

DUE PROCESS PROCEDURES

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OF THE FLORIDA FISH AND WILDLIFE

CONSERVATION COMMISSION

ADOPTED BY
FLORIDA FISH AND WILDLIFE
CONSERVATION COMMISSION
July 7, 1999

SUBMITTED TO
PRESIDENT OF THE FLORIDA SENATE AND
THE SPEAKER OF THE FLORIDA HOUSE OF
REPRESENTATIVES
December 1, 1999

SUMMARY OF REPORT

The due process procedures adopted by the Fish and Wildlife Conservation Commission (FWC) are designed to satisfy Article IV, Section 9, Florida Constitution, and to address the recommendations in section 20.331(6)(a)(b) and (c), F.S. (1999). The procedures adopted by the FWC are "adequate" within the meaning of the constitution because (1) The procedures fully comply with the applicable procedural and substantive due process provisions of Chapter 120, F.S., and its companion provisions, the Uniform Rules of Procedure; (2) As to rules promulgated under the FWC's constitutional authority, there are adequate judicial remedies to adjudicate such rules and provide due process of law; (3) With respect to FWC proposed rules to list or delist species as endangered, threatened or of special concern, the FWC has adopted an additional procedure, not required by law, which assures that any party shall receive a special hearing, known as a "draw-out," before an Administrative Law Judge as to the phase one part of the listing process, and that such special "draw-out" hearing shall suspend the rule; (4) FWC rulemaking authority over endangered marine species, such as manatees and sea turtles, is derived from the legislature and adjudication of proposed rules on these species is subject to Administrative Procedures Act (AP A).

BACKGROUND

Article IV, Section 9, Florida Constitution, as amended by Constitution Revision Commission Revision 5, as adopted in 1998, created the Fish and Wildlife Conservation Commission (FWC) to exercise the state's regulatory and executive authority with respect to wild animal life and freshwater aquatic life and to exercise executive and regulatory authority with respect to marine life. The issue of due process is specifically addressed in Revision 5 as follows:

The Commission shall establish procedures to ensure adequate due process in the exercise of its regulatory and executive functions.

Due process is also addressed in the "merger bill" which implements Revision 5. See, Chapter 99-245, Laws of Florida now codified in pertinent part as section 20.331, Florida Statutes. While this law does not mandate that any particular due process procedure must be followed by FWC, it provides several recommendations in section 20.331(6)(a-c), F.S.:

(6)(a) (FWC) Shall implement a system of adequate due process procedures to be accorded to any party, as defined in s. 120.52, whose substantial interests will be affected by any action of the Fish and Wildlife Conservation Commission in the performance of its constitutional duties or responsibilities.

(b) The Legislature encourages the commission to incorporate in its process the provisions of s. 120.54(3) (c) when adopting rules in the performance of its constitutional duties or responsibilities.

(c) The provisions of chapter 120 shall be accorded to any party whose substantial interests will be affected by any action of the commission in the performance of its statutory duties or responsibilities. For purposes of this subsection, statutory duties or responsibilities include, but are not limited to, the following:

1. Research and management responsibilities for marine species listed as endangered, threatened, or of special concern, including, but not limited to, manatees and marine turtles;
2. Establishment and enforcement of boating safety regulations;
3. Land acquisition and management;
4. Enforcement and collection of fees for all recreational and commercial hunting or fishing licenses or permits;

5. Aquatic plant removal and management using fish as a biological control agent;
 6. Enforcement of penalties for violations of commission rules, including, but not limited to, the seizure and forfeiture of vessels and other equipment used to commit those violations;
 7. Establishment of free fishing days;
 8. Regulation of off-road vehicles on state lands
 9. Establishment and coordination of a statewide hunter safety course;
 10. Establishment of programs and activities to develop and distribute public education materials;
 11. Police powers of wildlife and marine officers;
 12. Establishment of citizen support organizations to provide assistance, funding, and promotional support for programs of the commission;
 13. Creation of the Voluntary Authorized Hunter Identification Program; and
 14. Regulation of required clothing of persons hunting deer.
- (d) The commission is directed to provide a report on the development and implementation of its adequate due process provisions to the President of the Senate, the Speaker of the House of Representatives, and the appropriate substantive committees of the House of Representative and the Senate no later than December I. 1999.

In compliance with the constitution and the "merger bill," the FWC, at its inaugural meeting in Ft. Lauderdale, on July 7, 1999, approved and adopted due process procedures which address and satisfy the constitutional requirement and legislative recommendations.

Accordingly, the FWC submits, as its report, the FWC'S Due Process Procedures in compliance with section 20.231, F.S. (1999).

DUE PROCESS PROCEDURES ADOPTED BY THE FISH AND WILDLIFE CONSERVATION COMMISSION

Article IV, Section 9, Constitution of Florida, as amended by Revision 5 and as approved by the electorate in November 1998, requires that "The (Florida Fish and Wildlife Conservation) Commission shall establish procedures to ensure adequate due process in the exercise of its executive and regulatory functions." The following due process procedures of the Florida Fish and Wildlife Conservation Commission (FWC) approved and adopted by the Commission on July 7, 1999, are designed to provide adequate due process, in compliance with Article IV, Section 9, Florida Constitution, as amended, and to address the special recommendations on due process of section 20.331, F.S. (1999).

