

IN THE SUPREME COURT OF FLORIDA

Caribbean Conservation)		
Corporation, Inc., et al.)		
)		
Petitioners,)		
)		
v.)	Case No.	SC01-1885
)		
)	Lower Tribunal Case Nos.	
)	1D00-1389, 1D00-1804	
)		
Fish and Wildlife Conservation)		
Commission, State of Florida)		
ex rel. Robert A. Butterworth,)		
Attorney General,)		
)		
Respondents.)		
)		
_____)		

**INITIAL BRIEF OF PETITIONERS
CARIBBEAN CONSERVATION CORPORATION, INC., et al.**

Review of a Final Order of the
District Court for the First District of Florida

David Guest
Fla. Bar No. 0267228
Earthjustice
P.O. Box 1329
Tallahassee, Florida 32302-1329
Phone: (850) 681-0031
Fax: (850) 681-0020

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

STATEMENT OF THE CASE AND FACTS 1

SUMMARY OF THE ARGUMENT 5

ARGUMENT 8

I.
**The Literal and Plain Meaning of the Constitutional Provision
Creating the Fish and Wildlife Conservation Commission Confers
Jurisdiction over all Marine Life without Exception for Endangered
Species** 8

II.
**The Challenged Law Unconstitutionally Usurps the Constitutional
Authority of the Wildlife Commission** 21

III.
**Even if the Scheduling Provision Creates an Additional Exception to
the Constitutional Powers of the Wildlife Commission, the Legislation
is Unconstitutional because it goes well beyond any Exception implied
by the Scheduling Provisions** 24

CONCLUSION 29

TABLE OF AUTHORITIES

STATE CASES

- Advisory Opinion to the Attorney General re: Fish and Wildlife Conservation Commission*, 705 So.2d 1351 (Fla. 1998)5, 14, 15, 16, 20
- In re Apportionment Law*, 414 So.2d 1040 (Fla. 1982)10
- Armstrong v. Harris*, 773 So.2d 7 (Fla. 2000)9
- Beck v. Game and Fresh Water Fish Commission*, 33 So.2d 594 (Fla. 1948)21
- Berger v. Jackson*, 23 So.2d 265 (Fla. 1945)18
- Carson v. Miller*, 370 So.2d 10 (Fla. 1979)11
- City of Jacksonville v. Continental Can Company*, 151 So. 488 (Fla. 1933)10
- Dobbs v. Sea Isle Motel*, 56 So.2d 341 (Fla. 1952)12, 26
- Douglas v. McRaney*, 137 So. 157 (Fla. 1931)12
- Florida Department of Natural Resources v. Florida Game and Fresh Water Fish Commission*, 342 So.2d 495 (Fla. 1977)21, 22
- Florida Fish & Wildlife Conservation Commission v. Carribean Conservation Corporation*, 789 So.2d 1053 (Fla. 1st DCA 2001)4, 13, 24
- Graham v. Acer*, 204 So.2d 193 (Fla. 1967)12, 26
- Holly v. Auld*, 489 So.2d 217 (Fla. 1984)11
- Ideal Farms v. Certain Lands in Said District*, 19 So.2d 234 (Fla. 1944)12, 26
- Johnson v. McDonald*, 269 So.2d 682 (Fla. 1972)11
- Moonlit Waters v. Cauley*, 666 So.2d 898 (Fla. 1996)13
- Public Health Trust of Dade County v. Lopez*, 531 So.2d 946 (Fla. 1988)11, 17
- St. Petersburg Bank & Trust v. Hamm*, 414 So.2d 1071 (Fla. 1982)11
- State ex rel. Griffin v. Sullivan*, 30 So.2d 919 (Fla. 1947)21, 24
- State v. Davis*, 556 So.2d 1104 (Fla. 1990)7, 8, 14, 16 n.6, 26, 27, 28
- Towerhouse Condominium v. Merton Millman*, 475 So.2d 674 (Fla. 1985)13
- Wilson v. Crews*, 34 So.2d 114 (Fla. 1948)11
- Young v. Progressive Southeastern Insurance Co.*, 753 So.2d 80 (Fla. 2000)12, 26

