

STATE OF FLORIDA  
IN THE SUPREME COURT OF FLORIDA

CARRIBEAN CONSERVATION )  
CORPORATION, INC., et al.)

Petitioners, )

CASE NO. SC 01-1885

CASE NO. 1D00-1389

1D00-1804

v. )

FISH AND WILDLIFE )

CONSERVATION COMMISSION )

Trial Court No. 99-4188

STATE OF FLORIDA ex rel. )

ROBERT A. BUTTERWORTH, )

ATTORNEY GENERAL, )

Respondents. )

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ANSWER BRIEF OF RESPONDENT  
FISH AND WILDLIFE CONSERVATION COMMISSION

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REVIEW OF A FINAL ORDER OF THE DISTRICT COURT OF APPEAL  
FOR THE FIRST DISTRICT OF FLORIDA

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JAMES V. ANTISTA  
General Counsel  
Fla. Bar No. 171780  
FISH AND WILDLIFE  
CONSERVATION COMMISSION  
620 S. Meridian St.  
Tallahassee, FL 32399-1600  
(850) 487-1764  
(850) 487-1790 (fax)  
Attorney For Respondent FWC



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**PRELIMINARY STATEMENT**

References and abbreviations in the Answer Brief shall be as follows:

- "APP" is to the attached Appendix to the Reply Brief
- "CRC" is the Constitution Revision Commission,
- "DEP" is the Department of Environmental Protection
- "DNR" is the Department of Natural Resources
- "FWC" is the Fish and Wildlife Conservation Commission
- "GFC" is the Game and Fresh Water Fish Commission
- "MFC" is the Marine Fisheries Commission
- "TEDs" is the turtle excluder device
- "VOL." is the Volume of Record on Appeal
- "Revision 5" means only the provision adopted by the CRC that created the Fish and Wildlife Conservation Commission by amending Article IV, Section 9 and creating Article XII,

Section 23, Florida Constitution.

References to the Record on Appeal: References to the Record shall be "R" followed by a page number; references to any transcript shall be "T" followed by the page number; references to the Appendix to this brief shall be "App." followed by the tab letter followed by the page number printed on the document.

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**Statement Of The Case and of Facts**

Respondent, Fish and Wildlife Conservation Commission adopts the Statement of the Case and Facts as provided in Respondent's State of Florida ex rel. Robert A. Butterworth, Attorney General Reply Brief.

**STANDARD OF REVIEW**

The trial court's ruling on the constitutionality of challenged parts to Chapter 99-245, Laws of Florida is subject to *de novo* review on appeal. See State v. Keys Title & Abstract Co., 741 So.2d 599, 601 (Fla. 1<sup>st</sup> DCA 1999). Further, this state statute is presumed constitutional with all reasonable doubts resolved in favor of upholding the

constitutionality of a statute. See In re Estate of Caldwell,  
247 So.2d 1, 3 (Fla. 1971).

## SUMMARY OF ARGUMENT

Respondent Fish and Wildlife Conservation Commission (FWC) adopts the argument of Respondent State of Florida ex rel. Robert A. Butterworth, Attorney General, as set forth in its Reply Brief and also advances the following argument.

Revision 5, an amendment to Article IV, Section 9, Florida Constitution, effective July 1, 1999, created the Fish and Wildlife Conservation Commission by combining the Game and Fresh Water Fish Commission and the Marine Fisheries Commission. Revision 5 did not empower the FWC to exercise constitutional authority over certain marine species such as manatees, whales and marine turtles. Revision 5 only granted to the FWC the authority of GFC and the authority of MFC, as stated in section 370.027, Fla. Stat. (1997). Under that statute MFC did not exercise any regulatory authority over manatees, whales or any species of marine turtle. Those species were regulated and managed by DEP. The First District Court of Appeal in FWC v. Caribbean Conservation Corporation, et al, 789 So.2d 1053 (Fla. 1<sup>st</sup> DCA 2001) was correct in determining that State v. Davis, 506 So.2d 1104 (Fla 1990) does not enlarge the jurisdiction of MFC to include manatees, whales and marine turtles.

The trial court and the First District Court of Appeal

were correct to consider the schedule, the ballot summary, the transcript of proceedings of the Constitutional Revision Commission (CRC) and the CRC Statement of Intent to ascertain the intent of Revision 5.

