

ANCHORING AWAY

Government Regulation and the Rights of Navigation in **FLORIDA**




Sea Grant
Florida

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TP-180
March 2011

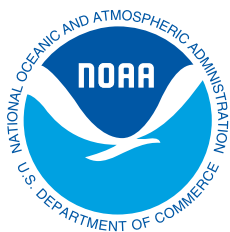
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This publication was supported by the National Sea Grant College Program of the U.S. Department of Commerce's National Oceanic and Atmospheric Administration (NOAA) under NOAA Grant No. NA06 OAR-4170014. The views expressed are those of the authors and do not necessarily reflect the views of these organizations.

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TP 180
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ANCHORING AWAY: GOVERNMENT REGULATION AND THE RIGHTS OF NAVIGATION IN FLORIDA

Third Edition

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March, 2011

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Author's Note

This represents the third edition of this analysis of the federal, state, and local government law that surrounds the practice of anchoring on the navigable waters of the state of Florida. While there has been little change in the federal law since the first edition in 1999, Florida law, particularly statutory law, has undergone two significant revisions, first in 2006 and again, more comprehensively, in 2009. In both cases the Florida legislature has modified the key provision that includes the term “navigation” for purposes of local regulation of anchoring. And in both cases the legislature has sought to reconcile the conflicting state, local, and boater interest in that basic attribute of navigation – anchoring. This third edition describes the current state of the law in Florida. In addition, we have newly included a brief “taxonomy” of vessels while they are on the water, and a brief review of “rights of navigation” under international law, as they apply to anchoring.¹

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 inland waterways. In 2009, Florida was home to 982,470 registered vessels and an estimated one million more unregistered vessels all of which were sharing Florida waterways.³ A recent study revealed that in 2007, the number of Florida registered vessels alone logged 21.7 million boating trips.⁴ This same study, prepared for the Florida Fish and Wildlife Conservation Commission (FWC), concluded these boating trips

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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, *2009 Boating Accident Statistical Report*. http://myfwc.com/SAFETY/Safety_Boat_AccidentStats.htm (last visited Oct. 14, 2010). There were 982,470 vessels registered in Florida in 2009 and another estimated one million unregistered vessels.

⁴ See Florida Boating Access Facilities Inventory and Economic Study, 2009, http://myfwc.com/About/Economic/About_Econ_RegisteredBoater.htm, (last visited Oct. 14, 2010). See also same website for a breakdown of economic contribution to regional economies.

and their related commercial activities contributed a total of \$17.6 billion dollars to Florida's economy in 2007. Given the estimated number of unregistered vessels plying state waters, the total economic impact of all boating activity in Florida may be even higher.

As commercial and recreational use of the Florida waterway system expands in conjunction with population growth, the potential for conflicts between boaters, the environment and different user groups will increase.⁵ State and local governments can be caught in the middle, forced to reconcile conflicting demands for the same limited geographic space and natural resources. One such aspect of state and local conflict involves the practice of transient and "live-aboard" anchoring by watercraft. It is an area that has engendered considerable litigation, both in Florida and elsewhere. More recently, state and local governments, in conjunction with regional bodies such as the inland navigation districts and regional planning councils, have sought to reconcile the navigation interests of boaters with governmental interests in protecting the coastal environment and shore side land uses.

The third edition of this report addresses the federal, state and local regulatory regime for anchoring and mooring in Florida. For the purposes of the report, anchoring refers to a boater's practice of seeking and using safe harbor on the public waterway system for an undefined duration. This may be accomplished using an anchor carried on the vessel, or through the utilization of moorings permanently affixed to the bottom. Anchorages are areas that boaters regularly use for anchoring or mooring, whether designated or managed for that purpose or not. Mooring fields are areas designated and used for a system of properly spaced moorings. The regulation of marinas, docks and other facilities affixed to the shore is not discussed, except to the extent it may relate to the practice of anchoring.

We first present the jurisdictional bases for anchoring and anchorage management and limitations on these activities, touching briefly on international law and then focusing on the federal navigation servitude, federal statutes and federal supremacy considerations. State and local efforts to address anchoring in Florida are then examined, along with the judicial opinions construing them. While anchoring is considered to be a "right incidental to navigation," and hence protected by federal law, some reasonable local regulation of anchoring is permissible. Unfortunately, in the absence of judicial clarification, there is little agreement on what constitutes reasonable regulation. The Trustees of the Internal Improvement Trust Fund are authorized to regulate anchoring on sovereignty submerged lands in Florida, but have not done so except for the establishment of mooring fields. In addition, the Florida Legislature has limited the authority of local governments to regulate anchoring, but the statute, recently amended for

⁵ 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.* 1-79 (1999).

the second time since this report was first published in 1999, still contains some ambiguity when it comes to the meaning of the term “navigation” which has not been statutorily defined. Boaters, especially cruising boaters who potentially could be considered “live-aboard” vessel owners, may continue to be faced with considerable uncertainty when anchoring in Florida waters depending on whether they are in “navigation” or not.

Consensus-based efforts to develop managed anchorages and mooring fields may provide the best strategy to reconcile the competing interests of boaters and other waterway users⁶. 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 will 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 by 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 lies at the heart of the difficulty in devising an appropriate regulatory and management regime.

Cruising vessels – Cruising vessels are vessels navigating from one place to another. They are also described as “transient” vessels. Whether a vessel is “cruising” or not depends upon its “length of stay” in any one place, but this duration can vary dramatically depending on the nature of the cruise. Cruising vessels can also be “live-aboard” vessels. Neither cruising nor transient vessels have been statutorily defined, although Chapter 327 does use the term “non live-aboard” vessel in a way that captures much of the apparent legislative intent to preempt local regulation of cruising vessels.

Stored vessels – Stored vessels are those which are 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-aboard” vessels. Vessels stored on state water preempt the use of the sovereign submerged lands beneath them, and may pose navigational and safety concerns when not properly anchored or moored or if they become derelict vessels. Stored vessels are also not defined by statute.

Live-aboard vessels – Live-aboard vessels are defined by statute and by submerged lands leases, but the definitions are different. One of the recent

⁶ See Section IV of this report.

2009 amendments to Chapter 327 of the Florida Statutes, refined the definition of a “live-aboard” vessel to now read as follows:

(17) “Live-aboard vessel” means:

- a) any vessel used solely as a residence **and not for navigation** (emphasis added); or
- 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.

A commercial fishing boat is expressly excluded from the term “live-aboard vessel.”⁷

The term “solely” makes the definition appear very narrow, but it 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.⁸ The term is only used once in Chapter 327, confirming local governmental authority to prohibit or restrict the mooring or anchoring of “live-aboard” vessels.

“Live-aboards” are also usually defined in submerged land leases entered into by the Trustees when describing authorized uses of submerged lands.⁹ In this context, the term “live-aboard” vessel is defined as a vessel docked at a facility and inhabited by any person or persons for (5) five consecutive days or a total of (10) days within a 30-day period. If “live-aboards” are authorized by paragraph (1) one of this instrument, in no event shall such “live-aboard” status exceed (6) six months within any (12) month period, nor shall any vessel constitute a legal or primary residence.

Derelict vessels –Section 823.11(1), Florida Statutes, defines a derelict vessel as “any vessel that is left stored or abandoned upon Florida waters in a wrecked, junked, or substantially dismantled condition. Vessels left at any Florida port without consent of the agency administering the port area and vessels left docked or grounded upon a property without the property

⁷ See Fla. Stat. 327.02(17) “Live-aboard vessel” (2010). See also Laws of Florida, Ch. 2009-86, for language stricken and added by the Florida Legislature’s 2009 amendment.

⁸ AGO 85-45, May 31, 1985. 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.” *Perez v. Marti*, 770 So.2d 284, 289 (Fla. 3d DCA 2000). 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. *Miller v. Gross*, 788 So.2d 256, 259 (Fla. 4th DCA 2000).

⁹ The following link maintained by the Florida Department of Environmental Protection provides a common example of State Submerged Land Leases in template format: http://www.dep.state.fl.us/lands/files/new_lease.pdf (last visited January, 2011). See Paragraph 29 of lease template.

owner's consent are also derelict vessels." Recent reforms have enhanced the ability of state and local agencies to remove derelict vessels.¹⁰

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

With 14 deepwater seaports¹¹ and proximity to cruise ship destinations, Florida is host to foreign-flagged vessels every day. 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."

Although not a signatory to this treaty,¹² the United States does recognize UNCLOS's role in international relations and abides by its framework.¹³ Rooted in some of the oldest concepts of international law and customs, the UNCLOS was adopted in 1982, was substantially amended in 1994, and now has 157 parties to the Convention. The treaty creates a regime of rights afforded to and duties imposed upon the parties to the agreement. It also defines territorial boundaries and legal jurisdictions, addresses rights of access to ocean resources, includes environmental protection concerns, and sets rules governing the behavior of vessels.

With regards to the navigational rights of vessels, the treaty includes Section Three, 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."¹⁴ 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.*

¹⁰ See Thomas K. Ruppert, *Local Government Authority to Remove Abandoned and Derelict Vessels*, http://www.law.ufl.edu/conservation/waterways/pdf/derelict_vessels_final_1.pdf, (last visited January, 2011).

¹¹ <http://www.dot.state.fl.us/seaport/seamap.shtm>, (last visited February, 2011).

¹² <http://www.state.gov/g/oes/ocns/opa/convention/index.htm>, (last visited February, 2011).

¹³ *Id.*

¹⁴ See Article 17, United Nations Convention on the Law of the Sea, 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. Hereinafter, The Law of the Sea (UNCLOS).

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.*¹⁵

Article 19 of the UNCLOS explains the “Meaning of Innocent passage” and enumerates acts of foreign vessels which would be considered in violation of 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.”¹⁶

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 the UNCLOS. As described in Article 19, a foreign-flagged vessel that stops and anchors in a coastal State’s waters may do so only “insofar as the same are incidental to the ordinary navigation or [is] rendered necessary...”.

Beyond this limitation, the UNCLOS also specifically requires foreign-flagged vessels to adhere to the local laws of coastal States regulating the use of waters. Article 21 of the UNCLOS states, “Foreign 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.”¹⁷ In addition, under Article 21, 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;*
- 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.*¹⁸

¹⁵ See *id.*, Article 18.

¹⁶ See *id.*, Article 19 (2).

¹⁷ See *id.*, Article 21.

¹⁸ See *id.*, Article 21, Subsection (1), *et seq.*

The significance of this limitation is that it shows even at the international level, there is consensus that certain state interests must take precedence over the idea of “freedom of the seas” and freedom to navigate or anchor at will. The UNCLOS identifies “Freedom of the High Seas” in Article 87 which includes “freedom of navigation,”¹⁹ but the High Seas include areas of the world’s oceans that remain outside of the various maritime jurisdictions claimed by coastal States. As a result of the UNCLOS, foreign-flagged vessels arriving in territorial waters of a coastal State, must comply with local laws with regard to navigation and anchoring.²⁰

Should the United States ever become a signatory to the UNCLOS,²¹ its states, including Florida, will need to examine current regulations to ensure concurrency with Federal law as well as the UNCLOS provisions. However, where Federal authority does not preempt State regulation and where State regulation would not conflict with the UNCLOS (if adopted by the United States), Florida would probably still have authority to regulate much vessel activity within its jurisdiction – including anchoring.

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

This section discusses the federal constitutional and statutory provisions that serve as the basis for federal jurisdiction over anchoring. In addition, the section addresses federal limits on state and local authority to regulate anchorages.

A. Federal Constitutional Authority over Navigable Waters

Under the Commerce Clause of the United States Constitution,²² the federal government has authority to control the navigable waters of the nation.²³ 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

¹⁹ See *id.*, Article 87, Subsection (1)(a)

²⁰ See *id.*, Article 21, Subsection (4)

²¹ Presidents Barack Obama, George W. Bush, and Bill Clinton have all urged Congress to accede to the UNCLOS and formally adopt it.

²² See U.S. Const. art. I, sect. 8.