A. Procedural Due Process

Procedural due process, in a broad sense, encompasses the procedural requirements that must be observed in the course of a legal proceeding to ensure the protection of private rights and property. Procedural due process, in an administrative setting, consists of requirements for notice, a meaningful opportunity to be heard and a fair, impartial decision-making authority.

1. The FWC has adopted, by Rule 68A-2.009, F.A.C., The Uniform Rules of Procedure, and shall follow Chapter 28-101, F.A.C., as the rules of procedure for the FWC. The Uniform Rules of Procedure are a companion to the APA and shall govern the practical and procedural aspects of agency action on the following subjects:

- a. Statement of agency organization
- b. Scheduling of meetings and workshops
- c. Decisions determining substantial interests
- d. Petitions for declaratory statements
- e. Summary proceedings
- f. Mediation
- g. Bid challenges
- h. Waivers and variances.

2. The FWC shall follow Chapter 120, F.S., the Administrative Procedures Act (APA), for all notices of FWC meetings and workshops.

3. The FWC shall follow the APA for all notices of FWC rule development and rulemaking.

4. The FWC shall follow the APA in the use of rule development workshops and shall prepare statements of estimated regulatory cost and statements of lower cost regulatory alternative in accordance with the APA.

5. The FWC shall comply with the Public Records Act (Chapter 119, F.S.) with respect to all records of the FWC and with the Sunshine Law with respect to meetings of the FWC.

6. The FWC due process procedures shall be accorded to any party as defined in section 120.52, F.S., whose substantial interests will be affected by any action of the FWC.

B. Substantive Due Process

Substantive due process refers to constitutional protections provided by the due process clause of the Florida and Federal Constitution. Therefore, substantive due process applies with respect to the decisions, orders and adjudications of government.

1. The FWC rules derived from constitutional authority are not to be subject to administrative rule challenges under section 120.56, F.S. See *Airboat Association of Florida, Inc. v. Florida Game and Fresh Water Fish Commission*, 498 So. 2d 629 (Fla. 3rd DCA 1986). Under the APA, The FWC is not defined as an agency except when it is acting pursuant to statutory authority derived from the Legislature. See, Section 120.52(1) (b), F.S. However, rules derived from constitutional authority can be challenged in a number of ways:

a. The FWC rules, and possible proposed rules, derived from constitutional authority may be challenged directly before the circuit court by declaratory action, injunctive action or, in appropriate circumstances, under the Bert J. Harris Private Property Rights Protection Act (section 70.001, F.S.). Decisions often circuit court can be appealed to the appropriate District Court of Appeal, and potentially to the Supreme Court of Florida.

b. The FWC rules derived from constitutional authority which carry a criminal or non-criminal sanction can, upon issuance of a citation, be challenged in county court. Decisions of the county court can be appealed to the circuit court, or, in some cases, directly to the District Court of Appeal.

c. FWC proposed rules derived from constitutional authority may also be subject to a special hearing, known as a "draw-out" hearing. See, section 120.54(3) (c), F.S. A "draw-out" is a special hearing which may be provided upon request of a party if the agency determines that the rulemaking proceeding is inadequate to protect the person's substantial interests and that the normal public hearing on a proposed rule does not provide that person with an adequate opportunity to protect their interests. The FWC, just as any other state agency, may consider, on a case by case basis, requests for use of a "draw-out" for proposed rules promulgated in performance of its constitutional duties in accordance with the statutory criteria.

2. The FWC rules which are derived from statutory authority are fully subject to administrative rule challenges under section 120.56, F.S. See Section 20.331, F.S.

3. All discretionary actions, orders, or decisions of the FWC which affect substantial interests are subject to adjudication under Chapter 120, F.S. Accordingly, to the extent that agency action is discretionary, FWC action to grant or deny permits or licenses or to suspend or revoke such permits or licenses is subject to adjudication under sections 120.57, 120.569 and 120.60, F.S. These discretionary decisions to grant or deny permits or licenses or to revoke or suspend such permits or licenses includes, but are not

limited to, the following subjects:

- Bid disputes
- Commercial fishing licenses
- Restricted species endorsements
- Salt water products licenses
- Marine special activity licenses
- Captive wildlife permits
- Permits to take remove or relocate wildlife, including wildlife listed as endangered, threatened or of special concern
- Permits to take freshwater fish, marine life, manatees, sea turtles or wildlife for educational or scientific purposes
- Permits to operate alligator farms and management programs
- Permits to operate game fish aquaculture facilities
- Permits to operate haul seines in Lake Okeechobee

4. The FWC shall also comply with the following provisions of law that assure adequate due process relating to various actions of the Commission.