FEDERAL CASES

Almendarez-Torres v. United States, 523 U.S. 224 (1998)18

FLORIDA CONSTITUTION

Art. IV, § 9, Fla. Const. *passim*

Art. V, § 3(b)(3), Fla. Const. 4

Art. XII, § 23, Fla. Const. 17, 18, 19, 28, 29

FLORIDA LAWS & STATUTES

Section 20.331(6)(c), Fla. Stat. 3, 30

Section 120.52(8), Fla. Stat. 24

Section 370.025(4), Fla. Stat. 3, 30

Section 370.027, Fla. Stat. 14, 16, 26, 27

Section 370.12(1)(c)(3), Fla. Stat. 3, 23, 29

Section 370.12(1)(h), Fla. Stat. 3, 23, 29

Section 370.12(2)(g), Fla. Stat. 3, 23, 29

Section 370.12(2)(h), Fla. Stat. 3, 23, 29

Section 370.12(2)(i), Fla. Stat. 3, 23, 29

Section 370.12(2)(k), Fla. Stat. 3, 23, 29

Section 370.12(2)(l), Fla. Stat. 3, 23, 29

Section 370.12(2)(m), Fla. Stat. 3, 23, 29

Section 370.12(2)(n), Fla. Stat. 3, 23, 29

Section 370.12(2)(p)(1), Fla. Stat. 3, 23, 29

Section 370.12(2)(q), Fla. Stat. 3, 23, 29

Section 372.072(3), Fla. Stat. 1, 22, 25

Section 372.072(4)(a)(2), Fla. Stat. 16

Chapter 99-245, Laws of Florida *passim*

OTHER AUTHORITIES

Fla. Admin. Code R. 68A-1.004(26)1, 26

Fla. Admin. Code R. 68A-27.005(1)1, 2, 26

Fla. Admin. Code R. 68A-27.003(1)(a)2

Fla. Admin. Code R. 68A-27.004(1)1

Fla. Admin. Code R. 68A-1.004(73)1, 26

Fla. Admin. Code R. 68A-1.004(77)1

STATEMENT OF THE CASE AND FACTS

This case concerns the constitutionality of a state statute which restricts the powers of the Fish and Wildlife Conservation Commission. In accordance with Article IV, section 2 of the Florida Constitution, Florida voters approved a revision to the state constitution in November 1998 regarding environmental and conservation issues. That revision amended Article IV, section 9, of the Florida Constitution to create the Florida Fish and Wildlife Conservation Commission (“Wildlife Commission”). Chapter 99-245, Laws of Florida restricts the Wildlife Commission in its powers to protect marine life that is endangered, threatened or a species of special concern. Endangered species are in imminent danger of extinction, threatened species are at very high risk of extinction in the future, and species of special concern are at moderate risk of extinction in the future or need protection because of other management issues.

¹ Included within these three classes of marine life are sea turtles, manatees,

¹ Fla. Admin. Code R. 68A-1.004(26), (73) and (77); 68A-27.005(1)(b). Florida Statutes contain essentially the same definitions of endangered and threatened species. Section 372.072(3), reads:

(a) "Fish and wildlife" means any member of the animal kingdom, including, but not limited to, any mammal, fish, bird, amphibian, reptile, mollusk, crustacean, arthropod, or other invertebrate. (b) "Endangered species" means any species of fish and wildlife naturally occurring in Florida, whose prospects of survival are in jeopardy due to modification or loss of habitat; overutilization for commercial,

sturgeon, whales and lesser known fish and reptiles.

2

Petitioners here contend that the law in question usurps the Wildlife Commission's constitutional powers over marine life and seek reversal of the order of the district court of appeal which upheld that statute. In short, the district court held that the jurisdiction granted to the Wildlife Commission by Article IV, section 9 of the Florida Constitution excluded powers over endangered marine species and thus deemed the legislation constitutional.

Petitioners Caribbean Conservation Corporation, Inc., d/b/a Sea Turtle Survival League, Save the Manatee Club, Inc., Florida Wildlife Federation, Inc., Danial R. Evans, Patrick M. Rose and Manley K. Fuller III (hereinafter "the Conservationists") commenced the case by filing a declaratory judgment action to invalidate portions of Chapter 99-245, asserting that it unconstitutionally reduces the constitutional powers of the Wildlife Commission in a manner that will impede its ability to protect endangered and threatened

sporting, scientific, or educational purposes; disease; predation; inadequacy of regulatory mechanisms; or other natural or manmade factors affecting its continued existence. (c) "Threatened species" means any species of fish and wildlife naturally occurring in Florida which may not be in immediate danger of extinction, but which exists in such small populations as to become endangered if it is subjected to increased stress as a result of further modification of its environment. The term "species of special concern" as explained and used in the rules of the Wildlife Commission refers to a species at risk of becoming threatened, that occupies so significant an ecological niche that a significant population decline would adversely affect other species, that has not sufficiently recovered from a past population depletion, or that has been introduced or managed to attain specific objectives. Fla. Admin. Code R. 68A-27.005(1)(b).

² Fla. Admin. Code R. 68A-27.003(1)(a)4, 5-9, 31, 34-38; Fla. Admin. Code R. 68A-27.004(1)(a)3, 12; Fla. Admin. Code R. 68A-27.005(1)(a)1, 3.

marine life.³ R-1. The action was filed in Tallahassee on August 2, 1999.

The Wildlife Commission and the Florida Attorney General defended the case. Two commercial fishermen and a commercial fishing organization were granted intervention. R-305. After considering cross motions for summary judgment, the trial court entered an order finding that the challenged provisions unconstitutionally invaded the powers of the Wildlife Commission.⁴ R-540.⁵

On appeal, the district court of appeal reversed, finding that since the former Marine Fisheries Commission had only “incidental authority” to protect marine endangered species, and since that commission’s powers had been transferred to the new Wildlife Commission, the legislation under challenge was constitutional. Florida Fish & Wildlife Conservation Comm. v. Carribean Conservation Corp., 789 So.2d 1053 (Fla. 1st DCA 2001). This court accepted jurisdiction on the petition of the Conservationists for review under Article V, section 3(b)(3) of the Florida Constitution.

