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IN THE CIRCUIT COURT FOR THE
SECOND JUDICIAL CIRCUIT IN AND
FOR LEON COUNTY, FLORIDA

WAKULLA COMMERCIAL
FISHERMAN'S ASSOCIATION,
INC. and RONALD FRED CRUM,

Plaintiffs,

v. CASE NO. 2005-CA-1623

FLORIDA FISH AND WILDLIFE
CONSERVATION COMMISSION,

Defendant.
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SUMMARY FINAL JUDGMENT AND ORDER
ON DEFENDANT'S MOTION TO STRIKE

This cause came to be heard on Plaintiffs' and Defendant's Motions for Summary Judgment and Defendant's Motion to Strike. The Court, having reviewed the motions, the court file, and having heard argument of counsel finds as follows:

Plaintiffs filed this action on July 1, 2005 in Wakulla County. On July 8, 2005, the Circuit Court in Wakulla County ordered the case transferred to Leon County. Following Plaintiffs' request for an emergency temporary injunction, this court convened a status conference on July 27, 2005. After that conference, the Plaintiffs noticed the case for trial; the trial was set, but continued, with the understanding that both parties would file motions for summary judgment, which would resolve the case.

The Amended Complaint, filed on July 28, 2005, contains four counts: Count I, for a declaration that certain of Defendant's rules are unconstitutional; Count II, for injunctive relief; Count III, an "action" asserting that those rules were "improperly adopted"; and Count IV, an "action" to declare the rules "unconstitutional as applied." Essentially, Plaintiffs seek a declaration, presumably under Chapter 86, that Defendant's rules 68B-4.002, 68B4.0081, and 68B-39.0047, F.A.C., are invalid in that they violate the Florida Constitution. Counts II, III, and IV are merely reiterations of, and supplemental to, Plaintiffs' contentions about the unconstitutionality of the rules, and injunctive relief was at least initially sought to enjoin enforcement of those same rules. That issue is now moot. Both motions for summary judgment directly address the issue of the constitutionality of the rules, but neither motion specifically mentions Counts II or IV of the Amended Complaint; Count III is addressed generally in both motions. Since all of the counts really must be considered together, in that they are based on the alleged unconstitutionality of the rules, the Court has concluded that Plaintiffs have abandoned any specific arguments addressing the other counts of the Amended Complaint in favor of resolution of the ultimate issue of the constitutionality of the rules.

The rules at issue prohibit the use of nets with meshes greater than two inches stretched; define gill and entangling nets; and limit the gear available to mullet

fishermen to a specified list. That list of gear does not include a net the Plaintiffs seek to use, which is called the "hybrid" net. Plaintiffs assert that these rules violate Article X, § 16; Article I, § 9; and Article II, § 7 of the Florida Constitution.[1] In Count III, Plaintiffs also claim that the rules "violate" the provisions of two statutes: Section 370.093, Fla. Stat., which is entitled "Illegal use of nets," and various subsections of Section 370.025, which purports to define certain policies and standards applicable to marine fisheries. Plaintiffs are an organization of fishermen based in Wakulla County and an individual Plaintiff, Ronald Fred Crum. The Defendant, the Florida Fish and Wildlife Conservation Commission, is an agency of the State of Florida created and empowered to act through Article IV, § 9 of the Florida Constitution. The Constitution has established the Commission as the body that "shall exercise the regulatory and executive powers of the state with respect to wild animal life and freshwater aquatic life, and shall also exercise regulatory and executive powers of the state with respect to marine life."

Because the Commission's actions are not reviewable under the Administrative Procedures Act, a Commission rule is "tantamount to a legislative act." *Airboat*

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[1] Article X, § 16 is the constitutional provision enacted in 1994 that limited marine net fishing; Article I, § 9 is the due process provision of Article I, the Florida Constitution's Declaration of Rights; and Article II, § 7 is a constitutional amendment enacted in 1996, and amended in 1998, establishing that it is the "...policy of the state to conserve its natural resources and scenic beauty...", and that laws should be enacted, *inter alia*, for "...the conservation and protection of natural resources."