a. FWC comments to other permitting agencies: If another agency relies upon recommendations of the FWC in granting or denying a license or permit, the FWC may be required to appear as a party in any legal challenge brought on such license or permit to show that the recommendation is within the FWC jurisdiction and is valid. See, section 120.60(7), F.S. In addition, such recommendations or comments must be based upon credible, factual scientific data, are not binding on any permitting agency, must be submitted within a strict 30-day deadline, and the FWC must bear its costs in defending its recommendation. See, section 20.331(7), F.S. (1999).

b. Alteration of hunting or fishing seasons: Agency action which has the effect of altering the established hunting or fishing seasons, or altering the established annual harvest limits for saltwater fishing is not a rule if the procedure for altering such harvest limits is set out by rule of the FWC. Such action shall be adequately noticed in the area affected through publishing in a newspaper of general circulation or through notice by broadcasting via electronic media. Section 120.81(5), F.S.

c. Personnel and disciplinary actions: When FWC acts to suspend, reduce in pay, transfer, and layoff, demote or dismiss any permanent employee in the Career Service System, the employee shall have appeal rights to the Public Employees Relations Commission. Section 447.207(8), F.S.

C. Additional Due Process Procedures: Use of the Draw-out Procedure of section 120.54(3) (c), F.S.

Section 20.331(6) (b), F.S., recommends that the FWC consider the use of the "draw out" procedure of section 120.54(7) (c), F.S., in the performance of its constitutional duties. Accordingly, FWC shall require that upon timely request, a party shall receive a special

"draw-out" hearing conducted by an administrative law judge on proposed rules that list or delist fish or wildlife as endangered, threatened or of species of special concern, during the phase one process for listing or delisting such species.

This draw-out will only be used specifically for phase one of the new listing process, as created by rule amendments approved by the GFC at its May 14, 1999 meeting. (See, Appendix; FWC rule sections governing the list and delisting of species). The "phase one" stage of the listing process determines if a species warrants a classification as endangered, threatened or of special concern, or, if the species is already classified, whether the species should be re-classified or removed from the list. The "phase two" stage deals with the specific conservation needs of the species, such as additional regulations or management. The draw-out process is appropriate for the "phase one" aspect of the listing process for a number of reasons: First, determining whether a species warrants classification or whether its classification should change is a decision which must be based upon credible biological data and therefore, an evidentiary hearing, such as a draw-out, may be useful. Secondly, phase one of the listing process deals with whether a species qualifies for higher level of protection or management and therefore, the decision should be factually correct and afforded special care and deliberation. Finally, listing affects a broad constituency and may significantly affect land-use decisions by other levels or agencies of government, including the federal government, and accordingly, an extra level of care and deliberation is appropriate.

The effect of a draw-out is to suspend any proposed rule until the completion of the draw-out proceeding. The draw-out proceeding consists of a hearing before an administrative law judge, the preparation of a record and the transmittal to and review of the record by the FWC. The draw-out is an evidentiary hearing only; there are no recommended findings of fact or conclusions of law and the draw-out record is not binding on the FWC nor is subject to appeal. It should be noted that the use of a special draw-out in these circumstances goes beyond what is legally required of state agencies under the draw-out provision of section 120.54(3)(c), F.S. Under the statute, the use of a draw-out is left to the discretion of the state agencies, and is decided on a case by case basis.

D. Due Process relating to marine species that are endangered, threatened or of special concern, and turtles and manatees:

Under the merger bill, research and management responsibilities for marine species listed as endangered or threatened, including marine turtles and manatees, is a statutory responsibility that has been delegated to FWC. See, section 20.331(6) (c)1., F.S. (1999), and section 370.025(4)(a), F.S. (1999). Under the bill, the FWC can only promulgate rules pertaining to endangered or threatened marine species if specifically authorized by the statutes.

These provisions of the merger bill are now the subject of a complaint in the case Caribbean Conservation Corporation and Save the Manatee Club, Inc. et al.. v. Florida Fish and Wildlife Conservation Commission, et al., Case No. 99-4188 (Circuit Court for the Second Judicial Circuit, Leon County). This complaint alleges that parts of merger bill encroach upon the Commission's constitutional authority and violate the recently amended version of Article IV, Section 9, of the Florida Constitution. Currently, the FWC is not

enjoined from complying with the merger bill. Therefore, until such time as a court order to the contrary is entered, FWC rules or proposed rules promulgated with respect to endangered or threatened marine species, including the West Indian manatee and sea turtles, shall be subject to APA administrative appeal procedures under section 120.56, F.S. (1999).

Addendum: On January 16, 2003, the Supreme Court of Florida upheld the Legislative bill (Chapter 99-245, Laws of Florida) which implemented FWC... In this ruling, the Supreme Court concluded that endangered and threatened marine species such as the Florida manatee, whales and sea turtles were not regulated by FWC under the Florida Constitution. FWC's authority to regulate these species was derived not from the constitution but from statute (section 370.12, F.S.). Therefore, the Administrative Procedures Act (Chapter 120, F.S.) applied in all respects to rulemaking for these species. See, Save the Manatee Club, et al v. FWC, 838 So.2d 492 (Fla. 2003).

