

IN THE SUPREME COURT OF FLORIDA

CARIBBEAN CONSERVATION CORPORATION,)
INC., et al.,)
)
 Petitioners,)
)
v.) Case No. 01-1885
)
) Lower Tribunal Case
FISH AND WILDLIFE CONSERVATION) Nos. 1D00-1389, 1D00-
) 1804
COMMISSION and STATE OF FLORIDA)
ex rel. ROBERT A. BUTTERWORTH,)
ATTORNEY GENERAL,)
)
 Respondents.)
_____ /

ANSWER BRIEF OF RESPONDENT
STATE OF FLORIDA ex rel. ROBERT A. BUTTERWORTH, ATTORNEY
GENERAL

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INTRODUCTION

The Fish and Wildlife Conservation Commission (FWCC) has jurisdiction over all levels of endangered marine life. The chief issue presented by this appeal is whether that jurisdiction is constitutionally or legislatively derived. Petitioners argue that the FWCC's endangered marine life authority arises under recent constitutional amendments and, consequently, that the Legislature has unconstitutionally attempted to require the commission to comply with the Administrative Procedure Act (APA) when regulating endangered marine life. The State and the FWCC itself maintain that the FWCC's endangered marine life authority is statutory and, thus, that the challenged statutes are constitutional.

From the outset, it is critical to appreciate that petitioners' theory impacts more than the APA-related statutes that petitioners challenge. Their theory disputes the Legislature's entire ability to address endangered marine species and thus calls into question the effectiveness of all Florida statutes governing manatees, sea turtles and other endangered marine life, including extensive manatee protection legislation recently passed by the Legislature. See Ch. 2002-264, §§ 16-19, Laws of Fla. (CS/HB 1243, approved by Governor Bush on May 15, 2002). The First District concluded that the

FWCC's endangered marine species jurisdiction is statutory and that the Legislature retains its historic authority to regulate such species. That decision should be approved.

STATEMENT OF THE CASE AND FACTS

Petitioners' claims center on a revision to the Florida Constitution proposed by a constitution revision commission and approved by voters in the 1998 general election. Effective July 1, 1999, that revision established the FWCC and eliminated two former state agencies. Those changes, and petitioners' claims in this case, can be understood only by examining how Florida regulated its "fish and wildlife" prior to July 1, 1999, and what efforts were undertaken to change that regulatory scheme.

I. REGULATORY BACKGROUND

Florida's "fish and wildlife" may be grouped into three categories -- wild animal life, freshwater aquatic life, and marine life. Prior to July 1, 1999, jurisdiction over these areas was exercised primarily by three separate state agencies -- the Game and Freshwater Fish Commission (Game Commission), the Marine Fisheries Commission (MFC), and the Department of Environmental Protection (DEP).¹

The Game Commission was a constitutional agency established by a 1942 constitutional amendment. See Art. IV, § 30, Fla.

¹ Other agencies had, and still have, minor roles in the regulation of fish and wildlife. For example, the Department of Agriculture and Consumer Services has jurisdiction over "aquaculture." See Ch. 597, Fla. Stat. (1999)(Florida Aquaculture Policy Act); see also Ch. 99-245, § 39, Laws of Fla. (1999)(creating § 370.025(4)(c), Fla. Stat., which excepts aquaculture regulation from the FWCC's jurisdiction).

Const. (1885, as amended)(subsequently amended and transferred to Art. IV, § 9, Fla. Const.). The Constitution granted the Game Commission "the regulatory and executive powers of the state with respect to wild animal life and fresh water aquatic life[.]" Id. The Legislature supplemented that constitutional authority through various grants of statutory authority. See, e.g., §§ 327.70 (permitting enforcement of boating safety requirements); 372.5717 (permitting coordination of hunter safety courses); 372.674 (permitting establishment of environmental education programs), Fla. Stat. (1997). Thus, the Game Commission was a constitutional agency that possessed both constitutional and statutory powers.

Among the Game Commission's activities was to maintain lists of endangered species. The Game Commission divided these species into three categories: endangered, threatened, and special concern. See, e.g., Fla. Admin. Code R. 39-27.002-.005 (1999)[State's Appx., Ex. G]. The Game Commission defined the criteria for listing on these three lists and selected which species to include on each list. The lists included marine species, but the lists themselves indicated that another agency, the DEP, had authority over those particular species. See, e.g., Fla. Admin. Code R. 39-27.002(3)(1999)[State's Appx., Ex. G](stating that the Secretary of the DEP may issue permits

relating to marine species listed as endangered or threatened).

The DEP was, and remains, a statutory agency created by the 1993 merger of two statutory agencies -- the Department of Environmental Regulation and the Department of Natural Resources (DNR). See Ch. 93-213, Laws of Fla.; see also § 20.255, Fla. Stat. (1993). The regulatory jurisdiction assumed by the DEP included diverse matters such as air quality, water quality, solid and hazardous waste management, and beach and shore preservation. See generally Chs. 161, 373, 376-78, 403, Fla. Stat. (1993).

With its creation, the DEP also received the statutory authority previously held by DNR regarding endangered marine species. See Ch. 93-213, § 3, Laws of Fla. (transferring all existing legal authorities and actions from DNR to DEP); § 370.02(2), Fla. Stat. (1993)(imposing duty on DNR's Division of Marine Resources to preserve, manage and protect the state's marine resources); see also § 372.072(4)(a)2., Fla. Stat. (1993)(making DEP responsible for research and management of marine species). The DEP also inherited numerous statutes that previously guided the DNR in its efforts to protect Florida's endangered marine life. For instance, the Marine Turtle Protection Act directed the DNR to require marine turtle protection as a permit condition for any activity that affected

the turtles, their nests, or their habitats. § 370.12(1)(d)-(g), Fla. Stat. (1993). Similarly, the Florida Manatee Sanctuary Act instructed the DNR to issue permits for the possession of manatees and to adopt rules regarding motorboat speed, motorboat operation, and the construction and expansion of marinas. § 370.12(2), Fla. Stat. (1993).

The third primary agency that regulated Florida's "fish and wildlife" prior to July 1, 1999, was the MFC, which the Legislature created by statute in 1983. See Ch. 83-134, § 1, Laws of Fla. (codified at section 370.026, Fla. Stat. (1983)). The 1983 Legislature granted the MFC full jurisdiction over marine life, including exclusive jurisdiction over a number of areas, but the Legislature specifically excepted endangered species from that grant and reserved all unaffected marine life authority to the then-existing DNR:

(1) Pursuant to the policy and standards in s. 370.025, the Marine Fisheries Commission is delegated full rulemaking authority over marine life, **with the exception of endangered species All administrative and enforcement responsibilities which are unaffected by the specific provisions of this act continue to be the responsibility of the [D]epartment [of Natural Resources].**

(2) Exclusive rulemaking authority in the following areas relating to marine life, **with the exception of endangered species**, is vested in the commission . . . :

- (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, except for public health purposes;
- (h) Quality control, except for oysters, clams, mussels, and crabs, unless such authority is delegated to the Department of Agriculture and Consumer Services;
- (i) Seasons; and
- (j) Special considerations relating to eggbearing females.

§ 370.027(1)-(2)(1983)(emphasis added). As previously indicated, the DNR's endangered marine species authority passed to the DEP with that agency's creation in 1993.

