

Ch. 18740, 1937 Laws of Fla, continued as rule

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Subject:

Ch. 18740, 1937 Laws of Fla, continued as rule

Mr. Russell Nelson
Executive Director
Marine Fisheries Commission
2540 Executive Center Circle West, Suite 106
Tallahassee, Florida 32301

RE: NATURAL RESOURCES, DEPARTMENT OF–MARINE FISHERIES COMMISSION–FISH AND FISHING–special act continued as rule in effect; interpretation of term "fish." Ch. 18740, 1937 Laws of Fla.

Dear Mr. Nelson:

You ask substantially the following questions:

- (1) Are the provisions of Ch. 18740, 1937 Laws of Florida, prohibiting "any other apparatus or device whatsoever for the purpose of catching fish" still in effect?
- (2) Does the term "fish" in the above provision include shrimp and crabs?
- (3) What measures must the Florida Marine Patrol take in order to ensure adequate notice to members of the public fishing in the effective area?

In sum, I am of the opinion that:

- (1) The provisions of Ch. 18740, Special Acts of 1937, repealed by Ch. 83-134, Laws of Florida, and carried forward as rules of the Department of Natural Resources, are still in effect.
- (2) The provisions in Ch. 18740, Special Acts of 1937 relating to the catching of fish include the catching of shrimp and crabs.
- (3) A determination as to what measures must be taken by the Florida Marine Patrol in order to provide adequate notice to members of the public is a determination which must be made by the Florida Marine Patrol and cannot be delegated to this office.

Section 1, Ch. 18740, Special Acts of 1937, provides:

That from and after the passage of this Act it shall be unlawful for any person, persons, firm or corporation, to use or have in his possession any stop net or seine, or any other apparatus or

device whatsoever for the purpose of catching fish in Old Tampa Bay North of Gandy Bridge or any creek or bayou emptying into said Bay, other than an ordinary gill net, cast net or hook and line, and the possession of any such stop net, or seine, or apparatus or device by any person, persons, firm or corporation, in or on said waters shall be prima facie evidence of intention and purpose of catching fish in said waters.[1]

The Marine Fisheries Commission (commission) was created by Ch. 83-134, Laws of Florida. Section 2(2) of the act provides that the commission is delegated full rulemaking authority over marine life, with the exception of endangered species, subject to final approval by the Governor and Cabinet sitting as the head of the Department of Natural Resources (department). To the extent of any conflicting authority of another division or bureau of the department or other state agency, such commission rules prevail in the following areas:

- "a) gear specifications,
- b) *prohibited gear*,
- c) bag limits,
- d) size limits,
- e) species that may not be sold,
- f) protected species,
- g) *closed areas*,
- h) quality control codes,
- i) seasons, and
- j) special considerations relating to eggbearing females and oyster and clam relaying."

Chapter 83-134, Laws of Florida repealed several local laws pertaining to saltwater fishing to the extent that they related to the above areas. Included was the repeal of Ch. 15379, Special Acts of 1931, as amended by Ch. 18740, Special Acts of 1937.[2] These special laws, however, "shall continue in effect as rules of the department." [3] You state that there have been no changes amending or repealing these laws, other than those mentioned above.

QUESTION ONE

You have advised this office that the Florida Marine Patrol, as did its predecessor, the Florida State Board of Conservation, publishes a book intended to contain accurate copies of the laws applicable to marine resources. The Marine Patrol officers use this "Florida Marine Patrol Law Book" in the field as an enforcement aid in carrying out their duties to enforce the laws of this state, including the rules of the commission and the department. You state that the staff of the Marine Fisheries Commission recently discovered that the Marine Patrol Book excluded the following phrase from Ch. 18740, Special Acts of 1937: "or any other apparatus or device whatsoever for the purpose of catching fish." The commission has been advised that the above language was contained in the manual from 1937 to 1955; however, the 1960 version deleted the phrase. You indicate that as a result of the deletion from the book, the Florida Marine Patrol has not been enforcing this provision. You, therefore, inquire whether the deleted provision is still in effect.

As stated above, s. 2(5)(a), Ch. 83-134, Laws of Florida repealed Ch. 18740, Special Laws of 1937, "to the extent [the special act] relate[s] to those areas specified in subsection (2)." Chapter

18740, *supra*, prohibiting certain gear in Old Tampa Bay and its tributaries north of Gandy Bridge, appears to fall within those areas of s. 2(2), Ch. 83-134, Laws of Florida, which refer, among other things, to prohibited gear and closed areas.

