

Exploring a New Strategy for Marine Protection: Private Conservation of Tidelands in Massachusetts*

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The coastal waters of the United States contain a significant and under-recognized element of the nation's biological diversity. With increasing populations living near or on the U.S. coast, and many others flocking to coastal areas annually for recreation, degradation of near-shore habitats is widespread and the effects on biological diversity and productivity are alarming.¹ As noted by the Pew Oceans Commission and U.S. Commission on Ocean Policy, real improvements in state and federal management of marine resources are needed;² however, governmental agencies are plagued by budget reductions and increasing workloads. Private entities may be the best partners to provide innovative solutions.

Traditionally, non-governmental organizations (NGOs) have played a substantial role in assisting public agencies but have limited their work to habitat restoration. Terrestrially, NGOs have played a large role in developing and testing new and innovative management approaches on the lands that they lease or own. It has been commonly assumed that the tools for estuarine and marine conservation must be substantially different from those for terrestrial conservation, in part because it is not possible to own parts of the ocean or to exclude areas from certain historic users.³ On the contrary, significant submerged land is available for lease and ownership in the U.S.⁴

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¹ PEW OCEANS COMM'N, AMERICA'S LIVING OCEANS: CHARTING A COURSE FOR SEA CHANGE v-vi (2003), available at http://www.pewtrusts.org/pdf/env_pew_oceans_final_report.pdf [hereinafter PEW OCEAN COMM'N REPORT].

² *Id.* at 119; U.S. COMM'N ON OCEAN POLICY, AN OCEAN BLUEPRINT FOR THE 21ST CENTURY 86 (2004), available at http://www.oceancommission.gov/documents/full_color_rpt/000_ocean_full_report.pdf.

³ MICHAEL W. BECK, THERESA D. MARSH, SHAUNA E. REISEWITZ, MARCI L. BORTMAN, *New Tools for Marine Conservation: The Leasing and Ownership of Submerged Lands*, CONSERVATION BIOLOGY Oct. 2004, at 1214.

⁴ *Id.*

This innovative approach has found traction across the U.S. This Article introduces the concepts of private conservation leasing and ownership of submerged lands and analyzes the potential for private entities to take interest in tidelands for conservation in Massachusetts.⁵ Part I provides the legal background of efforts by private parties to obtain proprietary rights over coastal and ocean resources for conservation, focusing on two projects spearheaded by The Nature Conservancy (“Conservancy”): conservation leasing in Washington and ownership of submerged lands in New York. Part II presents the authorities related to and management of tidelands in Massachusetts. Part III analyzes two mechanisms for private conservation in Massachusetts that allow licensing of tidelands for specific purposes, and evaluates their usefulness to private entities that may wish to undertake tidelands conservation. Part IV concludes with an assessment of the opportunity for private conservation efforts in Massachusetts with recommendations for entities that wish to pursue this emerging tool for marine conservation.

I. PRIVATE CONSERVATION & PROPERTY INTERESTS

Over the past several years, The Conservancy has worked to develop and implement opportunities for private conservationists to obtain proprietary rights over coastal and ocean resources throughout the U.S., noting the need for a broader toolkit to practice marine and estuarine conservation.⁶ The Conservancy is a private conservation organization with a core mission to protect biodiversity on key lands and waters.⁷ Probably best known for its efforts to buy or establish conservation easements in biologically critical upland areas, the Conservancy is adapting these proven terrestrial efforts to marine and estuarine environments,⁸ hoping to encourage private conservationists to become directly involved in the protection, restoration, and management of marine habitats.

The theory is that as direct stakeholders, private conservationists can enhance their effectiveness by expanding beyond their typical roles as advocates, watchdogs, policy advisors, and educators in the marine conservation arena. Each U.S. marine coastal state has a mechanism to lease or authorize use of state submerged lands, generically defined as “land lying below tidal waters.”⁹ Although less common, a system providing for private submerged land ownership

⁵ It is important to note that submerged lands and tidelands, while sometimes used interchangeably, may have distinct definitions depending on the state in which the lands are located. *See infra* Part II.A for the definition of tidelands in Massachusetts which distinguishes tidelands from submerged lands. For purposes of this Article, unless the state discussed specifically defines submerged lands as aquatic lands or tidelands, the generic “submerged lands” will be used.

⁶ *See* T.D. MARSH, M.W. BECK & S.E. REISEWITZ, *LEASING AND RESTORATION OF SUBMERGED LANDS: STRATEGIES FOR COMMUNITY-BASED, WATERSHED-SCALE CONSERVATION* 3 (2002) [hereinafter MARSH, et al.].

⁷ The Nature Conservancy, *How We Work*, <http://www.nature.org/aboutus/howwework/> (last visited Oct. 12, 2006) (stating that its mission is “to preserve the plants, animals and natural communities that represent the diversity of life on Earth by protecting the lands and waters they need to survive”).

⁸ *Id.*

⁹ DAVID SLADE, K. KEHOE, & J. STAHL, *PUTTING THE PUBLIC TRUST DOCTRINE TO WORK* xv (2d ed. 1997) [hereinafter SLADE, et al.].

exists as well. Many state submerged lands were historically used to maximize the economic benefits derived from coastal resources.¹⁰ In light of the historic economic gain from the leasing and use of submerged lands, the concept of conservation as a valid use of public submerged lands may seem to turn traditional leasing upside down. However, some agencies are considering this option and in fact, it is now possible to conserve submerged lands in some states through private leasing or licensing or private ownership.¹¹

A. Public Trust Implications

In presenting private conservation through either conservation leasing or ownership, implications of the Public Trust Doctrine (PTD) are consistently raised. The PTD, derived from ancient Roman law, provides that public trust lands, waters and living resources in a State, including certain submerged lands, are held by the State in trust for the benefit of all of the people.¹² Over time, the PTD has evolved as a diverse and dynamic set of legal principles. In some states, the boundaries of the PTD have been developed through case law. Other states have taken the PTD beyond its common law status and codified it, to some extent, establishing the scope and extent of public and private interests. Incorporating the PTD into statute or regulation can provide a state the means to balance public and private uses.

Uses and management of marine resources have evolved within the framework of the PTD. Although public ownership is one of the primary features and most frequently defines public trust issues, the essence of the PTD is the right of the public to use navigable waters and their shores.¹³

Historically, the availability of these lands and waters for public use has been crucial for travel, transportation of goods and sustenance.¹⁴ The Doctrine is built upon the recognition of the need to protect the public's continued use and benefits from these lands.

Though the Doctrine is intended to preserve public uses of navigable waters and the lands beneath, it has long recognized private uses of submerged lands. The creation of private interests in submerged lands has been found to be consistent with the Public Trust Doctrine subject to certain qualifications and limitations. . . [T]he leasing of submerged lands has been commonly practiced by

¹⁰ MARSH, et. al., *supra* note 6, at 7.

¹¹ In this Article, conservation leasing is used a generic term to indicate a type of authorization mechanism that grants less-than-fee interest to private entities who can obtain long-term rights to private or public submerged lands to protect biological targets from degradation. Thus, the terms for “conservation” and “lease” can differ depending on the state; conservation can be interchanged with restoration, preservation, research, science, or recreation and leases can be interchanged with licenses, permits, ascents, authorizations, or easements. See *infra* Section III.

¹² Extensive analyses of the Public Trust Doctrine and its application to state tidelands are given in several texts, most notably, Putting the Public Trust Doctrine to Work, SLADE, et. al., *supra* note 9, at 1-8. For a concise, but more focused review of the doctrine and its relationship to private conservation of tidelands is given in MICHAEL W. BECK, K. FLETCHER & L. HALE, TOWARDS CONSERVATION OF SUBMERGED LANDS: THE LAW AND POLICY OF CONSERVATION LEASING AND OWNERSHIP 4-16 (2005) [hereinafter BECK, et al.].

¹³ BECK, et. al., *supra* note 12, at 4.

¹⁴ *Id.*

states. . . Extending leasing to new purposes such as conservation is not inconsistent with the Doctrine; however, it should not be assumed that because conservation leasing serves a public purpose, potential interference with protected public rights is not a concern.