The original (but failed) initiative petition to create an FWC with full constitutional authority over all marine life differs significantly with Revision 5 which purposely reserved the regulatory authority over manatee, whales, and marine turtles to the Legislature.

Revision 5 and Chapter 99-245, Laws of Florida together gave FWC comprehensive authority over all living resources. When acting pursuant to its statutory authority over endangered marine species, FWC is required to follow all aspects of Chapter 120, Fla. Stat.

Revision 5 should be broadly construed to accomplish the objectives of the adopters, one of which is, to reserve certain authority over endangered and threatened marine species to the Legislature.

For the foregoing reasons, FWC submits that the First District Court's opinion in FWC v. Caribbean Conservation Corporation, Inc., et al, should be affirmed and the challenged parts of Chapter 99-245, Laws of Florida should be upheld as constitutional.

## ARGUMENT

- I. REVISION 5, AN AMENDMENT TO ARTICLE IV, SECTION 9 OF THE FLORIDA CONSTITUTION, MERGED THE GAME AND FRESH WATER FISH COMMISSION AND THE MARINE FISHERIES COMMISSION TO CREATE THE FISH AND WILDLIFE CONSERVATION COMMISSION AND DID NOT CONFER CONSTITUTION AUTHORITY OVER ALL MARINE LIFE TO THE NEW COMMISSION.

In the November 1998 general election, the voters of Florida approved Revision 5, an amendment to Article IV, Section 9 of the Florida Constitution, which provides in pertinent part:

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.

Art. IV, § 9, Fla. Const. Importantly, Revision 5 did not give FWC constitutional authority over all marine life.

The marine species over which FWC exercises constitutional authority is specified in Article XII, Section 23 of the Florida Constitution, the Schedule for Revision 5.

This schedule reads as follows:

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.

ART. XII, § 23, Fla. Const. This language defines the marine species over which the FWC has constitutional authority. The FWC only exercises constitutional authority over marine species subject to the MFC on March 1, 1998. As of that date, the MFC had no authority over endangered or threatened marine species such as manatees and marine sea turtles. See § 370.027, Fla. Stat. (1997); § 370.12, Fla. Stat. (1997).

In interpreting these provisions, the trial court and the District of Court of Appeal correctly concluded that Article IV, Section 9 must be construed in *pari materia* with the schedule, Article XII, Section 23(b), as to give the constitution the intended effect of the framers and adopters (Appendix E at 47-48). It is well settled that the framers' intent is paramount when interpreting a constitutional provision and that courts should use all provisions of the constitution, including schedules and transcripts of proceedings to determine the meaning of the provision. In re Reapportionment Law, 414 So.2d 1040, 1049 (Fla. 1982); Dade County v. Pan America World Airways, Inc., 275 So.2d 505, 509 (Fla. 1973); State ex rel West v. Gray, 74 So.2d 114 (Fla. 1954); (Supreme Court of Florida construes a constitutional provision in *pari materia* with related provisions in the schedule.) (Supreme Court of Florida uses a schedule to help

construe a constitutional provision). We submit that the trial court, thought it reached the wrong conclusion, used the correct approach in interpreting Revision 5.

The question is: What was the Marine Fisheries Commission's (MFC) jurisdiction over endangered or threatened marine species as of March 1, 1998? The trial Court, relying on State v. Davis, 556 So.2d 1104 (Fla. 1990) concluded that MFC had authority over endangered marine species. The First District Court of Appeal in Florida Fish and Wildlife Conservation Commission v. Caribbean Conservation Corporation, 789 So.2d 1053 (Fla 1<sup>st</sup> DCA 2001) disagreed and ruled that the trial court applied Davis too broadly. The District Court stated:

A careful review of Davis shows it does not hold that the MFC had general concurrent authority with other agencies to regulate endangered species. Instead that case holds that the MFC had only incidental 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.at 1054.

The District Court decision in Caribbean Conservation Corporation is correct and should be upheld.

### **A. MFC Lacked Authority To Regulate Endangered and Threatened Marine Species**

The MFC's regulatory authority was limited to those rules relating to saltwater fisheries. See §§ 370.025 -. 027, Fla. Stat. (1997). The Legislature empowered the MFC with exclusive rulemaking authority over marine life with the exception of endangered species. See § 370.027, Fla. Stat. (1997). MFC had no programmatic responsibilities related to endangered marine species. The MFC never promulgated any rules relating solely to the protection of endangered marine species, namely sea turtles and manatees. See Fla. Admin. Code Chapter 46 (1997). The rules promulgated by the MFC only impacted endangered marine species when the rules limited the use of prescribed gear, which incidentally benefitted to endangered species. See State v. Davis, 556 So.2d at 1106 (stating a turtle excluder device (TED) is a fishing gear specification which the MFC had authority to regulate).

