

# The Revised Comprehensive Shoreland Protection Act

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## ABOUT THIS PUBLICATION

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## **PART TWO**

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# **THE COMPREHENSIVE SHORELAND PROTECTION ACT FROM A MUNICIPAL LAWYER'S PERSPECTIVE**

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*By Justin C. Richardson, Esq.*

# INTRODUCTION

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The Comprehensive Shoreland Protection Act is unique among New Hampshire's environmental and water quality laws. Like many such laws enacted by the Legislature, it establishes minimum standards at the state level and gives municipalities the authority to adopt more stringent local standards. RSA 483-B:2, II; RSA 483-B:8, I. Less common, although not unheard of,<sup>1</sup> it allows local enforcement officers to enforce its provisions and even seek civil penalties for violations of what is in essence a state statute. RSA 483-B:8, III.

In other respects, the Shoreland Protection Act differs significantly from other environmental and water management laws. It is essentially a state-wide zoning statute<sup>2</sup> that specifically prohibits municipalities from issuing local approvals "inconsistent with the policies" of the Act, yet it provides little guidance on how local land use boards should determine when such policies, as opposed to specific provisions, are inconsistent. RSA 483-B:3, I. This provision alone raises a number of questions. For example:

- Do state permits under the Shoreland Protection Act that show construction of a structure inconsistent with local ordinances preempt those ordinances?<sup>3</sup>
- Can a zoning board of adjustment reverse a decision by a local building inspector to not issue a building permit for a structure that violates a state setback requirement under the Shoreland Protection Act?<sup>4</sup>
- Can a planning board impose conditions on a subdivision or site plan application to protect a public water, even if the proposal meets all local requirements?<sup>5</sup>

Questions such as these may be only the tip of the iceberg as developers, property owners and municipal officials navigate the recent amendments to the Shoreland Protection Act.

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If history is to serve as any guide, the Shoreland Protection Act will continue to evolve as developers, land owners, municipalities and the New Hampshire Department of Environmental Services (DES) struggle to implement its provisions. Indeed, since its initial adoption in 1991, the Act has been amended in 1992, 1994, 1996, 2002, 2003, 2004, 2007 and 2008, with multiple changes implemented in some years.

The goal of this presentation is to identify those areas where conflicts between property rights and state and local requirements are likely to occur, and, hopefully, set a course for clearer waters for municipalities hoping to avoid the rocky shoals that lie in uncharted waters.

# I. RECENT AMENDMENTS TO THE SHORELAND PROTECTION ACT

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In 2007, the New Hampshire Legislature amended the Shoreland Protection Act to include a permit system for all construction projects within the Protected Shoreland of Public Waters. These changes were to be implemented with an effective date of April 1, 2008, later revised to July 1, 2008. The Legislature not only enacted stringent permitting systems for the development of property adjacent to public waters, but it also amended the definition of public waters subject to the Act. In any case, whether it involves state or federal environmental regulations, land use controls, or any other matter, definitions are always critical. The same is true under the Shoreland Protection Act, and it is worth closely examining all of the definitions under the statute.

## II. PUBLIC WATERS SUBJECT TO REGULATION UNDER THE SHORELAND PROTECTION ACT

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The definition of public waters that are subject to the Shoreland Protection Act, RSA 483-B; XVI, recognizes three categories of public waters: lakes and ponds; tidal bodies of water; and rivers and streams. These are defined as follows:

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### A. LAKES AND PONDS

The Shoreland Protection Act governs “[a]ll fresh water bodies listed in the official list of public waters published by the department pursuant to RSA 271:20, II, whether they are great ponds or artificial impoundments.” RSA 483-B:4, XVI(a). That statute in turn defines public waters as follows:

All natural bodies of fresh water *situated entirely in the state* having an area of 10 acres or more are state-owned public waters, and are held in trust by the state for public use; and no corporation or individual shall have or exercise in any such body of water any rights or privileges not common to all citizens of this state; provided, however, the state retains its existing jurisdiction over those bodies of water located on the borders of the state over which it has exercised such jurisdiction. (emphasis added).