While the Doctrine can provide a strong foundation in principles for resolving potential leasing concerns, as a judicially enforced common law doctrine, it is poorly suited for striking a predictable balance between public and private uses. Effective application of the Doctrine to submerged lands leasing requires the establishment and implementation of well thought out administrative programs. . . [A]dditional considerations may need to be incorporated into programs to take into account the unique nature of conservation leasing and ownership.¹⁵

B. *Conservation Leasing in the State of Washington*

The State of Washington recently undertook an assessment of its ability to issue a conservation lease in light of its public trust responsibilities and leasing authority over submerged lands, termed state-owned aquatic lands in Washington.¹⁶ In partnership with the Conservancy, the Washington Department of Natural Resources (WDNR) created a Conservation Leasing Program in 2005 that “allows private and public entities to take a lead role in identifying, planning, and implementing conservation activities (preservation, enhancement, restoration, and creation of habitat) on state-owned aquatic lands.”¹⁷ The leasing program works similarly to conservation easements for the protection of uplands; it allows “external entities to acquire a real estate interest in natural areas that are in need of habitat protection and improvement. It differs from many traditional conservation easements in that the leases are not perpetual, require active management, and are located on public lands.”¹⁸

The originality of conservation leasing merits a closer analysis of the statutory and regulatory basis for the Washington program. “The constitutional authority for the proprietary management of state-owned aquatic lands in Washington is derived from Articles XV and XVII of its Constitution.”¹⁹ The Legislature delegated the responsibility for management of state-owned aquatic lands to the WDNR,²⁰ charging the agency to manage state-owned aquatic lands to achieve a balance of public benefits²¹ including encouraging direct public use and access, fostering water-dependent uses, ensuring environmental protection, and utilizing renewable

¹⁵ *Id.*

¹⁶ For a comprehensive look at the Conservation Leasing Program, see Washington State Department of Natural Resources, *Guidelines for Authorization of Conservation Activities on State-owned Aquatic Lands* (Sept. 9, 2004), http://www.dnr.wa.gov/htdocs/aqr/conservation_leasing/pdf/guidelines.pdf (last visited Nov. 6, 2006) [hereinafter *Guidelines*].

¹⁷ BECK, et al., *supra* note 12, at 17.

¹⁸ *Id.*

¹⁹ *Id.*; see WASH. CONST. art. XV, §§ 1 – 3; WASH. CONST. art. XVII § 1.

²⁰ The WDNR's management of state-owned aquatic lands is governed by Washington Revised Code Chapter 79.105.001 through 79.105.904 and applicable Washington Administrative Code sections 332-30-100 through 332-30-171.

²¹ WASH. REV. CODE § 79.105.030 (2006).

resources.²² The Revised Code of Washington grants the WDNR the authority to lease state-owned aquatic lands²³ stating that the management of state-owned aquatic lands shall preserve and enhance water-dependent uses.²⁴

The WDNR has determined that ensuring the protection of the aquatic environment is inherently a water-dependent use.²⁵ However, concerns regarding including conservation in the same vein as a traditional use of state-owned aquatic lands reinforced the need to clearly define conservation for purposes of a conservation leasing program. The agency debated how active a conservation effort must be: would restricting activity in a marine site be considered conservation or would proactive restoration or monitoring be required? Ultimately, the agency prioritized active habitat management over passive habitat protection; thus, the resulting leasing program authorizes conservation activities that “protect and/or improve the biota, ecological services, and natural functions of aquatic environments.”²⁶

As a state agency, the WDNR has Public Trust responsibilities. While Washington case law regarding the public trust doctrine is not well developed, some argue that “environmental quality and water quality are probably also protected interests.”²⁷ To meet the requirements of the PTD, the agency imposes term limits and conditions (i.e., revocability) within leases to retain the agency’s ultimate control of the state-owned aquatic lands. Further, the agency must determine that the leasing program does not substantially impair the public interests in the remaining lands and waters of the state.

Even though many of the leases issued in Washington have encumbered lands to such an extent that public trust interests have been infringed upon (such as a private marina that prohibits the public from entering the site), the WDNR maintains that the authorization of such uses remains consistent with the Public Trust Doctrine. The logical extension is that conservation activities that may infringe upon public trust interests does not violate the PTD. In fact, it may be easier to prove that conservation activities are justified under the PTD than other activities, because the Washington Supreme Court has implied that improvements to water and/or environmental quality could also be considered interests protected by the PTD.²⁸ As such, “in the case of conservation leasing, one interest protected by the Doctrine (i.e., public access) may be superseded by another protected interest (in this case, conservation of aquatic resources).”²⁹

²² BECK, et al., *supra* note 12, at 17.

²³ WASH. REV. CODE § 79.105.210 (2006).

²⁴ "Water-dependent use" means a use that cannot logically exist in any location but on the water. Examples include, but are not limited to, water-borne commerce; terminal and transfer facilities; ferry terminals; watercraft sales in conjunction with other water-dependent uses; watercraft construction, repair, and maintenance; moorage and launching facilities; aquaculture; log booming; and public fishing piers and parks. WASH. REV. CODE § 79.105.060 (24) (2006).

²⁵ BECK, et. al., *supra* note 12, at 17-29.

²⁶ Guidelines, *supra* note 16, at 1.

²⁷ Ralph W. Johnson, et. al, *The Public Trust Doctrine and Coastal Zone Management in Washington State*, 67 WASH. L. REV. 521, 567-568 (1992) (arguing that “[u]sing the public trust doctrine to protect environmental quality is a logical extension of the doctrine in Washington” based on the Washington Supreme Court holding and dicta in *Orion Corp. v. State*, 747 P.2d 1062, 1073 (1987)).

²⁸ *Orion Corp. v. State*, 747 P.2d at 1073 n.11 (quoting *Portage Bay-Roanoke Park Cmty. Council v. Shorelines Hearings Bd.*, 92 Wash. 2d 1, 4, 593 P.2d 151, 153 (1979)).

²⁹ BECK, et. al., *supra* note 12, at 21.

By explicitly authorizing conservation leasing as consistent with the PTD, a conservation leaseholder may be able to achieve active exclusion of the public from the site in order to protect the habitat and/or environmental features of the site.³⁰ It may seem counter to the underlying notion of the PTD to put public trust interests at odds with each other. Furthermore, this approach has not been upheld by the Washington courts and may be subject to future challenges.³¹

The WDNR also had to reconcile several other issues: whether the WDNR could/should relinquish its environmental protection mandate to external entities; whether conservation is a public trust interest that can supersede other public trust interests; whether conservation satisfies the WDNR's environmental protection mandate; and whether fees should be charged for conservation activities. However, given the existing statutory and historical interpretations of Public Trust rights and authorities, the WDNR found that very little formal policy interpretation, deliberation, and/or development were necessary to establish the legal and policy basis of the Conservation Leasing Program.³² As evidenced by the first-of-its-kind conservation lease issued to the Conservancy in 2005,³³ the WDNR determined that the proposed conservation was a form of environmental protection and was water-dependent and, thus, was an activity within the leasing authority and public trust responsibility of the agency.

C. Ownership of Submerged Lands in New York

The Nature Conservancy is also engaged in private conservation on submerged lands in New York as the owner of a 13,000 acre tract of submerged lands in Long Island's Great South Bay.³⁴ Known as the Bluepoints Property, the Conservancy obtained title to the tract of submerged lands from the Bluepoints Company, which had obtained title after a series of private transactions dating back to the original 1664 grant from King Charles II.³⁵ As a private landowner in Great South Bay, the Conservancy seeks to "champion and advance marine underwater land conservation efforts with rights distinct from those... associated with a lease."³⁶

Generally, a submerged lands owner has title to the lands subordinate to public trust rights. In the case of the Bluepoints Property, the state of New York never owned the property; title has been in private hands (in conjunction with the Town of Brookhaven) for over 300 years. In contrast to this property, New York case law confirms that public trust rights run with underwater lands that were originally owned by the state but later conveyed to private parties.³⁷ In addition, the original deed indicates that the Conservancy's private rights include the

³⁰ *Id.*

³¹ *Id.*

³² WDNR maintains that it has clear authority and ability to lease state-owned aquatic lands, preserve and enhance water-dependent uses, ensure environmental protection, consider natural values prior to leasing, and lease for the protection of the natural values of aquatic lands. WASH. REV. CODE § 79.105.210 (2006). *See also*, Guidelines, *supra* note 16.

³³ Press Release, TNC, State DNR and Nature Conservancy Sign First Aquatic Conservation Lease, (October 26, 2005), *available at* <http://www.nature.org/wherewework/northamerica/states/washington/press/press2143.html>.

³⁴ BECK, et. al., *supra* note 12, at 30.

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Coxe v. State*, 144 N.Y. 396 (1895).

“exclusive right of ‘fishing, hawking, hunting, and fowling’ together with the power to lease or sell the lands covered thereby.”³⁸

Given the “interesting” title history, there is some debate about the existence of public trust rights in the property.³⁹ In fact, in a case about the exclusive right to fish, hunt, and fowl in the property’s deed, the New York Court of Appeals determined that the right of navigation was the sole public right encumbering the lands, stating that:

[W]e are quite clear that there is no necessary conflict between the reservation to the public of the right of navigation and the recognition of the exclusive privilege expressly granted to the owner. The public right, whatever it might otherwise be, must be held limited in such a situation to the right to use the waters for the purposes of a public highway. . . . [T]he easement of passage over navigable waters does not involve a surrender of other privileges which are capable of enjoyment without interference with the navigator.⁴⁰

Thus, while the full range of public trust interests may be debated, it is accepted that, at the least, the public right to navigation is not affected by the private rights documented in the deed.

