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THE FLORIDA LEGISLATURE
**JOINT ADMINISTRATIVE
PROCEDURES COMMITTEE**

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JOINT ADMINISTRATIVE PROCEDURES COMMITTEE

Representative Lake Ray, Chair

Meeting Packet

Monday, April 4, 2011
10:15 a.m. – 12:15 p.m.
12 House Office Building

JOINT ADMINISTRATIVE PROCEDURES COMMITTEE

OBJECTION REPORT

AGENCY: DEPARTMENT OF REVENUE

RULE NUMBER: 12D-9.019(7)(b)

TITLE: SCHEDULING AND NOTICE OF A HEARING

OBJECTIONABLE PROVISIONS:

12D-9.019(7)(b) Scheduling and Notice of a Hearing.

(7)(b) In no event shall a petitioner be required to wait more than a reasonable time from the scheduled time to be heard. The board clerk is authorized to find that a reasonable time has elapsed based on other commitments, appointments or hearings of the petitioner, lateness in the day, and other hearings waiting to be heard earlier than the petitioner's hearing with the board or special magistrate. If his or her petition has not been heard within a reasonable time, the petitioner may request to be heard immediately. If the board clerk finds a reasonable time has elapsed and petitioner is not heard, the board clerk shall find good cause is present and shall reschedule the petitioner's hearing.

CITED AGENCY AUTHORITY:

(a) Rulemaking

s. 194.011(5), F.S.
s. 194.034(1), F.S.
s. 195.027(1), F.S.
s. 213.06(1), F.S.

(b) Law Implemented

s. 194.011, F.S.
s. 194.015, F.S.
s. 194.032, F.S.
s. 194.034, F.S.
s. 195.022, F.S.
s. 213.05, F.S.

(FULL TEXT ATTACHED)

SPECIFIC OBJECTIONS:

Rule 12D-9.019(7)(b) is objectionable because it modifies a specific statutory provision that mandates a waiting period of not more than four hours during meetings of the value adjustment board. The rule sets forth only a "reasonable" time for an individual to have to wait. This can be interpreted to mean any variety of times imposed with no consistency. The rule constitutes an invalid exercise of delegated legislative authority.

Rule 12D-9.019 establishes procedures regarding the scheduling of hearings of county value adjustment boards. The law implemented by the rule, s. 194.032(2), F.S., provides, in part:

No petitioner shall be required to wait for more than 4 hours from the scheduled time; and, if his or her petition is not heard in that time, the petitioner may, at his or her option, report to the chairperson of the meeting that he or she intends to leave; and, if he or she is not heard immediately, the petitioner's administrative remedies will be deemed to be exhausted, and he or she may seek further relief as he or she deems appropriate. (e.s.)

Although the rule provides that petitioners do not have to wait more than a "reasonable" time, no time limit is set forth. The use of the term "reasonable" could be construed as requiring more than a four-hour wait. In contrast, s. 194.032(2), F.S., clearly establishes a four-hour time limit before a petitioner can leave the meeting. While the department may not intend to authorize a waiting period of more than four hours, the rule creates the opportunity to impermissibly modify the statutory time period. See, City of Miami v. Save Brickell Avenue, 426 So. 2d 1100 (Fla. 3d DCA 1983).

It is axiomatic that an administrative rule must be consistent with the statute under which it is promulgated. It may not amend or repeal the statute. Department of Health v. Florida Psychiatric Society, Inc., 382 So. 2d 1280 (Fla. 1st DCA 1980). An agency rule cannot contravene statutory provisions. Statutes take precedence over administrative rules. Zimmerman v. Florida Windstorm Underwriting Association, 873 So. 2d 411 (Fla. 1st DCA 2004). Moreover, a rule cannot change the statute simply because it would be in the public interest to do so. See, Witmer v. Department of Business and Professional Regulation, Division of Pari-Mutuel Wagering, 662 So. 2d 1299 (Fla. 4th DCA 1995).

Pursuant to s. 120.52(8)(c), F.S., a rule that enlarges, modifies, or contravenes the specific provisions of the law being implemented is an invalid exercise of delegated legislative authority. Therefore, rule 12D-9.019(7)(b), which sets forth only a "reasonable" time for an individual to have to wait during meetings of the value adjustment board, modifies the statute and is objectionable.

NOTE: If the Committee votes an objection, copies will be sent to the following:

Lisa Vickers, Executive Director
Marshall Stranburg, General Counsel

s. 194.011, F.S. (2010)

194.011 Assessment notice; objections to assessments.—

(1) Each taxpayer whose property is subject to real or tangible personal ad valorem taxes shall be notified of the assessment of each taxable item of such property, as provided in s. 200.069.

¹(2) Any taxpayer who objects to the assessment placed on any property taxable to him or her, including the assessment of homestead property at less than just value under s. 193.155(8), may request the property appraiser to informally confer with the taxpayer. Upon receiving the request, the property appraiser, or a member of his or her staff, shall confer with the taxpayer regarding the correctness of the assessment. At this informal conference, the taxpayer shall present those facts considered by the taxpayer to be supportive of the taxpayer's claim for a change in the assessment of the property appraiser. The property appraiser or his or her representative at this conference shall present those facts considered by the property appraiser to be supportive of the correctness of the assessment. However, nothing herein shall be construed to be a prerequisite to administrative or judicial review of property assessments.

(3) A petition to the value adjustment board must be in substantially the form prescribed by the department. Notwithstanding s. 195.022, a county officer may not refuse to accept a form provided by the department for this purpose if the taxpayer chooses to use it. A petition to the value adjustment board shall describe the property by parcel number and shall be filed as follows:

(a) The property appraiser shall have available and shall distribute forms prescribed by the Department of Revenue on which the petition shall be made. Such petition shall be sworn to by the petitioner.

(b) The completed petition shall be filed with the clerk of the value adjustment board of the county, who shall acknowledge receipt thereof and promptly furnish a copy thereof to the property appraiser.

(c) The petition shall state the approximate time anticipated by the taxpayer to present and argue his or her petition before the board.

(d) The petition may be filed, as to valuation issues, at any time during the taxable year on or before the 25th day following the mailing of notice by the property appraiser as provided in subsection (1). With respect to an issue involving

the denial of an exemption, an agricultural or high-water recharge classification application, an application for classification as historic property used for commercial or certain nonprofit purposes, or a deferral, the petition must be filed at any time during the taxable year on or before the 30th day following the mailing of the notice by the property appraiser under s. 193.461, s. 193.503, s. 193.625, or s. 196.193 or notice by the tax collector under s. 197.253.

