

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

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PUBLICATION NO. _____

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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.*¹

Florida boasts one of the most complex and environmentally 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. This resource was used by more than a million vessels in 1998², contributing \$10.2 billion to Florida's economy.³ As commercial and recreational use of the Florida waterway system expands and the population of the State increases, the potential for conflicts between boaters and the environment and among different user groups will also grow. 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 area 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 shoreside land uses.

This article addresses the federal, state and local regulatory regime for anchoring and anchorage management in Florida.⁴ For the purposes of this article, anchoring refers to the

¹ See William K. Terrill, Note, LCM Enterprises v. Town of Dartmouth: Can Recreational Mariners Protect Their Right to Navigate?, 2 OCEANS & 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].

² There were 809,160 vessels registered in Florida in 1998. See State of Florida, Department of Highway Safety and Motor Vehicles, Bureau of Vessel Titles and Registrations, *Vessels Registered in Florida, Fiscal Year 1998-99*. The Florida Department of Environmental Protection estimates another 300,000 vessels visited the state. Personal communication, John Rudd, Fla. Dept. of Env't'l Protection, Div. of Law Enforcement, April 29, 1999.

³ Thomas J. Murray and Richard J. McHugh, Florida's Recreational Marine Industry--Economic Impact and Growth, 1980-1997 (October 1997). Marine Industries Association of Florida.

⁴ Support for this research was made possible by a grant from the U.S. Department of Commerce, National Oceanic and Atmospheric Administration, through the Florida Sea Grant College Program, to the Center for Governmental Responsibility at the University of Florida College of Law, for a project entitled "Legal Issues in Non-Regulatory Boating Management to Achieve Sustainable Waterway Use," Sea Grant No. NA36RG0070. The project provides

boater's practice of seeking and utilizing safe harbor on the public waterway system for an undefined duration. This may be accomplished utilizing an anchor carried on the vessel, or through the utilization of permanent moorings affixed to the bottom. Anchorages are areas that boaters regularly use for anchoring or mooring, whether designated or managed for that purpose or not. 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, beginning with 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. We conclude that while anchoring is considered to be a "right incidental to navigation," and hence protected by federal law, reasonable local regulation of anchoring is probably permissible. Unfortunately, in the absence of judicial clarification, there is little agreement on what constitutes reasonable regulation. Boaters are thus faced with considerable uncertainty when anchoring in Florida. Recent consensus-based efforts by entities such as the Southwest Florida Regional Harbor Board,⁵ in partnership with state and local governments, may provide the best strategy to reconcile the competing interests of boaters and other waterway users.

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

research support to an effort by concerned boaters and representatives of state agencies and local governments in Southwest Florida to develop regional ecosystem-based solutions to the inconsistent regulation of anchorages in the Southwest Florida waterway system. These interested parties formed the Southwest Florida Regional Harbor Board and launched a "pilot project" designed to ensure that anchorages are managed in the least restrictive manner that reconciles conflicting interests and protects the resources these sites provide. The Regional Harbor Board recognized the need to understand the existing legal framework that addresses these issues. This publication was initially prepared for this purpose. The authors are grateful for the research assistance provided by Todd Trexler, J.D. 1996, Ken Tinkler, J.D. 1997 and Shawn Arnold and Melissa Gross-Arnold, J.D. candidates at the University of Florida College of Law.

⁵ See Section III.A of this report.

Under the Commerce Clause of the United States Constitution⁶, the federal government has authority to control the navigable waters of the nation⁷. There are two related aspects to this authority. First, there is a federal power to regulate activities affecting navigable waters because of their relationship to interstate commerce. Second, there is a federal navigational servitude, which was recognized in some of the earliest decisions examining the scope of Congressional authority under the Commerce Clause. The navigational servitude encompasses the power of Congress to regulate navigation, prohibit or remove obstructions to navigation, and improve or destroy the navigable capacity of the nation's waters.⁸ When Congress acts within the scope of the navigational servitude, state regulatory power and private riparian rights must give way⁹.

One purpose of the navigational servitude is to protect the rights of private parties to access and use of the navigable waters¹⁰. 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 clear¹¹. 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

⁶ See U.S. CONST. art. I, sect. 8.

⁷ *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).

⁸ 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).

⁹ See *Id.*

¹⁰ 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).

¹¹ 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, ET AL., *PUTTING THE PUBLIC TRUST DOCTRINE TO WORK* 295 (1998).

any rational basis for them¹².

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,¹³ but it reserved certain federal interests, including navigation.¹⁴ The Department of Transportation, through the Coast Guard, is charged with regulating various aspects of the right of navigation.¹⁵ The U.S. Army Corps of Engineers and the Environmental Protection Agency regulate the dredging, filling, and placement of other structures in navigable waters.¹⁶ The Fish and Wildlife Service and the National Marine Fisheries Service are required to protect endangered and threatened species, including marine mammals.¹⁷ Finally, federal lands, including those beneath navigable waters, are administered by several agencies, including the National Park Service (national parks and monuments),¹⁸ the U.S. Fish and Wildlife Service (national wildlife refuges),¹⁹

¹² 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 must demonstrate that regulations affecting it are unreasonable.