²³ *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824); *United States v. Twin City Power Coop.*, 350 U.S. 222, 224 (1956). See generally, 4 Robert E. Beck (Ed.), *Waters and Water Rights* 35.02 (1996).

power of Congress to regulate navigation, prohibit or remove obstructions to navigation, and improve or destroy the navigable capacity of the nation's waters.²⁴ When Congress acts within the scope of the navigational servitude, state regulatory power and private riparian rights must give way.²⁵

One purpose of the navigational servitude is to protect the rights of private parties to access and use navigable waters.²⁶ In that sense it constitutes a right of navigation. Congress can protect those rights, but the extent to which private parties can assert a right of navigation under the navigation servitude is not as clear.²⁷ 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. The right to navigate, moor or anchor a vessel has never been recognized as a "fundamental right." Restrictions on the exercise of that right will therefore be upheld if there is any rational basis for them.²⁸

B. Federal Statutory Authority over Anchoring and Anchorages

Numerous federal statutes affect management and use of the navigable waters of the United States. The Submerged Lands Act (SLA) transferred title to the states of land underlying navigable waters,²⁹ but it reserved certain federal interests, including navigation.³⁰ The U.S. Coast Guard is charged with regulating

²⁴ 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). In *Gilman v. Philadelphia*, the Court declared the "power to regulate commerce comprehends the control . . . of all navigable waters of the United States which are accessible to the State . . . [f]or this purpose they are the public property of the nation, and subject to all the requisite legislation by Congress." 70 U.S. (3 Wall.) 713, 724-725 (1865).

²⁵ See *Id.*

²⁶ 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).

²⁷ A student commentator has interpreted 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." Terrill, *supra* note 1, at 174. *Marks*, however, involved the public trust doctrine, not the federal navigational servitude. See generally, David C. Slade, *Putting the Public Trust Doctrine to Work* 295 (1998).

²⁸ See *Murphy v. Department of Natural Resources*, 837 F. Supp. 1217, 1220-21 (S.D. Fla. 1993); *Barber v. State of Hawaii*, 42 F.3d 1185, 1196-97 (9th Cir. 1994); *Hawaiian Navigable Waters Preservation Soc. v. State of Hawaii*, 823 F. Supp. 766, 769-70 (Haw. D. 1993). Fundamental rights are among those rights which are explicitly or implicitly guaranteed by the Federal Constitution, for example the right of free speech. See Black's Law Dictionary 674 (6th ed. 1990). A regulation infringing on a fundamental right must be able to withstand "strict scrutiny," which means it is narrowly tailored to promote a compelling state interest. On the other hand, regulation affecting other rights need only be reasonably related to a legitimate government interest. See *Murphy* at 1220-1221. Because the right to navigate is not a fundamental right, a private party challenging navigation regulations affecting their actions must demonstrate that the regulations lack any possible reasonable basis.

²⁹ See 43 U.S.C. 1301, *et seq.* (2005).

³⁰ See 43 U.S.C. 1311(d) (2005).

various aspects of the right of navigation.³¹ The U.S. Army Corps of Engineers and the Environmental Protection Agency regulate dredging, filling, and placement of structures in navigable waters.³² The U.S. Fish and Wildlife Service and the National Marine Fisheries Service are required to protect endangered and threatened species, including marine mammals.³³ Finally, federal lands, including those beneath navigable waters, are administered by several agencies, including the National Park Service (national parks and monuments),³⁴ the Fish and Wildlife Service (national wildlife refuges),³⁵ and the National Oceanic and Atmospheric Administration (marine protected areas).³⁶

1. The Submerged Lands Act (SLA)

Under the Submerged Lands Act (SLA),³⁷ ownership of submerged lands and control of the overlying waters was transferred to the states, subject to a reservation of significant power by the federal government.³⁸ The SLA recognized, confirmed, and established each state's claim of title and ownership³⁹ as well as management and administrative responsibility⁴⁰ over submerged lands beneath navigable waters. The Supreme Court has characterized the SLA as a transfer to the states of rights to "submerged lands and waters."⁴¹ Congress' goal in passing

³¹ See 14 U.S.C. 81 (2005) (relating to aids to navigation and other signage); 33 U.S.C. 471 (2005) (relating to anchorage grounds and harbor regulations); 6 U.S.C. 468 (2005) (relating to preservation of Coast Guard functions in the Department of Homeland Security).

³² See 33 U.S.C. 403 (2005) (U.S. Army Corps of Engineers); 33 U.S.C. 1319 (2005) (Environmental Protection Agency).

³³ See 16 U.S.C. 1531- 1544 (2005); 50 C.F.R. 402.01(b) (2005) (designating which endangered and threatened species fall under the jurisdiction of the U.S. Fish and Wildlife Service and the National Marine Fisheries Service).

³⁴ See 16 U.S.C. 668dd (2005).

³⁵ See *Id.*

³⁶ See 16 U.S.C. 1434 (2005).

³⁷ See 43 U.S.C. 1301, *et seq.* The legislative history of the Submerged Lands Act indicates Congressional endorsement of the state's ownership rights. Brief of Amicus Curiae at 5, *Hawaiian Navigable Waters Preservation Society v. State of Hawaii*, 823 F.Supp. 766 (D. Haw. 1993), *aff'd* 42 F.3d 1185 (9th Cir. 1994) (citing Submerged Lands Act, H.R. Rep. No. 215, 83d Cong., 1st Sess. (1953), *reprinted in* 1953 U.S.C.C.A.N. 1385, 1436-37). The states probably already owned the submerged lands at issue by virtue of the public trust and equal footing doctrines. See *Phillips Petroleum Company v. Mississippi*, 484 U.S. 469, 474 (1988). Under the "equal footing doctrine," as each state entered the Union it obtained rights in its submerged lands equal to those possessed by the original thirteen states. See *Shively v. Bowlby*, 152 U.S. 1, 57 (1894).

³⁸ See 43 U.S.C. 1314(a) (2005).

³⁹ See 43 U.S.C. 1311(a)(1) (2005).

⁴⁰ See 43 U.S.C. 1311(a)(2) (2005).

⁴¹ 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).

the SLA was to decentralize management of coastal areas and foster greater local control to better meet the needs of the state and boaters.⁴² 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.”⁴³ The SLA, however, expressly reserved in the federal government the power to regulate these lands for the purposes of “commerce, navigation, national defense, and international affairs.”⁴⁴ The statutes discussed below implement that authority.

2. The Rivers and Harbors Act

Through the Rivers and Harbors Act, the federal government exercises control over activities which relate to maritime commerce and navigation.

a. Special Anchorage Areas and Anchorage Grounds. The Secretary of Transportation, through the Coast Guard, is authorized to establish both “anchorage grounds” and “special anchorage areas.” 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.”⁴⁵ In addition, the Secretary is granted the authority to adopt “suitable rules and regulations” governing their use.⁴⁶ The Coast Guard has established nine anchorage grounds in Florida, primarily for large commercial vessels using major ports.⁴⁷

Of more significance to recreational boaters, the Act also provides for special anchorage areas, in which vessels less than 65 feet in length are not required to display the anchorage lights otherwise required by the Coast Guard's Navigation Rules.⁴⁸ Other rules may also apply to these areas.⁴⁹ The Coast Guard has desig-

⁴² See *Id.*

⁴³ See H.R. Rep. No. 215, 83d Cong., 1st Sess. (1953), reprinted in 1953 U.S.C.C.A.N. 1385, 1436-37.

⁴⁴ See 43 U.S.C. 1314(a) (2005).

⁴⁵ See 33 U.S.C. 471 (2005).

⁴⁶ See *Id.* The rules are contained in 33 C.F.R. Part 110 (2005).

⁴⁷ See 33 C.F.R. 110.73-.74b. Anchorage grounds are established for a variety of reasons. For example, 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. 60 F.R. 14220 (Mar. 16, 1995). 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. 51 F.R. 11726 (April 7, 1986). Finally, the rule regarding the Port Everglades anchorage grounds states “[t]he primary purpose for establishing the federally designated anchorage grounds is to require commercial vessels to anchor within the anchorage grounds’ boundaries to avoid causing reef damage with their anchors.” 58 F.R. 36356 (July 7, 1993).

⁴⁸ See 33 C.F.R. 109.10 (2010).

nated a number of special anchorage areas in Florida.⁵⁰ Beyond designating special anchorages and anchorage grounds, 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 anchorages in Florida.⁵¹

b. Obstructions to Navigation. The Corps of Engineers also exercises jurisdiction under the Rivers and Harbors Act.⁵² 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.”⁵³ Corps regulations define “permanent mooring structures” and a “permanently moored floating vessel” as structures subject to regulation.⁵⁴ Although the limits for defining when a temporarily anchored vessel becomes permanent have not yet been established, several decisions have upheld the regulation of moored houseboats.⁵⁵ In recognition that these activities sometimes have minimal impacts, the Corps has established Nationwide Permits for installation of some types of moorings.⁵⁶ Permanent moorings and moored vessels that do not qualify for Nationwide Permits must be individually permitted.⁵⁷ In Florida, special provisions for consultation with the U.S. Fish and Wildlife Service are intended

⁴⁹ For example, in the Indian River special anchorage at Vero Beach, Florida, the rules provide that “[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.” See 33 C.F.R. 110.73b(c) (2005). Other rules contain “notes.” For example, the rule for the Marco Island, Florida, special anchorage area contains the following note: “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.” See 33 C.F.R. 110.74 (2005).

⁵⁰ See 33 C.F.R. 110.73-.74b (2005).

⁵¹ Memorandum No. 16501 from the Chief, Maritime and International Law Division, U.S. Coast Guard to the Chief Counsel, U.S. Coast Guard (Dec. 30, 1992).

⁵² See 33 U.S.C. 403 (2005).

⁵³ See 33 C.F.R. 320.2(b) (2005).

⁵⁴ See 33 C.F.R. 322.2 (2005).

⁵⁵ See *United States v. Estate of Boothby*, 16 F.3d 19 (1st Cir. 1994); *United States v. Boyden*, 696 F.2d 685 (9th Cir. 1983). See also, *United States v. Oak Beach Inn Corp.*, 744 F. Supp. 439 (S.D.N.Y. 1990) (permanently moored barge and ferry subject to regulation under the Rivers and Harbors Act). Numerous cases have concluded that sunken vessels may constitute obstructions. See *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).

⁵⁶ See 61 F.R. 65,913 (1996). Nationwide Permits are a type of general permit which require less time and paperwork than other permits. See 33 C.F.R. 330.1(b) (2005). Non-commercial, single-boat mooring buoys are authorized under Nationwide Permit 10. See 61 F.R. 65,913 (1996). Structures, buoys, floats and other devices placed within Coast Guard established anchorage or fleeting areas are authorized by Nationwide Permit 9. See *id.*

⁵⁷ See 33 C.F.R. 322.3 (2005).

to ensure protection of manatees in the construction and operation of boating-related facilities.⁵⁸

3. Coastal Zone Management Act

The Coastal Zone Management Act⁵⁹ encourages states to take an active role in the management and control of the submerged lands and coastal 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.⁶⁰

The State of Florida has successfully argued in one federal district court case involving anchoring that the Coastal Zone Management Act authorizes local regulations such as prohibitions on anchoring.⁶¹ 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 253.71⁶² were unconstitutional because the “State’s control over the water column is narrowly circumscribed by federal law.”⁶³ The state maintained that it had authority to regulate anchoring because the water and the land underneath the water had been passed on to the state by the federal government in the Submerged Lands Act.⁶⁴ 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 Coastal Zone Management Act.⁶⁵

The court noted that the Coastal Zone Management Act encourages “the states to effectively exercise their responsibilities in the coastal zone through the development and implementation of [federally approved] management programs.”⁶⁶ The court found that Congress considered navigation, including regu-

⁵⁸ See <http://www.fws.gov/northflorida/Manatee/manatees.htm> (last visited February 14th, 2011).

⁵⁹ See 16 U.S.C.A. 1451 *et seq.* (West 2005).

⁶⁰ See 16 U.S.C.A. 1452 (West 2005). See generally Ronald J. Rychlak, *Coastal Zone Management and the Search for Integration*, 40 DePaul I. Rev. 981 (1991) (discussing the process of the effort to integrate government coastal activities through the Coastal Zone Management Act); 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 Coastal Zone Management Act).

⁶¹ *Murphy v. Dept. of Natural Resources*, 837 F. Supp.1217 (S.D. Fla. 1993).

⁶² These statutes authorize the Board of Trustees of the Internal Improvement Trust Fund to issue leases for the use of submerged lands and the associated water column. See 253.128, Fla. Stat. (2005).

