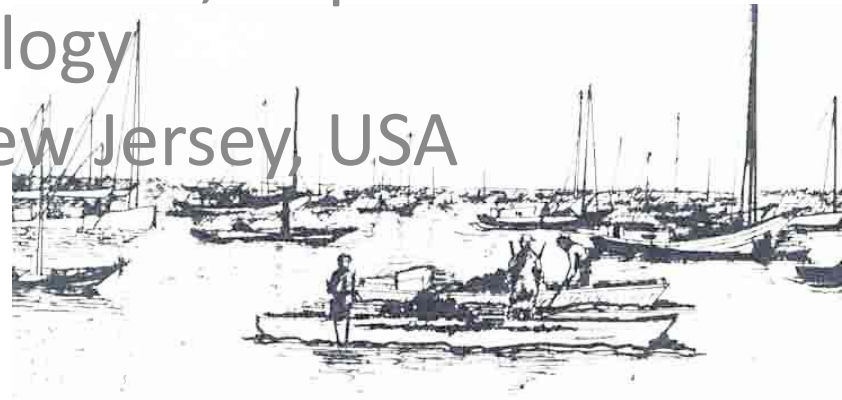


Law, Litigation, and the Liminal Littoral

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Roles of law in re...

- Tragedy of the Commons

“Therein is the tragedy. Each man is locked into a system that compels him to increase his herd without limit—in a world that is limited. ...Freedom in a commons brings ruin to all.” (Hardin, 1968)

- Comedy of the Commons

- “The drama of humans as social rather than private beings, a drama of social actions having a frankly corrective purpose.” (M.E. Smith, 1984; McCay and Acheson 1987).

The Littoral and the Liminal

- Littoral

of or on the shore—
especially a seashore,
brushed by the tides



- Liminal

- Latin *limin-*, *limen*
threshold

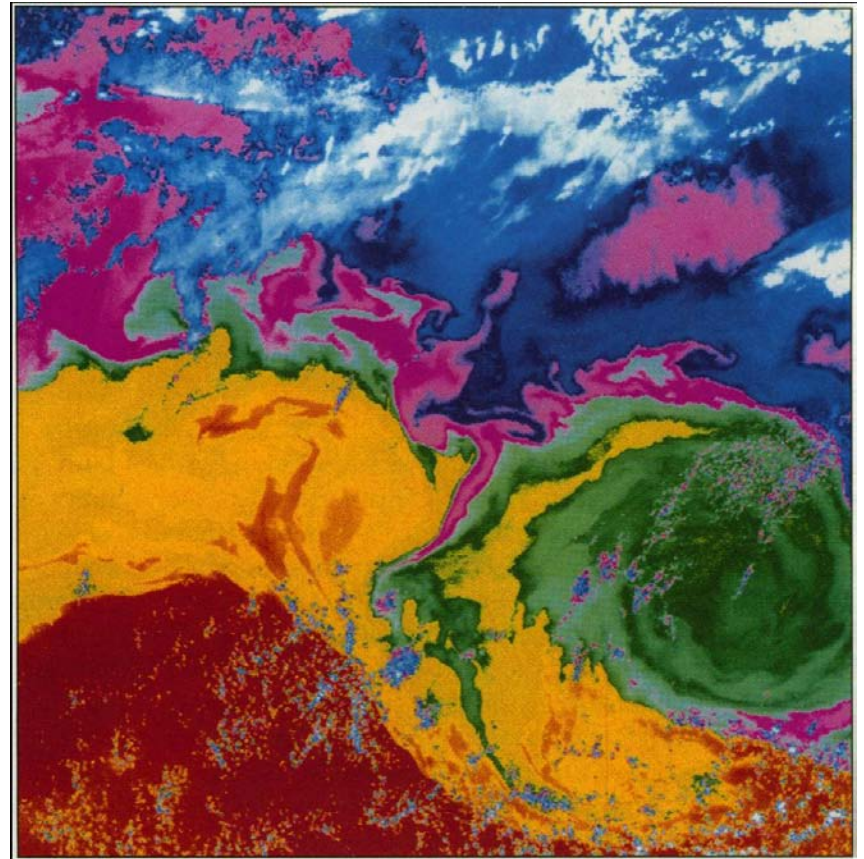
- relating to, or being an
intermediate state,
phase, or condition :
- in-between,
transitional , neither
one nor the other