³ The portions at issue are sections 1(c)(1), 39(4)(a) and 45, which require the Wildlife Commission to comply with Chapter 120, Florida Statutes in taking actions relating to marine species that area endangered, threatened or species of special concern.

⁴ Specifically, the court invalidated the Florida Statutes which codified the contested portions of Chapter 99-245. The provisions invalidated were Florida Statutes sections 20.331(6)(c), 370.025(4), 370.12(1)(c)(3), 1(h), 2(g), 2(h), 2(i), 2(k), 2(l), 2(m), 2(n), 2(p)(1) and 2(q). R-547.

⁵ On rehearing, the final summary judgment was explained but not altered. R-568.

SUMMARY OF THE ARGUMENT

Portions of Chapter 99-245 unconstitutionally usurp the Wildlife Commission's constitutional executive and regulatory powers over "marine life" by curtailing the Wildlife Commission's authority to manage marine species that are endangered, threatened or species of special concern. The literal and plain meaning of Article IV, section 9 of the constitution makes clear that the Wildlife Commission's constitutional powers encompass marine organisms that are endangered, threatened, or species of special concern. No exceptions to the grant of powers over marine life appear in the substantive grant of authority to the Wildlife Commission, other than exceptions preventing the Commission from regulating air and water pollution. The rule *inclusio unius est exclusio alterius* excludes any additional implied exceptions. Similarly, the inclusion of four explicit statutory powers in the constitutional amendment precludes any additional implied legislative powers over any class of marine species. This court's Advisory Opinion to the Attorney General re: Fish and Wildlife Conservation Commission, 705 So.2d 1351 (Fla. 1998) ("1998 Advisory Opinion"), interpreted language essentially identical to Article IV, section 9 and concluded that the executive and regulatory authority conferred by that provision would have covered endangered marine species.

The scheduling provisions enacted along with the amendment that created the Wildlife Commission established a process for folding in the members, rules and jurisdiction of two previous commissions; however, those scheduling provisions did not and could not create silent exceptions to the powers of the Wildlife Commission. Scheduling provisions deal with only with timing and process, not with the scope of the grant of constitutional powers, and no reference is made in the scheduling provisions to exceptions to the substantive grant of power to the Wildlife Commission.

Longstanding case law holds that the legislature lacks the power to usurp the constitutional authority of an executive agency. The constitution explicitly empowers the Wildlife Commission to adopt its own procedures to ensure adequate due process when performing its regulatory and executive functions. The challenged portions of Chapter 99-245 usurp this constitutional authority of the Wildlife Commission directly by requiring it to comply with the Chapter 120, Florida Statutes (“APA”) when researching or managing marine species that are endangered, threatened or species of special concern. The challenged provisions also indirectly usurp the Wildlife Commission’s substantive powers by making its regulations subject to invalidation under the APA for failure to comply with substantive statutory provisions that specify methods, geographic areas and conditions regarding

regulations.

Even if the scheduling provisions create implied exceptions to the Wildlife Commission's constitutional authority, Chapter 99-245 usurps this authority because it goes well beyond the scope of any possible implied exception that could stem from statutory provisions that had outlined the scope of the former Marine Fisheries Commission's jurisdiction. The implied exception to the Wildlife Commission's powers is based on the theory that they are subject to the same exceptions that were set out in the Marine Fisheries Commission statute. That statute contained only exceptions regarding endangered species, but Chapter 99-245 goes even further, restricting the Wildlife Commission's powers over two other classes of marine species – threatened species and species of special concern. Chapter 99-245 also imposes the APA on any action by the Wildlife Commission concerning marine endangered species, as if the former Marine Fisheries Commission statute contained a bar on management or regulations to protect endangered species. If the implied exceptions to the Wildlife Commission's stem from the statutory exceptions to the powers of the former Marine Fisheries Commission, this court's decision in State v. Davis, 556 So.2d 1104 (Fla. 1990) must govern the scope of those exceptions. There, this court held that the Marine Fisheries Commission had substantial

but not exclusive powers to protect marine endangered species. Chapter 99-245 adopts the exact interpretation of the Marine Fisheries Commission's powers that this court *squarely rejected* in Davis – that the commission had no powers whatsoever to protect and conserve endangered marine species.

By applying the APA to all actions of the Wildlife Commission regarding marine species that are endangered, threatened or species of special concern, Chapter 99-245 goes well beyond the reach of the exceptions to the jurisdiction of the former Marine Fisheries Commission.

ARGUMENT

I. The Literal and Plain Meaning of the Constitutional Provision Creating the Fish and Wildlife Conservation Commission Confers Jurisdiction over all Marine Life without Exception for Endangered Species

Chapter 99-245 attempts to apply the APA to the Wildlife Commission's management and regulatory activities concerning marine species that are endangered, threatened and species of special concern. However, the constitutional powers of the Wildlife Commission encompass all marine life without exception. Therefore, the legislature may not lawfully restrict the Wildlife Commission's management or regulatory actions regarding any subclass of marine life. The standard of review before this court is *de novo* because the issues presented concern only questions of law.