(e) A condominium association, cooperative association, or any homeowners' association as defined in s. 723.075, with approval of its board of administration or directors, may file with the value adjustment board a single joint petition on behalf of any association members who own parcels of property which the property appraiser determines are substantially similar with respect to location, proximity to amenities, number of rooms, living area, and condition. The condominium association, cooperative association, or homeowners' association as defined in s. 723.075 shall provide the unit owners with notice of its intent to petition the value adjustment board and shall provide at least 20 days for a unit owner to elect, in writing, that his or her unit not be included in the petition.

(f) An owner of contiguous, undeveloped parcels may file with the value adjustment board a single joint petition if the property appraiser determines such parcels are substantially similar in nature.

(g) The individual, agent, or legal entity that signs the petition becomes an agent of the taxpayer for the purpose of serving process to obtain personal jurisdiction over the taxpayer for the entire value adjustment board proceedings, including any appeals of a board decision by the property appraiser pursuant to s. 194.036.

(4)(a) At least 15 days before the hearing the petitioner shall provide to the property appraiser a list of evidence to be presented at the hearing, together with copies of all documentation to be considered by the value adjustment board and a summary of evidence to be presented by witnesses.

(b) No later than 7 days before the hearing, if the petitioner has provided the information required under paragraph (a), and if requested in writing by the petitioner, the property appraiser shall provide to the petitioner a list of evidence to be presented at the hearing, together with copies of all documentation to be considered by the value adjustment board and a summary of evidence to be presented by witnesses. The evidence list must

contain the property record card if provided by the clerk. Failure of the property appraiser to timely comply with the requirements of this paragraph shall result in a rescheduling of the hearing.

(5)(a) The department shall by rule prescribe uniform procedures for hearings before the value adjustment board which include requiring:

1. Procedures for the exchange of information and evidence by the property appraiser and the petitioner consistent with s. 194.032.

2. That the value adjustment board hold an organizational meeting for the purpose of making these procedures available to petitioners.

(b) The department shall develop a uniform policies and procedures manual that shall be used by value adjustment boards, special magistrates, and taxpayers in proceedings before value adjustment boards. The manual shall be made available, at a minimum, on the department's website and on the existing websites of the clerks of circuit courts.

¹(6) The following provisions apply to petitions to the value adjustment board concerning the assessment of homestead property at less than just value under s. 193.155(8):

(a) If the taxpayer does not agree with the amount of the assessment limitation difference for which the taxpayer qualifies as stated by the property appraiser in the county where the previous homestead property was located, or if the property appraiser in that county has not stated that the taxpayer qualifies to transfer any assessment limitation difference, upon the taxpayer filing a petition to the value adjustment board in the county where the new homestead property is located, the value adjustment board in that county shall, upon receiving the appeal, send a notice to the value adjustment board in the county where the previous homestead was located, which shall reconvene if it has already adjourned.

(b) Such notice operates as a petition in, and creates an appeal to, the value adjustment board in the county where the previous homestead was located of all issues surrounding the previous assessment differential for the taxpayer involved. However, the taxpayer may not petition to have the just, assessed, or taxable value of the previous homestead changed.

(c) The value adjustment board in the county where the previous homestead was located shall set the petition for hearing and notify the taxpayer, the property appraiser in the county where the previous homestead was located, the property

appraiser in the county where the new homestead is located, and the value adjustment board in that county, and shall hear the appeal. Such appeal shall be heard by an attorney special magistrate if the value adjustment board in the county where the previous homestead was located uses special magistrates. The taxpayer may attend such hearing and present evidence, but need not do so. The value adjustment board in the county where the previous homestead was located shall issue a decision and send a copy of the decision to the value adjustment board in the county where the new homestead is located.

(d) In hearing the appeal in the county where the new homestead is located, that value adjustment board shall consider the decision of the value adjustment board in the county where the previous homestead was located on the issues pertaining to the previous homestead and on the amount of any assessment reduction for which the taxpayer qualifies. The value adjustment board in the county where the new homestead is located may not hold its hearing until it has received the decision from the value adjustment board in the county where the previous homestead was located.

(e) In any circuit court proceeding to review the decision of the value adjustment board in the county where the new homestead is located, the court may also review the decision of the value adjustment board in the county where the previous homestead was located.

History.— s. 25, ch. 4322, 1895; GS 525; s. 1, ch. 5605, 1907; ss. 23, 66, ch. 5596, 1907; RGS 723, 724; CGL 929, 930; s. 1, ch. 67-415; ss. 1, 2, ch. 69-55; s. 1, ch. 69-140; ss. 21, 35, ch. 69-106; s. 25, ch. 70-243; s. 34, ch. 71-355; s. 11, ch. 73-172; s. 5, ch. 76-133; s. 1, ch. 76-234; s. 1, ch. 77-102; s. 1, ch. 77-174; s. 2, ch. 78-354; s. 36, ch. 80-274; s. 13, ch. 82-208; ss. 8, 55, 80, ch. 82-226; s. 209, ch. 85-342; s. 1, ch. 86-175; s. 1, ch. 88-146; s. 143, ch. 91-112; s. 1, ch. 92-32; s. 977, ch. 95-147; s. 6, ch. 95-404; s. 4, ch. 96-204; s. 3, ch. 97-117; s. 2, ch. 2002-18; s. 1, ch. 2004-349; s. 7, ch. 2008-173; s. 3, ch. 2008-197.

¹ **Note.**— Section 13, ch. 2008-173, provides that:

“(1) The executive director of the Department of Revenue is authorized, and all conditions are deemed met, to adopt emergency rules under ss. 120.536(1) and 120.54(4), Florida Statutes, for the purpose of implementing this act.

“(2) Notwithstanding any other provision of law, such emergency rules shall remain in effect for 18 months after the date of adoption and may be renewed during the pendency of procedures to adopt rules addressing the subject of the emergency rules.”

Note.—Former s. 193.25.

s. 194.015, F.S. (2010)

194.015 Value adjustment board.—There is hereby created a value adjustment board for each county, which shall consist of two members of the governing body of the county as elected from the membership of the board of said governing body, one of whom shall be elected chairperson, and one member of the school board as elected from the membership of the school board, and two citizen members, one of whom shall be appointed by the governing body of the county and must own homestead property within the county and one of whom must be appointed by the school board and must own a business occupying commercial space located within the school district. A citizen member may not be a member or an employee of any taxing authority, and may not be a person who represents property owners in any administrative or judicial review of property taxes. The members of the board may be temporarily replaced by other members of the respective boards on appointment by their respective chairpersons. Any three members shall constitute a quorum of the board, except that each quorum must include at least one member of said governing board, at least one member of the school board, and at least one citizen member and no meeting of the board shall take place unless a quorum is present. Members of the board may receive such per diem compensation as is allowed by law for state employees if both bodies elect to allow such compensation. The clerk of the governing body of the county shall be the clerk of the value adjustment board. The board shall appoint private counsel who has practiced law for over 5 years and who shall receive such compensation as may be established by the board. The private counsel may not represent the property appraiser, the tax collector, any taxing authority, or any property owner in any administrative or judicial review of property taxes. No meeting of the board shall take place unless counsel to the board is present. Two-fifths of the expenses of the board shall be borne by the district school board and three-fifths by the district county commission.