¹³ See 43 U.S.C. § 1301, *et seq* (1998).

¹⁴ See 43 U.S.C. § 1311(d) (1998).

¹⁵ See 33 U.S.C. § 81 (1998) (relating to aids to navigation and other signage); 33 U.S.C. § 471 (relating to anchorage grounds and harbor regulations).

¹⁶ See 33 U.S.C. § 403 (1998) (U.S. Army Corps of Engineers); 33 U.S.C. § 1319 (1998) (Environmental Protection Agency).

¹⁷ See 16 U.S.C. § 1531- § 1544 (1998); 50 C.F.R. § 402.01(b) (1998) (designating which endangered and threatened species fall under the jurisdiction of the U.S. Fish and Wildlife Service and the National Marine Fisheries Service).

¹⁸ See 16 U.S.C. § 668dd (1998).

¹⁹ See 16 U.S.C. § 668dd (1998).

and the National Oceanic and Atmospheric Administration (national marine sanctuaries).²⁰

1. The Submerged Lands Act (SLA)

Under the Submerged Lands Act (SLA),²¹ 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.²² The SLA recognized, confirmed, and established each state's claim of title and ownership²³ as well as management and administrative responsibility²⁴ 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”.²⁵ Congress’ goal in passing the SLA was to decentralize management of coastal areas and foster greater local control to better meet the needs of the state and boaters.²⁶ 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.”²⁷ 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.”²⁸ Several other statutes implement that authority.

²⁰ See 16 U.S.C. § 1434 (1998).

²¹ 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).

²² See 43 U.S.C. § 1314(a) (1998).

²³ See 43 U.S.C. § 1311(a)(1) (1998).

²⁴ See 43 U.S.C. § 1311(a)(2) (1998).

²⁵ 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).

²⁶ See *id.*

²⁷ See H.R. Rep. No. 215, 83d Cong., 1st Sess. (1953), *reprinted in* 1953 U.S.C.C.A.N. 1385, 1436-37.

²⁸ See 43 U.S.C. § 1314(a) (1998).

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.”²⁹ In addition, the Secretary is granted the authority to adopt “suitable rules and regulations” governing their use.³⁰ The Coast Guard has established nine anchorage grounds in Florida, primarily for large commercial vessels using major ports.³¹

Of more significance to recreational boaters, the Act also provides for special anchorage areas, in which vessels less than sixty-five feet in length are not required to display the anchorage lights otherwise required by the Coast Guard's Navigation Rules.³² Other rules may also apply to these areas.³³ The Coast Guard has designated a number of special anchorage areas in Florida.³⁴

²⁹ See 33 U.S.C. § 471 (1998).

³⁰ See *id.* The rules are contained in 33 C.F.R. Part 110 (1998).

³¹ 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).

³² See 33 C.F.R. § 110.1(a) (1997).

³³ 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. § 110.1(a) (1997). 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

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.³⁵

b. Obstructions to Navigation

The United States Army Corps of Engineers (USACOE) also exercises jurisdiction under the Rivers and Harbors Act.³⁶ Under the Act the USACOE 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”.³⁷ USACOE regulations define “permanent mooring structures” and a “permanently moored floating vessel” as structures subject to regulation.³⁸ 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.³⁹ In recognition that these activities sometimes have minimal impacts, the USACOE has established Nationwide Permits for installation of some types of moorings.⁴⁰ Permanent moorings and moored

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 (1998).

³⁴ *See* 33 C.F.R. §§ 110.73-.74b (1998).

³⁵ 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).

³⁶ *See* 33 U.S.C. § 403 (1998).

³⁷ *See* 33 C.F.R. § 320.2(b) (1998).

³⁸ *See* 33 C.F.R. § 322.2 (1998).

³⁹ *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).

⁴⁰ *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) (1998). 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.*

vessels that do not qualify for nationwide permits must be individually permitted.⁴¹

3. Coastal Zone Management Act

The Coastal Zone Management Act⁴² 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.⁴³

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.⁴⁴ 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 253.71⁴⁵ were unconstitutional because the “State’s control over the water column is narrowly circumscribed by federal law.”⁴⁶ 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.⁴⁷ 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.⁴⁸

⁴¹ See 33 C.F.R. 322.3 (1998).

⁴² See 16 U.S.C.A. § 1451 *et seq.* (West 1998).

⁴³ See 16 U.S.C.A. § 1452 (West 1998). See generally Ronald J. Rychlak, *Coastal Zone Management and the Search for Integration*, 40 DEPAUL L. REV. 981 (1991) (discussing the process of the effort to integrate government coastal activities through the 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).

⁴⁴ *Murphy v. Dept. of Natural Resources*, 837 F. Supp.1217 (S.D. Fla. 1993).

⁴⁵ 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. (1997).

⁴⁶ *Murphy*, 837 F. Supp. at 1219.

⁴⁷ See *Murphy*, 837 F. Supp. at 1220; *Barber v. State of Hawaii*, 42 F.3d 1185 (9th Cir. 1994).

⁴⁸ See *Murphy*, 837 F. Supp. at 1223.