II. CONSOLIDATION EFFORTS

In 1997 and 1998, there were two distinct efforts to consolidate Florida's regulation of fish and wildlife. The first, a ballot initiative, failed when this Court rejected the initiative's ballot summary as constitutionally insufficient. The second effort, a constitutional amendment proposed by a constitution revision commission, succeeded when the proposal was approved by voters in the 1998 general election. Both efforts are relevant to petitioners' arguments in this case.

A. Ballot Initiative

The ballot initiative proposed to amend Article IV, section 9, to unite the MFC and the Game Commission in a new commission to be known as the Fish and Wildlife Conservation Commission.

The proposed commission would "exercise the regulatory and executive powers of the state with respect to wild animal life, freshwater aquatic life, and marine aquatic life[.]" Advisory Opinion to the Attorney General re Fish & Wildlife Conservation Comm., 705 So. 2d 1351, 1353 (Fla. 1998) [hereafter "FWCC Advisory Opinion"].

In FWCC Advisory Opinion, this Court considered the ballot initiative and struck the proposal from the ballot. The Court held that the ballot summary failed to explain that the proposed consolidation would eliminate the Legislature's exclusive authority over marine life:

[T]he power to regulate marine life lies solely with the legislature, which has delegated that power to not only the Marine Fisheries Commission but also the Department of Environmental Protection and the Department of Agriculture. Though the summary states that the purpose of the amendment is to "unify" the Marine Fisheries Commission with the Game and Fresh Water Fish Commission, those two entities do not share the same status. Despite the common label "commission," the former is a legislative creation while the latter enjoys independent constitutional stature. Thus the proposed amendment does not unify the two so much as it **strips the legislature of its exclusive power to regulate marine life and grants it to a constitutional entity.** The summary does not sufficiently inform the public of this transfer of power.

Id. at 1355 (emphasis added)(footnote omitted).

2. 1997-1998 Constitution Revision Commission

In June, 1997, a Constitution Revision Commission (CRC) was

convened pursuant to Article XI, section 2, of the Florida Constitution. The CRC considered over 180 proposals to amend the Florida Constitution.² Proposal 45, by Commissioner Henderson (then-President of the Florida Audubon Society), proposed to transfer the powers and duties of the Game Commission to a new constitutional commission, to abolish the Game Commission and the MFC, and, like the ballot initiative, to grant the new FWCC executive and regulatory jurisdiction over all marine life. See Proposal 45 (CRC 17-31-pr (IV-9-1))[State's Appx., Ex. E]. Proposal 45 underwent several revisions before being unanimously approved by the CRC and placed within proposed Revision 5, which itself was approved by the CRC by a vote of 34 to 2. State's Appx., Ex. F, at 234.³

The final version of Revision 5 stated that it would abolish the Game Commission and the MFC, but, unlike the original

² A partial record of the CRC's activities, including copies of each proposal considered, the CRC Journal, and transcripts of the CRC's debates, is available on the Internet at <<http://www.law.fsu.edu/crc/index.html>>. The complete record relating to Proposal 45 is available at the Florida State Archives (R.A. Gray Building) in Record Group 1008, Series 1768, Carton 2.

³ Revision 5 was actually designated Revision 1 by the CRC. See State's Appx., Ex. C; Ex. F, at 249-50. However, it was placed on the ballot by the Secretary of State as Revision 5 because it followed four constitutional amendments proposed by the Legislature during the 1998 regular session. The State will refer to the revision as Revision 5 throughout this brief.

Proposal 45 and the failed ballot initiative, the revision did not state that it would grant the FWCC "the regulatory and executive powers of the state with respect to wild animal life, freshwater aquatic life, and marine aquatic life." Instead, the pertinent portion of Revision 5 provided, "The commission 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" State's Appx., Ex. C; Ex. F, at 250-51 (proposing to amend Art. IV, § 9). The revision also stated that "[t]he jurisdiction of the [MFC] as set forth in statutes in effect on March 1, 1998, shall be transferred to the [FWCC]." Id. (proposing to create Art. XII, § 12).

The ballot summary presented to voters in the 1998 general election stated that Revision 5 "remove[d] [the] legislature's exclusive authority to regulate marine life and grant[ed] certain powers to [the] new commission" State's Appx., Ex. C, at 6 (emphasis added). Seventy-two percent of voters in that election approved Revision 5. R. 12. The portions of that revision relating to the FWCC became effective on July 1, 1999. See Art. XII, § 23(d), Fla. Const.

To implement Revision 5, the Legislature passed Chapter 99-245, Laws of Florida (the "merger bill"), during the 1999

regular legislative session. R. 12; State' Appx. Ex. C. Like Revision 5, the merger bill became effective on July 1, 1999. Ch. 99-245, § 259, Laws of Fla. (1999). Among other things, the merger bill complemented Revision 5 by granting the FWCC statutory authority over marine life species listed by the commission as endangered, threatened, and of special concern, and, in particular, manatees and sea turtles. Id. §§ 1, 39, 45. The law also required the FWCC to comply with the APA when adopting rules relating to such species. Id.

III. COURSE OF PROCEEDINGS BELOW

Petitioners initiated this case on August 2, 1999, by filing a circuit court action for declaratory and injunctive relief. R. 1. Petitioners' complaint requested the court to "declare unconstitutional and invalidate portions of section 1 and section 39, and potentially portions of section 45, Chapter 99-245, Laws of Florida" because, in petitioners' view, those provisions "unconstitutionally limit the powers of the [FWCC] over endangered and threatened species." R. 1-2. In essence, petitioners argued that the FWCC's authority over manatees and marine turtles is constitutional, and thus the Legislature could not characterize that authority as statutory or require the commission's rulemaking activities to comply with the APA. R. 3-8 (¶¶ 5, 8, 11, 13, 15, 17). The Attorney General and the

FWCC itself disagreed and defended the merger bill's constitutionality.

On cross-motions for summary judgment, the trial court rejected petitioners' arguments that it should look no further than the text of newly amended Article IV, section 9, and hold that the Constitution gives the FWCC full jurisdiction over endangered species. The court instead looked to the transfer of power from the MFC to the FWCC found in Article XII, section 23, and considered whether the MFC had jurisdiction over endangered species. The court then interpreted State v. Davis, 556 So. 2d 1104 (Fla. 1990), to hold that the MFC had full jurisdiction over endangered species, and, finding that jurisdiction to have been constitutionally passed to the FWCC, the trial court entered summary judgment for petitioners. State's Appx., Ex. B.⁴

The FWCC and the Attorney General each timely appealed and moved to certify the matter as one requiring immediate resolution by this Court. The First District granted those motions, but this Court declined review at that time. See State v. Caribbean Conservation Corp., 767 So. 2d 461 (Fla. 2000); Florida Fish and Wildlife Cons. Comm'n, 767 So. 2d 456 (Fla.

⁴ Specifically, following a clarification on rehearing, the trial court declared unconstitutional § 20.331(6)(c)1., § 370.025(4)(a), and § 370.12(1)(c)3., (1)(h), (2)(g)-(I), (2)(k)-(n), (2)(p)1., and (2)(q).

2000). The cases were then consolidated before the First District, which reversed the trial court. Florida Fish and Wildlife Cons. Comm'n. v. Caribbean Cons. Corp., Inc., 789 So. 2d 1053 (Fla. 1st DCA 2001).