As of March 1, 1998, the Legislature had delegated programmatic responsibility for endangered marine species not to MFC but to the DEP. DEP had sole responsibility for a number of programs directly impacting endangered marine species. See § 370.12, Fla. Stat. (1997). The DEP's statutory authority included the management of marine turtles,

grant applications for marine turtle education and conservation, expansion or construction of marina facilities, and management of manatees, including research and the establishment of speed zones for motorboat traffic to protect manatees. See §§ 161.053(18)- (19), and 370.12, Fla. Stat. (1997). The MFC never exercised any regulatory authority in these program areas. While MFC could and did act cooperatively and assist DEP in the performance of its statutory responsibilities by enacting rules related to saltwater fishing that had a beneficial impact on those species, MFC never possessed statutory authority to regulate endangered marine species.

The Petitioners would ignore the text and the accompanying schedule of the Revision 5, as well as all evidence of the intent of the adopters of Revision 5.

**B. In construing the meaning of Revision 5, this Court is to ascertain the intent of the adopters of Revision 5**

The trial court correctly held that to determine the intent of Revision 5, it is necessary and proper to review the "ballot summary and statement of intent." See, Final Declaratory Summary Judgment at 4-5 (attached at App. D at 19); Vol. III, R. at 543-44. Revision 5 contained a ballot summary which described the transfer of authority as follows:

"Creates Fish and Wildlife Conservation Commission; grants 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 the new commission..."

(emphasis added). See Appendix 3 to FWC's Cross-Mot. For Summ. J. (attached at App. E at 46-49); Vol. III, R. at 411. This language explained to the voters that FWC would have the authority of the GFC and MFC and, therefore, not all marine species would fall under the ambit of FWC's constitutional authority. Also, the language clearly and explicitly provides that the Legislature retained some authority over marine life, that is, manatees, whales and sea turtles. See id.

The CRC proceedings contain a Statement of Intent which clarifies that Revision 5 did not transfer DEP's statutory authority over endangered species. See Appendix 4 to FWC's Cross-Mot. For Summ. J. (attached as App. E at 52-54); Vol. III, R. at 413-14. The relevant portions of the Statement of Intent include the following:

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 under 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, Fla. Stat., under the authority of the Department of Environmental Protection.

A question has been raised by the Department of Environmental Protection concerning the scope of the 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.

See Id. (emphasis added). This language shows clearly and conclusively that the CRC intended that the Legislature continue to exercise authority over the programs dealing with endangered marine species.

**C. Revision 5 is substantially different from the original initiative proposal because substantive amendments were made by the CRC.**

The Petitioner further submits that the language of the proposed initiative petition to amend Article IV, Section 9 and the language of Revision 5 is "essentially identical", and therefore, the new constitution should be governed by Advisory Opinion, 705 So.2d 1351 (Fla 1998) and construed to confer constitutional authority for all marine species to FWC. This is incorrect. The two provisions are significantly different.

In 1996, the Fish and Wildlife Conservation Committee, a coalition of environmental organizations, submitted a constitutional petition amendment form to the Secretary of State. See, Appendix 1 to FWC's Cross-Mot. For Summ. J.

(attached at App. E at 43-45); Vol. III, R. at 398. This initiative petition, Fish and Wildlife Conservation Commission: Unifies Marine Fisheries and Fresh Water Fish Commission, Serial Number 96-04, proposed amending Article IV, Section 9 in pertinent 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 marine aquatic 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.

(emphasis added). Id. at 45. This language would have transferred the Legislature's exclusive jurisdiction over all marine life to the FWC without any limitations. The drafters, by adding "marine aquatic life" to the list of species regulated under the constitutional authority of the proposed FWC, would have empowered the new commission with the same scope of authority over marine aquatic life that GFC exercised over wildlife and freshwater aquatic life.