Beach Haven, N.J., March 7 1962



Shifting paradigms

- “balance of nature” to “flux of nature”
- Non-equilibrium; dynamic;
- Open systems
- Disturbance, gaps, human activities are normal
- Risk & uncertainty
- Valuing biodiversity and charismatic megafauna



“Atlantic Jacuzzi “ off Cape Cod

Fisheries Commons Management

- Open access
 - State/ public (S/P)
 - Common Property (CP)
 - Private property
- CP : co-owned; shared use
Identifiable owners/users
with potential for joint
decision-making
- Open access embedded in a CP or S/P regime
 - S/P regime nesting CP, participatory, multi-scale
 - Quasi-private regimes, with CP and S/P features
 - Informal, small-scale CP (territories, concessions, co-management)

Legal ideas as cultural artifacts

- Public trust doctrine
 - Roman & medieval law
 - English common law
 - American common law
- A propertied idea about regulating access to & use of common pool resources:
 - Sovereign ownership, *jus publicum*: public rights of fishing, commerce, navigation; inalienability
- Trusteeship idea
 - State as trustee
 - Obligation to care for property on behalf of owners; accountable to owners
- Resilience; transformed through politics & practice
- Domination & resistance



Oyster
Wars
and the
Public
Trust

Property,
Law, and
Ecology in
New Jersey
History



BONNIE J. McCAY

"If you were to boil your book down to a few words, what would be its message?"

What is New Jersey?

- “Trying the right” –oyster farming versus wild oyster harvesting
- “Proprietary colony”
- Freedom/Private property
- Real estate venture or new society?
- Did common rights come with the settlers?
- *Arnold v. Mundy* (1821), NJ Supreme Ct.
- *Martin v. Waddell* (1842), US Supreme Ct.

Arnold v. Mundy (1821)

- People became “sovereign”
- Limits to state legislature:
 - Cannot make a “*direct and absolute grant of the waters of the state, divesting all the citizens of their common right.*”
 - Such would be considered “*a grievance which never could be long borne by a free people.*”

State Ownership...

- Mid-late 19th century waterfront cases
- Development of “state ownership” doctrine with sharp decline of the public trust component
- Riparian grants
- “the title of the state is proprietary, an attribute of which is the unqualified right of disposition to public or private uses..as in legislative discretion may be deemed most conducive to the public interest.”
(*Wooley v. Campbell*, 37 N.J.L. 163, 1864)