The First District agreed with the Attorney General and the FWCC that Davis v. State did not hold that the MFC had full jurisdiction over endangered species; rather, Davis held only that the MFC had what amounted to incidental jurisdiction over endangered species when the MFC exercised its exclusive authority to regulate fishing gear. The court thus also agreed that Revision 5 did not pass full authority over endangered species from the MFC to the FWCC. Accordingly, the First District held the trial court erred in determining that the FWCC's authority over those species was constitutional and that any legislation regarding those species is unconstitutional. Petitioners now seek review in this Court.

SUMMARY OF ARGUMENT

Petitioners argue that Revision 5 deprived the Legislature of all authority to oversee the regulation of endangered marine life, including manatees and sea turtles. Petitioners' "plain meaning" argument attempts to read amended Article IV, section 9, in isolation and contends that this amended provision grants the FWCC full constitutional authority over Florida's animal

wildlife, freshwater aquatic life, and marine life. Petitioners are incorrect. Florida law requires that constitutional provisions be read to effectuate the intent of those who drafted and approved the language. Constitutional provisions should also be read together, giving all constitutional language its intended effect.

Applying such principles, it is manifest that Revision 5 did not grant the FWCC full constitutional authority over marine life. Petitioners completely ignore that Revision 5 empowered the FWCC to exercise authority over marine life, but it did not give the FWCC "the" executive and regulatory authority of the state over marine life, as it did animal wildlife and freshwater aquatic life. Instead, Revision 5 transferred the former MFC's statutory jurisdiction to the FWCC, and with that transfer went the endangered species exception that precluded the MFC from having full jurisdiction over endangered marine life.

Petitioners also ignore that the CRC drafted Revision 5 with the specific, express intent of merely combining the MFC's limited marine life jurisdiction with the Game Commission's animal wildlife and freshwater aquatic life jurisdiction. The CRC specifically intended to leave authority over endangered marine life, including manatees and sea turtles, in the hands of the Legislature, which would be free to delegate that authority

to FWCC by statute, as it has now done.

Petitioners' reliance on FWCC Advisory Opinion for the notion that this Court has already interpreted the language of Article IV, section 9, to deprive the Legislature of all marine life authority fails to account for the material distinctions between the ballot initiative considered in that case and the language of Revision 5 as proposed by the CRC. Likewise, petitioners' reliance on State v. Davis for the notion that the MFC had full jurisdiction over endangered marine life misreads the narrow holding of that case and ignores both the Legislature's view of the MFC's jurisdiction and the CRC's specific intent not to deprive the Legislature of its endangered marine life authority.

Petitioners' final point, raised here for the first time, is that the endangered species exception to the MFC's jurisdiction extended only to marine life on the Game Commission's "endangered" list and not those on the "threatened" or "special concern" lists. This, too, is incorrect. When the Legislature created the MFC, it intended the endangered species exception to refer broadly to all marine species that were endangered to any degree and therefore listed by either the Game Commission or the federal government. The DNR's Department of Marine Resources already had jurisdiction over those species,

and the MFC's role was to regulate fishing of renewable marine fisheries resources. Of course, marine species on the Game Commission's or the federal government's lists were not renewable fish; nor were they fished. All entities involved shared this reasonable view of the MFC's jurisdiction, as did the Legislature and the CRC. Petitioners' point should be rejected.

STANDARD OF REVIEW

The constitutionality of a statute is reviewed de novo on appeal. E.g., Armstrong v. Harris, 773 So. 2d 7, 11 (Fla. 2000). The statute must be presumed constitutional, and all reasonable doubts as to the statute's validity must be resolved in favor of constitutionality. In re Estate of Caldwell, 247 So. 2d 1, 3 (Fla. 1971); see also Armstrong v. City of Edgewater, 157 So. 2d 422, 425 (Fla. 1963)(holding it to be a "judicial obligation" to sustain an act of the legislature wherever possible).

ARGUMENT

In this proceeding, petitioners ask this Court to invalidate statutes that require the FWCC to comply with the APA when making rules regarding endangered marine life. Petitioners' purported aim is to prevent delays in rule implementation where persons utilize the APA to challenge proposed rules. R. 4-8.

That purported aim, however, disregards the FWCC's ability to implement emergency rules during the pendency of rule challenges. See § 120.54(4)(a)-(c), Fla. Stat. (2001).

It cannot be overstated that the practical aim of this proceeding is to achieve judicial invalidation of all statutes addressing endangered marine life, particularly manatees and sea turtles, by prevailing on the theory that Revision 5 deprived the Legislature of all authority over those species. This radical notion is entirely contrary to the CRC's intent in drafting Revision 5. This notion is also based on a nonsensical view of the former MFC's statutory jurisdiction -- a view not shared by any entity involved, including the Legislature itself, which continues to enact legislation addressing Florida's manatees. See Ch. 2002-264, §§ 16-19, Laws of Fla. (CS/HB 1243, approved by Governor Bush on May 15, 2002). Petitioners' arguments should be rejected.

I. REVISION 5 DID NOT AUTHORIZE THE FWCC TO REGULATE ENDANGERED MARINE LIFE.

Throughout this litigation, petitioners' primary argument has been that, read in isolation, the "plain meaning" of amended Article IV, section 9, gives the FWCC full jurisdiction over endangered marine life. Yet neither the trial court nor the district court accepted that demonstrably false argument. In addition, petitioners' "plain meaning" argument completely

ignores the wealth of historical information that confirms the CRC's clear intent not to give the FWCC constitutional jurisdiction over endangered marine life. That intent, together with the text of the entire revision, should dispose of petitioners' first point.

A. THE AMENDED CONSTITUTION SIMPLY TRANSFERS TO THE FWCC THE FORMER JURISDICTION OF THE MFC, WHICH DID NOT ENCOMPASS ENDANGERED MARINE LIFE.

By providing that the FWCC "shall exercise the regulatory and executive powers of the state with respect to wild animal life and freshwater aquatic life . . . ," revised Article IV, section 9, grants the FWCC complete authority over two of Florida's three forms of "fish and wildlife." Art. IV, § 9, Fla. Const. (1999)(emphasis added). However, with respect to the third form -- marine life -- Article IV, section 9, states only that the FWCC "shall exercise regulatory and executive powers of the state with respect to marine life." Id. This second grant of authority is not absolute -- it simply declares that the FWCC holds some regulatory and executive powers regarding marine life. The scope of that authority is defined later in Revision 5, in language creating Article XII, section 23, which states, "The jurisdiction of the marine fisheries

commission as set forth in statutes in effect on March 1, 1998, shall be transferred to the fish and wildlife commission." Art. XII, § 23(b), Fla. Const. (1999).

Read together, these two constitutional provisions clearly provide that the FWCC is authorized (1) to exercise the state's regulatory and executive authority over animal wildlife and fresh water aquatic life and (2) to exercise the state's regulatory and executive authority over marine life to the extent the MFC had such jurisdiction on March 1, 1998. On that date, and on all dates since the agency's inception, the MFC did not exercise full authority over endangered species because that authority was expressly excepted from the agency's jurisdiction, § 370.027(1), Fla. Stat. (1997), and expressly delegated to another agency, the DEP. §§ 370.12, 372.072(4)(a)2., Fla. Stat. (1997).

To avoid the effects of importing the MFC's circumscribed jurisdiction into the FWCC, petitioners argue that Article IV, section 9, should be read in isolation and that its "plain meaning" grants the FWCC complete and exclusive authority over all marine life. Petitioners contend that Article XII, section 23, can have no substantive effect because that portion of Revision 5 was labeled "Schedule." Petitioners also argue that this Court's decision in FWCC Advisory Opinion commands the

result they seek because that decision supposedly interpreted "essentially identical" language to hold the meaning petitioners now advance.