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.”⁴⁹ The court found that Congress considered navigation, including regulation of anchoring, “as one of the areas the States should include in their management plans.”⁵⁰ The court reasoned that because the state’s Coastal Zone Management Plan was approved by the Secretary of Commerce, the plan did not encroach any federal power over navigation.⁵¹

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.⁵² Under the Supremacy Clause of the U.S. Constitution, federal law governs over conflicting state law,⁵³ and Congress may preempt local laws pursuant to this authority.⁵⁴

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.⁵⁵ Second, where the Congress has “spoken” so as to preclude state regulation in a given area

⁴⁹ *See id.*

⁵⁰ *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).

⁵¹ *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) (1997). 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.

⁵² *See* Section I.A.

⁵³ U.S. CONST. art. VI.

⁵⁴ *See* Sections I.C.1-.3.

⁵⁵ *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. 191(1983).

of law, state regulation is preempted.⁵⁶ Third, even where local regulation is neither in conflict nor preempted, a Dormant Commerce Clause prohibits states from unduly burdening interstate commerce.⁵⁷ The following sections address the potential impact of these limits on state and local efforts to regulate anchoring and anchorages.

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,⁵⁸ or the state law prevents implementation of the federal law.⁵⁹

At present, there are few federal anchorage regulations with which state laws and regulations might conflict. In a legal opinion, the U.S. Coast Guard asserted that neither the Rivers & 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.”⁶⁰ 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.”⁶¹

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

Preemption, like actual conflict, is founded on the supremacy of federal regulatory

⁵⁶ 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).

⁵⁷ 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).

⁵⁸ *Florida Lime and Avocado Growers, Inc. v. Paul*, 373 U.S. 132 (1963).

⁵⁹ *Hines v. Davidowitz*, 312 U.S. 52 (1941); *Pacific Gas and Electric Co. v. State Energy Commission*, 461 U.S. 191 (1983).

⁶⁰ 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).

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

authority.⁶² Preemption occurs where Congress has evidenced an intent to exclusively occupy an area of law.⁶³ If such intent is contained in the language of the federal law at issue, the preemption is said to be *express*.⁶⁴ If, however, such intent is inferred from a pervasive legislative scheme dominating an entire field of law, the preemption is considered *implied*.⁶⁵ In either case, preemption will not occur unless it is determined to be “the clear and manifest purpose of Congress.”⁶⁶

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.⁶⁷ Most notable among these sources are the Coastal Zone Management Act of 1972,⁶⁸ and Executive Order 12612 of October 26, 1987.⁶⁹

⁶² 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.

⁶³ *Silkwood v. Kerr-McGee Corp.*, 465 U.S. 1074 (1984).

⁶⁴ *See Hillsborough County v. Florida Restaurant Association*, 603 So.2d 587, 590 (Fla. 2d DCA 1992).

⁶⁵ *Id.* at 590-91.

⁶⁶ *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).

⁶⁷ 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) (listing 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.); THE FLORIDA BAR, MARITIME LAW AND PRACTICE § 13.17 (1991) (citing the Recreational Boating Safety Act of 1986 which encourages states to promote boating safety and provides federal funding for such programs).

⁶⁸ 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.

⁶⁹ The Executive Order directs federal agencies to avoid preemption of state action, except where state regulation clearly conflicts with agency action and policies.

State authority to regulate anchorages was upheld against a preemption challenge in a landmark case originating in the Hawaiian Islands.⁷⁰ 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.⁷¹ 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 seventy-two hours.⁷² The rules were adopted to provide for the safety of boaters and other recreational users of the area.⁷³ The district court granted summary judgment in favor of the state, and the Preservation Society appealed.⁷⁴

On appeal, the Preservation Society first 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.⁷⁵ The United States Court of Appeals, Ninth Circuit, found neither argument persuasive.⁷⁶ 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.⁷⁷ The court was also unwilling to find implicit preemption based on what it deemed the "far from extensive" body of federal law affecting anchorages.⁷⁸ The court indicated that the Secretary of Transportation and the Coast Guard had discretionary authority and "may act to affect all navigational issues, but they need not and they have not."⁷⁹

As mentioned above, it is unlikely that federal law expressly preempts local anchorage regulation considering the relatively few number of federal laws regulating anchoring. 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,

⁷⁰ *Barber v. State of Hawaii*, 42 F.3d 1185 (9th. Cir. 1994).

⁷¹ *Id.* at 1189.

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.* at 1188.

⁷⁵ *Id.* at 1189.

⁷⁶ *Id.* at 1190.

⁷⁷ *See id.*

⁷⁸ *See id.* at 1192.

⁷⁹ *Id.* at 1193.

especially if faced with different facts. For example, a stronger set of facts would have existed if the anchorage at issue was a Coast Guard designated “special anchorage area” or “anchorage grounds.”