RSA 271:20, II, then directs the Department of Environmental Services (DES) to prepare a list of all such water bodies it deems to exceed the 10-acre requirement. This definition of public waters is noteworthy in several respects.

- First, it should be noted that so long as a water body is listed on the Department’s official list promulgated under RSA 271:20, II, that water body is subject to the Act. It is irrelevant whether a particular water body is in fact more than 10 acres or less.

- Second, while RSA 271:20, I limits public waters to those “situated entirely within the state” and those on its borders over which the state “has exercised such jurisdiction,” the DES official list of public waters cites a number of other statutes which provide regulatory authority over its water bodies.

Visit the DES Web site (<http://www.des.nh.gov/>) to download a copy of the state’s Official List of Public Waters.

## B. TIDAL BODIES OF WATER

Tidal bodies of water subject to the Shoreland Protection Act are “coastal waters, being all waters subject to the ebb and flow of the tide, including the Great Bay Estuary and the associated tidal rivers.” RSA 483-B:4, XVI(b). Unlike their lacustrine counterparts, the Act does not define tidal water bodies in terms of whether they are included on an official statutory list.<sup>6</sup> The question of whether a shoreland is subject to the Act is therefore determined by the facts of the particular case. However, even if a water body is not tidal, it may still be subject to the Act if it is a lake or pond listed by the Department under RSA 271:20, or is a fourth order stream.

## C. RIVERS AND STREAMS

The Shoreland Protection Act applies to all:

Rivers, meaning all year-round flowing waters of fourth order or higher and all rivers and river segments designated as protected under RSA 483:15. Stream order shall be determined using the New Hampshire hydrography dataset archived by the geographically referenced analysis and information transfer system (GRANIT) at the complex systems research center of the University of New Hampshire, and developed by GRANIT in collaboration with the department of environmental services. A listing of the streams of fourth order and higher shall be prepared and periodically updated by the GRANIT at the complex systems research center of the University of New Hampshire and delivered to the commissioner 30 days after the effective date of this section. RSA 483-B:4, XVI(c).

Under this provision, the shoreland of a river or stream is subject to the Act if it is a designated river under RSA 483, or if, as a factual matter, it is a fourth order stream. The Act also provides for an official list of fourth order streams, but unlike lakes and ponds, the presence of a river on the official list does not, by itself, make a shoreland subject to the Act. It is therefore important to verify that a particular river is either a designated river under RSA 483, or meets the definition of a fourth order stream under the Strahler method. As one member of the legislative study commission that crafted the recent amendments to the Act noted, the dataset of fourth order rivers and streams has been “proofed and tested and thus, *while not perfect, was more reliable.*”<sup>7</sup>

Visit the DES Web site (<http://www.des.nh.gov/>) to view lists of fourth order streams and designated rivers.

# III. STRUCTURES SUBJECT TO THE SHORELAND PROTECTION ACT

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One of the first questions that must be addressed in any analysis of the Shoreland Protection Act is the classification of structures. This is critical because different setbacks and regulatory requirements apply to each category of structure. The Act recognizes three categories of structures: primary structures, accessory structures and water dependent structures, described below. In addition, a discussion of public roads is also included because they are regulated separately from other structures common to private development projects.

## A. PRIMARY STRUCTURES

A primary structure is defined as a structure “that is central to the fundamental use of the property and is not accessory to the use of another structure on the same premises.” RSA 483-B:4, XIV. The term structure “means anything ... constructed or erected with a fixed location on or in the ground, exclusive of fences.” RSA 483-B:4, XXII. Primary structures must be set back 50 feet from the reference line (RSA 483-B:9, II(b)), which in the case of a river means the ordinary high water mark. RSA 483-B:4, XVII(d).

## B. ACCESSORY STRUCTURES

An accessory structure is defined as a structure that is “on the same lot and customarily incidental and subordinate to the primary structure ... or a use, including but not limited to paths, driveways, patios, any other improved surface, pump houses, gazebos, woodsheds, garages, or other outbuildings.” RSA 483-B:4, II. The setback for accessory structures is established by DES regulations, and is 20 feet. RSA 483-B:17, IV; Env-Wq 1405.04. Equally importantly, the Shoreland Protection Act contains a limitation on square footage. Under Env-Wq 1405.03 (b)(1), accessory structures within 50 feet from the ordinary high water may not exceed 150 square feet within any 50-foot segment of the waterfront buffer,<sup>8</sup> unless permitted by variance or waiver.<sup>9</sup> If no variance or waiver is issued, then the structure must meet the setback requirements for primary structures, or be exempt from setback requirements as a water dependent structure permitted under RSA 482-A.