Petitioners' arguments conflict with settled law on the interpretation of constitutional provisions. Those arguments also ignore the text of the newly amended Constitution and the clear, well-expressed intent of Revision 5's drafters, the CRC. The State will address each of these points in turn.

Florida Law on Constitutional Interpretation

Petitioners' "plain meaning" argument relies heavily on cases applying the principle that no resort should be made to statutory construction where a statute's plain meaning is clear. In. Br. at 10-13. That analysis is inapplicable here, where constitutional provisions are at issue. Constitutional interpretation places greater reliance on language's intended effect than does statutory interpretation. Florida Soc. of Ophthalmology v. Florida Optometric Ass'n., 489 So. 2d 1118, 1119 (Fla. 1986)("Constitutions are 'living documents,' not easily amended, which demand greater flexibility in interpretation than that required by legislatively enacted statutes."). The principles espoused, rather than the direct operation or literal meaning of the words used, measure the purpose and scope of a constitutional provision. Id.

Ultimately, a court's interpretation of constitutional language should be led by the intent and purpose of those who drafted and approved that language. In re Apportionment Law, 414 So. 2d 1040, 1048 (Fla. 1982); State ex rel. West v. Gray, 74 So. 2d 114, 115 (Fla. 1954); see also Schreiner v. McKenzie Tank Lines, 432 So. 2d 567, 569 (Fla. 1983)(citing the transcripts of the 1968 CRC to determine the framers' intent of a provision formulated by that body); Advisory Opinion to the Governor, 374 So. 2d 959, 965-66 (Fla. 1979)(tracing the development of a constitutional amendment through the legislative process to determine the framers' intent); Williams v. Smith, 360 So. 2d 417, 419-20 (Fla. 1978)(relying on contemporaneous statement of governor who caused amendment to be drafted, to determine framers' intent); City of St. Petersburg v. Briley, Wild & Assoc., 239 So. 2d 817, 822, 824 (Fla. 1970)(referring to language considered but rejected by the Legislature in drafting a constitutional amendment as an aid in determining framers' intent).

Furthermore, as both the trial court and the district court recognized, Florida's Constitution is a symbiotic document whose provisions must be read together. "Where the constitution contains multiple provisions on the same subject, they must be read in pari materia to ensure a consistent and logical meaning

that gives effect to each provision." Advisory Opinion to the Governor - 1996 Amendment 5, 706 So. 2d 278, 281 (Fla. 1997)(emphasis added); see also Park-N-Shop, Inc. v. Sparkman, 99 So. 2d 571, 572 (Fla. 1957)(reading constitutional taxing provisions together). Placement in Article XII's "Schedule" does not preclude constitutional language from having a substantive effect. See, e.g., Williams, 360 So. 2d at 420 (stating that had the framers intended a revision to have a certain substantive effect, "they would have included those specifics within the subsection itself, or within a schedule"); see also Black's Law Dictionary, at 1206 (5th ed. 1979)(defining "schedule" as an exhibit that provides detail regarding the matter referenced in the principal document).

The Text of Article IV, § 9, and Article XII, § 23

Applying the foregoing principles to the provisions of Revision 5, the only reasonable interpretation of that revision is that it does not provide the FWCC complete and exclusive authority over all Florida marine life; rather, the Legislature retains authority over endangered marine life. Petitioners' argument completely ignores that Article IV, section 9, uses two separate and materially different clauses to define the FWCC's jurisdiction relating, on one hand, to animal wildlife and freshwater aquatic life, and, on the other hand, to marine life.

Article IV, section 9, provides the FWCC with regulatory and executive power over marine life, but not "the" (i.e., complete and exclusive) regulatory and executive power over marine life. The transferred authority was not complete and exclusive because, while the FWCC has full jurisdiction over non-endangered marine life, another entity, namely the Legislature, has the authority to regulate certain aspects of marine life. The authority retained by the Legislature was the authority previously withheld from the MFC's jurisdiction by statute, including the authority over manatees and marine turtles that was expressly delegated to DEP as of March 1, 1998. See, e.g., § 370.12, Fla. Stat. (1997). Though the Legislature delegated that residual authority to the FWCC through Chapter 99-245, Laws of Fla., that authority remains within the Legislature's purview.

Petitioners' reliance on the maxim *expresio unius est exclusio maximus* again demonstrates petitioners' lack of focus on the actual text of Article IV, section 9. Petitioners presume that the FWCC has complete jurisdiction over marine life and that limitations stated in that provision should prevent the supposed implication of additional exceptions, but petitioners' presumptions are incorrect. This Court has held that *expresio unius est exclusio maximus* is a tenet of statutory construction

that has little application to constitutional interpretation, particularly where its effect would limit the power of the Legislature. Taylor v. Dorsey, 19 So. 2d 876, 881 (Fla. 1944). Furthermore, Article IV, section 9, does not grant the FWCC complete jurisdiction over marine life. That section merely grants the FWCC some jurisdiction over marine life, as further defined in Article XII, section 23.

Finally, petitioners again -- for a third time -- refuse to acknowledge the critical distinction between the FWCC's two grants of authority when petitioners argue that FWCC Advisory Opinion controls this Court's interpretation of Article IV, section 9. In that case, this Court considered a ballot initiative proposal that would have empowered a fish and wildlife commission to "exercise the regulatory and executive powers of the state with respect to wild animal life, freshwater aquatic life, and marine aquatic life[" 705 So. 2d at 1353 (emphasis added). The Court correctly concluded that this proposed language would completely strip the Legislature of its authority over marine life, authority the Legislature had delegated to the MFC and the DEP, and because that significant aspect of the proposal was not noted in the proposed ballot summary, the Court struck the proposal from the ballot. Id. at 1355.

Inexplicably, petitioners repeatedly claim that the language at issue in FWCC Advisory Opinion was "essentially identical" to the language at issue here. In. Br. at 5, 15, 16, 20. That is patently incorrect. The plain text of Revision 5 differed materially from the proposed ballot initiative precisely because Revision 5 did not simply insert "and marine life" into the sentence granting the FWCC "the regulatory and executive powers of the state" over animal wildlife and freshwater aquatic life. Instead, Revision 5 separately provided for the commission's authority over marine life through a provision that did not grant the FWCC the regulatory and executive powers of the state -- it merely granted the FWCC some regulatory and executive powers. Furthermore, Revision 5 expressly transferred the MFC's statutory jurisdiction to the FWCC -- a provision not present in the proposed ballot initiative considered in FWCC Advisory Opinion.

When the provisions of Revision 5 are read together, it is plain that the FWCC's marine life jurisdiction is limited by the endangered species exception to the MFC's jurisdiction. That is made incontestably clear when the history of Revision 5 is examined.

The History of Revision 5

As explained above, the most significant examination in the interpretation of any constitutional provision is that of the intent of the provision's drafters. Petitioners make absolutely no mention of the CRC's intent in drafting Revision 5, although the CRC expressly intended Revision 5 to exclude manatees and sea turtles and all endangered marine life from the FWCC's constitutional marine life jurisdiction.