History.— s. 2, ch. 69-140; s. 1, ch. 69-300; s. 26, ch. 70-243; s. 22, ch. 73-172; s. 5, ch. 74-234; s. 1, ch. 75-77; s. 6, ch. 76-133; s. 2, ch. 76-234; s. 1, ch. 77-69; s. 145, ch. 91-112; s. 978, ch. 95-147; s. 4, ch. 2008-197.

s. 194.032, F.S. (2010)

194.032 Hearing purposes; timetable.—

(1)(a) The value adjustment board shall meet not earlier than 30 days and not later than 60 days after the mailing of the notice provided in s. 194.011(1); however, no board hearing shall be held before approval of all or any part of the assessment rolls by the Department of Revenue. The board shall meet for the following purposes:

1. Hearing petitions relating to assessments filed pursuant to s. 194.011(3).

2. Hearing complaints relating to homestead exemptions as provided for under s. 196.151.

3. Hearing appeals from exemptions denied, or disputes arising from exemptions granted, upon the filing of exemption applications under s. 196.011.

4. Hearing appeals concerning ad valorem tax deferrals and classifications.

(b) Notwithstanding the provisions of paragraph (a), the value adjustment board may meet prior to the approval of the assessment rolls by the Department of Revenue, but not earlier than July 1, to hear appeals pertaining to the denial by the property appraiser of exemptions, agricultural and high-water recharge classifications, classifications as historic property used for commercial or certain nonprofit purposes, and deferrals under subparagraphs (a)2., 3., and 4. In such event, however, the board may not certify any assessments under s. 193.122 until the Department of Revenue has approved the assessments in accordance with s. 193.1142 and all hearings have been held with respect to the particular parcel under appeal.

(c) In no event may a hearing be held pursuant to this subsection relative to valuation issues prior to completion of the hearings required under s. 200.065(2)(c).

(2) The clerk of the governing body of the county shall prepare a schedule of appearances before the board based on petitions timely filed with him or her. The clerk shall notify each petitioner of the scheduled time of his or her appearance no less than 25 calendar days prior to the day of such scheduled appearance. Upon receipt of this notification, the petitioner shall have the right to reschedule the hearing a single time by submitting to the clerk of the governing body of the county a written request to reschedule, no less than 5 calendar days before the day of the originally

scheduled hearing. A copy of the property record card containing relevant information used in computing the taxpayer's current assessment shall be included with such notice, if said card was requested by the taxpayer. Such request shall be made by checking an appropriate box on the petition form. No petitioner shall be required to wait for more than 4 hours from the scheduled time; and, if his or her petition is not heard in that time, the petitioner may, at his or her option, report to the chairperson of the meeting that he or she intends to leave; and, if he or she is not heard immediately, the petitioner's administrative remedies will be deemed to be exhausted, and he or she may seek further relief as he or she deems appropriate. Failure on three occasions with respect to any single tax year to convene at the scheduled time of meetings of the board shall constitute grounds for removal from office by the Governor for neglect of duties.

(3) The board shall remain in session from day to day until all petitions, complaints, appeals, and disputes are heard. If all or any part of an assessment roll has been disapproved by the department pursuant to s. 193.1142, the board shall reconvene to hear petitions, complaints, or appeals and disputes filed upon the finally approved roll or part of a roll.

History.— s. 4, ch. 69-140; ss. 21, 35, ch. 69-106; s. 27, ch. 70-243; s. 12, ch. 73-172; s. 6, ch. 74-234; s. 7, ch. 76-133; s. 3, ch. 76-234; s. 1, ch. 77-174; s. 13, ch. 77-301; ss. 1, 9, 37, ch. 80-274; s. 5, ch. 81-308; ss. 14, 16, ch. 82-208; ss. 9, 11, 23, 26, 80, ch. 82-226; ss. 20, 21, 22, 23, 24, 25, ch. 83-204; s. 146, ch. 91-112; s. 979, ch. 95-147; s. 5, ch. 96-204; s. 4, ch. 97-117; s. 2, ch. 98-52; s. 3, ch. 2002-18; s. 2, ch. 2004-349.

s. 194.034, F.S. (2010)

194.034 Hearing procedures; rules.—

(1)(a) Petitioners before the board may be represented by an attorney or agent and present testimony and other evidence. The property appraiser or his or her authorized representatives may be represented by an attorney in defending the property appraiser's assessment or opposing an exemption and may present testimony and other evidence. The property appraiser, each petitioner, and all witnesses shall be required, upon the request of either party, to testify under oath as administered by the chairperson of the board. Hearings shall be conducted in the manner prescribed by rules of the department, which rules shall include the right of cross-examination of any witness.

(b) Nothing herein shall preclude an aggrieved taxpayer from contesting his or her assessment in the manner provided by s. 194.171, whether or not he or she has initiated an action pursuant to s. 194.011.

(c) The rules shall provide that no evidence shall be considered by the board except when presented during the time scheduled for the petitioner's hearing or at a time when the petitioner has been given reasonable notice; that a verbatim record of the proceedings shall be made, and proof of any documentary evidence presented shall be preserved and made available to the Department of Revenue, if requested; and that further judicial proceedings shall be as provided in s. 194.036.

(d) Notwithstanding the provisions of this subsection, no petitioner may present for consideration, nor may a board or special magistrate accept for consideration, testimony or other evidentiary materials that were requested of the petitioner in writing by the property appraiser of which the petitioner had knowledge and denied to the property appraiser.

(e) Chapter 120 does not apply to hearings of the value adjustment board.

(f) An assessment may not be contested until a return required by s. 193.052 has been filed.

(2) In each case, except when a complaint is withdrawn by the petitioner or is acknowledged as correct by the property appraiser, the value adjustment board shall render a written decision. All such decisions shall be issued within 20 calendar days of the last day the board is in session under s. 194.032. The decision of the board shall contain findings of fact and conclusions of law and shall include reasons for upholding or overturning the determination of the property appraiser. When a special magistrate has been appointed, the recommendations of the special magistrate shall be considered by the board. The clerk, upon issuance of the decisions, shall, on a form provided by the Department of Revenue, notify by first-class mail each taxpayer, the property appraiser, and the department of the decision of the board.

(3) Appearance before an advisory board or agency created by the county may not be required as a prerequisite condition to appearing before the value adjustment board.