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Assoc. of Florida v. Florida Game and Freshwater Fish Commission, 498 So. 2d 629,, 632 (Fla. 3rd DCA 1986). The Commission is therefore vested with exclusive legislative authority to adopt reasonable rules to regulate marine life in this state, and the legislature is constitutionally prohibited from adopting statutes in conflict with such rules. *Whitehead v. Rogers*, 223 So.2d 330 (Fla.1969); *State ex rel. Griffin v. Sullivan*, 158 Fla. 870, 30 So.2d 919 (1947); *Price v. City of St. Petersburg*, 158 Fla. 705, 29 So.2d 753 (1947). The Commission's rules come before the court with a strong presumption of validity and must be upheld if they are rationally or reasonably related to a legitimate state interest. Because no fundamental right or suspect class is involved in this case, the rules in question will be analyzed using a rational basis test. Under this test, the validity of the rules must be upheld if "any state of facts may be conceived to justify [them]." *McElrath v. Burley*, 707 So. 2d 836, 839 (Fla. 1st DCA 1998), citing *Schwartz v. Kogan*, 132 F. 3d 1387, 1393 (11th Cir. 1998). Further, the Court is not permitted to question the wisdom or efficacy of the Commission's decisions. Instead, "...where there is a 'plausible' reason for a legislative enactment, it is 'constitutionally irrelevant whether that reason in fact underlay [sic] the legislative decision.' " *Gallagher v. Motors Ins. Corp.*, 605 So. 2d 62, 69 (Fla. 1992).

Here, both the Plaintiffs and the Defendant have moved for summary judgment.

It must first be noted that although Plaintiffs have asked that a summary final judgment be entered in their favor, they claimed at the summary judgment hearing that there are indeed disputes of fact that preclude such a judgment, and that they seek a trial on the merits. That argument certainly contrasts painfully with pages three through eight of Plaintiffs' motion for summary judgment, which list twenty-six paragraphs of "undisputed facts." Although counsel for the Plaintiffs did not explain these conflicting positions, both motions establish that there are no disputes of material fact relevant to disposition of the motions. The case can therefore be resolved through summary judgment.

Plaintiffs argue that Article X, § 16 of the Florida Constitution, while banning gill or entangling nets, was not intended to ban *all nets*. They proceed, however, to assert that *all* nets will gill or entangle marine life. That assertion is at the heart of Plaintiffs' contention that the aforementioned rules violate the Constitution. Plaintiffs argue that since the Commission's rules allow the use of nets that gill fish, rules permitting the use of *any* net are constitutionally invalid. This argument is rather curious, in light of Plaintiffs' insistence that the Commission permit the use of a net with three inch mesh. The argument also leads inexorably to the conclusion that Plaintiffs are seeking a declaration that the Florida Constitution prohibits the Commission from drawing *any* distinctions regarding the size of a net's mesh. Taken

to its logical conclusion, such an argument would also preclude use of the nets that the Plaintiffs favor, and would presumably forever end the use of nets other than a "hand thrown cast net" to catch mullet. *See* Article X, § 16, subsection (c)(1). Although Plaintiffs' advocacy on behalf of marine wildlife is certainly commendable, it does not lead to the declaration Plaintiffs seek.

The Commission does not dispute the proposition that while the Constitution bans gill or entangling nets, the nets the Commission has allowed do gill or entangle a certain number of fish. The Commission has, however, adopted definitions that seek to reconcile these two seemingly inconsistent concepts. Based on the legal standards that must be used to resolve this case, the court can find the Commission's choices, made in this area of its particular expertise and clearly within its jurisdiction[2], invalid only if they are not rational or are clearly erroneous. To determine whether there is, in fact, a rational basis for the rules, the Court must refer to the record herein.

In 1997, the two inch mesh rule was challenged by, among others, Plaintiff Crum. Testing the rule against the provisions of § 370.025, Fla. Stat., and Art. X, § 16, Fla. Const., a hearing officer found it to be valid. That decision that was

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[2] See, *Florida Fish and Wildlife Com'n v. Pringle*, 770 So. 2d 696 (Fla. 1st DCA 2000); *Florida Marine Fisheries Com'n (Div. of Law Enforcement) v. Pringle*, 736 So. 2d 17 (Fla. 1st DCA 1999).

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affirmed by the First DCA. *Pringle v. Marine Fisheries Com'n,* 20 FALR 2601 (1998), *aff'd* 732 So.2d 395 (Fla. 1st DCA 1999). Specifically addressing the issue of the legality of a three inch mesh net, the hearing officer held:

> The MFC's determination that nets comprised of greater than two-inch stretched mesh constitute "gill nets," illegal under the Florida Constitution, and that nets constructed of two-inch stretched mesh or less constitute "seine nets," legal under the Florida Constitution, is not arbitrary and capricious

20 FALR 2601, ¶ 78. The First DCA favorably cited the hearing officer's findings, noting that "[t]he administrative law judge thus found that the

Pringle-Crum net constituted a gill or entangling net." *Pringle*, 732 So.2d at 397.[3]

The facts also reveal that in March, 2003, Plaintiff Ronald Fred Crum petitioned the Commission for a declaratory statement regarding the legality of the use of the "hybrid net," which was constructed using meshes three inches or larger. In that Petition, Plaintiff Crum argued many of the same issues raised here. Citing to the long history of litigation over nets and mesh size, and the Commission's

