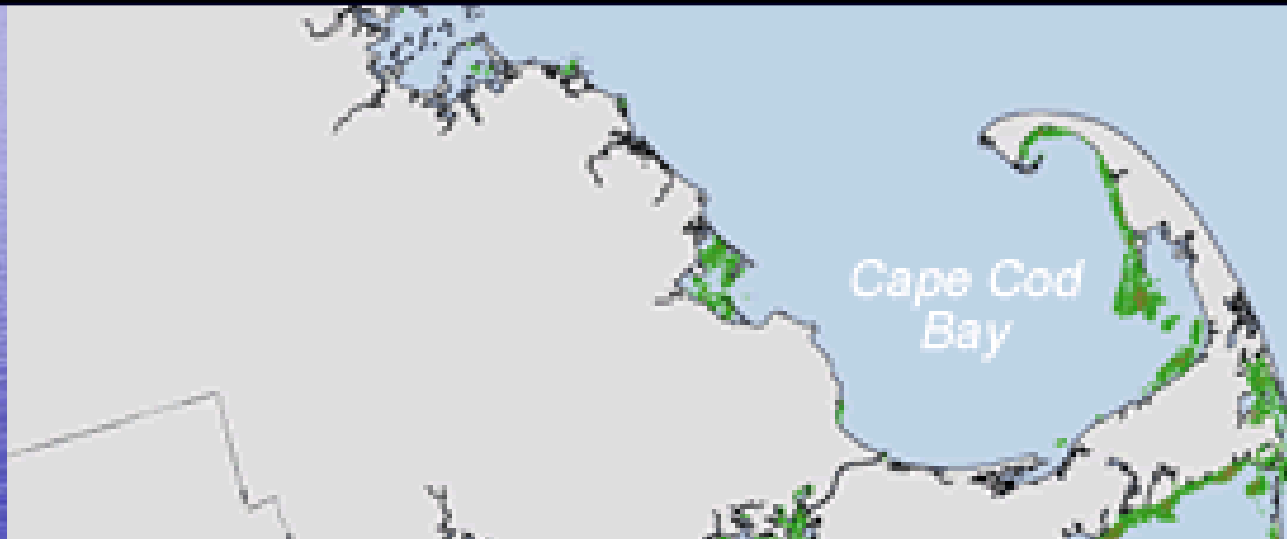




Exploring a New Strategy
for Marine Protection:



An analysis of
laws, policies, and practices related to
private conservation of tidelands in
Massachusetts

Agencies and Organizations Involved

- Organizing
 - The Nature Conservancy
 - NOAA's Coastal Services Center
 - Roger Williams University
 - Sea Grant
 - Coastal States Organization
- Cooperating and Advising/Commenting
 - MA Office of Coastal Zone Management
 - MA Department of Environmental Protection
 - MA Department of Conservation and Recreation
 - MA Department of Agriculture
 - MA Division of Marine Fisheries
 - MA Audubon
 - Cape Cod Commission
 - Compact of Cape Cod Conservation Trusts
 - Pleasant Bay Resource Management Alliance
 - Town officials

MA Tidelands Private Conservation

- *Why we researched*
- *What we researched*
- *What we found*

Why we researched ...

- Because various legal interests in uplands are useful for conserving habitat and resources

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- To learn how to apply strategies used for uplands, on tidelands

Why we researched ...

- Because various legal interests in uplands are useful for conserving habitat and resources
- To learn how to apply strategies used for uplands, on tidelands
- To protect investments in private conservation of tidelands

What we researched ...

- **a legal/policy tool for private conservation of Massachusetts tidelands**

- Evaluated existing legal/policy framework for conservation applications

~
Lease?
~

~
Aquaculture
License?
~

~
Structure
License?
~

- **local, state, federal authorities and their support (their advocacy?) for legally protected private conservation**

What we found ...