(4) A condominium homeowners' association may appear before the board to present testimony and evidence regarding the assessment of condominium units which the association

represents. Such testimony and evidence shall be considered by the board with respect to hearing petitions filed by individual condominium unit owners, unless the owner requests otherwise.

(5) For the purposes of review of a petition, the board may consider assessments among comparable properties within homogeneous areas or neighborhoods.

(6) For purposes of hearing joint petitions filed pursuant to s. 194.011(3)(e), each included parcel shall be considered by the board as a separate petition. Such separate petitions shall be heard consecutively by the board. If a special magistrate is appointed, such separate petitions shall all be assigned to the same special magistrate.

History.—s. 21, ch. 83-204; s. 12, ch. 83-216; s. 3, ch. 86-175; s. 147, ch. 91-112; s. 2, ch. 92-32; s. 980, ch. 95-147; s. 71, ch. 2004-11.

s. 195.022, F.S. (2010)

195.022 Forms to be prescribed by Department of Revenue.—The Department of Revenue shall prescribe all forms to be used by property appraisers, tax collectors, clerks of the circuit court, and value adjustment boards in administering and collecting ad valorem taxes. The department shall prescribe a form for each purpose. The county officer shall reproduce forms for distribution at the expense of his or her office. A county officer may use a form other than the form prescribed by the department upon obtaining written permission from the executive director of the department; however, a county officer may not use a form if the substantive content of the form varies from the form prescribed by the department for the same or a similar purpose. If the executive director finds good cause to grant such permission he or she may do so. The county officer may continue to use the approved form until the law that specifies the form is amended or repealed or until the officer receives written disapproval from the executive director. Otherwise, all such officers and their employees shall use the forms, and follow the instructions applicable to the forms, which are prescribed by the department. Upon request of any property appraiser or, in any event, at least once every 3 years, the department shall prescribe and furnish such aerial photographs and nonproperty ownership maps to the property appraisers as necessary to ensure that all real property within the state is properly listed on the

roll. All photographs and maps furnished to counties with a population of 25,000 or fewer shall be paid for by the department as provided by law. For counties with a population greater than 25,000, the department shall furnish such items at the property appraiser's expense. The department may incur reasonable expenses for procuring aerial photographs and nonproperty ownership maps and may charge a fee to the respective property appraiser equal to the cost incurred. The department shall deposit such fees into the Certification Program Trust Fund created pursuant to s. 195.002. There shall be a separate account in the trust fund for the aid and assistance activity of providing aerial photographs and nonproperty ownership maps to property appraisers. The department shall use money in the fund to pay such expenses. All forms and maps and instructions relating to their use must be substantially uniform throughout the state. An officer may employ supplemental forms and maps, at the expense of his or her office, which he or she deems expedient for the purpose of administering and collecting ad valorem taxes. The forms required in ss. 193.461(3)(a) and 196.011(1) for renewal purposes must require sufficient information for the property appraiser to evaluate the changes in use since the prior year. If the property appraiser determines, in the case of a taxpayer, that he or she has insufficient current information upon which to approve the exemption, or if the information on the renewal form is inadequate for him or her to evaluate the taxable status of the property, he or she may require the resubmission of an original application.

History.— s. 37, ch. 70-243; s. 4, ch. 73-172; s. 7, ch. 74-234; s. 10, ch. 76-133; s. 2, ch. 78-185; s. 1, ch. 78-193; s. 153, ch. 91-112; s. 8, ch. 93-132; ss. 70, 71, ch. 2003-399; s. 1, ch. 2004-22; s. 2, ch. 2008-138; s. 1, ch. 2009-67.

s. 195.027(1), F.S. (2010)

195.027 Rules and regulations.—

(1) The Department of Revenue shall prescribe reasonable rules and regulations for the assessing and collecting of taxes, and such rules and regulations shall be followed by the property appraisers, tax collectors, clerks of the circuit court, and value adjustment boards. It is hereby declared to be the legislative intent that the department shall formulate such rules and regulations that property will be assessed, taxes

will be collected, and the administration will be uniform, just, and otherwise in compliance with the requirements of the general law and the constitution.

* * * *

History.—s. 39, ch. 70-243; s. 2, ch. 73-172; ss. 8, 22, 23, ch. 74-234; s. 11, ch. 76-133; s. 16, ch. 76-234; s. 14, ch. 79-334; s. 10, ch. 80-77; s. 23, ch. 80-274; s. 6, ch. 81-308; s. 22, ch. 88-119; s. 64, ch. 89-356; s. 39, ch. 90-360; s. 154, ch. 91-112; s. 985, ch. 95-147; s. 5, ch. 96-397; s. 51, ch. 96-406.

Note.—Former s. 195.042.

s. 213.05, F.S. (2010)

213.05 Department of Revenue; control and administration of revenue laws.—The Department of Revenue shall have only those responsibilities for ad valorem taxation specified to the department in chapter 192, taxation, general provisions; chapter 193, assessments; chapter 194, administrative and judicial review of property taxes; chapter 195, property assessment administration and finance; chapter 196, exemption; chapter 197, tax collections, sales, and liens; chapter 199, intangible personal property taxes; and chapter 200, determination of millage. The Department of Revenue shall have the responsibility of regulating, controlling, and administering all revenue laws and performing all duties as provided in s. 125.0104, the Local Option Tourist Development Act; s. 125.0108, tourist impact tax; chapter 198, estate taxes; chapter 201, excise tax on documents; chapter 202, communications services tax; chapter 203, gross receipts taxes; chapter 206, motor and other fuel taxes; chapter 211, tax on production of oil and gas and severance of solid minerals; chapter 212, tax on sales, use, and other transactions; chapter 220, income tax code; chapter 221, emergency excise tax; ss. 336.021 and 336.025, taxes on motor fuel and special fuel; ¹s. 376.11, pollutant spill prevention and control; s. 403.718, waste tire fees; s. 403.7185, lead-acid battery fees; s. 538.09, registration of secondhand dealers; s. 538.25, registration of secondary metals recyclers; s. 624.4621, group self-insurer's fund premium tax; s. 624.5091, retaliatory tax; s. 624.475, commercial self-insurance fund premium tax; ss. 624.509-624.511, insurance code: administration and general provisions; s. 624.515, State Fire Marshal regulatory assessment; s. 627.357, medical malpractice self-insurance premium tax; s. 629.5011, reciprocal insurers

premium tax; and s. 681.117, motor vehicle warranty enforcement.

