


MEMORANDUM

TO: Members of the Commission
Ken Haddad, Executive Director

FROM: James V. Antista, General Counsel 

DATE: April 30, 2008

RE: Net Limitation Amendment and possible modification of current FWC rules to governing marine nets



Pursuant to a request from Chairman Rodney Barreto, this Legal Memorandum and Opinion is provided to review the Net Limitation Amendment, its implementing rules, the key administrative and court decisions relating to this subject and to discuss the legal impacts of possible modification of marine net requirements to allow larger mesh.

BACKGROUND

Article X, Section 16 of the Florida Constitution (Known as the Net Limitation Amendment) was adopted in November, 1994 and became effective July 1, 1995. Subsection (b) of the Net Limitation Amendment prohibits the use of gill nets or other entangling nets “for purposes of catching or taking any saltwater fin fish, shell fish or other marine animals in Florida Waters.” Additionally, the subsection states that “no other type of net containing more than 500 square feet of mesh area shall be used in nearshore and inshore Florida waters.” Article X, Section 16(b), Florida Constitution. The term “gill net” is defined in paragraph (c)(1) of the Net Limitation Amendment to mean “one or more walls of netting which captures saltwater finfish by ensnaring or entangling them in meshes of the net by the gills.” The same paragraph goes on to define “entangling net” to mean “a drift net, trammel net, stab net, or any other net which captures saltwater fin fish, shell fish, or other marine animals by causing all or part of the heads, fins, legs, or other body parts to become entangled or ensnared in the meshes of the net.” Rule 68B-4.002(3) and (4), F.A.C. repeats these definitions. The prohibition on use of gill or entangling gill nets does not include a hand thrown cast net. Article X, Section 16(c)(1).

Historically, there are two basic types of net gear used in Florida’s inshore waters – gill or entangling nets and seines. See *Commercial Fishing Gear and Fishing Methods in Florida, State Board of Conservation, Technical Series No 13*, J.B. Siebenater (1955), pages 11, 21; Rule 68B-4.002 (3)(4) and (12), F.A.C.

The mesh size of gill or entangling nets was historically larger than the mesh size of seines. The mesh size of a gill net determines the size of fish ensnared by the gills or able to pass through the meshes. Mesh size is expressed for this purpose in terms of “stretched mesh,” the distance across the diagonal of a mesh pulled tight between the knots. *Commercial Fishing Gear and Fishing Methods in Florida*, Page 8.

The twine sizes of nets used to gill or entangle fish are generally finer than the twine size of seines, since the entangling capability (catchability) of the net is dependent on the relative

visibility of the net in the water. Neilson, L.A. and Johnson, D. L., *Fisheries Techniques, American Fisheries Society*, Bethesda Maryland, 1983, pages 95-100, 123-125, 139-143; Von Brandt, A., *Fish Catching Methods of the World*, Fishing News (Books) Ltd. London, 1964, pages 109-113, 164-169. Monofilament line is nearly invisible to fish. For this reason, monofilament or multi strand monofilament "shall be considered an entangling net" within the meaning of the Net Limitation Amendment. Section 370.093(2), F.S.; Rule 68B-4.0081 (2)(b), F.A.C.

In order to implement and enforce the Net Limitation Amendment, the Marine Fisheries Commission (MFC), FWC's predecessor agency that regulated marine fishing gear prior to 1999, determined the "bright line" between a seine and a gill net. (*Marine Fisheries Commission Staff Report on Gear: Traps, Nets and Seines*, October 1996) MFC determined the bright line between a seine and a gill or entangling net to be two inch (2") stretched mesh and nets with mesh that exceeded 2 inches (2") stretched mesh were prohibited by MFC rule. See Former Rule 46-4.0081(2)(d), Now 68B-4.0081(2)(d), F.A. C. Any net with a mesh greater than two inches (2") stretched mesh shall be considered an entangling net. Rule 68B-4.0081(2)(d).

LITIGATION HISTORY OF NET LIMITATION AMENDMENT AND IMPLEMENTING RULES.

There has been extensive litigation surrounding the Net Limitation Amendment and its implementing rules. The following is a chronological history and summary of the major case decisions and other actions involving this issue.

1997-99 *Pringle et al v. MFC*, 20 FALR 2601 (Division of Administrative Hearings Final Order dated February 20, 1998).