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## C. WATER DEPENDENT STRUCTURES

Prior to the 2008 amendments to the Shoreland Protection Act, a water dependent structure was “a structure that services and supports activities that require direct access to, or contact with the water, or both, as an operational necessity and that requires a permit under RSA 482-A.” However, in the 2008 amendments to the Act the Legislature narrowed this definition to include only “a structure that is a dock, wharf, pier, breakwater, beach, boathouse, retaining wall, or launching ramp or other similar structure, or any part thereof, built over, on, or in the waters of the state.” RSA 483-B:4, XVII. This change seemed necessary in order to prevent a flood of arguments that could arise for structures that might be deemed by some to require direct access to the water as an operational necessity.

Water dependent structures are not subject to setbacks for primary and accessory structures. However, the Shoreland Protection Act requires that any person intending to “[c]onstruct a water-dependent structure ... obtain approval and all necessary permits pursuant to RSA

482-A,” the state’s Wetlands Statute. RSA 483-B:6, I(b) and 483-B:9, II(c). The Act is therefore clear that any structure exempt from the setback and other requirements of the Shoreland Protection Act must meet the avoidance and minimization requirements of RSA 482-A and the rules promulgated thereunder.

#### D. PUBLIC ROADS

Public roads are not specifically addressed by the Shoreland Protection Act. However, from a municipal perspective they are a critical municipal service that falls within the protected shoreland, particularly where roads laid out in ages past lie close to waterways for commerce or water access.

RSA 483-B:9, IV-b provides that “public roads ... shall be permitted by the commissioner as necessary and consistent with the purposes of this chapter and other state law.” The reference to purposes of the Act, as opposed to its provisions, while implying that a lower standard is to be applied, is entirely unclear. To what extent, for example, could a public road exceed the 150 square-foot limitation for secondary structures within the waterfront buffer? It is easy to imagine how this provision or others in the Act, such as those limiting removal of roots and rocks or requiring that buffers be maintained in an undisturbed state, could completely preclude construction of a new road crossing or even a relatively minor improvement to an existing road.

The provision of the Shoreland Protection Act stating that public roads “shall be permitted” needs to be understood in light of the fact that this language, more or less in its current form, pre-dates the permitting system established by the 2007 and 2008 amendments. Thus, the permits referred to are those that existed prior to implementation of any permit requirement under Section 5-a of the Act,<sup>10</sup> such as RSA 482-A (wetlands), RSA 485-A:17 (terrain alteration) and other laws requiring permits that must be applied consistent with the “purposes” of RSA 483-B, but not necessarily its provisions.

The legislative history of the Shoreland Protection Act confirms this interpretation. On November 13, 2006, the minutes of the Legislative Commission to Study the Comprehensive Shoreland Protection Act show that the Legislature considered this very question. After some debate and explanation, representatives from DES and its representative on the Commission explained:

- Under this provision “the Department would still have the ability to enforce the minimum standards as necessary to meet the intent of the act but it would alleviate those portions of the Act that might preclude any public road.”<sup>11</sup>
- The exemption for public roads was requested by the Departments of Transportation and Fish and Game because of the Act’s “size restrictions and setbacks which were inflexible” and to “meet the intent of the Act to the maximum extent possible while still allowing that public benefit without needing to go through a variance process to do it.”<sup>12</sup>
- Under this provision, public roads would continue to be regulated under its Terrain Alteration Program, but were not meant to be addressed under the Shoreland Protection Act because of “individuals who were using the law to block projects for traffic reasons and not real environmental reasons.”<sup>13</sup>

As a result, municipal proposals to expand, improve or construct entirely new public roads remain subject to the policies of the Shoreland Protection Act, but not necessarily the full panoply of regulations thereunder. The full meaning of this exemption, however, is therefore

likely to depend on the particular circumstances giving rise to the necessity for a public road or other such improvements within the protected shoreland.

