishing and maintaining open game preserves.

In 1913, the Legislature created a Department of Game and Fish, and an office of State Game and Fish Commissioner. The Commissioner was responsible for enforcing the state's wildlife laws, and also was authorized to appoint county game and fish wardens, and to issue state hunting licenses.<sup>1</sup> However, both the

office and the Department were abolished in 1915, and "the ownership and title to all wild birds and game in the State of Florida [was] vested in the respective counties of the State for the purpose of regulating the use and disposition of the same."<sup>2</sup> The Board of County Commissioners of each county was directed to appoint a County Game Warden.

In 1925, the Legislature created the State Department of Game and Fresh Water Fish. The department was funded with a loan under the idea the sale of hunting and fishing licenses would be the primary funding source. A State Game Commissioner was authorized to issue hunting and fishing licenses for non-residents, and hunting licenses for state residents. Conservation programs included bag limits, hunting and fishing seasons, the establishment of state game farm and fish hatcheries, and the establishment of fish and game refuges.<sup>3</sup>

The 1925 law was revised by the Legislature in 1927 with the enactment of Chapter 11838, Laws of Florida, which created the Department of Game and Fresh-Water Fish, and an Office of State Game Commissioner. The State Game Commissioner was appointed by the Governor and had authority to enforce all laws of the state relating to game, non-game birds, fresh-water fish and fur-bearing animals. The Commissioner was required to visit each county in the state at least once a year, and the Commissioner and department employees were provided with police powers, including authority to enter property, the power to serve subpoenas, and search and seizure authority for equipment used in the illegal taking of game and fish.

The Governor was authorized to appoint a "Wild Life Conservation Commission" made up of one resident from each congressional district and one resident from

<sup>1</sup> See Chapter 6535, Laws of Florida, 1913.

<sup>2</sup> See Chapter 6969, Laws of Florida, 1915.

<sup>3</sup> Florida Wildlife, November-December 1993, Florida Game and Fresh Water Fish Commission

the state at large. The Commission was charged with the responsibility of assisting and advising the Commissioner in establishing fish hatcheries, game farms, game and fresh-water fish breeding grounds, and state game refuges, and in the acquisition of state game lands.

With the consent of the Governor and the Commission, the State Game Commissioner could close any county or parts of a county to the hunting and trapping of game or fur-bearing animals, and acquire lands and waters in the name of the state, suitable for the protection and propagation of game, fish, non-game birds or fur-bearing animals. Specific license fees were created, including a vessel license fee, and the Act established hunting seasons, and "take" and bag limits. Specific violations were created and persons found guilty of committing a first offense were to be fined not less than \$10 and not more than \$300, imprisoned for not more than 90 days, or both. Persons found guilty of committing a second violation were fined not less than \$25 and not more than \$500, imprisoned for not more than 6 months, or both. Licenses and permits were subject to forfeiture if an individual was found guilty of committing a first or second offense.

The 1929 Legislature enacted Chapter 13644, Laws of Florida, to reorganize the Department to eliminate the Wild Life Conservation Commission and provide for four deputy game commissioners, one from the each congressional district. The deputy game commissioners were appointed by the State Game Commissioner instead of the Governor, and along with the Commissioner, were authorized to enforce all Florida laws relating to game, non-game birds, freshwater fish, and fur-bearing animals. The Act created the State Game Fund, and provided that any person, except residents 65 years of age or older, or children under 15 years of age. taking or attempting to take game, freshwater fish or fur-bearing animals must have a license.

### **Creation of the Game & Fresh Water Fish Commission in 1943**

From 1929 through 1940, the Department of Game and Fresh Water Fish was abolished, a State Board of Conservation was created, and a State Department of Game and Fresh Water Fish was created. Finally, in 1941, the Legislature proposed an amendment to the State Constitution to create a Game & Fresh Water Fish Commission (GFC).<sup>4</sup> The proposed amendment,

<sup>4</sup> See the CS/SJR 28, adopted by the 1941 Florida Legislature, proposing an amendment to create s. 30 in

approved in the General Election of 1942, provided for the creation of the GFC, composed of five members appointed by the Governor and representing each congressional district, and gave the Commission the constitutional power to fix bag limits, fix open/closed seasons on a statewide, regional or local basis, and regulate the taking of wild life and fish.