- MA context
- Tidelands definitions
- Ownership: Commonwealth or private
- Privately owned tidelands available for conservation
- Leasing not done, per se, in Massachusetts
- Aquaculture licenses not currently available for conservation purposes
- Licensing of conservation under Ch 91 = best option
- Required combination of local, state, federal authorizations depends on the site and project

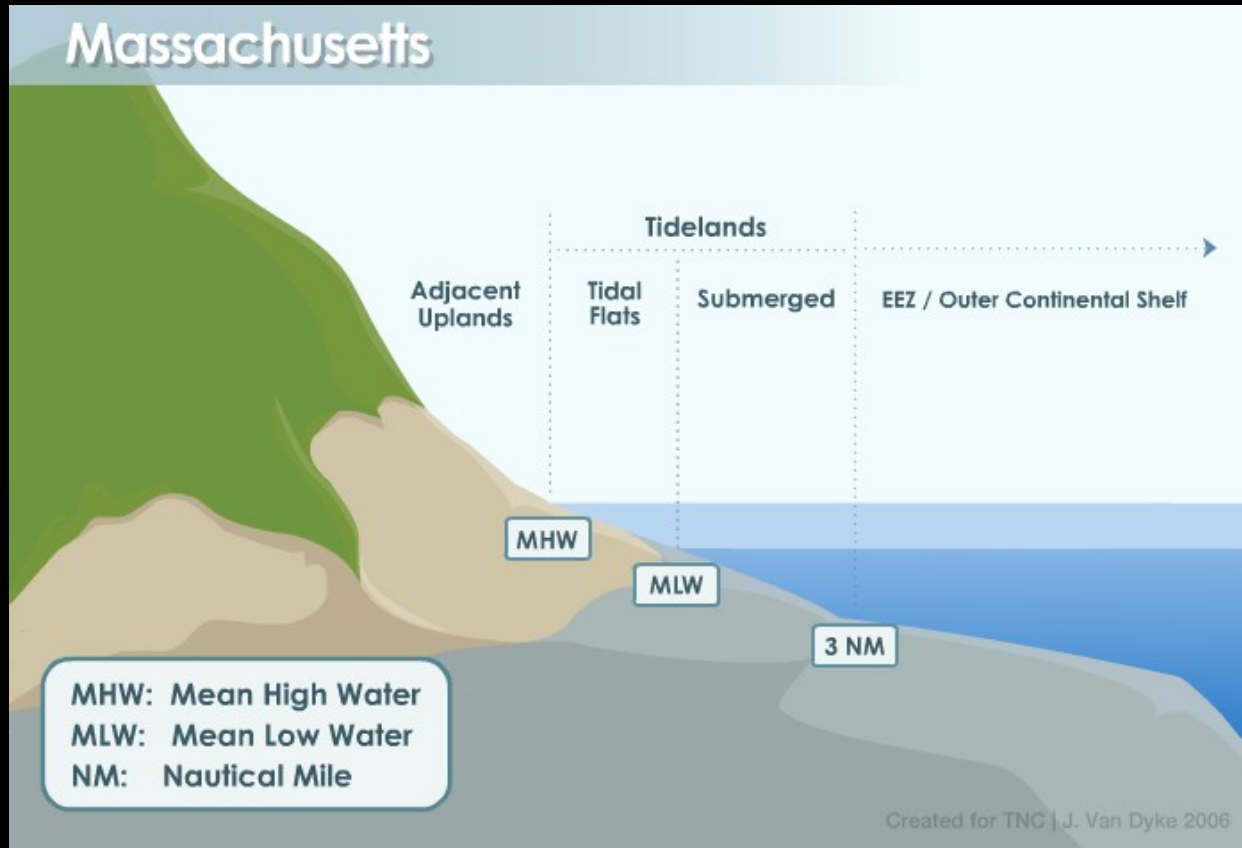
Massachusetts context

- Role of municipalities vs. state
 - Local decisionmaking with state oversight
- Application of Public Trust Doctrine
 - Sometimes one public use must yield to another
- Current ocean planning efforts
 - Bill in committee in state legislature