An Administrative Law Judge (ALJ) from the Division of Administrative Hearings upheld MFC rule requiring seine nets be constructed of two-inch mesh or smaller. The ALJ decision was upheld by the First District Court of Appeal in *Pringle v. MFC*, 732 So.2d 395 (Fla. 1st DCA 1999) While noting that the 2 inch mesh net allowed by rule might not be commercially viable, the court held that a net disallowed by the Net Limitation Amendment cannot lawfully be used whatever its commercial viability. This is a very important case because it was a full evidentiary hearing on the implementing rules of the Net Limitation Amendment and it answered two questions: a 2" stretched mesh rule is bright line between a seine and a gill or entangling net; and the rule is necessary to implement the Net Limitation Amendment.

1999 *FWC v. Pringle*, 736 So.2d 17 (Fla. 1st DCA 1999).

This case rejected a circuit court decision and held that the fishers failed to exhaust administrative remedies in their challenge of MFC marine net rules. The point of this decision was to head off multiple lawsuits in different circuit courts dealing with whether or not various nets were valid. In essence the court was directing the commercial fishers to ask MFC first about the legality of a particular net before going to court.

1998 *State v. Conner*, 717 So.2d 179 (Fla.1st DCA 1998).

The First District Court of Appeal upheld a MFC rule that prohibited fishers from using marine nets exceeding 500 square feet within three nautical miles seaward of the coastline in the Gulf of Mexico.

1999 *Lane v. Chiles*, 698 So.2d 260 (Fla. 1997).

The Florida Supreme Court rejected claims that the Net Limitation Amendment violated fishers constitutional rights to due process and equal protection. The Supreme Court upheld the constitutionality of the Net Limitation Amendment and stated that the Amendment served a legitimate interest to conserve marine resources.

2003 *FWC v Pringle and Crum*, 838 So.2d 648 (Fla.1st DCA 2003).

The District Court of Appeal reversed a 2007 Circuit Court decision which had invalidated FWC's 2 inch stretched mesh rule. The DCA reinstated the rules and held that the fishers had failed to seek an opinion from FWC as to the validity of a particular marine net.

2003 *Declaratory Statement given to Ronald Fred Crum and Keith Ward relating to a hybrid net.* FWC Order No. EO-03-05 (June 11, 2003).

FWC determined that a hybrid net with stretched mesh of 3 inches was not lawful under the Net Limitation Amendment and FWC implementing rules. FWC provided an extensively researched opinion and concluded that the hybrid net was in fact an entangling net which is prohibited by the Net Limitation Amendment, FWC rules and prior case decisions. (This net was mentioned in the 1999 administrative case as a commercially viable net and was also the subject of the 2002 Circuit Court case.)

2004 *Crum v FWC*, 888 So.2d 22 (Fla. 1st DCA 2004).

The First District Court of Appeal affirmed the FWC's Declaratory Statement about marine nets.

2004 FWC amended its net rules for clarification and to close a variety of loopholes including providing in rule the method for measuring mesh area of nets, eliminating the "shower curtain" net loophole and clarifying that nets with stretched mesh over 2 inches were entangling nets in violation of the Net Limitation Amendment.

2005 FWC forms the Net Study Group to evaluate nets and fishing gear; the group conducts tests of nets with 2 inches stretched mesh and with 3 inches stretched mesh to define catch characteristics.

2005 *Wakulla Commercial Fishermen's Association v. FWC*, Circuit Court Case No. 2005 CA 1623 (Second Judicial Circuit, Leon County).

The Plaintiff's challenged the 2005 rules, including the 2 inches stretched mesh rule, as unconstitutional. The Circuit Court upheld FWC rules and reaffirmed the FWC's 2003 Declaratory Statement. This is a very significant case because the 2005 rules are vital to closing

loopholes in enforcement of the Net Limitation Amendment. The Circuit Court's opinion relied upon the previous case decisions and on the Net Study Group study which verified that nets with 3 inches stretched mesh are gill and entangling nets.

2007 *Wakulla Commercial Fishermen's Association v. FWC*,
951 So. 2d 8 (Fla. 1st DCA 2007).

The First District Court of Appeal affirmed the Circuit Court decision referenced above.

