

TP 218

Boating, Waterways, and the Rights of Navigation in Florida



Fourth Edition

Thomas T. Ankersen
Richard Hamann
Byron Flagg
Alex Boswell-Ebersole
Jennifer Saviano

Boating, Waterways, and the Rights of Navigation in Florida

Fourth Edition

THOMAS T. ANKERSEN

RICHARD HAMANN

BYRON FLAGG

ALEX BOSWELL-EBERSOLE

JENNIFER SAVIANO

Conservation Clinic

Center for Governmental Responsibility

University of Florida Levin College of Law

Gainesville, FL 32611-7629

November 2015

I. Introduction	1
A. A Taxonomy of Vessels on Florida Waters	3
B. The United Nations Convention on the Law of the Sea (UNCLOS).....	6
C. Federal, State, and Local “Territorial” Waters.....	8
D. Relationship to Maritime and Admiralty Law	11
II. Federal Authority: Concurrent State and Local Jurisdiction and the Reservation of Federal Navigation Rights.....	13
A. Federal Constitutional Authority over Navigable Waters.....	14
B. Federal Statutory Authority over Navigation, Including Anchoring.....	16
1. The Submerged Lands Act (SLA).....	17
2. The Rivers and Harbors Act.....	18
a. Obstructions to Navigation	18
b. Anchorage Grounds and Special Anchorage Areas.....	19
3. Coastal Zone Management Act	20
C. Federal Limits on State and Local Authority to Regulate Navigation and Anchoring	23
1. Actual Conflict with Federal Laws	23
2. Preemption: <i>Barber v. State of Hawaii</i> and Local Anchoring Regulations	25
3. Dormant Commerce Clause Impact on State Regulation of Navigation and Anchoring	27
4. Navigation Rules (a.k.a. “The Rules of the Road”) and “COLREGs”	29
a. The International Rules or “COLREGs”	30
b. The Inland Rules	30
c. Preemption and Concurrency with State and Local Law.....	31
5. U.S. Coast Guard Authority and Federal Regulations.....	32
a. General Authority	32
b. Authority to Regulate Navigation.....	33
c. Aids to Navigation System.....	33
d. Regulated Navigation Areas and Limited Access Areas.....	34
e. Regulation of Anchoring	35
f. Rulemaking Process.....	36
6. Federal Channels (including the Intracoastal Waterway)	37
a. Locks and Bridges.....	39
III. Approaches to Local Boating Regulation in Other States	39
IV. State and Local Authority over Navigation and Anchoring.....	41
A. The Proprietary and Regulatory Source of State Authority.....	41
1. The Public Trust Doctrine and Sovereign Submerged Lands	42
2. Privately Owned Submerged Lands and Public Navigation Rights.....	44
3. Landowner Rights and Riparian Waters.....	47
4. The State’s Inherent Police Power and Navigation	49
5. Geographic Limitations to Municipal Police Powers.....	51
B. Statutory Basis for Regulating Navigation in Florida.....	52
1. Chapter 253, Florida Statutes: State Authority to Regulate Navigation and Anchoring and to Manage Anchorages.....	52
2. State Authority to Allow Local Regulation of Navigation and Anchoring...	54

3. Chapter 327, Florida Statutes: State Preemption of Local Regulation of Navigation and Anchoring	55
a. A Short History of Chapter 327, Florida Statutes.....	55
b. The 2009 Amendments to Chapter 327, Florida Statutes	57
4. Other State and Local Government Navigation Regulations in Florida	64
a. Florida Statutes § 327.46, Boating-Restricted Areas	64
b. Florida Statutes § 327.41, Uniform Waterway Regulatory Markers	67
c. Florida Statutes § 327.44, Interference with Navigation; Relocation or Removal; Recovery of Costs	67
d. Florida Statutes Regarding Derelict, Abandoned, and At-Risk Vessels ..	68
5. The Inland Navigation Districts.....	69
a. Regional Waterway Management Systems.....	70
V. Approaches to Anchorage Management in Florida.....	70
A. Managed Mooring Fields (MMFs)	70
B. Pilot Program for Regulation of Anchoring and Mooring	72
VI. Conclusion.....	73

This page intentionally left blank.

Author's Note¹

This represents the fourth edition of this analysis of the federal, state, and local government law associated with the practice of navigating on the waters of the state of Florida. When the first edition was released in 1999, we focused largely on anchoring, often considered part and parcel of the right of navigation. The second and third editions continued with this focus. For this fourth edition, we have expanded the substantive scope of analysis to more broadly address the attributes of waterborne navigation in Florida, including anchoring. Therefore, for this edition, we omitted the term *Anchoring Away* and have retitled the publication to align with our expanded approach.

I. Introduction

It's official! The U.S. Coast Guard's recommended equipment list has been revised. Now, in addition to anchors, fire extinguishers, emergency signals and personal flotation devices, American boaters are advised to pack a lawyer.²

Florida boasts one of the most complex and ecologically productive systems of coastal bays, bights, sounds, passes, inlets, cuts, canals and harbors in the United States, as well as an extensive network of maintained inland waterways. In 2013, Florida led the nation with 896,632 registered vessels and an estimated one million more non-registered vessels sharing its waterways.³ A 2007 study found that the number of Florida registered vessels alone logged 21.7 million

¹ Authors; Thomas T. Ankersen (ankersen@law.ufl.edu) is a Legal Skills Professor and Director of the University of Florida College of Law's Conservation Clinic. Ankersen is also Florida Sea Grant's Statewide Legal Specialist. Richard Hamann (hamann@law.ufl.edu) is an Associate in Law at the College of Law's Center for Governmental Responsibility. Byron Flagg (byron@theflagfirm.com) is an Assistant General Counsel with the St. Johns River Water Management District. He holds an LL.M in Environmental and Land Use Law from the University of Florida Levin College of Law and participated in its Conservation Clinic. He also served in the U.S. Coast Guard Reserves as a Boatswain's Mate 3rd Class. Alex Boswell-Ebersole (boz.ebersole@gmail.com) is the Assistant City Attorney at the City of Bonita Springs, Florida. He holds an LL.M in Environmental and Land Use Law from the University Florida Levin College of Law and participated in its Conservation Clinic where he worked on issues involving waterways and working waterfronts. Jennifer S. Saviano (jssaviano@hotmail.com) is a J.D. candidate at the University of Florida Levin College of Law and is pursuing a Certificate in Environmental and Land Use Law. Saviano has served in the U.S. Coast Guard in aids to navigation and waterways management assignments.

² See William K. Terrill, Note, *LCM Enterprises v. Town of Dartmouth: Can Recreational Mariners Protect Their Right to Navigate?* 2 Ocean & Coastal L.J. 167 (1996) (quoting Bob Weimer, Boaters New Problem: No Parking Zones, *Newsday* (Nassau and Suffolk ed.), Feb. 15, 1993, at 32)[Hereinafter Terrill].

³ See Florida Fish and Wildlife Conservation Commission's *2013 Boating Accidents Statistical Report*, available at <http://myfwc.com/media/2804464/2013-BoatingStatistics.pdf> (last visited Aug. 28, 2014). There were 896,632 vessels registered in Florida and another estimated one million non-registered vessels actively using Florida's waters in 2013.

boating trips.⁴ This same study, prepared for the Florida Fish and Wildlife Conservation Commission (FWC), concluded that these boating trips and their related commercial activities contributed \$17.6 billion dollars to Florida's economy in 2007.⁵ Although the Great Recession hit U.S. boating hard, the industry has since entered into a robust recovery. In fact, the National Marine Manufacturer's Association (NMMA) reports that direct sales of products and services have increased in each of the last three years, and have nearly reached the pre-recession high of \$39.5 billion in 2006.⁶ Moreover, the NMMA found that Florida led all states in total expenditures for new marine products,⁷ and that the total economic impact of recreational boating in the state now exceeds \$10 billion, with a \$10.35 billion impact in 2013.⁸

As commercial and recreational use of the Florida waterway system continues to expand with population growth, the potential for conflicts among boaters, the environment, and different user groups will also increase.⁹ Faced with these competing pressures, state and local governments are forced to reconcile conflicting demands for the same limited geographic space and natural resources. As a result, the right to freely navigate on Florida waters, which can involve associated anchoring, continues to engender considerable controversy, including litigation.

We begin our analysis by offering a taxonomy of vessels on the water, followed by a brief discussion of the often confused distinction between boating law—the focus of this report—and maritime law and admiralty law, a doctrinally distinct body of law. We then turn to the federal interest in navigation, including the federal navigation servitude, pre-emption and federal supremacy considerations, as well as relevant federal statutes and the congressionally adopted international COLREGs—known by mariners and other boaters as the “Rules of the

⁴ See Florida Boating Access Facilities Inventory and Economic Study, 2009, http://myfwc.com/media/1162720/About_Econ_BAFI_Full_09.pdf (last visited Aug. 28, 2014).

⁵ See *id.* See also the same URL for a breakdown of economic contribution to regional economies of boating trips and related activities.

⁶ See 2013 Recreational Boating Statistical Abstract, available at <http://www.nmma.net/assets/cabinets/Cabinet453/2013-US-Recreational-Boating-Statistical-Abstract-Preview.pdf>.

⁷ *Id.*

⁸ See National Marine Manufacturers Association. Economic Significance of Recreational Boating in Florida (2013), available at http://www.nmma.org/assets/cabinets/Cabinet508/Florida_Boating_Economics%20State.pdf.

⁹ Florida is not the only state experiencing such conflicts. See Barbara A. Vestal, *Dueling with Oars, Dragging Through Mooring Lines: Time for More Formal Resolution of Use Conflicts in States' Coastal Waters?* 4 *Ocean & Coastal L. J.* 1 (1999) (recognizing the general increase in use conflicts). See also Exec. Order No. 13547, 75 Fed. Reg. 43023 (Jul. 19, 2010), available at <http://www.gpo.gov/fdsys/pkg/FR-2010-07-22/pdf/2010-18169.pdf> (establishing a national policy for the purpose of addressing the effects of multiple uses on the ocean, coastal, and Great Lakes ecosystems and resources) (last visited Aug. 28, 2014).

Road.” Next, state and local efforts to address navigation, including anchoring in Florida, are examined along with the small number of judicial opinions construing such efforts. As explained in our analysis, the Florida Legislature continues to limit the authority of local governments to regulate navigation. However, despite substantial amendments, the statute limiting local regulation still contains some ambiguity when it comes to the meaning of the term “navigation,” which has yet to be defined by Florida law.

In addition to its police powers, we consider the state’s proprietary authority over the lands underlying navigable waters, including the still unresolved question of the scope of that authority when such submerged lands have been transferred from the sovereign. We also address the effect of riparian rights of adjacent landowners on boating law. We conclude by noting that recent amendments to Florida’s boating law, which include restrictions on local government regulation, guidelines for the creation of boating restricted areas, and pilot programs for mooring fields, can make a difference in promoting statewide consistency for the use of Florida’s waterways.

A. A Taxonomy of Vessels on Florida Waters

The regulatory interest in vessels and navigation can be understood through classifying vessels by their use or occurrence on state waters. These vessels may be commercial or recreational, but are mainly recreational. The taxonomy below characterizes the nature of vessels in terms of regulatory interest. Accurately describing and distinguishing these vessels based on their use illustrates the difficulty in devising an appropriate regulatory and management regime.

Vessel – Vessel, as defined by Chapter 327, includes “every description of a watercraft, barge, and airboat, other than a seaplane on the water, used or capable of being used as a means of transportation on water.”¹⁰

Cruising vessels – Cruising vessels are vessels navigating from one place to another and may be described as “transient” vessels. Cruising vessels can also be “live-aboard” vessels. Neither cruising nor transient vessels have been statutorily defined, although Chapter 327, Florida Statutes, does use the term “non-live-aboard” vessel in a way that captures much of the apparent legislative intent to preempt local “length of stay” regulation of cruising or transient vessels.¹¹

Stored vessels – Stored vessels are vessels kept indefinitely in one general location on the waters of the state for the benefit of the owner, who may or may not regularly use the vessel. Stored vessels can also be “live-

¹⁰ See Fla. Stat. § 327.02(43) (2015).

¹¹ See Fla. Stat. § 327.4105 (2015) (using, but not defining, the term “non-live-aboard” when referring to certain vessels).

aboard” vessels. Vessels stored on state waters may interfere with the use of sovereign submerged lands beneath them, and may pose navigational, environmental, and safety concerns when not properly anchored or moored, or if they become derelict vessels. Like transient and cruising vessels, stored vessels are not defined by statute.

Live-aboard vessels – Live-aboard vessels are defined by statute and by submerged lands leases, but the definitions differ. Chapter 327 of the Florida Statutes defines “live-aboard” vessel to include “a vessel used solely as a residence *and not for navigation* (emphasis added),” a vessel utilized as a business or commercial entity, or a vessel which has filed a declaration of domicile, excluding commercial fishing boats.¹²

The term “solely” makes the definition appear very narrow, but “live-aboard vessel” has been interpreted to include a vessel not used “solely” as a residence if it is used “primarily” as a residence and is represented as a legal residence.¹³ The term is mainly used in Chapter 327 to confirm local governmental authority to prohibit or restrict the mooring or anchoring of “live-aboard” vessels within a municipality’s jurisdiction.

Conversely, the submerged land leases entered into by the Board of Trustees defines “live-aboard” vessels based on periods of time when describing authorized uses of submerged lands.¹⁴ In this context, the term “live-aboard” vessel is defined as “a vessel docked at [a] facility and inhabited by a person or persons for five (5) consecutive days or a total of ten (10) days within a thirty (30) day period.”¹⁵ The definition further states that “if liveaboards are authorized by paragraph one (1) of this lease, in no event shall such ‘liveaboard’ status exceed six (6) months within any twelve (12) month period, nor shall any such vessel constitute a legal or primary residence.”¹⁶

¹² Fla. Stat. § 327.02(19) (2015). See also Ch. 2009-86, Laws of Fla. (2009) (providing the language both stricken and added by the Florida Legislature’s 2009 amendment).

¹³ Op. Att’y Gen. Fla. 85-45 (1985). See also *Perez v. Marti*, 770 So. 2d 284, 289 (Fla. 3d DCA 2000) (explaining that, in Florida, “[a] legal residence is the place where a person has a fixed abode with the present intention of making it their permanent home.”); *Miller v. Gross*, 788 So. 2d 256, 259 (Fla. 4th DCA 2000) (pointing out that the law requires “positive or presumptive proof” of an intention to remain in the residence “for unlimited time” in order for it to qualify as a legal residence).

¹⁴ To view a link maintained by the Florida Department of Environmental Protection that provides a common example of a State Submerged Land Lease in template format see http://www.dep.state.fl.us/lands/files/ssl_lease_template.pdf (last visited Aug. 03, 2015) (see Paragraph 29 of lease template for a provision specifically relating to “live-aboard” vessels).

¹⁵ *Id.*

¹⁶ *Id.*

Derelict vessels – Derelict vessels are defined under Section 823.11(1) of the Florida Statutes as “a vessel . . . that is left, stored, or abandoned . . . in a wrecked, junked, or substantially dismantled condition upon any public waters.”¹⁷ Additionally, vessels left at any Florida port without consent of the agency administering the port area, as well as vessels left “docked, grounded, or beached upon the property of another without the consent of the owner of the property” are also derelict vessels.¹⁸ Recent reforms have enhanced the ability of state and local agencies to remove derelict vessels.¹⁹

Floating structures – Floating structures are defined under Section 327.02(11) of the Florida Statutes as “a floating entity, with or without accommodations built thereon, which is not primarily used as a means of transportation on water but which serves purposes or provides services typically associated with a structure or other improvement to real property.”²⁰ This section lists several examples of possible floating structures including: an entity used as a place of business with public access, a residence, a restaurant or lounge, a storage facility, and a dredge.²¹ The definition explicitly excludes floating structures from the term “vessel” as used in Chapter 327, Florida Statutes.²² The definition further provides that an entity incidentally moving or resting partially or entirely on the bottom may still meet the definition of floating structure.²³

Regarding the term “floating structure,” the U.S. Supreme Court recently issued a ruling in a case requiring the Court to determine whether a floating home in Florida, used by an individual as his residence, amounted to a “vessel” for the purposes of federal admiralty jurisdiction.²⁴ The Court found that the floating home did not meet the definition of a “vessel”, and therefore

¹⁷ Fla. Stat. § 823.11 (2015).

¹⁸ *Id.* § 823.11.

¹⁹ See Thomas K. Ruppert, *Local Government Authority to Remove Abandoned and Derelict Vessels*, available at https://www.law.ufl.edu/pdf/academics/centers-clinics/clinics/conservation/resources/flow_chart.pdf (last visited Nov. 07, 2014). See also Ch. 2014-143, Laws of Fla. (2014).

²⁰ Fla. Stat. § 327.02(11) (2015).

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ See *Lozman v. City of Riviera Beach, Fla.*, 133 S. Ct. 735 (2013) (determining that a floating home that was docked at a marina and lacked the ability to propel itself, steer itself, and to generate its own electricity, did not meet the definition of a “vessel”). The Court made this decision because it found that a reasonable observer, “looking to the home’s characteristics and activities,” would not consider the home practically designed for transportation, *id.* at 739.

federal admiralty jurisdiction was not appropriate.²⁵ See Section I.D. discussing the relationship of maritime and admiralty law regarding *Lozman*.

B. The United Nations Convention on the Law of the Sea (UNCLOS)

With 14 deep-water seaports and favorable proximity to cruise ship destinations, Florida hosts foreign-flagged vessels every day.²⁶ As a result, it is important to consider Florida's connection to maritime commerce through the United States' relationship with the international treaty known as the United Nations Convention on the Law of the Sea (UNCLOS), sometimes referred to simply as "The Law of the Sea."²⁷

Although the United States has not ratified this treaty,²⁸ it does recognize UNCLOS's role in international relations and abides by much of its framework.²⁹ Rooted in some of the oldest concepts of international law and customs, UNCLOS was adopted in 1982 and was substantially amended in 1994. Currently, 167 nations have ratified the Convention, which both establishes a regime of rights and imposes a series of duties upon the parties to the agreement.³⁰ It also defines maritime boundaries and legal jurisdictions, addresses rights of access to ocean resources, includes provisions for environmental protection, and sets rules governing the behavior of vessels.

With regards to the navigational rights of vessels, the treaty includes Article 17, titled the "Right of Innocent Passage." This Article states that "ships of all States, whether coastal or land-locked, enjoy the right of innocent passage . . ."³¹

²⁵ *Id.*

²⁶ See <http://www.dot.state.fl.us/seaport/seamap.shtm> (last visited Aug. 28, 2014).

²⁷ To view a webpage maintained by the United Nations with links to the various parts of the text of the United Nations Convention on the Law of the Sea (hereinafter, The Law of the Sea or UNCLOS) and the related "Agreement relating to the Implementation of Part XI of the Convention," see http://www.un.org/Depts/los/convention_agreements/texts/unclos/closindx.htm (last visited Aug. 28, 2014).

²⁸ To view a link maintained by the United Nations listing UNCLOS signatory nations see http://www.un.org/depts/los/reference_files/chronological_lists_of_ratifications.htm#The%20United%20Nations%20Convention%20on%20the%20Law%20of%20the%20Sea (last visited Aug. 04, 2015). See BARRY E. CARTER & ALLEN S. WEINER, INTERNATIONAL LAW 813 (Vicki Been et al. eds., 6th ed. 2011).

²⁹ To view a webpage maintained by the U.S. State Department that contains links documenting efforts of the United States relating to UNCLOS see <http://go.usa.gov/QxsY> (last visited Aug. 28, 2014). See also, e.g., *U.S. v. Alaska*, 503 U.S. 569 (1992) and *U.S. v. Royal Caribbean Cruises, Ltd.*, 11 F. Supp. 2d 1358, 1998 A.M.C. 1817 (S.D. Fla. 1998) (concluding that, although the United States has not ratified UNCLOS, it still reflects customary international law). See also, Proclamation No. 5928, 54 Fed. Reg. 777 (Jan. 9, 1989).

³⁰ To view a link maintained by the United Nations listing UNCLOS signatory nations see http://www.un.org/depts/los/reference_files/chronological_lists_of_ratifications.htm#The%20United%20Nations%20Convention%20on%20the%20Law%20of%20the%20Sea (last visited Aug. 04, 2015).

³¹ Article 17, UNCLOS, Dec. 10, 1982. (U.N. Doc. A/CONF.62/122 21 I.L.M. 1261(1982); Signed 10 Dec. 1982;

Article 18 goes on to explain what this means:

Article 18: Meaning of Passage

1. *Passage means navigation through the territorial sea for the purpose of:*
 - a) *traversing that sea without entering internal waters or calling at a roadstead or port facility outside internal waters; or*
 - b) *proceeding to or from internal waters or a call at such roadstead or port facility.*
2. *Passage shall be continuous and expeditious. However, passage includes stopping and anchoring, but only insofar as the same are incidental to ordinary navigation or are rendered necessary by force majeure or distress or for the purpose of rendering assistance to persons, ships or aircraft in danger or distress.*³²

Article 19 of UNCLOS explains the “Meaning of Innocent passage” and enumerates acts of foreign vessels that violate true innocent passage. Passage is considered “innocent” “so long as it is not prejudicial to the peace, good order, or security of the coastal State.”³³

However, for foreign vessels operating pursuant to Innocent Passage on the waters of coastal States, like the United States, the right to stop and anchor is a limited right under UNCLOS. In other words, as described in Article 18, a foreign-flagged vessel that stops and anchors in a coastal State’s waters may do so only “in so far as [stopping and anchoring] are incidental to ordinary navigation or are rendered necessary . . .”

Beyond this limitation, UNCLOS also specifically requires foreign-flagged vessels to adhere to the laws of coastal States regulating the use of waters. For example, as stated by Article 21 of UNCLOS, “[f]oreign ships exercising the right of innocent passage through the territorial sea shall comply with all such laws and regulations and all generally accepted international regulations relating to the prevention of collisions at sea.”³⁴ Article 21 also provides that coastal States may adopt laws and regulations relating to the “right of innocent passage” with respect to the following:

- a) *the safety of navigation and the regulation of maritime traffic;*
- b) *the protection of navigational aids and facilities and other facilities or installations;*

Entry into Force: 16 Nov. 1994. Under international law, the term “State” refers to nations.

³² *Id.* at Article 18.

³³ *Id.* at Article 19(1).

³⁴ *Id.* at Article 21(4).

- c) *the protection of cables and pipelines;*
- d) *the conservation of the living resources of the sea;*
- e) *the prevention of infringement of the fisheries laws and regulations of the coastal State;*
- f) *the preservation of the environment of the coastal State and the prevention, reduction and control of pollution thereof;*
- g) *marine scientific research and hydrographic surveys; and*
- h) *the prevention of infringement of the customs, fiscal, immigration or sanitary laws and regulations of the coastal State.*³⁵

The significance of this limitation is that it indicates a consensus, even at the international level, that certain state interests must take precedence over the “freedom of the seas” concept, including the related freedom to navigate or anchor at will. Further advancing this point, although UNCLOS identifies the principle of the “freedom of the high seas” in Article 87, which includes the “freedom of navigation,”³⁶ it restricts the “high seas” to only include areas of the world’s oceans that remain outside of the various maritime jurisdictions claimed by coastal States.³⁷ So, despite this freedom under UNCLOS, foreign-flagged vessels arriving in territorial waters of a coastal State must nonetheless comply with local laws regarding navigation and anchoring.³⁸

There has been steady Presidential support over the last two decades urging the Senate to ratify UNLCOS, yet to no avail.³⁹ If the United States ever becomes a signatory to and ratifies UNCLOS, many states, including Florida, will need to examine current regulations to ensure concurrency with U.S. Federal Law, as well as with UNCLOS’ provisions. However, where federal authority does not preempt state regulation, and where state regulation would not conflict with UNCLOS (if ratified by the United States), Florida will continue to have the authority to regulate a significant degree of vessel activity within its jurisdiction.

C. Federal, State, and Local “Territorial” Waters

The geopolitical concept of federal, state, and local “territorial waters” drives the legal doctrines that attempt to sort out the rights of navigation in Florida. These different levels of government all enjoy certain rights to determine

³⁵ *Id.* at Article 21(1)(a)-(h).

³⁶ *Id.* at Article 87(1).

³⁷ *See id.* at Article 86.

³⁸ *Recall id.* at Article 21(4).