The Supreme Court struck the initiative petition from the ballot because the ballot summary failed to sufficiently inform the public that the amendment would strip the Legislature of its exclusive power to regulate all marine life and grant that power to the new constitutional commission. See Advisory Op. to the Att'y General Re: Fish and Wildlife

Conservation Comm'n: Unifies Marine Fisheries & Game & Fresh Water Comm'n, 705 So.2d 1351, 1355 (Fla. 1998). During the pendency of the Supreme Court's pre-ballot review of the initiative, the public submitted a measure to the CRC. Also, at that time, Mr. William Clay Henderson, a member of the CRC, introduced Proposal No. 45 which would eventually become known as Revision 5. See Appendix 5 to FWC's Req. for Judicial Notice (attached at App. F at 75); Supp. Vol. I, R. at 131. At the time these measures were introduced to the CRC, the language in both measures was identical to the Fish and Wildlife Conservation Committee's initiative petition.

However, during its proceedings, the CRC substantially amended the text of Revision 5. See Appendix 1 to FWC's Req. for Judicial Notice (attached as App. F at 72-96); Supp. Vol. I, R. at 76-87. The difference in verbiage between Revision 5 and the failed initiative petition is significant. It is appropriate for this court to review the CRC proceedings to see how the language of Revision 5 was amended to convey less than exclusive jurisdiction over all marine life. See, 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). City of St. Petersburg v. Briley, Wild & Associates,

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 the framers' intent). 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 the body).

These proceedings clearly show that the framers intended that any statutory authority exercised by DEP over endangered marine species would remain with the agency unless the Legislature deemed otherwise. See Appendix 1 to FWC's Cross-Mot. for Summ. J. at 36 (attached at App. E at 52-65); Supp. Vol. 1, R. at 76-87. The CRC undertook a lengthy amendment process to ensure this residual authority over manatees and sea turtles remained statutory in nature. See Id.

On March 17, 1998, during the CRC proceedings, Commissioner Clay Henderson addressed the CRC regarding two amendments to Proposal No. 45, which later became known as Revision 5. See Appendix 1 to FWC's Req. for Judicial Notice at 36-40 (attached at App. F at 77); Supp. Vol I, R. at 77-81. CRC Commissioner Henderson commented on the regulatory authority that the CRC intended to transfer to the proposed FWC:

The agreement which we worked out and has previously been adopted by this commission was that the regulatory authority which was being transferred was narrow in scope to the Marine Fisheries Commission, as it exists March 1<sup>st</sup> of 1998. That is what is being transferred. We have set up the mechanism for other regulatory authority to be transferred to the commission by subsequent legislative acts. The only transfer by operation of constitutional law, if this were to pass, would be the transfer of the Marine Fisheries Commission.

See Appendix 1 to FWC's Req. for Judicial Notice at 38 (attached at App. F at 77-78); Supp. Vol. I, R. at 78 (emphasis added).

CRC Commissioner Thompson introduced an amendment (hereinafter referred to as the "Thompson Amendment") to Proposal No. 45 which amended Article IV, Section 9 of the Florida Constitution to read: [t]he 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 authority and executive powers of the state with respect to marine life..." See Appendix 1 to FWC's Req. for Judicial Notice at 36 (attached at App. F at 77); Supp. Vol 1, R. at 76 (emphasis added). Commissioner Henderson described the Thompson Amendment as follows:

So the amendment which Commissioner Thompson offers really deals with this very narrow issue of whether or not there is any regulatory authority which will currently remain at DEP. And the answer is, yes, we did not move, for instance manatees or turtles with this, with this amendment. We have only moved the Marine Fisheries Commission.

See Appendix 1 to FWC's Req. for Judicial Notice at 38

(attached at App. F at 77); Supp. Vol. 1. R. at 78.

Commissioner Thompson explained his amendment in this manner:

The jurisdiction of the Marine Fisheries Commission as set forth in statutes in effect on March 1<sup>st</sup>, '98, 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. That's been our intent all along. This provision that's on the first page is presently inconsistent with that. So my amendment makes clear, and shall also exercise regulatory and executive powers of the state with respect to marine life as the Legislature sees fit. And that's all that there is to it. It is a very simple provision that just allows the Legislature to make the decision as to whether to expand that jurisdiction.

See Appendix 1 to FWC's Req. for Judicial Notice at 51

(attached at App. F at 90); Supp. Vol. I, R. at 91. The CRC adopted the Thompson Amendment. See Appendix 1 to FWC's Req. for Judicial Notice at 53 (attached at App. F at 92); Supp. Vol. I, R. at 93.

