

## RECENT CHANGES TO THE LAW MAY REQUIRE WATERFRONT PROPERTY OWNERS TO OBTAIN A STATE PERMIT FOR VARIOUS WATERFRONT ACTIVITIES

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Twice during the summer of 2008, the State legislature enacted important amendments to the existing Comprehensive Shoreland Protection Act (CSPA) which could greatly impact waterfront property owners. Many waterfront property owners will now be required to obtain a State permit for various types of activities that previously did not require one.

The existing CSPA provided protection to the State's public waters by establishing a 150' forested buffer area as well as restricted use areas within 250' of lakes, large ponds and most rivers. The rationale for passage of the CSPA was that these forested buffer areas control erosion, lessen flood damage, promote storm water infiltration, retain sediment, take up excess nutrients, moderate near shore surface water temperature, provide wildlife habitat, and help facilitate groundwater recharge, thereby providing essential ecological services.

The recently enacted amendments are meant to enhance the current CSPA and were based on recommendations from a legislative commission convened in 2005 to examine the strengths and weaknesses of the existing statute. The changes, all of which became effective July 1, 2008, are designed to strike a balance between the preferences of shoreland property owners and the need to protect the State's shoreland resource. A State Shoreland Permit is now required for many construction, excavation or filling activities within the Protected Shoreland. The revised CSPA also creates a 50' "waterfront buffer," in which vegetation removal and impervious surfaces are restricted, and pesticide, herbicide, and fertilizer use are limited. The revised CSPA now applies to all rivers designated under the Rivers Management and Protection Program<sup>1</sup>, including the Saco and Pemigewasset Rivers, as well as to all great ponds<sup>2</sup> and 4<sup>th</sup> order

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<sup>1</sup> RSA 483:15.

<sup>2</sup> Natural bodies of fresh water situated entirely in the state having an area of 10 acres or more; state-owned and held in trust by state for public use. RSA 271:20.

or greater streams<sup>3</sup>. The revised CSPA limits in varying degrees what a shoreland property owner may do, depending on the nature of the activity and its distance from the “reference line”<sup>4</sup>.

Specifically, the revised CSPA breaks down the “Protected Shoreland” into three distinct areas, with varying limitations on shoreland property owners.<sup>5</sup>

### **50 Feet from the Reference Line-Waterfront Buffer and Primary Building Setback**

1. Effective April 1, 2008, all primary structures must be set back at least 50' from the reference line; Towns may maintain or enact their own setback, only if it is more restrictive than 50 feet;
2. Within the first 50 feet, a waterfront buffer must be maintained; within the waterfront buffer, a tree coverage system replaces the basal area calculation of the old CSPA; tree coverage is managed via a 50' X 50' grid and point system where tree coverage in each grid must total 50 points;
3. No natural ground cover shall be removed except for a footpath to the water that does not exceed 6 feet in width and does not concentrate storm water or contribute to erosion;
4. Natural ground cover, including the duff layer, shall remain intact; no cutting or removal of vegetation below 3 feet in height (excluding existing lawns), except for the allowable footpath; stumps, roots, and rocks must remain intact in and on the ground;
5. Pesticide or herbicide application must be by a licensed applicator only;
6. Low phosphorus, slow release nitrogen fertilizer may be used for the area that is

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<sup>3</sup> See RSA 483-B:4 (XVI)(c) and DES website, [http://www.des.state.nh.us/cspa/fourth\\_order.htm](http://www.des.state.nh.us/cspa/fourth_order.htm), for criteria to determine stream order and list of 4th order or higher streams.

<sup>4</sup> Reference line: for coastal waters, it is the highest observable tide line; for rivers, it is the ordinary high water mark; for natural fresh waterbodies, it is the natural mean high water level; and for artificially impounded fresh waterbodies, it is the elevation at the spillway crest or, if there are flowage rights, the elevation of the flowage rights.

<sup>5</sup> Projects that receive a permit under RSA 482-A, do not require a shoreland permit. A complete list of projects that are exempted from the shoreland permit requirements can be found in the Shoreland Administrative Rules, Env-Wq 1406.

beyond 25 feet from the reference line; no fertilizer, except limestone, shall be used between the reference line and 25 feet.