⁶³ *Murphy*, 837 F. Supp. at 1219.

⁶⁴ See *Murphy*, 837 F. Supp. at 1220; *Barber v. State of Hawaii*, 42 F.3d 1185 (9th Cir. 1994).

⁶⁵ See *Murphy*, 837 F. Supp. at 1223.

⁶⁶ See *id.*

lation of anchoring, “as one of the areas the States should include in their management plans.”⁶⁷ The court reasoned that because the state’s Coastal Zone Management Plan was approved by the Secretary of Commerce, the plan did not encroach on any federal power over navigation.⁶⁸

C. Federal Limits on State and Local Authority to Regulate Anchorages

This section addresses potential federal limitations on the state’s authority to regulate anchorages. To understand these limitations, it is necessary to review the basis for federal supremacy in this area of law. As previously noted, the U.S. Congress has authority to regulate matters affecting interstate commerce, and the federal navigational servitude is constitutionally derived from the Commerce Clause.⁶⁹ Under the Supremacy Clause of the U.S. Constitution, federal law governs over conflicting state law,⁷⁰ and Congress may preempt local laws pursuant to this authority.⁷¹

Three distinct limits on state regulatory authority are derived from these principles. First, where a state law regulating anchorages actually conflicts with a federal law, the state law will be void.⁷² Second, where the Congress has “spoken” so as to preclude state regulation in a given area of law, state regulation is preempted.⁷³ Third, even when a local regulation is neither in conflict nor preempted, the Dormant Commerce Clause prohibits states from unduly burdening interstate commerce.⁷⁴ The following sections address the potential impact of these limits on state and local efforts to regulate anchoring and anchorages.

⁶⁷ *Murphy*, 837 F. Supp. 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).

⁶⁸ *Id.* at 1223. Florida’s Coastal Zone Management Act simply references existing environmental statutes and rules and has been incorporated into the State’s comprehensive plan. See Fla. Stat. 380.21(2) & (3)(b) (2005). Apparently, this was sufficient to merit federal approval. Several State law provisions specifically address anchorages, and these statutes have been incorporated into the Coastal Zone Management Plan. See also, *infra* Sections II.C.1-3.

⁶⁹ See Section I.A.

⁷⁰ U.S. Const. art. VI.

⁷¹ See Sections I.C.1-3.

⁷² 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).

⁷³ See *Silkwood v. Kerr-McGee Corp.*, 465 U.S. 1074 (1984); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947); *Hillsborough County v. Florida Restaurant Assoc.*, 603 So. 2d 587, 590 (Fla. 2d DCA 1992).

⁷⁴ See *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970); *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520 (1959); *Southern Pacific Co. v. Arizona*, 325 U.S. 761 (1945).

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. Therefore, any state regulation of anchorages that conflicts with validly exercised federal law will be invalid. A conflict will be found either when it is not possible to comply with both the state and federal law at the same time,⁷⁵ or the state law prevents implementation of the federal law.⁷⁶

At present, there are few federal anchorage 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 anchorage regulation, and characterized its own authority as merely “the authority to establish general and special anchorage areas where and when needed.”⁷⁷ In *Murphy v. Department of Natural Resources*, the Coast Guard’s position was accepted to mean that “no Federal law exists in the area of anchorage and mooring.”⁷⁸

As an example of how the Coast Guard has worked with local governments, one may examine the California case *Graf v. San Diego Unified Port District*.⁷⁹ 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. The anchorage plan was adopted by the California Coastal Commission making the plan part of the Port District’s certified coastal plan. However, the Coast Guard had already designated the entire San Diego Bay a federal anchorage. To avoid conflict between state and federal regulations, the California Coastal Commission requested the Coast Guard to actually modify its regulations of the Bay so that state and federal regulations could co-exist. The Coast Guard willingly complied and went through the Federal rule-making process to make the appropriate changes.

The Port Commissioners then adopted local ordinances creating a smaller anchorage in an area known as Fort Emory Cove and made it a crime to remain anchored there beyond a designated time period. Graf, the owner of a boat anchored in Fort Emory Cove and founder of the Fort Emory Cove Boat Owners Association was given notice (by posting on his boat) that he was in violation of the

⁷⁵ *Florida Lime and Avocado Growers, Inc. v. Paul*, 373 U.S. 132 (1963).

⁷⁶ *Hines v. Davidowitz*, 312 U.S. 52 (1941); *Pacific Gas and Electric Co. v. State Energy Commission*, 461 U.S. 190 (1983).

⁷⁷ Memorandum No. 16501 from the Chief, Maritime and International Law Division, U.S. Coast Guard to the Chief Counsel, U.S. Coast Guard (Dec. 30, 1992).

⁷⁸ 837 F. Supp. 1217, 1224 (S.D. Fla. 1993).

⁷⁹ *Graf v. San Diego Unified Port District*, 205 Cal. App. 3d 1189, 252 Cal. Rptr. 889. (1988).

new ordinance and that failure to weigh anchor and vacate the area could result in impoundment of his vessel, and he being charged with a criminal misdemeanor offense. Graf challenged the new ordinances as unconstitutional on several grounds but all of his arguments were dismissed by the court. Finding the ordinances constitutional, the court in *Graf v. San Diego Unified Port District*, 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.”⁸⁰

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

Preemption, like actual conflict, is founded on the supremacy of federal regulatory authority.⁸¹ Preemption occurs where Congress has demonstrated an intent to exclusively occupy an area of law.⁸² If such intent is contained in the language of the federal law at issue, the preemption is said to be express.⁸³ If, however, such intent is inferred from a pervasive legislative scheme dominating an entire field of law, the preemption is considered implied.⁸⁴ In either case, preemption will not occur unless it is determined to be “the clear and manifest purpose of Congress.”⁸⁵

The relatively sparse body of federal law concerning anchoring does not contain any 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.⁸⁶ The Coastal Zone Management

⁸⁰ *Id.* at 1193/891.

⁸¹ Several sources discuss state regulations that “actually conflict” with federal regulation as being “preempted.” While the result is the same in either case (invalid state regulation), the two concepts will be treated separately to minimize any confusion.

⁸² *Silkwood v. Kerr-McGee Corp.*, 465 U.S. 1074 (1984).

⁸³ See *Hillsborough County v. Florida Restaurant Association*, 603 So.2d 587, 590 (Fla. 2d DCA 1992).

⁸⁴ *Id.* at 590-91.

⁸⁵ See *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624, 633 (1973); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947); *Goodlin v. Medtronic, Inc.*, 167 F.3d 1367, 1371 (11th Cir. 1999).

⁸⁶ Memorandum No. 16501 from the Chief, Maritime and International Law Division, U.S. Coast Guard to the Chief Counsel, U.S. Coast Guard (Dec. 30, 1992) (reviewing an “extensive scheme of federal regulations over navigable waterways, maritime safety, and the marine environment” to include 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, *The Florida Bar, Maritime Law and Practice* 14.17 (2004).

Act of 1972,⁸⁷ and Executive Order 12612 of October 26, 1987⁸⁸ support that conclusion.

State authority to regulate anchorages was upheld against a preemption challenge in a landmark case originating in the Hawaiian Islands.⁸⁹ 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.⁹⁰ 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.⁹¹ The rules were adopted to provide for the safety of boaters and other recreational users of the area.⁹² The district court granted summary judgment in favor of the state, and the Preservation Society appealed.⁹³

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.⁹⁴ The United States Court of Appeals, Ninth Circuit, found neither argument persuasive.⁹⁵ 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.⁹⁶ The court was also unwilling to find implicit preemption based on what it deemed the "far from extensive" body of federal law affecting anchorages.⁹⁷ The court indicated that the Secretary of Transportation and

⁸⁷ 16 U.S.C. 1451 *et seq.* The Act encourages states to take an active role in managing their coastal zones through the development of extensive land and water use programs. *See also* Section I.B.3.

⁸⁸ The Executive Order directs federal agencies to avoid preemption of state action, except where state regulation clearly conflicts with agency action and policies.

⁸⁹ *Barber v. State of Hawaii*, 42 F.3d 1185 (9th Cir. 1994).

⁹⁰ *Id.* at 1189.

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.* at 1188.

⁹⁴ *Id.* at 1189.

⁹⁵ *Id.* at 1190.

⁹⁶ *See id.*

⁹⁷ *See id.* at 1192.

the Coast Guard had discretionary authority and “may act to affect all navigational issues, but they need not and they have not.”⁹⁸

As discussed above, it is unlikely that federal law expressly preempts local anchorage regulation. However, 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 Supreme Court would rule, especially if faced with different facts. For example, a stronger set of facts supporting preemption would have existed if the anchorage at issue was a Coast Guard designated “special anchorage area” or “anchorage grounds.” Referring to the California case of *Graf v. San Diego Unified Port District*, this very issue might have been a problem for the Port District if the Coast Guard had not changed its regulations regarding the San Diego Bay to allow concurrency between federal and local regulations.

3. Dormant Commerce Clause Impact on State Regulation of Anchorages

Even in the absence of direct conflict or express or implied preemption by Congress, the Commerce Clause may still restrict state laws that operate to excessively burden interstate commerce.⁹⁹ In this instance, the Commerce Clause is said to be “dormant” because Congress has not made active use of its power; however, courts interpret the Dormant Commerce Clause to limit states’ ability to regulate interstate commerce.¹⁰⁰ In order to evaluate whether state regulation violates the Dormant Commerce Clause, courts have followed a fact-based balancing test that weighs the local benefits of the state regulation against the burden on interstate commerce.¹⁰¹ To determine the local benefits, courts evaluate whether the state had a rational basis, such as safety, for enacting the law.¹⁰² Courts then assess the local need for the law against the burden of the law on interstate commerce.¹⁰³ Finally, courts also evaluate whether the state law is evenhanded in its application or whether it applies differently to intrastate commerce than to interstate commerce.¹⁰⁴

⁹⁸ *Id.* at 1193.

⁹⁹ See Daniel A. Farber et al., *Constitutional Law Themes for the Constitution’s Third Century* 863 (1993).

¹⁰⁰ See *id.*

¹⁰¹ See *id.* at 881.

¹⁰² See *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520 (1959).

¹⁰³ See *id.*

¹⁰⁴ See *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970).

In addition to not finding direct conflict or express or implied preemption with federal law, the Ninth Circuit in *Barber* refused to invalidate the state regulation based on the Dormant Commerce Clause.¹⁰⁵ The court found that the state's interest in the regulation was substantial, while the burden on interstate commerce was minor.¹⁰⁶ The court was swayed by evidence of the substantial threat to public safety that the regulations were designed to avoid.¹⁰⁷ The court evaluated the direct and indirect impact on interstate commerce of Hawaii's anchoring and mooring regulations.¹⁰⁸ First, the court determined that there was no direct regulation of interstate commerce because the regulation did not specifically target interstate vessels.¹⁰⁹ The court next explained that, even if there was an indirect impact on interstate commerce, it would be per se invalid if it was applied in a discriminatory manner.¹¹⁰ The court concluded, however, that the fee differentials prescribed by the regulations were not discriminatory toward out-of-state vessels.¹¹¹ Finding no discriminatory impact, the court applied a balancing test to determine whether any indirect impact on interstate commerce outweighed the state's interest.¹¹² 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.¹¹³ Therefore, the court concluded that the mooring regulation was not a violation of the Commerce Clause.¹¹⁴

Overall, the results in this case indicate that local regulation of anchoring is not preempted by federal law. Judicial decisions addressing the various enactments have consistently indicated that Congress has not occupied the field, thereby refusing to find an implied intent to preempt state regulation.¹¹⁵ The posi-

¹⁰⁵ See *Barber v. State of Hawaii*, 42 F.3d 1185, 1195 (9th Cir. 1994).

¹⁰⁶ See *id.*

¹⁰⁷ See *id.* These threats included the substantial threat to public safety by the mooring activities of recreational boaters on heavily traveled seaways. See *id.*

¹⁰⁸ See *id.* at 1194-95 (citing *Oregon Waste Sys., Inc. v. Department of Env'tl. Quality*, 114 S.Ct. 1345, 1350 (1994)).

¹⁰⁹ *Id.* at 1194.

¹¹⁰ *Id.* at 1194-95.