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[3] Plaintiffs argue that the challenged rules do not comply with the standards in § 370.025, Fla. Stat. In response, the Defendant asserts: 1) that this statute does not contain mandatory standards because of the constitutional status of the Commission; and 2) in any event, the 1997 rule challenge case was decided in favor of the MFC (the Commission's predecessor) based on compliance with that statute. The court agrees with Defendant that the statute no longer dictates mandatory standards but can only be seen as guidance for the Commission. In addition, the previous litigation over the two inch mesh rule precludes a finding that, even if the statute is applicable, the rules are inconsistent with the standards therein.

consistent conclusion that any rectangular net with meshes larger than two inches are considered prohibited gill or entangling nets, the Declaratory Statement again rejected Plaintiff Crum's assertion that the two inch mesh net was unconstitutional or in conflict with other statutory provisions. In addition to the "plethora" of reported appellate decisions upholding the two inch mesh rules, the Commission's decision was based on historical information about the construction and definition of nets, scientific research papers, the similarity of the subject net to the nets previously used in the mullet fishery (except for the size limit of 500 square feet, the nets were identical) and the expertise of the Commission staff. The Declaratory Statement was affirmed by the 1st DCA without an opinion. *Crum v. Fla. Fish & Wildlife Conservation Comm'n*, 888 So.2d 22 (Fla. 1st DCA 2004).

The record in this case also reveals that subsequent to the First District's affirmance of the Declaratory Statement, the Commission agreed in 2005 to test Plaintiffs' "hybrid" net. The "Net Working Group" charter established that any nets tested could not exceed 500 square feet of mesh and the primary harvest method of the net must not be gilling or entangling. The three inch mesh net was tested to determine if it harvested fish by some manner other than by gilling or entangling. The net was deployed and retrieved in tandem with a legal two inch net in the manner dictated by the fishermen. The data from this test showed that both the two inch and

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the three inch net gilled similar amounts of fish. The three inch net gilled legal size mullet and the two inch net gilled juvenile mullet too small to be caught and sold commercially, i.e., fish less than 11 inches. From the information gleaned during the test, Plaintiffs argue that if the three inch net is a gill net, then the two inch net also must be a gill net. They then assert that if both nets are gill nets, the Commission's rule allowing meshes of two inches or less is therefore unconstitutional. All nets are unconstitutional, Plaintiffs argue, because gill nets are banned, and because use of the two inch net will harm the resource by killing large numbers of juvenile mullet.

Returning to the two initial propositions on which the parties agree, that gill nets are banned and that all nets gill marine life, Plaintiffs' argument leads to a construction of Article X, § 16(b)(1) that would ban *all* rectangular nets. Such a construction of the Constitution produces an absurd result, and is clearly inconsistent with the plain words and the intent of the constitutional provision itself. The Court is compelled to point out that it is also inconsistent with the position Plaintiffs have taken in this case regarding use of the three inch mesh net, and flies in the face of their persistent requests that the Commission approve the three inch mesh net. Were this Court to accept Plaintiffs' argument, the Court would declare that all nets are prohibited by the Florida Constitution, and that mullet fishing with nets other than hand thrown cast nets is over. It is hard to understand why Plaintiffs have advanced

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an argument that is so clearly adverse to the interests of mullet fisherman. Such an argument falls squarely within the admonition of being careful about what you ask for, since finding the rules unconstitutional would not lead to the conclusion that *any* net is therefore available to fishermen. The argument is also legally flawed.

The Commission was, and is, required to interpret and implement this constitutional provision in a manner that harmonizes all of its parts and fulfills the intent of the people as expressed in its plain language, which is to protect the marine fisheries resources of the state by banning gill or entangling nets and limiting the size of all other nets in the nearshore and inshore waters of Florida to 500 square feet or less.[4] In order to accomplish this goal, the Commission chose to limit the size of meshes to two inches. Based on the previous decisions from the First District Court of Appeal addressing this issue, the Constitutional status of the Commission, the doctrine of primary jurisdiction, and the record in this case, this court simply cannot find that the Commission's rules are irrational, arbitrary, or clearly erroneous.