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 if those state laws operate to exclude interstate commerce.⁸⁰ In this instance, the Commerce Clause is said to be “dormant” because Congress has not made active use of its power; however, courts have used the Dormant Commerce Clause to limit states’ ability to regulate interstate commerce.⁸¹ In order to evaluate whether state regulation violates the Dormant Commerce Clause, courts have followed a fact-based balancing test which weighs the local benefits of the state regulation against the burden on interstate commerce.⁸² To determine the local benefits, courts evaluate whether the state had a rational basis, such as safety, for enacting the law.⁸³ Courts then assess the local need for the law against the burden of the law on interstate commerce.⁸⁴ Finally, courts also evaluate whether the state law is even-handed in its application or whether it applies differently to intrastate commerce than to interstate commerce.⁸⁵

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.⁸⁶ The court found that the state’s interest in the regulation was substantial, while the burden on interstate commerce was minor.⁸⁷ The court was swayed by evidence of the substantial threat to public safety that the regulations were designed to avoid.⁸⁸ The court evaluated the direct and indirect impact on interstate commerce of Hawaii’s anchoring and

⁸⁰ See DANIEL A. FARBER ET AL., CONSTITUTIONAL LAW THEMES FOR THE CONSTITUTION’S THIRD CENTURY 863 (1993).

⁸¹ *See id.*

⁸² *See id.* at 881.

⁸³ *See Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520 (1959).

⁸⁴ *See id.*

⁸⁵ *See Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970).

⁸⁶ *See Barber v. State of Hawaii*, 42 F.3d 1185, 1195 (9th Cir. 1994).

⁸⁷ *See id.*

⁸⁸ *See id.* These threats included the substantial threat to public safety by the mooring activities of recreational boaters on heavily traveled seaways. *See id.*

mooring regulations.⁸⁹ First, the court determined that there was no direct regulation of interstate commerce because the regulation did not specifically target interstate vessels.⁹⁰ 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.⁹¹ The court concluded, however, that the fee differentials prescribed by the regulations were not discriminatory toward out-of-state vessels.⁹² Finding no discriminatory impact, the court applied a balancing test to determine whether any indirect impact on interstate commerce outweighed the state's interest.⁹³ 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.⁹⁴ Therefore, the court concluded that the mooring regulation was not a violation of the Commerce Clause.⁹⁵

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.⁹⁶ The position of the U.S. Coast Guard is that "[u]p to this point, Congress has not demonstrated an express or implied intent to preempt state regulation of anchorages."⁹⁷ On the

⁸⁹ *See id.* at 1194-95 (citing *Oregon Waste Sys., Inc. v. Department of Env'tl. Quality*, 114 S.Ct. 1345, 1350 (1994)).

⁹⁰ *Id.* at 1194.

⁹¹ *Id.* at 1194-95.

⁹² *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)).

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Bass River Associates v. Mayor of Bass River Township*, 743 F.2d 159 (3d Cir. 1984) (46 U.S.C.A. § 12109); *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).

⁹⁷ 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

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.

III. STATE AND LOCAL AUTHORITY OVER ANCHORING AND ANCHORAGES

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

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 was 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.⁹⁸ These lands must be managed for the use and benefit of the public.⁹⁹ Management responsibility has been delegated to the Board of Trustees of the Internal Improvement Trust Fund (Trustees).¹⁰⁰ The state thus has greater authority to restrict the

from the Commandant, U.S. Coast Guard to the Commander, Thirteenth Coast Guard District (Jan. 19, 1993).

⁹⁸ *Philips 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 1998); *see* Section I.B.1. .

⁹⁹ *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).

¹⁰⁰ *See* FLA. STAT. § 253.03(1) (1997).

use of both the submerged lands and overlying waters than would be the case on private lands.¹⁰¹ The public trust doctrine may also serve as a limitation on the power of the trustees.¹⁰²

Because anchoring is viewed as a right incidental to the right of navigation, and navigation has been traditionally protected as a trust purpose,¹⁰³ 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 which 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.¹⁰⁴ Moreover, the Trustees have been accorded considerable discretion in their decisions concerning the management of trust lands.¹⁰⁵

2. The State's Inherent Police Power

States have an inherent police power to protect the public's health, safety, and welfare through regulation.¹⁰⁶ As political subdivisions of the state,¹⁰⁷ local governments in Florida share

¹⁰¹ 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* § 373.422, FLA. STAT. (1997); §40E-4.041, FLA. ADMIN. CODE (1998); § 18-21.005, FLA. ADMIN. CODE (1998).

¹⁰² *See Coastal Petroleum Co. v. American Cyanamid Co.*, 492 So.2d 339 (Fla. 1986).

¹⁰³ *See Hayes v. Bowman*, 91 So. 2d 795, 799 (Fla. 1957); *Broward v. Mabry*, 58 Fla. 398, 408, 50 So. 826, 829 (1909); *State ex rel. Ellis v. Gerbing*, 56 Fla. 603, 612, 42 So. 353 (1908); *State v. Black River Phosphate Co.*, 32 Fla. 82, 100-01, 13 So. 640-46 (1893).

¹⁰⁴ 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*, ___ F.3d ___, 1999 WL 153030 (8th Cir. 1999) (navigation can be regulated under the public trust doctrine to protect public waters and the public).

¹⁰⁵ *See Hayes v. Bowman*, 91 So. 2d 795, 799 (Fla. 1957).

¹⁰⁶ *See Florida East Coast Ry. Co. v. City of Miami*, 79 So. 682, 685 (Fla. 1975); 16A AM. JUR. 2D, Constitutional Law 366 (1979).