³⁹ *See* Yann-Huei Song & N. Elias Blood-Patterson, *Likelihood of U.S. Becoming a Party to the Law of the Sea Convention During the 112th Congress*, 43 J. Mar. L. & Com. 447, 452 (2012) (noting that Presidents’ Clinton, Bush, and Obama administrations have urged approval of UNCLOS).

what happens on the submerged lands and overlying water column within their political boundaries. The term “territorial waters” or “territorial sea” is used in international law to describe the area within 12 nautical miles of the shoreline over which nation-states have full sovereignty.⁴⁰ However, the term is also useful in describing the geographic basis of relative political power in domestic law. As sovereigns, nations have plenary authority to delegate attributes of sovereignty to political sub-units (e.g. states), and those sub-units (e.g. counties and municipalities) may do the same. In the United States, this has been accomplished through federal statutes, state constitutions, and court decisions. In the case of Florida, when the U.S. Congress approved the Florida Constitution, state’s boundaries were defined to extend three leagues (nine nautical miles) along the south and west coasts, and to the edge of the Gulf Stream along the east coast.⁴¹ In 1962, the Florida Constitution was amended to fix the eastern coastal boundary at three geographic miles.⁴² Finally, the State Constitution was again revised in 1968, effectively combining the two prior constitutions by establishing a three geographic mile limit except where the edge of the Gulf Stream is found beyond three geographic miles, in which case it is the location of the Gulf Stream that controls.⁴³

Disagreement over the meaning and extent of the delegation of sovereign powers to states within the federal territorial sea led to the federal Submerged Lands Act of 1953, which confirmed the maritime boundaries described in state constitutions, and the ownership of the submerged lands within those boundaries.⁴⁴ The U.S. Supreme Court subsequently confirmed Florida’s boundaries.⁴⁵ At least one Florida court has been required to evaluate the east coast’s ambulatory Gulf Stream boundary, where the event prompting the case occurred more than

⁴⁰ See Article 2, UNCLOS, Dec. 10, 1982. (U.N. Doc. A/CONF.62/122 21 I.L.M. 1261(1982); Signed 10 Dec. 1982; Entry into Force: 16 Nov. 1994 (providing that “[t]he sovereignty of a coastal State extends, beyond its land territory and internal waters and, in the case of an archipelagic State, its archipelagic waters, to an adjacent belt of sea, described as the territorial sea”). See also *Id.* at Art. 3 (providing that “[e]very State has the right to establish the breadth of its territorial sea up to a limit not exceeding 12 nautical miles, measured from baselines determined in accordance with this Convention”).

⁴¹ See *United States v. Florida*, 363 U.S. 121 (1960).

⁴² See Florida House Joint Resolution No. 1965 (filed in 1961), available at <http://www.law.fsu.edu/crc/conhist/1962amen.html> (last visited Dec. 30, 2014) (providing the language of the successful 1962 amendment).

⁴³ Fla. Const. art II, § 1. See also Legal Issues and State Authority Related to Territorial Waters, Interim Project Report to the Florida Senate (October 2007), available at http://archive.flsenate.gov/data/Publications/2008/Senate/reports/interim_reports/pdf/2008-142ju.pdf (last visited Dec. 30, 2014) (providing a helpful overview of the history and implications of Florida’s maritime boundaries).

⁴⁴ See 43 U.S.C. § 1312 (2012) (providing that “[a]ny claim heretofore or hereafter asserted either by constitutional provision, statute, or otherwise, indicating the intent of a State so to extend its boundaries is approved and confirmed, without prejudice to its claim, if any it has, that its boundaries extend beyond that line. Nothing in this section is to be construed as questioning or in any manner prejudicing the existence of any State’s seaward boundary beyond three geographical miles if it was so provided by its constitution or laws prior to or at the time such State became a member of the Union, or if it has been heretofore approved by Congress”).

⁴⁵ See *United States v. Florida*, 363 U.S. 121 (1960).

three geographical miles off the east coast of Florida, but not quite to the edge of the Gulf Stream.⁴⁶ In that case, the fact that the State's boundary may change according to the fluctuating position of the Gulf Stream was challenged, but the court found nothing inherently wrong with such a boundary.⁴⁷

In Florida, county territorial waters are legislatively established, while municipal boundaries, including water boundaries, are established by municipal charter, and approved by the Florida legislature. Chapter 7 of the Florida Statute's provides legal descriptions of each of Florida's 67 counties.⁴⁸ For coastal counties, the statute simply extends the county boundary to offshore waters "within the jurisdiction of the State of Florida,"⁴⁹ effectively deferring to the State Constitution. Inland water boundaries are more complicated. In some cases, county boundaries are set along the "thread" (centerline) of rivers and streams, and there are a number of instances where lakes can be found in two or more counties.⁵⁰ Municipal boundaries can be even more complicated. In many cases, municipal boundaries end at the water's edge. However, there are also many instances where municipal boundaries extend into adjacent waters, sometimes even to the limits of the state's jurisdiction.⁵¹ Physically distinguishing between the territorial waters of counties and municipalities greatly confounds efforts to address regulatory and management conflicts, and can be confusing to navigators and resource users. Moreover, there is no central geographic database depicting the territorial boundaries of Florida's municipalities.

The establishment of county and municipal boundaries creates the presumptive authority to exercise the state's police powers over local territorial waters under a legal doctrine referred to as "home rule," sometimes described as the state-local analogy to federalism.⁵² The Florida Constitution provides for two

⁴⁶ See *Benson v. Norwegian Cruise Line Ltd.*, 859 So. 2d 1213 (Fla. 3d DCA 2003).

⁴⁷ *Id.* See also Robert M. Jarvis, Case Note: Territorial Waters: Florida's Eastern Coastal Boundary is the Greater of the Edge of the Gulf Stream or Three Geographical Miles. *Benson v. Norwegian Cruise Line Ltd.*, 834 So. 2d 915 (Fla. Dist. Ct. App. 2003), 34 J. Mar. L. & Com. 351 (April 2003).

⁴⁸ See Chapter 7, Fla. Stats. (2014).

⁴⁹ See, e.g., Fla. Stat. § 7.36 (2014) (establishing the boundaries of Lee County, a county bordering the Gulf of Mexico); Fla. Stat. § 7.46 (2014) (establishing the boundaries of Okaloosa County, a county bordering the Gulf of Mexico); Fla. Stat. § 7.45 (2014) (establishing the boundaries of Nassau County, a county bordering the Atlantic Ocean); Fla. Stat. § 7.59 (2014) (establishing the boundaries of St. Lucie County, a county bordering the Atlantic Ocean).

⁵⁰ See, e.g., Fla. Stat. § 7.42 (2014) (establishing the boundaries of Marion County, which begin "in the thread of the Withlacoochee River"). See also, e.g., Fla. Stat. § 7.01 (2014) (establishing the boundaries of Alachua County, part of which include a line that "run[s] north following the east margin of said Santa Fe Lake to its westernmost intersection with a line which is . . .").

⁵¹ See St. Pete Beach, Florida, Municipal Code Part I, art. II, § 2.01 (2015) (demonstrating that St. Pete Beach's boundary line runs approximately 10 miles into the Gulf of Mexico).

⁵² See, e.g., Judge James R. Wolf, Sarah Harley Bolinder, The Effectiveness of Home Rule: A Preemption and Conflict Analysis, 83-JUN Fla. B.J. 92 (June 2009) (providing a helpful explanation of the home rule powers of

types of counties, charter and non-charter, and for the creation of municipalities. The Florida Constitution states that charter counties “shall have all powers of local self-government *not inconsistent with* general law. . .,”⁵³ and that non-charter counties “shall have the power of self-government *as is provided by* general or special law.”⁵⁴ Thus, while charter counties are afforded constitutional “home rule authority,” non-charter counties must rely on a statute to obtain the same authority. Despite the constitutional distinction, the Florida Legislature has provided much of that home rule authority to non-charter counties.⁵⁵ The Constitution also directly confers home rule authority on municipalities, providing that they “may exercise any power for municipal purposes *except as otherwise provided by law.*”⁵⁶ A further distinction between charter and non-charter counties bears on their relationship to municipalities. Charter counties may preempt municipal regulations and prevail where a conflict between ordinances exist, whereas non-charter counties may not preempt municipal regulations and are deemed not effective where a conflict in ordinances exist.⁵⁷ For a charter county to exercise this function through an amendment, it requires “dual elector approval both county-wide and within the affected municipal areas under the constitutional transfer of powers limitations.”⁵⁸ These distinctions enable charter counties to address navigation related conflicts that extend into municipal territorial waters, should they choose to do so. On the other hand, a municipality in a non-charter county may enact local laws covering their territorial waters regardless of inconsistency with county law.

D. Relationship to Maritime and Admiralty Law

Although in practice admiralty and maritime law are often referred to interchangeably, maritime law is technically a subset of the field of federal law applied under the umbrella of admiralty law and jurisdiction. The main objectives of admiralty law and jurisdiction, which is a jurisdiction normally conferred to federal courts sitting in admiralty, include facilitating maritime commerce and

local governments in Florida).

⁵³ Fla. Const. art. VIII, § 1(g) (emphasis supplied).

⁵⁴ Fla. Const. art. VIII, § 1(f) (emphasis supplied).

⁵⁵ See Fla. Stats. § 125.01 (2014) (stating that “the legislative and governing body of a county shall have the power to carry on county government [, and that, *to the extent not inconsistent with* general or special law, this power includes, but is not restricted to, the power to . . .”) (emphasis supplied).

⁵⁶ Fla. Const. art. VIII, § 2(b) (emphasis supplied).

⁵⁷ ROBERT L. NABORS, FLORIDA HOME RULE GREEN BOOK 61 (2d ed. 2014). See, e.g., Judge James R. Wolf, Sarah Harley Bolinder, The Effectiveness of Home Rule: A Preemption and Conflict Analysis, 83-JUN Fla. B.J. 92 (June 2009) (providing a helpful explanation of the home rule powers of local governments in Florida).

⁵⁸ NABORS, *supra* note 56, at 61.

protecting workers engaged in such commerce. Helping to perpetuate the interchangeable use of the terms, maritime law is the most typical subset of law applied under admiralty law and jurisdiction.

Founded on ancient principles, many of which are still applicable today, maritime law involves both important procedural rules that apply to cases in federal court under admiralty jurisdiction and special substantive rules. Therefore, determining whether or not to apply maritime law, as opposed to state law or some other type of law, has significant implications. As previously discussed in connection with “floating structures” under Florida law, the U.S. Supreme Court, in *Lozman v. City of Riviera Beach, Fla.*, recently made this determination in a case requiring it to decide if admiralty jurisdiction, and thus maritime law, applied or could be asserted against a floating home.⁵⁹

Admiralty jurisdiction, and thus the application of maritime law, is only appropriate for “vessels,” and usually these vessels must be “in navigation.” For admiralty law purposes, “vessel” is defined as part of the Rules of Construction Act, which is codified in Title 1, Section 3 of the United States Code.⁶⁰ This section of the United States Code defines a “vessel” as including “every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water.”⁶¹ Such a broad definition fails to provide much guidance for determining whether a floating object is a vessel under federal law, and has led to a wide variety of interpretations.⁶²

⁵⁹ See *Lozman v. City of Riviera Beach Fla.*, 133 S. Ct. 735 (2013).

⁶⁰ See 1 U.S.C. § 3 (2012).

⁶¹ *Id.*

⁶² See Raul Chacon Jr. & Adam Ferguson, All that Floats is Not a Boat: The Supreme Court’s *Lozman* Decision Makes Waves Impacting Multiple Areas, 32 No. 3 Trial Advoc. Q. 11 (2013). See *Davis v. Jacksonville Beach*, 251 F. Supp. 327 (M.D. Fla. 1965) (holding that admiralty law should be used in situations occurring on the high seas or navigable waters and should apply to the instant case regarding a surfer’s liability in colliding with a swimmer; however, not specifying whether the surfboard was a “vessel”). See Memorandum from Chief, Boating Safety Division, U.S. Coast Guard on Legal Determination on Vessel Status of Paddleboard (Oct. 3, 2008) (on file with authors) (establishing that the U.S. Coast Guard reviewed 1 U.S.C. § 3 and determined that when beyond a “swimming, surfing or bathing area” a paddleboard is considered a vessel under 46 U.S.C. § 2101). See Memorandum from Chief, Boating Safety Division, U.S. Coast Guard on Parameters for Determining Whether a “Paddleboard” is a Vessel (Oct. 3, 2008) (on file with authors). See *Gonzalez v. United States Shipping Board Emergency Fleet Corp.*, 3 F.2d 168 (E.D.N.Y. 1924) (a plaintiff claimed himself a “seaman” while injured on a vessel that was part of a “laid-up fleet” for the purpose of asserting admiralty jurisdiction yet the court held that the vessels in the fleet were only capable of navigation and not in navigation and therefore were not considered vessels for the purposes of defining the plaintiff as a seaman. However, the court further noted that “navigation” can include a period when a vessel is at anchor). See *United States v. Monstad et al.*, 134 F.2d 986, 987 (9th Cir. 1943) (the court held that a vessel that had been converted to an anchored fishing vessel for more than two years can be deemed “in navigation” for purposes of admiralty jurisdiction).

In 2005, the Supreme Court determined that such “use” of a “vessel” must be a “practical possibility” rather than “merely a theoretical one.”⁶³ For example, a vessel that has sat idle for an extended period of time and lacks the proper equipment or integrity to serve as a means of transportation on water may be deemed to be a “dead ship” or “withdrawn from navigation.”⁶⁴ In *Lozman*, the City of Riviera Beach initially sought to evict the owner of a floating home “apply[ing] state landlord-tenant statutes to the case because [the City’s] contract with Lozman created a nonresidential tenancy under Florida law.”⁶⁵ A jury however, ultimately found for Lozman.⁶⁶ The City then passed new regulations for the marina, and brought an admiralty case to federal court against Lozman based on Lozman’s lack of compliance with the new regulations under the premise that his home was a “vessel.”⁶⁷ Lozman prevailed and the City was precluded from maintaining the case in admiralty. As a result of its recent decision in *Lozman*, the Supreme Court has continued to decrease the potential for this wide variety of interpretation by narrowing the range of objects on water coming under admiralty jurisdiction as “vessels.” In *Lozman*, the Court explained that “[n]ot every floating structure is a ‘vessel’” and that the statute applies specifically to objects capable of being used as transportation beyond the objects mere ability to float, carry items, or be towed.⁶⁸ Furthermore, the Court noted that an object is a “vessel” where a reasonable observer, looking to its characteristics and activities, would consider it practically designed for transportation.⁶⁹

II. Federal Authority: Concurrent State and Local Jurisdiction and the Reservation of Federal Navigation Rights

This section discusses the provisions in federal constitutional and statutory law that serve as the basis for federal jurisdiction over navigation. Additionally, this section addresses federal limits on state and local authority to regulate anchorages.

⁶³ *Stewart v. Dutra Constr. Co.*, 543 U.S. 481, 496 (2005).

⁶⁴ George Rutherglen, *Dead Ships*, 30 J. Mar. L. & Com 677 (1999).

⁶⁵ Kathryn D. Yankowski, *Whatever Floats the “Reasonable Observer’s” Boat: An Examination of Lozman v. City of Riviera Beach, Fla. and the Supreme Court’s Ruling That Floating Homes Are Not Vessels*, 67 U. MIAMI L. REV. 975, 980 (2013).

⁶⁶ *Id.*

⁶⁷ *Id.* at 980-81.

⁶⁸ See *Lozman v. City of Riviera Beach Fla.*, 133 S. Ct. 735 (2013).

⁶⁹ See *id.* at 740-41.

A. Federal Constitutional Authority over Navigable Waters

Under the Commerce Clause of the United States Constitution,⁷⁰ the federal government has authority to control the navigable waters of the nation.⁷¹ There are two related aspects to this authority. First, there is a federal power to regulate activities affecting navigable waters because of their relationship to interstate commerce. Second, there is a federal navigational servitude, which was recognized in some of the earliest decisions examining the scope of Congressional authority under the Commerce Clause. The navigational servitude encompasses the power of Congress to regulate navigation, prohibit or remove obstructions to navigation, and improve or destroy the navigable capacity of the nation's waters.⁷² When Congress acts within the scope of the navigational servitude, state regulatory power and private riparian rights must give way.⁷³

One purpose of the navigational servitude is to protect the rights of access and use of navigable waters.⁷⁴ In this sense, access and use constitute rights of navigation. Congress can protect these rights, but the extent to which private parties can independently assert a right of access and use pursuant to the navigational servitude is not as clear.⁷⁵ Even if private parties could bring an action to assert rights to navigate under the federal navigational servitude, they may still be subject to reasonable regulation because the right to navigate, moor, or anchor a vessel has never been recognized as a "fundamental right."⁷⁶ If it were "fundamental," constitutional principles would require any regulation curtailing the right to withstand a high level of judicial review, and would only be upheld in

⁷⁰ U.S. Const. art. I § 8, cl. 3.

⁷¹ *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824); *United States v. Twin City Power Coop.*, 350 U.S. 222, 224 (1956); *Kaiser Aetna v. U.S.*, 444 U.S. 164, 173 (1979). See generally 4 Robert E. Beck (Ed.), *Waters and Water Rights* §§ 35.01-02 (1996).

⁷² See *United States v. Willow River Power Co.*, 324 U.S. 499 (1945); *United States v. Chandler-Dunbar Water Power Co.*, 229 U.S. 53 (1913). See also *Gilman v. Philadelphia*, 70 U.S. 713, 724-725 (1865) (declaring that the "power to regulate commerce comprehends the control . . . of all navigable waters of the United States which are accessible from a State[, and f]or this purpose they are the public property of the nation, and subject to all the requisite legislation by Congress."

⁷³ See *id.*

⁷⁴ See *Kaiser Aetna v. United States*, 444 U.S. 164 (1979); *United States v. Rands*, 389 U.S. 121 (1967). See generally Eva H. Morreale, *Federal Power in Western Waters: The Navigation Power and the Rule of No Compensation*, 3 *Natural Resources J.* 1 (1963).

⁷⁵ Terrill, *supra* note 1, at 174. (providing a student commentator's interpretation of a California case involving the scope of the state public trust doctrine—*Marks v. Whitney*, 491 P.2d 374, 381 (Cal. 1971)—as giving a mariner "facing an obstruction to navigation . . . standing to assert the navigational servitude." But see generally, David C. Slade, *Putting the Public Trust Doctrine to Work* 295 (1998) (explaining that, as opposed to the federal navigational servitude, *Marks* involved the public trust doctrine).

⁷⁶ See *Murphy v. Department of Natural Resources*, 837 F. Supp. 1217, 1220-21 (S.D. Fla. 1993) (determining that navigation is not a fundamental right). Note that fundamental rights are among those rights explicitly or implicitly guaranteed by the Federal Constitution, such as the right of free speech.

limited circumstances (i.e., where it passed the stringent standard of “strict scrutiny”).⁷⁷ Under the lower “rational basis” standard of review, a regulation limiting the exercise of the right of navigation will be upheld as valid unless the regulation lacks a rational relation to a legitimate government purpose.⁷⁸

A navigational servitude case arose in Crystal River, Florida in the 1980’s when a land owner significantly limited public access to a spring and its run (channel) claiming ownership over the submerged land.⁷⁹ The main question the court focused on was whether the spring and a portion of its run, which eventually connected to Kings Bay, the Crystal River, and ultimately the Gulf of Mexico, were considered navigable waters and therefore subject to navigational servitude.⁸⁰ The land owner placed much emphasis on the Supreme Court’s holding in *Kaiser Aetna v. United States*, which found that a private pond that had been dredged and newly connected to existing navigable waters was subject to regulation by the Army Corps of Engineers but that the pond’s “owners could not be required to open [the pond] to the public without compensation.”⁸¹ The court distinguished the instant case from the prior Supreme Court decision by explaining that *Kaiser Aetna v. United States* was a unique case where the body of water in question was undeniably historically private and that the private pond was dredged and connected to navigable waters by means of private funding.⁸² The spring and run, however, had been navigable waters since at least the 1920’s, was accessed and used by the public and commercial entities, and showed evidence of being affected by the tide.⁸³ The court ultimately concluded that the spring and its run were navigable waters “at all material times” and hence subject to the navigation servitude.⁸⁴

⁷⁷ ERWIN CHERMERINSKY, CONSTITUTIONAL LAW 933 (Vicki Been et al. Eds, 4th ed. 2013).

⁷⁸ See *Barber v. State of Hawaii*, 42 F.3d 1185, 1196-97 (9th Cir. 1994). See also generally *Romer v. Evans*, 517 U.S. 620, 631 (1996).

⁷⁹ *Goodman v. Crystal River*, 669 F. Supp. 394 (M.D. Fla. 1987).

⁸⁰ *Id.* at 398.

⁸¹ Genevieve Pisarski, *Testing the Limits of the Federal Navigational Servitude*, 2 Ocean & Coastal L.J. 313, 319 (1997). See also *Kaiser Aetna v. United States*, 444 U.S. 164 (1979).

⁸² *Goodman*, 669 F. Supp. at 400.

⁸³ *Id.* at 399-400.

⁸⁴ *Id.* at 402.

B. Federal Statutory Authority over Navigation, Including Anchoring

Numerous federal statutes affect the use and management of the navigable waters of the United States. With regards to government authority over navigation, the two most significant are the Submerged Lands Act and the Rivers and Harbors Act. The Submerged Lands Act (SLA) transferred title to the states of land underlying navigable waters,⁸⁵ but it reserved certain federal interests, including navigation.⁸⁶ The Rivers and Harbors Act established the authority of the United States to regulate navigation and vested that authority in the Department of the Army (Corps of Engineers).⁸⁷ In addition to these Acts, the Coastal Zone Management Act (CZMA) serves as another significant federal law affecting the use and management of waters in coastal areas.

The U.S. Coast Guard is charged with regulating and enforcing various aspects of the right of navigation.⁸⁸ The U.S. Army Corps of Engineers and the Environmental Protection Agency regulate dredging, filling, and placement of structures in navigable waters,⁸⁹ and the U.S. Fish and Wildlife Service and the National Marine Fisheries Service have jurisdiction over endangered and threatened species, including marine mammals.⁹⁰ Finally, federal lands, including those beneath navigable waters, are administered by several agencies, including but not limited to: the National Park Service (national parks and monuments),⁹¹ the U.S. Fish and Wildlife Service (national wildlife refuges),⁹² the Bureau of

⁸⁵ 43 U.S.C. §§ 1301 *et seq.* (2012).

⁸⁶ *See* 43 U.S.C. § 1311(d) (2012).

⁸⁷ *See* 33 U.S.C. § 1 (2012) (providing that “[i]t shall be the duty of the Secretary of the Army to prescribe such regulations for the use, administration, and navigation of the navigable waters of the United States as in his judgment the public necessity may require for the protection of life and property, or of operations of the United States in channel improvement, covering all matters not specifically delegated by law to some other executive department”).

⁸⁸ *See* 14 U.S.C. § 81 (2012) (relating to aids to navigation and other signage); 33 U.S.C. § 471 (2012) (relating to U.S. Coast Guard enforcement of anchorage grounds and harbor regulations); 6 U.S.C. § 468 (2012) (relating to preservation of Coast Guard functions in the Department of Homeland Security).

⁸⁹ *See* 33 U.S.C. § 403 (2012); 33 U.S.C. § 1344 (2012).

⁹⁰ *See* 16 U.S.C. §§ 1531 *et seq.* (2012); 50 C.F.R. § 402.01(b) (2014) (designating which endangered and threatened species fall under the jurisdiction of the U.S. Fish and Wildlife Service and the National Marine Fisheries Service).

⁹¹ *See* 16 U.S.C. § 1 (2012).

⁹² *See* 16 U.S.C. § 668dd (2012).

Ocean Energy Management (“renewable energy-related management functions”),⁹³ and the National Oceanic and Atmospheric Administration (national marine sanctuaries).⁹⁴

1. The Submerged Lands Act (SLA)

Under the Submerged Lands Act (SLA),⁹⁵ Congress confirmed both state ownership of submerged lands and control of the overlying waters, although it reserved significant power to the federal government.⁹⁶ The SLA recognized, and established each state's claim of title and ownership⁹⁷ as well as management and administrative responsibility⁹⁸ over submerged lands beneath navigable waters within the respective state boundaries. In addition, the U.S. Supreme Court has characterized the SLA as a transfer to the states of rights to “submerged lands and waters.”⁹⁹ Congress’ goal in passing the SLA was to decentralize management of coastal areas and foster greater local control to better meet the needs of the state and boaters.¹⁰⁰ Congress stated that because management of submerged lands is directly tied to local activities, “any conflict of interest arising from the use of the submerged lands should be and can best be solved by local authorities.”¹⁰¹ The SLA, however, expressly reserved in the federal government the

⁹³ See U.S. Dep’t of Interior Order No. 3299, Establishment of the Bureau of Ocean Energy Management, the Bureau of Safety and Environmental Enforcement, and the Office of Natural Resources Revenue (May 19, 2010), available at <http://www.doi.gov/deepwaterhorizon/loader.cfm?csModule=security/getfile&PageID=32475>.

⁹⁴ See 16 U.S.C. § 1433 (2012) (providing authority to designate and regulate marine sanctuaries to the Secretary of Commerce, and the Secretary has, in turn, delegated this authority to the National Oceanic and Atmospheric Administration’s Office of National Marine Sanctuaries).

⁹⁵ 43 U.S.C. §§ 1301, *et seq.* (2012).

⁹⁶ See 43 U.S.C. §§ 1311 & 1314 (2012).

⁹⁷ See 43 U.S.C. § 1311(a)(1) (2012). See also *Phillips Petroleum Company v. Mississippi*, 484 U.S. 469, 489-90 (1988) (explaining that the legislative history of the Submerged Lands Act indicates Congress’ endorsement of states’ ownership rights, and also recognizing that the states likely already owned the submerged lands at issue by virtue of the public trust and equal footing doctrines); *Shively v. Bowlby*, 152 U.S. 1, 57 (1894) (finding that, under the “equal footing doctrine,” the states, upon entering the Union, obtained rights in their submerged lands equal to those possessed by the original thirteen states).