Court Cases: Class Acts



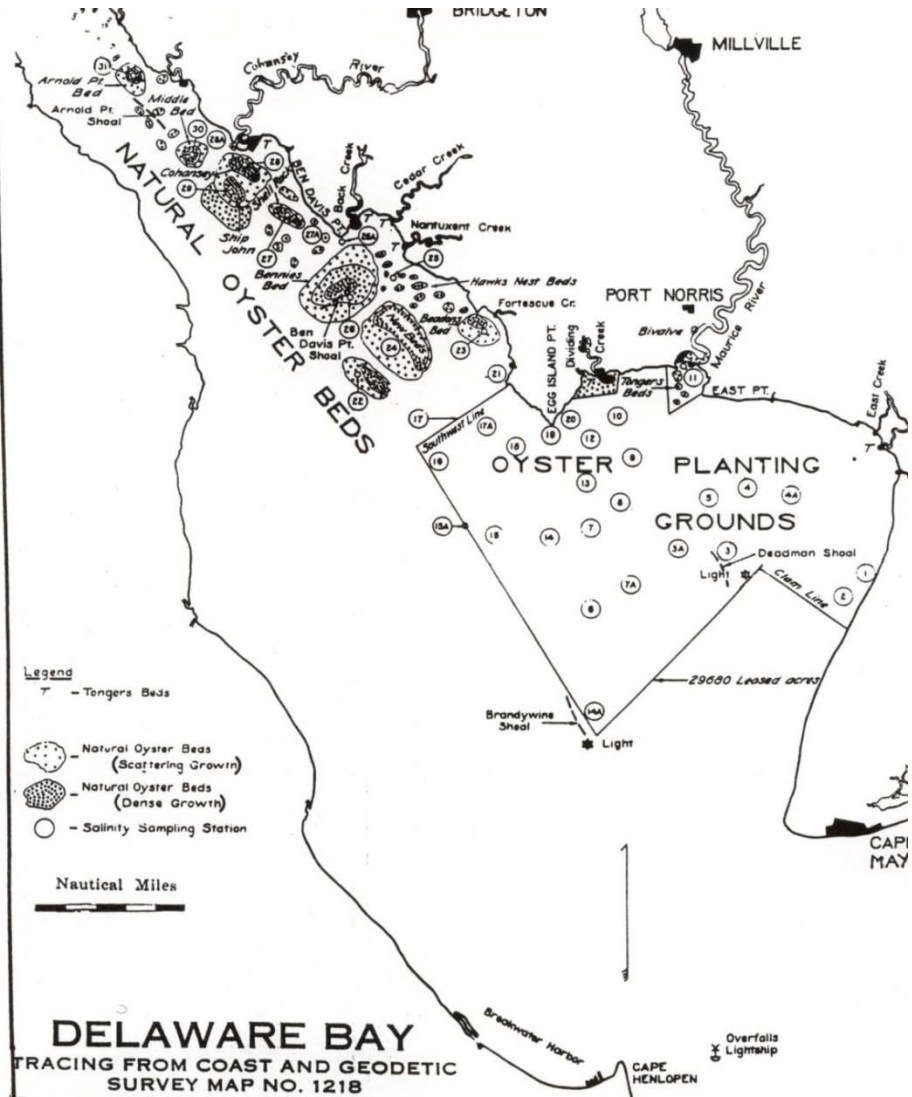
An aged oysterman and his cabin.



Home of an industrious oysterman at Bivalve.

Defending the “common heritage” by “trying the right”

- Delaware Bay, April 1894
- “The gathering of a fleet...to forcibly seize upon the property of the riparian grantees will constitute a riot.”
- Test cases



State policy

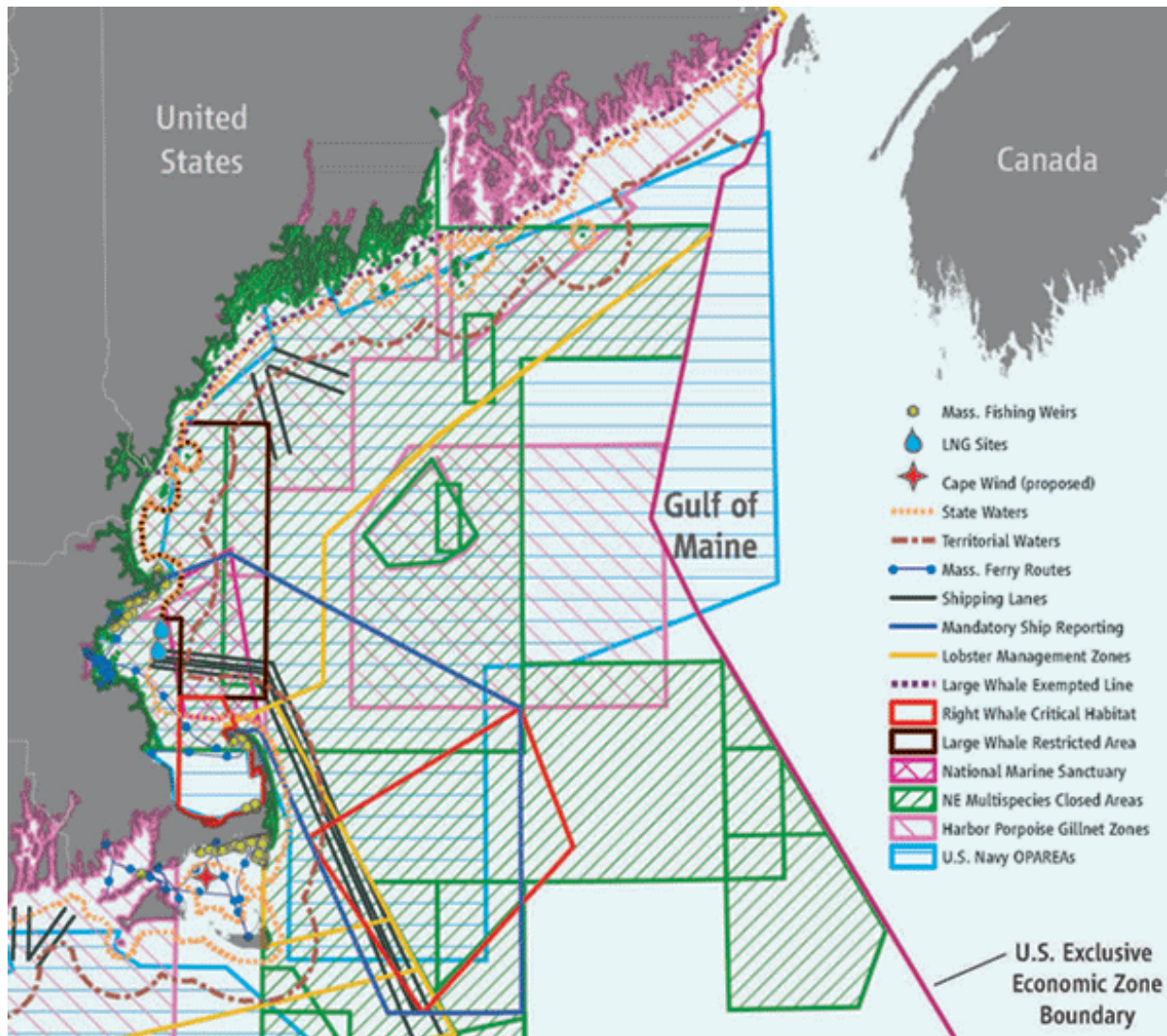
- “We are opposed to either selling or leasing any of the natural beds above the southwest line.
- These oyster beds are the natural heritage of all the people of the State,
- And should be forever preserved and kept sacred to the free public use of the inhabitants of the States, except in so far as their use may be reasonably regulated to prevent destruction.”
- (Bureau of Shellfisheries 1904: 40).