Armstrong v. Harris, 773 So.2d 7, 11 (Fla. 2000).

The constitutional amendment creating the Wildlife Commission reads as follows:

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

Art. IV, § 9, Fla. Const. (emphasis supplied). This provision creates a new constitutional executive agency and charges it with the responsibility to

manage wild animal life, fresh water aquatic life and marine life. No exceptions are listed, indicating that the new constitutional commission's charge encompasses all creatures great and small.

The Conservationists contend that because words of the constitutional provisions creating the Wildlife Commission have a literal and plain meaning, they must be given that meaning. In In re Apportionment Law, 414 So.2d 1040 (Fla. 1982), this court applied the literal meaning rule to a dispute about the numbering system for newly apportioned state Senate and House districts. Although the House of Representatives argued that the literal meaning of the constitutional language at issue would allow the distorted numbering pattern that the new constitutional language had been intended to cure, this court found that it could only interpret the constitution as it was grammatically written. Id. at 1051. Because the language of the constitutional amendment creating the Wildlife Commission has a literal meaning that is neither absurd nor internally contradictory, it should be given that literal meaning. City of Jacksonville v. Continental Can Co., 151 So. 488, 489 (Fla. 1933) (“[I]f the words thus regarded convey a definite meaning and involve no absurdity or contradiction between parts of the same instrument, no construction is allowable.”).

The term “marine life” has a plain meaning, which is the living

organisms of the sea. When words in the constitution or statute use words of common or natural meaning, the ordinary meaning and literal language must be used without resort to rules of construction. See Public Health Trust of Dade County v. Lopez, 531 So.2d 946, 949 (Fla. 1988) (when the language of a statute is clear and conveys a definite meaning, there is no occasion for resorting to rules of construction); Holly v. Auld, 489 So.2d 217, 219 (Fla. 1984) (when language is clear and unambiguous and conveys a clear meaning, the statute must be given its clear and obvious meaning); St. Petersburg Bank & Trust v. Hamm, 414 So.2d 1071, 1073 (Fla. 1982) (even when a court is convinced that the legislature intended something different than the literal meaning of a statute, the court is not at liberty to depart from the plain and literal meaning of the words if they are unambiguous); Carson v. Miller, 370 So.2d 10, 11 (Fla. 1979) (unambiguous statutory language must be given its plain meaning); Johnson v. McDonald, 269 So.2d 682, 683 (Fla. 1972) (plain meaning rule meant term “committee” in the constitution included subcommittees because they are a species of committee); Wilson v. Crews, 34 So.2d 114, 118 (Fla. 1948) (the words and terms of a constitution must be given their most usual and obvious meaning unless text suggests that they have been used in a technical sense); Douglas v. McRainey, 137 So. 157, 158 (Fla. 1931) (when a statute is clear and unambiguous, it must be

given its plain and obvious meaning).

Two exceptions prohibit the Wildlife Commission from regulating air and water pollution absent authorization by general law. Because two exceptions are listed, an additional exception should not be implied because of the rule of *inclusio unis est exclusio alterius*. Young v. Progressive Southeastern Ins. Co., 753 So.2d 80, 85 (Fla. 2000) (listing of four exceptions to obligation to provide uninsured motorist coverage bars interpretation allowing additional exception); Graham v. Acer, 204 So.2d 193, 194-95 (Fla. 1967) (debts not on list of exceptions to homestead exemption in Florida Constitution could not be collected by forced sale of homestead because listing of exceptions impliedly excluded other exceptions); Dobbs v. Sea Isle Motel, 56 So.2d 341, 342 (Fla. 1952) (inclusion of one exception to two year statute of limitations for workers' compensation claims foreclosed interpretation that statute could allow other exceptions); Ideal Farms v. Certain Lands in Said District, 19 So.2d 234, 235 (Fla. 1944) (drainage district lien barred by statute of limitations because list of entities exempt from statute of limitations did not include drainage districts).

Similarly, Article IV, section 9 confers on the legislature four clear powers: to set license fees, to set penalties, to adopt laws to aid the new

commission and to regulate its management, personnel and purchasing practices. Because four powers are listed, an additional power should not be implied because of the rule *inclusio unius est exclusio alterius*. See e.g., Moonlit Waters v. Cauley, 666 So.2d 898, 899-900 (Fla. 1996) (statutory authorization for apartment cooperative associations to acquire two kinds of property demonstrated absence of authority to purchase third type of property); Towerhouse Condominium v. Merton Millman, 475 So.2d 674, 676 (Fla. 1985) (explicit statutory authority allowing condominium associations to buy condominium units showed lack of statutory authority to purchase other kinds of property).