⁹⁸ See 43 U.S.C. § 1311(a)(2) (2012).

⁹⁹ See *United States v. California*, 436 U.S. 32, 37 (1978); *Murphy v. Department of Natural Resources*, 837 F. Supp. 1217, 1221 (S.D. Fla. 1993) (recognizing the U.S. Supreme Court’s characterization of the SLA).

¹⁰⁰ See *id.*

¹⁰¹ H.R. Rep. No. 215, 83d Cong., 1st Sess. (1953), reprinted in 1953 U.S.C.C.A.N. 1385, 1436-37.

power to regulate these lands for the purposes of “commerce, navigation, national defense, and international affairs.”¹⁰² The statutes discussed below implement this authority.

2. The Rivers and Harbors Act

Pursuant to the Rivers and Harbors Act, the federal government exercises control over activities relating to maritime commerce and navigation. The Act is composed of a series of appropriations statutes authorizing federal public works projects on navigable waters. Due to provisions prohibiting discharge of refuse into the navigable waters, it has also been described as the country’s oldest environmental statute.¹⁰³

a. Obstructions to Navigation. The U.S. Army Corps of Engineers exercises jurisdiction under the Rivers and Harbors Act.¹⁰⁴ Under the Act, the Corps has authority to regulate the creation of “any obstruction . . . to the navigable capacity of any of the waters of the United States,” including the building of any “structure.”¹⁰⁵ Corps regulations define “permanent mooring structures” and a “permanently moored floating vessel” as structures subject to regulation.¹⁰⁶ Although the limits for defining when a moored vessel becomes permanently moored have not been established, several judicial decisions have upheld the regulation of moored structures, including houseboats.¹⁰⁷

The Corps regulates activities under Sections 9 and 10 of the Rivers and Harbors Act of 1899 by requiring permits.¹⁰⁸ In recognition that some activities may

¹⁰² 43 U.S.C. § 1314(a) (2012).

¹⁰³ See David M. Uhlmann, *Environmental Crime Comes of Age: The Evolution of Criminal Enforcement in the Environmental Regulatory Scheme*, 2009 Utah L. Rev. 1223 (2009). See also 33 U.S.C. § 403 (2012) (describing what is prohibited under the Act).

¹⁰⁴ See 33 U.S.C. § 403 (2012). See also 33 C.F.R. § 320.2(b) (2014).

¹⁰⁵ 33 U.S.C. § 403 (2012).

¹⁰⁶ See 33 C.F.R. § 322.2 (2014).

¹⁰⁷ See, e.g., *United States v. Estate of Boothby*, 16 F.3d 19 (1st Cir. 1994) (relating to a houseboat); *United States v. Boyden*, 696 F.2d 685 (9th Cir. 1983) (relating to houseboats). See also *United States v. Oak Beach Inn Corp.*, 744 F. Supp. 439 (S.D.N.Y. 1990) (finding a permanently moored barge and ferry subject to regulation under the Rivers and Harbors Act). Numerous cases have concluded that sunken vessels may also constitute obstructions. See, e.g., *Agri-Trans Corp. v. Gladders Barge Line, Inc.*, 721 F.2d 1005 (5th Cir. 1983); *U.S. v. Raven*, 500 F.2d 728 (5th Cir. (Fla.) 1974), cert. denied, 419 U.S. 1124 (1975); *U.S. v. Cargill, Inc.*, 367 F.2d 971 (5th Cir. 1966); aff. *Wyandotte Trans. Co. v. United States* 389 U.S. 191 (1967).

¹⁰⁸ See 33 U.S.C. § 401 (2012) (Section 9); 33 U.S.C. § 403 (2012) (Section 10).

have minimal obstructive impact, the Corps has established “Nationwide Permits” for installation of some types of moorings.¹⁰⁹ Permanent moorings and moored vessels that do not qualify for Nationwide Permits must be individually permitted.¹¹⁰ In determining whether to issue permits, the Corps may be required to consult with certain entities for wildlife conservation purposes. For example, the Fish and Wildlife Coordination Act requires that the Corps consult with the U.S. Fish and Wildlife Service, in the Department of the Interior, as well as applicable state entities when issuing permits under the Rivers and Harbors Act.¹¹¹ In certain circumstances, the Corps may also need to consult the U.S. Fish and Wildlife Service and/or the National Marine Fisheries Service in order to address impacts to endangered and threatened species.¹¹² From a navigational perspective, the Corps also reaches out to the U.S. Coast Guard for guidance. In a Memorandum of Agreement between the Corps and the Coast Guard, both parties have agreed that the Coast Guard will be informed and will provide the Corps feedback regarding permits the Corps receives relating to fixed and floating structures upon the navigable waters of the United States.¹¹³

b. Anchorage Grounds and Special Anchorage Areas. The Secretary of the Department of Homeland Security is authorized to establish “anchorage grounds” through the Rivers and Harbors Act of 1915,¹¹⁴ and “special anchorage areas” may also be established by rule.¹¹⁵ The Secretary has further delegated this authority to the Coast Guard. Anchorage grounds may be established on navigable waters of the United States wherever “the maritime or commercial interests of the United States require such anchorage grounds for safe navigation.”¹¹⁶ In addition, the Secretary is granted the authority to adopt “suitable rules and regulations” governing the use of such anchorage grounds.¹¹⁷ The Coast Guard has

¹⁰⁹ See 61 Fed. Reg. 65874-01 (Dec. 13, 1996) (providing the rule on Nationwide Permits, which includes authorizations of both “non-commercial, single-boat, mooring buoys” under Nationwide Permit 10 and “[s]tructures, buoys, floats and other devices placed within [Coast Guard established] anchorage or fleeting areas” under Nationwide Permit 9). See also 33 C.F.R. § 330.1(b) (2014) (explaining that Nationwide Permits are a type of general permit intended to require less time and paperwork than other permits).

¹¹⁰ See 33 C.F.R. § 322.3 (2014).

¹¹¹ See 16 U.S.C. §§ 661 & 662 (2012).

¹¹² See, e.g., 15 U.S.C. § 1536 (2012) (containing Endangered Species Act’s Section 7 requirements).

¹¹³ See Memorandum of Agreement between the United States Army Corps of Engineers and the United States Coast Guard (Jun. 02, 2000) (on file with authors).

¹¹⁴ See 33 U.S.C. § 471 (2012).

¹¹⁵ See 33 C.F.R. § 109.10 (2012) (relating to Special Anchorage Areas).

¹¹⁶ 33 U.S.C. § 471 (2012).

¹¹⁷ *Id.* See also 33 C.F.R. § 110 (2015) (containing the rules).

established nine anchorage ground regulations in Florida, primarily for large commercial vessels using major ports.¹¹⁸

Of greater significance to recreational boaters, special anchorage areas afford vessels less than 65 feet in length exemption from displaying anchorage lights, otherwise required by the Inland Navigation Rules, while anchored in the designated area.¹¹⁹ Like anchorage grounds, special anchorage areas may also contain additional area specific rules.¹²⁰ The Coast Guard has designated a number of special anchorage areas in Florida.¹²¹ There is potential value in identifying special anchorage areas because their designation at the federal level establishes an area presumptively preserved for navigation (anchoring) that may be protected from incompatible uses. Beyond designating anchorage grounds and special anchorage areas, however, the Coast Guard has construed its jurisdiction relatively narrowly under the Rivers and Harbors Act and has deferred to local law with regard to the regulation of anchoring in Florida.¹²²

For more details and a list of Florida's anchorage grounds and special anchorage areas, see Section (II(C)(5)(e) discussing the authority of the Coast Guard.

3. Coastal Zone Management Act

The Coastal Zone Management Act (CZMA)¹²³ encourages states to take an active role in the management and control of the submerged lands and coastal

¹¹⁸ See 33 C.F.R. §§ 110.182-93a (2015). Anchorage grounds are established for a variety of reasons. See, for example, 60 Fed. Reg. 14220-01 (Mar. 16, 1995) (explaining that the St. Johns River Anchorage Grounds were established "to disestablish grounds with poor bottom holding capabilities and to disestablish the portions of anchorage grounds which currently extend to the federal channel"); 51 Fed. Reg. 11726-01 (Apr. 7, 1986) (providing that establishing the anchorage grounds at the Port of Palm Beach was necessary "to provide defined anchorage areas to protect local environmentally sensitive reefs presently being subjected to damage by ships' anchors and chains"); 73 Fed. Reg. 6607 (Feb. 5, 2008) (stating that "[t]his rule is needed to strengthen existing anchoring requirements and guidelines in order to provide a higher degree of protection to the coastal area and sensitive benthic coral reef ecosystems, as well as to provide a safer anchorage for mariners").

¹¹⁹ See 33 C.F.R. §109.10 (2014). For more information on the Inland Navigation Rules see Section II.C.4.b.

¹²⁰ See, e.g., 33 C.F.R. § 110.73b(c) (2015) (providing that, within the Indian River Special Anchorage Area at Vero Beach, Florida, "[v]essels shall be so anchored so that no part of the vessel obstructs the turning basin or channels adjacent to the special anchorage areas.") Other rules contain "notes." See, e.g., 33 C.F.R. §110.74 (2015) (including the following note within the rule that designates the Marco Island, Florida, Special Anchorage Area: "The area is principally for use by yachts and other recreational craft. Fore and aft moorings will be allowed. Temporary floats or buoys for marking anchors in place will be allowed. Fixed mooring piles or stakes are prohibited. All moorings shall be so placed that no vessel, when anchored, shall at any time extend beyond the limits of the area").

¹²¹ See 33 C.F.R. § 110.73-74b (2015) (designating seven special anchorage areas regulations in Florida).

¹²² Memorandum from the Chief, Maritime and International Law Division, U.S. Coast Guard on Federal vs. State Regulation (Dec. 30, 1992) (on file with the authors).

¹²³ 16 U.S.C 1451 *et seq.* (2012).

waters within the territorial boundaries of the state. The Act authorizes states to develop Coastal Zone Management Plans and provides incentives for states with approved plans.¹²⁴ A significant feature of the Act is its consistency requirement. Once the federal government approves a state coastal management plan,¹²⁵ this requirement acts as an incentive for states because it forces federal agencies to ensure the consistency of their activities with the state's plan. Where federal agency action will cause certain reasonably foreseeable coastal effects, the federal agency must submit the proposed action to the relevant state agency for a consistency review¹²⁶ evaluating whether the activity is "consistent to the maximum extent practicable" with the policies in the state's coastal management plan.¹²⁷ The state may then decide whether to object to the activity. Where a federal agency is issuing permits or licenses, a slightly different process applies, but the state is similarly provided the opportunity to object.¹²⁸ The significance of the consistency requirement lies largely in its potential to invert the supremacy of federal regulatory authority, such as the authority to regulate aspects of navigation, to a position that is inferior to state regulation.

The State of Florida has successfully argued in one federal district court case involving anchoring that the CZMA authorizes local regulations such as prohibitions on anchoring.¹²⁹ In *Murphy v. Dept. of Natural Resources*, residents of an area known as "houseboat row" in Key West filed a suit seeking a declaratory judgment that Florida Statutes sections 253.67 through 253.71¹³⁰ were unconstitutional because the "State's control over the water column is narrowly circumscribed by federal law."¹³¹ The state maintained that it had authority to regulate anchoring because, although the federal government reserves the right under the Sub-

¹²⁴ See 16 U.S.C. § 1452 (2012) (declaring a national policy under the Coastal Zone Management Act to, among other things, encourage states "to achieve wise use of the land and water resources of the coastal zone"). See also, e.g., 16 U.S.C. §§ 1455-55a (2012) (giving the Secretary of Commerce authority to provide certain grants in connection to states' approved plans). See also generally Ronald J. Rychlak, *Coastal Zone Management and the Search for Integration*, 40 DePaul L. Rev. 981 (1991) (discussing the process of the effort to integrate government coastal activities through the CZMA); Daniel W. O'Connell, *Florida's Struggle for Approval Under the Coastal Zone Management Act*, 25 Nat. Resources J. 61, 65-68 (1985) (criticizing the federal approval process of state plans pursuant to the CZMA).

¹²⁵ The National Oceanic and Atmospheric Administration (NOAA) approves the state plans.

¹²⁶ See 16 U.S.C. § 1456(c)(1)(C) (2012).

¹²⁷ See 16 U.S.C. § 1456(c)(1)(A) (2012); 15 C.F.R. § 930.39(a) (2014).

¹²⁸ See 16 U.S.C. § 1456(c)(3)(A) (2012).

¹²⁹ See *Murphy v. Dept. of Natural Resources*, 837 F. Supp. 1217 (S.D. Fla. 1993).

¹³⁰ See Chapter 253, Fla. Stats. (2014) (relating to all state lands held under the name of the Board of Trustees, and containing Sections 253.67 through 253.71, which authorize the Board of Trustees to issue leases for certain uses of submerged lands and the associated water column).

¹³¹ *Murphy*, 837 F. Supp. at 1219.

merged Lands Act to use the water column above submerged lands for navigation, this does not prohibit the state from regulating anchoring in the absence of affirmative action by the federal government.¹³² The court agreed with the state, finding that the state's exercise of control over the water column as an incident to its ownership of sovereign submerged lands was specifically sanctioned in the CZMA.¹³³

The court noted that the CZMA encourages "the states to exercise effectively their responsibilities in the coastal zone through the development and implementation of [federally approved] management programs."¹³⁴ The court found that Congress considered navigation, as one of the areas the States should include in their management plans."¹³⁵ The court reasoned that because the state's Coastal Zone Management Plan was approved by the U.S. Secretary of Commerce, the plan did not encroach on any federal power over navigation.¹³⁶

Florida has an adopted and federally approved Coastal Management Program, which largely consists of 24 statutes designed to protect the state's natural, cultural, historic, and economic coastal resources.¹³⁷ The Florida Department of Environmental Protection, along with other partner agencies, is charged with administering the Program, which must be updated as the laws that comprise the Program are amended.¹³⁸ Interestingly, Florida's Program does not include Chapter 327 as an enforceable policy despite it being Florida's primary boating law and a key statute conferring navigation rights in the state.¹³⁹ The rationale for excluding Chapter 327, which creates enforceable policies concerning navigation and other matters of apparent coastal zone importance is unclear. Because of the "reverse federalism" policy that undergirds the CZMA, if Chapter

¹³² *Id.* at 1220.

¹³³ *Id.* at 1223. See also *Barber v. State of Hawaii*, 42 F.3d 1185, 1190-91 (9th Cir. 1994) (involving a similar finding).

¹³⁴ *Murphy*, 837 F. Supp. at 1223 (citing a section of the CZMA).

¹³⁵ *Id.* at 1223-24 (citing Commerce Committee, Coastal Zone Management Act, S. Rep. No. 753, 92d Cong., 2d Sess. (1972), reprinted in 1972 U.S.C.C.A.N. 4776, 4786).

¹³⁶ *Id.* at 1223. See also Fla. Stat. § 380.21(2) & (3)(b) (2014) (wherein the Florida's Coastal Management Act simply references existing environmental statutes and rules, and has been incorporated into the State's comprehensive plan).

¹³⁷ Florida Department of Environmental Protection, Florida Coastal Management Program Guide: A Guide to the Federally Approved Florida Coastal Management Program 9 (2014), available at http://www.dep.state.fl.us/cmp/publications/FCMP_Program_Guide_2014.pdf.

¹³⁸ *Id.*

¹³⁹ See *id.* at 64 (Chapter 327 is absent from the list of Enforceable Policies).

327 were included in the Program, the State would presumably be in a better position to argue that inconsistent federal regulations would be impermissible.

C. Federal Limits on State and Local Authority to Regulate Navigation and Anchoring

This section addresses potential federal limitations on the state's authority to regulate navigation and anchoring. While we focus on anchoring, these principles generally hold true for other attributes of navigation. To understand these limitations, it is necessary to review the basis for federal supremacy in this area of law. As previously noted, Congress has authority to regulate matters affecting interstate commerce, and the federal navigational servitude is constitutionally derived from the Commerce Clause.¹⁴⁰ Under the Supremacy Clause of the U.S. Constitution, federal law governs over conflicting state law,¹⁴¹ and Congress may preempt local laws pursuant to this authority.¹⁴²

Three distinct limits on state regulatory authority are derived from these principles. First, where a state law, such as a law regulating navigation and anchoring, actually conflicts with a federal law, the state law will be void.¹⁴³ Second, where Congress has “spoken” so as to preclude state regulation in a given area of law, state regulation is preempted.¹⁴⁴ Third, even when state regulation is neither in conflict nor preempted, the doctrine known as the Dormant Commerce Clause prohibits states from unduly burdening interstate commerce.¹⁴⁵ The following sections address the potential impact of these limits on state and local efforts to regulate navigation and anchoring.

1. Actual Conflict with Federal Laws

The Supremacy Clause of the U.S. Constitution places federal law above state law when conflicts arise between the two separate bodies of law. Therefore, any state law regulating navigation and anchoring that conflict with validly exercised federal law will be invalid. A state law conflicts with federal law either when it is

¹⁴⁰ See Section II.A.

¹⁴¹ See U.S. Const. art. VI, cl. 2.

¹⁴² See Sections II.C.2 – II.C.4.

¹⁴³ See *Florida Lime and Avocado Growers, Inc. v. Paul*, 373 U.S. 132 (1963); *Hines v. Davidowitz*, 312 U.S. 52 (1941); *Pacific Gas and Electric Co. v. State Energy Commission*, 461 U.S. 190 (1983).

¹⁴⁴ See *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238 (1984); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

¹⁴⁵ See, e.g., *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970); *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520 (1959); *Southern Pac. Co. v. State of Arizona ex rel. Sullivan*, 325 U.S. 761 (1945).

not possible to comply with both the state and federal law at the same time,¹⁴⁶ or when the state law prevents implementation of the federal law.¹⁴⁷

Currently, there are few federal anchoring regulations with which state laws and regulations might conflict. In a legal opinion, the Coast Guard asserted that neither the Rivers and Harbors Act nor its implementing regulation provide any substantive anchoring regulation, and characterized its own authority to regulate as merely “the authority to establish general and special anchorage areas where and when needed.”¹⁴⁸ In *Murphy v. Department of Natural Resources*, the court accepted the Coast Guard's position as meaning that “no Federal law exists in the area of anchorage and mooring.”¹⁴⁹

The circumstances considered in *Graf v. San Diego Unified Port District*,¹⁵⁰ a California case, provide an example of how the Coast Guard has worked with local governments to deal with potentially conflicting anchorage regulations. In that case, the San Diego Unified Port District sought to update its Port District Master Plan by incorporating a new small craft anchorage plan for an area of the San Diego Bay.¹⁵¹ The California Coastal Commission certified the plan, and the Port District thereafter made the plan part of the District's coastal plan by accepting the certification.¹⁵² Before this plan was established, however, the Coast Guard had already designated the entire San Diego Bay a federal anchorage area.¹⁵³ To avoid conflict between state regulations (i.e., the Port District's certified plan) and federal regulations (i.e., the Coast Guard's designation), the Port District requested that the Coast Guard actually modify its regulation of the Bay to allow the state and federal regulations to co-exist.¹⁵⁴ The Coast Guard willingly

¹⁴⁶ *Florida Lime and Avocado Growers, Inc. v. Paul*, 373 U.S. 132 (1963).

¹⁴⁷ *Hines v. Davidowitz*, 312 U.S. 52 (1941); *Pacific Gas and Electric Co. v. State Energy Resources Conservation & Development Commission*, 461 U.S. 190 (1983).

¹⁴⁸ Memorandum from the Chief, Maritime and International Law Division, U.S. Coast Guard on Federal v. State Regulations (Dec. 30, 1992).

¹⁴⁹ See 837 F. Supp. at 1224.

¹⁵⁰ *Graf v. San Diego Unified Port District*, 205 Cal. App. 3d 1189 (1988).

¹⁵¹ *Id.* at 1192.

¹⁵² *Id.* at 1192-93.

¹⁵³ *Id.* at 1193.

¹⁵⁴ *Id.*

complied and made the appropriate changes through the Federal rule-making process.¹⁵⁵

The Port District's governing board (the Port Commissioners) then adopted local ordinances creating smaller anchorages in Central San Diego Bay and made it a crime to remain anchored beyond a certain date in South San Diego Bay.¹⁵⁶ Graf, who owned a boat anchored in Fort Emory Cove, located in South San Diego Bay, and also founded the Fort Emory Cove Boat Owners Association, received notice from the harbor police (by a posting on his boat) that he was in violation of the new ordinance, and that failure to weigh anchor and vacate the area could result in both impoundment of his vessel and a criminal misdemeanor offense charge.¹⁵⁷ Graf challenged the new ordinances as unconstitutional on several grounds, but the court dismissed all of his arguments.¹⁵⁸ Finding the ordinances constitutional, the court further stated, "[t]hus the jurisdiction to establish and enforce the anchorage and nonanchorage areas in San Diego Harbor is concurrent. The Coast Guard recognizes the right of the San Diego Port District to establish these anchorages and enforce the provisions of the anchorages by ordinance and to punish violators by enforcing criminal laws against them."¹⁵⁹

2. Preemption: *Barber v. State of Hawaii* and Local Anchoring Regulations

The Doctrine of Preemption is also founded on the supremacy of federal regulatory authority.¹⁶⁰ Preemption occurs where Congress has demonstrated intent to exclusively occupy an area of law.¹⁶¹ If such intent is contained in the language of the federal law at issue, the preemption is said to be express.¹⁶² If, however, instead of existing within the language of the law itself, such intent is inferred from a pervasive legislative scheme dominating (i.e., leaving no room for state law to supplement) an entire field of law, then the preemption is considered implied.¹⁶³

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* at 1192-93.

¹⁵⁷ *Id.* at 1191-92.

¹⁵⁸ *Id.* at 1192.

¹⁵⁹ *Id.* at 1193.

¹⁶⁰ Several sources discuss state regulations that "actually conflict" with federal regulation as being "preempted." While the result (invalid state regulation) is the same in either case, the two concepts will be treated separately to minimize any confusion.

¹⁶¹ *Silkwood*, 465 U.S. at 248.

¹⁶² See *Jones v. Rath Packing Co.*, 430 U.S. 519 (1977).

¹⁶³ See, e.g., *id.*; See also, e.g., *Fid. Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141 (1982).

In either case, preemption will not occur unless it is determined to be “the clear and manifest purpose of Congress.”¹⁶⁴

The relatively sparse body of federal law concerning anchoring contains no provision expressly preempting state authority. Several analysts have extensively surveyed federal law and concluded that Congress never intended to preempt state authority to regulate anchorages.¹⁶⁵ The Coastal Zone Management Act of 1972,¹⁶⁶ and the general principles set forth in Executive Order 13132 of August 4, 1999 support that conclusion.¹⁶⁷

State authority to regulate anchorages was upheld against a preemption challenge in a landmark case originating in the Hawaiian Islands.¹⁶⁸ In *Barber v. State of Hawaii*, a citizens’ group known as the Hawaiian Navigable Waters Preservation Society (Preservation Society), acting on behalf of boaters, brought suit challenging the constitutionality of state regulations affecting their rights of navigation, including anchoring.¹⁶⁹ The state’s Department of Transportation had promulgated rules requiring boaters to obtain a permit and moor only in designated locations if the vessel were to remain for longer than 72 hours.¹⁷⁰ The rules were adopted to provide for the safety of boaters and other recreational users of the area.¹⁷¹ The lower court (i.e., the district court) granted summary judgment in favor of the state, and the Preservation Society appealed.¹⁷²

¹⁶⁴ *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624, 633 (1973) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). See also *Goodlin v. Medtronic, Inc.*, 167 F.3d 1367, 1371 (11th Cir. 1999).

¹⁶⁵ Memorandum from the Chief, Maritime and International Law Division, U.S. Coast Guard on Federal v. State Regulation (Dec. 30, 1992) (reviewing an “extensive scheme of federal regulations over navigable waterways, maritime safety, and the marine environment,” including 14 U.S.C. §§ 81-91; 33 U.S.C. § 471, 33 U.S.C. § 4421 *et seq.*; Title 46, U.S.C.; Title 33, C.F.R.); see also generally *The Florida Bar, Maritime Law and Practice* § 14.17 (4th ed., 2004).

¹⁶⁶ See 16 U.S.C. § 1451 *et seq.* (2012) (containing the Act’s provisions and encouraging states to take an active role in managing their coastal zones through the development of extensive land and water use programs). See also Section II.B.3.

¹⁶⁷ See Exec. Order No. 13132, 64 Fed. Reg. 43255 (Aug. 4 1999), available at <http://www.gpo.gov/fdsys/pkg/FR-2010-07-22/pdf/2010-18169.pdf> (providing general principles and criteria for federal agencies to follow when making policy that has “federalism implications,” and providing for these principles and criteria by directing federal agencies to essentially avoid preemption of state action, except where state regulation clearly conflicts with authority under which the agency may act).

¹⁶⁸ *Barber v. State of Hawaii*, 42 F.3d 1185 (9th Cir. 1994).

¹⁶⁹ *Id.* at 1189.