PTD and collective action

- Law as ideology
“elements of domination and the seeds of resistance”
- Public oyster commons
- Beach access; dry-sand extension of PTD
- Environmental protection vs. developers
- Citizens as true “owners” of PT resources (“Sovereign”); state as trustee
 - Demands on the state
 - Basis for organized efforts to improve “the commons”
 - Participatory and collaborative arrangements

- New Jersey (and Calif) expanded scope of PTD to include rights of access to tidelands for recreation purposes
- “home rule” and privatization of beaches
- Public trust extended to dry-sand areas
- PTD and Environmental law (J. Sax et al.) and Coastal Management (Archer et al.)

Who's in charge here?



Extending the Public Trust Doctrine farther out to sea?

- Use property law to
- Clarify roles & responsibilities for complex, dynamic systems management
- Govt. “trustee” required to seek legal action against private parties that infringe on PT
- Citizens can seek judicial review of action or inaction, if govt. trustees abdicate responsibility to manage the trust
- Intergenerational equity—“owners” are living & future citizens
- **M. Turnipseed et al. 2009a, 2009b**

The idea: Public Trust---but also “inalienable” Rights

- Trustee could exclude and privatize on behalf of public interests---MPAs, leaseholds, Individual Transferable Quotas, etc.
- Resistance: cultural linkages between the PTD and democratic notions of procedural and social justice
- Current “crisis” in New England over catch shares, framed in these terms.