Tidelands defined

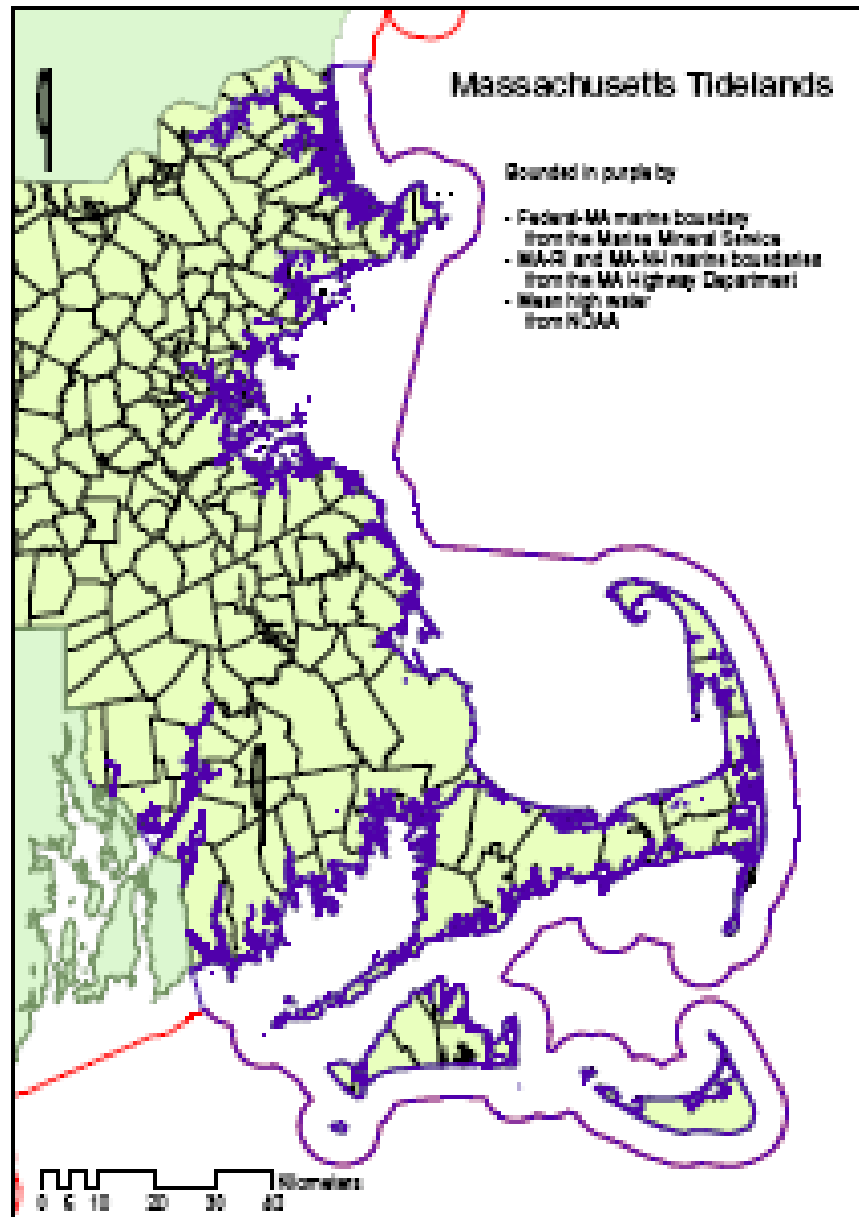
- **Tidelands**: present and former submerged lands and tidal flats lying below the mean high water mark; any land lying between Historic Mean High Water line and the three-mile seaward limit of Commonwealth jurisdiction
 - *Flowed vs. Filled* tidelands
- **Intertidal** lands: lands lying between MHW and MLW lines; also “tidal flats,” “tidal mudflats,” “tide flats lands,” and “tidal lands”
- **Submerged** lands: lands lying between MLW and the three-mile seaward limit of Commonwealth jurisdiction

Massachusetts shore profile: MHW, MLW



Tidelands

- map view



Compiled and edited by The Nature Conservancy, Massachusetts Marine Lands Pilot Project, August 2006
For illustrative purposes only. This map may contain errors.