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² *Id.*

On appeal, the Preservation Society argued that Hawaii’s regulations were in conflict with federal regulations, and that even absent conflict, federal regulation was so extensive that Congress intended to preempt state action.¹⁷³ The United States Court of Appeals, Ninth Circuit, found neither argument persuasive.¹⁷⁴ The court noted that the Submerged Lands Act was not intended to reserve exclusive federal jurisdiction over waters above submerged lands, but to confer concurrent jurisdiction on the state.¹⁷⁵ The court was also unwilling to find implicit preemption based on what it deemed the “far from extensive” body of federal law affecting anchorages.¹⁷⁶ The court indicated that the Secretary of Transportation and the Coast Guard had discretionary authority and “may act to affect all navigational issues, but they need not and they have not.”¹⁷⁷

As discussed above, it seems clear that federal law does not expressly preempt local anchorage regulations. However, the existence of an implied intent to preempt may not be as clear. While the Ninth Circuit found no implied preemption in *Barber*, it is unclear how other federal circuits or the U.S. Supreme Court might rule on the issue, especially if faced with facts different than those considered by the court in *Barber*. For example, if the anchorage at issue is a Coast Guard designated “special anchorage area” or “anchorage grounds,” a court may be more inclined to find that preemption exists. Recalling the facts considered by the California court in the above-discussed case of *Graf v. San Diego Unified Port District*, this very issue might have become a problem for the Port District if the Coast Guard decided not to change its regulations to allow concurrency between the federal and local regulations that applied in San Diego Bay.

3. Dormant Commerce Clause Impact on State Regulation of Navigation and Anchoring

Even in the absence of direct conflict with federal law or express or implied preemption by Congress, the U.S. Constitution’s Commerce Clause may still restrict state laws where such laws operate either to directly discriminate against interstate commerce or to excessively burden interstate commerce.¹⁷⁸ This restriction results from interpretation of the Constitution that has developed into the legal doctrine known as the dormant Commerce Clause. Under this doctrine, the Commerce Clause is said to be “dormant” because Congress has not made

¹⁷³ *Id.* at 1189-90.

¹⁷⁴ *Id.* at 1190-91, 1193.

¹⁷⁵ *Id.* at 1190-91.

¹⁷⁶ *Id.* at 1193.

¹⁷⁷ *Id.*

¹⁷⁸ See *Dep’t of Revenue of Ky. v. Davis*, 553 U.S. 328, 338-39 (2008); *Oregon Waste Sys., Inc. v. Dep’t of Envtl. Quality of State of Or.*, 511 U.S. 93, 99 (1994).

active use of its power. Thus, even where Congress has not acted, courts interpret the dormant Commerce Clause to limit states' ability to adopt and implement regulation that either directly discriminates against interstate commerce or, if it does not directly discriminate, regulation that excessively burdens interstate commerce.¹⁷⁹

State regulation directly discriminates against interstate commerce when it treats out of state commercial interests different than commercial interests within the state. If a court finds that a regulation directly discriminates, the regulation is likely to be deemed unconstitutional as a violation of the dormant Commerce Clause.¹⁸⁰ However, when evaluating state regulations indirectly burdening interstate commerce, courts follow a fact-based balancing test that weighs the local (i.e., *intrastate*, not *interstate*) benefits of the state regulation against the burden on interstate commerce.¹⁸¹ Under this test, courts will uphold the regulation, "unless the burden imposed on [interstate] commerce is clearly excessive in relation to the [alleged] local benefits."¹⁸²

In addition to rejecting the preemption arguments based on direct conflict with federal law and express or implied preemption by federal law, the Ninth Circuit in *Barber*, discussed above, also refused to use the dormant Commerce Clause to invalidate the state regulation.¹⁸³ The court determined that the state's interest in regulating the particular activity it was attempting to regulate was substantial, while the burden on interstate commerce was indirect and minor.¹⁸⁴ The court was swayed by evidence indicating that the conduct the state regulation was designed to protect against posed a substantial threat to public safety.¹⁸⁵ The court also evaluated the direct and indirect impact Hawaii's anchoring and mooring regulations imposed on interstate commerce¹⁸⁶ and determined that the state was not directly regulating interstate commerce because the state's anchoring and mooring regulation did not specifically target interstate vessels.¹⁸⁷ The

¹⁷⁹ See *Davis*, 533 U.S. at 338-39; *Oregon Waste Sys., Inc.*, 511 U.S. at 99.

¹⁸⁰ ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW* 456 (Vicki Been et al. Eds, 4th ed. 2013).

¹⁸¹ See *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142-46 (1970) (note that the state interest that the regulation in question is aimed at benefitting must also amount to a "legitimate" interest).

¹⁸² *Id.* at 142.

¹⁸³ See *Barber*, 42 F.3d at 1194-95.

¹⁸⁴ See *id.* at 1195.

¹⁸⁵ See *id.* (explaining that these threats included "conflicting uses between recreational ocean users and vessels conducting passive mooring activities . . . on heavily traveled seaways).

¹⁸⁶ *Id.* at 1194-95.

¹⁸⁷ *Id.* at 1194.

court made this finding despite the fact that the state regulation imposed a higher mooring fee on nonresidents than on residents. The court recognized past judicial decisions refusing to find this sort of disparate fee structure discriminatory because state residents already pay state taxes, whereas nonresidents do not. Thus, to summarize the dormant Commerce Clause analysis in *Barber*, the court found that Hawaii's public safety interest in regulating "the conflicting uses between recreational ocean users and vessels conducting passive mooring activities" outweighed any small burden on interstate commerce,¹⁸⁸ and therefore the mooring regulation was not a violation of the Commerce Clause.¹⁸⁹

Overall, the result of this case indicates that federal law does not preempt local/state regulation of anchoring. Judicial decisions addressing various federal laws have consistently indicated that Congress has not occupied the field in this aspect of navigation, thereby refusing to find an implied intent to preempt state regulation.¹⁹⁰ The Coast Guard takes the position that, "[u]p to this point, Congress has not demonstrated an express or implied intent to preempt state regulation of anchorages."¹⁹¹ Regarding other aspects of maritime regulation, there are various cases in which courts have held that federal law trumps local/state legislation.¹⁹² However, there have also been a series of cases in which courts have found that federal law does not preempt local/state legislation.¹⁹³

4. Navigation Rules (a.k.a "The Rules of the Road") and "COLREGs"

No discussion of the interaction between federal, state and local government law on navigational issues in Florida would be complete without addressing the role of the "Navigation Rules" or as most in the boating community call them: "Rules of the Road."

¹⁸⁸ *Id.* at 1195.

¹⁸⁹ *Id.*

¹⁹⁰ See also *Beveridge v. Lewis*, 939 F.2d 859 (9th Cir. 1991) (addressing the Ports and Waterways Safety Act); *Murphy v. Department of Natural Resources*, 837 F.Supp. 1217 (S.D.Fla. 1993) (addressing the Submerged Lands Act); *Hawaiian Navigable Waters Preservation Soc. v. State of Hawaii*, 823 F.Supp. 766 (D. Haw. 1993), *aff'd* 42 F.3d 1185 (9th Cir. 1994) (addressing the Submerged Lands Act).

¹⁹¹ Memorandum from the Chief, Maritime and International Law Division, U.S. Coast Guard on Federal v. State Regulation (Dec. 30, 1992); see also generally Memorandum from the Commandant, U.S. Coast Guard on Anchorage Policy (Jan. 19, 1993).

¹⁹² See *United States v. Locke*, 529 U.S. 89, 115-16 (2000) (addressing that federal regulation should be the "sole source of a vessel's reporting obligation" trumping Washington's marine casualty reporting requirement regulation). See *Ray v. Atl. Richfield Co.*, 435 U.S. 151, 168, 178 (1978) (addressing federal regulations trumping state regulations for tank vessel design and size limitations with respect to transiting through Puget Sound).

¹⁹³ See *Bass River Associates v. Mayor of Bass River Township*, 743 F.2d 159 (3d Cir. 1984) (addressing that federal legislation on ship licenses and the Water Pollution Control Act do not preempt the state from using its police power to prohibit floating homes); *Chevron U.S.A., Inc. v. Hammond*, 726 F.2d 483 (9th Cir. 1984) (addressing the Ports and Waterways Safety Act, as amended by the Ports and Tanker Safety Act, and holding that "Congress did not intend to preclude all state regulation of the discharge of pollutants from tankers within three miles of shore").

There are two sets of Navigation Rules that vessels moving in, across, and out of Florida waters, into U.S. waters and international waters are required to follow.¹⁹⁴ One set of rules is often referred to as the “International Rules” or “COLREGS” and the other set of rules is often referred to as the “Inland Rules.”¹⁹⁵ There is minimal difference between the two sets of rules, which establish, among other things, lighting on vessels at night and the order and hierarchy upon which vessels have the right of way under various meeting scenarios. In essence, these rules are very similar to the way that highway traffic rules govern the movement of land-based vehicles. The primary intent of the rules is to prevent collisions between vessels at sea and to ensure the safe operation of vessels in navigable waters.

Which set of rules a vessel should follow depends on what side of a “line of demarcation” the vessel is located.¹⁹⁶ The Secretary of Homeland Security, is delegated the authority to identify the lines of demarcation separating the high seas from inland waters.¹⁹⁷ As the name implies, Inland Rules are followed when vessels are on the ‘inland’ side of a line of demarcation, whereas the International Rules are followed once the vessel crosses over the line and is transiting outside the inland area.¹⁹⁸

a. The International Rules or COLREGS. The “International Rules” or COLREGS were created out of the Convention on the International Regulations for Preventing Collisions at Sea in 1972.¹⁹⁹ Many of the world’s countries are parties to the Convention and as a result, vessels flying the flags of countries that have ratified the treaty, including the United States, are required to follow these Rules.²⁰⁰ Congress officially adopted the COLREGS under the name of the International Navigational Rules Act of 1977, thus giving them the force of law within U.S. territorial waters.²⁰¹

b. The Inland Rules. For many decades, the rules of navigation for vessels operating in the United States were different across the country. There were distinct navigation rules ranging from local rules to the Western Rivers rules, the

¹⁹⁴ 33 C.F.R. § 80.01 (2015).

¹⁹⁵ *See id.* § 80.01.

¹⁹⁶ *See id.* § 80.01.

¹⁹⁷ 33 U.S.C. § 151 (2012).

¹⁹⁸ 33 C.F.R. § 80.01 (2015).

¹⁹⁹ 33 C.F.R. Chapter 1, Subchapter D Special Note (2015).

²⁰⁰ *See id.*

²⁰¹ International Navigational Rules Act of 1977, Pub. L. No. 95-75, 91 Stat. 308.

Great Lakes rules and the Motorboat Act of 1940.²⁰² In the early 1960's, as the international convention began efforts to draft international rules, the United States simultaneously made efforts to unify the country's internal conglomerate of rules.²⁰³ The nation's rule unification efforts; however, were temporarily placed on hold while the International Rules were finalized and ultimately accepted and signed into law in 1977.²⁰⁴ Upon acceptance of the International Rules, the Secretary of Transportation created the Rules of the Road Advisory Committee, whose efforts led to the formal standardization of the Inland Rules in 1980.²⁰⁵

The Inland Navigation Rules are now encompassed in the Code of Federal Regulations – 33 C.F.R. parts 83 – 90. Rules 1 through 38 are the heart of the Rules, governing vessel behavior, movement across the water, signaling, and determining what vessel is the “give-way” vessel in any situation.²⁰⁶ There are also five annexes contained in the Rules, which proscribe technical lighting and signal requirements, distress signals, and additional special rules for fishing vessels and pilots.²⁰⁷

c. Preemption and Concurrency with State and Local Law. Previously in this publication we have discussed the Doctrine of Preemption in which superior Federal law essentially trumps State or local laws. The Inland Navigation Rules provide an example of express preemption. In 2004, upon passage of the federal Maritime Transportation Act, the U.S. Coast Guard received delegated authority to issue inland navigation regulations.²⁰⁸ After a regulatory change in 2010, the Inland Navigation Rules were transferred from the United States Code to the Code of Federal Regulations enabling the Coast Guard to more easily modify the Rules.²⁰⁹ In 2012, the Coast Guard amended the Inland Navigation Rules based on a 2009 “Preemption” memorandum issued by President Obama.²¹⁰ The memorandum directed “agencies to include preemption provisions in the codified regulations when regulatory preambles discussed its intention to preempt State law

²⁰² Mark A. Tilford & William D. Kline, *Mariner's Guide to the Inland and International Rules 1* (2008).

²⁰³ *Id.*

²⁰⁴ *Id.* at 16-17.

²⁰⁵ *Id.* at 17-18.

²⁰⁶ 33 C.F.R. § 83 (2015).

²⁰⁷ 33 C.F.R. §§ 84-88 (2015).

²⁰⁸ Changes to the Inland Navigation Rules, 77 Fed. Reg. 52176 (Aug. 28, 2012).

²⁰⁹ *Id.*

²¹⁰ 33 C.F.R. § 83.01(a) (2015). See Changes to the Inland Navigation Rules, 77 Fed. Reg. 52176 (Aug. 28, 2012).

through the regulation.”²¹¹ The language in the Rules was amended to specifically and expressly make the Rules supreme over State and local law by adding the following sentence to Inland Rule 1: “The regulations in this subchapter (subchapter E, 33 CFR parts 83 through 90) have preemptive effect over State or local regulation within the same field.”²¹²

Florida had previously incorporated the Navigation Rules by including the term in the definitions section of Chapter 327, Florida Statutes. But keeping in line with the superior federal law when it was amended to expressly preempt State law, Florida amended its definition of Navigation Rules to make sure to reference the most recent Congressional amendments including the preemption language.²¹³ The ultimate meaning of the interplay between Florida’s incorporation of the Code of Federal Regulations (C.F.R.’s) codifying the Navigation Rules is that not only is Florida law preempted by federal law, but federal law is also specifically incorporated into Florida law. Thus, Florida law and Federal law are essentially one and the same.

As a result, where Section 327.33 (“Reckless or careless operation of a vessel”) of the Florida Statutes states in subsection (3) that “[e]ach person operating a vessel upon the waters of this state shall comply with the navigation rules,” this is specifically referring to the “Rules of the Road” as contained in Title 33 of the U.S. Code. Florida law also prescribes civil and criminal penalties for those boaters who violate the Navigation Rules while operating a vessel on waters within Florida’s jurisdiction.²¹⁴

5. U.S. Coast Guard Authority and Federal Regulations

a. General Authority. The U.S. Coast Guard is the nation’s lead maritime service executing a variety of maritime safety and security missions inland, along the coasts, and in international waters. The organization’s foundation dates back to 1790 when then Secretary of the Treasury Alexander Hamilton envisioned and Congress authorized the creation of the Revenue-Cutter Service – a fleet of ships built to protect the country’s revenue.²¹⁵ In 1915, the term “Coast Guard” was of-

²¹¹ Changes to the Inland Navigation Rules, 77 Fed. Reg. 52176 (Aug. 28, 2012).

²¹² 33 C.F.R. § 83.01(a) (2015). See Changes to the Inland Navigation Rules, 77 Fed. Reg. 52176 (Aug. 28, 2012).

²¹³ See Ch. 2013-194, Laws of Fla. (2013) (updating the definition of “navigation rules” to reference 33 C.F.R. §§ 83-90). See Ch. 2014-70, Laws of Fla. (2014) (making minor changes to the definition of “navigation rules”).

²¹⁴ See Fla. Stat. § 327.33(3)(a) (2015). See Fla. Stat. § 327.33(3)(b) (2015).

²¹⁵ Alexander Hamilton, the first Secretary of the Treasury, Federalist No. 12, Nov. 27, 1787 (stating that “[t]he relative situation of these States; the number of rivers with which they are intersected, and of bays that wash their shores; the facility of communication in every direction; the affinity of language and manners; the familiar habits of intercourse; -- all these are circumstances that would conspire to render an illicit trade between them a

ficially implemented when the Revenue-Cutter Service and the Life-Saving Service merged.²¹⁶ As the country has grown, so has the Coast Guard. Other maritime services have become incorporated into the Coast Guard, such as the Steamboat Inspection Service, the Lighthouse Service, and the Bureau of Marine Inspection and Navigation, and new missions have formed as threats and priorities facing the nation have changed.²¹⁷

Today, the Coast Guard has 11 primary missions: search and rescue, aids to navigation, drug interdiction, living marine resources, marine safety, defense readiness, migrant interdiction, marine environmental protection, ice operations, law enforcement, and ports, waterways and coastal security. The expansiveness of these missions is partially due to the Coast Guard's structural organization and delegated authority. While the Coast Guard is considered one of the nation's five armed services, it is unique in that it resides under the Department of Homeland Security versus the Department of Defense. As a result of this unique position and diverse mission set, members of the Coast Guard have been given domestic law enforcement authority not instilled in the other armed services.²¹⁸ Specifically, the Coast Guard through its members "may make inquiries, examinations, inspections, searches, seizures, and arrests upon the high seas and waters over which the United States has jurisdiction, for the prevention, detection, and suppression of violations of laws of the United States."²¹⁹

b. Authority to Regulate Vessel Navigation. The Ports and Waterways Safety Act of 1972, in addition to various other statutes, provides the Coast Guard with authority to protect vessel safety, the environment, the waterways, and their surrounding infrastructure.²²⁰ The Coast Guard can control vessel traffic independently or holistically through the creation of vessel traffic systems, restricted navigation areas, safety zones, security zones, and anchorage areas. The Coast Guard's authority to regulate navigation expands from the nation's inland waters to the coastal waters and high seas, concurrently with State and local regulations where applicable and not otherwise preempted.

c. Aids to Navigation System. The Coast Guard administers the nation's Aids to Navigation System which "consists of Federal aids to navigation oper-

matter of little difficulty, and would insure frequent evasions of the commercial regulations of each other A few armed vessels, judiciously stationed at the entrances of our ports, might at a small expense be made useful sentinels of the laws"). See Robert Erwin Johnson, *Guardians of the Sea* 1 (1987).

²¹⁶ See Robert Erwin Johnson, *Guardians of the Sea* 32 (1987). See also 14 U.S.C. § 2 (2012).

²¹⁷ See Robert Erwin Johnson, *Guardians of the Sea* 162 (1987). See also 14 U.S.C. § 2 (2012).

²¹⁸ See 14 U.S.C. § 89(a) (2012).

²¹⁹ *Id.*

²²⁰ See 33 U.S.C. §1221 et seq. (2006). See also 14 U.S.C. § 2 (2012).

ated by the Coast Guard, aids to navigation operated by the other armed services, and private aids to navigation operated by other persons.”²²¹ The Aids to Navigation System encompasses a variety of fixed and floating markers with varying lights, colors, shapes, sound signals, and electronic signals utilized in conjunction to best mark navigation routes for vessels and draw attention to hazards to navigation. Along the coast and in international waters surrounding the nation, the National Oceanic and Atmospheric Administration (NOAA) charts the waters depicting the location of markers, hazards, and channels using information from the Coast Guard and the Army Corps of Engineers. The Coast Guard primarily maintains all aids to navigation that mark federal channels, including the Intracoastal Waterway, and relies on routine inspections, and reports of discrepancies from the Coast Guard Auxiliary, members of the maritime industry, and the boating public to ensure that aids are continuously “watching properly.”

d. Regulated Navigation Areas (RNA’s) and Limited Access Areas. The Coast Guard is authorized to create Regulated Navigation Areas (RNA) to ensure the safe and secure movement of vessel traffic within U.S. waters. RNAs are created with a specific intent to address a certain area of concern along the waterway and allows the Coast Guard to control the movement or function of vessels based upon certain requirements such as size, speed, or draft.²²² RNAs are created and disestablished as needed, yet they are generally permanent in nature with regulations being published in 33 CFR part 165 subpart F. There are currently five RNA regulations published for Florida.²²³

Safety Zones. Safety zones are created to limit access into a certain area of water or shoreline to protect the public.²²⁴ A safety zone may be fixed to a certain area, such as a set of coordinates or geographic references, or may be mobile based on the circumstances of the situation. Safety zones differ from RNAs in that they completely restrict entry into a designated area unless specific authorization has been given.²²⁵ While there are a variety of safety zones established and denoted in 33 CFR part 165 subpart F, the majority of the Coast Guard’s issued

²²¹ See 33 C.F.R. § 62.1 (2015).

²²² See 33 C.F.R. § 165.10 (2014).

²²³ See 33 C.F.R. § 165.726 (2015) (RNA restricting the width and arrangement of vessels mooring and rafting along the Miami River in Miami, Florida to ensure a navigable channel exists for transiting traffic); see 33 C.F.R. § 165.752 (2015) (RNA limiting the draft of vessels allowed to transit Sparkman Channel near Tampa Bay, Florida due to limited water depth from an underwater pipeline); see 33 C.F.R. § 165.753 (2015) (RNA requiring vessels greater than 50 meters in the Tampa Bay area to give Navigational Advisory Broadcasts); see 33 C.F.R. § 165.765 (2015) (RNA establishing a slow speed area near Port Everglades for vessels less than 150 meters in length); see 33 C.F.R. § 165.779 (2015) (RNA establishing a slow speed zone through part of Bis-cayne Bay during Columbus Day weekend to facilitate a seasonal increase of traffic).

²²⁴ See 33 C.F.R. § 165.20 (2015).

²²⁵ See 33 C.F.R. § 165.20 (2015).

safety zones are temporary in nature and are not published in the Code of Federal Regulations. There are a variety of reasons that a Coast Guard unit may establish a permanent or temporary safety zone. There are less than 10 permanent safety zones published for Florida, including a recurring zone around a fireworks event and a zone to restrict traffic in a channel during periods of restricted visibility.²²⁶ On some occasions, a Coast Guard unit must create a quick and/or short-term safety zone, which cannot be published due the nature of the circumstances. Situations that require last minute and/or short-term safety zones can include an adrift mine or for search and rescue/recovery/salvage needs arising from a boat accident.

Security Zones. Security zones are created to restrict access into a certain area of water or shoreline in order to protect an entity (person, vessel, or facility) from harm.²²⁷ There are a handful of permanent security zones in Florida, including zones around cruise ships as the ships enter and depart port and while they are moored.²²⁸ Like safety zones, security zones can be fixed to a certain location, can be mobile, and can be temporary in nature.²²⁹ A presidential visit to a waterfront property often triggers the need for a temporary and last minute security zone. As with safety zones, a list of permanent security zones can be found in 33 CFR part 165 subpart F.

e. Regulation of Anchoring. The Coast Guard plays an important, albeit limited regulatory role regarding the anchorage of vessels in coastal waters. As previously mentioned, Congress has delegated authority to the Coast Guard to create two main types of anchorage areas—anchorage grounds and special anchorage areas.²³⁰ For more information regarding historical authority of anchorage grounds and special anchorage areas see Section II.B.2.b.

Anchorage Grounds. Every anchorage ground is unique and the regulations establishing each area contain specific requirements for anchoring within the designated grounds.²³¹ Florida has nine designated anchorage ground regulations that can be found in 33 CFR part 110 subpart B: Fort George Inlet (near

²²⁶ See 33 C.F.R. § 165.721 (2015) (restricting access to waters around a barge used for a fireworks display in the St. Johns River in Jacksonville, Florida). See 33 C.F.R. § 165.782 (2015) (restricting vessel traffic movement into certain waterways in the Tampa Bay area zone due to restricted visibility).

²²⁷ See 33 C.F.R. § 165.30 (2015).

²²⁸ See 33 C.F.R. § 165.761 (2015) (establishing fixed and moving security zones around passenger vessels in and around Port Miami, Port Everglades, and the Port of Palm Beach).

²²⁹ See 33 C.F.R. § 165 Subpart F (2015).

²³⁰ See also 33 C.F.R. § 166.200 (2015) (the Coast Guard has also established several anchorage areas near various ports lining the Gulf of Mexico “to control the erection of structures” and to provide safe navigation in the vicinity of the ports).

²³¹ See 33 C.F.R. § 110 Subpart B (2015).

Mayport), St. Johns River, Port of Palm Beach, Port Everglades, Miami, Key West, Tampa Bay, St. Joseph Bay, and the Tortugas Harbor, in vicinity of Garden Key, Dry Tortugas. While several of these regulations establish a single anchorage ground area, others establish multiple anchorage ground areas. Additionally, some of the anchorage grounds are designated for specific uses such as vessels carrying explosives or areas for aircraft carriers and deep draft vessels.²³²

Special Anchorage Areas. Special anchorage areas are designed to establish anchorage areas for small vessels away from main channels and fairways.²³³ A vessel less than 65 feet in length, when at anchor in a special anchorage area, is exempt from having to display anchorage lights at night.²³⁴ Special anchorage areas in Florida can be found in 33 CFR part 110 subpart A and include the following areas: St. Johns River, Indian River at Sebastian, Indian River at Vero Beach, Okeechobee Waterway along the St. Lucie River in Stuart, Marco Island Manatee River in Bradenton and Apollo Beach.

f. Rulemaking Process. Authority to establish anchorage grounds, special anchorage areas, and RNA's has been delegated to Coast Guard District Commanders and authority to establish safety zones and security zones has been further delegated to Coast Guard Captains of the Ports.²³⁵ In order to establish or modify one of the above-mentioned federal regulations, the Coast Guard follows a formal rule-making process. This process consists of the applicable Coast Guard unit discovering an area of concern, discussing the concern with applicable stakeholders, drafting the proposed rule, and then publishing the proposed rule in the Federal Register for comment and public notice.²³⁶ After a specified period of time, the Coast Guard then reviews any comments or concerns received and if no further outreach is required, a Final Rule is created and published in the Federal Register.²³⁷ The creation of each regulation is unique despite following the formal rule-making process and at times, a significantly abbreviated process is completed in order to expedite the regulation for emergent safety or security reasons.²³⁸ Outreach seeking public comment regarding a regulation may also be

²³² See 33 C.F.R. § 110.186 (2015) (establishing a single anchorage ground area near Port Everglades, Florida). See 33 C.F.R. § 110.182 (2015) (establishing multiple anchorage ground areas near Mayport, Florida, including areas for aircraft carriers and deep draft vessels, an area for destroyer sized vessels, and a designated area for vessels with explosives).