¹⁰⁷ FLA. CONST. art. 8, § 1(a).

the police power,¹⁰⁸ including the authority to regulate anchorages. Local regulations affecting navigation have long been upheld.¹⁰⁹ 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.¹¹⁰ The Court called such regulations “necessary and indispensable in every commercial port, for the convenience and safety of commerce.”¹¹¹ 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.”¹¹²

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.¹¹³ 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.¹¹⁴ 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

¹⁰⁸ 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).

¹⁰⁹ See *Mobile County v. Kimball*, 102 U.S. 691 (1881); *Huse v. Glover*, 119 U.S. 5453 (1886).

¹¹⁰ See *The James Gray v. The John Fraser*, 62 U.S. 184, 187 (1858).

¹¹¹ See *id.*

¹¹² See *Id.* However, the Court upheld the regulations only after concluding that the regulations were not in conflict with any federal laws.

¹¹³ 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).

¹¹⁴ See 381 So. 2d 312, 315 (Fla. 3rd DCA 1980).

the health, safety, or welfare of the general populace.”¹¹⁵ The court upheld two sections of the ordinance, however, which required approved sanitation equipment on all live aboard vessels because of their clear relationship to public health.¹¹⁶ 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.¹¹⁷ 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 pollution, navigational hazards and visual intrusion, thus justifying regulation under the police power.¹¹⁸

B. Statutory Bases 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,¹¹⁹ holds sovereign submerged lands in trust for the public.¹²⁰ 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.¹²¹ 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, pumpout requirements, and facilities associated with anchorages. The regulations must not interfere with commerce or the transitory operation of vessels

¹¹⁵ *See id.* at 315.

¹¹⁶ *See id.*

¹¹⁷ *See Dozier v. City of Miami*, 639 So.2d 167 (Fla. 3d DCA 1994).

¹¹⁸ *See id.*, at 169.

¹¹⁹ The Board of Trustees is comprised of the Governor, the Secretary of State, the Attorney General, the Comptroller, the State Treasurer, the Commissioner of Education and the Commissioner of Agriculture. FLA. STAT. ch. 253.02(1) (1997).

¹²⁰ *See* FLA. STAT. ch. 253.03(1) (1997). For a discussion of the “public trust doctrine” *see* Section II.A.1 of this report.

¹²¹ In some instances, submerged lands may have been alienated, or artificially created, and they may be subject to non-state ownership.

through navigable water, but shall control the use of sovereignty submerged lands as a place of business or residence.¹²²

The Trustees have not exercised their authority to adopt rules regulating anchoring. The Department of Environmental Protection (DEP), which staffs the Trustees,¹²³ began a rule-making process in 1994. That process was held in abeyance pending implementation of an administrative effort in Southwest Florida to develop a non-regulatory solution to anchorage management.¹²⁴

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 sovereign submerged lands.¹²⁵ The term “activity” is defined to include the construction of mooring pilings or docks.¹²⁶ The term “dock” is defined to mean “a fixed or floating structure, including moorings, used for the purpose of berthing buoyant vessels.”¹²⁷ Chapter 253 provides a framework for various forms of consent to conduct activities on sovereignty submerged lands.¹²⁸ The relevant forms of consent include a consent of use,¹²⁹ lease,¹³⁰ and management agreement;¹³¹ each applicable under different circumstances. The consent of use allows use of sovereign submerged lands for relatively small scale activities, e.g. the construction of a single dock for a private home. A lease is required for docks too large to qualify as a consent of use and for activities that generate revenue or serve

¹²² See FLA. STAT. ch. 253.03(7)(b) (1997).

¹²³ 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 (1997); FLA. ADMIN. CODE § 18-21.002(1) (1998). In addition, DEP and the water management districts are responsible for environmental permitting and water quality protection on sovereign lands. FLA. STAT §373.414 (1997).

¹²⁴ See Section III A of this report.

¹²⁵ See FLA. ADMIN. CODE §18-21.005(1) (1998).

¹²⁶ See FLA. ADMIN. CODE §18-21.003(2) (1998).

¹²⁷ See FLA. ADMIN. CODE §18-21.003(17) (1998).

¹²⁸ See FLA. ADMIN. CODE § 18-21.005(1) (1998).

¹²⁹ A consent of use is generally required for small-scale docks, access channels, or boat ramps. See FLA. ADMIN. CODE. § 18-21.005(1)(a) (1998).

¹³⁰ See FLA. ADMIN. CODE §18-21.005(1)(b) (1998).

¹³¹ See FLA. ADMIN. CODE §18-21.005(1)(e) (1998).

businesses.¹³² Thus, a commercial marina or a large commercial mooring field in waters above sovereignty lands would require a lease from the state.¹³³

A management agreement may be utilized for activities involving non-commercial projects to protect and manage sovereign submerged lands.¹³⁴ This approach has been adopted by the state in a few cases to permit local governments to establish managed anchorage areas within their jurisdiction.¹³⁵ Local governments with management agreements approved or under review include Vero Beach, Stuart and Key West. Authority to enter into management agreements has been delegated by the Trustees to the Director of the Division of State Lands in the Department of Environmental Regulation.¹³⁶ The Directive authorizes the Director to “approve management agreements with governmental entities, nonprofit and nonrevenue generating conservation, education, charitable, recreation or scientific groups for the management of educational, recreational or scientific activities.”¹³⁷ However, in special cases, such as where there is controversy, the Governor and Cabinet must approve the Agreement.¹³⁸

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

¹³² See FLA. ADMIN. CODE § 18-21.005(1)(b) (1998).

