Introduction to the Special Issue: Focus on Florida

Thomas T. Ankersen[1]

Florida, it has been said, is one big sand bar. Its peninsular land mass helps to define three globally significant water bodies, the Atlantic Ocean, the Caribbean Sea, and the Gulf of Mexico. It is young geologically. The last of the states to emerge from the water, it will be the first to return – with or without our help. In the meantime it has become home to nearly 20 million people, all of whom live in the coastal zone as defined by federal law. In Florida, a practitioner of environmental and land use law is necessarily a practitioner of marine and coastal law. Much of the work of the law in Florida is reconciling the people with their place in the coastal zone.

This edition of the Sea Grant Law and Policy Journal focuses on Florida. All but one was written by or with students in the University of Florida College of Law's Conservation Clinic. The UF Law Conservation Clinic did not begin with any explicit mandate to focus on marine and coastal law. It didn't need one. The Clinic is in Florida and in Florida most things are marine and coastal. The Clinic's work in the area of marine and coastal law has, however, led to a long-term partnership with Florida Sea Grant. Florida Sea Grant provides support to the Clinic to work with Florida's coastal communities and stakeholders on the issues that matter to them. Most of articles presented here, and described below, either resulted from applied research tied to policy products, or from the opportunity to reflect on policy products developed through the work of the Clinic.

Even though the focus is on Florida, all of the articles described below address issues of immediate concern to the broader marine and coastal legal community, something that sets this journal apart from most other law journals. Indeed, three of the articles were in progress at the time of two of the biggest disasters in global marine and coastal history – the BP Deepwater Horizon oil spill in the Gulf of Mexico and the tsunami-induced nuclear disaster in Japan – and tackle legal and policy issues that these disasters have brought to the forefront. We hope that readers will find all of these articles useful.

The Decade of the Dockominium. In middle of the first decade of this century Florida experienced a real estate boom that rivaled that of the 1920's. Always precious, Florida's water accessible real estate skyrocketed in value, along with waterfront property taxes. The twin factors of market value and exorbitant taxes relative to traditional waterfront economies led to the rapid conversion of Florida's "recreational and commercial working waterfronts" to uses inimical to public water access, especially the so-called dockominium. In his piece entitled: "Take me to the Water: Florida's Shrinking Public Access to the Waterfront and the Steps to Preserve It," Conservation Clinic student Kevin Sharbaugh, a seafarer before he was a law student and now in private practice, reviews the policy prescriptions Florida has put into place to address the loss of water access. He argues for a more nuanced approach to public water access, one that recognizes that the individual components of working waterfronts, such as boat ramps and marinas, should not be addressed with the same broad brush when designing water access protection policies. Sharbaugh also argues that preferential property tax policies to protect water access through

[1] Legal Skills Professor and Director, Conservation Clinic, University of Florida Levin College of Law. Through his clinic, Professor Ankersen also serves in a part-time capacity as the Florida Sea Grant Legal Specialist, and teaches a field course in marine and coastal law. www.law.ufl.edu/conservation.

changes in valuation should require binding commitments from the beneficiaries of those policies to maintain public access for longer than the current tax year.

Nuclear Power's "Wait and Sea" Approach. No coastal issue in Florida is more pervasive than the inexorable rise of the sea. In no place is coastal infrastructure at greater risk. Long before sea level rise became a pressing policy concern, Florida had built cities along the coast, and the infrastructure to sustain them – in particular, nuclear power plants that rely on large quantities of water to cool them. Now these plants appear to be in harm's way, as climate scientists predict that the flood plain will migrate landward as the land erodes around them. Moreover, new reactors are being proposed now that will continue to be operational when the trajectory of anticipated sea level rise acceleration steepens. James Choate, an LLM student in the UF Law Conservation Clinic and now an honors attorney with the U.S. Army Corps of Engineers, tackled the arcane regulatory apparatus of the Nuclear Regulatory Commission to determine the extent that sea level rise was being considered in current licensing and relicensing decisions. He concluded that it is not, at least not sufficiently. For solutions, Choate turns to the United Kingdom where the government and industry are working in tandem to address sea level rise and power plant siting. While no one expected the sea to rise 32 feet instantaneously, as it did recently in Japan, the ensuing nuclear meltdown resulting from the Japanese tsunami, has made Choate's article a timely one.

A Sea Change in Sea Grass Restoration Policy. Interdisciplinary graduate student Althea Hotaling recognized that her science-based PhD work had a strong policy component. Funded by Florida's West Coast Inland Navigation District, Hotaling is developing an estuary-wide approach to sea grass restoration that does not rely on permit-by-permit mitigation. On the advice of her advisor, the Director of Florida Sea Grant's Boating and Waterways Program, she sought out the Conservation Clinic and partnered with law student Ben Lingle, now in private practice in Georgia, to address the legal and policy feasibility of her proposed management approach. In this article, Hotaling and Lingle first review essential sea grass science before turning to the federal and state legal framework for addressing sea grass impacts. They then deconstruct the arcane method for evaluating wetland impacts in Florida, the Uniform Mitigation Assessment Methodology (UMAM), and conclude that because it was designed for traditional wetlands, it is not adequate for assessing impacts to sea grass beds. They argue that a permit-by-permit approach to sea grass mitigation may not be in the best interest of the resource. They conclude that sea grass mitigation banking could offer a viable alternative on the ecosystem scale, despite some problematic legal aspects.

Crying Over Spilled Oil. Working under the supervision of one of Florida's, and the Nation's, leading experts in ocean and coastal law, Professor Donna Christie at the Florida State University College of Law, second-year law student Alex Quimby delves into the arcane and confused realm of maritime tort law. Quimby's research presaged a key legal issue in the aftermath of the BP Deepwater Horizon Oil Spill – maritime tort liability for purely economic harm. He argues that Congress should carve out an exception to the rule against purely economic damages for specifically enumerated parties affected by oil spills only, and the federal government should explicitly preempt state law and apply the current bright line rule against purely economic losses due to maritime torts in all other instances.

U.N. Law of the Sea. Working on a Conservation Clinic project with the interagency Southeast Florida Coral Reef Initiative examining compliance with Clean Water Act permit conditions in South Florida's near shore waters, Joe Mathews came across a curious spatial gap in federal law. He discovered that one of the United States' most important environmental laws, the Clean Water Act, does not extend all of its jurisdiction to the edge of the territorial sea, as that has been redefined by the United Nations Convention on the Law of the Sea. When President Reagan signed an executive order in 1988 to conform the 3 mile United States territorial sea to the 12-mile limit now recognized by international law, Congress followed suit by amending a number of important ocean and coastal statutes, but not the CWA. In the article, Mathews describes the increasingly varied activities in offshore waters that could give rise to the types of pollution covered by the CWA, such as expanded oil and gas exploration and exploitation, ocean aquaculture and alternative ocean energy from wind, tides and geothermal sources. He then goes on to analyze the current regulatory regimes that address these activities in the territorial sea. Despite impressive coverage across a range of activities, Mathews concludes that the marine environment may be better off if the Clean Water Act also played a role. Lapses in permitting judgment by the responsible agencies in the recent Gulf oil spill illustrate this point.