As a private landowner, the Conservancy is working side by side with the other two primary landowners of the underwater land in Great South Bay, the Towns of Islip and Brookhaven, and the umbrella organization, the Bluepoints Bottomlands Council, to craft a long-term conservation strategy for Great South Bay. This position differs greatly from that of a leaseholder subject to a restricted duration of time and limits on the ability to exclude other uses.

II. THE LEGAL CONTEXT FOR PRIVATE CONSERVATION IN MASSACHUSETTS

The emergence of private conservation in submerged lands raises questions about its applicability in other states which, given the differences in statutes, regulations, authorities, and scope of the PTD, must be a state by state analysis. As shown below, Massachusetts has many unique characteristics distinguishing it from both New York and Washington. But these differences do not necessarily impede the use of private conservation leasing as an effective marine conservation tool in the state.⁴¹ The ability of private entities to conserve Massachusetts submerged lands hinges on the application of the PTD, an understanding of the definition and ownership of Commonwealth tidelands and an examination of the State’s mechanisms to provide interests in Commonwealth tidelands, namely Chapter 91 and Chapter 130 aquaculture licenses.

A. Rights in Tidelands

From the start, it is important to define the submerged lands in Massachusetts to distinguish those that are available for private conservation leasing. In Massachusetts, tidelands

³⁸ BECK, et. al., *supra* note 12, at 31, *citing* Smith v. Odell, 234 N.Y. 267, 270 (1922) (court found that the sole public right encumbering this 13,000 acre tract was the right of navigation).

³⁹ BECK, et. al., *supra* note 12, at 31-32.

⁴⁰ Smith v. Odell, 234 N.Y. at 272.

⁴¹ MASS. GEN. LAWS ch. 91 (2006); MASS. GEN. LAWS ch. 130 (2006).

are “present and former submerged lands and tidal flats lying below the mean high water mark.”⁴²

The PTD provides the foundation of public rights in Massachusetts’s tidelands, and affords the specific public rights of navigation, fishing, and commerce.⁴³ These rights are dominant over private interests in tidelands, meaning that even if Massachusetts grants, gives, or sells tidelands to private parties, the Commonwealth maintains these public rights.⁴⁴ Related to these doctrine-based public trust rights is the constitutional right of Massachusetts citizens to:

[C]lean air and water, freedom from excessive and unnecessary noise, and the natural, scenic, historic, and esthetic qualities of their environment; and the protection of the people in their right to the conservation, development and utilization of . . . water, air and other natural resources⁴⁵

Tidelands ownership in Massachusetts is complex: public rights in Commonwealth tidelands and privately owned tidelands differ from one another. Commonwealth tidelands are defined as “tidelands held by the commonwealth in trust for the benefit of the public or held by another party by license or grant of the commonwealth subject to an express or implied condition subsequent that it be used for a public purpose.”⁴⁶ Thus, Commonwealth tidelands are subject to the public’s right to walk, swim, and engage in other recreational activities, such as hunting waterfowl, fishing, and navigating.⁴⁷ The Massachusetts policy for Commonwealth tidelands reflects a fairly broad interpretation of the PTD and may include environmental protection as a public interest and legitimate use of public trust lands.⁴⁸

The right of the public, however, to use privately owned tidelands in Massachusetts is narrowly prescribed when compared to some other states. Privately owned tidelands are “tidelands held by a private party subject to an easement of the public for the purposes of navigation and free fishing and fowling and of passing freely over and through the water.”⁴⁹ Massachusetts courts have allowed as public rights only fishing, fowling, and navigation, and ancillary activities such as obtaining access to the shore.⁵⁰ Specifically, in 1994, the

⁴² MASS. GEN. LAWS ch. 91, § 1 (2006). The Massachusetts regulations expound on this definition to include those present and former submerged lands and tidal flats lying between the present or *historic* high water mark, whichever is farther landward, and the seaward limit of state jurisdiction. 310 MASS. CODE. REGS. 09.02 (2006).

⁴³ See generally SLADE, et. al., *supra* note 9, at 172.

⁴⁴ See Opinion of the Justices, 424 N.E.2d 1092, 1099 (1981) (“[T]he nature of the public’s rights in flats, the area between mean high water and mean low water (or 100 rods from mean high water, if lesser) . . . are of a limited nature [T]he littoral owner owns them subject at least to the reserved public rights of fishing, fowling and navigation.”).

⁴⁵ MASS. CONSTITUTION art. XCVII.

⁴⁶ MASS. GEN. LAWS ch. 91, § 1 (2006).

⁴⁷ *Id.* See Office of Coastal Zone Management, Executive Office of Environmental Affairs, <http://www.mass.gov/czm/shorelinepublicaccess.htm>, (last visited Oct. 17, 2006).

⁴⁸ See *Home for Aged Women v. Commonwealth*, 89 N.E. 124 (Mass. 1909).

⁴⁹ MASS. GEN. LAWS ch.91, § 1 (2006).

⁵⁰ OFFICE OF THE MASSACHUSETTS ATTORNEY GENERAL, PUBLIC RIGHTS/PRIVATE PROPERTY: ANSWERS TO FREQUENTLY ASKED QUESTIONS ON BEACH ACCESS, *available at* <http://www.ago.state.ma.us/filelibrary/beachacc.rtf>; see also *McCready v. Virginia*, 94 U.S. 391,

Massachusetts Supreme Judicial Court decided in *Pazol v. Director of the Division of Marine Fisheries* that the public does not have the right to access a licensed aquaculture site or be present at all on privately owned tidelands, for the purpose of aquaculture, unless the private tideland owner consents.⁵¹

In addition, a Massachusetts appellate court identified in *Rauseo v. Commonwealth*⁵² circumstances under which public trust rights may be terminated altogether. The rights of the public to use tidelands are terminated where an owner acts, and a judicial decree approves, lawfully filling intertidal lands under a wharfing statute, even if the lands were part of a parcel that included some submerged lands.⁵³ After lawfully filling flats, the landowner may exclude the public but may not interfere unreasonably with navigation.⁵⁴

1. Commonwealth Tidelands

The Commonwealth of Massachusetts owns nearly all of the tidelands in Massachusetts. While Commonwealth and local interests in tidelands were asserted as early as the 17th century in Massachusetts, Massachusetts and other states within the United States formally received title to their unoccupied and undeveloped intertidal and submerged lands through the federal Submerged Lands Act (SLA) of 1953.⁵⁵ The SLA conveyed ownership of such lands to states upon their entrance into the Union.⁵⁶ The seaward boundary of Massachusetts's tidelands stops where federal jurisdiction begins:⁵⁷ at approximately three nautical miles from shore.⁵⁸ The three-mile limit is not static, as it varies and adjusts whenever new data is obtained or the accuracy of old data is improved. Approximately 25% of the Massachusetts shoreline is publicly owned, including federal, local, and adjacent intertidal areas.⁵⁹ In Massachusetts, regardless of the ownership of the tidelands beneath, the flowed waters are always owned by the Commonwealth.⁶⁰

2. Privately Owned Tidelands

By virtue of the Colonial Ordinances of 1641-1647, adjacent private upland owners own in fee-simple the intertidal lands in Massachusetts down to the Mean Low Water ("MLW") line

395 (1877) (for the proposition that states may limit shoreline access by out of state persons).

⁵¹ 631 N.E.2d 547, 572-73 (Mass. 1994).

⁵² 838 N.E. 2d 585 (Mass. App. Ct. 2005).

⁵³ *Id.* at 591.

⁵⁴ *Id.* at 589.

⁵⁵ Submerged Lands Act, 43 U.S.C. §§ 1301-1315 (2006) (the SLA also transferred ownership of submerged lands that lie beneath navigable freshwaters).

⁵⁶ *Id.*

⁵⁷ MASS. GEN. LAWS ch. 1, § 3 (2006).

⁵⁸ 43 U.S.C. § 1312 (2000).

⁵⁹ Massachusetts Office of Coastal Zone Management, available at <http://www.mass.gov/czm//////////beachestom.htm> (last visited Nov. 27, 2006).

⁶⁰ See SLADE, et. al., *supra* note 9, at 30 (stating "Unlike trust lands, however, trust waters cannot be privately owned" *citing* United States v. Twin Power Co., 350 U.S. 222, 226 (1955), and Packer v. Bird, 137 U.S. 661, 667 (1891)).

or 100 rods (or 1,650 feet) from the Mean High Water (“MHW”) line, whichever is closer to the MHW line.⁶¹ For this reason, intertidal lands are often referred to as private tidelands.