The literal and plain meaning of the words in Article IV, section 9 and the rule *inclusio unius est exclusio alterius* indicate that the Wildlife Commission has jurisdiction over marine life without exception. However, the court below found the challenged legislation constitutional on the theory that the Wildlife Commission lacked constitutional authority to protect endangered marine life. Florida Fish & Wildlife Conservation Comm. v. Carribean Conservation Corp., 789 So.2d 1053 (Fla. 1st DCA 2001). This opinion was based on the premise that the constitutional amendment simply unified the powers of the Game and Freshwater Fish Commission with those of the Marine Fisheries Commission and thus carried forward the limitations

on this latter commission's jurisdiction to the new Wildlife Commission.⁶

The decision of the court below is inconsistent with this court's 1998 Advisory Opinion, 705 So.2d 1351. There, this court evaluated the accuracy of the ballot summary for an initiative that sought to unify the Game and Freshwater Fish Commission and the Marine Fisheries Commission into a new constitutional commission. The constitutional language proposed by that initiative was essentially identical to the language of Article IV, section 9 which is at issue here.⁷ Because the ballot summary failed to disclose that

⁶ Section 370.027, Florida Statutes (1997) described part of the Marine Fisheries Commission's jurisdiction. Entitled "Rulemaking authority with respect to marine life," it contained two grants of rulemaking authority with respect to marine life. Subsection (1) read in relevant part: ". . . the Marine Fisheries Commission is delegated *full* rulemaking authority over marine life, with the exception of endangered species, subject to approval by the Governor and Cabinet, sitting as the Board of Trustees . . ." (emphasis supplied). Subsection (2) granted *exclusive* rule-making authority over the taking of marine life, including gear specifications, prohibited gear, species that may not be sold and the like: "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) Species that may not be sold; . . ." As discussed in more detail later, this court interpreted this language to mean that the Marine Fisheries Commission was not precluded from acting with reference to endangered species but instead had non-exclusive rulemaking authority with regard to endangered species. State v. Davis, 556 So.2d 1104, 1106 (Fla. 1990).

⁷ Article IV, section 9 of the Florida Constitution reads in relevant part: "[T]he commission shall exercise the regulatory and executive powers of the state with respect to wild animal life and fresh water aquatic life, and shall also exercise regulatory and executive powers of the state with respect to marine life, except that all license fees for taking wild animal life, fresh water aquatic life, and marine life and penalties for violating regulations of the commission shall be prescribed by general law." The language of the constitutional initiative reviewed in the 1998 Advisory Opinion read in relevant part: "[T]he Commission shall exercise the regulatory and executive powers of the state with respect to wild animal life, freshwater aquatic life, and marine aquatic life, except that all license fees for taking wild animal life, freshwater aquatic life and marine aquatic life, and penalties for violating regulations of the Commission shall be prescribed by specific statute." 705 So.2d at 1352.

the legislature’s exclusive power over marine life would be transferred to the proposed constitutional commission, this court found the summary to be legally inadequate. 1998 Advisory Opinion, 705 So.2d. at 1355-56. In particular, it held that:

The summary does not explain to the reader that the 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. (footnote 3)

Id. at 1355. The accompanying footnote 3 reads: “[T]hus, if the amendment were passed, the legislature's determination that the Department of Environmental Protection should regulate endangered marine species would no longer be effective.”

⁸ The 1998 Advisory Opinion found that the ballot initiative’s language would have transferred regulatory and executive powers over all marine life – including endangered species – from the legislature to the new proposed commission. Because the ballot summary failed to disclose this shift in power, this court invalidated the ballot summary. 705 So.2d at 1355. Given that the language of Article IV, section 9 is essentially identical to the

⁸ This is the full text of the footnote with the citations omitted. The citations following the text read “§ 370.027; § 372.072(4)(a)2, Fla. Stat. (1995).” 1998 Advisory Opinion, 705 So.2d. at 1355, n.3. The operative provisions of Section 370.027 relating to the Marine Fisheries Commission’s powers are excerpted in footnote 6, supra.

language construed in the advisory opinion, the same interpretation should apply.

The literal terms of Article IV, section 9 indicate that the Wildlife Commission has jurisdiction over all marine life without exception. The language describing the Commission's powers could have been written to read "marine life, *except endangered species*," but it was not. The language setting out exceptions to the Wildlife Commission's powers could have been written to read "unless provided by general law, the commission shall have no authority to regulate matters relating to air and water pollution *or to regulate endangered marine species*," but it was not. Article IV, section 9 could have been written to include a sentence reading "*the legislature shall have the power to regulate endangered marine life*," but it was not.

Courts will not supply additional language that could have been but was not included in the constitution. Public Health Trust of Dade County v. Lopez, 531 So.2d at 949 (being asked not "merely to construe or interpret the [constitutional] amendment but rather to graft onto it something that is not there," court held "[t]his we cannot do. . .").

The constitution does not set out exceptions to the Wildlife Commission's jurisdiction over marine life, and the Conservationists submit that additional words may not be inserted by the court to create exceptions.

The scheduling provisions of the constitutional amendment do not contain any exceptions either. Article XII entitled "Schedule" now includes section 23, which reads as follows:

Fish and Wildlife Conservation Commission.—

(a) The initial members of the commission shall be the members of the game and fresh water fish commission and the marine fisheries commission who are serving on those commissions on the effective date of this amendment, who may serve the remainder of their respective terms. New appointments to the commission shall not be made until the retirement, resignation, removal, or expiration of the terms of the initial members results in fewer than seven members remaining.