The amendment also provided the Commission with the constitutional authority to acquire, establish, control and manage "hatcheries, sanctuaries, refuges, reservations, and all other property now or hereafter owned or used for such purposes by the State of Florida." More importantly, the amendment limited the Legislature's authority to regulate birds, game, fur bearing animals, and fresh water fish to the enactment of laws in aid of the provisions of the amendment. The constitutional amendment further required that the Legislature enact laws to fix penalties for violations of the provisions of the amendment, and enact all laws imposing license taxes. This constitutional structure of the GFC remained in place until 1968, and it was during this period of time that the Commission had the constitutional authority to create wildlife management areas.

### **GFC Rulemaking Authority**

In 1943, the Legislature enacted Chapter 21945, Laws of Florida with the purpose of implementing section 30, Article IV, of the State Constitution. The GFC was authorized to exercise the powers, duties and authority granted in the State Constitution, and was provided with the authority to adopt rules, regulations, and orders to implement the agency mission.

The Legislature provided that "all general codes of rules, regulations and orders, and all revisions thereto, of statewide application, made and adopted by the Commission shall be promulgated by the director of the Commission, by filing a certified copy thereof in the office of the Secretary of State...." Certified copies of proposed rules were to be sent to each county judge, and were to be published one time in each congressional district in a general circulation newspaper. After the rules were adopted by the Commission, certified copies were to be filed with the Secretary of State, and with each county judge. Copies could be obtained at the Commission office in Tallahassee. General rules, regulations and orders, and all revisions and amendments and additions, were to become effective 30 days after the certified copies were filed with the Secretary of State.

Within 10 days of adoption, all rules, regulations, orders, and code of rules, regulations and orders were to be certified by the Director of the GFC and filed with the Secretary of State, as well as with each county judge. Copies of rules certified by the Secretary of State or by the Director under the seal of the GFC were to be received into evidence in all courts of the state without further authentication.

In July 1944, the Florida Supreme Court recognized the Legislature's authority "to expressly confer upon the Commission the authority to adopt such rules and regulations as may be reasonably necessary and appropriate to the performance of their powers in carrying into effect the purposes of the constitutional amendment as therein expressed" by recognizing that the 1942 constitutional amendment expressly provided the Legislature with the authority to enact laws in aid of the GFC so long as those laws were not inconsistent with the provisions of the amendment.<sup>5</sup>

Three important provisions were also contained in Chapter 21945, Laws of Florida. First the Legislature provided that rulemaking provisions were "directional" and not mandatory.<sup>6</sup> Second, the Legislature created misdemeanor penalties for persons violating the provisions of the Act, or any rule or regulation of the GFC.<sup>7</sup> Last, the Legislature repealed all laws in conflict with Chapter 21945, except for laws relating to black bass<sup>8</sup>.

### **1969 Transfer of the GFC to the Department of Natural Resources**

In 1969, the Legislature enacted Chapter 69-106, Laws of Florida, and created a Department of Natural Resources with a Division of Game and Fish. The Legislature transferred all the functions of the GFC to the Department of Natural Resources but provided that the Commission would "exercise its powers prescribed by section 9 of article IV of the state constitution, independent of the head of the department of natural resources." The GFC remained at the Department until 1977.

<sup>5</sup> Sylvester v. Tindall, 18 So.2d 892 (Fla. 1944)

<sup>6</sup> This implied that if the Legislature wasn't satisfied with the efforts of the agency, the Legislature could readdress the issue.

<sup>7</sup> This generic authority is still in place.

<sup>8</sup> This indicates that while the Legislature recognized the GFC's authority, it also retained authority over a specific species.

### **1974 Constitutional Amendment<sup>9</sup>**

In November 1974, Florida's voters approved an amendment to the 1968 Revised State Constitution<sup>10</sup>, providing for a restructured GFC. Commission appointees were subject to confirmation by the Senate, and the GFC was authorized to exercise "the regulatory and executive powers of the state with respect to wild animal life and fresh water aquatic life." The amendment provided that "penalties for violating regulations of the commission shall be prescribed by specific statute." The executive powers of the GFC in the area of planning, budgeting, personnel management, and purchasing were to be provided by law. Revenue derived from the sale of license fees was required to be appropriated to the GFC by the Legislature for specific purposes.

Finally, the Legislature was again provided with the authority to enact laws in aid of the commission so long those laws were not inconsistent with the provisions of section 9, Article IV, of the State Constitution.

### **1975 Statutory changes to the Division of Game and Fish**

In order to implement the provisions of the 1974 constitutional amendment allowing the executive powers of the GFC to be provided by law, the Legislature amended s. 20.25, F.S., by enacting Chapter 75-22, Laws of Florida. This legislation repealed provisions of law allowing the GFC to exercise its powers independent of the Department of Natural Resources and gave the department budget authority over the GFC.

