

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

ALLEY CAT ALLIES, INC. and	)	
FRANK HAMILTON,	)	
	)	
Petitioners,	)	
	)	
and	)	Case No. 03-2156RU
	)	
SPACE COAST FELINE NETWORK,	)	
ELLEN DOZIER, MELINDA R.	)	
BUSCHOR, EILEEN GOULD, MARY	)	
PRICE, ELVIRA HASTY, and THE	)	
CAT NETWORK, INC.,	)	
	)	
Intervenors,	)	
	)	
vs.	)	
	)	
FISH AND WILDLIFE CONSERVATION	)	
COMMISSION,	)	
	)	
Respondent.	)	
_____	)	

SUMMARY FINAL ORDER

This Summary Final Order is entered following the filing of Respondent's Motion for Summary Final Order on July 23, 2003. Also considered prior to the entry of this order are Petitioners' response in opposition filed August 6, 2003; Respondent's Initial Brief filed August 6, 2003; Petitioners' Response Brief filed August 20, 2003; and Respondent's Reply Brief filed August 27, 2003. All citations are to Florida Statutes (2002) unless otherwise indicated.

## STATEMENT OF THE ISSUE

Whether the policy on impacts of domestic cats on native wildlife adopted by the Florida Fish and Wildlife Conservation Commission on May 30, 2003, is an agency statement that violates Section 120.54(1)(a), Florida Statutes?

## FINDINGS OF FACT

1. On May 30, 2003, the Florida Fish and Wildlife Conservation Commission (the "FWC" or the "Commission") adopted a policy (the "Feral and Free Ranging Cat Policy" or the "Policy"). The Policy is attached as an exhibit to the Petition filed by Petitioners, Alley Cat Allies, Inc. and Frank Hamilton, that initiated this proceeding:

### **Position and Policy**

The domestic cat (*Felis catus*) is not native to Florida, but feral and free-ranging cats occur throughout the state and number several million. Cats prey upon both common and rare species of native wildlife in Florida, including species listed as threatened or endangered by state and federal governments. Although the cumulative impact of cats upon native wildlife in Florida remains uncertain relative to other impacts, predation by cats is common and can be especially detrimental to wildlife populations that are small or restricted in their distribution.

The Florida Fish and Wildlife Conservative Commission (FWC) is mandated by the Florida Constitution to conserve and protect populations of native wildlife, and the FWC has authority to curtail adverse impacts that nonnative animals cause to native

species. Therefore, it is the policy of the FWC to protect native wildlife from predation, disease, and other impacts presented by feral and free-ranging cats.

The FWC recognizes that local governments have the responsibility to regulate domesticated species, including cats, but the actions of local governments must not adversely impact native wildlife. Thus, the FWC will strive to minimize or eliminate the impacts of cats where they pose a significant threat to local wildlife populations, but will otherwise leave control of nuisance of feral cats and issues of local public safety and welfare to local governments.

### **Implementation**

Implementing this broad policy will require a variety of FWC resources as well as cooperative efforts between FWC and other public agencies and private groups. Because of the extent of the domestic cat problem, protection of listed species and public lands are considered the highest priority. Several strategies may be followed and listed below are some that should be particularly useful in protecting native wildlife from feral or free-ranging cats. FWC staff should consider these and other potential strategies and recommend implementation measures, as appropriate.

#### **Recommended strategies:**

- (1) develop and implement a comprehensive education program to increase public awareness of the impacts that feral and free-ranging cats present to wildlife, identify ways for cat owners to minimize impacts, and inform cat owners of laws prohibiting the release or abandonment of cats to the wild;

(2) eliminate the threat cats pose to the viability of local populations of wildlife, particularly species listed as Endangered, Threatened, or of Special Concern;

(3) prohibit the release, feeding, or protection of cats on lands managed by the FWC, and strongly oppose programs and policies that allow the release, feeding, or protection of cats on public lands that support wildlife habitat;

(4) provide technical advice, policy support, and partnerships to land management agencies in order to prevent the release, feeding, or protection of cats on public lands that support wildlife habitat;

(5) oppose the creation or maintenance of Trap-Neuter-Release (TNR) programs and similar activities involving managed cat colonies because they are not an effective means of reducing or eliminating the impacts of feral cat populations on native wildlife;

(6) support the elimination of TNR colonies and similar managed cat colonies wherever they potentially and significantly impact local wildlife populations;

(7) evaluate the need for new rules to minimize the impact of cats on native wildlife.