Ownership of tidelands

- Private intertidal tidelands
 - ~75% of upland coast and adjacent intertidal down to MLW or 100 rods from MHW, whichever is closest to shore
- Federal, Commonwealth, local gov't, other non-private intertidal tidelands
- Commonwealth submerged tidelands
 - Most submerged tidelands are public
- Private submerged tidelands
 - unusual

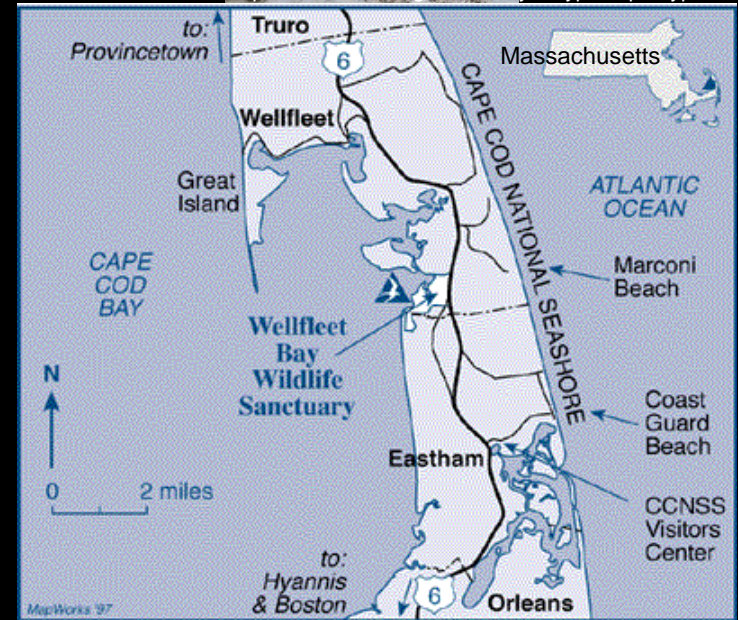
Private tidelands available for conservation?

- Yes. Private tidelands are available for private acquisition for conservation purposes

Example of private conservation ownership of tidelands

Massachusetts Audubon, Wellfleet, MA

- owns tidelands adjacent to conserved uplands
- Audubon controls shellfish harvest and other activities within conservation area boundaries
- should cultivate positive relations with harvesters, towns, public ...
- difficult to settle who owns certain tidelands, where boundaries lie, etc.

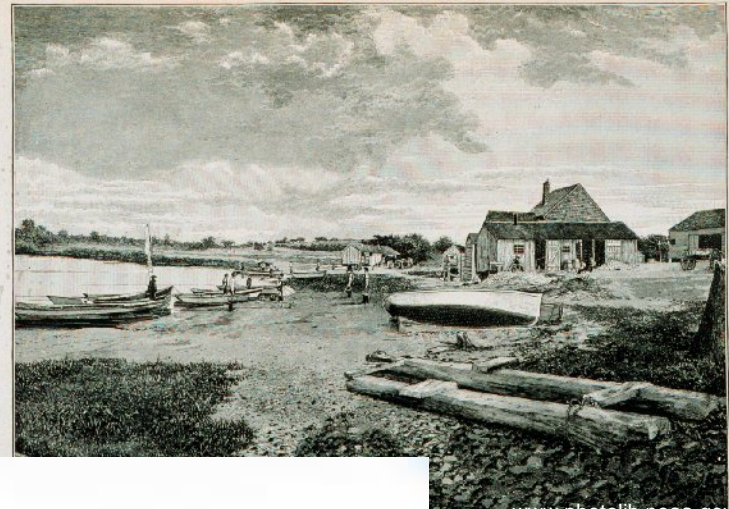


Leasing

- There apparently are no leased tidelands, per se, in Massachusetts
- Investigated two state tidelands licensing programs, instead:
 - Similarity to leasing in other states
 - MGL Ch. 130 shellfish aquaculture on Massachusetts intertidal and submerged lands
 - MGL Ch. 91 activities and structures in waterways

Aquaculture licenses may not be available for conservation

- Aquaculture licensing program subject to different interpretations (commercial vs. conservation use)
- Cannot readily be used for conservation



www.photolib.noaa.gov



http://www.ma.nrcs.usda.gov/news/images/shellfish_Wellfleet_IMG_1391.jpg

www.ams.usda.gov

Cooperation with municipalities

- Instead of aquaculture licensing
- Cooperative relationship with municipalities conducting shellfish propagation/stocking
- Better current option for shellfish restoration



oyster seed www.mass.gov/.../gallery/pages/031.htm

Licensing of tidelands activities under Ch 91 of Mass. General Laws

- New concept...



- Licensing private conservation under the law governing activities and structures in waterways
- **best option for now** because
 - State authorization
 - Long-term
 - Private conservation

Terms and Conditions of Licenses...