History.—s. 5, ch. 63-253; s. 4, ch. 65-371; ss. 10, 21, 35, ch. 69-106; s. 43, ch. 71-355; s. 62, ch. 73-333; s. 1, ch. 79-9; s. 42, ch. 79-164; s. 3, ch. 82-75; ss. 16, 80, ch. 82-226; s. 12, ch. 82-385; s. 72, ch. 86-152; s. 9, ch. 87-102; s. 16, ch. 87-198; s. 4, ch. 89-167; s. 11, ch. 89-171; s. 39, ch. 90-132; s. 102, ch. 90-136; s. 28, ch. 90-203; s. 13, ch. 90-351; s. 89, ch. 91-112; s. 1, ch. 92-318; s. 64, ch. 93-207; s. 37, ch. 95-280; s. 121, ch. 95-417; s. 81, ch. 99-2; s. 1, ch. 2000-152; ss. 34, 58, ch. 2000-260; s. 38, ch. 2001-140; s. 4, ch. 2006-185.

Note.—Paragraphs (4)(a) and (b) of s. 376.11 were transferred to paragraphs (1)(a) and (b) of s. 206.9935 by s. 3, ch. 86-159.

s. 213.06(1), F.S. (2010)

213.06 Rules of department; circumstances requiring emergency rules.—

(1) The Department of Revenue has the authority to adopt rules pursuant to ss. 120.536(1) and 120.54 to implement provisions of the revenue laws.

* * *

History.—s. 6, ch. 63-253; ss. 21, 35, ch. 69-106; s. 4, ch. 82-75; s. 76, ch. 83-217; s. 13, ch. 86-152; s. 22, ch. 89-356; s. 38, ch. 96-410; s. 22, ch. 98-200.

JOINT ADMINISTRATIVE PROCEDURES COMMITTEE

OBJECTION REPORT

AGENCY: FLORIDA FISH AND WILDLIFE CONSERVATION COMMISSION

RULE NUMBER: 68A-27.001(1)(a) and (2)

TITLE: DEFINITIONS

OBJECTIONABLE PROVISIONS:

68A-27.001(1)(a) and (2) Definitions.

When used in this rule chapter, the terms and phrases listed below have the meaning provided:

(1) Florida Endangered and Threatened Species – species of fish or wild animal life, subspecies or isolated populations of species or subspecies, whether vertebrate or invertebrate, that are native to Florida which are endangered and threatened under Commission rule as either:

(a) Federally-designated Endangered and Threatened species by virtue of designation as endangered or threatened by the United States Departments of Interior or Commerce under the Endangered Species Act, 16 U.S.C. § 1531, et seq. and rules thereto; or

(b) As a State-designated Threatened species. Florida Endangered and Threatened species retain their status regardless of subsequent changes in scientific nomenclature or subsequent identification of species or subspecies within the species listed.

(2) Federally-designated Endangered and Threatened Species – species of fish or wild animal life, subspecies or isolated populations of species or subspecies, whether vertebrate or invertebrate, that are native to Florida and are classified as Endangered and Threatened under Commission rule by virtue of designation by the United States Departments of Interior or Commerce as endangered or threatened under the Federal Endangered Species Act, 16 U.S.C. § 1531 et seq. and rules thereto.

CITED AGENCY AUTHORITY:

(a) Rulemaking

(b) Law Implemented

s. Art. IV, Sec., 9, Fla. Const.

s. Art. IV, Sec., 9, Fla. Const.

(FULL TEXT ATTACHED)

SPECIFIC OBJECTIONS:

Rule 68A-27.001 is objectionable because it contravenes the laws being implemented by automatically delegating the Commission's responsibility to designate endangered species to the United States Departments of Interior and Commerce. The rule is an invalid exercise of delegated legislative authority, as defined by s. 120.52(8)(c), F.S.

The Florida Fish and Wildlife Conservation Commission must follow the provisions of chapter 120 when adopting rules relating to endangered and threatened marine species. *Caribbean Conservation Corp., Inc., v. Florida Fish and Wildlife Conservation Commission*, 838 So.2d 492 (Fla. 2003). Rule 68A-27.001 defines Florida endangered species “by virtue of designation as endangered or threatened by the U. S. Departments of Interior and Commerce under the Federal Endangered Species Act, 16 U.S.C. §1531 et seq. and rules thereto.” The Commission is obligated pursuant to s. 20.331(7)(c), F.S., to “protect and conserve the state’s diverse and unique fish and wild animal life,” and pursuant to s. 379.411, F.S., to *designate* species of fish and wildlife as endangered, threatened, or of special concern. Further, Florida’s Endangered and Threatened Species Act, s. 379.2291, F.S., requires the Commission to be responsible for research and management of freshwater, upland and marine species. Florida law requires the Commission to exercise its discretion in designating endangered species, and not abdicate that responsibility to the federal government.

It is the responsibility of the Commission to designate those threatened and endangered species, making certain that those designations meet Florida’s definitions of endangered and threatened found in s. 379.2291(3)(b) and (c), F.S. In rule 68A-27.001, the Commission abandons that responsibility and delegates it to the U.S. Departments of Interior and Commerce by adopting the federal lists of endangered and threatened species. Because the rule directs the Commission to classify as endangered certain species when the Departments of Interior and Commerce do so, it contravenes the statutory provisions requiring the Commission to designate those species. An agency rule cannot enlarge, modify or contravene the specific provisions of law that it implements. *Department of Business and Professional Regulation v. Calder Race Course, Inc.*, 724 So.2d 100 (Fla. 1st DCA 1998). The Commission has abdicated its responsibility to designate endangered species, and delegated that responsibility to the federal government. The rule therefore contravenes the law implemented.

Because the powers and duties being exercised by the Commission in this rule have been granted by general law, and not by the Florida Constitution, this rule is subject to the requirements of chapter 120. For the reasons stated above, Rule 68A-27.001 violates provisions of chapter 120, F.S., and is objectionable.

NOTE: If the Committee votes an objection, copies will be sent to the following:

Rodney Barreto, Chair
Nick Wiley, Executive Director
Bud Vielhauer, General Counsel
Michael Yaun, Deputy General Counsel

ARTICLE IV

EXECUTIVE

SECTION 9. Fish and wildlife conservation commission.—There shall be a fish and wildlife conservation commission, composed of seven members appointed by the governor, subject to confirmation by the senate for staggered terms of five years. The commission shall exercise the regulatory and executive powers of the state with respect to wild animal life and fresh water aquatic life, and shall also exercise regulatory and executive powers of the state with respect to marine life, except that all license fees for taking wild animal life, fresh water aquatic life, and marine life and penalties for violating regulations of the commission shall be prescribed by general law. The commission shall establish procedures to ensure adequate due process in the exercise of its regulatory and executive functions. The legislature may enact laws in aid of the commission, not inconsistent with this section, except that there shall be no special law or general law of local application pertaining to hunting or fishing. The commission's exercise of executive powers in the area of planning, budgeting, personnel management, and purchasing shall be as provided by law. Revenue derived from license fees for the taking of wild animal life and fresh water aquatic life shall be appropriated to the commission 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 by the legislature for the purposes of management, protection, and conservation of marine life as provided by law. The commission shall not be a unit of any other state agency and shall have its own staff, which includes management, research, and enforcement. Unless provided by general law, the commission shall have no authority to regulate matters relating to air and water pollution.