¹¹¹ *Id.* at 1195 (citing *Hawaii Boating Ass'n v. Water Transp. Facilities Div., Dep't of Transp.*, 651 F.2d 661, 666 (9th Cir. 1981) (holding that fee differentials serve to equalize increased costs for accommodation of nonresidents)).

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Bass River Associates v. Mayor of Bass River Township*, 743 F.2d 159 (3d Cir. 1984) (46 U.S.C.A. 12109);

tion of the Coast Guard is that “[u]p to this point, Congress has not demonstrated an express or implied intent to preempt state regulation of anchorages.”¹¹⁶ On the other hand, the Dormant Commerce Clause may generate different results depending on the type of state or local regulation involved and its impact on interstate commerce.

4. Other State Approaches to Local Regulation of Anchoring

Coastal states vary markedly in their approach to local regulation of vessel navigation, but most seek to balance the state and local interest to some extent. The approaches of these states range along a continuum from considerable local regulatory discretion to complete state preemption of local authority. In the most common approach, the state preempts local regulatory authority and then returns it upon petition by the local government, usually after review for policy consistency by the state agency charged with boating management. The following paragraphs contain examples from across the continuum.¹¹⁷

Maine gives local governments broad authority to regulate mooring in their harbors,¹¹⁸ but does not otherwise provide 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,¹¹⁹ and water surface use ordinances must be approved by their Commissioner of Natural Resources prior to adoption by local governments.¹²⁰ In Connecticut, local governments can pass any local law or regulation dealing with the operation of boats within its territorial limits upon submission to the Commissioner of Environmental Protection. Such regulation will take effect in 60 days as long as it is not disapproved by the commissioner.¹²¹ California allows local governments to pass laws and rules relating to boating but requires that the local government submit the new law to the state department 30 days prior to the local law going into effect.¹²²

Chevron U.S.A., Inc. v. Hammond, 726 F.2d 483 (9th Cir. 1984) (Ports and Waterways Safety Act); *Beveridge v. Lewis*, 939 F.2d 859 (9th Cir. 1991) (Ports and Waterways Safety Act); *Murphy v. Department of Natural Resources*, 837 F.Supp. 1217 (S.D.Fla. 1993) (Submerged Lands Act); *Hawaiian Navigable Waters Preservation Soc. v. State of Hawaii*, 823 F.Supp. 766 (D. Haw. 1993) (Submerged Lands Act), *aff'd* 42 F.3d 1185 (9th Cir. 1994).

¹¹⁶ Memorandum No. 16501 from the Chief, Maritime and International Law Division, U.S. Coast Guard to the Chief Counsel, U.S. Coast Guard (Dec. 30, 1992); Memorandum No. 16500 from the Commandant, U.S. Coast Guard to the Commander, Thirteenth Coast Guard District (Jan. 19, 1993).

¹¹⁷ For additional information and copies of the state laws reference, please see the appendix document “Comparative Boating Law Summary.”

¹¹⁸ MAINE REV. STAT. ANN. tit. 38, § 7 (2009).

¹¹⁹ MINN. STAT. § 86B-201 (2010). *See also*, <https://www.revisor.mn.gov/statutes/?id=86B>, (last visited, February, 2011).

¹²⁰ MINN. STAT. § 86B-205 (2010). *See also*, <https://www.revisor.mn.gov/statutes/?id=86B>, (last visited, February, 2011)

¹²¹ CONN. GEN. STAT. ch. 268, §15-136 (2010).

¹²² CAL. HARB. & NAV. CODE § 660 (2010). A California attorney general's opinion states that local governments

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;¹²³ however, these ordinances must be submitted to the state for review as to uniformity, enforcement, and “the local situation” prior to final adoption.¹²⁴ The state issues an advisory report prior to adoption where after the state and certain organizations have a right to object and initiate a hearing process.¹²⁵ Wisconsin explicitly allows local regulation to protect natural resource values.¹²⁶ Both Connecticut and Wisconsin consider the consistency among local regulations of water bodies with shared jurisdiction.¹²⁷ Delaware, Rhode Island, Mississippi, and Georgia allow local governments to petition the state to allow local regulations, often with a need to demonstrate why the special regulation is necessary and delineating criteria for state review of proposed ordinances.¹²⁸

Some states simply prohibit local governments from having regulatory authority over boating, with very limited exceptions. Louisiana prohibits local boating regulations except for certain speed restrictions.¹²⁹ Maryland allows no regulations inconsistent with state regulations.¹³⁰ North Carolina and Texas grant no authority to local government.¹³¹ North Carolina does, however, authorize creation of local advisory committees to address local concerns.¹³²

III. State and Local Authority over Anchoring and Anchorages

This section discusses the organic sources of state jurisdiction over activities on lands underlying navigable waters and the Florida statutes that are relevant to anchoring. This section also reviews Florida laws that restrict local regulation of anchoring.

need not supply the state with the justification for proposed ordinances. 74 Op.Atty.Gen. 174, 9-26-91.

¹²³ WIS. STAT. § 30.77 (2009).

¹²⁴ WIS. STAT. § 30.77(3)(d) (2009).

¹²⁵ WIS. STAT. § 30.77(3)(dm)2g (2009).

¹²⁶ WIS. STAT. § 30.77 (2009).

¹²⁷ CONN. GEN. STAT. ch. 268, §15-136(b) (2011); WIS. STAT. § 30.77(3) (2009).

¹²⁸ DEL. CODE ANN. ch. 23, § 2121 (2011); R.I. GEN. LAWS § 46-22-14 (2010). Rhode Island’s stated boating policy includes promoting uniformity of state regulations. R.I. GEN. LAWS § 46-22-1 (2010). MISS. CODE ANN. § 59-21-129 (2010). GA. CODE ANN. § 52-7-21 (2010).

¹²⁹ LA. REV. STAT. ANN. tit. 34, § 851.27 (2010).

¹³⁰ MD. CODE ANN., NAT. RES. § 8-704f (2010).

¹³¹ TEX. PARKS & WILD. CODE ANN. § 31.091 (2010); N.C. GEN. STAT. §§ 75A-1 and 75A-15 (2010).

¹³² N.C. GEN. STAT. § 75A-26 (2010).

A. The Proprietary and Regulatory Source of State Authority

Florida's authority to regulate activities on the navigable waters has two fundamental foundations. The first is the public trust doctrine, under which the state is vested with the ownership of the beds of all navigable waters. Under this doctrine the state has a special duty to protect the trust resources for the benefit of the public. Second, the state's inherent police power provides authority to regulate a broad range of activities.

1. The State's Proprietary Interest in Submerged Lands and the Public Trust Doctrine

Under the public trust doctrine, the state of Florida gained title to the beds of all navigable waters in the state upon gaining statehood.¹³³ These lands must be managed for the use and benefit of the public.¹³⁴ Management responsibility has been delegated to the Board of Trustees of the Internal Improvement Trust Fund (Trustees).¹³⁵ Because it is acting in a proprietary capacity, the state has greater authority to restrict the use of both the submerged lands and overlying waters than would be the case on private lands.¹³⁶ The public trust doctrine may also serve as a limitation on the power of the trustees.¹³⁷

It should be noted, however, that there are 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. Augustine¹³⁸ and the City of Ft. Myers owns to the centerline of the

¹³³ *Phillips Petroleum v. Mississippi*, 484 U.S. 469 (1988); *Coastal Petroleum Co. v. American Cyanamid Co.*, 492 So.2d 339 (Fla. 1986). The federal Submerged Lands Act (SLA) confirmed state ownership. See 43 U.S.C.A. 1301 *et seq.* (West 2005); see Section I.B.1.

¹³⁴ 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*, 87 Fl. Bar J. (June, 1996).

¹³⁵ See Fla. Stat. 253.03(1) (2005).

¹³⁶ Without owning the submerged lands under navigable waters, an individual must obtain both permission to use the submerged land and an environmental permit for any activities involving submerged land. See Fla. Stat. 373.422 (2005); Fla. Admin. Code 40E-4.041 (2005); Fla. Admin. Code 18-21.005 (2005).

¹³⁷ See *Coastal Petroleum Co. v. American Cyanamid Co.*, 492 So.2d 339 (Fla. 1986).

¹³⁸ See Laws of Florida (Vol. II) Chapter 6769 – (No. 349); (1913) at 942. The Title of the Act states; “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 which states: “In 1913, the Florida Legislature granted title to the submerged lands within the City boundaries to the City. TAB 17; TAB 18. 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 activities.” *Id.* § 7-81(b). According to Article IV, neither the Board nor the Commission contributes to the negotia-

Caloosahatchee River. Whether these submerged lands were transferred subject to the public trust doctrine has not been addressed.

Because anchoring is viewed as a right incidental to the right of navigation, and navigation has been traditionally protected as a trust purpose,¹³⁹ efforts by the state or local governments to unduly restrict that right could potentially be viewed as a breach of the state's trust obligations. No cases have been found in Florida or elsewhere that articulate the trust doctrine as a limitation on state or local authority to regulate anchoring or mooring. The right to navigate must be balanced against other trust purposes.¹⁴⁰ Moreover, the Trustees have been accorded considerable discretion in their decisions concerning the management of trust lands.¹⁴¹

2. The State's Inherent Police Power

States have an inherent police power to protect the public's health, safety, and welfare through regulation.¹⁴² As political subdivisions of the state,¹⁴³ local governments in Florida share the police power,¹⁴⁴ including the authority to regulate anchorages. Local regulations affecting navigation have long been

tions 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).

¹³⁹ 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*, 42 So. 353 (Fla. 1908); *State v. Black River Phosphate Co.*, 13 So. 640-46 (Fla. 1893).

¹⁴⁰ Other express trust purposes include commerce, fishing, bathing and swimming. See Slade, *supra* note 11, at 170-73. More recently, the public trust doctrine has been viewed as protective of environmental values of trust lands. See *Marks v. Whitney*, 491 P.2d 374 (Cal. 1971); Slade at 173-74. For an argument in favor of balancing navigation with other trust purposes, see 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). See also, *St. Croix Waterway Ass'n v. Meyer*, 178 F.3d 515, 1999 WL 153030 (8th Cir. 1999) (navigation can be regulated under the public trust doctrine to protect public waters and the public).

¹⁴¹ See *Hayes v. Bowman*, 91 So. 2d 795, 799 (Fla. 1957).

¹⁴² See *Florida East Coast Ry. Co. v. City of Miami*, 79 So. 682, 685 (Fla. 1975); 16A Am. Jur. 2D, Constitutional Law 366 (1979).

¹⁴³ Fla. Const. art. 8, sect. 1(a).

¹⁴⁴ See *Amos v. Mathews*, 126 So. 308 (1930). The case law of Florida is clear that the Constitution of Florida is a limitation on the power of the state government. *Id.* at 311. The court in *Amos* wrote, "it should be further borne in mind that our State Constitution is not a grant of power to the Legislature, but is voluntarily imposed by the people themselves upon their inherent lawmaking power, exercised under our Constitution through the Legislature, which power would otherwise be absolute save as it transcended the powers granted by the state to the federal government." *Id.* However, the Florida Supreme Court has steadfastly held to the belief that state and local governments owe a duty of care to the citizens of the state to exercise its police power to protect the health, safety and welfare of citizens when necessary. See *Florida East Coast Ry. Co. v. City of Miami*, 79 So. 682, 685 (Fla. 1975).

upheld.¹⁴⁵ The United States Supreme Court in 1858 addressed whether a local government could prohibit vessels from remaining in a “harbor thoroughfare” or require those vessels to display a light after dark.¹⁴⁶ The Court called such regulations “necessary and indispensable in every commercial port, for the convenience and safety of commerce.”¹⁴⁷ 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.”¹⁴⁸

Local governments may only invoke their police power to regulate anchorages, however, if the regulation is necessary to protect the public health, safety and welfare. Anyone challenging such an ordinance has the burden of proving it is not even “fairly debatable” that the ordinance bears a rational relationship to a legitimate objective of the police power.¹⁴⁹ Challenges of that nature are thus rarely successful. In *Dennis v. Key West*, however, the court struck down a local regulation that prohibited “live-aboard” vessels that were not moored or docked within a local yacht club or public dock.¹⁵⁰ The Florida Third District Court of Appeals ruled that the regulation was an abuse of police power because “there was no discernible relationship between the regulation and the health, safety, or welfare of the general populace.”¹⁵¹ The court upheld two sections of the ordinance, however, that required approved sanitation equipment on all “live-aboard” vessels because of their clear relationship to public health.¹⁵² No other courts have reached this conclusion, and in a subsequent decision, the same court upheld a ban on “live-aboard” vessels in the City of Miami.¹⁵³ In *Dozier v. City of Miami*, the court found from testimony before the City Commission and from the language of the ordinance that it was designed to address problems of water pol-

¹⁴⁵ See *Mobile County v. Kimball*, 102 U.S. 691 (1881); *Huse v. Glover*, 119 U.S. 5453 (1886).