However, the GFC sued the Department claiming that the transfer was a "deprivation of the Commission's constitutional authority." The GFC won at the circuit court level and when the Department directly appealed the case to the Florida Supreme Court, the Court found that the statute violated the State Constitution by depriving the GFC of its constitutional authority to exercise its executive powers.<sup>11</sup>

<sup>9</sup> See CS/HJR 637 adopted by the 1973 Florida Legislature and proposing an amendment to s. 9, Art. IV, of the State Constitution.

<sup>10</sup> In the 1968 Revision to the State Constitution, the Legislature's authority to enact laws in aid of the commission was eliminated, as was the GFC's specific constitutional authority to acquire lands and to establish, control, and manage hatcheries, sanctuaries, refuges and reservations.

<sup>11</sup> Florida Department of Natural Resources and Harmon Shields, as Executive Director of the Florida Department of Natural Resources v. Florida Game and Fresh Water

In 1977, the Legislature enacted Chapter 77-204, Laws of Florida, to recognize the GFC's constitutional authority by providing the agency with rights and privileges similar to other departments of the state.

### **Marine Fisheries Commission**

The Marine Fisheries Commission (MFC), created by the Legislature in 1983<sup>12</sup>, was composed of seven commissioners appointed by the Governor and confirmed by the Senate. This statutory agency was provided with both full rulemaking authority over marine life, and exclusive rulemaking authority over gear specifications, prohibited gear, bag limits, size limits, species that may not be sold, protected species, closed areas except for public health purposes, and quality control, except for oysters, clams, mussels and crabs, and seasons (see s. 370.027, F.S., 1998). Penalties for violations of MFC rules and regulations were established by the Legislature and mostly contained in Chapter 370, F.S..

Existing special acts (commonly known as local laws) relating to marine fisheries were transferred by the Legislature to the Department of Natural Resources as rules of the department, not the MFC. As provided by statute, prior to the MFC's recommendation to the Governor and Cabinet as head of the department for those rules to be repealed or amended, the MFC was required to hold a public hearing in any affected local area.

The MFC was authorized to propose rules following the administrative procedures requirements established in Chapter 120, F.S. (Administrative Procedures Act). However, the MFC's rulemaking authority was limited as any MFC proposed rule had to be approved by the Governor and Cabinet prior to adoption and implementation.

In 1993, the Legislature merged the Department of Natural Resources, including the MFC, and the Department of Environmental Regulation to create the current Department of Environmental Protection. The implementing legislation provided that the head of the new agency would be a Secretary appointed by the Governor and confirmed by the Florida Senate.

### **Department of Environmental Protection**

The Department of Environmental Protection, created in 1993<sup>13</sup> and still in existence today, contained a Division of Marine Resources and the MFC which were transferred intact from the Department of Natural Resources. The Division was responsible for administering commercial fishing license programs as well as managing, preserving, and protecting Florida's marine resources. Saltwater species of plants, fish, mammals, and shellfish, as well as marine habitat, boating safety, patrol of marine waters, and seafood quality control also were regulated by the Division.

Rules promulgated by the agency on behalf of the Division were promulgated under the procedures established by the Legislature in Chapter 120, F.S.. Penalties for violations of those rules were established in law. The Department's Division of Law Enforcement was responsible for enforcing the rules and regulations of the department and of the MFC.

### **Fish & Wildlife Conservation Commission (FWCC)**

In 1998, Florida's voters adopted Revision 5<sup>14</sup> to the State Constitution to create the FWCC, and to consolidate the regulation of wild animal life, freshwater aquatic life, and marine life under one agency.<sup>15</sup> The MFC and the GFC were merged into the new agency and abolished, and most of the Department of Environmental Protection's law enforcement officers and most of its Division of Marine Resources were transferred to the new agency.

Revision 5 limited the transfer of the MFC's jurisdiction to the powers which the MFC held on March 1, 1998, and specifically established that "the jurisdiction of the marine fisheries commission transferred to the commission shall not be expanded except as provided by law."<sup>16</sup> In a recent Florida Supreme Court decision, the Court concluded

[W]hat the FWCC is to have with respect to marine life is some regulatory powers, not "the" regulatory power of the state, and that the power which the FWCC is to have is the power which the Marine Commission had on March 1, 1998. The power in respect to marine life which the Marine

<sup>13</sup> Chapter 93-213, Laws of Florida

<sup>14</sup> Revision 5, proposed by the State Constitution Revision Commission and approved by the Florida Supreme Court to appear on the ballot in the 1998 General Election, is sometimes called "the Conservation Amendment."