²³³ See 33 C.F.R. § 109.10 (2015).

²³⁴ *Id.*

²³⁵ See 33 C.F.R. § 1.05 (2015).

²³⁶ See 33 C.F.R. 1.05-35 (2015).

²³⁷ See 33 C.F.R. 1.05-40 (2015).

²³⁸ See 33 C.F.R. 1.05-55 (2015).

published in the “Local Notice to Mariners”.²³⁹ Additionally, notification of enforcement may also be published in the Local Notice to Mariners, and for short term or emergency zones, notification will generally include on scene law enforcement presence and a Broadcast Notice to Mariners over Channel 16, VHF marine radio.

6. Federal Channels (including the Intracoastal Waterway)

The Rivers and Harbors Appropriation Act of 1899, vested authority in the Army Corps of Engineers to create and maintain the nation’s federal channels.²⁴⁰ Several years later Congress expanded this authority allowing individuals and municipalities to make improvements to waterways at their own expense with the caveat that any such effort would be contingent upon approval by the Chief of Engineers.²⁴¹ In 1913, Congress further addressed waterway improvement concerns by establishing procedures in order to determine which proposed waterway projects were deserving of federal funding support.²⁴²

There are approximately 12,000 miles of inland waterways and approximately 13,000 miles of deep and shallow draft channels throughout the nation.²⁴³ Florida contains a multitude of waterways including: deep draft channels, shallow draft inlets, inland channels transecting the state and the Florida Keys, and a large portion of the Intracoastal Waterway system. Florida’s deep draft channels connect the high seas to various ports including Port Miami, Port Everglades, Port of Jacksonville, and Port Tampa Bay. These deep draft channels have controlling depths ranging from over 30 feet to over 40 feet.²⁴⁴ In 2012 the White House announced support, through an initiative titled “We Can’t Wait,” for the modernization and expansion of several major ports including Port Miami and

²³⁹ The Local Notice to Mariners (LNM) is a weekly publication created by Coast Guard Districts to advise mariners and waterway stakeholders of waterway hazards, bridge and aids to navigation discrepancies, and upcoming events and waterway restrictions. Available at <http://www.navcen.uscg.gov/?pageName=InmMain>

²⁴⁰ See 33 U.S.C. § 403 (2006). See also PROPELLER CLUB OF THE UNITED STATES, RIVER AND HARBOR IMPROVEMENTS HOW THEY ARE INITIATED AUTHORIZED AND COMPLETED 17 (Thomas A. Scott, 1938).

²⁴¹ *Id.*

²⁴² *Id.*

²⁴³ U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-13-80, MARITIME INFRASTRUCTURE: OPPORTUNITIES EXIST TO IMPROVE THE EFFECTIVENESS OF FEDERAL EFFORTS TO SUPPORT THE MARINE TRANSPORTATION SYSTEM (2012).

²⁴⁴ See U.S. Dep’t of Commerce, NOAA, United States Coast Pilot 4 at 256, 325 and 330 (46th ed. 2014). See U.S. Dep’t of Commerce, NOAA, United States Coast Pilot 5 at 256 (43rd ed. 2015).

the Port of Jacksonville.²⁴⁵ Port Everglades is also embarking on a major port expansion project including the deepening and widening of federal channels and terminal and berthing improvements.²⁴⁶

Shallower channels and inlets also line Florida's coastline, some connecting the high seas to small commercial ports, some passing through various Keys, and others connecting the high seas to smaller towns predominately used for recreational and local level commercial endeavors, such as fishing and tourism. Furthermore, a unique series of shallow channels transect the state and connect the Atlantic portion of the Intracoastal Waterway to the Gulf of Mexico portion of the Intracoastal Waterway. These series of channels include the St. Lucie Canal along the eastern side of the state that stretches west into Lake Okeechobee. Lake Okeechobee includes two channel routes, which then connect to the Caloosahatchee Canal along the western portion of the Lake. The Caloosahatchee Canal then connects the Lake to the western side of the state ending in Fort Myers.

The Intracoastal Waterway is a unique channel system that stretches and interconnects Norfolk, Virginia to the Florida Keys, and also connects the Caloosahatchee River near Fort Myers to Brownsville, Texas by outlining the Gulf of Mexico.²⁴⁷ The Intracoastal Waterway enables shallow draft vessels to transit in the shelter of barrier islands or in channels near to the coastline. The depths of the Intracoastal Waterway are generally maintained at nine feet but can range from seven feet to 12 feet depending on the area.²⁴⁸

Various federal and state regulations impact vessel traffic along Florida's waterways including federal channels, non-federal channels, and along the coastline. Federal regulations that can impact federal channels include the Coast Guard's establishment of regulated navigation areas and safety and security zones to control traffic for safety and security reasons. Additionally, the Florida Fish and Wildlife Conservation Commission (FWC) has established certain waterway restrictions along federal channels including boating restricted areas and

²⁴⁵ See Press Release, The White House Office of the Press Secretary, We Can't Wait: Obama Administration Announces 5 Major Port Projects to Be Expedited (Jul. 19, 2012) *available at* <https://www.whitehouse.gov/the-press-office/2012/07/19/we-can-t-wait-obama-administration-announces-5-major-port-projects-be-ex>.

²⁴⁶ See Port Everglades Master / Vision Plan *available at* <http://www.porteverglades.net/expansion/master-vision-plan/>.

²⁴⁷ See U.S. Dep't of Commerce, NOAA, United States Coast Pilot 4 at 353 (46th ed. 2014). See U.S. Dep't of Commerce, NOAA, United States Coast Pilot 5 at 449 (43rd ed. 2015). See also WILLIAM G. CRAWFORD JR., FLORIDA'S BIG DIG: THE ATLANTIC INTRACOASTAL WATERWAY FROM JACKSONVILLE TO MIAMI 1881 TO 1935 (2006). See also William G. Crawford Jr., *A History of Florida's East Coast Canal: The Atlantic Intracoastal Waterway From Jacksonville to Miami*, Broward Legacy 2 (Summer/Fall 1997).

²⁴⁸ See U.S. Dep't of Commerce, NOAA, United States Coast Pilot 4 at 353 (46th ed. 2014). See U.S. Dep't of Commerce, NOAA, United States Coast Pilot 5 at 449 (43rd ed. 2015).

manatee protection rules. These state regulations include speed restrictions and limitations to activities in certain areas.²⁴⁹

a. Locks and Bridges

There are a series of locks and fixed and movable bridges impacting various channels throughout Florida's waterway system. While the locks are located upon inland waters, bridges can be encountered while entering port, or traversing through inland channels or the Intracoastal Waterway. The Army Corps of Engineers manages the holistic operation of the lock systems and maintains applicable lock information in 33 CFR part 207. Actual operation of the locks may be conducted directly by the Corps or operated by another agency or contractor.

The U.S. Coast Guard oversees the management and overarching operation of bridges that span across navigable channels to ensure the public right of navigation.²⁵⁰ This authority stems from a variety of Acts including but not limited to the Rivers and Harbors Appropriation Act of 1899, the Act of March 23, 1906, and the General Bridge Act of 1946.²⁵¹ The majority of bridges in Florida are owned and operated by state and local municipalities. The Coast Guard's Seventh District Bridge Administration Branch located in Miami, Florida reviews and permits all bridge construction operations, as well as oversees the operating schedule of all moveable bridges in Florida. Bridge information can be found in 33 CFR Chapter 1 Subchapter J, with specific Florida related drawbridge operation regulations located in 33 CFR parts 117.258 – 117.341.

III. Approaches to Local Boating Regulation in Other States

Coastal and Great Lakes states vary markedly in their approach to local regulation of vessel navigation, but most seek to balance state and local interests to some extent. The approaches of these states range on a continuum from allowing considerable local regulatory discretion to completely preempting local authority. In the most common approach, the state preempts local regulatory authority and then, usually after review for policy consistency by the state agency charged with boating management, returns it upon petition by the local government. The following paragraphs contain examples from across the continuum.

²⁴⁹ See List of FWC Manatee Protection Zones and/or FWC Boating Restricted Areas *available at*: <http://myfwc.com/wildlifehabitats/managed/manatee/data-and-maps/>. See Section IV.B.4.a.

²⁵⁰ See U.S. Coast Guard, Bridge Administration Manual (2004).

²⁵¹ *Id.* at Ch. 4(1).

Maine gives local governments broad authority to regulate mooring in harbors within their jurisdiction,²⁵² but does not otherwise allow for local authority over boating regulation. Minnesota gives considerable authority to local governments to regulate many aspects of boating as long as the provisions do not conflict with state law,²⁵³ and local water surface use ordinances must also be approved by the state's Commissioner of Natural Resources prior to adoption.²⁵⁴ In Connecticut, local governments can pass any local regulation dealing with the operation of boats within its territorial limits upon submission to the Commissioner of Environmental Protection, and such regulation will take effect in 60 days as long as it is not disapproved by the Commissioner.²⁵⁵ California also allows local governments to pass provisions regulating boating, but only provisions pertaining to "time of day restrictions, speed zones, special-use areas, and sanitation and pollution control."²⁵⁶ Moreover, local governments in California must submit these types of local provisions—which cannot conflict with applicable state laws or regulations—to the state's Department of Boating and Waterways 30 days prior to the local provision going into effect.²⁵⁷

Wisconsin allows local governments to enact ordinances that are not contrary to existing state law and that relate to the equipment, use, or operation of boats or to any other activity regulated by the Wisconsin boating law;²⁵⁸ however, when it comes to certain inland lakes, these ordinances must be submitted to the state (i.e., the Wisconsin Department of Natural Resources) for review as to uniformity, enforcement, and "the local situation" prior to final adoption.²⁵⁹ Based on this review, the state issues an advisory report that includes any suggested changes prior to adoption.²⁶⁰ Moreover, for most ordinances in Wisconsin, the state and certain organizations have a right to object to the ordinance and initiate a hearing process.²⁶¹ Wisconsin also explicitly allows local regulation that protects natural resource values.²⁶² Both Connecticut and Wisconsin consider the

²⁵² See Me. Rev. Stat. Ann. tit. 38, § 7 (2014).

²⁵³ See Minn. Stat. § 86B-201 (2014).

²⁵⁴ Minn. Stat. § 86B-205 (2010).

²⁵⁵ See Conn. Gen. Stat. § 15-136 (2014).

²⁵⁶ See Cal. Harb. & Nav. Code § 660 (2012).

²⁵⁷ See *id.* But see also 74 Cal. Op. Att'y Gen. 174 (1991) (providing a California Attorney General's opinion stating that local governments need not supply the state with justification for such proposed ordinances).

²⁵⁸ See Wis. Stat. § 30.77(3)(a) (2014).

²⁵⁹ See Wis. Stat. § 30.77(3)(d) (2014).

²⁶⁰ See *id.*

²⁶¹ Wis. Stat. § 30.77(3)(dm) (2014).

²⁶² Wis. Stat. § 30.77(3)(a), (am), & (b) (2014).

consistency among local regulations of water bodies over which two or more local governments share jurisdiction.²⁶³ Delaware, Rhode Island, Mississippi, and Georgia allow local governments to petition the state to allow local regulations, but often require the local government to demonstrate why the special regulation is necessary, and often delineate criteria for state review of proposed ordinances.²⁶⁴

Some states simply prohibit, with very limited exception, the authority of local government to regulate boating. Louisiana prohibits local boating regulations except for certain speed restrictions,²⁶⁵ and Maryland allows no regulations inconsistent with state regulations.²⁶⁶ Texas grants no authority to local government to regulate navigation.²⁶⁷

IV. State and Local Authority over Navigation and Anchoring

This section discusses the sources of state jurisdiction over activities on lands underlying navigable waters and the Florida statutes relevant to boating and waterway management.

A. The Proprietary and Regulatory Source of State Authority

Florida's authority to regulate activities on navigable waters has two fundamental foundations – proprietary and regulatory. As discussed in Section II.B.1., the Submerged Lands Act confirmed the state's ownership of the beds of all navigable waters. This proprietary authority is limited by the "public trust doctrine, which imposes on the state a special duty to protect the trust resources (i.e., submerged lands and overlying water) for the benefit of the public. In certain circumstances, the state has transferred title of these beds to private entities or local governments, therefore potentially giving rise to conflicts between public use and private ownership. Additionally, riparian rights associated with the private ownership of land ownership adjacent to water might also give rise to this type of conflict. The second foundation, the state's inherent police power, provides authority to the state to regulate a broad range of activities for the protection of

²⁶³ See Conn. Gen. Stat. § 15-136(b) (2014); Wis. Stat. § 30.77(3) (2014).

²⁶⁴ Del. Code Ann. tit. 23, § 2121 (2014); R.I. Gen. Laws § 46-22-14 (2014). Miss. Code Ann. § 59-21-129 (2014). Ga. Code Ann. § 52-7-21 (2014).

²⁶⁵ La. Rev. Stat. Ann. § 34:851.27 (2013).

²⁶⁶ Md. Code Ann., Nat. Res. § 8-704(f) (2014).

²⁶⁷ Tex. Parks & Wild. Code Ann. § 31.091 (2013).

its citizens. As the state also delegates this power to local governments, local governments may also have concurrent regulatory authority over waters within their jurisdiction.

1. The Public Trust Doctrine and Sovereign Submerged Lands

The public trust doctrine traces its lineage to ancient Roman law, which essentially stated that the ocean, the seashore areas affected by the ebb and flow of the tides, and running rivers or streams were for the common usage of all.²⁶⁸ The doctrine survived through the centuries and emerged as part of the common law of England, and thereafter in the original American Colonies.²⁶⁹ After the United States acquired the territory known as East and West Florida by treaty of cession from Spain, this territory was held subject to the constitution and laws of the United States. Moreover, “[t]he lands under navigable waters, including the shores, were held by the United States for the benefit of the whole people, to go to the future state for the use of the whole people of the state.”²⁷⁰ Under the Equal Footing Doctrine, the state of Florida gained and continues to hold title to the beds of all waters in the state that were navigable at the time it entered the Union, and these beds are known as sovereign submerged lands.²⁷¹ Today, the public trust doctrine remains part of the modern law of the United States, and is specifically recognized in Florida law.

The public trust doctrine requires that the state manage submerged lands for the use and benefit of the public.²⁷² The management responsibility for submerged lands has been delegated by the state legislature to the government cabinet, sitting as the Board of Trustees of the Internal Improvement Trust Fund (Board of Trustees).²⁷³ Because the state is acting in a proprietary capacity as a landowner, it has greater authority to restrict the use of both the submerged lands and overlying waters than would be the case for private lands where only regulatory authority would apply.²⁷⁴ However, because the public trust doctrine

²⁶⁸ The Institutes of Justinian 2.1.1 (Thomas Cooper trans. & ed. 1841).

²⁶⁹ See James M. Kehoe, Note, *The Next Wave In Public Beach Access: Removal of States as Trustees of Public Trust Properties*, 63 Fordham L. Rev. 1913, 1924 (1995).

²⁷⁰ *State ex rel. Ellis v. Gerbing*, 56 Fla. 603 (1908).

²⁷¹ *Philips Petroleum v. Mississippi*, 484 U.S. 469 (1988); *Coastal Petroleum Co. v. American Cyanamid Co.*, 492 So. 2d 339 (Fla. 1986). See also Fla. Const. art. X, § 11 (codifying the common law public trust doctrine in Florida as a constitutional provision); 43 U.S.C. § 1311 (2012) (confirming state ownership of lands under navigable water in the respective states); see Section II.B.1.

²⁷² See Fla. Const. art. X, § 11; *Coastal Petroleum Co. v. American Cyanamid Co.*, 492 So. 2d 339 (Fla. 1986); Sid Ansbacher & Susan C. Grandin, *Local Government Riparian Rights and Authority*, Fl. Bar J., at 87 (June, 1996).

²⁷³ See Fla. Stat. § 253.03(1) (2014).

²⁷⁴ See, e.g., Fla. Stat. § 373.422 (2014) (providing that Florida Department of Environmental Protection (DEP) or Water Management District permits authorizing activities on submerged lands generally must be conditioned

imposes a duty on the state to use and manage the lands for the benefit of the public it also serves as a limitation on the power of the Board of Trustees.²⁷⁵ Navigation, commerce, fishing, and swimming are generally accepted as the public rights protected by the public trust doctrine.²⁷⁶

It should be noted that there are many instances throughout Florida where the State has conveyed ownership of submerged lands to private entities or local governments. For example, all of St. Augustine Harbor is owned by the City of St. Augustine.²⁷⁷

Efforts by the state or local governments to unduly restrict navigation and associated anchoring may amount to a breach of the state's obligations under the public trust doctrine because the Florida Supreme Court has explicitly identified navigation as a trust purpose.²⁷⁸ Yet, we find no cases in Florida – and only limited case law elsewhere – that articulate the public trust doctrine as a limitation on state or local authority to regulate navigation.²⁷⁹ Nevertheless, when considering the right to navigate, the state must balance the right against other rights

on those approvals and authorizations that the Board of Trustees requires); Fla. Admin. Code R. 18-21.005 (2014) (providing the rules guiding the manner in which the Board of Trustees gives authorizations for activities on submerged lands); *but see* Fla. Admin Code R. 18-21.0051 (2014) (delegating certain authority of the Board of Trustees to the Florida Department of Environmental Protection and/or the water management districts).

²⁷⁵ See *Coastal Petroleum Co. v. American Cyanamid Co.*, 492 So. 2d 339 (Fla. 1986).

²⁷⁶ See *Illinois Cent. R.R. Co. v. Illinois*, 146 U.S. 387 (1892).

²⁷⁷ See Ch. 6769, at 942, Laws of Fla. (1913) (providing that the title of the Act states it is "An Act Granting Unto the City of St. Augustine, a Municipal Corporation Under the Laws of the State of Florida, All Unsurveyed, marsh or Submerged Lands, Within and Adjacent to Said City of St. Augustine, Lying in and Bordering Along the Matanzas River, Maria Sanchez Creek and St. Sebastian River, and Not Now owned by Private Parties."); See also, *Fish Island Development, LLC v. City of St. Augustine*, Petition for Writ of Certiorari (2007 WL 7267003) at FN 11 (stating that: "In 1913, the Florida Legislature granted title to the submerged lands within the City boundaries to the City. . . . In January 1996, the City enacted Article IV, Code of Ordinances, to 'provide for the implementation of the administration and management of submerged lands that are owned by the City of St. Augustine' Code § 7-81(a). Article IV established the exclusive procedure by which the City leases City-owned submerged lands for use in 'all revenue-generating or income-related activit[ies].' Id. § 7-81(b). According to Article IV, neither the Board nor the Commission contributes to the negotiations for a submerged land lease between the City and the applicant; rather, the 'city manager shall have the authority to enter into negotiations with and enter into leases with applicants and shall have the authority to execute such leases in the name of the city.' Id. § 7-85(f).").

²⁷⁸ See *Hayes v. Bowman*, 91 So. 2d 795, 799 (Fla. 1957); *Broward v. Mabry*, 50 So. 826, 829 (Fla. 1909); *State ex rel. Ellis v. Gerbing*, 47 So. 353 (Fla. 1908); *State v. Black River Phosphate Co.*, 13 So. 640-46 (Fla. 1893).

²⁷⁹ See, e.g., *Kuramoto v. Hamada*, 30 Haw. 841, 844 (1929); *Pierson v. Coffey*, 706 S.W.2d 409, 412 (1985) ("the "public right of navigation" includes the right to navigate the waterways in the strictest sense, that is, for travel and for transportation... The right also includes the right to use the public waterways for recreational purposes such as boating, swimming, and fishing... Moreover, the "public right of navigation," whether for commercial or recreational purposes, necessarily includes the right of temporary anchorage and the right of incidental use of the riverbed); *Munninghoff v. Wisconsin Conservation Comm'n*, 255 Wis. 252, 260 (1949).

protected for trust purposes.²⁸⁰ Furthermore, the Board of Trustees enjoys considerable discretion in their decisions concerning the management of trust lands.²⁸¹

2. Privately Owned Submerged Lands and Public Navigation Rights

Despite the presumption that the State owns and manages submerged land subject to the public trust doctrine, title to submerged lands throughout Florida has been converted to private ownership. This circumstance gives rise to questions regarding the manner in which ownership of privately owned submerged land affects the public's right of navigation over those submerged lands, in addition to other public rights protected by the public trust doctrine.

The state, as holder of title to submerged land, may sell, lease, or otherwise divest itself of submerged land. However, when divesting such land, the state is strictly limited by the Florida Constitution's requirement that a transfer of title of submerged land to a private person or entity be in the public interest.²⁸² The Florida Supreme Court has also determined that the state has the authority to transfer title of submerged land under navigable waters to a private entity, but may only do so subject to the Florida Constitution's requirement that "the rights of the people of the state are not invaded or impaired."²⁸³ Normally, in real estate transfers, a title that is "fee simple" means it contains all the rights enjoyed by complete ownership—sometimes referred to as the "whole bundle of sticks." Although fee simple title normally includes the right to exclude others, in the case of sovereign submerged lands, it may be that the public's right to navigation on waters covering submerged lands survives the transfer of submerged lands into private ownership.

As far back as 1931 this question was posed in a lawsuit in the U.S. District Court of the Southern District of Florida. In the case of *Silver Springs Paradise*

²⁸⁰ See *State v. Gerbing*, 47 So. 353, 355 (Fla. 1908) (finding that, in addition to navigation, trust purposes include "commerce, fishing and other useful purposes afforded by the waters [over the lands held in trust]"); *Coastal Petroleum Co.*, 492 So. 2d at 346-47 (pointing to "transport, fishing, floating, and swimming" as trust purposes See also *Marks v. Whitney*, 491 P.2d 374 (Cal. 1971) (providing an example of more recent instances where the public trust doctrine has been viewed as protective of environmental values of trust lands); Kelly Lowry, Note, *Zoning the Water: Using the Public Trust Doctrine as a Basis for a Comprehensive Water-Use Plan in Coastal South Carolina*, 5 S.C. Envtl. L.J. 79, 91 (Spring 1996) (providing an example of an argument in favor of balancing navigation with other trust purposes). See also *St. Croix Waterway Ass'n v. Meyer*, 178 F.3d 515 (8th Cir. 1999) (finding that navigation can be regulated under the public trust doctrine to protect public waters and the public).

²⁸¹ See *Hayes v. Bowman*, 91 So. 2d 795 (Fla. 1957).

²⁸² See Fla. Const. art. X, § 11 (providing that the "[s]ale of such lands may be authorized by law, but only when in the public interest . . .").

²⁸³ See *Pembroke v. Peninsular Terminal Co.*, 108 Fla. 46, 61 (1933).

Co. v. Ray,²⁸⁴ two contending glass-bottom boat operators were competing for the thriving eco-tourism business at the now famous Silver Springs. Ray argued that by virtue of owning title to several large tracts of land (over which the Silver Springs Run flowed), which were purchased by his predecessor in interest prior to Florida becoming a State, title to his property also included title to the submerged lands of Silver Springs and beneath Silver Springs Run. Ray further asserted that such private ownership of the submerged land granted him the right to exclude the use of the navigable waters by others—hoping to exclude his competitor from transporting tourists to see the main springs. On the other hand, the competitor, Silver Springs Paradise Co., owned upland property further downstream along the Run, and contended that the public right of navigation existed for the entire length of the Silver Springs Run and all the way to head Springs. The Court found no need to examine the title history or actual title ownership of the submerged lands, and ruled that even if Ray was deemed to hold the submerged land in private ownership, such ownership did not trump the public’s right of navigation. The Court stated:

*It follows that if appellant, in operating for hire glass-bottom boats on and over the navigable waters of Silver Springs, was exercising the public right of navigation, and the maintenance of the asserted claim of the appellees that they had the exclusive right of operating for hire such boats on and over those waters would be inconsistent with the exercise by appellant of the public right of navigation, it is not material to determine whether appellees do or do not possess such qualified or limited title to land covered by those waters as is capable of being acquired in private ownership.*²⁸⁵ (Citations omitted).

The Court went on to explain:

*The public right of navigation entitles the public generally to the reasonable use of navigable waters for all legitimate purposes of travel or transportation, for boating or sailing for pleasure, as well as for carrying persons or property gratuitously or for hire, and in any kind of water craft the use of which is consistent with others also enjoying the right possessed in common. As to that right a riparian owner, though he also has a qualified or bare technical title to the soil covered by the navigable water opposite his upland, is entitled to no preference or priority, his right in that regard being only concurrent with that of other members of the public, and to be exercised in a way not inconsistent with the enjoyment of the same right by others. He cannot, any more than can one who has no title to riparian or submerged land, acquire an exclusive right to use navigable water opposite his upland for travel or navigation for purposes of business or of pleasure or diversion.*²⁸⁶

²⁸⁴ *Silver Springs Paradise Co. v. Ray*, 50 F.2d 356 (5th Cir. 1931).