Intertidal land ownership poses particular challenges. The *Pazolt* holding also established that if a landowner owns to the MHW line, that same individual is presumed to own the adjacent intertidal lands, absent evidence to the contrary.⁶² It is difficult, however, to find documents clarifying ownership; the deed must state whether the property extends to the MHW or MLW line.⁶³ Due to the costs and uncertainties, very few waterfront landowners have surveyed the locations of their intertidal property boundaries.⁶⁴ Towns are not required to determine the boundaries or owners of tidelands, although some records of intertidal land ownership and private rights exist in specific deeds in the county registry of deeds.⁶⁵

A complicating factor in discerning intertidal land ownership is that some adjacent upland parcels may have been severed from their intertidal land parcels, usually by a specific conveyance.⁶⁶ Once severed, either parcel can be sold separately from the other, resulting in different owners and different tax parcels. As a result, one cannot assume, without seeing the deed to the uplands and intertidal lands, that the adjacent upland owner is the owner of a certain parcel of intertidal lands. However, judicial decisions have established that when a transfer document describes a parcel “to the water line” or “shore” it means that the parcel includes the intertidal lands adjacent to whatever upland is being transferred.⁶⁷ As a result, intertidal lands should be assumed to be included in a transfer of adjacent uplands, if the intertidal lands are not explicitly severed from the uplands or if the upland is not explicitly stated as being bounded by the high water line.⁶⁸

Private entities also have limited ownership of tidelands; because of sparse records, it remains unclear how many and where Massachusetts tideland parcels have been granted to private entities. At least several hundred tideland parcels were granted to individual owners in the 18th and 19th centuries via “wharfing statutes” as a means to promote waterborne commerce activities.⁶⁹ These are probably mostly located near ports and large, urban areas.⁷⁰ Specifically,

⁶¹ See *In re Opinion of the Justices*, 313 N.E.2d 561, 565-66 (Mass. 1974) (citing the Colonial Ordinances of 1641-1647).

⁶² *Pazolt v. Dir. of the Div. of Marine Fisheries*, 631 N.E.2d 547, 550 (Mass. 1994).

⁶³ Telephone interview with Edward Englander, Esq., Englander & Chicoine, P.C., in Newton, Mass. (May 15, 2006) [hereinafter Telephone interview with Edward Englander].

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ OFFICE OF THE MASSACHUSETTS ATTORNEY GENERAL, PUBLIC RIGHTS/PRIVATE PROPERTY: ANSWERS TO FREQUENTLY ASKED QUESTIONS ON BEACH ACCESS, available at <http://www.ago.state.ma.us/filelibrary/beachacc.rtf> (last visited Nov. 27, 2006)

⁶⁷ See *Pazolt*, 631 N.E.2d at 550-51 (citing *Porter v. Sullivan*, 7 Gray 441, 445 (1856); *Valentine v. Piper*, 22 Pick. 85, 94 (1839); and *Commonwealth v. Roxbury*, 9 Gray 451, 524 (1857)).

⁶⁸ Telephone interview with Edward Englander, *supra* note 63.

⁶⁹ See ANSWERS TO FREQUENTLY ASKED QUESTIONS ON BEACH ACCESS, *supra* note 66. See also *Trio Algarvio v. Comm’r of the Dep’t of Env’tl. Prot.*, 795 N.E.2d at 1151 - 52 (Mass. 2003).

⁷⁰ Telephone interview with Dennis Ducsik, Tidelands Policy Coordinator, Massachusetts Office of Coastal Zone Management, in Boston, Mass. (Mar. 8, 2006) [Hereinafter Telephone interview with Dennis Ducsik].

around Cape Cod, and Pleasant Bay in particular, several local experts believe there are few, if any, privately-owned tidelands.⁷¹

Early Massachusetts wharfing statutes granted to individuals lands that were traditionally Commonwealth tidelands.⁷² The grants carried with them the requirement that the new fee-simple private owners use the tidelands in accordance with the public purpose contemplated in each statute (this requirement is a “condition subsequent” to fee title ownership; noncompliance with the condition results in revocation of the grant).⁷³ *Boston Waterfront Development Corp. v. Commonwealth*, known as the “Lewis Wharf” case, found that the public’s rights in formerly submerged tidelands are not extinguished merely by filling; rather, submerged tidelands must continue to be used for a public purpose, where the legislature’s granting language requires it.⁷⁴ The court noted that nothing in the statute being challenged “shall be understood as authorizing . . . interfere[nce] with the legal rights of” the public.⁷⁵

3. The Role of Municipalities

Having distinguished the rights in private and Commonwealth owned tidelands, it is imperative to note the role that municipalities have in tidelands’ use and conservation in Massachusetts. Coastal municipalities have regulatory jurisdiction and police powers on tidelands three nautical miles from the high water mark, which often (but not always) coincides with the seaward boundary of the Commonwealth of Massachusetts.⁷⁶ Within their jurisdictional areas, coastal municipalities can enforce municipal codes, issue mooring and shellfish licenses, manage shellfish beds, and enhance shellfish populations.⁷⁷

Various coastal towns have passed bylaws that protect marine and shellfish habitat in the face of proposed development.⁷⁸ In some cases, town policies of protecting eelgrass and shellfish populations make certain activities on tidelands impermissible.⁷⁹ Towns consider, for

⁷¹ Telephone interview with Steve Tucker, Coastal & Marine Resources Program Manager, Cape Cod Commission, in Barnstable, Mass. (Apr. 21, 2006) [Hereinafter Telephone interview with Steve Tucker]; Telephone interview with Dawson Farber, Town of Orleans Harbormaster and Shellfish Constable, in Orleans, Mass. (Apr. 25, 2006) [Hereinafter Telephone interview with Dawson Farber]; Telephone interview with David Murphy, Assistant Register of Deeds, Barnstable County Registry of Deeds, in Barnstable, Mass. (Apr. 25, 2006) [Hereinafter Telephone interview with David Murphy]; Telephone interview with George Meservey, Town Planner, in Orleans, Mass. (May 2, 2006) [Hereinafter Telephone interview with George Meservey]; Telephone interview with Robert Wilber, Massachusetts Audubon Land Acquisition Director, in Boston, Mass. (May 3, 2006) [Hereinafter Telephone interview with Robert Wilber].

⁷² 1806 Mass. Acts. 13, § 1. For discussion of the wharfing statutes, see *Trio Algarvio v. Comm’r of the Dep’t of Env’tl. Prot.*, 795 N.E.2d 1148, 1151-52 (Mass. 2003).

⁷³ *Boston Waterfront Dev. Corp. v. Commonwealth*, 393 N.E.2d 356, 365-67 (Mass. 1979).

⁷⁴ *Id.* at 364-65

⁷⁵ *Id.* at 361.

⁷⁶ *See Commonwealth v. Manchester*, 25 N.E. 113, 116-17 (Mass. 1890).

⁷⁷ MASS. GEN. LAWS ch. 91, § 10A (2006); MASS. GEN. LAWS ch. 130, § 52 (2006).

⁷⁸ *Matthews v. Falmouth Conservation Comm’n*, No. 00168, 2001 WL 1809817, at *4 (Mass. Super. Sept. 17, 2001).

⁷⁹ *Pierce v. Conservation Comm’n of Falmouth*, 63 Mass. App. Ct. 1114, 826 N.E.2d 794 (Mass. App. Ct. May 10, 2005).

example, whether tidelands are significant shellfish habitat when determining if dock construction projects should be permitted.⁸⁰ Coastal towns may also deny proposals to build a pier where the Division of Marine Fisheries (DMF) of the Department of Fish and Game finds productive shellfish habitat would suffer a “permanent loss of productiv[ity].”⁸¹ In *Comstock v. Barnstable Conservation Commission*, the town was considered just in deciding not to allow a pier to be built because the tidelands in question were significant for shellfish, fisheries, and recreation.⁸²

Pierce v. Conservation Commission of Falmouth noted, when discussing another pier application use, that the opposite was also true: a public benefit would accrue if permit applicants increased eelgrass and shellfish habitat in the process of building their structure.⁸³ As such, a coastal town should be justified in approving a proposal for conservation, which may improve marine habitat, or when DMF finds productive shellfish habitat would experience a permanent gain in productivity.