Taking Back What is Rightfully Yours—The Public Trust Doctrine in Action



Baykeeper Oyster Restoration Project



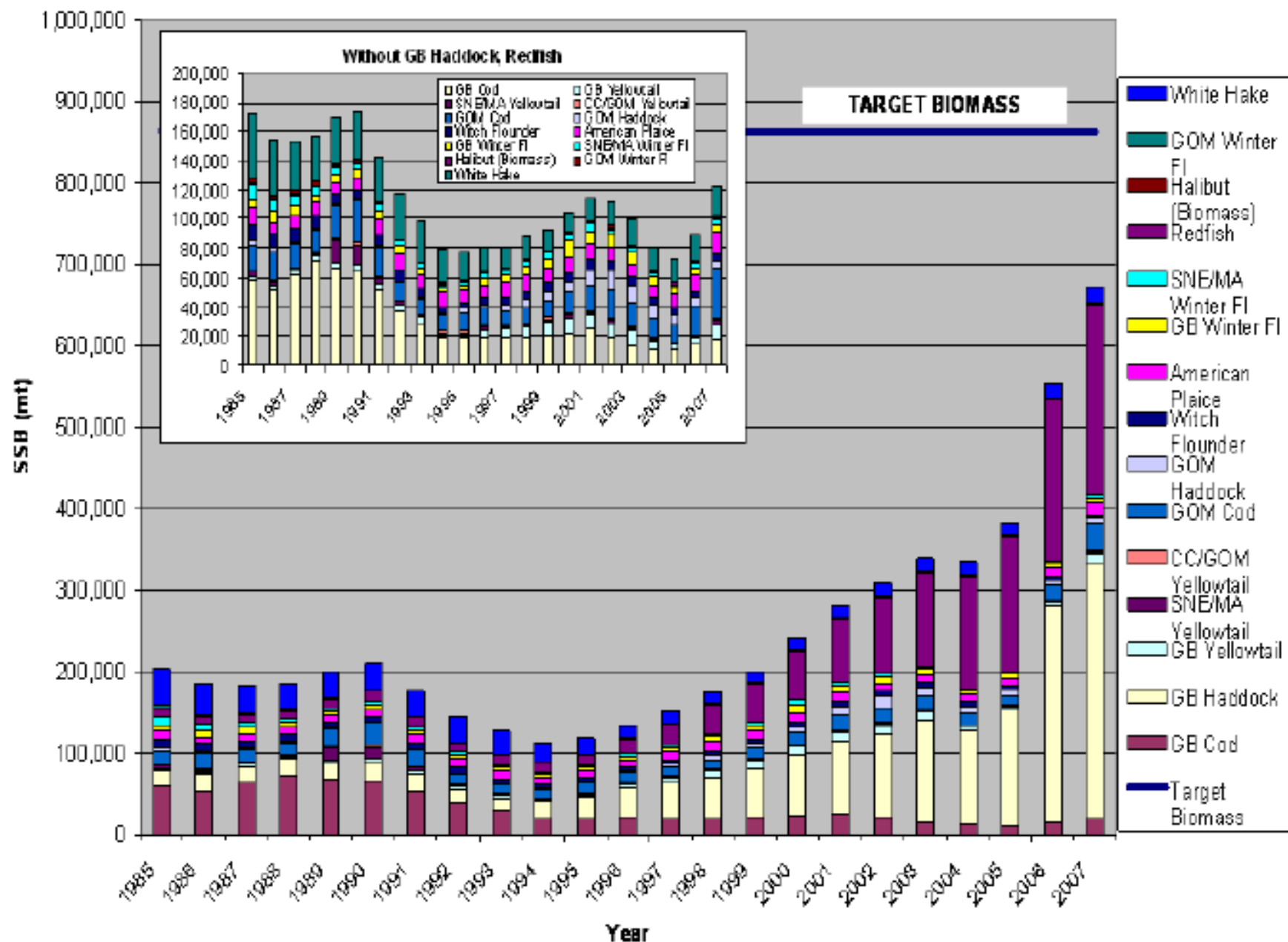
Law and Precautionary Choices

- Uncertain and volatile systems
- “participatory”
“extended peer”
“citizen science”
- >Paradox of Transparency (Wilson 2009)—q. credibility & legitimacy
- Use of law & courts to force precautionary choices in uncertain situations

New England Groundfish

- “Ludwig’s ratchet” – downward spiral
- Scientific understanding vs. industry perspective.
- Turnaround, 1990s: better science? Industry recognition of self-interest? Neither
- Problem Definition Framework (Layzer 2006)law suits, supported by credible science, precautionary way of viewing uncertainty.
- Emboldened> national law changes, 1996, 2007

Spawning Stock Biomass of 15 Groundfish Stocks, 1985-2007



Legal intervention and flexibility

- Stringent precautionary measures, lifted out of participatory decision-making arena
- Science committees determine upper limits of allowable catches (ABCs) with rules reflecting scientific uncertainty
- 10 year restoration rule
- Etc.
- Council avoidance of ITQ voting rule > “sector management”
- Major crisis. Intervention of politicians. Reignite distrust and animosity



Fishermen hold signs at the regional headquarters of the National Marine Fisheries Service, an agency of the National Oceanic and Atmospheric Administration, at Blackburn Industrial Park to protest against NOAA and NMFS regulations and enforcement tactics yesterday morning.