The pertinent portions of Revision 5 originated as Proposal 45 before the CRC. The relevant language of the initial version of Proposal 45 was identical to that of the ballot initiative petition considered in FWCC Advisory Opinion. The proposal set forth the jurisdiction of the FWCC in relevant part as:

The commission shall exercise the regulatory and executive powers of the state with respect to wild animal life, freshwater aquatic life, **and marine life**
. . . .

See Proposal 45 (CRC 17-31-pr (IV-9-1))[State's Appx., Ex. E](proposing Art. IV, § 9(c), Fla. Const.)(emphasis added).

Proposal 45 was amended on several occasions by committees of the CRC and by the full CRC, but the language quoted above was not affected by those initial amendments.⁵ However, at its

⁵ Compare Proposal 45 (CRC 17-31-pr (IV-9-1)) with CS for Proposal 45 (by Committee on Executive) and CS for CS for Proposal 45 (by Committee on Legislative) and CS for CS for Proposal 45 (First Engrossed) and CS for CS for Proposal 45

session on March 17, 1998, the CRC adopted an amendment proposed by Commissioner Thompson that deleted the bold-italicized language quoted above and inserted the following in its place: "and shall also exercise regulatory and executive powers of the state with respect to marine life." State's Appx., Ex. F, at 211-12 (CRC Journal, Mar. 17, 1998)[hereafter "Thompson Amendment"]. As a result of the Thompson Amendment, the authority of the proposed FWCC was set forth in relevant part as follows:

The commission shall exercise the regulatory and executive powers of the state with respect to wild animal life, freshwater aquatic life, and shall also exercise regulatory and executive powers of the state with respect to marine life,

See State's Appx., Ex. F, at 211-12 (emphasis added); see also CS for CS for Proposal 45 (Third Engrossed), available at <http://www.law.fsu.edu/crc/proposals/ind_proposals.html>. Commissioner Thompson explained that his amendment was intended to harmonize Article IV, section 9, and Article XII, section 23(b) and, in so doing, that it clarified the "limited jurisdiction" over marine life transferred to the FWCC and "allow[ed] the Legislature to make the decision as to whether to

(Second Engrossed). These documents are available online at <http://www.law.fsu.edu/crc/proposals/ind_proposals.html> and at Florida State Archives in Record Group 1008, Series 1768, Carton 2.

expand that jurisdiction." Supp. R. 89-90 (CRC Transcript, Mar. 17, 1998, at 50-51). The comments of Commissioner Henderson (who initially offered Proposal 45) on the Thompson Amendment are highly instructive:

[T]he amendment which Commissioner Thompson offers really deals with this very narrow issue of whether or not there is any regulatory authority which will currently still remain at DEP. And the answer to that is, yes, we did not move, for instance, manatees or turtles with this, with this amendment.

* * *

By the Thompson amendment, we recognize that there are still some matters that still remain within the regulatory authority of DEP; namely at this time, manatees and sea turtles.

Supp. R. 77, 92-93 (CRC Transcript, Mar. 17, 1998, at 38, 53-54)(emphasis added).

Subsequently, in connection with the final passage of the proposed revisions, Commissioner Henderson offered the following "statement of intent" with respect to the portions of Revision 5 relating to the FWCC:

Section 2 [of Revision 5] amends Article IV Section 9 to convert the Game and Fresh Water Fish Commission into the Fish and Wildlife Conservation Commission creating a constitutional agency with regulatory and executive authority for the protection of fish and wildlife.

The section is drafted with [the prior] Article IV Section 9 as the base document. The purpose is to make clear that no change in the authority or jurisdiction of the Game and Fresh Water Fish Commission is being contemplated. In addition, new

language makes clear that expansion of the jurisdiction of the commission is not intended to create a new regulatory program.

* * *

The proposal enlarges the jurisdiction of the commission to include "marine life." It is the express intent of the drafters to use this term as it is used in Chapter 370, Fla. Stat. as the authority of the Board of Trustees as delegated to the Marine Fisheries Commission. As used in Section 370.027, Fla. Stat., the term "marine life" excludes "marine endangered species" such as manatees and marine sea turtles. These animals are currently regulated by Section 372.12 [sic], Fla. Stat. under the authority of the Department of Environmental Protection.

* * *

An amendment to the Schedule Article XII provides for the orderly transition from the Game Commission and Marine Fisheries Commission to the new Fish and Wildlife Conservation Commission. The Schedule makes clear the limited intention of the proposal to combine the responsibilities of the two into a single independent agency.

A question has been raised by the Department of Environmental Protection concerning the scope of this proposal. In addition to the Marine Fisheries Commission, DEP administers a number of other marine related programs like the Florida Marine Patrol, research facilities, and manatee and marine sea turtle programs. None of these programs are addressed by the proposal. It is contemplated that the existing language in Art. 4 Section 9 will allow the legislature to address these issues in later years. The current language provides, "The legislature may enact laws in aid of the commission, not inconsistent with this section."

R. 407-08; State's Appx., Ex. F, at 262 (CRC Journal, May 5, 1998) (emphasis added). The statement of intent was published

without objection in the CRC's Journal. Id.

The "statement of intent" was entirely clear. Revision 5 did not and was not intended to transfer DEP's regulatory jurisdiction over manatees and marine turtles to the FWCC. This intent was reaffirmed by the official commentary on Article IV, section 9, now printed in the Florida Statutes Annotated:

[A]ny functions delegated by the legislature will be subject to the APA. Several conservation programs were not addressed in the proposal but were left for the legislature to determine the administering entity - namely, the Florida Marine Patrol, certain research facilities, and manatee and marine sea turtle programs. The language that specifically transfers jurisdiction is found in Section 23 of Article XII (Schedule).

Art. IV, § 9, Const. of Fla., Fla. Stat. Ann. (West 2002 Supp.).⁶

Finally, the CRC's ballot summary for Revision 5 confirms that the revision did not grant the FWCC complete authority over all marine life. The summary informed voters that the amendment merged the Game Commission and the MFC and that the FWCC would have only "certain powers" previously held by the Legislature

⁶ This commentary was prepared by William A. Buzzett and Deborah K. Kearney who served as the Executive Director and the General Counsel, respectively, of the 1997-98 CRC. It should be viewed as persuasive authority when interpreting the meaning of Revision 5. See Lake Worth Utilities Authority v. City of Lake Worth, 468 So. 2d 215, 217 (Fla. 1985)(relying on the commentary of Talbot "Sandy" D'Alemberte, the official reporter for the 1968 CRC, when interpreting a constitutional provision revised by that CRC); Broward County v. City of Ft. Lauderdale, 480 So. 2d 631, 634 (Fla. 1985)(same).

related to marine life:

BALLOT TITLE: CONSERVATION OF NATURAL RESOURCES AND CREATION OF FISH AND WILDLIFE CONSERVATION COMMISSION

BALLOT SUMMARY: Requires adequate provision for conservation of natural resources; creates Fish and Wildlife Conservation Commission, granting it the regulatory and executive powers of the Game and Fresh Water Fish Commission and the Marine Fisheries Commission; removes legislature's exclusive authority to regulate marine life and grants certain powers to new commission; authorizes bonds to continue financing acquisition and improvement of lands for conservation, outdoor recreation, and related purposes; restricts disposition of state lands designated for conservation purposes.