When municipalities pass ordinances allowing or prohibiting certain activities, the towns are due considerable respect by state and federal authorities.⁸⁴

Preemption of municipal law by federal or state law is not to be inferred lightly. Municipalities are given broad latitude within which to legislate and ‘a sharp conflict’ between the local and state provision is required before the local ordinance is struck down. A conflict appears either when the legislature has plainly stated its intention to preclude local action in a particular area or when ‘the purpose of the [state] statute cannot be achieved in the face of the local by-law.’ At the federal level, the constitutional test for preemption of state (or local) law by federal law is similar. Express congressional intent to displace particular state or local law is required; or where not so stated by Congress, an actual conflict must exist between what federal and local law prescribe. Absent either of these requirements, evidence is needed of congressional intent to exclusively occupy the field covered by the local law.⁸⁵

4. The Role of Tribes

It is worth noting that tribal rights may affect tideland activities, especially in states in which reservations include coastal areas. At this time, the Native Americans of Massachusetts have not retained significant rights to use tidelands beyond those held by the general public.⁸⁶

⁸⁰ *Matthews v. Falmouth Conservation Comm’n*, 2001 WL 1809817, at *4.

⁸¹ *Kennie v. Town of Dennis Natural Res. Dept.*, No. 02293, 2005 WL 3739755, at *2 (Mass. Super. Dec. 29, 2005).

⁸² 65 Mass. App. Ct. 1121, 843 N.E.2d 721, No. 05-P-457, 2006 WL 547876 at *1 (Mass. App. Ct.).

⁸³ 2005 WL 1106689, at *3.

⁸⁴ *Creekside Parking, Inc. v. City of Chelsea*, No. 192808, 1994 WL 16193975 at *3 (Mass. Land Ct. July 29, 1994).

⁸⁵ *Creekside Parking, Inc. v. City of Chelsea*, No. 192808, 1994 WL 16193975 at *3 (Mass. Land Ct. July 29, 1994) (internal citations omitted).

⁸⁶ Telephone interview with Mark Robinson, Executive Director, Compact of Cape Cod Conservation Trusts, in Barnstable, Mass. (Apr. 25, 2006) [Hereinafter Telephone interview with

However, the Wampanoag Tribe of Gay Head (Aquinnah) of Massachusetts received federal recognition through the Indian Claims Settlement Act of 1987.⁸⁷ Though the tribe does not own any tidelands, it operates the Wampanoag Shellfish Hatchery and cultivates oysters on town-owned tidal flats.⁸⁸ Like other aquaculturists, the hatchery is subject to all DMF and town regulations.⁸⁹ As of 2006, the Mashpee Wampanoag Tribal Council, Inc. was campaigning for official recognition as a tribe.⁹⁰

It is unclear whether a hypothetical reservation would include any tidelands or a recognized tribe's duty to follow state law related to tidelands. However, reservations in tidelands may exist in other states that would give tribes an interest in affecting tideland management. Tribes also may have an interest in participating as a conservation entity; the Wampanoags have shown some interest in tideland management as they are a signatory to a 1995 Memorandum of Understanding regarding the management of the Mashpee National Wildlife Refuge.⁹¹ However, the tribe does not own land within the refuge; thus, individual landowners will ultimately decide what happens on the land that they own.⁹²

B. Tideland Management

The Massachusetts Office of Coastal Zone Management (OCZM) reported in 2006 that it manages 1,500 miles of Massachusetts coastline.⁹³ Commonwealth jurisdiction over tidelands off of the 1,500 miles of coast extends seaward three nautical miles (in limited areas beyond closed bays Commonwealth jurisdiction can extend beyond three nautical miles).

Article 97 of the Massachusetts Constitution, the PTD-relevant enabling legislation, court decisions, and public opinion provide the foundation for the Massachusetts's tideland management policies. Massachusetts environmental statutes address a broad range of approaches to land use and resource conservation. The importance of marine resource conservation is mentioned in the enabling legislation of the agencies involved in tidelands management as well as other environmental laws and official statements and publications by members of those agencies.⁹⁴

Mark Robinson].

⁸⁷ 100 Public Law No. 95 (1987).

⁸⁸ Telephone conversation with David Vanderhoop, Wampanoag Aquinnah Shellfish Hatchery, in Aquinnah, Mass (Nov. 8, 2006).

⁸⁹ *Id.*

⁹⁰ A March 31, 2006 preliminary finding indicates that the Wampanoags do qualify for federally-recognized status. See Bureau of Indian Affairs, http://www.doi.gov/bia/federal_acknowledgment_decisions.html (last visited November 21, 2006).

⁹¹ E-mail communication with Libby Herland, Complex Manager, Great Meadows National Wildlife Refuge, in Sudbury, Massachusetts (Nov. 27, 2006).

⁹² *Id.*

⁹³ About the Massachusetts Coastal Zone Management Program, <http://www.mass.gov/czm/aboutczm.htm>, (last visited Oct. 13, 2006).

⁹⁴ MASS. GEN. LAWS ch. 21A, § 1 (2006) (establishing Massachusetts Executive Office of Environmental Affairs); *see also* Massachusetts Coastal Zone Management Plan, <http://www.mass.gov/czm/managementplan.htm> (last visited Oct. 5, 2006).

Several offices within the Executive Office of Environmental Affairs (EOEA) are responsible for managing Massachusetts tidelands. The EOEA's Department of Environmental Protection (DEP) carries out most managerial responsibilities on tidelands, with certain regulatory powers over living natural resources afforded to the DMF and coastal municipalities.⁹⁵ Coastal municipalities, acting on behalf of DMF and DEP, regulate and authorize certain activities on tidelands via licensing programs.⁹⁶ The OCZM implements the coastal zone management program and is charged with balancing the impacts of human activity with the protection of coastal and marine resources.⁹⁷ The Department of Agricultural Resources (DAR) also has as part of its mission to promote and develop the aquaculture on tidelands.⁹⁸

In managing tidelands for the benefit of the people, Massachusetts may provide authorizations for both public and private uses. Management activities and use authorizations on Massachusetts tidelands are typically not recorded in a regimented fashion as they are in some states.⁹⁹ Historically, Commonwealth tideland transactions were driven by industries such as shellfish aquaculture, railroads, ports, and commercial waterfront development.¹⁰⁰

Massachusetts has several mechanisms used to regulate and authorize activities on tidelands, some of which may be applicable to conservation activities. Tideland managers at the private, local, Commonwealth, and federal levels in Massachusetts often use the terms "lease," "license," and "grant" (among other terms) interchangeably when discussing instruments allowing various uses of tidelands. Also, some regulations refer to "grants" when "licenses" are actually issued.¹⁰¹ Although the terms for the authorization mechanisms may be used inconsistently and sometimes interchangeably, the most relevant mechanisms for private conservation efforts in Massachusetts are licenses.

III. TIDELANDS LICENSING IN MASSACHUSETTS

Although the word "lease" is sometimes used by agency officials and others in Massachusetts to describe the mechanism by which one may acquire privately held rights in tidelands, the interests are almost always gained through licenses. In fact, the Tidelands Policy Coordinator at the OCZM has never heard of any true tidelands lease in Massachusetts, stating that "Section 6 of Massachusetts General Laws Chapter 91 gives state authority over state piers,

⁹⁵ See MASS. GEN. LAWS ch. 130, § 52 (2006) (granting City and Town Officers Regulatory authority over the taking of certain fish).

⁹⁶ *Id.* at § 57 (authorizing cities and towns to grant shellfish aquaculture licenses).

⁹⁷ See MASS. GEN. LAWS ch. 21A, § 4A (2006) (establishing the Massachusetts Coastal Zone Management Program to coordinate with the Federal Coastal Zone Management Act) and 301 MASS. CODE REGS. 21.98 (2006) (noting management principles for OCZM).

⁹⁸ Massachusetts Department of Agricultural Resources, Aquaculture, <http://www.mass.gov/agr/aquaculture/> (last visited Oct. 5, 2006).

⁹⁹ Telephone interview with Dennis Ducsik, *supra* note 70.

¹⁰⁰ See *Boston Waterfront Dev. Corp. v. Commonwealth*, 393 N.E.2d 356, 359-63 (Mass. 1979) (providing a history of encroachment on the flats of Boston Harbor and noting that "continuing pressure for development" resulted in the need for a Board of Harbor Commissioners to regulate "building or filling on the tidelands" of the Boston Harbor as early as 1866).