Thus, the provisions of Ch. 18740, Special Acts of 1937, were repealed by Ch. 83-134, Laws of Florida, and carried forward as rules of the Department of Natural Resources. As noted above, these rules do not appear to have been amended, modified or repealed. Accordingly, this office has no authority to declare such rules no longer valid or effective. Instead this office must presume the validity or effectiveness of such rules until declared otherwise in a court of competent jurisdiction. Therefore, I am of the opinion that the provisions of Ch. 18740, Special Acts of 1937, repealed by Ch. 83-134, Laws of Florida, and carried forward as rules of the Department of Natural Resources, are still in effect.

QUESTION TWO

Chapter 18740, Special Acts of 1937, prohibits the use or possession of any stop net or seine, or any other apparatus or device for the purpose of catching fish in Old Tampa Bay north of Gandy Bridge or its tributaries, other than an ordinary gill net, cast net or hook and line. The act, however, does not define the term "fish."

As you note in your letter, s. 370.01(2), F.S., defines the term "saltwater fish" to include "all classes of pisces, shellfish, sponges and crustacea indigenous to salt water." While the above definition first appeared in 1941 as s. 371.01(12), F.S.1941, you state that you have been unable to find any specific definition of "saltwater fish" in existence prior to 1941, although the subject has been regulated by the State since 1880's.[4] The term "fish," however, in its broadest sense has been generally held to be a designation of almost any exclusively aquatic animal and to include oysters, clams and other shell fish.[5]

Accordingly, in the absence of judicial clarification and based upon the above, I am of the opinion that the term "fish" includes shrimp and oysters.

Question Three

You ask what measures should be taken by the Florida Marine Patrol in order to ensure that members of the public who are fishing in the affected area are notified. This office can only advise you that, absent amendment or repeal of these rules, this office must presume that the provisions of Ch. 18740, Special Acts of 1937, are still in effect. The determination as to the measures that should be taken to notify the public of enforcement of the rules involves questions of administrative policy which must be made by the Florida Marine Patrol and cannot be delegated to this office.

Sincerely,

Robert A. Butterworth
Attorney General

RAB/tjw

[1] Chapter 18740, Special Acts of 1937, amended Ch. 15379, Special Acts of 1931, which regulated fishing in Old Tampa Bay and its tributaries north of Gandy Bridge. In 1953, a special act known as "The Pinellas County Salt Water Fishing Law," was passed regulating the use of nets and seines for the catching of and fishing for salt water fish in the waters of Pinellas County. Section 16 of the act repealed all laws, general, special or local, insofar as they applied to Pinellas County and were in conflict, "provided, however, nothing herein shall be held or construed as repealing . . . Chapter 18740, Special Laws of 1937. . . ."

[2] See s. 2(5)(a), Ch. 83-134, Laws of Florida. *And see* s. 2(5)(b), Ch. 83-134, *supra*, repealing Ch. 29432, Special Acts of 1953. Although Ch. 83-134, Laws of Florida, has been subsequently amended by Chs. 84-121, 85-163, and 86-240, Laws of Florida, such amendments are not relevant to the instant inquiry.

[3] Section 2(5)(a) and (b), Ch. 83-134, Laws of Florida.

[4] *Compare, e.g.*, s. 1, Ch. 11838, Laws of Florida 1927, defining fresh water fish as all of the class of Pisces that are indigenous to freshwater and also all fish that are in the fresh water of the State, whether or not they are indigenous. *See also* s. 372.001(6), F.S., defining "freshwater fish" to include all classes of pisces that are indigenous to freshwater. The revisor's note to s. 371.01, F.S.1941, states that there are numerous definitions and general provisions in the fish and games laws which relate to salt water fish, shell fish, sponges and fresh water fish and game. These provisions "have been collected under one chapter, which chapter is applicable to all fish and game laws."

[5] 36A C.J.S. *Fish* s. 1. *And see* Black's Law Dictionary *Fish* p. 764 (4th rev. ed. 1968) (an animal which inhabits the water, breathes by means of gills, swims by the aid of fins and is oviparous. The term includes crabs, escallops and mussels and other shellfish).