History.—Am. C.S. for H.J.R. 637, 1973; adopted 1974; Am. proposed by Constitution Revision Commission, Revision No. 5, 1998, filed with the Secretary of State May 5, 1998; adopted 1998.

JOINT ADMINISTRATIVE PROCEDURES COMMITTEE

OBJECTION REPORT

AGENCY: FLORIDA FISH AND WILDLIFE CONSERVATION COMMISSION

RULE NUMBER: 68A-27.0011

TITLE: Killing Endangered Species

OBJECTIONABLE PROVISIONS:

68A-27.0011 Killing Endangered Species.

No person shall intentionally kill, attempt to kill or wound any species that is both designated in Rule 68A-27.003, F.A.C., and designated in 50 C.F.R. 17.11 as endangered.

CITED AGENCY AUTHORITY:

(a) Rulemaking

(b) Law Implemented

s. Art. IV, Sec., 9, Fla. Const.

s. Art. IV, Sec., 9, Fla. Const.

(FULL TEXT ATTACHED)

SPECIFIC OBJECTIONS:

Rule 68A-27.0011 is objectionable because it modifies the law being implemented in violation of s. 120.52(8)(c), F.S.

The Florida Fish and Wildlife Conservation Commission must follow the provisions of chapter 120 when adopting rules relating to endangered and threatened species. *Caribbean Conservation Corp., Inc. v. Florida Fish and Wildlife Conservation Commission*, 838 So.2d 492 (Fla. 2003). Rule 68A-27.0011 prohibits the intentional killing, attempt to kill or wounding of any species that is both designated in Rule 68A-27.003, F.A.C., and designated by the U.S. Department of the Interior in 50 C.F.R. 17.11 as endangered. The law being implemented, s. 379.411, F.S., states, "It is unlawful for a person to intentionally kill or wound any fish or wildlife of a species designated by the Fish and Wildlife Conservation Commission as endangered, threatened, or of special concern" Because it requires designation of species by the Department of the Interior as well as by the Commission, the rule modifies s. 379.411, F.S., the law being implemented. Pursuant to s. 120.52(8)(c), F.S., a rule is an invalid exercise of delegated legislative authority if the rule enlarges, modifies, or contravenes the specific provisions of the law implemented. *Association of Florida Community Developers v. Department of Environmental Protection*, 943 So.2d 989 (Fla. 1st DCA 2006).

OBJECTION REPORT
RULE 68A-27.0011

04-04-11

Because the powers and duties being exercised by the Commission in this rule have been granted by general law, and not by the Florida Constitution, this rule is subject to the requirements of chapter 120, and for the reasons stated above, Rule 68A-27.0011 violates provisions of chapter 120, F.S., and is objectionable.

NOTE: If the Committee votes an objection, copies will be sent to the following:

Rodney Barreto, Chair
Nick Wiley, Executive Director
Bud Vielhauer, General Counsel
Michael Yaun, Deputy General Counsel

ARTICLE IV

EXECUTIVE

SECTION 9. Fish and wildlife conservation commission.—There shall be a fish and wildlife conservation commission, composed of seven members appointed by the governor, subject to confirmation by the senate for staggered terms of five years. The commission shall exercise the regulatory and executive powers of the state with respect to wild animal life and fresh water aquatic life, and shall also exercise regulatory and executive powers of the state with respect to marine life, except that all license fees for taking wild animal life, fresh water aquatic life, and marine life and penalties for violating regulations of the commission shall be prescribed by general law. The commission shall establish procedures to ensure adequate due process in the exercise of its regulatory and executive functions. The legislature may enact laws in aid of the commission, not inconsistent with this section, except that there shall be no special law or general law of local application pertaining to hunting or fishing. The commission's exercise of executive powers in the area of planning, budgeting, personnel management, and purchasing shall be as provided by law. Revenue derived from license fees for the taking of wild animal life and fresh water aquatic life shall be appropriated to the commission 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 by the legislature for the purposes of management, protection, and conservation of marine life as provided by law. The commission shall not be a unit of any other state agency and shall have its own staff, which includes management, research, and enforcement. Unless provided by general law, the commission shall have no authority to regulate matters relating to air and water pollution.

History.—Am. C.S. for H.J.R. 637, 1973; adopted 1974; Am. proposed by Constitution Revision Commission, Revision No. 5, 1998, filed with the Secretary of State May 5, 1998; adopted 1998.

JOINT ADMINISTRATIVE PROCEDURES COMMITTEE

OBJECTION REPORT

AGENCY: FLORIDA FISH AND WILDLIFE CONSERVATION COMMISSION

RULE NUMBER: 68A-27.0012(1) and (2)

TITLE: PROCEDURES FOR LISTING AND REMOVING SPECIES FROM
FLORIDA'S ENDANGERED AND THREATENED SPECIES LIST

OBJECTIONABLE PROVISIONS:

68A-27.0012(1) and (2) Procedures for Listing, and Removing Species from Florida's Endangered and Threatened Species List.

(1) Federally-designated Endangered and Threatened Species. Species which are native to Florida and which are designated as Endangered or Threatened under the Federal Endangered Species Act (ESA), 15 [sic] U.S.C. § 1531 et seq. and rules thereto will be listed by the Commission as a Florida Endangered and Threatened Species by virtue of the federal designation. If a species native to Florida is added or reclassified under the ESA, the species shall be so listed or reclassified in the Florida Endangered and Threatened Species rule pursuant to the notice provisions of Subsection 120.54(6), F.S., relating to adoption of federal standards. Before species that have been removed from the ESA are removed from the Florida Endangered and Threatened Species rule, they shall receive a biological status review according to subparagraph (2)(c)2. to determine if the species warrants listing as a state-designated species. Prior to any species being removed from the Florida Endangered and Threatened Species list, the Commission shall develop a management plan that is intended to maintain or enhance the conservation of that species.

(2) State-designated Threatened Species.

(a) Except as provided in subsection (1) above, these procedures shall not apply to:

1. Federally-designated Endangered and Threatened species,

* * *

(b) Requesting the evaluation of a species for listing or removal from the State-designated Threatened species list.