Petition to Challenge Agency Rule or Statement Entitled, "Policy on Impacts of Domestic Cats on Native Wildlife", Exhibit A, p. 4 and 5.

2. The Feral and Free Ranging Cat Policy was not adopted by the rulemaking procedure provided by Section 120.54.

## CONCLUSIONS OF LAW

### Jurisdiction

3. The petition in this case is filed pursuant to Section 120.56(4).

4. The Commission is in agreement with Petitioners that the Feral and Free Ranging Cat Policy was adopted without compliance with the rulemaking provisions of Chapter 120, Florida Statutes, the Administrative Procedure Act (the "APA"). There are, therefore, no facts in dispute in this case material to a determination pursuant to Section 120.56(4).

5. Since there is no "genuine issue as to any material fact," notwithstanding Petitioners' written response in opposition, the Commission's Motion for Summary Final Order is appropriate. Section 120.57(1)(h); Fla. Admin. Code R. 28-106.204.

### Pertinent Provisions of the APA

6. Section 120.56(4)(a), states "[a]ny person substantially affected by an agency statement may seek an administrative determination that the statement violates s. 120.54(1)(a)."

7. Section 120.54(1)(a), in part, states, "[r]ulemaking is not a matter of agency discretion. Each agency statement defined as a rule by s. 120.52 shall be adopted by the

rulemaking procedure provided by this section as soon as feasible and practicable."

8. Section 120.52(15), in pertinent part, defines the term "rule:"

'Rule' means each agency statement of general applicability that implements, interprets, or prescribes law or policy or describes the procedure or practice requirements of an agency . . .

The term does not include:

(a) Internal management memoranda which do not affect either the private interests of any person or any plan or procedure important to the public and which have no application outside the agency issuing the memorandum.

\* \* \*

#### The Commission's Contentions

9. The Commission contends that the Feral and Free Ranging Cat Policy is not subject to the rulemaking provisions of the APA because it is an exercise of Commission power derived solely from the Florida Constitution.

10. Indeed, the Legislature has specifically recognized that the exercise of the Commission's constitutional power is not subject to Chapter 120 rulemaking provisions. Only "agency statements" are subject to the provisions of Section 120.56(4), that allow challenges to statements defined as rules. The term "agency" includes the Commission only "when acting pursuant to

statutory authority derived from the Legislature." Section 120.52(1)(b)4.

11. In support of its argument that the Feral and Free Ranging Cat Policy is a statement made under the Commission's constitutional power immune from challenge under Section 120.56(4), the Commission has cited a number of cases dealing with its constitutional power and among them are: *Caribbean Conservation Corporation, Inc. v. Florida Fish and Wildlife Conservation Commission*, 838 So. 2d 492 (Fla. 2003); *Airboat Ass'n of Fla., Inc. v. Florida Game and Fresh Water Fish Commission*, 498 So. 2d 629, 631 (Fla. 3d DCA 1986); and, *Florida Minerals Association v. Florida Fish and Wildlife Conservation Commission*, Case No. 01-0746RU (DOAH March 27, 2001).

12. By its terms, the purpose of the Policy is to protect native wildlife. The Commission is mandated by the Florida Constitution in Article IV, Section 9, to exercise the regulatory and executive powers of the state over native wildlife: "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 [those powers] with respect to marine life [with certain exceptions]."

13. Article IV, Section 9 of the Florida Constitution, provides further that "[t]he 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." Hence, the Legislature included the Commission within the definition of "agency" in Section 120.52(1)(b)4., "when acting pursuant to statutory authority derived from the Legislature" and, further provided that the Commission is subject to challenges under Section 120.56(4) to its non-rule statements based on that non-constitutional authority.