¹³³ 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 §18-21.004(30) (1998).

¹³⁴ FLA. ADMIN. CODE § 18-21.005(1)(e) (1998).

¹³⁵ See Department of Environmental Protection webpage (visited April 12, 1999) <<http://www.dep.state.fl.us/ecosystem/enved/emwork/place.htm>>; Interview with Don Keirn, Planner IV, Department of Environmental Protection, April 5, 1999.

¹³⁶ See Department of Natural Resources Directive 120 (May 17, 1990). The Department of Natural Resources and the Department of Environmental Regulation have subsequently been merged to form the Department of Environmental Protection.

¹³⁷ See *id.*

¹³⁸ See *id.*

Chapter 327 of the Florida Statutes, known as the “Florida Vessel Registration and Safety Law,”¹³⁹ is administered by the DEP.¹⁴⁰ This law primarily relates to vessel registration, including numbering and fees, as well as various safety considerations, such as safe operation, accident procedures, and personal water craft requirements. However, Chapter 327 also addresses jurisdiction over anchorages in Florida. Two provisions of the Act are especially important for purposes of this article. The first relates to local government regulations concerning resident vessels, while the second relates directly to mooring and anchoring. Each provision both preserves and limits regulatory authority for local governments.¹⁴¹

The first provision affects local efforts to regulate the operation and equipment of vessels.¹⁴² The Act preserves 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.¹⁴³ 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.”¹⁴⁴ Section 327.22(1)(a) provides:

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 noncriminal violations of s. 327.33 relating to the careless operation of a vessel which results in the endangering or damaging of property, by citation mailed to registered owner of the vessel. Any such ordinance shall apply only in designated restricted areas which are properly marked and in need of shoreline protection. Any county and the municipalities located within the county may jointly regulate vessels.

The import of this provision for local regulation of anchorages is unclear. It could be read to authorize comprehensive local government regulation of resident vessels, including limitations

¹³⁹ See FLA. STAT. § 327.01 (1997).

¹⁴⁰ See FLA. STAT. § 327.03(1) (1997).

¹⁴¹ See Section IA of this report, discussing the rights of navigation and the Federal Navigational Servitude.

¹⁴² See FLA. STAT. § 327.22 (1997).

¹⁴³ See FLA. STAT. § 327.22(1)(a) (1997).

¹⁴⁴ See *City of Winter Park v. Jones*, 392 So. 2d 568, 572 (1980).

on anchoring, thereby suggesting potentially different limitations for non-resident vessels. On the other hand, it could be construed as limited to subjects related to vessel registration and safety for resident vessels, which is the context of the provision.¹⁴⁵

Local government regulation of the operation and equipment of vessels is further addressed in section 327.60(1) of the Florida Statutes. This provision expressly prohibits local regulations applying to the Florida Intracoastal Waterway and also prohibits any ordinances in conflict with the Florida Registration and Safety Act¹⁴⁶. 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.¹⁴⁷

The second provision, section 327.60(2), Florida Statutes, relates directly to mooring and anchoring and lies at the heart of the continuing controversy over the scope of local government authority to restrict anchoring. It states:

Nothing contained in the provisions of this section shall be construed to prohibit local governmental 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. However, local governmental authorities are prohibited from regulating the anchorage of non-live-aboard vessels engaged in the exercise of rights of navigation.¹⁴⁸

¹⁴⁵ See FLA. STAT. §§ 327.15-.21 (relating to vessel registration); FLA. STAT. §§ 327.22(2)-(3) (relating to annual registration fees imposed by counties or municipalities).

¹⁴⁶ See FLA. STAT. § 327.60(1) (1997).

¹⁴⁷ However, the U.S. Army Corps of Engineers, Jacksonville District, recently 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 (1997).

¹⁴⁸ FLA. STAT. § 327.60(2) (1997) (emphasis added).

The Act defines a live-aboard vessel as any vessel “used solely as a residence”¹⁴⁹ or “represented as a place of business, a professional or other commercial enterprise, or a legal residence.”¹⁵⁰ The Act expressly excludes a commercial fishing boat from this definition.¹⁵¹ 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.¹⁵²

Thus, with reference to live-aboard vessels, or non-live-aboards *not* engaged in the exercise of the rights of navigation, the Act expressly permits local governments to regulate anchoring.¹⁵³ Accordingly, this provision establishes a two part test for local regulation. Anchoring may be restricted if the vessel is 1) a live-aboard, or 2) a non live-aboard which is *not* engaged in the exercise of rights of navigation. With respect to the first part, the validity of local ordinances 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(16).¹⁵⁴ 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.”¹⁵⁵ 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

¹⁴⁹ See FLA. STAT. § 327.02(16)(a) (1997); *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).