¹⁰¹ MASS. GEN. LAWS ch. 130, § 57 (2006).

so entities may lease facilities on piers. However, no section one leasing authority has been used.”¹⁰²

Instead, Massachusetts often issues licenses and permits for structures and activities such as dredging, filling, and laying cable on the seafloor, as well as for shellfish aquaculture on tidelands. State and local licensing requirements apply to private and Commonwealth-owned tidelands equally, but are generally not required on landlocked tidelands.¹⁰³

A license in Massachusetts enables the holder to use tidelands for a specified activity or structure, for a certain period of time, for (in most cases) a fee, and indicates the authorized exclusion of other uses.¹⁰⁴ A license is only revocable if the terms of the license are breached.¹⁰⁵ As such, a license on Commonwealth-owned tidelands in Massachusetts is roughly equivalent to what is termed a lease in many other states. Compared to other states’ leasing programs, Massachusetts’s licensing program sets out the terms, conditions, rights, and restrictions for use of tidelands. Importantly, a license issued by Massachusetts agencies on privately-owned tidelands, however, only grants the state’s regulatory authorization to conduct activities on the property; proprietary authorization must come from the private landowner.

Although conflicts between licensed private activities and public trust uses are a concern, some private activities necessarily exclude some public trust uses.¹⁰⁶ While the state is responsible for the protection of public trust rights, it must balance public trust rights with other authorized uses on tidelands.

A. Chapter 91 Licenses

The most promising mechanism in Massachusetts for private conservation leasing is the licensing provision authorized under Chapter 91 of the Massachusetts General Laws. The overall mission of the Chapter 91 Public Waterfront Act Waterways Permitting Program is “to preserve and protect the rights in tidelands of the inhabitants of the Commonwealth by ensuring that the tidelands are utilized only for water-dependent uses or otherwise serve a proper public purpose.”¹⁰⁷ The program promotes economic development, while protecting the public trust rights below the MHW line in great ponds, navigable rivers, and streams.¹⁰⁸

A Chapter 91 license is required to conduct any construction, improvement, or maintenance on lands generally considered trust lands.¹⁰⁹ Currently, project proponents can receive thirty-year Chapter 91 licenses or permits for projects and structures in most flowed and filled tidelands.¹¹⁰ Proposed alteration of marine resources, such as those normally proposed

¹⁰² Telephone interview with Dennis Ducsik, *supra* note 70.

¹⁰³ 310 MASS. CODE REGS. 9.04 (2) (2006); MASS. GEN. LAWS ch. 130, § 57 (2006).

¹⁰⁴ *Id.*

¹⁰⁵ 310 MASS. CODE REGS. 9.26 (2006).

¹⁰⁶ MASS. GEN. LAWS ch. 91 (2006); MASS. GEN. LAWS ch. 130, § 57 (2006).

¹⁰⁷ MASS. GEN. LAWS ch. 91, § 2 (2006); 310 MASS. CODE REGS. 9.01 (2)(b) (2006). *See generally* Department of Environmental Protection, Chapter 91: An Overview and Summary, <http://www.mass.gov/dep/water/resources/about01.htm> (last visited Oct. 5, 2006).

¹⁰⁸ 310 MASS. CODE REGS. 9.01 (2)(a) – (e) (2006).

¹⁰⁹ 310 MASS. CODE REGS. 9.04 – 9.05 (2006).

¹¹⁰ 310 MASS. CODE REGS. 09.02 (2006) “Flowed Tidelands are submerged lands and tidal flats which are subject to tidal action. Filled Tidelands are former submerged lands and tidal flats which are no longer subject to tidal action due to the presence of fill.” Flowed tidelands and filled tidelands are subsets of “tidelands” that, together, make up the totality of “tidelands.” *Id.*

under Chapter 91, includes coordination with Massachusetts environmental permitting programs¹¹¹ to evaluate the impacts resulting from proposed activities that would, for example, cover the seafloor and exclude others from using the area.¹¹²

A Chapter 91 license can grant permission to conduct all the activities of interest for conserving tidelands habitat and would persist through transfers of title of the underlying property.¹¹³ If someone other than the licensee wants to undertake activity in the same footprint, they must get a Chapter 91 authorization (e.g., if a marina is built, the licensee gets exclusive control over the space).¹¹⁴

Unless otherwise provided in the license, a valid license [runs] with the land and automatically [transfers] upon a change of ownership of the affected property within the chain of title of which the license has been recorded. All rights, privileges, obligations, and responsibilities specified in the license transfers to the new landowner upon recording of the changed ownership.¹¹⁵

A license enumerates certain state and licensee responsibilities. The state retains certain managerial responsibilities under the PTD. Existing Chapter 91 regulations may allow some public uses to be excluded in furtherance of conservation; for example, Chapter 91 allows interference with one public right in the interest of another for structures and uses on tidelands.¹¹⁶

Both private and public entities must apply for Chapter 91 licenses. State and local governments are required to apply for Chapter 91 licenses for structures and other activities on tidelands, such as construction of highways, parks, other public purposes.¹¹⁷ The federal government applies through the Commonwealth licensing process for purposes such as lighthouses, military bases, and reclamation.¹¹⁸ The federal government and the Commonwealth negotiate projects for federal purposes such as navigation, flood control, and national security by applying a combination of federal navigational servitude, federal consistency review to ensure that the project follows Massachusetts law, and Massachusetts General Laws Chapter 91 licensing for activities and/or structures in waterways.¹¹⁹

Chapter 91 projects must meet numerous conditions including not interfering with public rights or rights of adjacent property owners, conformance with municipal zoning laws and harbor plans, and state environmental protection standards.¹²⁰ Generally, compatible uses are

¹¹¹ See 310 MASS. CODE REGS. 9.31 (2006) (summary of License and Permit Requirements); Telephone interview with Steve Tucker, *supra* note 71.

¹¹² Telephone interview with Steve Tucker, *supra* note 71.

¹¹³ Telephone interview with Dennis Ducsik, *supra* note 70; 310 MASS. CODE REGS. 9.23 (2006); 310 MASS. CODE REGS. 9.07(2)(d) (2006). It is notable that interests related to possessing and cultivating shellfish and possibly other tideland species are arguably covered under Chapter 130 licenses. *Id.*

¹¹⁴ *Id.*

¹¹⁵ 310 MASS. CODE REGS. 9.23 (2006).

¹¹⁶ MASS. GEN. LAWS ch. 91, § 10 (2006).

¹¹⁷ 310 MASS. CODE REGS. 9.05 (2006).

¹¹⁸ This application process is primarily courtesy as the federal interests in these activities are paramount. Telephone interview with Dennis Ducsik, *supra* note 70.

¹¹⁹ *Id.*

¹²⁰ See 310 MASS. CODE REGS. 9.33 – 9.36 (2006).

accommodated in good faith. However, it is state policy that “a project shall not significantly disrupt any water-dependent use in operation . . . at an off-site location within the proximate vicinity of the project site.”¹²¹

Displacement fees and occupation fees can be charged for Chapter 91 licenses. Displacement fees are assessed by DEP to compensate the Commonwealth for the amount of tidewater displaced (and as a result, impacts to navigation) by structures or fills below the MHW line.¹²² Occupation fees are determined pursuant to Chapter 91 regulations and are generally charged for occupying Commonwealth tidelands in some manner, for example by way of a fill or building a structure.¹²³

Arguably, the use of tidelands to promote conservation of marine resources might not be assessed displacement and occupation fees.¹²⁴ The assessment of displacement fees for tideland conservation depends in part on the public benefits provided by the project and whether the project interferes with navigation.¹²⁵ Similarly, it may “be just and equitable” if conservation projects are considered a public benefit, they may not be subject to occupation fees for the rights and privileges granted in Commonwealth tidelands.¹²⁶

B. Potential of Chapter 91 for Conservation Licensing

Private conservation of tidelands is consistent with, and supported by, Chapter 91 licensing in several ways. Water-dependent uses are considered a “proper public purpose” and are generally favored over nonwater-dependent uses in Massachusetts.¹²⁷ Since wildlife and habitat protection (which presumably would be included in marine conservation projects) are listed as water-dependent uses in Massachusetts regulations, marine conservation projects are arguably proper public purposes.¹²⁸ In addition, public recreation related to public trust resources on tidelands (i.e., fishing, shellfishing, aesthetic appreciation, walking, and swimming) is arguably supported and enhanced by protection and improvement of the tideland habitat and resources (i.e., water quality, eelgrass, shellfish, and fish).

Given the consistency of private marine conservation with current law, policy, and agency climate, while unprecedented, a private entity could likely obtain a Chapter 91 license to use tidelands for conservation purposes in Massachusetts. Potential benefits of using the Chapter

¹²¹ 310 MASS. CODE REGS. 9.36(3) (2006).

¹²² MASS. GEN. LAWS ANN. ch. 91, § 21 (2006).

¹²³ *Trio Algarvio, Inc. v. Comm’r of the Dept. of Env’tl. Prot.*, 795 N.E.2d 1148, 1150 (2003); MASS. GEN. LAWS ANN. ch. 91, § 22 (2006).