## IV. ZONES REGULATED BY THE SHORELAND PROTECTION ACT

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RSA 483-B establishes three distinct zones or areas that have their own sets of regulatory requirements, which are referred to as “minimum standards” under RSA 483-B:9, V. The areas subject to the minimum standards are the following:

### A. PROTECTED SHORELAND (250 FEET)

The term protected shoreland means “all land located within 250 feet of the reference line of public waters.” RSA 483-B:4, XV. Thus, the protected shoreland includes both the natural woodland and waterfront buffers, and provisions applicable to the protected shoreland also apply to those areas. The following restrictions apply to the protected shoreland:

- *Restrictions on Fertilizer Use.* No fertilizer, except limestone shall be used within 25 feet of the reference line, and, within the protected shoreland low phosphate, slow release nitrogen fertilizer “may” be used. RSA 483-B:9, II(d). (Note that this provision does not expressly prohibit use of fertilizers beyond 25 feet from the reference line, although that may have been the intent. In any case, the proximity of the water supply well may mean that fertilizers should likely not be used at any location on the site.)
- *Erosion Controls and Compliance with BMPs.* RSA 483-B:9, V(d)(1) requires that any work within the protected shoreland “be designed and constructed in accordance with rules adopted by the department under RSA 541-A for terrain alteration under RSA 485-A:17, to manage stormwater and control erosion and sediment, during and after construction.”
- *Alteration of Terrain Permit Required.* Under RSA 483-B:6, I(d) and :9, V(d)(3), a terrain alteration permit is required if the total disturbed area exceeds 50,000 square feet, rather than the 100,000 square feet normally considered under RSA 485-A:17. DES has proposed major revisions to its terrain alteration regulations and applicable Best Management Practices for construction projects, that will likely become effective in the fall of 2008. <sup>14</sup>
- *Limitation on Impervious Surfaces – 30 percent.* On June 16, 2008, the Governor signed into law Senate Bill 352 (2008) which established a standard for imperviousness for lots subject to the Shoreland Protection Act. As a result of SB 352, effective July 1, 2008, RSA 483-B:9, V(g) states that:

- (1) Subject to subparagraph (2), *no more than 30 percent of the area of a lot located within the protected shoreland shall be composed of impervious surfaces.*
- (2) If the impervious surface area *will exceed 20 percent*, a stormwater management system shall be implemented and maintained which is designed to infiltrate increased stormwater from development occurring after the effective date of this paragraph in accordance with rules established by the department under RSA 485-A:17.

- *Definition of Impervious.* The Shoreland Protection Act defines an “impervious surface” as “any modified surface that cannot effectively absorb or infiltrate water” and lists examples including “roofs ... paved, gravel, or crushed stone driveways, parking areas, and walkways *unless designed to effectively absorb or infiltrate water.*” RSA 483-B:4, VII-a (emphasis added).

## **B. THE NATURAL WOODLAND BUFFER (150 FEET)**

The natural woodland buffer refers to the area located within 150 feet of the reference line. This area includes the waterfront buffer, and, under RSA 483-B:9, V(b)(1), the requirements of the natural woodland buffer also apply to the waterfront buffer. See RSA 483-B:9, V(b)(1) (“[t]he first 50 feet of this buffer is designated the waterfront buffer and is subject to the *additional* requirements of [the waterfront buffer].”) (emphasis added).

The following restrictions apply within the natural woodland buffer:

- *Maintenance of a Natural Woodland Buffer.* The Shoreland Protection Act requires that “a natural woodland buffer shall be maintained within 150 feet of the reference line.” RSA 483-B:9, V(b)(1). A natural woodland buffer is defined as “a forested area consisting of various species of trees, saplings, shrubs, and ground covers in any combination and at any stage of growth.” RSA 483-B:4, XI and RSA 483-B:9, V(b). As a practical matter, this definition proved subjective and difficult to enforce. Many of the measurable standards adopted by the legislature (below) in Senate Bill 352 were intended to make this subjective requirement achievable.
- *Fifty Percent Unaltered State.* As a result of Senate Bill 352 (2008), within the natural woodland buffer “the vegetation within at least 50 percent of the area outside the waterfront buffer, exclusive of impervious surfaces, shall be maintained in an unaltered state.” RSA 483-B:9, V(b)(2)(A). The term “exclusive of impervious surfaces” refers to the fact that DES regulations allow for primary and accessory structures to be constructed within the natural woodland buffer. Thus, the impervious structures such as buildings and roads appear to be deducted from the total area before calculating the 50 percent.<sup>15</sup> The term “unaltered” state is defined as “native vegetation allowed to grow without cutting, limbing, trimming, pruning, mowing, or other similar activities.” RSA 483-B:4, XXIV-a. This requirement does not apply to “lots legally developed prior to April 1, 2008.”
- *Nonconforming Lots.* The percentage of area maintained in an undisturbed state on nonconforming lots shall not be decreased. RSA 483-B:9, V(b)(2)(A). A nonconforming lot is defined as “an existing lot which does not conform to the provisions of [RSA 483-B].” RSA 483-B:4, XI-a.

### **Recommendations for Projects within the Natural Woodland Buffer**

- *Documentation of Pre-development Site Conditions.* In cases where a municipality reviews a project that comes before a local board for an approval, local land use boards should consider requiring that the applicant document the current conditions of a site and obtain photographs and other records of the site’s condition prior development. This is particularly important where a site currently may not meet the requirement of the natural woodland buffer in all areas.

- *Construction Staging Areas.* Local land use boards should consider not only the final design of the project, but also the location and management of construction staging areas because these may have a significant impact on the natural resource areas protected by the Act. All projects should develop a plan to demonstrate that construction staging areas will not cause the site to come out of compliance with the requirement that 50 percent of the natural woodland buffer remain in an unaltered state.

### C. THE WATERFRONT BUFFER (50 FEET)

Within 50 feet of the reference line is referred to as the waterfront buffer. The waterfront buffer is subject to RSA 483-B:9, V(a), which includes the following requirements:

- Protected shoreland and natural woodland buffer requirements apply (see previous sections). RSA 483-B:9, V(b)(1).
- Primary structures may not be located within the waterfront buffer except by variance or waiver. RSA 483-B:9, II(b) and 483-B:9, V(i).
- Accessory structures are allowed, subject to the 20-foot setback, and height and area limitations.
- Rocks and stumps and their root systems shall be left intact in the ground unless removal is specifically approved by the department, pursuant to RSA 482-A or RSA 483-B:11, II.
- No natural ground cover shall be removed except as necessary for a foot path to water as provided under RSA 483-B:9, V(a)(2)(D)(viii), cutting those portions that have grown over 3 feet in height for the purpose of providing a view, or as specifically approved by the department, pursuant to RSA 482-A or 483-B:11, II.
- *Requirement to maintain 50 points with each 50-foot segment.* RSA 483-B establishes a point system applicable to each 50-foot by 50-foot segment of the waterfront buffer, beginning with the northerly or easterly boundary of the property. RSA 483-B:9, V(a)(2)(D). In each segment a total of 50 points must be maintained. (RSA 483-B:9, V(a)(2)(D). Note, if there is insufficient area for an entire 50-foot by 50-foot segment, the number of points required is proportional to that required for a full segment.) The points are counted as specified in RSA 483-B:9, V(a)(2)(D)(i) based on the diameter of each tree or sapling measured at 4-½ feet above the ground:

Diameter	Points
Less than 1 inch	0
1-6 inches	1
6-12 inches	5
> 12 inches	10

#### Recommendations Concerning the Waterfront Buffer

- Design the project to avoid removal of vegetation and root systems within the waterfront buffer whenever possible. While road construction and expansion is not strictly prohibited under RSA 483-B:9, IV-b, it is still discouraged as a policy under the Shoreland Protection Act and potentially prohibited unless a necessity can be demonstrated.
- Retain a qualified wetlands scientist to document, by plan and photographs, the location of the reference line, that is, ordinary high water mark, and all shoreland vegetation greater than 1" DBH within each 50-foot segment of the waterfront buffer.