¹⁴⁶ 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).

¹⁴⁷ See *id.*

¹⁴⁸ See *id.* However, the Court upheld the regulations only after concluding that the regulations were not in conflict with any federal laws.

¹⁴⁹ See *Nance v. Town of Indialantic*, 419 So.2d 1041 (Fla. 1982); *Dade County v. United Resources*, 374 So.2d 1046 (Fla. 3d DCA 1979).

¹⁵⁰ See 381 So. 2d 312, 315 (Fla. 3rd DCA 1980).

¹⁵¹ See *id.* at 315.

¹⁵² See *id.*

¹⁵³ See *Dozier v. City of Miami*, 639 So.2d 167 (Fla. 3d DCA 1994).

lution, navigational hazards and visual intrusion, thus justifying regulation under the police power.¹⁵⁴

B. Statutory Basis for Regulating Anchoring in Florida

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

Under Chapter 253, Florida Statutes, the Governor and Cabinet, sitting as the Board of Trustees of the Internal Improvement Trust Fund,¹⁵⁵ hold sovereignty submerged lands in trust for the public.¹⁵⁶ To the extent anchoring activities are conducted in navigable waters over sovereignty submerged lands, the Trustees are vested with general authority to regulate the activity, subject perhaps to the extent that anchoring is an incidental right to the right of navigation protected by the Public Trust Doctrine.¹⁵⁷ Chapter 253, however, provides more specific and limited regulatory authority.

Section 253.03(7)(b), Florida Statutes, authorizes the 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, pump out 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.*¹⁵⁸

The Trustees have not exercised this statutory authority to adopt rules regulating anchoring. The Department of Environmental Protection (DEP), which staffs the Trustees,¹⁵⁹ began a rule-making process in 1994. That process was held

¹⁵⁴ See *id.* at 169.

¹⁵⁵ The Board of Trustees is comprised of the Governor, the Attorney General, the Commissioner of Agriculture, and the Chief Financial Officer. Fla. Stat. ch. 253.02(1) (2005).

¹⁵⁶ See Fla. Stat. 253.03(1) (2005). For a discussion of the “public trust doctrine” see Section III.A.1 of this report.

¹⁵⁷ In some instances, submerged lands may have been alienated, or artificially created, and they may be subject to non-state ownership.

¹⁵⁸ See Fla. Stat. 253.03(7)(b) (2010).

¹⁵⁹ DEP and the water management districts are responsible for “all staff duties and functions related to the acquisition, administration, and disposition of state lands,” held by the Board of Trustees. Fla. Stat. ch. 253.002 (2005); Fla. Admin. Code 18-21.002(1) (2009). In addition, DEP and the water management districts are responsible for environmental permitting and water quality protection on sovereign lands. Fla. Stat. 373.414 (2005).

in abeyance pending implementation of an administrative effort in Southwest Florida to develop a non-regulatory solution to anchorage management;¹⁶⁰ this regulatory effort has not been resumed.

2. State Authority to Allow Local Anchorage Management

While no rules have been promulgated specifically regulating anchoring or anchorages, the Trustees require some form of approval for any “activity” on sovereignty submerged lands.¹⁶¹ The term “activity” is defined to include the construction of mooring pilings or docks.¹⁶² 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.”¹⁶³ Rule 18-21 provides a framework for various forms of consent to conduct activities on sovereignty submerged lands.¹⁶⁴ The relevant forms of consent include consent by rule,¹⁶⁵ letter of consent,¹⁶⁶ and a lease,¹⁶⁷ each applicable under different circumstances. Consent by rule allows use of sovereign 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. A letter of consent is required for docks too large to qualify for consent by rule and minimum-size public piers, boat ramps, and channels. 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.¹⁶⁸ Thus, both a commercial marina and a municipal mooring field in waters above sovereignty lands would require a lease from the state.¹⁶⁹

¹⁶⁰ See Section IV A of this report.

¹⁶¹ See Fla. Admin. Code 18-21.005(1) (2009).

¹⁶² See Fla. Admin. Code 18-21.003(2) (2009).

¹⁶³ See Fla. Admin. Code 18-21.003(16) (2009).

¹⁶⁴ See Fla. Admin. Code 18-21.005(1) (2009). For activities conducted in an aquatic preserve, Rule 18-20 is also applicable.

¹⁶⁵ See Fla. Admin. Code 18-21.005(1)(b) (2009)

¹⁶⁶ See Fla. Admin. Code 18-21.005(1)(c) (2009)

¹⁶⁷ See Fla. Admin. Code 18-21.005(1)(d) (2009).

¹⁶⁸ See Fla. Admin. Code 18-21.005(1)(d) (2009).

¹⁶⁹ See *id.* It is also conceivable that a mooring field could be considered a “marina” for purposes of management by the Trustees. The term “marina” is administratively defined as “a small craft harbor complex used primarily for recreational boat mooring or storage.” See Fla. Admin. Code 18-21.003(36) (2009). Mooring fields are also subject to regulation under the state’s Environmental Resource Permit (ERP) system. Fla. Stat. 373.413 (2005). In 2005 the Legislature required DEP to develop a rule to allow the installation of mooring fields less than 50,000 square feet pursuant to a general permit. Fla. Stat. 373.118(4) (2005). The Florida Department of

3. Chapter 327, Florida Statutes: State Preemption of Local Anchorage Regulation

Chapter 327 of the Florida Statutes, known as the “Florida Vessel Safety Law,”¹⁷⁰ is administered by the Florida Fish and Wildlife Conservation Commission (FWC). This law primarily relates to various safety considerations, such as safe operation, accident procedures, personal water craft requirements, uniform waterway markings and restrictions on local government regulation of boating-related activities including anchoring.

a. A Short History of Chapter 327, Florida Statutes. Chapter 327, Florida’s vessel safety law, was enacted in 1959,¹⁷¹ at a time when the combination of surface water use, resource demand and number of vessels were minimal. The statute was originally enacted as the “Florida motorboat registration and certification act,”¹⁷² and was prompted by the federal Boating Act of 1958. The Florida law has been substantially revised on several occasions and amended frequently since then. Originally codified as Chapter 371, Florida Statutes, it was re-codified as Chapter 327 in 1981. 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” and contained a section specific to vessel registration.¹⁷³

The history of changes to Florida’s boating law has resulted in general policy confusion and the statute retains vestiges of repealed provisions and sometimes obtuse terminology. Despite an absence of clarity in the statute, there has been remarkably little case law interpreting Chapter 327.¹⁷⁴ However, in 2009, the Florida Legislature made several important changes to the statutory framework of Chapter 327 which consolidated separate provisions into Section 327.60, now titled, “Local regulations; limitations” and which also specifically addresses the issue of anchoring in Florida.¹⁷⁵

Environmental Protection held workshops to develop proposed rule 62-341.425 but such rule has not been adopted. Few mooring fields, however, will meet the size limit.

¹⁷⁰ See Fla. Stat. 327.01.

¹⁷¹ See Fla. Stat. 327. It was originally passed as chapter 371 in 1959 by Laws of Florida ch. 59-399.

¹⁷² Laws of Florida §1, ch 59-399.

¹⁷³ See Laws of Florida §5, ch. 99-289, Laws of Fla. (amending Fla. Stat. 327.01 to read: This chapter shall be known as the “Florida Vessel ~~Registration and~~ Safety Law.”); See Laws of Florida §1, ch. 99-289 (creating “Chapter 328, Florida Statutes, consisting of ss. 328.01 through 328.30, Florida Statutes, is designated as part I of said chapter and entitled ‘Vessels; title certificates; liens.’”).

¹⁷⁴ 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.

¹⁷⁵ See Fla. Stat. 327.60 (2009).

Prior to 2009, Chapter 327 contained two statutes that preserved and limited the regulatory authority of local governments with regards to resident vessels and the act of anchoring or mooring a vessel.¹⁷⁶ Those sections were 327.22 and 327.60.

Section 327.22(1) regulated the operation and equipment of vessels.¹⁷⁷ That section preserved a local government's authority to regulate "resident vessels" where the county or municipality spends money on boating-related activities such as the patrol and maintenance of water bodies.¹⁷⁸ 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."¹⁷⁹ 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 that provision for local regulation of anchorages was unclear. One interpretation of the old statute was that it could be read to approve comprehensive local government regulation of resident vessels, including limitations on anchoring. Local enforcement authorities would have had to distinguish resident from non-resident vessels. Everything else in this section related to safety or the protection of property¹⁸⁰ and the only thing it specifically authorized was the enforcement of restrictions to protect property in properly marked restricted areas.

¹⁷⁶ See F.S.A 327.22 Repealed by Laws 2009, c.2009-86, §61, eff. Oct. 1, 2009. and F.S. 327.60 Amended by Laws 2009, c.2009-86, eff. Oct. 1, 2009.

¹⁷⁷ See Fla. Stat. 327.22 (2005).

¹⁷⁸ See Fla. Stat. 327.22(1) (2005).

¹⁷⁹ See *City of Winter Park v. Jones*, 392 So. 2d 568, 572 (1980).

¹⁸⁰ See Fla. Stat. 327 *et seq.* (title of statute is Florida Vessel Safety Law and majority of provisions deal with safe vessel operation).

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 allowed the local government to regulate anchoring of any vessel located within a mooring field.¹⁸¹ Additionally, the prior version of Section 327.60(2) contained a provision regarding mooring and anchoring which caused 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. New Changes to Chapter 327, Fla. Stats. The previous edition of *Anchoring Away* focused on Sections 327.22 and 327.60 as the two main statutes dealing with local governments' authority to regulate anchoring. When the changes occurred to these two statutes in 2009, the Legislature did not simply do away with those regulations. Even though Section 327.22 was repealed, the core concept of local government regulation of vessels resurfaced in the new 2009 amendment to Section 327.60. Section 327.60 was revamped in a manner that 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 water 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;*

¹⁸¹ See Laws of Fla. Ch. 2009-86 (2009).

- 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);***
 - 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. 327.02.¹⁸²*

Much of the language of this statute originated from 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 authority to regulate certain boating activities. Local regulations and ordinances that conflict 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 and this would include anchoring ordinances.¹⁸³

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

¹⁸² Fla. Stat. 327.60(2) (2005), 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.

¹⁸³ The creation of mooring fields by local governments is contemplated in part by Sections 373.118 “*General Permits; delegation*” and 327.40 “*Uniform Waterway Markers*”, administered by the Florida Fish and Wildlife Conservation Commission and subject to Chapter 120, the Florida Administrative Procedure Act. A discussion of Florida’s Mooring Field Pilot program is below.

The definition of “live-aboard” vessel was tweaked slightly by an amendment in 2009. As a result, Chapter 327 now defines a “live-aboard” vessel as any vessel “used solely as a residence **and not for navigation** (emphasis added).”¹⁸⁴ The definition also added that a “live aboard” vessel is any vessel for which a declaration of domicile has been filed pursuant to Section 222.17, Florida Statutes and retained the language making any vessel represented as a place of business, commercial or professional enterprise a “live aboard” vessel as well.¹⁸⁵ The definition expressly excludes commercial fishing boats.¹⁸⁶

This definition seems straight forward enough. But experienced boaters and local government authorities know that some vessels might not fit so neatly in that definition and sometimes a vessel that might claim to be something different is obviously being lived aboard. A helpful opinion by the Florida Attorney General has concluded that a vessel may qualify as a “live-aboard” if it can be proven with objective facts that the operator intends to use the vessel as a legal residence.¹⁸⁷ In addition, Section 327.60(3) includes the term “floating structures” as also being subject to local government regulation in the same manner as “live-aboard” vessels.