²⁸⁵ *Id.* at 358-59 (1931).

²⁸⁶ *Id.* at 359 (referencing: “*Merrill-Stevens Co. v. Durkee*, 62 Fla. 549, 57 So. 428; *Ferry Pass. I. & S. Ass'n v.*

However, there are instances in Florida's history in which the State has passed special Acts intended to encourage the development of coastal areas. For instance the Riparian Act of 1856, the Butler Act of 1921, and the Bulkhead Act of 1957 were legislative efforts that allowed riparian or coastal land-owners to obtain title to submerged lands if they captured and filled-in the submerged lands by constructing bulkheads or other improvements. The "newly" filled-in land would essentially become new dry land, and the improver could then apply to the State to receive title. In these situations, the ability of vessels to navigate over submerged lands was obviously practically extinguished by virtue of filling in once navigable water.

One case that highlights this circumstance and illustrates that the "in the public interest" requirement might also cut against the rights of navigation protected by the public trust doctrine, is the case *Sarasota County Anglers Club, Inc. v Burns*.²⁸⁷ In that case, a local fishing club filed suit against the Town of Longboat Key and the Board of Trustees seeking declaratory action and an injunction to stop the filling of submerged land that had been transferred to private ownership. The area in question, the fishing club argued, had previously been fished by both members of their club and members of the general public, and that allowing the filling of the submerged lands was at the detriment of their rights of fishing, boating and bathing. The lower court rendered an extensive opinion supporting the approval to fill the submerged lands, and this opinion was upheld on appeal. In reaching its conclusion, the appellate court cited with approval the following excerpt from the lower court:

*The title to public bottoms is vested in the State as a public trust to be held for the benefit of all the people. The trust, however, does not go to the extent of requiring that every part of public bottoms must be forever maintained in a state of nature for use in that condition by any citizen who would prefer that no change be made. If this were true no docks could be built, no piers constructed and no bridges (except suspension bridges) erected over any public bottoms. The economic development of the state public health and safe navigation often require the draining of marshes, the dredging of channels and the filling of some areas to produce firm land. It is quite obvious that the public interest demands that there by some impairment of the individual citizen's right to enjoy absolute freedom in the use of public bottoms.*²⁸⁸

White River I. & S. Ass'n, 57 Fla. 399, 48 So. 643, 22 L.R.A.(N.S.) 345; *Broward v. Mabry*, 58 Fla. 398, 50 So. 826, 828; *Apalachicola Land & D. Co. v. McRae*, 86 Fla. 393, 98 So. 505; *Lamprey v. State*, 52 Minn. 181, 53 N.W. 1139, 18 L.R.A. 670, 38 Am.St.Rep. 541, 551; *State v. Columbia Water Power Co.*, 82 S.C. 181, 63 S.E. 884, 22 L.R.A.(N.S.) 435, 129 Am.St.Rep. 876, 882, 17 Ann.Cas. 343; *Heyward v. Farmers' Mining Co.*, 42 S.C. 138, 19 S.E. 963, 20 S.E. 64, 28 L.R.A. 42, 46 Am.St.Rep. 702; *Smart v. Aroostook Lumber Co.*, 103 Me. 37, 68 A. 527, 14 L.R.A.(N.S.) 1083; *Monroe Mill Co. v. Menzel*, 70 L.R.A. note, 277; *Sanborn v. People's Ice Co.*, 82 Minn. 43, 84 N.W. 641, 51 L.R.A. 829, 83 Am.St.Rep. 401; 45 C.J. 447, 559; *Farnham on Waters*, 130, 131").

²⁸⁷ 193 So. 2d 691 (Fla. 1st DCA 1967).

²⁸⁸ *Id.* at 693.

Thus, the extent to which private ownership of submerged lands may impact the rights of navigation remains an open question.²⁸⁹

3. Landowner Rights and Riparian Waters

With a considerable amount of waterfront property in Florida, any discussion relating to the regulation of navigation should acknowledge certain rights called “riparian” rights, which are private rights enjoyed by owners of land abutting navigable waterways.²⁹⁰ In connection with their ownership of land, riparian landowners hold certain rights related to the use of riparian waters, and these rights are distinct from the rights of the general public. American courts first recognized riparian rights in the early-nineteenth century.²⁹¹ Over the years a substantial body of law has developed in the United States to govern the rights of riparian landowners. Similarly, Florida courts have also established a significant body of law related to riparian rights.²⁹²

Despite the fact that riparian landowners enjoy distinct rights, these rights are restricted (or “qualified”) in certain ways. The public’s rights pursuant to the previously discussed public trust doctrine, the federal government’s power to regulate under the federal navigational servitude, and state and local government police powers all restrict the rights of riparian landowners. The Florida Legislature has also adopted statutes codifying, or otherwise affecting, the common law’s riparian rights principles,²⁹³ and these statutes can also operate to restrict the enjoyment of riparian rights. Furthermore, it is important to point out that riparian ownership gives rise to rights pertaining to the *use* of water, and not the right to actually own the water resource itself.²⁹⁴ When it comes to navigation, the way that private riparian rights interact with the rights of the public (and vice-versa) can result in disputes between boaters and private landowners,²⁹⁵

²⁸⁹ See Jesse Reiblich, *Private Property Rights Versus Florida’s Public Trust Doctrine: Do any Uses Survive a Transfer of Sovereign Submerged Lands from the Public to Private Domain?*, *The Environmental and Land Use Law Section Reporter*, Vol. XXXV, No. 1 (September 2013), available at <http://eluls.org/wp-content/uploads/2012/01/The-Environmental-and-Land-Use-Law-Section-Reporter-September-2013.pdf> (last visited Feb. 2, 2015).

²⁹⁰ Technically, “riparian” land is the term used for land abutting a river or stream, while “littoral” land is used for land abutting a lake or ocean. However, these terms are often used interchangeably.

²⁹¹ Joseph W. Dellapenna, Symposium: Changing Conceptions of Water in the Law: The Evolution of Riparianism in the United States, 95 *Marq. L. Rev.* 53, 64-65 (2011).

²⁹² See Theresa Bixler Proctor, *Erosion of Riparian Rights Along Florida’s Coast*, 20 *J. Land Use & Envtl. Law* 117 (2004).

²⁹³ See, e.g., Fla. Stat. § 253.141 (2014); Fla. Stat. § 177.27(14) (2014); Fla. Stat. § 161.191 (2014).

²⁹⁴ This right to use water is sometimes deemed a “usufructory” rights. See Christine A. Klein *et al.*, *Modernizing Water Law: The Example of Florida*, 61 *Fla. L. Rev.* 403, 407 (2009).

²⁹⁵ Note that, in addition to the potential for riparian rights to conflict with the public’s rights, private riparian rights can also result in conflicts with other private riparian rights (e.g., two private landowners with land along

The most fundamental element for enjoying riparian rights is ownership of land contiguous to water—not land merely near or in close proximity to water.²⁹⁶ Ownership of such land confers legally-protected property rights with constitutional protection from government “takings” of the land.²⁹⁷ As mentioned above, however, significant interest also exists in preserving the public’s use of navigable water under the public trust doctrine, ensuring the general welfare of the public through police powers, and safeguarding the federal government’s interest in safety and efficiency.

Because private property does not ordinarily extend to the land beneath navigable waters, the boundary between private property and navigable public water is an important consideration when defining private riparian rights. Florida’s courts and the Florida Constitution define this boundary as the “mean high water line” for the boundary associated with navigable tidal waters.²⁹⁸ This line is described as the “average reach of the high tide over the preceding 19 years.”²⁹⁹ Courts have also established the “ordinary high water line” as the boundary for navigable freshwater. The “ordinary high water line” is determined by looking to the physical characteristics associated with the boundary, and is described as “the point up to which the presence and action of the water is so continuous as to destroy the value of the land for agricultural purposes...[it] is not the highest point to which the stream rises....”³⁰⁰

Specific riparian rights recognized by courts consist of the right to access the water, the right to “wharf out” (i.e., build a dock or a pier), the right to an unobstructed view of the water, the right to reasonably use the surface water, and the right to title to land created by accretion or reliction.³⁰¹ Although characterizing the rights to access, unobstructed view, and reasonable use can be difficult when applied to a particular conflict or landowner, the concepts expressed in these rights are relatively simple. On the other hand, accretion and reliction is

the same waterway). Additionally, riparian rights can involve rights relating to the consumptive or non-consumptive use of water. However, neither conflicting private riparian rights nor consumptive water use, which is not necessarily implicated by navigation and is governed by a different regulatory scheme, will be discussed here.

²⁹⁶ See *Johnson v. McCowen*, 348 So. 2d 357 (Fla. 1st DCA 1977); *Illinois Cent. R. Co. v. State of Illinois*, 146 U.S. 387 (1892).

²⁹⁷ See *Broward v. Mabry*, 50 So. 826 (Fla. 1909); *Pounds v. Darling*, 77 So. 666 (Fla. 1918). But see also Fla. Stat. § 253.141(1) (2014) (despite courts finding certain riparian rights protected as property rights, there is slight confusion between the common law and statutory law because this statutory section provides that such rights are not “owned” by riparian landowners and are “not of a proprietary nature”).

²⁹⁸ See *Stop the Beach Renourishment, Inc. v. Florida Dep’t of Env’tl. Prot.*, 560 U.S. 702 (2010); Fla. Const., art. X, § 11.

²⁹⁹ *Stop the Beach Renourishment, Inc.*, 560 U.S. at 707-08. See also Fla. Stat. § 177.27(14) and (15).

³⁰⁰ *Tilden v. Smith*, 113 So. 708, 712 (Fla. 1927). See also Richard Hamann & Jeff Wade, *Ordinary High Water Line Determination: Legal Issues*, 42 FLA. L. REV. 323 (1990).

³⁰¹ See FRANK E. MALONEY ET. AL., WATER LAW AND ADMINISTRATION THE FLORIDA EXPERIENCE 31-32, 118 (1968). See generally Proctor, *supra* note 291, at 124.

not as simple. “Accretion” is a gradual and imperceptible accumulation of sediment along a shoreline, and “reliction” is an increase in sediment along a shoreline due to the gradual and imperceptible withdrawal of water. Contrast both accretion and reliction with avulsion, which occurs suddenly. When an avulsive event adds new sediment, the riparian owner does not have a claim to title to that land, and in theory would lose the riparian rights that accrue to a landowner whose property line is the mean or ordinary high waterline. Similarly, when an avulsive event removes sediment, the riparian owner retains title to the newly submerged land, and would seem to retain the riparian rights, which presumably extend beyond the avulsed property.

The U.S. Supreme Court recently considered whether a Florida law fixing the shoreline boundary for erosion control purposes, and thus effectively taking away riparian landowners’ right to accretion, constituted a taking. This case, *Stop the Beach Renourishment, Inc. v. Florida Dept. of Environmental Protection*,³⁰² gives an example of an occasion where a court must balance the interests of private riparian owners with those of the greater public. In *Stop the Beach Renourishment, Inc.*, the Court found that the state law establishing the shoreline boundary was not a “taking” in violation of private riparian property rights because any future private riparian interests in accretions were inferior to those of the state’s interest in filling its own seabed, and because a statutory scheme guaranteed the right even after the property no longer reached the mean high water line.³⁰³

4. The State’s Inherent Police Power and Navigation

States have an inherent power to protect the public's health, safety, and welfare through regulation, often referred to as the “police power.”³⁰⁴ As political subdivisions of the state,³⁰⁵ local governments in Florida share the state’s police power because the state delegates the power to the local governments.³⁰⁶ Courts have a long history of upholding local regulations affecting navigation.³⁰⁷ The U.S. Supreme Court in 1858 addressed whether a local government could either

³⁰² 560 U.S. 702 (2010).

³⁰³ *Id.* at 731.

³⁰⁴ See *Florida East Coast Ry. Co. v. City of Miami*, 79 So. 682, 689 (Fla. 1918). See also 16A Am. Jur. 2d Constitutional Law § 332 (2009).

³⁰⁵ Fla. Const. art. VIII, § 1(a) (establishing counties as political subdivisions of the state); *City of Miami v. Lewis*, 104 So. 2d 70 (1958) (explaining that, although not established by the Constitution as subdivisions of the state, municipalities are nevertheless political subdivisions of the state).

³⁰⁶ See *Duval Lumber Co. v. Slade*, 2 So. 2d 371, 372 (Fla. 1941) (explaining that local governments acquire the “right to exercise the sovereign police power by statute[,] and [that] it is elementary that the State Legislature may delegate to, or withhold from, the municipality the exercise of such sovereign power as it may deem wise and expedient”); *Ferguson v. McDonald*, 63 So. 915 (Fla. 1913) (providing that “[m]unicipalities can lawfully exercise only such taxing, police, and other powers as are conferred by express or implied provisions of statutes within the limitations imposed by organic law”).

³⁰⁷ See, e.g., *Mobile County v. Kimball*, 102 U.S. 691 (1881); *Huse v. Glover*, 119 U.S. 543 (1886).

prohibit vessels from remaining in a “harbor thoroughfare” or require those vessels to display a light after dark.³⁰⁸ The Court found such regulations “necessary and indispensable in every commercial port, for the convenience and safety of commerce.”³⁰⁹ The Court also noted that “local authorities have a right to prescribe at what wharf a vessel may lie, and how long she may remain there, . . . where she may anchor in the harbor, and for what time.”³¹⁰

Although local governments may invoke their police power to regulate navigation, they may only do so if the regulation is necessary to protect the public health, safety and welfare. Yet, anyone challenging such a regulation on these grounds must show that the adoption of the regulation is arbitrary and unreasonable, and thus not reasonably related to the protection of the public’s health, safety, and welfare. Courts have developed what is known as the “fairly debatable” test to determine whether a regulation is arbitrary and unreasonable.³¹¹ This test is intended to give significant deference to the legislative judgment of local governments, and requires a determination that no “fairly debatable” grounds exist for finding that the regulation at issue protects the health, safety, and welfare of the public.³¹²

Challenges to the exercise of police power under this standard are rarely successful. In *Dennis v. Key West*, however, the Florida Third District Court of Appeal struck down a local regulation that prohibited “live-aboard” vessels not moored or docked within a local yacht club or public dock.³¹³ The Court ruled that the regulation was an abuse of police power because there was “no discernible relationship between [the] regulation and the health, welfare, or safety of the general populace.”³¹⁴ No other courts have reached this conclusion, and in a subsequent decision, the same Third District Court of Appeal upheld a ban on “live-aboard” vessels in the City of Miami.³¹⁵ In this decision, *Dozier v. City of Miami*, the Court found that both testimony before the City Commission as well as the

³⁰⁸ See *The James Gray v. The John Fraser*, 62 U.S. 184, 187 (1858). A reasonable fee may also be levied. *Clyde Mallory Lines v. Alabama*, 296 U.S. 261 (1935).

³⁰⁹ See *The James Gray*, 62 U.S. at 187.

³¹⁰ See *id.* (providing, however, that the Court upheld the regulations only after concluding that the regulations were not in conflict with any federal laws).

³¹¹ See *Dade County v. United Resources, Inc.*, 374 So. 2d 1046 (Fla. 3d DCA 1979).

³¹² See *United Resources, Inc.*, 374 So. 2d at 1049-50; *Nance v. Town of Indianantic*, 419 So. 2d 1041 (Fla. 1982).

³¹³ See *Dennis v. Key West*, 381 So. 2d 312, 315 (Fla. 3d DCA 1980).

³¹⁴ See *id.* at 315.

³¹⁵ See *Dozier v. City of Miami*, 639 So. 2d 167 (Fla. 3d DCA 1994).

language of the ordinance established that the ordinance was designed to address problems of water pollution, navigational hazards and visual intrusion, thus justifying regulation under the police power.³¹⁶

5. Geographic Limitations to Municipal Police Powers

At least two examples exist in Florida where municipalities addressed a lack of regulatory authority over water by actually expanding their political boundaries to encompass waterways located outside of the municipal jurisdiction. These two examples, which involve the Town of Fernandina and Bradenton Beach, illustrate two of the different approaches cities might consider when seeking to regulate activities on waters located outside of their municipal jurisdiction but within the boundaries of the surrounding county. In both Fernandina and Bradenton Beach, the municipal governments wanted to create mooring fields and needed political control of the submerged lands where the mooring fields were to be located.³¹⁷

The two different methods for municipal boundary changes are annexation and special legislation. More particularly, municipalities can either annex the submerged land underneath the adjacent water (like in Fernandina),³¹⁸ or seek special legislation from the Florida Legislature modifying the local boundaries to include the adjacent water (like in Bradenton Beach).³¹⁹ In theory, annexation occurs either where a city sees a need in the surrounding, unincorporated area for the city's services, or where the residents in the unincorporated area want such services.³²⁰ Due to the fact they are created by statute, municipalities may also seek special legislation modifying the boundaries of the city.

Transferring power is another potential way to address the need to regulate over extra-jurisdictional waters. Pursuant to Article VIII, § 4 of the Florida

³¹⁶ See *id.* at 169.

³¹⁷ See Samantha Culp *et al.*, *The Tiff over TIF: Extending Tax Increment Financing to Municipal Maritime Infrastructure*, *The Environmental and Land Use Law Section Reporter*, Vol. XXXIV, No. 3 (April 2013), available at <http://eluls.org/wp-content/uploads/2012/01/ELULS-Section-Reporter-April-2013.pdf> (last visited Dec. 11, 2014) (discussing the actions of Bradenton Beach and Fernandina in the context of the use of funds designated for "redevelopment districts" by local governments to revitalize or otherwise maintain waterfront areas lying outside either local "redevelopment district" boundaries and/or outside the broader local government boundaries).

³¹⁸ In Fernandina, the annexation was voluntary but somewhat unique because the owner of the continuous submerged land was the state. Thus the state, as opposed a group of residents, petitioned Fernandina to annex the submerged land.

³¹⁹ See Fla. Const., Art. VIII, § 2(a). See also H.B. 1217, 2006 Leg. (Fla. 2006), available at http://www.myfloridahouse.gov/Sections/Documents/loaddoc.aspx?FileName=_h1217er.docx&DocumentType=Bill&Bill-Number=1217&Session=2006 (providing the language to modify the boundaries of Bradenton Beach) (last visited Dec. 19, 2014).

³²⁰ See Fla. Stat. § 171.021 (essentially stating that the provision of such municipal services is actually one of the purposes of the Act).

Constitution, powers exercised by the various local governments may be transferred among the local governments. This may be accomplished either by local resolution approved by voters in both the transferring government and the government receiving the powers or by state legislation.³²¹ Examples of legislation providing for the transfer or joint exercise of power include the Florida Interlocal Service Boundary Agreement Act.³²² The legislature adopted this Act as an alternative to the annexation procedures under the Municipal Annexation or Contraction Act.³²³ Essentially, this Act makes it easier for municipalities and counties to cooperate to determine where a boundary should be established in order to most efficiently and effectively provide services.

In addition to power transfers that involve boundary modifications, various provisions in Florida law also allow local governments to enter into agreements to jointly exercise power with other local governments or public entities. Thus, where a county or municipality seeks to exercise its police powers over waters outside its jurisdiction, it might be able to do so without modifying boundaries. Interlocal agreements authorized by the Florida Interlocal Cooperation Act³²⁴ are principle examples of such joint exercise of power.

B. Statutory Basis for Regulating Navigation in Florida

1. Chapter 253, Florida Statutes: State Authority to Regulate Navigation and Anchoring and to Manage Anchorages

Under Chapter 253, Florida Statutes, the Governor and Cabinet, sitting as the Board of Trustees of the Internal Improvement Trust Fund (Board of Trustees),³²⁵ holds sovereignty submerged lands in trust for the public.³²⁶ To the extent activities are conducted in navigable waters over sovereignty submerged lands, the Board of Trustees is vested with general authority to regulate, subject perhaps to the caveat that the right of navigation is protected by the public trust

³²¹ See Fla. Const., art VIII, § 4 (providing that “[b]y law or by resolution of the governing bodies of each of the governments affected, any function or power of a county, municipality or special district may be transferred to or contracted to be performed by another county, municipality or special district, after approval by vote of the electors of the transferor and approval by vote of the electors of the transferee, or as otherwise provided by law”).

³²² See Fla. Stat. § 171.20 *et seq.* (2014) (codifying the Interlocal Service Boundary Agreement Act).

³²³ See Fla. Stat. § 171.201 (2014).

³²⁴ Fla. Stat. § 163.01 (2014).

³²⁵ See Fla. Stat. § 253.02(1) (2014) (providing that the Board of Trustees is comprised of the Governor, the Attorney General, the Commissioner of Agriculture, and the Chief Financial Officer).

³²⁶ See Fla. Stat. § 253.03(1) (2014). For a discussion of the “public trust doctrine” see Section IV.A.1.

doctrine, which serves as a limitation on state authority,³²⁷ and by the federal interest in navigation discussed previously. Chapter 253, however, provides more specific and limited regulatory authority.

Section 253.03(7)(b), Florida Statutes, authorizes the Board of Trustees to:

*adopt rules governing all uses of sovereignty submerged lands by vessels, floating homes, or any other water craft, which shall be limited to regulations for anchoring, mooring, or otherwise attaching to the bottom; the establishment of anchorages; and the discharge of sewage, pumpout requirements, and facilities associated with anchorages. The regulations must not interfere with commerce or the transitory operation of vessels through navigable water, but shall control the use of sovereignty submerged lands as a place of business or residence.*³²⁸

Section 253.035, Florida Statutes, provides that:

*if an anchorage area at a deepwater port has been formally designated by the United States Coast Guard, it shall be unlawful for commercial vessels waiting to enter the port to anchor outside the anchorage area.*³²⁹

The Board of Trustees has not exercised this statutory authority to adopt rules regulating anchoring. The Department of Environmental Protection (DEP), which acts as staff for the Board of Trustees,³³⁰ began a rule-making process in 1994. However, that process was held in abeyance pending implementation of an administrative effort in Southwest Florida to develop a non-regulatory solution to anchorage management. This regulatory effort was never resumed.

³²⁷ In some instances, submerged lands may have been alienated, or artificially created, and they may be subject to non-state ownership.

³²⁸ See Fla. Stat. § 253.03(7)(b) (2014).

³²⁹ Fla. Stat. § 253.035 (2014).

³³⁰ See Fla. Stat. § 253.002 (2014) (giving the Florida Department of Environmental Protection (DEP), Florida's water management districts, and the Florida Department of Agriculture and Consumer Services (DACS) various staff duties related to regulation of sovereignty submerged lands; Fla. Admin. Code R. 18-21.002(1) (2014) (giving staff duties to DEP and DACS); Fla. Stat. § 373.414 (2014) (providing that DEP and the water management districts are responsible for environmental permitting and water quality protection on sovereign lands).

2. State Authority to Allow Local Regulation of Navigation and Anchoring

While it has not promulgated rules specifically regulating anchoring or anchorages, the Board of Trustees does require some form of approval for any “activity” on sovereignty submerged lands.³³¹ The term “activity” is defined to include the construction of mooring pilings or docks.³³² The term “dock” is defined to mean “a fixed or floating structure, including . . . mooring pilings, lifts, davits and other associated water-dependent structures used for mooring and accessing vessels.”³³³ The Board of Trustees’ Rule 18-21 provides a framework for various forms of consent required in order for a party to conduct activities on sovereignty submerged lands.³³⁴ The relevant forms of consent include consent by rule,³³⁵ letter of consent,³³⁶ and a lease,³³⁷ each applicable under different circumstances. Consent by rule allows use of sovereignty submerged lands for relatively small-scale activities, for example the installation of mooring pilings associated with private docking facilities or the construction of a single, small dock for a private home.³³⁸ A letter of consent is required for docks too large to qualify for consent by rule and for certain minimum-size piers,³³⁹ certain boat ramps, and certain channels.³⁴⁰ A lease is required for “all revenue-generating activities,” “open-water mooring fields,” and for structures that don’t qualify for the consent by rule or letter of consent.³⁴¹ Thus, a mooring field in waters over sovereignty lands would require a lease from the state.³⁴²

³³¹ See Fla. Admin. Code R. 18-21.005(1) (2014).

³³² Fla. Admin. Code R. 18-21.003(2) (20d14).

³³³ Fla. Admin. Code R. 18-21.003(20) (2014).

³³⁴ See Fla. Admin. Code R. 18-21.005(1) (2014). For activities conducted in an aquatic preserve, Rule 18-20 is also applicable.

³³⁵ See Fla. Admin. Code R. 18-21.005(1)(b) (2014).

³³⁶ See Fla. Admin. Code R. 18-21.005(1)(c) (2014).

³³⁷ See Fla. Admin. Code R. 18-21.005(1)(d) (2014).

³³⁸ See Fla. Admin. Code R. 18-21.005(1)(b) (2014).

³³⁹ See Fla. Admin. Code R. 18-21.003(39) (defining the term “minimum-size dock or pier”).

³⁴⁰ See Fla. Admin. Code R. 18-21.005(1)(c) (2014).

³⁴¹ See Fla. Admin. Code R. 18-21.005(1)(d) (2014).