Before considering Proposal No. 45, as amended by the Thompson Amendment, Commissioner Henderson offered some final comments:

In support of the package as now amended, I want to make very clear that what we are doing is a narrow transfer of the Marine Fisheries Commission to a new Fish and Wildlife Conservation Commission. 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. There may be some other things. The amendment contemplates that future Legislatures will be able to transfer additional

authority to the new commission.

See Appendix 1 to FWC's Req. for Judicial Notice at 53-54 (attached at App. F at 92-93); Supp. Vol. I, R. at 93-94 (emphasis added).

The above-described amendatory process makes it clear that whatever the original language of Proposal No. 45, the CRC approved only a narrow transfer of the MFC's jurisdiction to the FWC to exercised as constitutional powers. Indeed, the CRC approved Proposal No. 45 with the belief that future Legislatures would determine if any of the residual authority should be transferred from DEP to the FWC. The Legislature did transfer statutory authority over endangered and threatened marine species to the FWC as part of its comprehensive approach in Chapter 99-245, Laws of Florida. Following the framers' intent, the Legislature maintains discretion over these statutorily-derived powers.

**II. SECTIONS 1, 39 AND 45 OF CHAPTER 99-245, LAWS OF FLORIDA CORRECTLY IMPLEMENT REVISION 5 AND DO NOT USURP THE CONSTITUTIONAL AUTHORITY OF FWC.**

Chapter 99-245, Laws of Florida, also known as the "merger bill," enacted the statutory changes necessary to implement the provisions of Revision 5. In addition, Chapter 99-245, Laws of Florida transferred residual statutory authority over endangered and threatened marine species

(manatees and sea turtles) from the DEP to the FWC, as well as some statutorily-derived authority previously delegated to GFC. See Ch. 99-245, §§ 1, 39, & 45, Laws of Fla. (attached at App. A-C at 1-18). Though Revision 5 did not vest the FWC with authority over endangered marine species such as manatees and sea turtles, the Legislature completed, through Chapter 99-245, what was not accomplished by Revision 5; the unification of rulemaking authority over all wildlife, freshwater aquatic life and marine life under one agency.

The FWC, like every state agency, must follow the procedures outlined in Chapter 120, Fla.Stat., when engaged in rulemaking authorized under Florida Statutes. See § 120.54(1) (a), Fla. Stat. (2001). The GFC exercised statutorily-derived regulatory authority in certain program areas which were subject to Chapter 120 under the definition of an agency which included "[t]he Game and Fresh Water Fish Commission when acting pursuant to its statutory authority derived from the Legislature..." §120.52(1) (b), Fla. Stat.(1997). Because the Legislature in Chapter 99-245, not the language of Revision 5, moved the statutory authority belonging to the GFC to the new agency, the FWC must follow Chapter 120 when exercising its statutory powers relating to wildlife and fresh water fish. See § 120.52(1) (b) 4., Fla. Stat.(2001) Similarly, the

Legislature, in Chapter 99-245, transferred residual statutory authority over programs relating to endangered and threatened marine species, previously delegated to DEP, to the FWC. This authority, by virtue of its statutory derivation, is also subject to Chapter 120. See id.

The District Court of Appeals decision in Carribbean Conservation Corporation correctly concludes that the FWC's authority over endangered and threatened marine species is statutorily derived and consequently subject to Chapter 120. Therefore, the FWC's exercise of statutory authority over program areas previously delegated to GFC or the DEP is consistent with Revision 5. Collectively, Revision 5 and the Legislature's transfer of authority in Chapter 99-245 achieved the goal of creating a constitutional entity that exercised broad authority, including some statutorily-derived powers, over wildlife, freshwater fish and marine life.

**III. THE CONSTITUTIONAL AUTHORITY OF THE FISH AND WILDLIFE  
CONSERVATION COMMISSION EXTENDS TO THOSE  
SPECIES WHICH WERE REGULATED BY THE GAME AND  
FRESH WATER FISH COMMISSION AND THE MARINE  
FISHERIES COMMISSION AND EXCLUDES ENDANGERED AND  
THREATENED MARINE SPECIES.**

As the trial court and appellate court acknowledged, central to the resolution of this case is the scope of MFC's jurisdiction on March 1, 1998. (See App. D at 1-8); Vol. III,

R. at 544. The trial and appellate courts looked to section 370.027, Fla. Stat. (1997), which provided that the MFC had rulemaking authority over marine life in a number of areas "with the exception of endangered species."