R. 419; State's Appx., Ex. C, at 6 (emphasis added).

The "certain powers" referred to in the summary meant only those powers previously delegated by the Legislature to the MFC. Had the CRC intended to inform voters that the amendment transferred all of the Legislature's regulatory authority over all marine life to the FWCC, it would not have needed to mention the MFC and certainly would not have used any language of limitation (such as "certain powers") when describing the legislative powers transferred to the FWCC. The CRC's use of the words "certain powers" (rather than "that power" or "that authority") informed voters that the FWCC's constitutional authority over marine life species would not be complete.

It bears mention that the CRC was well aware of this Court's prior decision in FWCC Advisory Opinion, and the ballot summary

for Revision 5 tracks the Court's language from that decision in most respects. However, the ballot summary language deviates from the Court's language in a material respect by not stating that the revision transfers or grants the Legislature's exclusive authority over marine life to new commission. Instead, the ballot summary for Revision 5 informed voters that only "certain powers" over marine life are granted to the FWCC by the revision. If petitioners' arguments regarding Revision 5 are correct, then this ballot summary may be called into question. See Armstrong v. Harris, 773 So. 2d 7 (Fla. 2000)(declaring voter-approved constitutional amendment invalid based on misleading ballot summary).

Ultimately, the history of Revision 5, and in particular the commentary regarding the Thompson Amendment, clearly sets forth the CRC's intent not to grant the FWCC constitutional authority over manatees, sea turtles, and all other endangered marine life. This Court should give effect to that intent, and as a result, petitioners' constitutional challenge should fail. See Schreiner; In re Apportionment Law; Advisory Opinion to the Governor; Williams; City of St. Petersburg; State ex rel. West.⁷

⁷ Petitioners have abandoned their argument below that the voters' intent deserves more weight than the framers' intent and that the voters intended the FWCC to regulate endangered species. Petitioners relied on a small number of newspaper articles or editorials. See Pet. 1DCA Ans. Br. at 39-47. Those

B. THE FIRST DISTRICT CORRECTLY CONSTRUED STATE V. DAVIS NOT TO HOLD THAT THE MFC HAD FULL AUTHORITY OVER ENDANGERED SPECIES.

The trial court considered the text of both Article IV, section 9, and Article XII, section 23, as well as the history of Revision 5. Nevertheless, the court held that the MFC had full jurisdiction over endangered marine life species and, therefore, the FWCC now does as well. The sole authority for that conclusion was this Court's decision in State v. Davis, 556 So. 2d 1104 (Fla. 1990), which the trial court misconstrued. The First District correctly rejected the trial court's misconstruction of Davis, and this Court should do the same. Tellingly, petitioners place very little weight on Davis in their Initial Brief.

Davis involved an emergency rule promulgated by the MFC which required turtle excluder devices to be installed in shrimp

materials were simply inaccurate, as press reports may sometimes be, Singer v. State, 109 So. 2d 7, 17 (Fla. 1959)("[I]t must be admitted that press reports are not always accurate and are seldom complete."), and they did not inform voters that the Legislature would lose all authority over endangered marine species or that the APA would no longer apply when protecting such species. Furthermore, other public materials correctly reflected Revision 5's purpose and effect. See Wm. C. Henderson & D. Ben-David, Protecting Florida's Natural Resources, Fla. B.J., at 24-25 (Oct. 1998); see also Wm. C. Henderson, Florida Constitution Revision Commission Sends Environmental Proposals to November Ballot, Env't'l & Land Use Law Section Reporter, at 9-10 (Nov. 1998); W. Hopping, Why I Will Vote Against Revision 5, Env't'l & Land Use Law Section Reporter, at 3 (Nov. 1998)(both available at <http://www.eluls.org/reporter_novdec_1998.html>).

trawls. See Davis, 556 So. 2d at 1105. That rule was a "fishing gear specification" regarding shrimp trawls -- a matter over which the MFC had exclusive rulemaking authority. See id. at 1106 (citing § 370.027(2)(a), Fla. Stat.). In light of this limited characterization, the Court held that the express exception of endangered species from the MFC's regulatory jurisdiction did not preclude the MFC from adopting a gear specification rule that "might impact on endangered species." Id. The Davis court never held that the MFC had plenary jurisdiction over marine turtles or other endangered marine species. Nor did the Court hold that the MFC could adopt rules impacting endangered species that were not incident to a matter over which the MFC had "exclusive rulemaking authority."

The narrow scope of the Davis holding is more evident when the MFC's jurisdiction as of March 1, 1998, is viewed in light of DEP's regulatory jurisdiction over manatees and marine turtles. In this regard, section 370.12(1) and (2), Fla. Stat. (1997), directed DEP, not the MFC or any other agency, to issue permits for the possession of manatees (§ 370.12(2)(b)-(e)), to establish boat speed zones to protect manatees (§ 370.12(2)(f)-(o)) and to restrict the taking of marine turtles (§ 370.12(1)).⁸

⁸ Other examples of specific legislative delegations of authority to DEP (rather than MFC) related to manatees include: § 370.12(2)(p), Fla. Stat. (1997)(requiring DEP to approve

See also Marine Industries Association, Inc. v. Dept. of Environmental Protection, 672 So. 2d 878, 881-82 (Fla. 4th DCA 1996) (holding that section 370.12(2) is not an unconstitutional delegation of authority to DEP). Thus, whatever incidental regulatory authority the MFC had over marine endangered species under section 370.027, that authority did not include those matters specifically assigned to DEP pursuant to section 370.12(1) and (2). Cf. § 370.027(1), Fla. Stat. (1997) (expressly preserving DEP's "administrative and enforcement responsibilities" over all aspects of marine life not addressed in § 370.027). Because the MFC did not have authority to regulate those matters as of March 1, 1998, such authority was not transferred to the FWCC by Revision 5.

Thus, the trial court erred when it relied on Davis to hold that the MFC had (and the FWCC now has) plenary but nonexclusive authority to "act with reference to endangered [marine] species." State's Appx., Ex. B, at 6-7. By comparison, the First District correctly held that "[a] careful review of Davis shows it does not hold that the MFC had general concurrent authority with other agencies to regulate endangered species."

manatee speed zone ordinances adopted by local governments); § 370.12(5)(administration of the Save the Manatees Trust Fund, the proceeds of which are used for manatee protection and recovery efforts).

789 So. 2d at 1054-55. Instead, as the First District held, "that case holds the MFC had only incidental regulatory authority to establish rules that might impact upon endangered marine species (such as those pertaining to gear specifications), and that incidental authority did not usurp or affect the statutory authority specifically assigned to other agencies." Id.

As a final matter, even if Davis had held that the MFC had plenary, though nonexclusive, authority over endangered species (and it did not), the discussion above demonstrates beyond question that neither the CRC nor the Legislature believed that to be the case and that the CRC specifically intended not to include plenary authority over endangered species in the constitutional grant of authority to the FWCC. That intent should govern this Court's examination of Article IV, section 9, and Article XII, section 23, and this Court should construe those provisions so as to effectuate that intent. See cases cited supra at 17-19; see also Greater Loretta Improvement Ass'n v. State ex rel. Boone, 234 So. 2d 665, 669-70, 680 (Fla.1970)("[W]here a constitutional provision may well have either of several meanings, . . . if the Legislature has by statute adopted one, its action in this respect is well-nigh, if not completely controlling."); Brown v. Firestone, 382 So. 2d

654, 670-71 (Fla. 1980)(same); Ivey v. Chicago Ins. Co., 410 So. 2d 494, 497 (Fla. 1982)(utilizing subsequent legislation to determine the meaning of earlier legislation); Gay v. Canada Dry Bottling Co., 59 So. 2d 788, 790 (Fla. 1952)(same).