<sup>15</sup> Art. IV, § 9, Fla. Const

<sup>16</sup> Art. XII, § 23(b), Fla. Const.

<sup>12</sup> Fish Commission et al., 342 So.2d 495 (Fla. 1977)

<sup>13</sup> Chapter 83-134, Laws of Florida

Commission had on that date did not include the power which had been given to DEP.<sup>17</sup>

Revision 5 provided that revenue from license fees for the taking of wild animal life and freshwater aquatic life was to be appropriated to the FWCC by the Legislature "for the purposes of management, protection, and conservation of wild animal life and fresh water aquatic life. Revenue derived from license fees relating to marine life shall be appropriated...for the purposes of management, protection, and conservation of marine life as provided by law."<sup>18</sup> The Legislature was also granted authority over the areas of planning, budgeting, personnel management, purchasing, and prescribing license fees and penalties for the violation of FWCC regulations. The Legislature was further empowered to enact laws in aid of the commission that were not inconsistent with the provisions of section 9, Article IV, of the State Constitution.

Year	Agency	Authority
1913	Dept. of Game and Fish with a State Game and Fish Commissioner.	Executive agency.
1915	None.	Agency repealed. Authority to County Game Wardens
1925	Dept. of Game and Fresh Water Fish with a State Game Commissioner. Activities approved by the Governor.	Executive agency.
1927	Dept. of Game and Fresh-Water Fish, with a State Game Commissioner and a Wild Life Conservation Commission.	Executive agency.
1929	Dept. of Game and Fresh-Water Fish with a State Game Commissioner and Deputy Game Commissioners.	1927 Act repealed. New executive agency created
1929-1940		GFC abolished. State Conservation Board created. New GFC created as executive agency.
1943	Game & Fresh Water Fish Commission with Commission Director.	Constitutional agency with some legislative oversight.
1968	Game & Fresh Water Fish Commission. No mention of Director or State Game Commissioner.	Constitutional agency with some legislative oversight.
1969	Division of Game & Fish at Dept. of Natural Resources (DNR)	GFC transferred to DNR but retains authority. Budget authority of GFC transferred to DNR by Legislature in 1974.
1974	Game & Fresh Water Fish Commission. No mention of Director or State Game Commissioner.	Constitutional agency with some legislative oversight.
1998	Fish & Wildlife Conservation Commission. No mention of Director or State Game Commissioner.	Constitutional agency with some legislative oversight.

<sup>17</sup> Caribbean Conservation Corp., Inc. et al v. Florida Fish and Wildlife Conservation Commission, et al, 838 So.2d 492 (Fla. 2003)

<sup>18</sup>This provision of s. 9, Art. IV, implies that the FWCC may determine what constitutes the management, protection and conservation of wild animal life and fresh water aquatic life, while the Legislature may determine what constitutes the management, protection, and conservation of marine life.

### **FWCC Rulemaking Authority**

In order to fulfill the agency's mission with respect to wild animal life, freshwater aquatic life, and marine life, the FWCC adopts rules under its constitutional authority and statutory authority. Under section 9, Article IV, of the State Constitution, the FWCC is required to "establish procedures to ensure adequate due process in the exercise of its regulatory and executive functions."

In the 1999 legislation implementing Revision 5, the Legislature encouraged (but did not require) the FWCC to incorporate the hearing provisions of s. 120.54(3), F.S., when adopting rules under the cloak of the agency's constitutional authority. The same legislation required that the FWCC promulgate rules implementing the agency's statutory authority under the provisions of Chapter 120, F.S..

The FWCC adopted and follows the Uniform Rules of Procedure established in Chapter 28 of the Florida Administrative Code when developing rules that implement constitutional responsibilities, and follows the procedures established in Chapter 120, F.S., when developing rules that implement statutory responsibilities. As a rule, the FWCC follows the notice requirements established in Chapter 120, F.S., for all notices of FWCC meetings and workshops, and for notices of rule development and rulemaking. However, this is not required by law or by the State Constitution.

Currently, rules implementing the agency's constitutional authority are challenged in the circuit courts, while rules implementing the agency's statutory responsibilities are challenged under the provisions contained s. 120.56, F.S.

### **Penalties**

The provisions that regulate the statutory activities of the FWCC are primarily found in Chapters 370 and 372, F.S.. While each chapter contains specific penalties for specific violations, each chapter also contains one section that deals generically with violations of FWCC rules and regulations, as well as laws of the state.