The Petitioner submits that, if there is an exception to the FWC's constitutional authority, that exception is only as to species classified as endangered, not to species listed as threatened or of special concern. We submit that Petitioner's argument, never raised at trial or at the appellate court, is incorrect and an extremely narrow view of the Constitution, which is inconsistent with the intent of the framers.

**A. MFC never exercised regulatory authority over endangered or threatened marine species.**

As of March 1, 1998, the Marine Fisheries Commission exercised no regulatory over any marine mammal or marine turtle species including those species which were listed as endangered or threatened by the rules of the Game and Fresh Water Fish Commission (GFC) or the United States Fish and Wildlife Service. These marine species are as follows: West Indian Manatee; Atlantic Green turtle; Atlantic Ridley turtle; Atlantic hawks bill turtle; Leatherback turtle; Loggerhead sea turtle; Atlantic right whale; Finback whale; Sei whale; Humpback whale; Sperm whale. All but one of the above

species, the Loggerhead sea turtle, are listed as endangered under Florida law. The Loggerhead sea turtle is listed as threatened. One species, the Atlantic Green turtle is endangered under Florida law but threatened under Federal law.

The FWC's current list of species listed as endangered, threatened or of special concern (Fla. Admin. Code Rules 68A-27.002-.005) was originally created by GFC (Fla. Admin. Code Rules 39-27.002-27.005) (attached as Appendix J at 109-115) and was transferred to FWC by Section 2, Chapter 99-245, Laws of Florida. GFC created the list of specially protected species pursuant to its constitutional authority over fish and wildlife and also in furtherance of its obligations under the Endangered Species Act to establish, as wildlife agency for the State of Florida, programs and regulations to protect and manage species classified as endangered or threatened under the Federal Endangered Species Act which are indigenous to Florida. 16 U.S.C. § 1535. The GFC list included marine species but the rule noted that listed marine species were under the regulatory and management authority of DEP. See, Fla. Admin Code Rule 39-27.002(3). (attached as Appendix J at 111). The current FWC classification of endangered, threatened and special concern indicate different levels of imperilment.

See, Fla. Admin. Code Rules 68A-1.004 (28) (73) and (77) for definitions of endangered, threatened and of special concern. The federal definition of endangered and threatened species is not the same as the Florida definitions. See 50 C.F.R. § 17.3.

Under the Petitioner's argument, the FWC has constitutional authority over the Loggerhead sea turtle because they are listed as "threatened" but lacks such authority over the other marine turtles because they are "endangered". Thus, one marine turtle species is exclusively under the constitutional authority of FWC but other species of sea turtles are under the statutory control of the Legislature. Under Petitioners' argument, FWC alone could control which species were "constitutional" and which were "statutory" by altering the species classification from endangered to threatened. Such an arrangement could throw the regulation of turtles and manatees into turmoil, inviting suspicion as to the motives of FWC listing actions, causing confusion if the same species was classified as threatened on FWC's list but endangered under the Federal Endangered Species Act and, generally creating an untenable situation for wildlife regulation. Such an irrational construction is not in harmony with the intent of Revision 5. This court should avoid

an interpretation that will render the Constitution inoperable, frivolous or meaningless. Broward County v. City of Fort Lauderdale, 480 So. 2d 631 (Fla.1985).

There is no evidence in the record to support that MFC had authority to regulate turtles or any other marine species whether listed as endangered or threatened. As of March 1, 1998, these species were regulated by the Department of Environmental Protection (successor agency to the Department of Natural Resources). In its sixteen-year history, the MFC's statutory or management responsibilities never included endangered or threatened marine species. See Fla. Admin. Code Rule Chapter 46 (1983-99). In fact, the DEP (formerly the DNR) and not the MFC, exercised regulatory, management, and enforcement authority over endangered marine species by, for example, creating and enforcing vessel speed zones to protect manatees, regulating the possession of sea turtles for education purposes, and regulating coastal construction activities to protect turtle nests. See §§ 161.053, 370.12, Fla. Stat. (1997). Under Section 370.12(1)(d)-(g), Fla. Stat. (1999), the DEP still oversees the issuance of coastal construction permits and may, in accordance with applicable FWC rules, place conditions on those permits to protect sea turtles. The MFC lacked the requisite statutory authority to

operate the above programs. The issuance of permits for activities impacting endangered or threatened marine species was strictly a function of the DEP, and not the MFC. See §§161.053, 370.12, Fla. Stat. (1997).