CONCLUSIONS AS TO LITIGATION

As demonstrated by the above-cited case, the Net Limitation Amendment and FWC's implementing rules have been consistently upheld by the courts of Florida. Some key principles and conclusions have emerged from the litigation:

- (1) The Net Limitation Amendment prohibits the use of gill or entangling nets in Florida waters but does not prohibit all net fishing;
- (2) Commercial fishing is not a fundamental right but a regulated activity;
- (3) FWC marine net rules can only be challenged in court and must pass the rationale basis test, which is: that the rule must be within the FWC's jurisdiction and must be rationally related to the conservation of marine fish;
- (4) The Net Limitation Amendment must be enforced regardless of the fact that some commercially viable nets are prohibited;
- (5) The Net Limitation Amendment does not violate due process of law or equal protection of law;
- (6) FWC has the legal authority to regulate marine net gear but must do so consistent with the Net Limitation Amendment;
- (7) The FWC two inch (2") stretched mesh rule, which sets the "bright line" between a seine and a gill or entangling net, is necessary to implement the Net Limitation Amendment and is scientifically and legally valid;
- (8) The FWC rules have consistently met and exceeded the rationale basis test in court because the rules are based upon sound and credible science.

FWC's 2" stretched mesh rule was created to implement the Net Limitation Amendment and is supported by sound and credible science. The study of *Commercial Fishing Gear and Fishing Methods in Florida*, considered a definitive work on commercial fishing gear and techniques in Florida, was accepted by the Administrative Judge in the 1999 case, and in subsequent cases, as an important factor in support for the 2 inches stretched mesh rule. In order to further study larger mesh nets, the 2005 Net Study Group study tested both a net with 2 inches stretched mesh and the net with 3 inches stretched mesh preferred by some commercial fishers. In these tests, the net was deployed by commercial fishers on their boats. Based upon the design of the net, the

manner in which it was fished and the manner in which it caught fish, FWC's net expert concluded that the net with 3 inches stretched mesh was a gill or entangling net. This study was an important factor in the 2007 Circuit Court case.

OPINION

Some commercial fishers continue to urge the FWC to allow larger mesh nets for marine fishing. The question reoccurs: Would a larger mesh net (larger than the current maximum mesh size of 2 inches stretched mesh) be a gill net in violation of the Net Limitation Amendment?

The former MFC and the FWC have successfully defended the Net Limitation Amendment and its implementing rules for nearly 10 years, based upon the best scientific information and testimony available on gill nets and seines. There is currently no scientific information available to FWC to show that marine nets with mesh exceeding two inches stretched mesh are not entangling nets. Based upon the best scientific information available, including the *Commercial Fishing Gear and Fishing Methods in Florida* net study, the critical factor in determining whether a net is a seine or gill net is mesh size. In this context, to modify net regulations to allow nets which exceed two inches stretched mesh would be inconsistent with the Net Limitation Amendment, the available net studies and with all court case decisions and precedent on the subject. Even if FWC considered measures to mitigate gilling and entangling characteristics of larger mesh (soak time regulations, twine standards, time and season restrictions), such measures do not change the basic and uncontroverted characteristic of large mesh nets as entangling nets designed to entangle marine fish. Further study is unlikely to refute existing scientific studies and may only raise false hope that there is an easy way out of this constitutional box in which FWC has been placed.

Some commercial fishers argue that FWC's current net rules encourage the killing of small fish. If fisheries research were to conclude that the use of nets with 2 inches stretched mesh were negatively impacting fish stocks by inordinately killing small fish, then FWC might need to consider reducing the mesh size rather than increasing it. Current research does not indicate that the net with 2 inches stretched mesh has had a negative impact on marine fisheries stocks. Moreover, a net which allows smaller fish to pass through while gilling and entangling killing larger fish would still be a gill net within the meaning of the Net Limitation Amendment. Note that when MFC was determining the "bright line" between seine and gill or entangling net, it initially considered 1 ½ inches stretched mesh as a standard, but settled on 2 inches stretched mesh.

In light of existing science on gill and entangling nets and the case decisions on the Net Limitation Amendment and implementing rules, a rule proposal that allows a marine net with mesh size greater than 2 inches stretched mesh is not consistent with the Net Limitation Amendment.