14. The Policy, predominately, concerns the regulatory and executive powers over native wildlife derived from the Florida Constitution.

15. Among the Policy's "[r]ecommended strategies" to be considered under the Policy by FWC staff, however, is development of a comprehensive education program to increase public awareness. See (1) under "Recommended strategies" listed in the Policy. Such a strategy would likely include the entry by FWC into agreements for the private publication of public information, an act authorized by statute:

(1) The Fish and Wildlife Conservation Commission may enter into agreements to secure the private publication of public information brochures, pamphlets, audiotapes, videotapes, and related



materials for distribution without charge to  
the public . . . .

Section 372.0222.

16. It is upon this slender reed, the possibility of the Policy's implication of authority in Section 372.0222, that the petition in this case was able to withstand a motion to dismiss filed by FWC.

17. There is another potential basis for disposition of this proceeding briefed by the parties pursuant to an order entered in this proceeding; one that is not grounded in the Florida Constitution. Summary final order should be entered in favor of FWC if the Feral and Free Ranging Cat Policy does not meet the definition of the term "rule" in the APA.

A Rule? The Arguments of the Parties

18. There is no question that the Feral and Free Ranging Cat Policy is a statement of the FWC. It is in writing. It was adopted at a meeting of the Commission. It sets forth the "policy of the FWC to protect native wildlife from predation, disease, and other impacts presented by feral and free-ranging cats." See paragraph 2 of the Policy. But is it "one of general applicability that implements, interprets, or prescribes law or policy or describes the procedure or practice requirements of an agency?"

19. The Commission cites to *Department of Revenue v. Novoa*, 745 So. 2d 378 (Fla. 1st DCA 1999) in which the court cautioned:

The legislative power to regulate rulemaking necessarily includes the authority to prevent an agency from employing a policy that meets the definition of a rule. It does not follow, however, that the definition of a rule should be applied so expansively that it brings all agency functions within the direct supervision of the legislature. When a dispute arises over the mandatory rulemaking provisions of section 120.54(1)(a), the court must protect the legislative power to regulate rulemaking, but the court must also ensure that the definition of a rule is not applied so broadly that it includes executive branch functions within its scope.

*Id.* at 381. The court in *Novoa* found the policy at issue there, that employees of the Department of Revenue are not allowed to prepare tax returns for private parties during non-working hours, to fall within the "internal memorandum" exception to the definition of a rule.

20. But the court also found that the policy was not a rule because it was not self-executing. It did not, therefore, have the force of a rule. The policy at issue in *Novoa* did not constitute a mechanism for action. It established a disciplinary standard, but it did not mention the possible penalty. Nor did it contain a procedure for imposing the penalty. The court wrote:

Another factor supporting our conclusion in this case is that the Department's policy is not self-executing. Although the policy sets a standard of conduct that might ultimately result in disciplinary action, it does not provide a remedy or establish a procedure that could be used to impose a penalty. A career service employee charged with a violation of the policy is still entitled to all of the protections of the career service system. In this respect, we find the policy to be quite different from the one we addressed in *Florida State University v. Dann*, 400 So. 2d 1304 (Fla. 1st DCA 1981). There, we held that a University policy setting forth the procedure for awarding merit pay increases for faculty members was not an internal management memorandum. The difference is that the mechanism for the agency action in *Dann* was the policy itself. Because the policy was self-executing, it had the same force as a rule.

*Id.* at 382.

21. Petitioners respond that the Feral and Free Ranging Cat Policy, by its very existence, is disrupting years of planning, education and activity to promote spay/neuter, vaccinations, adoption and other humane care management programs that have proved successful in reducing populations of feral and free-ranging cats in a cost efficient manner. While proof of this allegation might sustain Petitioners' standing, it does not make the Policy a rule.

22. Petitioners further argue that the Policy does not fall within the "internal memorandum" exception to the definition of a rule. However apt, this argument does not cure

the other bases in *Novoa* offered by the court for its finding that the *Novoa* policy was not a rule.