Ch 91 Licenses

- Terms and Conditions
 - Could be tailored
 - Possible 30-yr license
 - For any activity or structure in waterways
 - MA Constitution prioritizes environmental protection

MA environmental laws and policies relevant to tidelands conservation

- The combination of required local, state, and federal authorization mechanisms depends on
 - site ownership (private or public) and
 - project type
- Massachusetts Wetlands Protection Act
 - Evidence of priority placed on conserving wetlands resources
 - And...
- Areas of Critical Environmental Concern designation
 - Establishes general policy of conservation whenever projects are planned, etc.
 - And...
- Mass. Ocean Sanctuaries, Clean Water, Etc.

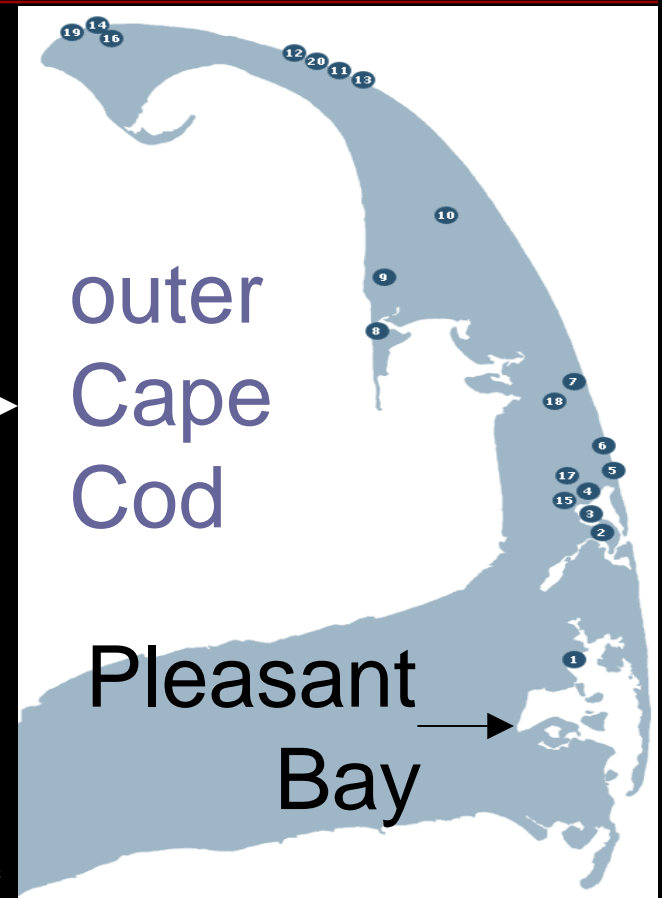
Pleasant Bay, Cape Cod



Coastal Massachusetts

Map adapted from www.csc.noaa.gov

Map from http://www.nps.gov/archive/caco/places/images/index_01.gif



Pleasant Bay

- Pleasant Bay on Cape Cod
 - Area of Critical Environmental Concern
 - Communities invested in protecting and wisely using resources
- Provided a concrete context in which to ask questions of local officials and practice measuring/mapping

Conclusion

- 1) fee ownership only appears to be available for intertidal lands, not submerged lands;
- 2) we found no precedent in Mass. for leasing of tidelands;
- 3) of two existing licensing programs, one (Ch 91 “Activities and Structures in Waterways”) appears to be an option for conservation purposes;
- 4) TNC’s Massachusetts Marine Program is interested in pursuing and testing a pilot Ch 91 license as a conservation option in conjunction with a restoration project

Massachusetts Tidelands Conservation Findings

- “Tidelands” include intertidal and submerged lands; adjacent upland owners typically own the intertidal but *not* submerged tidelands below MLW
- Ownership: Commonwealth or private ownership of intertidal or submerged lands
- Private tidelands are available for conservation
- Leasing, per se, is not an option in Massachusetts
- Aquaculture licenses not currently available for conservation purposes
- Licensing of conservation activity under MGL Ch 91 = best option
- Required combination of local, state, federal authorizations depends on the site and project

Exploring a New Strategy for Marine Protection:

An analysis of laws, policies, and
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Massachusetts

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