2. Species evaluation requests shall be clearly identified as such, and must contain the following in order to be considered complete:

c. Sufficient information on the biology and distribution of the species to warrant investigation of its status using the criteria contained in the definition of a State-designated Threatened species. For listing requests, this information shall also include a biological score calculated according to the process initially described in Millsap, B. A., J. A. Gore, D. E. Runde, and S. I. Cerulean, Wildlife Monographs: Setting Priorities for the Conservation of Fish and Wildlife Species in Florida (Wildlife Monographs 111, July 1990, and as subsequently modified), the data, or references to data, and the score assigned for each biological variable used to determine the biological score. . . .

(c) Determining when changes in listing status are warranted.

2. Biological Status Review.

c. Commission staff shall recommend and the Commission shall designate a biological review group of scientists with demonstrated knowledge of species conservation and management that consists of an odd number of three to seven members. . . . When assessing a species, this group shall follow the most recent versions of “Guidelines for Using the IUCN Red List Categories and Criteria” and “Guidelines for Application of IUCN Red List Criteria at Regional Levels” available at www.iucnredlist.org. . . .

* * *

e. The Commission shall consider the biological status report, independent scientific reviews received, and public comments regarding the biological status in making a final determination whether listing a species is warranted.

CITED AGENCY AUTHORITY:

(a) Rulemaking

(b) Law Implemented

s. Art. IV, Sec., 9, Fla. Const.

s. Art. IV, Sec., 9, Fla. Const.

(FULL TEXT ATTACHED)

SPECIFIC OBJECTIONS:

Rule subsections 68A-27.0012(1) and (2)(a) are objectionable because they contravene the laws being implemented, in violation of s. 120.52(8)(c), F.S., by automatically delegating the Commission’s responsibility to designate endangered species to the United States Departments of Interior and Commerce. Rule subsection 68A-27.0012(2) also is objectionable because it improperly incorporates by reference material as it may exist in the future, in violation of s. 120.54(1)(i)1., F.S. In addition, rule paragraph 68A-27.0012(2)(c) fails to specify the criteria used by the Commission in determining whether a species will be listed as threatened, in violation of s. 120.52(8)(d), F.S.

Contravention of Law Implemented

The Florida Fish and Wildlife Conservation Commission must follow the provisions of chapter 120 when adopting rules relating to endangered and threatened marine species. *Caribbean Conservation Corp., Inc., v. Florida Fish and Wildlife Conservation Commission*, 838 So.2d 492 (Fla. 2003). Rule 68A-27.0012(1) states, “Species which are native to Florida and which are designated as Endangered or Threatened under the Federal Endangered Species Act (ESA), 15 [sic] U.S.C. §1531 et seq. and rules thereto *will be listed* by the Commission as a Florida Endangered and Threatened Species *by virtue of* the federal designation.” (e.s.) The rule goes on in paragraph (2)(a) to prohibit the Commission’s evaluation of federally designated species for purposes of including those species as State-designated Threatened Species.

The Commission is obligated pursuant to s. 20.331(7)(c), F.S., to “protect and conserve the state’s diverse and unique fish and wild animal life,” and pursuant to s. 379.411, F.S., to *designate* species of fish and wildlife as endangered, threatened, or of special concern. Further,

Florida's Endangered and Threatened Species Act, s. 379.2291, F.S., requires the Commission to be responsible for research and management of freshwater, upland and marine species. Florida law requires the Commission to exercise its discretion in designating endangered species, and not abdicate that responsibility to the federal government.

It is the responsibility of the Commission to designate those threatened and endangered species, making certain that the designations meet Florida's definitions of endangered and threatened found in s. 379.2291(3)(b) and (c), F.S. In rule 68A-27.0012(1), the Commission abandons that responsibility and delegates it to the U.S. Departments of Interior and Commerce by adopting the federal lists of endangered and threatened species. Because the rule directs the Commission to classify as endangered certain species when the Departments of Interior and Commerce do so, it contravenes the statutory provisions requiring the Commission to designate those species. An agency rule cannot enlarge, modify or contravene the specific provisions of law that it implements. *Department of Business and Professional Regulation v. Calder Race Course, Inc.*, 724 So.2d 100 (Fla. 1st DCA 1998).

Incorporation of Materials

Rule paragraphs 68A-27.0012(2)(b) and (c) require the use of external materials referenced in the rule. Such required use incorporates by reference those materials in the rule. Further, the rule attempts to incorporate materials "as subsequently modified" and "the most recent version" of materials. By attempting to incorporate subsequent modifications, or future versions of the materials, the Commission impermissibly delegates its duty to adopt criteria by which species will be designated as endangered or threatened to the authors of the incorporated material. Section 120.54(1)(i)1., F.S., states unequivocally that material may be incorporated by reference only as the material exists on the date the rule is adopted. In addition, Department of State rule 1B-30.005(2), which implements s. 120.54(1)(i)1., F.S., requires that rules incorporating material by reference include identification of the material, the effective date of the material, a statement that the material is being incorporated by reference, and information about how a copy of the material can be obtained. Rule paragraphs 68A-27.0012(2)(b) and (c) fail to include the effective date of the incorporated materials and instructions on how a copy of the material can be obtained. In doing so, the rule violates the requirements of s. 120.54(1)(i)1., F.S.

Unbridled Discretion

Rule 68A-27.0012 does not specify the standards or criteria to be used by the Commission to determine whether a species will be designated as threatened in Florida. Rule sub-subparagraph 68A-27.0012(2)(c)2.e. states, "The Commission shall consider the biological status report, independent scientific reviews received, and public comments regarding the biological status in making a final determination whether listing a species is warranted." Although the rule includes a list of materials that will be considered, the failure to require application of criteria or standards, including its own rule defining "State-designated Threatened Species," in making its "final determination whether listing a species is warranted" vests unbridled discretion in the Commission, in violation of s. 120.52(8)(d), F.S. In the case of *Effie, Inc. v. City of Ocala*, 438 So.2d 506 (Fla. 5th DCA 1983), the court declared an ordinance unconstitutional which required the mayor and city commission, on a case by case basis, to "take into account" certain information before issuing a permit. The court stated:

The ordinance in question requires the council to "take into account" certain enumerated criteria, but with no other standard, leaves each member of the council free to arbitrarily decide how to weigh each factor, if at all. . . Clearly, the opportunity for the exercise of unbridled discretion is present here, and whether so exercised or not, renders the ordinance unconstitutional.
Effie, Inc. v. City of Ocala, supra., p.509.

Without a standard by which to evaluate the information "considered," the rule vests unbridled discretion in the Commission to make its final determination in violation of s. 120.52(8)(d), F.S.

Because the powers and duties being exercised by the Commission in this rule have been granted by general law, and not by the Florida Constitution, this rule is subject to the requirements of chapter 120, and for the reasons stated above, Rule 68A-27.0012 violates provisions of chapter 120, F.S., and is objectionable.