Gloucester Daily Times, Oct. 31, 2009

Cultural changes & resilience of ideology?

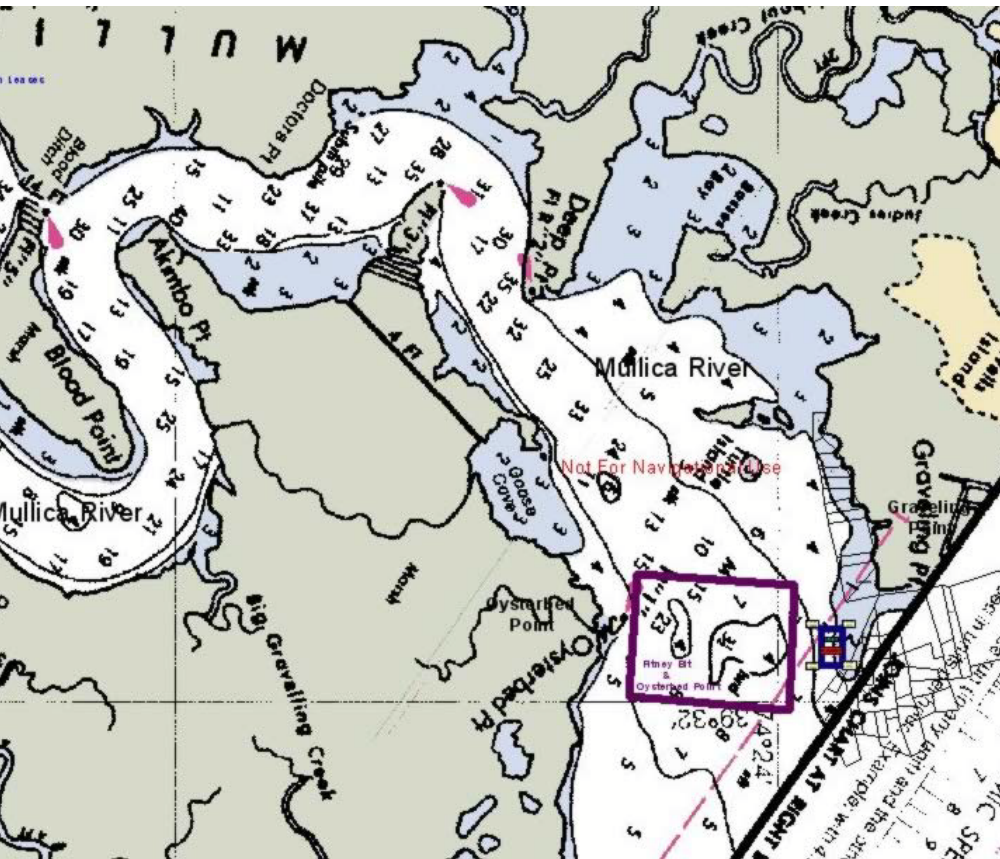
- Change in “social preference”; stewardship & conservation ethic (Acheson & Gardner 2010)
- Law: more precautionary decision-making but may be transient
- Subjectivity and social practice.
 - “environmentality” (Agrawal 2005) – participation in governance; vs. interference of courts
 - Other ways and places; permit banks and trusts; community fishing associations; “catch shares” for communities.

Community Fishing Association

vision (Pacific Fishery Management Council 2010)

- “It is possible, for instance, that CFAs can provide a pool of QS [quota share] that is
- readily accessible to new entrants,
- that promotes active participation,
- promotes responsible stewardship, and
- provides a source of income that can be leveraged to purchase QS”
- Source: “Shoreside Trawl Individual Fishing Quota Program Accumulation Limit Control Rule “Safe Harbors” August. 2010.

Fall 2010 Reopening of Mullica River (NJ) Oyster Seed Beds



Meanwhile, back on the oyster reefs of New Jersey, reserved for public use 120 years ago, overharvested, disease-ravaged, and restored, for the time being, through public/private partnership





The End