(b) 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 conservation commission. The jurisdiction of the marine fisheries commission transferred to the commission shall not be expanded except as provided by general law. All rules of the marine fisheries commission and game and fresh water fish commission in effect on the effective date of this amendment shall become rules of the fish and wildlife conservation commission until superseded or amended by the commission.

(c) On the effective date of this amendment, the marine fisheries commission and game and fresh water fish commission shall be abolished.

(d) This amendment shall take effect on July 1, 1999.

Art. XII, § 23, Fla. Const. (emphasis supplied).

The timing and process provisions of Article XII, section 23 did not and could not create invisible exceptions to the powers granted to the Wildlife Commission. Scheduling provisions should be interpreted as dealing with timing and process rather with the substance of the allocation of executive and legislative authority. Berger v. Jackson, 23 So.2d 265, 267-68 (Fla. 1945) (title reading “LIMITATION AGAINST UNADMINISTERED ESTATES” meant that terms of section dealt only with estates that had been dormant,

not ones where a will contest had delayed publication of notice to creditors);⁹ see also,

Almendarez-Torres v. United States, 523 U.S. 224, 234 (1998) (the title

“Criminal Penalties for Reentry of Certain Deported Aliens” indicated that terms of statute should be interpreted as specifying penalties rather than creating substantive crimes).

The plain and literal meaning of the provisions of Article XII, section 23 is that on July 1, 1999, the board members, rules and jurisdiction

¹⁰ of two commissions

¹¹ were folded into the Wildlife Commission, and the two commissions were abolished. These provisions deal only with process and timing. It might be

⁹ The court there noted that the existence of a section heading in capital letters signaled clearly the subject of the section and limited available interpretations to those that fell within the ambit of the meaning of the heading. The title at issue here reads “Article XII SCHEDULE,” which signals that interpretations are restricted to matters concerning scheduling.

¹⁰ Because the Marine Fisheries Commission’s statutory powers were to be transferred to the new Wildlife Commission, only its jurisdiction on a date certain could be folded in to the new commission. Otherwise the legislature could have enlarged the Wildlife Commission’s constitutional powers beyond its grant of authority of Article IV, section 9 to include, for example, growth management responsibilities or regulation of sovereignty lands. The date restriction and prohibition on expansion prevented legislative enlargement of the powers conferred by Article IV, section 9 because although the constitutional amendments were to be voted on in November, 1998, while the new the commission was not scheduled to come into being until July 1, 1999. Art. XII, § 23, Fla. Const.

¹¹ The scheduling provisions transferred the statutory powers of the Marine Fisheries Commission but did not transfer the constitutional and statutory powers of the Game and Fresh Water Fish Commission. Art. XII, § 23, Fla. Const. For that reason, the scheduling provisions did not merge those two commissions.

argued that the addition of the statutory powers of the Marine Fisheries Commission in the scheduling section means that the exceptions to that commission's statutory powers were transferred as well. However, Article IV, section 9 created the Wildlife Commission with a broad grant of powers, and the addition of another commission's statutory powers to it cannot *subtract* from those general powers.

The court below appears to have been of the opinion that the scheduling provisions indicate that the new Wildlife Commission represented a unification of the Game and Freshwater Fish Commission and the Marine Fisheries Commission, and thus that the statutory exceptions to the latter commission's powers were carried forward to the new unified commission. However, the 1998 Advisory Opinion forecloses this interpretation. 705 So.2d at 1355. There, this court considered essentially identical language and characterized it as both unifying the two commissions and as transferring all powers over endangered marine species to the proposed commission.

The Conservationists respectfully submit that Article IV, section 9 states that the Wildlife Commission has jurisdiction over endangered marine species. As this court has consistently held, the constitution must be interpreted to mean what it says and say what it means. The constitution says that the Wildlife Commission is vested with jurisdiction over marine life

without exception and the Conservationists respectfully submit that it should be interpreted to mean just that.

II. The Challenged Law Unconstitutionally Usurps the Constitutional Authority of the Wildlife Commission

It is well settled constitutional law that the legislature may not usurp the constitutional powers of an executive agency. See e.g., Florida Dept of Natural Resources v. Florida Game and Fresh Water Fish Comm., 342 So.2d 495, 497 (Fla. 1977) (legislative transfer of constitutional executive powers of Game and Fresh Water Fish Commission to a different executive agency held unconstitutional); Beck v. Game and Fresh Water Fish Comm., 33 So.2d 594, 595 (Fla. 1948); (invalidating legislative action attempting to regulate within the zone of constitutional powers of the Game and Fresh Water Fish Commission); State ex rel. Griffin v. Sullivan, 30 So.2d 919, 920 (Fla. 1947) (legislative acts regulating within the zone of constitutional powers of the Game and Fresh Water Fish Commission held invalid). Where a constitutional executive agency has executive powers and the legislature is authorized to enact laws in aid of that agency, the legislature may not use this power to restrict the exercise of constitutional powers of the agency. See Florida Dept. of Natural Resources, 342 So.2d at 497.

In the instant case, the Florida Constitution confers upon the Wildlife Commission regulatory and executive powers over marine life. Art. IV, § 9, Fla. Const. Chapter 99-245, however, usurps this authority in three separate sections.