Perhaps because all marine mammals and all but one marine turtle species on the GFC list were classified as "endangered", the Legislature in section 370.027, Fla.Stat.(1997) expressed the exception to MFC's authority over marine life as "endangered species."<sup>1</sup> In fact, the authority of DEP, as of March 1, 1998, extended to all marine turtles including the threatened Loggerhead turtle. Section 370.12(1)(b) Fla. Stat.(1997) states:

(b) The Legislature intends, pursuant to the provision of this subsection, to ensure that the Department of Environmental Protection has the appropriate authority and resources to implement its responsibilities under the recovery plans of the United States Fish and Wildlife Service for the following species of marine turtle:

1. Atlantic loggerhead turtle (*caretta caretta*)

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<sup>1</sup>We submit that the term "endangered species" may have been meant as a euphemism for "listed species", that is, species listed as endangered or threatened in Florida or under the Federal Endangered Species Act. 16 U.S.C. § 1531-1543 Indeed, the "Endangered Species Act" is itself a title of a federal law that includes species listed in a variety of classifications, including endangered, threatened, and endangered by similarity of appearance. See 50 C.F.R. §§ 17.3, 17.11, 17.50. It is not clear whether the term "endangered" in section 370.027, Fla. Stat. (1997) refers to the species in the Florida list or the Federal list or both.

*caretta*).

2. Atlantic green turtle (*Chelonia mydas mydas*).
3. Leatherback turtle (*Dermochelys coriacea*).
4. Atlantic hawksbill turtle (*Eretmochelys imbricata imbricata*).
5. Atlantic Ridley turtle (*Lepidochelys Kempfi*).

We submit a logical and rational explanation: Framers of Revision 5 did not intend for "threatened" sea turtles, or any other marine species classified as threatened, to be species under the Constitution authority of FWC. On this point, the CRC "Statement of Intent" for Revision 5 with respect to regulation of sea turtles states as follows:

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."

(attached as App. E. at 52-53 (CRC Journal, May 5, 1998 R 407-408) (emphasis supplied). The statement of intent was published without objection in the CRC's Journal. Id. Clearly the intent of the framers was to create a new constitutional agency which combined the GFC and the MFC, and which would exercise constitutional authority only over these species directly regulated by those commissions. This court

should give broad construction to constitutional provisions so as to accomplish the objective of the framers of Revision 5. Metropolitan Dade County v. City of Miami, 396 So.2d 144 (Fla. 1981). In constructing a constitutional provision, a constitution should be given a broader and more liberal construction than statutes. Florida Society of Ophthalmology v. Florida Optometric Association, 489 So.2d 1118 (Fla. 1986). The Supreme Court in Florida Society of Ophthalmology stated:

Constitutions are "living documents," not easily amended, which demand greater flexibility in interpretation than that required by legislatively enacted statutes. Consequently, courts are far less circumscribed in construing language in the area of constitutional interpretation than in the realm of statutory construction. See Malnak v. Yogi, 592, F.2d 197, 204 (3d Cir. 1979). When adjudicating constitutional issues, the principles, rather than the direct operation or literal meaning of the words used, measure the purpose and scope of a provision. United States v. Lefkowitz, 285 U.S. 452, 467, 52 S.Ct. 420, 424, 76 L.Ed. 877 (1932). See also Bain Peanut Co. v. Pinson, 282 U.S. 499, 501, 51 S.Ct. 228, 229, 75 L.Ed. 482 (1932) ("[t]he interpretation of constitutional principles must not be too literal"); Plante v. Smathers, 372 So.2d 933,, 936 (Fla. 1979) ("[t]he spirit of the constitution is as obligatory as the written word").  
Id at 1119.

Petitioners' narrow reading of the term "endangered species" will result in a narrow and literal interpretation of Revision 5, which could potential create confusion about FWC's source and scope of authority over marine turtles.

Petitioners interpretation will frustrate the intent of Revision 5 and should be rejected by this court.

**B. Section 370.027, Fla. Stat (1997), as interpreted by State v. Davis, does not enlarge MFC's jurisdiction to include endangered or threatened marine species**

The trial court and appellate court looked to case law interpreting section 370.027 and, specifically, at State v. Davis. (attached as App. D at 5-6); Vol. III, R. at 544-45. The Supreme Court in Davis did not hold that the MFC has the authority to regulate turtles or any other species or programs statutorily delegated to DNR. The Davis case only concerned the validity of MFC's rule requiring the use of turtle excluder devices (TEDs). TEDs are a fishing gear specification over which the MFC had clear regulatory authority. See Davis, 556 So.2d at 1106. The MFC, as the sole agency of the state with delegated statutory authority over fishing gear, found it necessary to take emergency action to restrict fishing gear that was being used in a manner that had devastating effects on sea turtle populations.