Section 370.021, F.S., contains penalties for minor and major infractions of saltwater fishing regulations. These penalties, which apply to fishermen as well as to wholesale and retail saltwater products dealers, range from a \$100 fine and/or 60 days in jail for a first

conviction, to civil penalties of up to \$5,000, lifetime revocation of saltwater products licenses with forfeiture of gear for major violations, and additional felony penalties for the illegal use of nets, or the purchase or sale of saltwater products during a period of license suspension or revocation.

Section 372.83, F.S., provides the penalties for noncriminal and criminal infractions, as well as suspension and revocation of licenses and permits for violations of state laws and FWCC rules to regulate wild animal life and fresh water aquatic life. For noncriminal infractions, individuals may pay a \$50 civil penalty or be required to appear before a county court judge where a larger penalty may be assessed. Misdemeanor penalties typically apply when individuals are convicted of taking game or fish out of season or over the bag limits, and include fines and/or jail time. Persons found guilty of forging FWCC licenses or permits commit 3rd degree felonies.

The generic penalties contained in Chapters 370 and 372, Florida Statutes, have been applied by the FWCC, to certain prohibitions created under the agency's constitutional and statutory rulemaking authority, sometimes without legislative approval as required in s. 9, Art. IV., of the State Constitution. Historically, the former GFC developed prohibitions to regulate wild animal life and fresh water aquatic life by rule, and enforced those rules by applying the generic authority now contained in s. 372.83, F.S, without necessarily seeking additional legislative approval to do so each time a new prohibition was created. Also, the former Department of Natural Resources, now the Department of Environmental Protection, and the former MFC historically developed prohibitions regulating marine life by rule. Those prohibitions were enforced by applying the generic authority in s. 370.021, F.S., without necessarily seeking additional legislative approval to do so<sup>19</sup>.

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<sup>19</sup> The 1942 amendment to the State Constitution creating s. 30, Art. IV, to establish the Game and Fresh Water Fish Commission, provided that "all laws fixing penalties for the violation of the provisions of this amendment...shall be enacted by the Legislature **from time to time** (emphasis added). The 1974 amendment to the State Constitution amending s. 9, Art. IV, revising the makeup of the Game and Fresh Water Fish commission, provided that "...penalties for violating regulations of the commission **shall be prescribed by specific statute** (emphasis added).

## METHODOLOGY

This project seeks to review the rules adopted by the FWCC since the creation of the new agency in 1999, with the purpose of determining if legislative action is necessary to conform statutorily created penalties with new prohibitions created by rule. To determine if legislative action is necessary, a review of the rules proposed and adopted by the agency since its creation is appropriate. The FWCC holds four regular meetings each year, and the agendas and minutes from those meetings can be used to develop a list of specific rules to be more closely evaluated. After the specific rules have been reviewed, the agency can identify which rules have been promulgated using constitutional or statutory authority, the section of statute that identifies enforcement authority, and the provisions of statute which govern the application of penalties. A thorough review of the data prepared through legislative oversight and supplemented by the agency will help determine if additional legislative action is necessary to authorize the penalties now being assessed for violations of agency rules.

## FINDINGS

Committee staff identified twenty-nine rules adopted by the FWCC which were new prohibitions for which generic statutory penalties were being applied. The list was submitted to the agency for review, and the FWCC identified which prohibitions were created and adopted under the agency's constitutional or statutory authority, and the appropriate statutory enforcement and penalty provisions.

A review of the information submitted by the agency indicates that some clarification is necessary to determine if the agency is properly applying its constitutional and statutory authority through the rule development process, and to determine if agency rules infringe on the Legislature's authority to create penalties for rule infractions.

## RECOMMENDATIONS

The Legislature should determine whether the existing generic penalties provisions established in Chapters 370 and 372, F.S., should be re-enacted to incorporate prohibitions created by agency since 1999. Also, the Legislature should determine the strength and sufficiency of the generic penalty provisions being applied by the FWCC to the prohibitions created by agency rules adopted after July 1, 1999.

Additionally, the information submitted by the FWCC indicates potential issues regarding areas over which the FWCC believes it has constitutional authority. (At one time, the former GFC had the constitutional authority to create wildlife management areas. That authority was eliminated in the revisions to the 1968 State Constitution, yet rules of the Commission governing activities on wildlife management areas are adopted under the cloak of their constitutional authority. Some of those activities may fall under their constitutional authority to regulate wild animal life, but some may not.) Therefore, an examination of the provisions of Chapters 370 and Chapter 372, F.S., to determine the extent of the FWCC's statutory authority to regulate wild animal life, marine life, and fresh water aquatic life is appropriate.

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