Some of the impetus for the recent amendments to Chapter 327 appears to stem from a growing concern in the Legislature and from the Florida Fish and Wildlife Conservation Commission (FWC) that unregulated mooring and anchoring lead to various problems at the local level.¹⁸⁸ 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:

Currently, 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;

¹⁸⁴ See Fla. Stat. 327.02(17)(a) (2010); See also, Laws of Fla., Ch. 2009-86, Sec. 6, eff. July, 1, 2009, for language added and deleted by amendment. See also, *Brault v. Florida*, Case No. 89-0075 AC (A) 02 (Palm Beach County App. Ct. 1991) (vessel found to be a live-aboard because it was where the owner kept his clothing, cooked food, slept, and where his dog lived).

¹⁸⁵ See Fla. Stat. 327.02(17)(b) (2010).

¹⁸⁶ See Fla. Stat. 327.02(17) (2010).

¹⁸⁷ See Fla. AGO 85-45, 1985 WL 190102 (Fla.A.G.)

¹⁸⁸ See Florida House of Representatives Staff Analysis; Bill No. 1361, March 3rd, 2010.

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

*Confusion with the interpretation of statutes that provide jurisdictional guidance for local governments.*¹⁸⁹

The same House bill, which ultimately died in Committee, would have also amended the current Section 327.60. The proposed bill would have deleted Section 327.60(2)(f) altogether and changed Section 327.60(3) back to its previous language prior to the 2009 changes.¹⁹⁰ The Staff Analysis report states that the effect of these proposed changes would have clarified 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.”¹⁹¹ This proposal does not appear to change in any way 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 to add “...used solely as a residence **and not for navigation**” in 2009. The new phrase, “and not for navigation” makes whether or not a vessel is engaged in navigation the key term for defining a vessel’s status. In other words, if a “live-aboard” vessel is engaged in navigation, then local governments may not regulate the anchoring of this vessel. This new phrase will raise questions for boaters and local governments about what exactly is meant by “in navigation.” If anchoring is considered a right incidental to ordinary navigation and therefore protected by the public trust doctrine, then the question remains whether or not a vessel at anchor is “in navigation.”

In 2007, the City of Marco Island, found itself in court litigating this very question while defending its own anchoring ordinance that applied to non-live-aboard vessels in certain areas.¹⁹² The City had enacted an ordinance that specifi-

¹⁸⁹ See Florida House of Representatives Staff Analysis; Bill No. 1361, March 3rd, 2010 at Page 2; (Section 1A. Effect of proposed changes: Current Situation).

¹⁹⁰ See 2010 FL H.B. 1361 (NS), 1361 (NS), 2010 Florida House Bill No. 1361, (Mar 02, 2010), VERSION: Introduced, PROPOSED ACTION: Amended.

¹⁹¹ See Florida House of Representatives Staff Analysis; Bill No. 1361, March 3rd, 2010, Page 3; (Section 1A. Effect of proposed changes)

¹⁹² See, *City of Marco Island v. Dumas*, 13 so. 3d 108 (2009). After the City of Marco Island’s ordinance was

cally prohibited vessels from anchoring within 300 ft. of shore for more than twelve consecutive hours. In January 2007, the owner of a 42-foot motor yacht intentionally violated the ordinance in order to challenge its constitutionality.¹⁹³ In subsequent legal proceedings the City defended its ordinance arguing the term “in navigation” as stated in Section 327.60(2) (*prior to the 2009 amendments discussed above*) does not include anchoring. The City’s logic was that any vessel at anchor anywhere was subject to local government regulation and 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 out of the ten arguments that the ordinance was unconstitutional. For one, the court found that the ordinance violated the express prohibition of Section 327.60(2) (*prior to the 2009 amendment above*). Second, the court also found that because there was an express prohibition in Section 327.60(2) that the ordinance was an invalid exercise of the City’s police powers and third, that the ordinance violated Article 8, Section 2 of the Florida Constitution because it directly conflicted with State law. The court’s fourth 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 to regulate, and the prohibition would be unnecessary. [Citations omitted] A reason-

found unconstitutional at the trial court level in Collier County Court, the City appealed this 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 which the Circuit Court ruled the City had not. The City appealed this ruling to the 2nd DCA and the issue was resolved in the City’s favor in May, 2009. However, the City chose not to continue its appeal in light of the new amendments to Chapter 327 in 2009 discussed above which would eventually preempt the City’s ordinance.

¹⁹³ Kelly Farrell, *Marco Island appeals to higher court on city’s anchor ordinance dismissal* (Feb. 12, 2009, 2:19 PM), <http://www.marconews.com/news/2009/feb/12/marco-island-appeals-higher-court-citys-anchor-ord/>.

*able construction of this statute, and the only construction that gives it meaning, is that "in navigation" includes anchoring.*¹⁹⁴

Because an appellate court never reviewed the merits of the County Court's analysis, this County Court Order may only serve as precedent within Collier County for defining the term "in navigation." However, this Order's treatment of the phrase "in navigation" illustrates the 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 the 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.¹⁹⁵ The same Attorney General opinion also noted that such a right does not include the right to anchor indefinitely.¹⁹⁶ 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.*¹⁹⁷

A section containing comments from FWC regarding the term "in navigation" was included as part of the House Staff Analysis report for proposed Bill 1361 mentioned above.¹⁹⁸ 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 incapable of transportation or movement."¹⁹⁹ The comments go on to explain

¹⁹⁴ 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).

¹⁹⁵ See Fla. AGO 85-45, 1985 WL 190102 (Fla.A.G.).

¹⁹⁶ See *id.* (citing *Hall v. Wantz*, 57 N.W.2d 462 (Mich. 1953)). A similar concept was incorporated into the Law of the Sea to define the "right of innocent passage" that ships of all nations enjoy when navigating through territorial waters. See, United Nations Convention on the Law of the Sea (UNCLOS), Section 3. Navigation under the "right of innocent passage" must be "continuous and expeditious." It "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." *Id.*, Art. 18.

¹⁹⁷ Memorandum No. 16612 from the District Legal Officer, U.S. Coast Guard to the Chief, Marine Safety Division, U.S. Coast Guard (Apr. 16, 1982).

¹⁹⁸ 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).

¹⁹⁹ See Florida House of Representatives Staff Analysis; Bill No. 1361, March 3rd, 2010, Page 5; (Section 1C.

under existing statutes, that local governments already have the authority to regulate floating structures being used as living space that are incapable of transport on the water.

It should be noted that the newly amended version of Section 327.60 (2) also addresses local government regulation of the operation and equipment of vessels. This section expressly prohibits local regulations applying to the Florida Intracoastal Waterway²⁰⁰ and further prohibits any local ordinances that conflict with any provisions of Chapter 327, its amendments or administrative rules adopted by State agencies.²⁰¹ To the extent that anchoring relates to the “operation” of a vessel, this suggests that anchoring within the Florida Intracoastal Waterway could not be regulated by local governments.²⁰²

The validity of local ordinances regulating anchoring may turn on whether a local ordinance’s definition of “live-aboard” vessel is broader than the statutory definition provided for in Section 327.02(17).²⁰³ Several local ordinances have attempted 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 forty-eight (48) hours aboard any vessel while it is moored or docked on the waters within the city.”²⁰⁴ This definition could be interpreted as being broader than the residency test established by Chapter 327, and thus sweep non “live-aboards” under its ambit. If so, the ordinance could be struck down as conflicting with Chapter 327.²⁰⁵

Drafting Issues or Other Comments: FWC offered the following comments).

²⁰⁰ See Fla. Stat. 327.60(2)(c)

²⁰¹ See Fla. Stat. 327.60(2)(h)

²⁰² However, the U.S. Army Corps of Engineers, Jacksonville District, issued a policy and guidance memorandum establishing setback restrictions for various activities within 100 feet of the channel of the Intracoastal Waterway (on the east and west coasts of Florida), Atlantic Intracoastal Waterway, and Okeechobee Waterway. The setback applies to moorings but does not expressly refer to anchoring. See Memorandum re: Setback Criterion, November 23, 1998, CESAJ-RD (1145) (on file with the authors). In addition, it is unlawful to operate or anchor a vessel “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.” Fla. Stat. 327.44 (2010).

²⁰³ A live-aboard vessel is “a) Any vessel used solely as a residence and not for navigation; or 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 222.17 . A commercial fishing boat is expressly excluded from the term “live-aboard vessel.” Fla. Stat. 327.02(17) (2009)

²⁰⁴ Code of Ordinances of the City of Sanibel, Florida, Chapter 74-136.

²⁰⁵ See Fla. Const. Art. VIII, Section 2(b). 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.

At least three Florida trial courts have addressed local restrictions on anchoring in the context of the statute prior to the 2009 amendments.²⁰⁶ In *State v. Hager*,²⁰⁷ the court upheld a 72-hour length-of-stay restriction, giving deference to 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 anchoring for more than 72 hours was "anchorage . . . in the exercise of the rights of navigation," because at the time of the decision, Section 327.60(2), Florida Statutes (1990) contained such language. The court stated "[n]o authority has been cited which establishes a legal time frame within which to determine when, if ever, an anchored vessel is under navigation."²⁰⁸ The court concluded that while 72 hours "may appear unnecessarily restrictive," the city's ordinance was valid.

In 1991, the court in *State v. Frick*,²⁰⁹ reached the opposite conclusion, refusing to define the rights of navigation in terms of an "arbitrary time period of 72 hours." The 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 striking the Riviera Beach ordinance, the court determined that innocent boaters, 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 these cases do not resolve the length-of-stay issue, it does appear 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.²¹⁰

Finally and most recently, in 2007, the City of Marco Island enacted an anchoring ordinance that prohibited any vessel from anchoring within 300 feet of

²⁰⁶ 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). The court concluded that Section 327.60(2), Florida Statutes, only preempts local government regulation of anchoring. *Id.*

²⁰⁷ See Case No. 90-19207MOANO (County Ct., Pinellas Co., Nov. 27, 1990).

²⁰⁸ See *id.*

²⁰⁹ See Case No. 91-6860 M0 A08 (May 28, 1991).

²¹⁰ See Letter from Mark P. Barnebey, Senior Assistant County Attorney, Manatee County to Commissioner Kathy Snell (June 5, 1992). A Lee County ordinance, which made it a criminal offense to use a boat as a live-aboard for greater than 72 hours, was struck down as unconstitutional because it was found to be "overbroad and not reasonably tailored to address its stated purpose." See *State v. Moncure*, Case No. 92CO-636, 637, 638, 639, 640, 641, 642, 643, 92MM-333, 92MM-552 (Feb. 20, 1992). The court noted several aspects of the ordinance which made "seemingly harmless actions illegal." For example, the ordinance did not require that anyone be on board the vessel at all times during the 72 hour period giving rise to a violation. Although the stated purpose was to prevent the unlawful discharge of waste, no actual discharge was required for a violation to occur. Further, the ordinance did not require that the 72 hour use of the vessel as a live-aboard occur at the same anchorage; nor did the ordinance allow for emergency situations (such as mechanical breakdown or a hurricane) which might require keeping a vessel in County waters for greater than 72 hours. Concluding that innocent boaters legitimately exercising the rights of navigation might also be subject to criminal penalties, the court struck the ordinance as overbroad.

shore. As discussed previously, a boat owner challenged the ordinance as unconstitutional on several grounds. The County Court hearing the case found that the City of Marco Island's ordinance was expressly prohibited by Section 327.60 and also ruled that the City's argument that a vessel at anchor was no longer "in navigation" was unpersuasive. The County Court, in fact, stated that a vessel at anchor can be "in navigation."

Admiralty jurisdiction extends to "vessels" that are "in navigation."²¹¹ In addition, the phrase has been used for the purpose of defining jurisdiction under statutes that provide remedies for injured maritime workers, the Jones Act,²¹² and the Longshore and Harbor Workers Compensation Act.²¹³ For purposes of admiralty and maritime law, a vessel must be "used or capable of being used as a means of transportation on water."²¹⁴ That use must be a "practical possibility" rather than "merely a theoretical one."²¹⁵ 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."²¹⁶ Such terminology, borrowed from Admiralty jurisprudence, could prove helpful if incorporated into Chapter 327.