23. What is it about the Policy that is self-executing? What is it that the Policy implements, interprets or prescribes? What procedure or practice requirement of the agency does the Policy describe? The answer to each of these questions is "nothing." The Policy exhorts staff to consider various recommended strategies. Not only does it merely recommend that staff consider various strategies, it then calls for staff, in turn, to "recommend" appropriate implementation measures. The Policy is at least one step, if not two, removed from actual interpretation, implementation or prescription of law or policy. Just as the *Novoa* policy was not self-executing, the Feral and Free Ranging Cat Policy of the FWC is not self-executing. It is merely hortatory.<sup>1</sup>

24. The Feral and Free Ranging Cat Policy adopted by FWC on May 30, 2003, does not meet the definition of "rule" contained in Section 120.52(15).

#### ORDER

Because the Feral and Free Ranging Cat Policy does not meet the definition of the term "rule" in Section 120.52(15), Summary Final Order is entered in favor of the Commission. The Petition to have the Feral and Free Ranging Cat Policy determined to be a statement that violates Section 120.54(1)(a), is denied.

DONE AND ORDERED this 29th day of August, 2003, in  
Tallahassee, Leon County, Florida.



DAVID M. MALONEY  
Administrative Law Judge  
Division of Administrative Hearings  
The DeSoto Building  
1230 Apalachee Parkway  
Tallahassee, Florida 32399-3060  
(850) 488-9675 SUNCOM 278-9675  
Fax Filing (850) 921-6847  
www.doah.state.fl.us

Filed with the Clerk of the  
Division of Administrative Hearings  
this 29th day of August, 2003.

ENDNOTE

1/ See *In re CODE OF JUDICIAL CONDUCT*, 643 So. 2d 1037, (Fla. 1994), for another context in which language is hortatory and does not constitute a rule. "When the text uses 'shall' or 'shall not,' it is intended to impose binding obligations the violation of which, if proven, can result in disciplinary action. When 'should' or 'should not' is used, the text is intended as hortatory and as a statement of what is or is not appropriate conduct but not as a binding rule under which a judge may be disciplined. When "may" is used, it denotes permissible discretion or, depending on the context, it refers to action that is not covered by specific proscriptions. *Id.* at 1041.

COPIES FURNISHED:

Barbara A. Eagan, Esquire  
Arnold, Matheny & Eagan, P.A.  
801 North Magnolia Avenue, Suite 201  
Post Office Box 2967  
Orlando, Florida 32802-2967

Charles J. Hardee, Esquire  
Michael A. Yaun, Esquire  
Florida Fish and Wildlife Conservation Commission  
620 South Meridian Street  
Tallahassee, Florida 32399-1600

James V. Antista, Esquire  
Florida Fish and Wildlife Conservation Commission  
620 South Meridian Street  
Bryant Building, Room 108  
Tallahassee, Florida 32399-1600

Liz Cloud, Chief  
Department of State  
Bureau of Administrative Code  
The Elliott Building  
Tallahassee, Florida 32399-0250

Carroll Webb, Executive Director  
And General Counsel  
Administrative Procedures Committee  
Holland Building, Room 120  
Tallahassee, Florida 32399-1300

Kathleen F. Harer, President  
Space Coast Feline Network  
138 East Leon Lane  
Cocoa Beach, Florida 32931

Albert S. Lagano, Esquire  
551 South Apollo Boulevard, Suite 103  
Melbourne, Florida 32901

#### NOTICE OF RIGHT TO JUDICIAL REVIEW

A party who is adversely affected by this Final Order is entitled to judicial review pursuant to Section 120.68, Florida Statutes. Review proceedings are governed by the Florida Rules of Appellate Procedure. Such proceedings are commenced by filing the original notice of appeal with the Clerk of the Division of Administrative Hearings and a copy, accompanied by filing fees prescribed by law, with the District Court of Appeal, First District, or with the District Court of Appeal in the Appellate District where the party resides. The notice of appeal must be filed within 30 days of rendition of the order to be reviewed.