- To the extent that any 50-foot segment does not contain the required number of points, develop proposed plantings based on the DES Env-Wq 1412 regulations and its list of *Native Shoreland/Riparian Buffer Plantings for New Hampshire*, formerly included as Appendix A to the Shoreland Protection Act regulations and available from DES.

## V. VARIANCES AND WAIVERS UNDER THE SHORELAND PROTECTION ACT: WHAT'S THE DIFFERENCE?

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The Shoreland Protection Act provides for both waivers and variances from its requirements. The availability of these two mechanisms will likely play an important role in any project within the protected shoreland. This is particularly so where projects are proposed for lots created or developed prior to modern zoning and subdivision regulations (RSA 485-A), and the Shoreland Protection Act itself.

### A. WAIVERS

The term variance is well known to municipal officials and developers alike. The Shoreland Protection Act's use of the term waiver, however, is less than clear. The Act makes four references to the commissioner's authority to waive certain requirements,<sup>16</sup> yet the term is largely undefined, and the criteria to be applied are less than certain.

The following may be surmised from the language of the statute itself:

- A *variance* may be obtained from the "minimum standards of RSA 483-B:9, V" whereas a *waiver* may be obtained from any of the "minimum standards of RSA 483-B:9." RSA 483-B:5-a, V(a) and (c). Thus, a variance may be obtained only for the limited number of minimum standards under Subsection V, whereas a waiver may be obtained from any of the minimum standards under Section 9 of the Act.
- The commissioner has the "sole authority" to issue variances and waivers. RSA 483-B:6, III. A municipality cannot waive any requirements of the Act.
- The commissioner may grant waivers or variances only "as specifically authorized" by the Act. RSA 483-B:6, III.
- Waivers to the minimum standards are specifically authorized for "redevelopment of sites that contain nonconforming structures or any expansions of nonconforming structures" and may be issued "so long as there is at least the same degree of protection provided to the public waters." RSA 483-B:11, II.

Taken as a whole, it appears that waivers under the Shoreland Protection Act are limited to the minimum standards under RSA 483-B:9 in circumstances where:

1. Nonconforming structures exist on a developed site (RSA 483-B:11, II);
2. An expansion or redevelopment is proposed which triggers the permit requirements under RSA 483-B:5-a;

3. The project includes proposals to make non-conforming structures “more nearly conforming” to the Act, which may include changes in size or location of non-conforming structures, or improvements to stormwater runoff, wildlife habitat or other resource protection measures;
4. The project will provide “at least the same degree of protection provided to the public waters.” RSA 483-B:11, II.

It is important to note, however, that these requirements are as much inferred from the Act’s provisions as they are expressly stated. For example, the Act does not expressly state that a waiver may be issued only where a nonconforming structure exists. Nor does the Act expressly require that such redevelopment make a structure more nearly conforming. The Commissioner need only “review” proposals to make a site more nearly conforming, but may issue a waiver to any project that provides at least the same degree of protection to public waters. RSA 483-B:11, II.

The DES regulations fill some of the gaps left open by the Act. Chapter 1413 of the DES administrative regulations govern the issuance of waivers. Env-Wq 1413.04, titled *Criteria*, states as follows:

- (a) Subject to (b), below, a request for a rule waiver shall be granted if:
  - (1) Granting the request will not result in:
    - a. An adverse effect to the environment or natural resources of the state, public health, or public safety; or
    - b. An impact on abutting properties that is more significant than that which would result from complying with the rule; and
  - (2) One or more of the following conditions is satisfied:
    - a. Granting the request is consistent with the intent and purpose of the rule being waived; or
    - b. Strict compliance with the rule will provide no benefit to the public and will cause an operational or economic hardship to the applicant.
- (b) No rule waiver shall be granted if the effect of the waiver would be to waive or modify a statutory requirement.

DES’s Env-Wq 1413 regulations set forth in relatively plain terms the criteria to be applied to requests for waivers. Curiously, however, those regulations appear to preclude issuance of any waiver that “if granted ... would ... waive or modify a statutory requirement.” Thus, the regulations appear to preclude DES from issuing waivers as clearly contemplated by RSA 483-B:5-a, V (a) and (c) and RSA 483-B:11!