³⁴² See *id.* See also Fla. Stat. § 373.413 (2014) (whereby mooring fields are further subject to regulation by DEP or a water management district under the state’s Environmental Resource Permit (ERP) system); Fla. Stat. § 373.118(4) (2014) (authorizing general ERP permits for “local governments to construct, operate, and maintain public mooring fields, public boat ramps, including associated courtesy docks, and associated parking facilities located in uplands,” but restricting general permits to mooring fields of 100 vessels or less. “Marina” was

3. Chapter 327, Florida Statutes: State Preemption of Local Regulation of Navigation and Anchoring

The Florida Fish and Wildlife Commission (FWC) administers Chapter 327 of the Florida Statutes, which is known as the “Florida Vessel Safety Law.”³⁴³ This law primarily relates to various safety considerations, such as accident procedures, the safe operation of vessels, personal water craft requirements, and uniform waterway markings. However, the statute also includes restrictions on local government regulation of boating-related activities, including navigation and anchoring.

a. A Short History of Chapter 327, Florida Statutes. The predecessor to the current version of Florida’s Vessel Safety Law was enacted in 1959,³⁴⁴ at a time when surface water use, resource demand, and the number of vessels were minimal. The statute was originally enacted as the “Florida motorboat registration and certification act,”³⁴⁵ and was prompted by the federal Boating Act of 1958. The law has been substantially revised on several occasions, and amended frequently since its last substantial revision. Originally codified as Chapter 371, Florida Statutes, it was re-codified in 1981 as Chapter 327. In 1999, laws dealing with boat registration were moved from Chapter 327 to Chapter 328. The title of Chapter 327 was simultaneously changed to “Florida Vessel Safety Law,” and Chapter 328 was entitled “Vessels: Title Certificates; Liens; Registration.”³⁴⁶

The history of changes to Florida’s boating law, as well the fact it retains vestiges of repealed provisions and some obtuse terminology, has resulted in general policy confusion. Despite an absence of clarity in the statute, there has been remarkably little case law interpreting Chapter 327.³⁴⁷ However, in 2009, the Florida Legislature made several important changes to the statutory framework of Chapter 327. These changes consolidated separate provisions into Section 327.60,

removed by 2013 legislation, and the type of mooring field that may come under general permit was also changed to a mooring field of 100 vessels or less. Also, the Department is now authorized to have delegated authority from the Board of Trustees to issue leases for mooring that come under general permits.)

³⁴³ See Fla. Stat. § 327.01 (2014).

³⁴⁴ See Ch. 59-399, at 1356, Laws of Fla. (1959) (providing the Legislature’s predecessor to Chapter 327, Florida Statutes, which was originally codified as Chapter 371).

³⁴⁵ Chapter 59-399 § 1, at 1357, Laws of Fla (1959).

³⁴⁶ See Ch. 99-289, § 5, at 3191, Laws of Fla. (1999) (amending Section 327.01, Florida Statutes, to read: “[t]his chapter shall be known as the “Florida Vessel Registration and Safety Law.”); Ch. 99-289, § 1, at 3190, Laws of Fla. (1999) (creating “Chapter 328, Florida Statutes, consisting of [§§] 328.01 through 328.30, Florida Statutes, is designated as part I of said chapter and entitled ‘Vessels; title certificates; liens’”).

³⁴⁷ See Collier County Court Order on Defendant’s Motion to Declare Ordinance Unconstitutional in *City of Marco Island v. David Dumas*, Case No.: 07-81-MOA-RC (Collier County, FL; October, 2007); finding an anchoring ordinance regulating non-live-aboard vessels enacted by the City of Marco Island to be in conflict with Fla. Stat. 327.60 and therefore invalid and unenforceable, discussed in greater detail below.

which is now titled “Local regulations; limitations,” and specifically addresses the issue of, navigation and anchoring in Florida.³⁴⁸

Prior to 2009, Chapter 327 contained two sections that both preserved and limited the regulatory authority of local governments with regards to vessels and the act of anchoring or mooring a vessel. Those sections were 327.22 and 327.60.³⁴⁹ Section 327.22(1) regulated the operation and equipment of vessels.³⁵⁰ This section preserved a local government's authority to regulate “resident vessels” where the local government spends money on boating-related activities such as the patrol and maintenance of water bodies.³⁵¹ A case dating back to 1980 explained that a “resident vessel” is one that is normally stored within the city or county imposing the regulation, and not one that is merely being operated on waters within that jurisdiction.³⁵² Section 327.22(1), which was repealed in 2009, gave local governments the following authority:

Nothing in this chapter shall be construed to prohibit any municipality or county that expends money for the patrol, regulation, and maintenance of any lakes, rivers or waters, and for other boating-related activities in such municipality or county, from regulating vessels resident in such municipality or county. Any county or municipality may adopt ordinances which provide for enforcement of non-criminal violations of restricted areas which result in the endangering or damaging of property, by citation mailed to the registered owner of the vessel. Any such ordinance shall apply only in legally established restricted areas which are properly marked as permitted pursuant to SS. 327.40 and 327.41. Any county and the municipalities located within the county may jointly regulate vessels.

The import of this provision for local regulation was unclear. One interpretation was that it could be read to approve local government regulation of resident vessels, including limitations on navigation and anchoring. Regardless of whether the provision was interpreted this way, it would have required local enforcement authorities to distinguish resident from non-resident vessels.

Section 327.60, Florida Statutes, dealt with anchoring. Prior to the 2009 amendment, this section specifically allowed local governments wide discretion to enact prohibitions and enforce restrictions on the anchoring and mooring of “floating structures” and “live-aboard” vessels within their jurisdictions. It also

³⁴⁸ See Fla. Stat. § 327.60 (2014).

³⁴⁹ See Fla. Stat. § 327.22 (Repealed by Laws 2009), c.2009-86, §61, eff. Oct. 1, 2009; Fla. Stat. § 327.60 Amended by Laws 2009, c.2009-86, eff. Oct. 1, 2009.

³⁵⁰ See Fla. Stat. § 327.22 (Repealed 2009).

³⁵¹ See Fla. Stat. § 327.22(1) (Repealed 2009).

³⁵² See *City of Winter Park v. Jones*, 392 So. 2d 568, 572 (1980).

allowed the local government to regulate anchoring of any vessel located within a mooring field.³⁵³ Additionally, the pre-2009 version of Section 327.60(2) contained a provision regarding mooring and anchoring, which created controversy over the scope of local government authority to restrict anchoring. However, as previously stated, the Legislature made several changes to Chapter 327 in 2009. These changes are discussed below.

b. The 2009 Amendments to Chapter 327, Florida Statutes. Prior to 2009, Sections 327.22 and 327.60 were treated as the two main statutes dealing with local governments' authority to regulate anchoring. In 2009 the legislature repealed Section 327.22, and transferred the section's core concept of local government regulation of vessels to the newly amended Section 327.60. Moreover, this revamped Section 327.60 clearly lists certain prohibitions against local government regulations dealing with the operation of vessels, including anchoring regulations. Presented in its entirety below, Section 327.60 now reads:

327.60. Local regulations; limitations

- 1) *The provisions of this chapter and chapter 328 shall govern the operation, equipment, and all other matters relating thereto whenever any vessel shall be operated upon the waters of this state or when any activity regulated hereby shall take place thereon.*
- 2) *Nothing in this chapter or chapter 328 shall be construed to prevent the adoption of any ordinance or local regulation relating to operation of vessels, except that a county or municipality shall not enact, continue in effect, or enforce any ordinance or local regulation:*
 - a) *Establishing a vessel or associated equipment performance or other safety standard, imposing a requirement for associated equipment, or regulating the carrying or use of marine safety articles;*
 - b) *Relating to the design, manufacture, installation, or use of any marine sanitation device on any vessel;*
 - c) *Regulating any vessel upon the Florida Intracoastal Waterway;*
 - d) *Discriminating against personal watercraft;*
 - e) *Discriminating against airboats, for ordinances adopted after July 1, 2006, unless adopted by a two-thirds vote of the governing body enacting such ordinance;*
 - f) ***Regulating the anchoring of vessels other than live-aboard vessels outside the marked boundaries of mooring fields permitted as provided in s. 327.40 (emphasis added);***

³⁵³ See Ch. 2009-86, § 14, Laws of Fla. (2009).

- g) *Regulating engine or exhaust noise, except as provided in s. 327.65; or*
- h) *That conflicts with any provisions of this chapter or any amendments thereto or rules adopted thereunder.*

3) *Nothing in this section shall be construed to prohibit local government authorities from the enactment or enforcement of regulations which prohibit or restrict the mooring or anchoring of floating structures or live-aboard vessels within their jurisdictions or of any vessels within the marked boundaries of mooring fields permitted as provided in s. 327.40. However, local governmental authorities are prohibited from regulating the anchoring outside of such mooring fields of vessels other than live-aboard vessels as defined in s. 327.02 (emphasis added).*³⁵⁴

Much of the language of this statute originated from the repealed Section 327.22. However, the new statute is structured in a way that specifically lists each area where the legislature has determined local governments shall have no, or limited, authority to regulate certain boating activities. Any local regulations and ordinances conflicting with Section 327.60 would be deemed preempted by this state law, and therefore invalid.

With regards to anchoring, Section 327.60(f) clearly imposes restrictions on local government regulation. As a result, the only valid local ordinances related to anchoring will be those that pertain to “live-aboard” vessels which are “outside the marked boundaries of mooring fields” This statutory language means that *any* vessel located within a legally created mooring field may be subject to local government regulations, including anchoring ordinances.³⁵⁵

However, where a vessel is situated outside a mooring field, the key question concerning local government enforcement of anchoring ordinances is whether or not the vessel is a “live-aboard” vessel. If the answer is yes, the vessel may be subject to a local anchoring ordinance.

The legislature also tweaked the definition of “live-aboard vessel” in the 2009 amendments. As a result, Chapter 327 now defines a “live-aboard vessel” to include any vessel “used solely as a residence **and not for navigation** (emphasis added).”³⁵⁶ The definition also includes any vessel for which a declaration of

³⁵⁴ Fla. Stat. § 327.60(2) (2014) (as amended by Section 3, HB 7175, 2006 Regular Session, Florida Legislature). The primary effect of the amendment may be to clarify that local governments have authority to prohibit anchoring in legally marked mooring fields.

³⁵⁵ The creation of mooring fields by local governments is contemplated in part by Sections 373.118, Florida Statutes, (“General Permits; delegation”) and 327.40, Florida Statutes, (“Uniform Waterway Markers”), administered by the Florida Fish and Wildlife Conservation Commission and subject to Chapter 120, Florida Statutes, which is the Florida Administrative Procedure Act.

³⁵⁶ See Fla. Stat. § 327.02(19)(a) (2014); See also Ch. 2009-86, § 6, Laws of Fla. (2009) for language added and deleted by amendment. See also H. Phillip Hodes, Letter to the Editor, Waterfront News: South Florida’s

domicile has been filed pursuant to Section 222.17, Florida Statutes, and as well as any vessel represented as a place of business, commercial, or professional enterprise.³⁵⁷ The definition expressly excludes commercial fishing boats.³⁵⁸

While this interpretation seems straight forward, experienced boaters and local government authorities know that some vessels might not fit so neatly into the definition. A helpful opinion by the Florida Attorney General has concluded that a vessel may qualify as a “live-aboard” if it can be proven by a combination of the operator’s subjective intent and objective facts that the operator intends to use the vessel as a legal residence.³⁵⁹ Additionally, Section 327.60(3) also specifies “floating structures” as subject to local government regulation in the same manner as “live-aboard” vessels.³⁶⁰

During the 2010 Legislative session, House Bill 1361 was introduced in the House Agriculture and Natural Resources Policy Committee as proposed legislation dealing with this issue. Committee staff prepared a report explaining common issues local governments were dealing with in regards to unregulated anchoring. The report explains:

[c]urrently, local governments are prohibited from regulating the anchoring of vessels other than live-aboard vessels outside the marked boundaries of legally permitted mooring fields. According to FWC, the unregulated anchoring and mooring leads to various problems including:

The accumulation of anchored vessels in inappropriate locations;

Unattended vessels;

Vessels with no anchor watch (dragging anchor, no lights, bilge);

Vessels that are not properly maintained;

Vessels ignored by owners that tend to become derelict; and

Nautical Newspaper, Aug 1991, at 4, available at <http://ufdc.ufl.edu/UF00072837/00085/4> (referring to *Brault v. Florida*, Case No. 89-0075 AC (A) 02 (Palm Beach County App. Ct. 1991) (ruling that a vessel amounted to a live-aboard because the owner kept his clothing in the vessel cooked food and slept at the vessel, and allowed his dog to live at the vessel)).

³⁵⁷ See Fla. Stat. § 327.02(19)(b) & (c) (2014).

³⁵⁸ See Fla. Stat. § 327.02(19) (2014).

³⁵⁹ See Op. Att’y Gen. Fla. 85-45 (1985). (It should be noted that the opinion predates the 2009 changes to Chapter 327.)

³⁶⁰ See Fla. Stat. § 327.60(3) (2015); See also Fla. Stat. § 327.02(11) (2015) (defining a floating structure as a “floating entity, with or without accommodations built thereon, which is not primarily used as a means of transportation on water but which serves purposes or provides services typically associated with a structure or other improvement to real property”).

*Confusion with the interpretation of statutes that provide jurisdictional guidance for local governments.*³⁶¹

The House Bill, which ultimately died in Committee, would have amended the current Section 327.60. The Bill proposed deleting Section 327.60(2)(f) altogether and changing the language of Section 327.60(3) back to the way it was before the 2009 changes.³⁶² The Staff Analysis report on this bill states that the effect of the proposed changes would be to clarify that “local governmental authorities are prohibited from regulating the anchoring outside of properly permitted mooring fields of non-live-aboard vessels in navigation. In doing so, the bill allows local government authorities to regulate the anchoring of ‘live-aboard’ vessels not in navigation outside of the permitted marked boundaries of mooring fields.”³⁶³ This proposal does not appear to change the authority currently granted to local governments under Section 327.60 to regulate the anchoring of (1) any vessel in a properly permitted mooring field and (2) any “live-aboard” vessel outside of a mooring field when not in navigation.

As previously noted, the definition of “live-aboard” vessel was amended in 2009 to add “...used solely as a residence **and not for navigation.**” The new phrase, “and not for navigation” makes determining whether or not a vessel is engaged in navigation the key in defining a vessel’s status for the purposes of local regulation. In other words, if a “live-aboard” vessel is engaged in navigation, then local governments may not regulate the anchoring of the vessel. This new phrase will undoubtedly cause boaters and local governments to question what exactly “in navigation” means. If anchoring is considered a right incidental to ordinary navigation, and therefore also protected by the public trust doctrine, then the question remains whether or not a vessel at anchor, even a live-aboard vessel, is “in navigation,” and for how long the vessel may lie at anchor before it is no longer in navigation.

In 2007, the City of Marco Island, found itself in court litigating this very question under the previous statute while defending its own anchoring ordinance that applied to non-live-aboard vessels in certain areas.³⁶⁴ The City’s ordinance specifically prohibited vessels from anchoring within 300 feet of shore for

³⁶¹ See Florida House of Representatives Staff Analysis; Bill No. 1361, March 3rd, 2010 at Page 2; (Section 1A. *Effect of proposed changes: Current Situation*).

³⁶² See 2010 FL H.B. 1361 (NS), 1361 (NS), 2010 Florida House Bill No. 1361, (Mar 02, 2010), VERSION: Introduced, PROPOSED ACTION: Amended.

³⁶³ See Florida House of Representatives Staff Analysis; Bill No. 1361, March 3rd, 2010, Page 3; (Section 1A. *Effect of proposed changes*)

³⁶⁴ See *City of Marco Island v. Dumas*, 13 So. 3d 108 (Fla. 2d DCA 2009). After the City of Marco Island’s ordinance was found unconstitutional at the trial court level in Collier County Court, the City appealed the trial court’s order to the 20th Judicial Circuit Court for Collier County. Brief litigation ensued at that level regarding whether or not the City had timely filed its Notice of Appeal, but not regarding the constitutionality of the ordinance. The Circuit Court ruled the City had failed to file the notice in a timely manner. The City appealed this ruling to the Second District Court of Appeal, and that court resolved the issue related to the Notice of Appeal in

more than twelve consecutive hours. The owner of a 42-foot motor yacht intentionally violated the ordinance in order to challenge its constitutionality.³⁶⁵ In subsequent legal proceedings the City defended its ordinance, arguing that the term “in navigation” as stated in Section 327.60(2) (*prior to the 2009 amendments discussed above*) does not include anchoring. The City claimed any vessel at anchor anywhere in its jurisdiction was subject to local government regulation, and that the City was free to determine at what point a vessel at anchor could be considered no longer “in navigation.” The yacht owner argued the ordinance was unconstitutional on ten grounds.

The Collier County Court Judge agreed with four of the ten arguments challenging the ordinance’s constitutionality. For one, the court found that the ordinance violated the express prohibition of Section 327.60(2) (*prior to the 2009 amendment above*). The court also found the ordinance was an invalid exercise of the City’s police powers because of the express prohibition in Section 327.60(2), and that the ordinance violated Article 8, Section 2 of the Florida Constitution because it directly conflicted with State law. The court’s final basis for finding the ordinance invalid focused on the meaning of “in navigation.” After noting that 327.60(2) prohibited local regulation of non-“live-aboard” vessels *in navigation*, the Court’s Order stated:

However, the parties dispute the meaning of the phrase “in navigation.” Plaintiff [City] suggests that ‘in navigation’ refers to vessels actually traversing the waterways, not to anchoring. Therefore, Plaintiff [City] argues, the provisions in the ordinance that regulate anchoring do not violate state law because ‘in navigation’ does not include anchoring.

Rather than search for a legal meaning of “in navigation” or for authority supporting the proposition that anchoring can be construed as a right incidental to the right of navigation, the Court viewed the term from a different point of view. Instead, the Court stated the following:

It is a cardinal rule of statutory interpretation that courts should avoid readings that would render part of a statute meaningless. [Citations omitted] To accept Plaintiff’s [City’s] interpretation of “in navigation” is to render this statute meaningless. If a vessel in navigation, by definition, cannot be anchored, then there would be nothing

the City’s favor in May of 2009. However, the City chose not to continue its appeal in light of the 2009 amendments to Chapter 327 (discussed above), which would eventually preempt the City’s ordinance.

³⁶⁵ Kelly Farrell, *Marco Island appeals to higher court on city’s anchor ordinance dismissal*, *Naples Daily News*, *Marco Eagle* (posted Feb. 12, 2009, 2:19 PM, updated Feb. 13, 2009, 1:36 PM), available at <http://www.naplesnews.com/community/marco-eagle/marco-island-appeals-higher-court-citys-anchor-ord> (last visited Oct. 08, 2014).

*to regulate, and the prohibition would be unnecessary. [Citations omitted] A reasonable construction of this statute, and the only construction that gives it meaning, is that “in navigation” includes anchoring.*³⁶⁶

Because a district court never reviewed the merits of the County Court’s analysis, there is no statewide controlling precedent for defining the term “in navigation” stemming from Collier County’s Court Order. However, this Order’s treatment of the phrase “in navigation” illustrates the continuing ambiguity of the term under Florida law.

For many years prior to 2006, Section 327.60(2) used the phrase “engaged in the exercise of rights of navigation” in the same context. When this phrase was in effect, it was neither defined judicially nor statutorily. However, a 1985 Florida Attorney General opinion did state that the right of navigation includes the right to anchor or moor.³⁶⁷ The same Attorney General opinion also noted that such a right does not include the right to anchor indefinitely.³⁶⁸ In addition, the Coast Guard has stated:

*While a right to remain aboard the vessel for a reasonable period appurtenant to transit, anchoring and navigation is part of the navigational servitude, this does not extend to utilizing a vessel as a residence. Such usage may be regulated by the City as long as reasonable provision is made for those individuals who reside aboard vessels appurtenant to navigation.*³⁶⁹

A Section containing comments from FWC regarding the term “in navigation” was included as part of the 2010 House Staff Analysis report for proposed Bill 1361, mentioned above.³⁷⁰ This Section explains that the term is not defined within Florida Statutes but that Federal admiralty law defines “in navigation” so broadly that it would include all vessels except for “a vessel rendered practically

³⁶⁶ See, *Order on Defendant’s Motion To Declare Ordinance Unconstitutional; City of Marco Island v. Dumas*; In the County Court of the 20th Judicial Circuit in and for Collier County; Case No: 07-81-MOA-RC; (October 25th, 2007).

³⁶⁷ See Op. Att’y Gen. Fla. 85-45 (1985).

³⁶⁸ See *id.* (citing *Hall v. Wantz*, 57 N.W.2d 462 (Mich. 1953)). See also Art. 18, UNCLOS, Dec. 10, 1982. (U.N. Doc. A/CONF.62/122 21 I.L.M. 1261(1982) (incorporating a similar concept into the Law of the Sea by defining the “right of innocent passage” enjoyed by ships of all nations when navigating through another nation’s territorial waters to include the restriction that the “right of innocent passage” be “continuous and expeditious”). See also Art. 18, UNCLOS (explaining that this right “includes stopping and anchoring, but only in so far as the same are incidental to ordinary navigation or are rendered necessary by *force majeure* or distress or for the purposes of rendering assistance to persons, ships or aircraft in danger or distress”).

³⁶⁹ Memorandum from the District Legal Officer, U.S. Coast Guard to the Chief, Marine Safety Division, U.S. Coast Guard on Florida “Bottom Lands” Jurisdiction (Apr. 16, 1982).

³⁷⁰ See Florida House of Representatives Staff Analysis; Bill No. 1361, March 3rd, 2010, Page 5; (Section 1C. Drafting Issues or Other Comments: FWC offered the following comments).

incapable of transportation or movement.”³⁷¹ The comments go on to explain that under existing statutes, local governments already have the authority to regulate floating structures being used as living space if those structures are incapable of transport on the water.

The validity of local ordinances regulating navigation and anchoring may depend on whether a local ordinance defines “live-aboard” vessel more broadly than the statutory definition provided in Section 327.02(19).³⁷² Several local ordinances attempt to define “live-aboard” differently from the state statute. One local government, for example, defines “on-board” living as “eating, sleeping and carrying on other living activities for a period in excess of 48 hours aboard any vessel while it is moored or docked on the waters within the city.”³⁷³ This definition could be interpreted as broader than the residency test established by Chapter 327, and thus sweep non-“liveaboards” under its ambit. If so, a court might strike down the ordinance on the basis of it conflicting with Chapter 327.³⁷⁴

In addition to the City of Marco Island case described above, two Florida trial courts have addressed local restrictions on anchoring in the context of the statute prior to the 2009 amendments.³⁷⁵ In *State v. Hager*,³⁷⁶ the court upheld a 72-hour length-of-stay restriction, giving deference to the City of Clearwater's determination that a vessel anchored for greater than 72 hours during any 30-day period was no longer engaged in navigation. After determining that the vessel was a non-“live-aboard,” the court examined whether the language in the 1990 version of Section 327.60(2), which stated “anchorage . . . in the exercise of the rights of navigation,” included anchoring for more than 72 hours. The court found that “[n]o authority has been cited which establishes a legal time frame within which

³⁷¹ See Florida House of Representatives Staff Analysis; Bill No. 1361, March 3rd, 2010, Page 5; (Section 1C. Drafting Issues or Other Comments: FWC offered the following comments).

³⁷² See Fla. Stat. § 327.02(19) (2014) (defining the term “live-aboard vessel” as “(a) [any] vessel used solely as a residence and not for navigation; (b) [any] vessel represented as a place of business or a professional or other commercial enterprise; or (c) [any] vessel for which a declaration of domicile has been filed pursuant to s. 222.17,” and also expressly excluding from the term any commercial fishing boat).

³⁷³ Code of Ordinances of the City of Sanibel, Florida, Chapter 74-136.

³⁷⁴ See Fla. Const., art. VIII, § 2(b) (providing that local governments may exercise any power for local purposes “except as otherwise provided by law”). Florida’s test establishing the supremacy of state law over local law is similar to the federal test vis-a-vis a state. In this instance, however, a statute specifically describes the ambit of local government authority, and it is unnecessary to engage in a detailed preemption analysis.

³⁷⁵ Another court has interpreted whether the statute preempts a local government from banning navigation with a specific type of vessel, i.e. airboats. See *Moore v. State*, 6 Fla. Law Weekly Supp. 8, 98 ER FALR 276 (10th Cir., Polk County, Sept. 8, 1998) (wherein the court concluded that Section 327.60(2), Florida Statutes, only preempts local government regulation of anchoring).

³⁷⁶ See Case No. 90-19207MOANO (County Ct., Pinellas Co., Nov. 27, 1990).

to determine when, if ever, an anchored vessel is under navigation,” and concluded that, while 72 hours “may appear unnecessarily restrictive,” the city’s ordinance was valid.³⁷⁷

A trial court in a 1991 case, *State v. Frick*,³⁷⁸ reached the opposite conclusion, refusing to define the rights of navigation in terms of an “arbitrary time period of 72 hours.” This court noted that “[t]he length of time that a boat remains anchored may be only one criteria determining whether it is involved in navigation.” In finding the Riviera Beach ordinance invalid, the court determined that innocent boaters either genuinely exercising the rights of navigation or forced “out of necessity, weather, or unforeseen conditions” to stop for longer than 72 hours would violate the ordinance. Although not resolving the length-of-stay issue, these cases seem to suggest that length-of-stay restrictions are more likely to be upheld if they permit vessels to remain for a longer time frame and make adequate provision for contingencies such as safe harbor during storms.