The MFC enacted an emergency rule in 1989 requiring the use of TEDs in shrimp trawls, which was the rule at issue in the Davis case, to protect turtles during the pendency of a federal rule challenge. In January, 1989, Kemp's Ridley turtles were dying in record numbers along Florida's northeast

coast. See Emergency Rule 46ER89-3 as filed for adoption with the Department of State at 2 (attached at App. I at 101-107). The DNR and the MFC had worked cooperatively to protect sea turtles in the past when MFC regulations secondarily affected this species. See id. In 1989, fishing gear allowed by the MFC, shrimp trawls in particular, were negatively impacting sea turtles. The mechanism to address this problem was to require the use of TEDs in shrimp trawls or, in other words, promulgate a rule for fishing gear. The DNR had no regulatory authority over any type of fishing gear; section 370.027, Fla.Stat., specifically delegated this authority to the MFC. Consequently, the DNR requested that the MFC adopt an emergency rule for Florida's northeast coast requiring TEDs in all offshore trawls in order to protect endangered and threatened sea turtles. See id.

In May 1989, the MFC approved a rule to require TEDs year-round in all trawls used in state waters and subsequently imposed an emergency rule to require use of TEDs. See Id. In this case, the MFC rule addressed saltwater fishing gear because the only agency with jurisdiction over saltwater fishing gear was the MFC. See, § 370.12, Fla. Stat.(1997). The MFC's rule requiring TEDs represents a coordinated action done in cooperation with state and federal agencies. Thus,

MFC had no regulatory authority over marine mammals or marine turtles. The Davis case merely upholds the MFC's ability to require the use of fishing gear to protect endangered sea turtles. The Davis case does not enlarge the jurisdiction of MFC to include endangered or threatened marine species, and consequently, the Petitioners are incorrect in asserting that the Davis decision imparts constitutional authority over sea turtles and manatees to the FWC.

By enacting Chapter 99-245, Laws of Florida, the Legislature acted properly to vest FWC with statutory authority over manatees, whales and all sea turtles. By delegating to FWC the statutory authority to regulate and manage these species, Chapter 99-245, Laws of Florida, is in aid of the FWC and unifies the regulation of all living resources in one agency. In short, this law does not usurp FWC's authority under Revision 5, but fulfills it.

#### **CONCLUSION**

The Respondent FWC requests this Court to uphold FWC v. Caribbean Conservation Corporation, 789 So.2d 1053 (Fla. 1<sup>st</sup> DCA 2001) and to find the challenged parts of Chapter 99-245, Laws of Florida to be constitutional.

#### **CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by U.S. Mail to the following on this \_\_\_\_\_ day of May, 2002.

Mr. David Guest  
Earth Justice  
P.O. Box 1329  
Tallahassee, FL 32302-1329

Mr. Matthew Conigliaro  
Deputy Solicitor General  
The Capitol PL-01  
Tallahassee, FL 32399

Ms. Donna Biggins  
Mowrey & Minacci, PA  
515 N. Adams St.  
Tallahassee, FL 32301-1111

Mr. Gary Sams  
Mr. Gary Perko  
Hopping, Green & Sams, P.A.  
P.O. Box 6526  
Tallahassee, FL 32314-6526

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JAMES V. ANTISTA  
General Counsel  
Fla. Bar No. 171780  
FISH AND WILDLIFE  
CONSERVATION COMMISSION  
620 S. Meridian St.  
Tallahassee, FL 32399-1600  
(850) 487-1764  
(850) 487-1790 (fax)  
Attorney For Respondent FWC

**CERTIFICATE OF COMPLIANCE**

The undersigned certifies the type size and style used in this brief is 12-point Courier New and this brief complies with the font requirements of Florida Rule of Appellate Procedure 9.210.

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JAMES V. ANTISTA  
General Counsel  
Fla. Bar No. 171780  
FISH AND WILDLIFE  
CONSERVATION COMMISSION  
620 S. Meridian St.  
Tallahassee, FL 32399-1600  
(850) 487-1764  
(850) 487-1790 (fax)  
Attorney For Respondent FWC