II. THE LEGISLATURE MAY REGULATE ENDANGERED SPECIES BECAUSE THE CONSTITUTION DOES NOT GRANT THE FWCC FULL AND EXCLUSIVE AUTHORITY OVER THOSE SPECIES.

Petitioners' second "point" is not a separate point at all -- it is merely a conclusion to their first point. Petitioners assert that three portions of chapter 99-245 are unconstitutional because, in two instances, they require the FWCC to comply with the APA, and, in one instance, they provide that the FWCC lacks constitutional rulemaking authority over endangered marine species. In. Br. at 22-23.

The State does not challenge the principle that the Legislature cannot restrict or limit authority that an agency receives from the constitution. See Airboat Ass'n, Inc. v. Florida Game & Fresh Water Fish Comm'n, 498 So. 2d 629, 632 (Fla. 3d DCA 1986)(dismissing appeal under APA of Game Commission rule adopted pursuant to the agency's constitutional authority); see also § 120.52(1)(b)4., Fla. Stat. (2001)(providing that the APA applies to the FWCC only where it

acts under statutory authority).⁹ However, petitioners' contention is entirely based on their position, asserted in their first point, that the FWCC has constitutional authority over endangered marine species. As demonstrated in the preceding discussion, and as held by the First District, petitioners' premise is incorrect. The FWCC lacks constitutional authority over endangered marine species because the CRC intentionally drafted Revision 5 to achieve that result. Therefore, petitioners' constitutional challenge should be rejected by this Court as well.

It bears repetition that no reason would appear to limit petitioners' theory, if accepted, to the APA-related statutes that petitioners directly challenge in this litigation. Acceptance of petitioners' arguments would call into question the validity of every Florida statute addressing Florida's endangered marine life. The Legislature would be deprived of its historical ability to oversee agency action relating to

⁹ But see Commission on Ethics v. Sullivan, 449 So. 2d 315, 317 (Fla. 1st DCA), rev. denied 458 So. 2d 271 (Fla. 1984)(Commission on Ethics is subject to Chapter 120 even though it is a constitutional agency); Orange County v. Florida Game & Fresh Water Fish Comm'n, 397 So. 2d 411, 413 (Fla. 5th DCA 1981)(suggesting that a Game Commission rule regulating hunting of game in a wildlife management area could be challenged "through a section 120.56 proceeding"); Op. Att'y Gen. 76-80 (1976) (opining that the Game Commission is an "agency" for purposes of Ch. 120).

these important marine resources, an ability the Legislature has frequently, and, indeed, recently, exercised. See, e.g., Ch. 2002-264, §§ 16-19, Laws of Fla. (CS/HB 1243, approved by Governor Bush on May 15, 2002)(adopting new protections related to manatees). Such a result cannot be reconciled with the intent underlying Revision 5.

III. THE FWCC'S CONSTITUTIONAL GRANT OF AUTHORITY EXCLUDES AUTHORITY OVER ALL SPECIES THAT ARE, TO ANY DEGREE, ENDANGERED.

Petitioners third and final "point" is a last-breath assertion that, even if the FWCC lacks constitutional authority over endangered species, that exclusion of authority must be limited to species listed on the FWCC's particular "endangered" list and not those listed on the agency's "threatened" or "special concern" lists. This unsupported argument, raised here for the first time in this litigation, does nothing less than ask this Court to rewrite the historical division of authority among Florida's agencies in order to deprive the Legislature of authority over some endangered marine species. Petitioners' theory is contrary to the long-settled understanding shared by every entity involved in the protection of Florida's endangered species and the creation of Revision 5.

At the outset, it should be emphasized that petitioners did not plead this argument and never advanced it in the trial

court. Indeed, it is questionable whether these petitioners (who, as pled in their complaint, work to protect manatees and certain sea turtles) would even have standing to raise an issue regarding marine species listed by the FWCC as "threatened" or "special concern." Furthermore, petitioners made no mention of this argument before the First District, except in a footnote of their brief wherein they conceded that basing the FWCC's constitutional authority over a marine species on whether the species is listed by the FWCC as "endangered" or "threatened" would "not make sense" and, in fact, would be "absurd." Pet. 1DCA Ans. Br., at 24 n.15. Under these circumstances, petitioners have not preserved this argument for appeal. Tillman v. State, 471 So. 2d 32, 35 (Fla. 1985)(holding that the specific legal argument raised on appeal must have been presented to the trial court to be preserved for review); see also Metropolitan Dade County v. Chase Fed. Hous. Corp., 737 So. 2d 494, 499 n.7 (Fla. 1999)(holding an issue not raised before the trial or district courts not to be preserved).

Moreover, when carefully explored, petitioners' argument amounts to a nonsensical attempt to rewrite the settled history of the former MFC's jurisdiction. The Game Commission began maintaining its lists in 1979 in connection with a federal cooperative program administered under the Endangered Species

Act of 1973. See 16 U.S.C. § 1535(c); Fla. Admin. R. 39-27.002-.005 (1999)(indicating original adoption date under "History")[State's Appx., Ex. G]. The Endangered Species Act's cooperative program provides participating states with funds to use towards the conservation of species determined by the states to be endangered or threatened, as those terms are defined under federal law. 16 U.S.C. § 1535(c)(1); see also 16 U.S.C. § 1532(6),(20)(defining terms). The federal government maintains its own list of "endangered" and "threatened" species. 50 C.F.R. § 17.11.

The Game Commission divided its "Endangered Species Act" lists into three categories: "endangered," "threatened," and "special concern." State's Appx., Ex. G. The FWCC continues to do the same. Reduced to its essence, the FWCC's "endangered" list contains any "species, subspecies, or isolated population of a species or subspecies which is so few or depleted in number or so restricted in range or habitat due to any man-made or natural factors that it is in imminent danger of extinction" Fla. Admin. Code R. 68A-1.004(26)[State's Appx., Ex. H](emphasis added). The "threatened" list contains any "species, subspecies, or isolated population of a species or subspecies which is facing a very high risk of extinction in the future" Fla. Admin. Code R. 68A-1.004(77)[State's

Appx., Ex. H](emphasis added). Finally, the "special concern" list contains any "species, subspecies, or isolated population of a species or subspecies which is facing a moderate risk of extinction in the future" Fla. Admin. Code R. 68A-1.004(73)[State's Appx., Ex. H](emphasis added). In each case, extensive criteria are used to calculate the risk of extinction.

Simply put, these three categories cover varying degrees of endangerment. In all three cases, a bona fide risk of extinction is present and the species's prospects for survival are in question. A "threatened" or "special concern" species is, in all material respects, endangered.

Beyond doubt, the Legislature utilized this broad view of the term "endangered species" when, in 1983, the Legislature created the MFC and excepted "endangered species" from the agency's jurisdiction. The analysis accompanying the final bill creating the MFC reveals that, prior to 1983, a division within the DNR (the Division of Marine Resources) was charged with preserving and managing Florida's marine fishery resources and that over 220 local laws dealt with various aspects of saltwater fisheries. Bill Analysis, House Comm. on Natural Resources, CS/CS/HBs 194, 224, 244, 285, 442 (1983)[State's Appx., Ex. I]. Those local laws were phased out following the MFC's creation, and the plain purpose of the MFC was to provide a comprehensive,

statewide authority to implement the Legislature's expressed policy of managing and preserving Florida's "renewable marine fisheries resources." See *id.*; § 370.025(1), Fla. Stat. (1983). To this end, the MFC regulated where persons could fish, when they could fish, what they could fish, what they could use to fish, and what and how many fish could be caught and kept.