First, Chapter 99-245, provides in section 1 that:

(c) The provisions of chapter 120 shall be accorded to any party whose substantial interests will be affected by any action of the commission in the performance of its statutory duties or responsibilities. For purposes of this subsection, statutory duties or responsibilities include, but are not limited to, the following:

1. Research and management responsibilities for marine species listed as endangered, threatened, or of special concern, including, but not limited to, manatees and marine turtles;

Second, Chapter 99-245 provides in section 39 that:

(4) Pursuant to s. 9, Art. IV of the State Constitution, the commission has full constitutional rulemaking authority over marine life, and listed species as defined in s. 372.072(3), except for:

(a) Endangered or threatened marine species for which rulemaking shall be done pursuant to chapter 120;

Finally, Chapter 99-245 requires in section 45 that where the Wildlife Commission makes rules regarding endangered and threatened sea turtles and manatees, the Wildlife Commission must comply with the Florida APA. See § 370.12(1)(c)(3), (1)(h), (2)(f), (2)(g), (2)(h), (2)(i), (2)(k), (2)(l), (2)(m), (2)(n), (2)(p)1, (2)(q), Fla. Stat. (1999).

Together, these sections usurp the Wildlife Commission's constitutional powers. The legislature lacks the power to impose the APA on any constitutional function of the Wildlife Commission. By applying APA provisions to the Wildlife Commission's rulemaking regarding marine species that are endangered, threatened or species of special concern, proposed or existing rules concerning these species can be invalidated if the rules go outside the methods, geographic areas or procedures established by general law. Under the provisions of section 120.52(8), Florida Statutes, any rule that goes beyond the powers and duties delegated by the legislature can be invalidated, and the lack of a specific grant of authority from the legislature is a basis for invalidating any rule. Therefore, by requiring compliance with the APA, the legislature indirectly controls the substance and scope of the constitutional regulatory powers of the Wildlife

Commission.

These portions of the law are not “in aid of” the Wildlife Commission. As to matters of procedure, Article IV, section 9 explicitly directs the Wildlife Commission rather than the legislature to “establish procedures to ensure adequate due process in the exercise of its regulatory and executive functions.” Therefore, the legislature cannot constitutionally require the Wildlife Commission to comply with the APA in adopting rules concerning marine species that are endangered, threatened or species of special concern. State ex rel. Griffin v. Sullivan, 30 So.2d at 919, 920 (legislative act inconsistent with regulations adopted pursuant to the constitutional powers of the Game and Fresh Water Fish Commission held not to be “in aid” of the Commission).

For these reasons, Chapter 99-245 is invalid to the extent that it attempts to usurp the constitutional powers of the Wildlife Commission as they concern marine species that are endangered, threatened, or species of special concern.

III. Even if the Scheduling Provision Creates an Additional Exception to the Constitutional Powers of the Wildlife Commission, the Legislation is Unconstitutional because it goes well beyond any Exception implied by the Scheduling Provisions

The court below found Chapter 99-245 constitutional on the theory that the Wildlife Commission received only the statutory powers of the old Marine Fisheries Commission, which powers excluded jurisdiction over endangered species. Florida Fish & Wildlife Conservation Comm. v. Caribbean Conservation Corp., 789 So.2d at 1055. A closer examination of Chapter 99-245 and the Marine Fisheries Commission statute contradicts this finding. As shown above, Chapter 99-245 imposes a variety of procedural

and substantive restrictions on the Wildlife Commission’s ability to manage and conserve marine species that are a) endangered, b) threatened or c) species of special concern. However, the Marine Fisheries Commission statute contained exceptions *only* relating to endangered species, and contained no exceptions relating to threatened species or species of special concern.

12

These three classes of species are different. Endangered species are defined as those in jeopardy of immediate extinction.

¹³ Threatened species are defined as those at high risk of extinction in the future.

¹⁴ Species of special concern include not only those at a moderate risk of extinction in the future, but also include those that occupy an ecological niche such that a significant population decline would adversely affect other species, those that have not recovered from a previous population depletion, and those that are introduced or managed to attain specific objectives.

15

¹² See *supra* footnote 6.

¹³ Fla. Admin. Code R. 68A-1.004(26), § 372.072(3)(b), Fla. Stat.

¹⁴ Fla. Admin. Code R. 68A-1.004(73); § 372.072(3)(c), Fla. Stat.

¹⁵ Fla. Admin. Code R. 68A-27.005(1)(b). Ironically, the legislature has not adopted any definition of “species of special concern” but in the course

If the theory is that the Wildlife Commission's constitutional powers over marine life are implicitly limited by the endangered species exception to the statutory powers of the Marine Fisheries Commission, Chapter 99-245 is unconstitutional to the extent that it attempts to enlarge that exception to include threatened species and species of special concern. Only one exception was listed to the Marine Fisheries Commission's powers, and the inclusion of one exception excludes an interpretation that would allow other exceptions. See Young, 753 So.2d at 85; Graham, 204 So.2d at 194-95; Dobbs, 56 So.2d at 342; Ideal Farms, 19 So.2d at 235.