¹²⁴ Telephone interview with Dennis Ducsik, *supra* note 70; see also 310 MASS. CODE REGS. 9.16(4b) (2006) which states: (b) Non-profit organizations. The fees described herein at 310 CMR 9.16(2) and 9.16(3) shall not be applicable to a non-profit organization as defined in 310 CMR 9.02, if: 1. the project is a facility of public accommodation which does not deny access to its services and facilities to any citizen of the Commonwealth in a discriminatory manner; 2. the project is not intended to generate revenues in excess of that needed for construction, operation and maintenance of the uses specified in the license; and 3. said organization has not been created for the purpose of avoiding said fees while sheltering profits in another entity.

¹²⁵ *Id.*

¹²⁶ MASS. GEN. LAWS ch. 284, § 1 (1874).

¹²⁷ MASS. GEN. LAWS ch. 91, § 2 (2006); 310 MASS. CODE REGS. 9.31(2) (2006).

¹²⁸ 310 MASS. CODE REGS. 9.12(2)(a)(15) (2006).

91 licensing program include: (1) clear state authority; (2) state agency support; (3) the opportunity for a longer term than other licenses; (4) the ability to negotiate terms; and (5) flexibility in case the conservation project requires alteration of tidelands that may not be allowed by other licenses (i.e., dredging, filling, or other activities, such as erecting structures that exceed size or area limits of shellfish aquaculture licensing). The three primary drawbacks to using the Chapter 91 license for private conservation are that it has not been used for shellfish-related conservation work, does not alone give sufficient authority for shellfish bed restoration, and it will still require the acquisition of private owner authorization.

For private conservationists that wish to pursue the first conservation license via Chapter 91, the first step in the process must involve consultation with DEP tidelands personnel as the unique nature of a conservation license application may require more information than the traditional use permit.¹²⁹ Public participation, comment, and an optional public hearing would give opportunities to gauge the effect on stakeholders.¹³⁰ The specific activities and structures proposed as part of the tidelands conservation project would be closely scrutinized to determine the applicability of Chapter 91 to the project.¹³¹ In some cases, depending on the objectives and site-specific circumstances of the proposed conservation project, private conservationists may want to protect the site from impacts for an extended period of time and thus take advantage of Chapter 91's thirty-year duration.¹³² A Chapter 91 license could also authorize activities that may be necessary for conservation but are normally not part of bottom-anchored structures typically permitted by harbor masters.

Entities pursuing a conservation license can request explicit clarifications within the Chapter 91 license regarding reasonable concurrent uses (such as public access restrictions and public trust interests that are maintained), and *should* request such clarifications if complete restrictions on public access are sought or anticipated. Public access restrictions would depend on the clear illustration of the sensitivity of the targeted marine resources and the effectiveness of the proposed conservation activities.¹³³ The reaction of a town Board of Selectmen to a conservation license application and request for limitation of public use would also depend upon the local political climate.¹³⁴

The challenges to Chapter 91 conservation licensing are rooted in the novelty of the approach. The practice of proactive tidelands conservation via a Chapter 91 license that allows some degree of exclusive use is unprecedented in Massachusetts. Also, an application that includes shellfish restoration would require DMF and municipal consent as these entities have the authority regulate the harvest of fish and wildlife. Thus, if the conservation objectives required fish and shellfishing restrictions, a potential conservation licensee would have to consult and collaborate with all of these entities (and have the permission of the tideland owner). If the project included shellfish restoration, a Chapter 130 shellfish aquaculture license, and/or special designation by the town as a closed shellfish sanctuary, may be necessary.

¹²⁹ Telephone interview with Dennis Ducsik, *supra* note 70; Telephone interview with Dawson Farber, *supra* note 70.

¹³⁰ Telephone interview with Dennis Ducsik, *supra* note 70.

¹³¹ *Id.*; Telephone interview with Dawson Farber, *supra* note 71.

¹³² Telephone interview with Robert Wilber, *supra* note 71.

¹³³ Telephone interview with Dennis Ducsik, *supra* note 70.

¹³⁴ Telephone interview with Scott Soares, Shellfish Aquaculture Promoter, Massachusetts Department of Agriculture, in Boston, Mass. (Apr. 20, 2006) [hereinafter Telephone interview with Scott Soares]; Telephone interview with Dawson Farber, *supra* note 71.

C. Chapter 130 Aquaculture Licenses

The second proposed mechanism in Massachusetts is the Chapter 130 aquaculture license, which is primarily issued by coastal towns within their respective tideland jurisdictions for commercial shellfish aquaculture purposes. Despite having delegated the Chapter 130 authority to coastal town officials (such as shellfish constables, town boards of selectmen, and mayors), DMF maintains a review and concurrence responsibility over all Chapter 130 aquaculture licenses issued by the towns.¹³⁵ Presumably, the DMF would also issue Chapter 130 aquaculture licenses on tidelands lying outside of town jurisdiction but within Commonwealth jurisdiction (i.e., outside of closed bays where Commonwealth jurisdiction extends past three nautical miles). DMF also retains management responsibility for surf clams and ocean quahaugs.¹³⁶

The statute does not require that Chapter 130 aquaculture licenses have shellfish production (i.e., harvest) quotas or be issued for commercial purposes only.¹³⁷ A shellfish aquaculture license sought exclusively for conservation purposes may even receive special consideration from a town's Board of Selectmen.¹³⁸ Given this, it would appear that private conservationists may be able to use Chapter 130 aquaculture licenses for noncommercial shellfish restoration purposes. Historical practices and current agency philosophy, however, indicate that, at present, Chapter 130 aquaculture licenses would not be issued for restoration purposes because, even if a coastal town desired to issue such a license, the DMF would likely not concur.¹³⁹ Thus, while Chapter 130 gives context to current shellfish management practices on Massachusetts tidelands, it does not appear to present an opportunity for private conservationists.

The Chapter 130 aquaculture licensing program was instituted to give aquaculturists a right to place and protect their equipment (with the permission of tideland owners) on property they did not own.¹⁴⁰ Massachusetts currently has approximately 1,000 acres of licensed shellfish aquaculture occurring on tidelands.¹⁴¹ As of 2006, however, many towns were not granting new

¹³⁵ MASS. GEN. LAWS ANN. ch. 130, § 57 (West 2006); *see generally* Massachusetts Division of Marine Fisheries Programs and Projects, <http://www.mass.gov/dfwele/dmf/programsandprojects/shelsani.htm> (last visited Oct. 16, 2006).

¹³⁶ 322 MASS. CODE REGS. 6.08 (2006).

¹³⁷ Telephone interview with Dennis Ducsik, *supra* note 70.

¹³⁸ Telephone interview with Dawson Farber *supra* note 71; Telephone interview with Andy Koch, Town of Wellfleet Health/Conservation Agent, in Wellfleet, Mass. (May 3, 2006) [hereinafter Telephone interview with Andy Koch].

¹³⁹ Interview with Mike Hickey, Shellfish Program Chief, Division of Marine Fisheries, in Pocasset, Mass. (July 11, 2006) [hereinafter Interview with Mike Hickey]. Hickey indicated that, to his knowledge, many towns had incorporated a commercial harvest component into their town requirements. *Id.*

¹⁴⁰ Telephone interview with Scott Soares, *supra* note 134.

¹⁴¹ Massachusetts Office of Coastal Zone Management, Massachusetts Aquaculture White Paper – Shellfish Bottom and Off-Bottom Culture (1995), available at <http://www.mass.gov/czm/wpshell.htm> (noting approximately 646.5 acres of tidelands currently licensed for shellfish cultivation and 226.5 acres of surface water and water column for off-bottom aquaculture operations) (last visited Nov. 27, 2006).

Chapter 130 aquaculture licenses.¹⁴² When entities want shellfish licenses, they have to show that under normal circumstances, there are no shellfish growing in the proposed license areas.¹⁴³ In addition, Chapter 130 requires that “no substantial adverse effect on the shellfish or other natural resources” should happen as a result of a shellfish aquaculture license being granted.¹⁴⁴ After demonstrating that there are no shellfish growing on the site and that no adverse effects will be caused, aquaculturists have to obtain several authorizations including: (1) a Chapter 130 aquaculture license from the municipality; (2) an undersized shellfish permit from DMF; (3) a commercial “transaction card” from DMF to sell the shellfish; (4) a “tag” from the public health department to sell shellfish because it is a potentially hazardous food; (5) and authorization from private tideland owners if the project will be on private tidelands.¹⁴⁵ Additionally, in *Palzolt v. Director of the Division of Marine Fisheries* the Massachusetts Supreme Court determined that aquaculture is farming, not fishing, and therefore an aquaculturist cannot rely on the public trust right to conduct activities on tidelands.¹⁴⁶

The relevant features of a shellfish aquaculture license include exclusive use (free of incompatible uses by the public) of tidelands by a licensee, construction of equipment to provide shellfish substrate, an eventual 10-year term,¹⁴⁷ with renewals of the same duration likely available, transferability, and the right to pass the license to one’s heirs.¹⁴⁸ Terms applicable to a conservation licensee might be negotiated.