All species facing a risk of extinction are, by definition, not renewable resources, and they are not fished. Thus, it would be nonsensical to consider any endangered species -- whatever the degree of endangerment -- a renewable marine fisheries resource or to consider that any such species fit within the statutory role of the MFC. Furthermore, in 1983, all endangered marine species were already regulated by the DNR's Division of Marine Resources, regardless of how the Game Commission chose to list them. §§ 370.02(2)(a), 372.072(4)(a)2., Fla. Stat. (1983).

The clear and eminently reasonable intent of the endangered species exception in section 370.027 was to prevent an overlap of regulation concerning all endangered marine species, particularly since the MFC's role of conserving renewable marine fisheries resources did not directly align with the DNR's role of protecting endangered marine species. Petitioners' contrary construction of the MFC's role is simply nonsensical, just as

petitioners asserted to the district court that such a construction would be.

Indeed, the purpose of preventing overlapping protective jurisdiction would have been undermined if the endangered species exceptions in section 370.027 did not apply to species listed as "threatened" or "special concern." There would have been no logical reason to draw a jurisdictional line between species that are at one degree of risk of extinction and those at another degree of risk of extinction, giving the MFC jurisdiction over one group but not the other. No member of any of such species was going to be fished for pleasure or commerce, and there would have been no reason for the MFC to regulate any such species. The DNR's Division of Marine Resources had jurisdiction over every marine life species on the "endangered," "threatened," and "special concern" endangerment lists. §§ 370.02(2)(a), 372.072(4)(a)2., Fla. Stat. (1983).

Furthermore, 370.027 should be viewed in *pari materia* with other statutes governing endangered species, including the federal Endangered Species Act. When this is done, it becomes plain that the Legislature viewed the "endangered species" exception to include all species contained on the Game Commission's lists and the federal government's lists.

For instance, long before 1983, and through the effective

date of chapter 99-245, the Legislature provided the DNR and its successor agencies specific guidance on how to protect the manatee -- the official "Florida state marine mammal," § 370.12(2)(b), Fla. Stat. (1983) -- as well as all sea turtles, without any regard to which of the Game Commission's lists or the federal lists any particular species of those marine animals may have been on. § 370.12(1)-(2), Fla. Stat. (1983). If the MFC had jurisdiction over marine life listed by the Game Commission as "threatened," then the Legislature would have directed the MFC, rather than the DNR and the DEP, to regulate those species. It did not, and as the FWCC explains in its Answer Brief, the MFC never regulated any such species. FWCC Ans. Br., at 20-23. That plainly occurred because the MFC did not believe it had jurisdiction over them.

Likewise, the endangerment lists used by the Game Commission prior to the adoption of Revision 5 noted that the marine species listed on those lists were under the jurisdiction of the DEP. See Fla. Admin. Code R. 39-27.002(3)(1999)[State's Appx., Ex. G] (stating that the Secretary of the DEP may issue permits relating to marine species listed as endangered or threatened). The Game Commission made no mention of the MFC.

Finally, the discussion in part I of this brief confirms that, in respectively drafting Revision 5 and chapter 99-245,

the CRC and the Legislature interpreted the MFC's jurisdiction to exclude manatees, sea turtles, and all other endangered marine life. The CRC had no intention whatsoever of abolishing the Legislature's authority over any of these species, regardless of the lists on which they appeared. The Legislature necessarily agreed, since it enacted chapter 99-245 and thereby transferred the broad endangered species jurisdiction previously enjoyed by the DNR and later the DEP to the FWCC. The CRC's intent, together with the Legislature's understanding of its own statutory scheme, should confirm that the MFC did not have jurisdiction over marine species the Game Commission listed as "threatened" or "special concern" and that the FWCC does not have constitutional jurisdiction over those species today. See cases cited supra at 17-19; see also Ivey v. Chicago Ins. Co., 410 So. 2d 494, 497 (Fla. 1982)(utilizing subsequent legislation to determine the meaning of earlier legislation); Gay v. Canada Dry Bottling Co., 59 So. 2d 788, 790 (Fla. 1952)(same).

Petitioners address neither this law nor these historical facts. Petitioners also do not mention that the criteria for Florida's three lists have changed and that the lists maintained by the federal Department of the Interior differ from Florida's lists with respect to both criteria and contents. See 16 U.S.C. § 1535 (defining "endangered" and "threatened"); 50 C.F.R.

§ 17.11 (listing species). Petitioners merely assume, with no supportive authority, that the 1983 Legislature intended the MFC's jurisdiction to include "threatened" and "special concern" species listed on Florida's lists.

Simply put, the exception to the MFC's jurisdiction did not state "except for species listed by the Game Commission as endangered species." Petitioners offer no principled reason to conclude that the present distinction between species on the FWCC's "endangered" and "threatened" lists should now be one of major constitutional significance.

Petitioners' arguments about the APA and rulemaking authority also ignore the significant ramifications of their theory. For instance, the FWCC has recently amended the listing criteria for all three lists. If under the new criteria the manatee is shifted from the "endangered" list to the "threatened" list, then, under petitioners' theory, the Florida Manatee Sanctuary Act, which in some form has been the law of Florida since at least 1953, and has governed, among others, the DNR, the DEP, and now the FWCC, would likely be constitutionally unenforceable, as might every other statute addressing Florida's manatees, including the new manatee legislation recently passed by the 2002 legislature. See § 370.12(2); Ch. 2002-264, §§ 16-19, Laws of Fla. (CS/HB 1243, approved by Governor Bush on May

15, 2002). The Florida Legislature could have no authority to regulate Florida's manatees under any conditions, even though they were at a "very high risk of extinction." This would come, of course, to the total surprise of both the Legislature and the CRC.

Likewise, if sea turtles listed in the Marine Turtle Protection Act were to be relisted from "endangered" to "threatened," then that act might also be constitutionally unenforceable as to those species. See § 370.12(1). Indeed, one turtle listed in that act has long been on Florida's "threatened" list -- the loggerhead sea turtle. By petitioners' theory, that act should currently be unenforceable as to that turtle species.

In this previously unraised argument, then, petitioners ask this Court to rewrite the historical jurisdiction of the MFC and create a constitutional scheme that is flatly contrary to the expressed intentions of those who drafted Revision 5 and the views of the legislatures that enacted chapters 99-245 and 2002-264. The only reasonable interpretation of the FWCC's constitutional jurisdiction is that the FWCC has constitutional jurisdiction over a marine species only when that species is not endangered to any degree and is therefore not listed on either the FWCC's or the federal government's endangerment lists.

Petitioners' unpreserved arguments to the contrary would create an unforeseen result based on a view of the MFC's jurisdiction that is both historically inaccurate and, as a practical matter, nonsensical. Petitioners' theory should be rejected.

CONCLUSION

For all of the foregoing reasons, the State respectfully requests this Court to approve the First District's decision and expressly hold that the challenged portions of Chapter 99-245, Laws of Florida, are constitutional.

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I certify that on this 3d day of June, 2002, a true and correct copy of this brief, including Appendix, was provided by **U.S. Mail** to:

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