4. Other State and Local Government Navigation Regulations in Florida

a. Florida Statutes § 327.46, Boating-Restricted Areas. This section grants authority to the FWC and local governments to establish rules and ordinances for “any purpose necessary to protect the safety of the public.”³⁷⁹ While the FWC may establish boating restricted areas via the rule-making process afforded to state agencies under the Florida Administrative Procedure Act (Chapter 120, Florida Statutes), local governments also have the authority to establish boating-restricted areas by ordinance.³⁸⁰ However, Section 327.46 requires that any such ordinance adopted “shall not take effect until the [FWC] has reviewed the ordinance and determined by substantial competent evidence that the ordinance is necessary to protect public safety pursuant to this paragraph.”³⁸¹ This Section also creates a procedure with applicable time frames for local governments to seek the required FWC approval.³⁸² Another important aspect of the Section is that it requires each proposed “boating-restricted area” to be developed in consultation and coordination with the applicable governing body of the local gov-

³⁷⁷ See *id.*

³⁷⁸ *State v. Frick*, Case No. 91-6860 M0 A08 (May 28, 1991).

³⁷⁹ Fla. Stat. § 327.46(1) (2014).

³⁸⁰ See Fla. Stat. § 327.46(1)(a)-(b) (2014).

³⁸¹ Fla. Stat. § 327.46(1)(c)3b (2014).

³⁸² See *id.*

ernment, and if the proposed “boating-restricted area” is to be on navigable waters of the United States, then the U.S. Coast Guard and the U.S. Army Corp of Engineers must also be consulted.³⁸³

Section 327.46 does seem to give some amount of discretion to local governments to decide what type of activities may be restricted, so long as the restriction relates to the protection of public safety. Restrictions on vessel speeds and vessel traffic are listed as examples of the types of restrictions local governments may implement in the name of public safety.³⁸⁴ It is important to note, however, that Section 327.46 requires “boating-restricted areas,” and the restrictions which apply therein, to be “necessary based on boating accidents, visibility, hazardous currents or water levels, vessel traffic congestion, or other navigational hazards.”³⁸⁵ Therefore, local ordinance proposals relating to “boating-restricted areas” must be supported by some kind of statistical or factual basis to justify why a “boating-restricted area” is necessary, and that justification is limited to the protection of public safety. This limitation presumably precludes restricted areas for purposes such as environmental protection.

To that end, Section 327.46 identifies special conditions existing throughout Florida’s waterways where “boating-restricted areas” may be justified, and thus subject to local government restrictions. The section also identifies areas where idle speed and no wake zones, as well as slow speed zones, minimum wake zones and numerical speed limit zones, may be established. Moreover, Section 327.46 also enables local governments to establish “vessel exclusion zones” in areas reserved exclusively as a canoe trail or for other vessels “under oars or under sail.” Furthermore, a local government may create a “vessel exclusion zone” to protect a particular type of waterborne activity where “user group separation must be imposed to protect the safety of those participating in such activity.”³⁸⁶

Below are excerpts taken directly from Section 327.46 that describe the generic locations on Florida waterways where the Legislature expressly permits local governments to establish “boating-restricted areas.”

Boating-restricted areas . . . [designating] an idle speed, no wake [zone may be established in the following areas]:³⁸⁷

Within 500 feet of any boat ramp, hoist, marine railway, or other launching or

³⁸³ See Fla. Stat. § 327.46(2) (2014).

³⁸⁴ See Fla. Stat. § 327.46(1) (2014).

³⁸⁵ See *id.*

³⁸⁶ Fla. Stat. § 327.46(1)(c)3b (2014).

³⁸⁷ Fla. Stat. § 327.46(1)(b)1 (2014).

landing facility available for use by the general boating public on waterways more than 300 feet in width or within 300 feet of any boat ramp, hoist, marine railway, or other launching or landing facility available for use by the general boating public on waterways not exceeding 300 feet in width.

Within 500 feet of fuel pumps or dispensers at any marine fueling facility that sells motor fuel to the general boating public on waterways more than 300 feet in width or within 300 feet of the fuel pumps or dispensers at any licensed terminal facility that sells motor fuel to the general boating public on waterways not exceeding 300 feet in width.

Inside or within 300 feet of any lock structure.

Boating-restricted areas . . . [designating] a slow speed, minimum wake [zone may be established in the following areas]:³⁸⁸

Within 300 feet of any bridge fender system.

Within 300 feet of any bridge span presenting a vertical clearance of less than 25 feet or a horizontal clearance of less than 100 feet.

On a creek, stream, canal, or similar linear waterway if the waterway is less than 75 feet in width from shoreline to shoreline.

On a lake or pond of less than 10 acres in total surface area.

Boating-restricted areas . . . [designating] a vessel exclusion [zone may be established in the following areas]:

If the area is designated as a public bathing beach or swim area.

Within 300 feet of a dam, spillway, or flood control structure.³⁸⁹

If the area is reserved exclusively as a canoe trail or otherwise limited to vessels under oars or under sail.

For a particular activity and user group separation must be imposed to protect the safety of those participating in such activity.³⁹⁰

Boating-restricted areas . . . [designating] an idle speed, no wake [zone may be established in the following area]:³⁹¹

If the area is within 300 feet of a confluence of water bodies presenting a blind

³⁸⁸ Fla. Stat. § 327.46(1)(b)2 (2014).

³⁸⁹ Fla. Stat. § 327.46(1)(b)3 (2014).

³⁹⁰ Fla. Stat. § 327.46(1)(c)3 (2014).

³⁹¹ Fla. Stat. § 327.46(1)(c)1 (2014).

corner, a bend in a narrow channel or fairway, or such other areas if an intervening obstruction to visibility may obscure other vessels or other users of the waterway.

Boating-restricted areas . . . [designating] a slow speed, minimum wake, or numerical speed limit [zone may be established in the following areas]:³⁹²

Within 300 feet of a confluence of water bodies presenting a blind corner, a bend in a narrow channel or fairway, or such other area if an intervening obstruction to visibility may obscure other vessels or other users of the waterway.

Subject to unsafe levels of vessel traffic congestion.

Subject to hazardous water levels or currents, or containing other navigational hazards.

An area that accident reports, uniform boating citations, vessel traffic studies, or other creditable data demonstrate to present a significant risk of collision or a significant threat to boating safety.

b. Florida Statutes § 327.41, Uniform Waterway Regulatory Markers. A necessary component of “boating-restricted areas” is the need for local governments to properly mark the types of zones they create. Section 327.41, titled “[u]niform waterway regulatory markers,” requires local governments to apply for a permit through the FWC to install waterway markers.³⁹³ This ensures that all waterway markers are uniform throughout the state and are also in compliance with U.S. Coast Guard requirements.³⁹⁴

c. Florida Statutes § 327.44, Interference with Navigation; Relocation or Removal; Recovery of Costs. Even though “boating-restricted areas” do not specifically address anchoring, a “catch-all” statute indicates that enforcement authorities may prevent anchoring wherever it presents certain dangers to the public. Until 2014, Section 327.44 was titled “[i]nterference with navigation,” and stated:

No person shall anchor, operate, or permit to be anchored, except in case of emergency, or operate a vessel or carry on any prohibited activity in a manner which shall unreasonably or unnecessarily constitute a navigational hazard or interfere with another vessel. Anchoring under bridges or in or adjacent to heavily traveled channels shall constitute interference if unreasonable under the prevailing circumstances.³⁹⁵

³⁹² Fla. Stat. § 327.46(1)(c)2 (2014).

³⁹³ Fla. Stat. § 327.41(2) & (3) (2014).

³⁹⁴ See Fla. Stat. § 327.41(1) (2014).

³⁹⁵ Fla. Stat. § 327.44(2) (2014).

This language remains in force, but new legislation added language further emphasizing the power of FWC and local law enforcement to enforce the statute.³⁹⁶ In addition to the general power to both remove non-compliant vessels³⁹⁷ and issue non-criminal citations (which can become a second degree misdemeanor if the party cited fails to respond within 30 days),³⁹⁸ the statute now also provides more specific and robust enforcement power. Section 327.44 now specifically protects FWC and local law enforcement from liability for damage they cause to a vessel while exercising their power to remove or relocate, unless the damage results from “willful misconduct” or “gross negligence.”³⁹⁹ Furthermore, the new legislation also allows the enforcement authorities to recover from vessel owners any costs incurred while removing or relocating such vessels.⁴⁰⁰

d. Florida Statutes Regarding Derelict, Abandoned, and At-Risk Vessels.

Due to Florida’s large boating community, it was inevitable that the state would face deteriorated and abandoned vessels with unidentifiable owners infringing upon waterways and creating hazardous to navigation and the environment. Florida Fish and Wildlife Conservation Commission (FWC) has taken lead on combatting this statewide issue and has made great strides over the years by collaborating with local law enforcement and county environmental, boating, and waterway entities. While there are some statutes in place to deal with derelict vessels and FWC has created a statewide tracking database depicting vessels that are derelict and vessels that are “at-risk” of becoming derelict, there are still many legislative hurdles to overcome to streamline the identification and removal process.

Florida Statute Section 823.11 defines “derelict vessel” and outlines procedures for handling these hazardous to navigation. As noted in Section I.A. a derelict vessel is “a vessel . . . that is left, stored, or abandoned . . . in a wrecked, junked, or substantially dismantled condition upon any public waters.”⁴⁰¹ While law enforcement officers are given authority to remove derelict vessels from public waters, there are many caveats that impact each case including trying to identify an owner, minimizing potential environmental impacts during removal, and securing funding for the removal process.⁴⁰² In addition to specific derelict vessel statutes, FWC and local law enforcement may also use “abandoned property”

³⁹⁶ See Ch. 2014-143, Laws of Fla. (2014).

³⁹⁷ See Fla. Stat. § 327.70(1) (2014).

³⁹⁸ See Fla. Stat. § 327.70(1) & (2)(a)2 (2014).

³⁹⁹ See Fla. Stat. § 327.44(3) (2014).

⁴⁰⁰ See Fla. Stat. § 327.44(5) (2014).

⁴⁰¹ Fla. Stat. § 823.11 (2015).

⁴⁰² See Fla. Stat. § 376.15 (2015) (funding regarding derelict removal from public waters).

statutes to help combat this growing problem. Florida Statute Section 705.101 defines “abandoned property” to specifically include the term “derelict vessel.”⁴⁰³

While these aforementioned statutes have been beneficial in combating the growing problem, there have been recent efforts to modify related legislation to improve the identification and removal process. Most recently, there was an initiative to create a formal section in Florida’s Statutes defining “at-risk” vessels.⁴⁰⁴ Such vessels were to be described in a manner as being vessels of the verge of becoming derelict.⁴⁰⁵ Furthermore, the legislative language included mechanisms for law enforcement to formally identify these vessels prior to them entering a severely deteriorated condition with potential violations against owners resulting in noncriminal infractions.⁴⁰⁶ The recommended additions, however, were not implemented and FWC has since begun outreach efforts internally and with the public to revamp and determine potential proposals to improve the present derelict vessel management system.⁴⁰⁷

5. The Inland Navigation Districts

The Legislature has granted nonregulatory waterway management authority to the state’s inland navigation districts. The Florida Inland Navigation District (FIND) and the West Coast Inland Navigation District (WCIND) serve as the local sponsors for the Atlantic Intracoastal Waterway and the Gulf Intracoastal Waterway.⁴⁰⁸ This authority consists primarily of financing channel maintenance to maintain navigation, but can also include waterway access amenities such as boat ramps and waterfront facilities.

The FIND is an independent special taxing district that covers an area extending along Florida’s east coast from Duval to Dade counties.⁴⁰⁹ FIND is governed by a twelve-member board with one representative from each county

⁴⁰³ See Fla. Stat. § 705.101(3) (2015).

⁴⁰⁴ See H.B. 7123, 2015 Leg., Reg. Sess. (Fla. 2015).

⁴⁰⁵ See *id.*

⁴⁰⁶ See *id.*

⁴⁰⁷ *Id.* See also FWC News Release (Aug. 04, 2015) available at <http://myfwc.com/news/news-releases/2015/august/04/dv-meeting-edgewater/>.

⁴⁰⁸ See Fla. Stat. § 374.976(1)(a)-(e) (2014) (providing a list of projects the districts are empowered and authorized to undertake, which include serving as local sponsors for these waterways). For a website maintained by FIND and WCIND, see <http://www.aicw.org> (maintained by FIND) and <http://wcind.net> (maintained by WCIND).

⁴⁰⁹ See Fla. Stat. § 374.982 (2014).

within the district.⁴¹⁰ Florida's governor appoints the board members to staggered four-year terms.⁴¹¹ The WCIND is also a special taxing district, covering four counties: Manatee, Sarasota, Charlotte and Lee.⁴¹² The WCIND is governed by a four-member board comprised of one county commissioner from each of the four counties within its jurisdiction.⁴¹³

In 1998, the Legislature added anchorage management to the list of activities for which the FIND and the WCIND are permitted to aid and cooperate with the federal government, state, member counties and local governments.⁴¹⁴

a. Regional Waterway Management Systems. In association with WCIND, DEP, and the four counties in its jurisdiction, Florida Sea Grant developed a tool called Regional Waterway Management Systems (RWMS) to address waterway management issues. This tool involves the application of science and geospatial technology to evaluate how to best balance the health of coastal ecosystems with the maintenance of safe navigation in coastal communities. The RWMS tool essentially uses a geospatial framework to map channel depths, produce a census of actual boating populations, and evaluate the spatial extent of natural resources at a regional level to determine which channels are most appropriate for navigation improvements (i.e., dredging) and how to implement related regulatory policy.⁴¹⁵ In issuing certain general permits to WCIND for dredging channels in Manatee, Sarasota, and Lee Counties, DEP has incorporated this system into its regulations.⁴¹⁶

V. Approaches to Anchorage Management in Florida

A. Managed Mooring Fields (MMFs)

To better manage and accommodate navigation within their jurisdictions, a number of local governments around the state of Florida have established Man-

⁴¹⁰ See Fla. Stat. § 374.983(1) (2014).

⁴¹¹ See Fla. Stat. § 374.983(2) (2014).

⁴¹² See Ch. 23770, at 320, Laws of Fla. (1947); Fla. Admin. Code R. 66A-1.001(1) (2014).

⁴¹³ See Fla. Admin. Code R. 66A-1.002(1) (2014).

⁴¹⁴ See Fla. Stat. § 374.976(1)(c) (2014); Fla. Admin. Code R. 66B-2.001 (2014).

⁴¹⁵ See Robert Swett et al., *A Regional Waterway Management System for Balancing Recreational Boating and Resource Protection*, 43 *Journal of Environmental Management* 962 (2009).

⁴¹⁶ See Fla. Admin. Code R. 62.330.410 (2014) (applying to Manatee and Sarasota Counties); 62.330.412 (2014) (applying to Lee County).

aged Mooring Fields (MMFs). A MMF is an area specially designated and managed by a local government or some other entity for the mooring of vessels. Some local governments with established MMFs include Fort Myers, Fort Myers Beach, Key West, Marathon, Sarasota, Stuart, Vero Beach, and Fernandina Beach, among others. These MMFs range in size, accommodating anywhere from a mere handful of vessels to more than a hundred.

There is a distinct difference between “anchorage” and “mooring fields.” Anchorages are areas designated for the anchoring of vessels using ground tackle carried on the vessel; mooring fields are areas where vessels tie up to a buoy attached to ground tackle that is maintained in place. Anchoring within a MMF is typically prohibited, though it could conceivably be allowed through proper zoning of the field. Local governments often use MMFs to encourage tourism by creating convenient and safe opportunities for cruisers to stop in an area to either anchor or tie to a mooring. A well-designed MMF includes amenities such as dingy docks, fueling stations, holding tank pump-out stations, garbage disposal facilities, and shower and restroom facilities. Many MMFs provide 24-hour security through an on-site harbormaster.

A local government may either choose to operate a MMF itself,⁴¹⁷ enter into a concession agreement with a private company allowing for private management,⁴¹⁸ or allow for management by a non-profit organization. The operation of a MMF is typically governed by the adoption of an ordinance or resolution. Activities addressed in such ordinances generally include the length of time a vessel may remain in the MMF, the establishment of fees, safety and insurance considerations, operational hours for noise and machinery, requirements relating to the display of signs, sanitation requirements, provisions regarding fishing, swimming, and other recreational activities, and the restrictions on feeding wildlife. The Conservation Clinic at the University of Florida Levin College of Law has drafted a model “harbor management ordinance,” that has been used by some local governments as a guide in preparing their local ordinance.⁴¹⁹

Local governments face a number of regulatory hurdles before they can establish MMFs. Initially, the ownership of the beds underlying the water in question must be determined. In most cases, ownership of the beds will lie in the hands of the State and the use of it for a MMF must be authorized.⁴²⁰ The local comprehensive plan must be evaluated and amended if necessary to ensure the

⁴¹⁷ Vero Beach MMF is administered by the municipality.

⁴¹⁸ Fort Myers Beach and Sarasota utilize a private concession model.

⁴¹⁹ See <http://www.law.ufl.edu/conservation/waterways> and http://conservation.law.ufl.edu/pdf/harbor_ordinance.pdf.

⁴²⁰ Some type of authorization to use sovereign submerged lands may be required, usually in the form of a lease. See Section IV.B.

MMF will be consistent with that plan,⁴²¹ and any Manatee Protection Plan that has been adopted by the local government. All applicable regulatory authorizations from the state and federal governments must also be obtained.⁴²² The DEP recently streamlined the state process for approval, creating a “general permit to local governments for public mooring fields.” The general permit is limited to 100 moorings, and subject to additional siting, design and operating criteria specified in the rule.⁴²³ Permits may also be required by the U.S. Army Corps of Engineers for activities on navigable waters. The establishment of a new MMF will likely now require approval as a boating restricted area under the 2009 revisions to Chapter 327, Florida Statutes discussed above. Consideration should also be given to seeking designation of a new MMF as a special anchorage area under Coast Guard regulations, also discussed above.

B. Pilot Program for Regulation of Anchoring and Mooring

In 2009, along with the previously discussed amendments, the Legislature directed the FWC to establish a Pilot Program, often referred to as the “Anchoring and Mooring Pilot Program.” Section 327.4105 requires the FWC, in consultation with DEP, to explore options for regulating the anchoring or mooring of non-live aboard vessels outside the marked boundaries of public mooring fields.⁴²⁴

The stated goals of this Pilot Program are to (1) promote and establish mooring fields, (2) promote public access to State waters, (3) enhance navigation safety, (4) protect maritime infrastructure, (5) protect the marine environment, and (6) deter improperly stored, abandoned, or derelict vessels.⁴²⁵ The law establishing the Pilot Program seeks to achieve these goals by directing FWC to choose five different municipalities to create operational mooring fields as a prerequisite to being allowed to enact anchoring ordinances in their respective local jurisdictions. Essentially, once one of the five local governments chosen as part of the Pilot Program installs a properly approved and permitted mooring field, it may then also seek approval to enact an anchoring ordinance regulating vessels which will be anchored outside of the mooring field.

⁴²¹ See Fla. Stat. § 163.3194 (2014).

⁴²² Regulatory authorizations might include a federal permit under Section 10 of the River and Harbors Act, 33 U.S.C. 403 (2012), 33 C.F.R. Part 320 (2014); and an Environmental Resource Permit from DEP, see Fla. Stat. § 373.422 (2014), Fla. Admin. Code R. 18-21.005 (2014). Consultation with the U.S. Fish and Wildlife Service regarding potential impacts to manatees is usually required in many parts of Florida.

⁴²³ See Fla. Admin. Code Rule 62-330.420 (effective Nov. 19, 2015)(implementing Fla. Stat. § 373.118(4) (2014).

⁴²⁴ See Fla. Stat. § 327.4105 (2014).

⁴²⁵ See Fla. Stat § 327.4105(1) (2014). To view a FWC maintained webpage relating to the Pilot Program see <http://myfwc.com/boating/anchoring-mooring/pilot-program/> (last visited Oct. 8, 2014).

Reflecting the requirement in Section 327.4105 that two locations be off the east coast, two off the west coast, and one in Monroe County, FWC chose the cities of St. Augustine, St. Petersburg, and Sarasota, and the counties of Martin (in partnership with the City of Stuart) and Monroe County (in partnership with the cities of Key West and Marathon), to participate in the Pilot Program. Each of these five local governments are permitted to enact anchoring ordinances that would otherwise be pre-empted by F.S. 327.60(f).⁴²⁶ The legislature also directs FWC to work with the five local governments and provide consultation and technical assistance to those governments, among other things.⁴²⁷ The ordinances that the local governments enact shall only be effective and enforceable once approved by FWC.⁴²⁸

All five of the Pilot Program's designated local governments have established operational mooring fields, and adopted FWC-approved anchoring ordinances.⁴²⁹ Although the program was set to expire in July of 2014, the Legislature—at the recommendation of FWC—extended the program until July of 2017. One reason FWC cited for recommending an extension to the program is that the process for developing, approving, and adopting the various ordinances became much lengthier than originally predicted.⁴³⁰ Additionally, FWC asserted that it needed more time to collect data and receive public input in order to address the effectiveness of the program.

VI. Conclusion

Navigation rights are protected by the U.S. Constitution's Commerce Clause and the federal navigation servitude. Anchoring that is incidental to the exercise of these rights of navigation remains protected by federal law. However, in *Barber*, the Ninth Circuit Court of Appeals concluded that while the federal government may preempt state and local anchorage regulation, it has not done so. In fact, there is ample federal authority which suggests that Congress intended for states to assume a substantial role in the regulation of navigation, including anchoring, as long as it does not unduly circumscribe the protected federal inter-

⁴²⁶ See Fla. Stat. § 327.4105(3) (2014).

⁴²⁷ See Fla. Stat. § 327.4105(4) (2014).

⁴²⁸ See Fla. Stat. § 327.4105(3) (2104).

⁴²⁹ See St. Augustine, Florida, Code of Ordinances § 7-93; St. Petersburg, Florida, Code of Ordinances §§ 7-214 – 7-233; Sarasota, Florida, Code of Ordinances §§ 10-50 – 10-55; Martin, Florida, Code of Ordinances §§ 8.10 – 8.13; Monroe, Florida, Code of Ordinances §§ 26-100 – 26-104.

⁴³⁰ See Florida Fish and Wildlife Conservation Commission, *Anchoring and Mooring Pilot Program: Report of Findings and Recommendations* (Dec. 31, 2013), available at <http://myfwc.com/media/2704721/FindingsRecommendations.pdf> (last visited Feb. 23, 2015).

ests. However, federal law offers little guidance concerning how far a state or local government may regulate navigation and anchoring before it interferes with the federal interest.

In Florida, the Legislature has authorized the Board of Trustees to regulate anchoring, but the Board has not exercised this authority. The Legislature has, however, preempted local government regulation of anchoring by non-live-aboard vessels. In 2009, the Legislature renovated the statutory scheme dealing with state preemption of vessels in navigation and associated anchoring by repealing Section 327.22 and amending Section 327.60. These changes now clearly list several prohibitions on local government regulations related to vessels and their operation including anchoring. Arguably, these statutory changes make Florida's boating law less confusing because it is now clear that local governments may not regulate the navigation, including anchoring of non-live-aboard vessels outside of mooring fields, but they may regulate the anchoring of "live-aboard" vessels outside of mooring fields, provided that live-aboard is not also navigating. Nonetheless, when a live-aboard vessel is no longer in navigation remains a mariner's mystery.

It seems clear that the issue of local regulation of navigation in Florida will not go away. In the 2015 legislative session, amendments were unsuccessfully offered to create a new statute titled "anchoring and mooring of vessels outside public mooring fields."⁴³¹ The new recommended language included restricting vessels from anchoring and mooring within 200 feet of a public boat ramp, railway, or a permitted mooring field.⁴³² Furthermore, the proposed bill would have restricted vessels from anchoring and mooring within 200 feet of a developed waterfront overnight with only several limited exceptions.⁴³³

⁴³¹ See S.B. 1548, 2015 Leg., Reg. Sess. (Fla. 2015).

⁴³² *Id.* at 2.

⁴³³ *Id.* at 2-3.

Suggested Citation

Ankersen, Thomas T., Richard Hamann, Byron Flagg, Alex Boswell-Ebersole, and Jennifer Saviano. 2015. *Boating, Waterways, and the Rights of Navigation in Florida (4th ed)*. Gainesville: Florida Sea Grant College Program.

Previous editions of this publication have appeared as *Anchoring Away: Government Regulations and the Rights of Navigation in Florida*.

This publication was supported by the National Sea Grant College Program of the U.S. Department of Commerce's National Oceanic and Atmospheric Administration (NOAA) under NOAA Grant No. NA 14OAR4170108. The views expressed are those of the authors and do not necessarily reflect the views of these organizations.

Additional copies are available by contacting:

Florida Sea Grant
University of Florida
PO Box 110409
Gainesville, FL, 32611-0409
(352) 392-2801
www.flseagrants.org

TP 218
November 2015





Conservation Clinic
Center for Governmental Responsibility
Levin College of Law
PO BOX 117629
University of Florida
Gainesville, FL 32611-7629