Defendant has moved to strike Plaintiffs' affidavits in opposition to its Motion for Summary Judgment asserting that they are riddled with hearsay; they contain

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[4] Although the provision is deemed to be self-executing, the Commission can "establish[] by law or pursuant to law [] more restrictions on the use of nets for the purpose of catching or taking any saltwater finfish, shellfish, or other marine animals." Art. X, § 16(f), Fla. Const.

factual and legal conclusions (both lay and expert); they fail to show the competence of the witnesses to give the proffered testimony; and they rely on documents either not attached to the affidavits or not properly authenticated. The Court is well aware of the legal predicate for granting summary judgment. Most importantly, there is a heavy burden on the party moving for summary judgment; the burden to prove the nonexistence of a triable issue is on the moving party, and the burden of proving the existence of such issues is not shifted to the opposing party until the movant has successfully met his burden." *Holl v. Talcot,* 191 So. 2d 40 (Fla. 1966). The law related to summary judgment disfavors resolving such motions on perceived "technical" deficiencies in the nonmovant's affidavits. *Charlonne v. Rosenthal,* 642 So. 2d 632 (Fla. 3rd DCA 1994); *Heitmeyer v. Sasser,* 664 So. 2d 358 (Fla. 4th DCA 1995). Further, the court acknowledges that certain types of claims, notably negligence and malpractice, are generally not amenable to summary judgment due to the inevitable dispute of material fact involved in such cases. See *Wal-Mart Stores, Inc. v. Tracz,* 799 So. 2d 413 (Fla. 5th DCA2001). The rationale supporting this proposition is that where the case is close on the question of negligence, the question should always be resolved in favor of a jury trial, and that all reasonable inferences are to be construed in favor of the party opposing summary judgment. *White v. Whiddon,* 670 So. 2d 131, 133 (Fla. 1st DCA 1996).

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In light of the foregoing, the court will not strike the affidavits submitted by plaintiffs. They do not, however, create a genuine dispute of material fact in this case. As distinguished from a negligence or malpractice case, the issue in this declaratory judgment action is whether there is a rational basis for the Commission's rules. As such, Plaintiffs long-standing disagreement with the substance of the rule is not the dispute of fact contemplated by the case law. In this action, the Defendant's motion for summary judgment need only establish that there is a rational basis for defining nets with meshes greater than two inches as constitutionally prohibited gill or entangling nets (68B4.0081), adopting the constitutional definition by rule (68B-4.002), and not allowing such a net to be used in the mullet fishery (68B-39.0047). The Commission is not obligated to negate all disagreement with the rules, or to show that the method it chose to address the situation was superior to any other method of accomplishing the same result.

Protection of the State's marine fishery resources is a responsibility given to the Fish and Wildlife Conservation Commission by the people of the State of Florida. As such, execution of those duties is an exercise of the police power which unquestionably furthers a legitimate state interest. Applying the rational basis test here requires the court to determine whether the Commission could have reasonably concluded, or whether there is any state of facts to prove, that the challenged rules

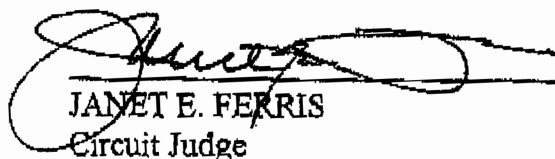
would further the goal of the protection of the State's marine resources. The previous litigation addressing the net mesh size issue, including the rule challenge and the declaratory statement where the Commission's positions have been uniformly upheld, and the affidavits supplied by the Commission in support of its motion, provide a basis for the Commission to so conclude. In addition, because of the unique status of the Commission, merely showing that there is a dispute about the proper definition of a gill or entangling net as that term is used in the Constitution is not enough. If such a dispute exists, it would be up to the Commission to exercise its judgment as it sees fit, as long as that exercise is not arbitrary. There must be *no* rational basis for support of the rules, not simply a dispute. Here the Commission has provided a rational basis for the rules and it is one that is supported by qualified experts in marine fisheries resources. As such, the rules far exceed the minimal showing necessary.

In light of the case law applicable here, the court finds that the Commission has provided the court with sufficient rational bases for the rules in question. Because that rational basis is evident, there is no dispute of material fact precluding summary judgment. Furthermore, there is no conflict with the statutory provisions cited by Plaintiffs that require further interpretation by this Court, and the Plaintiffs have made no viable argument explaining their contentions that these rules violate due process

or the general policy set forth in Article II, § 7 of the Constitution. It is therefore

ORDERED AND ADJUDGED that rules 68B-4.002, 68B4.0081, and 68B-39.0047, F.A.C., are a valid exercise of the Commission's constitutionally delegated authority and that there is a rational basis for their provisions. Plaintiffs' Motion for Summary Judgment is DENIED; Defendants' Motion for Summary Judgment is GRANTED; and Defendant's Motion to Strike is DENIED. Judgment is therefore entered for Defendant.

DONE AND ORDERED in chambers, at Tallahassee, Leon County, Florida, this 3rd day of February, 2006.



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