In *Gonzalez v. United States Shipping Board Emergency Fleet Corp.*(1924),²¹⁷ the District Court asked the question, "What does navigation mean and when is a vessel navigated?" The court asked this question in the context of an admiralty claim of an employee of a shipping company who was injured on a vessel that was part of a "laid-up fleet" of "dead ships." The Court described the "laid-up fleet" as follows:

This particular fleet is about 130 ships, and is divided into sections, with a mother ship and about 25 on an average dead ships clustered around her, and on the ships of each section there is no steam or other evidence of possible navigation, except the steam which is piped over from the mother ship, from one boiler, for purposes apparently other than navigation, to wit, heat and light, and even on the mother ship the machinery, engines, boilers, and so forth are not in condition for present navigation

²¹¹ Thomas J. Schoenbaum, Admiralty and Maritime Law, §1-6 (4th ed. 2004); The Florida Bar, Maritime Law and Practice, §§1.4, 3.4 (4th ed. 2004).

²¹² 46 U.S.C. §§688, 801.

²¹³ 33 U.S.C. sect. 902(3)(G).

²¹⁴ 1 U.S.C. sect. 3.

²¹⁵ *Stewart v. Dutra Constr. Co.*, 543 U.S. 481, 125 S.Ct. 1118 (2005).

²¹⁶ George Rutherglen, Dead Ships, 30 J. Mar. L. & Com 677 (1999).

²¹⁷ See *Gonzalez v. United States Shipping Board Emergency Fleet Corp.* 3 F.2d 168; 1924 U.S. Dist. LEXIS 1249 (November 14, 1924).

*without a considerable amount of delay and extra work in assembling the same, and then only after the necessary inspection.*²¹⁸

The plaintiff, who attempted to define himself as a “seaman” for purposes of asserting admiralty jurisdiction argued that the vessel he was employed on was unseaworthy and therefore the company owning the ship was liable for his injuries under Admiralty jurisdiction. However, the court determined that because the vessels in question were only *capable* of navigation and not actually “in navigation,” they could not be considered vessels and therefore the plaintiff could not be considered a seaman. But most importantly for this analysis, the Court specifically stated that “navigation” can include a period when a vessel is at anchor. The Court explained:

*What does “navigation” mean, and when is a vessel navigated? It has been said a ship is navigating when she is able to proceed under her own power. [Citation omitted] In some cases the vessel may be customarily moved by outside power. [Citation omitted] It also includes a period when the ship is not in motion, as for instance when she is at anchor. Hayn v. Culliford, 3 C.P.D. 410, page 417. Or being repaired. Adams v. U.S. (D.C.) 281 F. 895. It might not include moving a vessel from one place to another in an unfinished state for the sole purpose of completing such vessel, but it would include any moving of a vessel which was for the purpose of profit. [Citation omitted] The words are of relative meaning, to be determined by surrounding facts and circumstances. G. R. Booth, 171 U.S. 450, 19 S. Ct. 9, 43 L. Ed. 234; The Miletus, 17 Fed. Cas. p. 288.*²¹⁹

In another case dealing with the issue of whether a vessel of at least 100 tons lying at anchor for more than two years can be deemed in navigation for purposes of Admiralty jurisdiction, the Ninth Circuit Court of Appeals stated the following in 1943:²²⁰

*The Kohala was anchored by two bow anchors and one stern anchor in the Bay of Santa Monica, approximately one mile west of Redondo Beach, California. She was then at sea. United States v. Newark Meadows Company, C.C., 173 F. 426, 428; United States v. Ross, 27 Fed.Cas. 899, 900, No. 16,196. As so anchored by her commander, she was enabled to rise and fall on the slack of her anchor chains with the rise and fall of the tide, and also within the slack of the chains to move from right to left through the water with the varying wind and tidal and other currents of the harbor.*²²¹

²¹⁸ See *id.*

²¹⁹ See *id.*

²²⁰ See *UNITED STATES v. MONSTAD et al.*, 134 F.2d 986 (1943).

²²¹ See *id.*

This vessel had essentially been converted to an anchored fishing barge and retained its steering apparatus and hull lines. A pump was also operating and storage was made for fishing gear and tackle for the fishermen who came aboard. Because of these facts, and after consulting a Webster's dictionary to help define "navigating" the Court stated;

*Here, within the dictionary definition, she was managed by those in command of the barge so that she was "directed" and "controlled" in the passing currents of the bay by her anchor chains, whether or not she was capable of being further guided in such moving currents by the use of her rudder in combination with the pull of the anchor chains. We do not believe that the word "navigate" should be confined to the moving of a vessel from one port to another for the purposes of transportation of goods or passengers. This vessel necessarily must have moved from one place to another in the water, under the control we have indicated above; that is to say, she necessarily moved her passengers across the ocean currents, and had a movement in them.*²²²

Florida courts may decide to determine whether a vessel is "in navigation" by reference to Florida law or the dictionary. The definition of navigation in Webster's New International Dictionary (2d ed 1954) supports the interpretation that a vessel that is anchored for very long is not "in navigation." According to this dictionary, which the Supreme Court regards as authoritative on the plain meaning of English,²²³ "navigation" is "the art or practice of navigating." To "navigate" is "to go from one place to another by water." None of the alternative meanings support the interpretation that navigation means to stay in one place on the water. This interpretation is also consistent with the limitations the Legislature has placed on the authority of the Trustees to regulate anchoring, which prohibit the interference with "commerce or the transitory operation of vessels through navigable water."²²⁴

The most recent amendment to Section 327.60 may entirely change the analysis of whether a vessel is deemed "in navigation" under Admiralty jurisdiction or not. In fact, the new language of 327.60 eliminates any reference to the words "in navigation." Instead, the new amended statute discusses a vessel's status in terms of whether the vessel is operating upon the waters of the state.²²⁵ The words "not for navigation" only appear in the definition of "live-aboard" vessel as discussed above.

²²² See *id.*

²²³ See e.g., *Rapanos v. U.S.*, 126 S.Ct. 2208, 2220 (2006); *Alaska v. U.S.*, 125 S.Ct. 2137, 2153 (2005); *Engine Mfrs. Assoc. v. South Coast Air Quality Mgt. Dist.*, 124 S.Ct. 1756, 1761 (2004).

²²⁴ See Fla. Stat. 253.03(7)(b)(2005).

²²⁵ See Fla. Stat. 327.60(1). "The provisions of this chapter and chapter 328 shall govern the operation, equipment, and all other matters..."

“Operating upon” the waters of the state implies movement or navigation. Whether anchoring is specifically an element of a vessels’ “operation” is not defined in the new statutory scheme of Chapter 327 either.

Although, under the definitions section of Chapter 327, “Operate” means to be in charge of or in command of or in actual physical control of a vessel upon the waters of this state, or to exercise control over or to have responsibility for a vessel’s navigation or safety while the vessel is underway upon the waters of this state, or to control or steer a vessel being towed by another vessel upon the waters of the state.²²⁶

Whether the Legislature intended for elements of Admiralty Law to be used in interpreting the extent of local government jurisdiction is debatable. Without better evidence of legislative intent, a specialized field of law used for determining the rights of injured maritime workers or the applicability of a particular type of lien seems unsuited for determining the scope of local government regulatory authority.²²⁷ If the Legislature and State agencies intend to incorporate terminology commonly used in Admiralty Jurisprudence into Florida’s boating law, consistency in use of terms would prove helpful.

4. Other State and Local Government Regulation of Vessels

a. Fla. Stat. 327.46, Boating Restricted Areas. The Legislature also made other changes in 2009 to Chapter 327 that affect how vessels may operate on state waters by creating a special section entitled “Boating-restricted Areas.”²²⁸ This section grants authority to the FWC and local governments to establish ordinances for “any purpose necessary to protect the safety of the public.”

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 have the authority to establish boating-restricted areas by ordinance. However, Section 327.46 requires that any ordinance adopted pursuant to this statute, “shall not take effect until the commission has reviewed the ordinance and determined by substantial competent evidence that the ordinance is necessary to protect public safety pursuant to this paragraph.”²²⁹ This same section also creates a procedure with applicable

²²⁶ See Fla. Stat. 327.02

²²⁷ The policy argument against incorporating federal law in this area is buttressed by inconsistencies and conflicts in federal interpretation of the terms, characterized by one commentator as “confused.” John Munch, From the “Dead Ship” Doctrine to Vessels “In Navigation”: One Changing Aspect in Determining Admiralty Jurisdiction and Available Remedies, 70 Tul. L. Rev. 717 (1995).

²²⁸ See Fla. Stat. 327.46 (2009).

²²⁹ See Fla. Stat. 327.46(1)(c)(b) (2009).

time frames for local governments to seek commission approval.²³⁰ Another important aspect of this 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 government and in situations where 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.²³¹

The statute 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 protection of public safety. For example, “Boating-restricted areas, including but not limited to, restrictions of vessel speeds and vessel traffic, may be established...”²³²

Both vessel speed and vessel traffic are specifically mentioned as aspects of vessel operation that may be regulated by local governments under this statute. It is important to note that the statute 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.”²³³ Therefore, local ordinance proposals relating to “boating-restricted areas” must have some kind of statistical or factual basis to justify why a “boating-restricted area” is necessary.

To that end, the Legislature has identified in this statute, special conditions which exist throughout Florida's waterways where “boating-restricted areas” would be justified and thus subject to local government restrictions. This section identifies areas where idle speed and no wake zones may be established as well as slow speed zones, minimum wake zones and numerical speed limit zones. In addition, this section also enables local governments to establish “vessel exclusion zones” if the area is reserved exclusively as a canoe trail or for any other vessel “under oars or under sail.” A “vessel exclusion zone” may also be created 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.”²³⁴

Below is a breakdown taken directly from Section 327.46 describing the generic locations on Florida waterways where “boating-restricted areas” are expressly permitted.

²³⁰ See Fla. Stat. 327.46(3)(b) (2009).

²³¹ See Fla. Stat. 327.46(2)(2009).

²³² See Fla. Stat. 327.46(1) (2009).

²³³ See *id.*

²³⁴ See Fla. Stat. 327.46(3)(b) (2009).

“Boating-restricted areas” establishing idle speed or no wake zones may be established in the following areas:²³⁵

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

If the area is 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.

“Boating-restricted areas” establishing only slow speed zones or minimum wake zones may be established in the following areas:²³⁶

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” establishing slow speed zones, minimum wake zones or numerical speed limit zones may be established in the following areas:²³⁷

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.

²³⁵ See Fla. Stat. 327.46 (2010).

²³⁶ *Id.*

²³⁷ *Id.*

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.

“Boating-restricted areas” establishing vessel exclusion zones may be established in the following areas:²³⁸

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

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

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.

b. Fla. Stat. 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 “Uniform waterway regulatory markers” requires local governments to apply for a permit through the FWC to install waterway markers.²³⁹ This ensures that all waterway markers are uniform throughout the State and are also in compliance with U.S. Coast Guard requirements.²⁴⁰

c. Fla. Stat. 327.44, Interference with navigation. Even though “boating-restricted areas” do not specifically address anchoring, a “catch-all” statute indicates that wherever the act of anchoring presents a danger to the public in some way, enforcement authorities may prevent such anchoring. Section 327.44 “Interference with navigation” states:

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.

Non-criminal violations, which include “interference with navigation” above may be enforced by local law enforcement agencies and citations may be issued to violators.²⁴¹ In addition, local law enforcement is authorized to forcibly move

²³⁸ *Id.*

²³⁹ See Fla. Stat. 327.41(2) & 327.41(3) (2010).

²⁴⁰ See Fla. Stat. 327.41(1)

²⁴¹ See Fla. Stat. 377.70(1)

non-compliant vessels.²⁴² Ultimately, if a person issued a non-criminal citation for violating 327.70 (and other non-criminal boating violations) fails to respond to or answer for the citation, the Legislature has proscribed such failure to respond within 30 days of the issuance of the citation to be a second degree misdemeanor.²⁴³

5. Fla. Stat. 327.4105, Pilot Program for Regulation of Mooring Vessels Outside of Public Mooring Fields

The 2009 Legislature directed the FWC to establish a new anchoring ordinance Pilot Program. Section 327.4105 requires the FWC, in consultation with the Florida DEP to explore options for regulating the anchoring or mooring of non-live-aboard vessels outside the marked boundaries of public mooring fields.

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.²⁴⁴ The pilot program will work with five different municipalities that must first create their own operational mooring fields. Once the five municipalities are selected to be in the pilot program, the FWC and DEP will work with these local governments to develop pilot anchoring and mooring ordinances outside of established mooring fields. The current status of the pilot program is still in the planning and development stages at the state level.