### **150 Feet from the Reference Line-Natural Woodland Buffer (NWB) Restrictions**

7. On lots that contain 0.5 acre or more within the NWB, in the area between 50 feet and 150 feet of the reference line, the vegetation within at least 50 percent of the area, exclusive of impervious surfaces, shall be maintained in an unaltered state;
8. On lots that contain less than 0.5 acre within the NWB, in the area between 50 feet and 150 feet of the reference line, the vegetation within at least 25 percent of the area shall be maintained in an unaltered state.

### **250 Feet from the Reference Line-The Protected Shoreland**

Impervious Surface Area Allowance: 20 percent of the area within the protected shoreland may be impervious surface; this may be increased to 30 percent if there are 50 points of tree coverage in each 50' X 50' grid segment in the waterfront buffer, and a storm water management plan is submitted and approved by DES.

#### Other Restrictions

9. No establishment/expansion of salt storage yards, auto junk yards, solid waste and hazardous waste facilities;
10. All new lots, including those in excess of 5 acres are subject to subdivision approval by DES;
11. Setback requirements for all new septic systems are determined by soil characteristics;
12. Minimum lot size in areas dependent on septic systems determined by soil type;
13. Alteration of Terrain Permit trigger reduced from 100,000 square feet to 50,000 square feet;
14. For new lots with on-site septic, the number of dwelling units per lot shall not exceed 1 unit per 150 feet of shoreland frontage.

The above requirements apply to new construction within the Protected Shoreland. With regard to **existing waterfront development**, the revised CSPA

makes a distinction between “nonconforming lots of Record” and “nonconforming structures”.<sup>6</sup> Existing nonconforming lots of record and nonconforming structures are not immune to regulation under the CSPA. The revised CSPA does away with the prohibition on vertical expansion for nonconforming structures, and additionally allows for the repair, renovation, or replacement in kind of those nonconforming structures, “provided the result is a functionally equivalent use.” Those repairs and/or replacements may alter the interior design or existing foundation, but cannot result in any expansion of the existing footprint unless authorized by DES, using the following criteria. If an owner wishes to redevelop a site containing nonconforming structures or expand nonconforming structures, the Commissioner of DES will review such proposals that are “more nearly conforming than the existing structures, and may waive some of the standards specified in RSA 483-B:9, so long as there is at least the same degree of protection provided to the public waters.”<sup>7</sup> The revised CSPA goes on to define “more nearly conforming” as “a proposal for significant changes to the location or size of existing structures that bring the structures into greater conformity, or a proposal for changes to other aspects of the property, including but not limited to stormwater management, wastewater treatment or traffic volume or flow, or both types of proposal which significantly improve wildlife habitat or resource protection.”<sup>8</sup>

Under the revised CSPA, a shorefront owner that wanted to convert seasonal homes to year round use, for example, would likely have to request such a change from the Commissioner and show that the proposed change is “more nearly conforming” as described above, and how the proposal would significantly improve wildlife habitat or resource protection. A shorefront owner could alternatively seek a variance from the minimum requirements of the revised CSPA from the Commissioner.<sup>9</sup> In determining whether to grant the variance, the Commissioner utilizes the same criteria as that of a zoning board of adjustment under RSA 674:33,1(b). Specifically, the Commissioner can only issue a variance from the terms of the CSPA when such a variance “...will not be

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<sup>6</sup> RSA Sections 483-B:10 & 11, respectively.

<sup>7</sup> RSA 483-B:11, II.

<sup>8</sup> Id.

<sup>9</sup> See RSA 483-B:9, V(i).

contrary to the public interest, if, owing to special conditions, a literal enforcement of the provisions of the ordinance will result in unnecessary hardship, and so that the spirit of the ordinance shall be observed and substantial justice done.” RSA 674:33,1(b).

The above information was taken from the revised CSPA, RSA 483-B; the Shoreland Administrative Rules, Env-Wq 1400, et seq.; and the DES website regarding the CSPA, <http://www.des.state.nh.us/CSPA/>.

If you are a shoreland property owner and have questions about compliance with the revised CSPA, or are an abutter and have questions about a neighbor’s compliance with the CSPA, please feel free to contact the experienced attorneys at Baldwin & Callen, PLLC, for a free 30 minute consultation regarding your concerns.