¹⁵⁰ See FLA. STAT. § 327.02(16)(b) (1997).

¹⁵¹ See FLA. STAT. § 327.02(16) (1997).

¹⁵² See FLA. AGO 85-45, 1985 WL 190102 (Fla.A.G.)

¹⁵³ This interpretation is supported by the Preamble to the 1993 amendments to the Act, which states that local governments should be free to regulate the mooring or anchoring of floating structures and live-aboard vessels. 1983 FLA. LAWS ch. 83-20. If Florida Statute section 327.22(1) is interpreted as authorizing comprehensive regulation of resident vessels, however, then anchorage by resident “non live-aboard vessels engaged in the exercise of rights of navigation” would be subject to regulation, and the prohibition would protect only non-resident vessels.

¹⁵⁴ A live-aboard vessel is “a) Any vessel used solely as a residence; or b) Any vessel represented as a place of business, a professional or other commercial enterprise, or a legal residence. A commercial fishing boat is expressly excluded from the term “live-aboard vessel.” FLA. STAT. §327.02(16) (1997)

¹⁵⁵ Code of Ordinances of the City of Sanibel, Florida, Chapter 6-15. Supp. No. 25.

subject to challenge as violative of state general law and therefore could be struck down as exceeding the local government's grant of authority under Chapter 327.¹⁵⁶

Although Chapter 327 provides a definition of live-aboard, the meaning of "engaged in the exercise of the rights of navigation" remains elusive.¹⁵⁷ While the "exercise of the rights of navigation" has not been defined judicially or statutorily, the Florida Attorney General has stated that the right of navigation includes the right to anchor or moor.¹⁵⁸ However, the Attorney General noted that such a right does not include the right to anchor indefinitely.¹⁵⁹ In addition, the U.S. 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

¹⁵⁶ 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. See, e.g., *supra* notes 59-85 and accompanying text.

¹⁵⁷ Section 327.60 provides no definition of the "right to navigate." FLA. STAT. §327.60 (1997). The right to navigate has been only loosely defined in Florida. See A.G.O. Report 85-45, 1985 WL 190102 (Fla.A.G.). In *Ferry Pass Inspectors' & Shippers' Association v. White's River Inspectors' & Shippers' Association*, 57 Fla. 399, 48 So. 643 (1909), the Supreme Court of Florida set forth the following dicta, "The rights of the public in navigable streams for purposes of navigation are to use the waters and the shores to high-water mark in a proper manner for transporting persons and property thereon subject to controlling provisions and principles of law. The right of navigation should be so used and enjoyed as not to infringe upon the lawful rights of others. All inhabitants of the state have concurrent rights to navigate and to transport property in the public waters of the state." See also 65 C.J.S. *Navigable Waters* § 22 ("The public right of navigation entitles the public generally to the reasonable use of navigable waters for all legitimate purposes of travel or transportation, for boating or sailing for pleasure, as well as for carrying persons or property gratuitously or for hire, and in any kind of water craft the use of which is consistent with others also enjoying the right possessed in common.") Several Florida cases involving the construction of bridges or water control structures have upheld interference with navigation. See e.g., *State ex rel. Wilcox v. T.O.L.*, 206 So.2d 69 (Fla. 4th DCA 1968); *Carmazi v. Dade County*, 108 So.2d 318 (Fla. 3d DCA 1959). Restrictions on navigation in airboats have been upheld as to the general public, but invalidated as to the owners of island property with no other reasonable access to their estates. *Game and Fresh Water Fish Commission v. Lake Islands*, 407 So.2d 189 (Fla. 1981).

¹⁵⁸ See FLA. AGO 85-45, 1985 WL 190102 (Fla.A.G.).

¹⁵⁹ See *id.* (citing *Hall v. Wantz*, 57 N.W.2d 462 (Mich. 1953)).

as long as reasonable provision is made for those individuals who reside aboard vessels appurtenant to navigation.¹⁶⁰

At least two Florida trial courts have addressed local restrictions on anchoring in the context of this statute.¹⁶¹ In *State v. Hager*,¹⁶² 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 thirty-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," pursuant to section 327.60(2), Florida Statutes. 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."¹⁶³ The court concluded that while 72 hours "may appear unnecessarily restrictive," the will of the legislative body should stand.

More recently, however, the court in *State v. Frick*,¹⁶⁴ 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.¹⁶⁵

¹⁶⁰ 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).

¹⁶¹ 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.*

¹⁶² *See* Case No. 90-19207MOANO (County Ct., Pinellas Co., Nov. 27, 1990).

¹⁶³ *See id.*

¹⁶⁴ *See* Case No. 91-6860 M0 A08 (May 28, 1991).

¹⁶⁵ *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

District 4. Anchorage Management and the Inland Navigation

In addition to the foregoing, the Florida Legislature recently granted additional 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.¹⁶⁶

The FIND is an independent special taxing district which covers an area extending along Florida's east coast from Duval to Dade Counties.¹⁶⁷ FIND is governed by an eleven-member board with one representative from each county within the district.¹⁶⁸ Florida's governor appoints the board members to staggered four-year terms.¹⁶⁹ The WCIND is also a special taxing district, but it only covers four counties: Manatee, Sarasota, Charlotte and Lee.¹⁷⁰ The WCIND is governed by a four-member board comprised of one county commissioner from each of the four counties within its jurisdiction.¹⁷¹

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,

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.

