

FLORIDA FISH AND WILDLIFE CONSERVATION COMMISSION  
LEGAL OFFICE

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MEMORANDUM

DATE: January 11, 2010

TO: Nick Wiley  
Executive Director

FROM: Mark Henderson   
Asst. General Counsel

SUBJECT: Executive Order no: 10-01, (attached), re: dismissal of administrative petition for (hearing or declaratory statement) filed by Boca Grande Fishing Guides Inc. on December 1, 2009. F.W.C. case no. 09-0038.

**ACTION**

**REQUESTED:** Signature and issuance of attached Order Dismissing Petition (Without Prejudice).

**BASIS FOR**

**REQUEST:** The administrative petition that is before the Commission in this case fails to contain the requirements for either declaratory relief by the Commission, or referral to DOAH for a hearing to determine a substantial interest, and therefore it should be dismissed. In fact, the petition is so lacking in legal sufficiency that it can't be defined as any type of petition recognized under the Administrative Procedure Act. However, as it does not appear on the face of the petition that the defects could not be cured, the attached order requiring your signature is for dismissal without prejudice. The petitioners will be granted 21 days to amend the petition.

**HISTORY:** The Petitioner in this case is Boca Grande Fishing Guides Inc. It is an association that states that it is composed of professional fishing guides. They filed the administrative petition that is currently before the Commission. It concerns alleged tarpon fishing methods in Boca Grande Pass and the regulation of same by FWC. Boca Grande Fishing Guides Inc., had previously filed a petition for declaratory relief in July of 2009 in Leon County Circuit Court. No relief was granted and that petition was dismissed in November 2009. In summary, that circuit court petition alleged that certain fisherman (mostly fishing guides the Petitioners referred to as "jiggers"), operating under the pretext of sport fishing, are using techniques that actually constitute the illegal taking of Tarpon by "snagging" or "snatch hooking" as defined in rule 68B-32.002(3), F.A.C.. A motion to dismiss the circuit court petition was filed on behalf of FWC. The motion to dismiss asserted several basis for dismissal, including that the Petitioners had failed to exhaust their administrative remedies. The Circuit Court granted F.W.C's Motion to

Dismiss based on the Court's determination that the petitioners had failed to exhaust their administrative remedies.

As a result, the petitioners subsequently filed the administrative petition that is now before the Commission seeking administrative relief. That is the administrative petition that is currently before the Commission and upon which the attached Order of Dismissal is based. The administrative petition currently before the Commission contains basically the same type of allegations as the previous Circuit Court Petition. The primary theme is that certain fisherman acting under the pretext of sport fishing, are using techniques that actually constitute the illegal taking of taking of Tarpon by snagging or snatch hooking.

**PROCEDURE:** The Executive Director is authorized by Commission Delegation of Authority number 18 to issue Administrative Orders on behalf of the Commission. This includes orders relating to administrative proceedings brought before the Commission. The Order of Dismissal (attached), is a dismissal of the petition without prejudice. This means that the Petitioner has leave to amend the administrative petition. This will allow the Petitioner 21 days to attempt to cure the deficiencies and re-file a legally sufficient petition.

It is a requirement of the Administrative Procedure Act that an order dismissing a petition be without prejudice at least one time, unless it conclusively appears from the face of the petition that the defect cannot be cured, [section 120.569(2)(c) F.S.]. This allows a petitioner at least one opportunity to amend a defective administrative petition.



particular circumstances. The Petition asks for the Commission to comment on the actions of another party, and not the petitioner's actions or activity, contrary to rule 28-105.001 F.A.C..

Treating the Petition as a request for a formal hearing

3. In the alternative, if the request in the petition for referral to DOAH is construed as a request for a formal hearing for a determination of a substantial interest held pursuant to sections 120.57 and 120.569 F.S. the following is required;

a) In order to have standing to request a formal hearing, section 120.54(5)(a)(4)c. F.S. requires that the petition include a statement as to how the petitioner's substantial interest will be affected. For a petitioners substantial interest to be affected they must show that they have or will suffer an injury in fact, and that the injury is of a type the proceeding was designed to protect, Agrico Chemical Co. v. DER, 406 So.2d 478 (2<sup>nd</sup> DCA 1981), Menorah Manor Inc. v. Agency for Health Care Administration, 908 So.2d 1100 (1<sup>st</sup> DCA 2005).

b) A petition requesting a formal administrative hearing must also contain all the elements and information required by section 120.54(5)(b)4 F.S. and rule 28-106.201(2). *That law requires, in part, that the petition contain the following: a concise statement of the material facts that are in dispute, the ultimate and specific facts that support reversal or modification of the Agency action, the specific statutes or rules that require*

reversal or modification, and the specific relief requested by the petitioner.

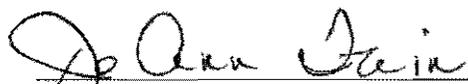
4. If all of the above cited requirements are not set forth in a petition requesting a formal administrative hearing, it is not legally sufficient and therefore cannot be referred to the Division of Administrative Hearings for a formal hearing.

5. Based on the conclusions above, the Petition does not meet the legal requirements for any type of legally recognized method for obtaining administrative relief.

**WHEREFORE**, for the foregoing reasons, the Complaint for Declaratory Relief, and or Request for referral to the Division of Administrative Hearings for a formal hearing is dismissed without prejudice. As the Petition does not contain defects that are clearly uncorrectable, an amended Petition may be filed within 21 days from the date of this order.

DONE AND ORDERED this 19~~th~~ day of January 2010, in Tallahassee, Leon County, Florida.

  
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Nick Wiley  
Executive Director

Attest:   
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Agency Clerk

Copies furnished to the following:

Counsel for Petitioner  
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