Only the endangered species exception could limit the Wildlife Commission's constitutional powers under this theory. However, the controlling decision by this court interpreted those exceptions not as *denying* the Marine Fisheries Commission the power to manage and protect endangered species, but instead left that commission with substantial but non-exclusive powers to protect such species. State v. Davis, 556 So.2d at 1106. There, the Marine Fisheries Commission's jurisdiction was interpreted in the context of a rule challenge aimed entirely at protecting sea turtles.

¹⁶ In explaining the endangered species exception to the commission's jurisdiction, this court held:

We find that a plain reading of section 370.027 does not preclude the Commission from establishing rules that might impact upon

of restricting the powers of the Wildlife Commission in Chapter 99-245 used the Commission's own terminology for classifying species for management purposes. Chapter 99-245, § 1, Laws of Florida.

¹⁶ The rules at issue required shrimp nets to be equipped with escape hatches that allow the escape of sea turtles captured by the nets. Davis, 556 So.2d at 1105-06.

endangered species. Rather, the plain import of the reference to “endangered species” is to modify the Commission’s otherwise “full” and “exclusive” rulemaking authority relating to all marine life. The statute does not say that the Commission cannot act at all with reference to endangered species; it says that the Commission is not the only agency permitted to act with reference to endangered species.

Davis, 556 So.2d at 1106.

The Davis decision also gave four other rationales for why the endangered species exceptions to the Marine Fisheries Commission’s statute did not preclude measures to protect and recover endangered species. The regulation was actually a gear specification over which the commission clearly had authority. Id. Because its rulemaking power was circumscribed only by the obligation to act reasonably pursuant to the broad statutory policy and standards, the commission could take action to conserve and protect endangered species. Id. at 1107. The Marine Fisheries Commission’s charge was to protect renewable marine resources for present and future generations, which power necessarily included powers to restore a depleted marine resource. Id. At the conclusion of the opinion, the court noted that the apparent purpose of the exceptions was not to bar action to protect endangered species but to bar rules that would authorize the taking of endangered species. Id. at 1108. Davis leaves no doubt that the Marine Fisheries Commission had substantial but not exclusive powers to protect

endangered species.

If the scheduling provisions of Article XII, section 23 incorporated statutory limitations on the Marine Fisheries Commission's jurisdiction as exceptions to the Wildlife Commission's constitutional powers, the scope of those exceptions must be governed by this court's interpretation in Davis. However, Chapter 99-245 adopts the exact interpretation of the Marine Fisheries Commission's powers that this court *squarely rejected* in Davis – that the commission had no powers whatsoever to protect and conserve endangered marine species. Section 1 of that act states that the provisions of the APA shall apply to any action of the commission when engaging in “research and management responsibilities for marine species listed as endangered, threatened, or of special concern, including but not limited to manatees and marine turtles.” Section 39(4)(a) states that the Wildlife Commission has constitutional rulemaking authority over fish and wildlife except for “endangered or threatened marine species for which rulemaking shall be done pursuant to Chapter 120.” Section 45 requires that whenever the Wildlife Commission makes rules regarding sea turtles or manatees, it must comply with the APA. Chapter 99-245 operates on the erroneous assumption that the Marine Fisheries Commission had no powers with regard to endangered marine species, and unconstitutionally usurps the Wildlife

Commission's powers to establish its own procedures to provide for due process.

No constitutional justification for Chapter 99-245 can be found in the exceptions to the full and exclusive authority of the Marine Fisheries Commission over marine life. For that reason, the challenged provisions of Chapter 99-245, Laws of Florida are unconstitutional even if the scheduling provisions of Article XII, section 23 are interpreted as creating silent exceptions to the authority of the Wildlife Commission.

CONCLUSION

In conclusion, Conservationists respectfully request that this court find unconstitutional Florida Statutes sections 20.331(6)(c), 370.025(4), 370.12(1)(c)(3), 1(h), 2(g), 2(h), 2(i), 2(k), 2(l), 2(m), 2(n), 2(p)(1) and 2(q) because they usurp the constitutional powers of the Wildlife Commission.

Respectfully submitted,

David Guest
Fla. Bar No. 0267228
Earthjustice Legal Defense Fund
Post Office Box 1329
Tallahassee, FL 32302-1329
(850) 681-0031

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via First Class U.S.

Mail this 7th day of May, 2002, to:

James Antista
General Counsel
Fish and Wildlife Conservation Commission
620 South Meridian Street
Tallahassee, FL 32399-1600

Thomas Warner
Solicitor General
Office of the Attorney General
PL-01
The Capitol
Tallahassee, FL 32399-1050

Donna Biggins
Ronald Mowrey
Mowrey & Minacci, P.A.
515 N. Adams Street
Tallahassee, Florida 32301-1111

Gary P. Sams
Dan Stengle
Gary Perko
Hopping, Green, Sams & Smith, P.A.
P.O. Box 6526
Tallahassee, Florida 32314-6526

Attorney

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the text herein is printed in Times New Roman 14-point font, and this brief complies with the font requirements of Florida Rule of Appellate Procedure 9.210.

Attorney