NOTE: If the Committee votes an objection, copies will be sent to the following:

Rodney Barreto, Chair
Nick Wiley, Executive Director
Bud Vielhauer, General Counsel
Michael Yaun, Deputy General Counsel

ARTICLE IV

EXECUTIVE

SECTION 9. Fish and wildlife conservation commission.—There shall be a fish and wildlife conservation commission, composed of seven members appointed by the governor, subject to confirmation by the senate for staggered terms of five years. The commission shall exercise the regulatory and executive powers of the state with respect to wild animal life and fresh water aquatic life, and shall also exercise regulatory and executive powers of the state with respect to marine life, except that all license fees for taking wild animal life, fresh water aquatic life, and marine life and penalties for violating regulations of the commission shall be prescribed by general law. The commission shall establish procedures to ensure adequate due process in the exercise of its regulatory and executive functions. The legislature may enact laws in aid of the commission, not inconsistent with this section, except that there shall be no special law or general law of local application pertaining to hunting or fishing. The commission's exercise of executive powers in the area of planning, budgeting, personnel management, and purchasing shall be as provided by law. Revenue derived from license fees for the taking of wild animal life and fresh water aquatic life shall be appropriated to the commission 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 by the legislature for the purposes of management, protection, and conservation of marine life as provided by law. The commission shall not be a unit of any other state agency and shall have its own staff, which includes management, research, and enforcement. Unless provided by general law, the commission shall have no authority to regulate matters relating to air and water pollution.

History.—Am. C.S. for H.J.R. 637, 1973; adopted 1974; Am. proposed by Constitution Revision Commission, Revision No. 5, 1998, filed with the Secretary of State May 5, 1998; adopted 1998.

JOINT ADMINISTRATIVE PROCEDURES COMMITTEE

OBJECTION REPORT

AGENCY: FLORIDA FISH AND WILDLIFE CONSERVATION COMMISSION

RULE NUMBER: 68A-27.007(2)(a) and (b)

TITLE: PERMITS AND AUTHORIZATIONS FOR THE TAKE OF FLORIDA
ENDANGERED AND THREATENED SPECIES

OBJECTIONABLE PROVISIONS:

68A-27.007(2)(a) and (b) Permits and Authorizations for the Take of Florida Endangered and Threatened Species.

(2) The permit requirements for the taking of a State-designated Threatened species are as follows:

(a) Intentional take: The Commission may issue permits authorizing intentional take of Florida State-designated Threatened species for scientific or conservation purposes which will benefit the survival potential of the species except for species that have a permitting standard for intentional take in Rule 68A-27.003, F.A.C., and then that standard will apply. . . .

(b) Incidental take: The Commission may issue permits authorizing incidental take of State-designated Threatened species upon a conclusion that the following permitting standards have been met: the standards for species when contained in Rule 68A-27.003, F.A.C., take precedence; for blackmouth shiner, striped mud turtle, Florida mastiff bat, and pillar coral, a permit may be issued if the permitted activity clearly enhances the survival potential of the species; for all other State-designated Threatened species, the permit may be issued when there is a scientific or conservation benefit and only upon a showing by the applicant that the permitted activity will not have a negative impact on the survival potential of the species. Factors which shall be considered in determining whether a permit may be granted are: . . .

CITED AGENCY AUTHORITY:

(a) Rulemaking

(b) Law Implemented

s. Art. IV, Sec., 9, Fla. Const.

s. Art. IV, Sec., 9, Fla. Const.

(FULL TEXT ATTACHED)

SPECIFIC OBJECTIONS:

Rule paragraphs 68A-27.007(2)(a) and (b) are objectionable as they apply to marine life because they state that the Commission “may” issue certain permits, which vests unbridled discretion in the Commission to issue those permits, in violation of s. 120.52(8)(d), F.S.

Rule paragraphs 68A-27.007(2)(a) and (b) provide that the Commission “may” issue permits under certain circumstances. Use of the word “may” necessarily implies that the Commission either may or may not choose to issue such permits based upon whim or caprice. This constitutes an arrogation of unbridled discretion to the Commission.

In the case of *Barrow v. Holland*, 125 So.2d 749 (Fla. 1960), a rule of the Florida Game and Freshwater Fish Commission was considered, which stated, “The Director may issue permits giving the right to take or to be in possession of wildlife” The Court ruled that the rules were defective, and “authorize the exercise of arbitrary governmental power measured only by the uncontrolled discretion of the enforcement officer.” *Barrow v. Holland*, p. 753. The Court further stated:

The appellant could have read the rules of the Commission backwards and forwards and could not have obtained any information whatsoever as to just what he would have to do to obtain the permit. . . . This is the type of arbitrary authority that due process prohibits. *Barrow v. Holland*, p.753.

Section 120.52(8)(d), F.S., provides that the vesting of unbridled discretion in an agency by rule is an invalid exercise of delegated legislative authority. Because the powers and duties being exercised by the Commission in this rule have been granted by general law, and not by the Florida Constitution, this rule is subject to the requirements of chapter 120, and for the reasons stated above, Rule 68A-27.007 violates provisions of chapter 120, F.S., and is objectionable.

NOTE: If the Committee votes an objection, copies will be sent to the following:

Rodney Barreto, Chair
Nick Wiley, Executive Director
Bud Vielhauer, General Counsel
Michael Yaun, Deputy General Counsel

ARTICLE IV

EXECUTIVE

SECTION 9. Fish and wildlife conservation commission.—There shall be a fish and wildlife conservation commission, composed of seven members appointed by the governor, subject to confirmation by the senate for staggered terms of five years. The commission shall exercise the regulatory and executive powers of the state with respect to wild animal life and fresh water aquatic life, and shall also exercise regulatory and executive powers of the state with respect to marine life, except that all license fees for taking wild animal life, fresh water aquatic life, and marine life and penalties for violating regulations of the commission shall be prescribed by general law. The commission shall establish procedures to ensure adequate due process in the exercise of its regulatory and executive functions. The legislature may enact laws in aid of the commission, not inconsistent with this section, except that there shall be no special law or general law of local application pertaining to hunting or fishing. The commission's exercise of executive powers in the area of planning, budgeting, personnel management, and purchasing shall be as provided by law. Revenue derived from license fees for the taking of wild animal life and fresh water aquatic life shall be appropriated to the commission 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 by the legislature for the purposes of management, protection, and conservation of marine life as provided by law. The commission shall not be a unit of any other state agency and shall have its own staff, which includes management, research, and enforcement. Unless provided by general law, the commission shall have no authority to regulate matters relating to air and water pollution.

History.—Am. C.S. for H.J.R. 637, 1973; adopted 1974; Am. proposed by Constitution Revision Commission, Revision No. 5, 1998, filed with the Secretary of State May 5, 1998; adopted 1998.