D. *Potential of Chapter 130 Aquaculture Licenses for Conservation Licensing*

Although it presently appears that Chapter 130 shellfish aquaculture licenses will not be available for private conservation purposes, there are several issues that should be considered if it is ever made available. While Chapter 130 would be useful because it allows for direct collaboration with the local towns, each town may apply different criteria to shellfish aquaculture licensing. Consequently, private conservationists may have to establish how a shellfish restoration project would contribute to the broader shellfish population of the region to help justify the project. One strategy may be to look for an area that is degraded or not productive, with respect to shellfish or eelgrass, and provide a benefit that is “restored” to the regional ecosystem and the public in the form of shellfish production.¹⁴⁹

When holding a shellfish aquaculture license tailored to conservation purposes, an entity’s interest most likely would be subject to the same exclusive rights and level of protection as a commercial license.¹⁵⁰ Despite towns being very protective of public access, public access could be balanced (i.e., compromised) to allow shellfish habitat restoration. Massachusetts

¹⁴² Telephone interview with Dawson Farber, *supra* note 71; Telephone interview with Andy Koch, *supra* note 138.

¹⁴³ See MASS. GEN. LAWS ch. 130 § 57.; Telephone interview with Dawson Farber, *supra* note 71.

¹⁴⁴ MASS. GEN. LAWS ch. 130, § 57 (2006).

¹⁴⁵ Massachusetts Office of Coastal Zone Management, Massachusetts Aquaculture White Paper – Legal and Regulatory Issues, <http://www.mass.gov/czm/wpmlglrg.htm> (last visited Oct. 6, 2006).

¹⁴⁶ 631 N.E.2d 547, 551 (Mass. 1994).

¹⁴⁷ There may be initial trial terms of 1-5 years granted. Telephone interview with Andy Koch, *supra* note 138.

¹⁴⁸ MASS. GEN. LAWS ch. 130, §§ 57, 58, 63 (2006).

¹⁴⁹ Telephone interview with Scott Soares, *supra* note 134.

¹⁵⁰ *Id.*

statutory authorization of shellfish aquaculture indicates that a licensee is given a right to exclusive use of the area and that public use, such as boating, would be allowed only if it did not injure an aquaculture project.¹⁵¹ As such, aquaculture priority over conflicting uses is contemplated by the aquaculture law, and public access may sometimes be curtailed in the interest of encouraging shellfish cultivation.

IV. THE EVOLUTION OF CONSERVATION LICENSING IN MASSACHUSETTS

Conservation licensing obviously would not occur in a vacuum: there are numerous local, Commonwealth, and federal laws and programs that apply to the management and conservation of Massachusetts tidelands. Some of these may lend support to private conservation efforts.

Most of the tideland-related laws and programs in Massachusetts consist of some type of special designated areas or zoning. The special areas and zones at the local and Commonwealth levels act as tools for tidelands conservation, but their effectiveness may be hampered by incomplete implementation or insufficient authority to do more than furnish advice on appropriate tideland management. Federal protection mechanisms in Massachusetts include national seashores (such as the Cape Cod National Seashore), national estuary research reserves (such as the Waquoit Bay NERR), and national wildlife refuges (such as the Monomoy National Wildlife Refuge). Local zoning of various types exist throughout the Commonwealth¹⁵² including special tidelands designations,¹⁵³ Article 97 Lands,¹⁵⁴ Areas of Critical Environmental Concern,¹⁵⁵ Ocean Sanctuaries,¹⁵⁶ fishery closures, and Outstanding Resource Waters¹⁵⁷ and Priority Habitat.¹⁵⁸

A wisely-crafted private tidelands conservation licensing program could complement and enhance the effects of existing local, Commonwealth, and federal tideland-related laws and programs. Private conservationists must be aware and understand such designated areas and applicable zoning but can proactively bring needed focus, expertise, and resources to Massachusetts tidelands conservation.

Private entities could undertake several types of projects to conserve specific tideland sites. For authorization purposes, projects can be separated into two distinct groups: on-site and off-site projects. On-site projects include preservation, habitat improvement via restoration, enhancement, or creation, and scientific research and monitoring. On-site activities will often involve alterations of the environment (i.e., habitat improvement, scientific experiments), placement of man-made structures (i.e., signs, fill, plantings), or a physical presence on the site (i.e., monitoring, general cleanup, enforcement). These activities are likely to maintain or

¹⁵¹ MASS. GEN. LAWS ch. 130, §§ 57, 63 (2006).

¹⁵² MASS. GEN. LAWS ch. 40A (2006).

¹⁵³ Tidelands designations include designated port areas (MASS. GEN. LAWS ch. 21F § 2 (2006)) and municipal harbor planning areas 301 CODE MASS. REGS. 23.01 (2006).

¹⁵⁴ MASS. CONST. art. 97.

¹⁵⁵ Areas of critical environmental concern are “those areas within the Commonwealth where unique clusters of natural and human resource values exist and which are worthy of a high level of concern and protection.” 301 CODE MASS. REGS. 12.03 (2006). *See generally* MASS. GEN. LAWS ch. 21A § 2(7) (2006); 301 CODE MASS. REGS. 12.00 – 12.16 (2006).

¹⁵⁶ Ocean Sanctuaries Act, MASS. GEN. LAWS ch. 132A, §§ 12A – 16F (2006).

¹⁵⁷ *See generally* Outstanding Resource Waters, 314 MASS. CODE. REGS. 4.00 (2006).

¹⁵⁸ Massachusetts Endangered Species Act, MASS. GEN. LAWS ch. 131A (2006).

change (either improve or decrease) the status quo of the site in a manner agreed upon and preferred. Off-site projects include planning, public education and outreach, and adjacent landowner outreach and collaboration. While it is expected that most on-site projects will require some form of specific authorization, the exact nature, extent, and duration (among other factors) of the on-site activities will ultimately determine if private entities need authorization to undertake them, at the Commonwealth and/or municipal levels. It is not likely that authorization would be needed for the off-site activities.

If private conservation depends on on-site tideland conservation, then acquiring a Chapter 91 license will likely be necessary. Because conservation licensing is new to Massachusetts, private conservationists must meet not only the technical requirements of application and maintenance but should also work closely with Commonwealth and local officials tideland owners, other marine stakeholders, and the public to build consensus on the best methods of conserving tideland habitat, determine how to classify proposed projects, complement existing coastal, tideland, and ocean management and conservation programs, and evaluate the applicable regulatory requirements.¹⁵⁹

Private conservationists should strive to undertake tideland projects within the jurisdiction of existing coastal, tideland, and ocean management and conservation programs that complement and lend support and rationale for the proposed projects. For example, the Pleasant Bay region on Cape Cod may be an appropriate place to investigate tideland conservation targets because the region is designated an Area of Critical Environmental Concern, stakeholders have developed and are implementing a pro-active resource management plan, and area decision makers have to some degree participated in the development of this report. The duration of any required authorizations will ultimately be determined by funding requirements, agency requirements, and the need on behalf of private conservationists to protect sites and their conservation investments. Projects will likely meet with better local support if public access (in accordance with the PTD) is allowed on the project site to the extent compatible with the conservation objectives for the site.

Given the above, a pilot tideland conservation project could test and establish the process, engage agencies, and conserve marine biodiversity. A successful pilot project would likely help establish a “place at the table” and a voice for the conservation entity when agencies and coastal towns are making decisions affecting tidelands. Successful projects involving private conservation of tidelands may eventually foster a stewardship ethic within local communities and build support for additional, more expansive tideland conservation activities in the future.

Although existing laws, regulations, policies, and practices appear to support Chapter 91 conservation licensing without the creation of a new program, a specific conservation licensing program could establish conservation as a legitimate licensing purpose and standardize the process by which a conservation license might be obtained. Additionally, a Chapter 91 conservation licensing program – if supported by the agencies and coastal towns – may help enhance current tideland conservation efforts by identifying and meeting conservation priorities of the state agencies.¹⁶⁰

¹⁵⁹ Telephone interview with Dennis Ducsik, *supra* note 70.

¹⁶⁰ For recent recommendations regarding ocean management in Massachusetts, *see* MASSACHUSETTS OCEAN MANAGEMENT TASK FORCE, WAVES OF CHANGE (2006) http://www.mass.gov/czm/oceanmanagement/waves_of_change/pdf/wavesofchange.pdf (last visited Sept. 26, 2006).