¹⁶⁶ See FLA. STAT. § 374.976(1)(a) (1998 Supp.).

¹⁶⁷ See FLA. STAT. § 374.982 (1997).

¹⁶⁸ See FLA. STAT. § 374.983(1) (1997).

¹⁶⁹ See FLA. STAT. § 374.983(2) (1997).

¹⁷⁰ See Ch. 23770, Laws of Florida (1947); FLA. ADMIN. CODE § 66A-1.001(1) (1998).

¹⁷¹ See FLA. ADMIN. CODE § 66A-1.002(1) (1998).

state, member counties and local governments.¹⁷² However, even before this legislation, the WCIND was involved in anchorage management by becoming a charter member of the Southwest Florida Regional Harbor Board.

IV. EMERGING 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.¹⁷³ 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 focuses on boater education to achieve the greatest ecosystem benefit. The group has also been involved in an effort to identify anchorages in Southwest Florida which 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 is 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 has developed a set of guiding principles for anchorage management.¹⁷⁴ In addition, the SWFRHB has encouraged municipalities in 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.

B. Managed Anchorage Fields in Southeast Florida

Through its Ecosystem Management Division, the Southeast District office of the Department of Environmental Protection (DEP) has initiated a proactive program to encourage responsible boater use of waters of Florida. This program is actively working with local governments to establish managed mooring and anchorage areas. The end result of DEP's involvement is typically management plans and management agreements for these anchorage areas.

¹⁷² See FLA. STAT. § 374.976(1)(c) (1998 Supp.); *see also* FLA. ADMIN. CODE § 66B-2.001 (1998).

¹⁷³ 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).

¹⁷⁴ See Appendix A of this report.

The basis for this approach is that if mooring and anchorage fields are managed properly and located in appropriate areas, boat owners will be more inclined to use them.

DEP staff is currently coordinating with several interested governmental programs, such as the City of Stuart, the City of Riviera Beach, the City of Miami, Biscayne National Park and several others, to facilitate the required planning, design and construction of the mooring and anchorage fields. District Staff provides support teams called Technical Assistance Teams (“TAT’s”) to closely coordinate with the sponsors to implement the necessary planning, to identify potential sites through field work, and to assist in locating funding sources. These TAT’s offer expertise in a variety of associated fields and disciplines. At present, there are volunteers representing many professional fields as well as various user groups, such as recreational organizations and marine industries. One of the added benefits of the TAT’s comes during permitting because DEP staff are part of the TAT. When the permitting application is submitted for review, the agency’s concerns are more likely to have been addressed in the TAT report.¹⁷⁵

C. The Vero Beach Local Managed Anchorage Model

The City of Vero Beach, Florida, has addressed anchorage management and regulation by establishing a municipal marina and anchorage.¹⁷⁶ The anchorage consists in part of a mooring field offering permanent and transient moorings for a fee.¹⁷⁷ The City permits transient vessels to raft up to four vessels per mooring, depending on conditions. In the relatively small area outside the managed anchorage, anchoring is limited to twelve hours.¹⁷⁸ Fees fully support the municipal anchorage facilities, which include a fueling station, pump-out facility and restrooms. The City employs a harbor master, assistant harbor master and two part-time assistants. The harbor master is appointed by the city manager and resides at quarters provided by the City within the anchorage. In addition, there is a Marine Commission, made up of at least three representatives who live within the City, which serves as an advisory board for the anchorage.¹⁷⁹

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

¹⁷⁵ See Department of Environmental Protection webpage (visited April 12, 1999) <<http://www.dep.state.fl.us/ecosystem/enved/emwork/place.htm>>; Interview with Don Keirn, Planner IV, Department of Environmental Protection, April 5, 1999.

¹⁷⁶ See Code of Ordinances of Vero Beach, Florida, Chapter 12.

¹⁷⁷ See Code of Ordinances of Vero Beach, Florida, § 12.06.

¹⁷⁸ See Code of Ordinances of Vero Beach, Florida, § 12.01(b).

¹⁷⁹ See Code of Ordinances of Vero Beach, Florida, § 4.02(c).

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.

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 aboards “engaged in the exercise of the rights of navigation.” Although a definition of live aboard is provided, the Legislature has not clarified what it means by “engaged in the “exercise of the rights of navigation.” Two Florida circuit courts have addressed this question in the context of local government regulations and arrived at conflicting decisions. The Attorney General has opined that this provision probably requires a “case by case” analysis. Accordingly, until some clarity is brought to the issue by the appellate courts or the Legislature, or the issue is resolved by the efforts of entities like the SWFRHB or the DEP’s managed anchorage program, the question of the validity and extent of local anchorage regulation of non-liveaboards will probably remain an open one.

APPENDIX A

I. PRINCIPLES OF ANCHORING

"The Southwest Florida Regional Harbor Board's Regional Umbrella: Standards for Anchorage Management," set forth below, should represent the basic management approach for anchoring in Florida.

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 SeaGrant (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.