6. Anchorage Management and the Inland Navigation Districts

In addition to the foregoing, the Florida Legislature has granted nonregulatory anchorage 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.²⁴⁵

The FIND is an independent special taxing district that covers an area extending along Florida's east coast from Duval to Dade counties.²⁴⁶ FIND is go-

²⁴² See *Id.*

²⁴³ See Fla. Stat 327.72. There is a similar Florida Statute which criminalizes the refusal to sign a civil traffic citation for violations of motor vehicle laws. See Fla. Stat. 318.14(3) "*Any person who willfully refuses to accept and sign a summons as provided in subsection (2) commits a misdemeanor of the second degree.*"

²⁴⁴ See Fla. Stat 327.4105. See also, http://myfwc.com/RECREATION/boat_AnchoringPilotProgram.htm. (Last visited, January 2011).

²⁴⁵ See Fla. Stat. 374.976(1)(a) (2005).

²⁴⁶ See Fla. Stat. 374.982 (2005).

verned by a twelve-member board with one representative from each county within the district.²⁴⁷ Florida's governor appoints the board members to staggered four-year terms.²⁴⁸ The WCIND is also a special taxing district, but it only covers four counties: Manatee, Sarasota, Charlotte and Lee.²⁴⁹ The WCIND is governed by a four-member board comprised of one county commissioner from each of the four counties within its jurisdiction.²⁵⁰

In 1998, the Florida 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.²⁵¹

IV. Approaches to Anchoring and Anchorage Management in Florida

A. The Southwest Florida Regional Harbor Board (SWFRHB)

The Southwest Florida Regional Harbor Board (SWFRHB) was created in July 1995 by a memorandum of agreement among a local organization of boaters, state and regional agencies, and the Florida Sea Grant College Program to resolve conflicts that arose from inconsistent local government regulation of anchorages.²⁵² Many of the boaters felt that length-of-stay restrictions were unnecessary in most of the anchorages of Southwest Florida and that overly burdensome regulations would discourage cruising in the region. The Board's non-regulatory approach focused on boater education to achieve the greatest ecosystem benefit. The group was also involved in an effort to identify anchorages in Southwest Florida that require more active management based on current conflicts and to provide technical assistance in the development of appropriate anchorage management plans. The Board's philosophy was to maintain the widest possible degree of freedom for boaters consistent with appropriate environmental and safety concerns and based upon active participation by boaters. To this end, the SWFRHB developed a set of guiding principles for anchorage management, included in Appendix A. In addition, the SWFRHB encouraged municipalities in

²⁴⁷ See Fla. Stat. 374.983(1) (2005).

²⁴⁸ See Fla. Stat. 374.983(2) (2005).

²⁴⁹ See Ch. 23770, Laws of Florida (1947); Fla. Admin. Code 66A-1.001(1) (2005).

²⁵⁰ See Fla. Admin. Code 66A-1.002(1) (2005).

²⁵¹ See Fla. Stat. 374.976(1)(c) (2005); see also Fla. Admin. Code 66B-2.001 (2005).

²⁵² See Memorandum of Agreement Among the Boaters' Action and Information League, Florida Department of Environmental Protection, Florida Sea Grant College Program, Southwest Florida Regional Planning Council, and the West Coast Inland Navigation District Relating to Anchoring of Vessels in Southwest Florida (July 13, 1995) (unpublished agreement on file with the authors).

Southwest Florida to enter into memoranda of agreement endorsing a non-regulatory, consensus-based approach based on these principles, and to relax their length of stay restrictions. The term of the Regional Harbor Board ultimately expired and it was replaced by a regional advisory council with broader jurisdiction. However, the “guiding principles” for anchorage management developed by the SWFRHB remain a useful touchstone in the development of both regulatory and non-regulatory approaches to anchorage management in Florida.

B. Managed Anchorage and Mooring Fields (MAMF)

To better manage and accommodate anchoring activities within their jurisdictions, a number of local governments around the state of Florida have established Managed Anchorage and Mooring Fields (MAMFs).²⁵³ These MAMFs can range in size from 9 to 80 acres, accommodating anywhere from a handful to more than a hundred vessels. MAMFs are often used to encourage tourism by creating convenient and safe opportunities for cruisers to stop in an area by either anchoring or tying to a mooring. Those mooring closest to shore, and the restaurants, shops and pubs of a waterfront community, may be reserved for short term use. Those staying for a longer duration or merely storing vessels, do not require the easiest access. A well-designed MAMF includes amenities such as dingy docks, fueling stations, holding tank pump-out stations, garbage disposal facilities, and shower and restroom facilities. Many MAMFs provide 24 hour security through an on-site harbormaster.

A local government may choose to operate the MAMF itself,²⁵⁴ enter into a concession agreement with a private company allowing for private management,²⁵⁵ or allow management by a non-profit organization. The operation of a MAMF is typically governed by the adoption of an ordinance or resolution. Activities typically addressed in ordinances include the length of time a vessel may remain in the MAMF, the establishment of fees, safety and insurance, operational hours for noise and machinery, the display of signs, sanitation requirements, fishing, swimming, and other recreational activities, and the feeding of wildlife. Anchoring within the mooring field is typically prohibited. The Conservation Clinic at the University of Florida Levin College of Law has drafted a model

²⁵³ A MAMF is an area specially designated and managed by a local government or some other entity for the mooring and anchoring of vessels. Local governments with established MAMFs include Fort Myers, Fort Myers Beach, Key West, Marathon, Sarasota, Stuart, Vero Beach, and Fernandina Beach among others. There is a difference between “anchorages” 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. .

²⁵⁴ Vero Beach MAMF is administered by the municipality.

²⁵⁵ Fort Myers Beach and Sarasota utilize a private concession model.

“harbor management ordinance,” that has been used by some local governments as a guide to their local ordinance.²⁵⁶

Local governments face a number of regulatory hurdles before they can establish MAMFs. 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 MAMF must be authorized.²⁵⁷ The local comprehensive plan must be evaluated and amended if necessary to ensure the MAMF will be consistent with that plan,²⁵⁸ 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.²⁵⁹ The establishment of a mooring field currently requires an Environmental Resource Permit (ERP), usually issued by the Department of Environmental Protection or a Water Management District. Permits may also be required by the U.S. Army Corps of Engineers for activities in navigable waters. The establishment of a new MAMF 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 MAMF as a Special Anchorage Area under Coast Guard regulations, also discussed above.

V. Conclusion

Federal rights to navigation are protected by the Commerce Clause and the federal navigation servitude. Anchoring that is incidental to the exercise of the 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 interests. However, federal law offers little guidance concerning how far a state or local government may regulate anchoring before it interferes with the federal navigation interest.

²⁵⁶ See <http://www.law.ufl.edu/conservation/waterways>

²⁵⁷ Some form of authorization to use sovereign submerged lands may be required, usually a lease. See Section III.B of this report. The relevant political jurisdiction over the area must also be determined.

²⁵⁸ See Fla. Stat. 163.3194 (2005).

²⁵⁹ Regulatory authorizations might include a federal permit under Section 10 of the River and Harbors Act, 33 U.S.C. 403, 33 C.F.R. Part 320; and an Environmental Resource Permit from DEP, see Fla. Stat. 373.422 (2005); see also Fla. Admin. Code 40E-4.041 (2005); see also Fla. Admin. Code 18-21.005 (2005). Consultation with the U.S. Fish and Wildlife Service regarding potential impacts to manatees is usually required in many parts of Florida.

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 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 anchoring of non-live-aboard vessels outside of mooring fields, but they may regulate the anchoring of "live-aboard" vessels outside of mooring fields.

Yet some confusion in statutory interpretation remains. As a result of the 2009 amendment to the definition of "live-aboard" vessel, the definition now includes any vessel used "solely as a residence and not for navigation." Thus, local ordinances attempting to restrict the anchoring of live-aboard vessels outside of mooring fields will continue to be confronted by the question of whether the vessel is "in navigation," albeit for a substantially more limited subset of vessels. Although a "live-aboard" vessel is defined in Chapter 327, the Legislature has still not defined the term "in navigation."

Prior to the 2009 amendments, three Florida courts addressed the validity of local government regulations and arrived at conflicting decisions. The Attorney General had opined that the earlier statutory provisions probably required a "case-by-case" analysis. Until some clarity is brought to the issue by the appellate courts or the Legislature, the validity and extent of local anchorage regulation of "live-aboard" vessels outside of managed mooring fields will turn on whether or not the vessel can be considered "in navigation." This also necessarily requires anchoring disputes to be analyzed on a case-by-case basis. As long as "in navigation" remains undefined in Florida Statutes and as long as anchoring is considered a right incidental to navigation, local ordinances regulating the anchoring of "live-aboard" vessels will be open to litigation. For non-live-aboards outside of mooring fields – the vast majority of the boats operating on the state's waters – the preemption has been clarified by the 2009 amendments, and appears complete.

The authority of local governments to regulate anchoring and mooring within legally marked mooring fields, however, is not in doubt. Under Chapter 327, local governments can exert control over any and all vessels anchoring inside a designated mooring field within their jurisdiction. Perhaps the best hope for local governments seeking to regulate anchoring outside of designated mooring fields will crystallize with the new pilot program created by Section 327.4105. Administered by the FWC and still in the planning stage, the successful implementation of this pilot program could provide a way forward in the ongoing policy debate over how much authority local governments could or should have over the activities of vessels navigating – and anchoring – in the waters under their political jurisdiction.

VI. Appendix

The Southwest Florida Regional Harbor Board's Principles for Anchorage and Harbor Management

I. Principles of Anchoring

1. All federal and state laws apply to all vessels, including laws concerning overboard discharge of petroleum products, waste, garbage and litter. Local laws regarding nuisance, noise, etc to all persons, including those at anchor.

2. Vessels may not anchor in a manner that: a. Jeopardizes other vessels at anchor or underway; b. Might cause damage to other property or persons; c. Impedes access to docks, slips or public or private property.

3. Areas of seagrass, living coral or rock outcroppings as identified by Florida Sea Grant (FSG), the Department of Environmental Protection (FDEP) or the regional National Estuary Programs, cannot be used for anchoring. Special care must be taken to avoid anchoring impacts in aquatic preserves.

4. Vessels must be capable of navigating under their own sail or power, or have ground tackle capable of holding vessel until winds are fair or a tow or repairs can be arranged. A reasonable amount of time must be allowed for such situations.

5. In emergencies, the safety of the crew and the vessel will be of paramount importance until the emergency is past or the vessel has been moved to safety. Each mariner remains responsible for damages caused by his vessel or its wake.

[Note: There are no third part beneficiaries under these standards. No third party has any rights or cause of action based upon any failure to enforce any of these standards.]

Further restrictions should not be placed on anchoring in Florida in the absence of environmental damage or user conflicts that cannot be otherwise resolved.

II. Harbor Management

1. When environmental damage or user conflict have been demonstrated by objective standards, consideration should be given to the development of a local harbor management plan.

2. Objective standards should be based on planned, periodic inventories of all natural and cultural resources within the harbor and adjacent shoreline.

3. Local harbor management plans should be developed utilizing consensus building processes that include representation among all stakeholders.

4. Local harbor management plans should be implemented by a local harbor board that includes broad-based stakeholder representation, including boater representation from within the anchorage.
5. Local harbor management plans should consider the appointment of a harbor master, who should be competitively selected based on qualifications established by the local harbor board and who reports to it.
6. Local harbor management plans should ensure that there is adequate anchoring and/or mooring capacity for transient boaters and that adequate provision is made for “safe harbor” shelter during storms.
7. Local harbor management plans should ensure that adequate support facilities are available to boaters. At a minimum this should include dedicated dinghy facilities. Where resources are available, consideration should also be given to restrooms, showers, laundry facilities and other amenities.
8. Local harbor management plans should include appropriate aids to navigation and other signage, as necessary to distinguish anchorage, mooring fields, restricted areas and navigation channels.
9. Local harbor management plans should consider appropriate means to obtain financing or capital improvements and management activities, including government grants and reasonable user fees.
10. For managed anchorages, consideration should be given to seeking Special Anchorage Area designation by the Coast Guard.
11. Local harbor management plans should consider appropriate mechanisms to resolve disputes within the anchorage.
12. For managed anchorages, local harbor management plans should seek the appropriate approval from the State of Florida or other legal owners of the bottomlands beneath the anchorages.



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