It is odd that an agency would adopt a rule precluding issuance of waivers to statutory requirements when such waivers are expressly authorized by statute. There is no clear answer to this question, other than to follow the plain meaning of the Act and be prepared for some degree of confusion where it may conflict with the regulations. As the history of the Act suggests, the Legislature is more likely than not to re-examine its provisions, and clarification of the circumstances in which waivers apply may be warranted.

## **B. VARIANCES**

As noted previously, the term variance is well known to municipal officials and developers alike. Fortunately, the Shoreland Protection Act incorporates by reference this well known, if complicated, body of law. In that regard, RSA 483-B:9, V(i) states that:

- (i) The commissioner shall have the authority to grant variances from the minimum standards of this section. Such authority shall be exercised subject to the criteria which govern the grant of a variance by a zoning board of adjustment under RSA 674:33, I(b).

A review of the body of law related to variances and their issuance will not be attempted here. There is, however, at least one interesting legal question worth mention. The Shoreland Protection Act's reference to the standards for issuance of a variance from the minimum standards using the criteria applied under RSA 674:33, I(b) pre-dates the New Hampshire Supreme Court's decisions in the *Simplex* and *Boccia* line of cases. *Simplex Technologies, Inc. v. Town of Newington*, 145 N.H. 727 (2001) (use variances); *Boccia v. City of Portsmouth*, 151 N.H. 85 (2004)(area variances). It remains to some extent open to debate whether the pre-*Simplex* standards apply as the Legislature could not have intended to adopt a standard that did not yet exist. On the other hand, however, it seems at least as likely that a Court, if asked to rule on the issue, would find that the *Simplex* and *Boccia* cases have crept into the variance analysis under the Act due to the passage of time and the fact that the Legislature has left this provision in place despite several amendments to the Act since these cases were decided.<sup>17</sup>

In brief, the availability of variances from the minimum standards is noteworthy in the following respects:

- Variances serve as a safety valve against regulatory takings claims where denial of the variance would result in the loss of reasonable use and enjoyment of property. This is as much the case under the Shoreland Protection Act as it is under local zoning regulations.
- It is important for local officials to keep the availability of variances from DES in mind as developers may attempt to use the provisions of the Shoreland Protection Act to convince local zoning boards of adjustment to grant more extensive variances than might otherwise be warranted.
- Under DES regulations, applications for a variance from DES must include plans that show all applicable state and local setbacks.<sup>18</sup> As a matter of state law, projects must comply with both local zoning laws and the Shoreland Protection Act, and Shoreland Protection Act requirements do not take precedence over local zoning ordinances.<sup>19</sup> Officials should therefore not feel forced to issue variances from local requirements simply because state setbacks and requirements may push projects to encroach on other legitimate local concerns such as setbacks from property lines, roads or other features. The Shoreland Protection Act does not fundamentally change the responsibility of the owner or developer to find an appropriate proposal that satisfies state and local requirements.

# VI. PERMITTING: ISSUANCE OF LOCAL APPROVALS FOR PROJECTS WITHIN THE PROTECTED SHORELAND

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## A. PERMIT REQUIREMENT UNDER THE SHORELAND PROTECTION ACT

The amendments to the Shoreland Protection Act that came into effect on July 1, 2008, include a requirement to obtain a permit from DES prior to commencing any “construction, excavation, or filling activities within the protected shoreland.” The permit requirement is contained in RSA 483-B:5-a, which states as follows:

### **483-B:5-a Permit Required; Exemption.**

I. (a) No person shall commence construction, excavation, or filling activities within the protected shoreland without obtaining a permit from the department to ensure compliance with this chapter.

(b) [Fee schedule omitted for the sake of brevity]

II. Timber harvesting operations permitting requirements shall be in accordance with RSA 485-A:17, IV and therefore shall be exempt from the permitting requirement under paragraph I.

III. Construction of public roads, public utility lines and associated structures and facilities, and public water access facilities shall be exempt from the permitting fees of paragraph I.<sup>20</sup>

IV. Impacts in the protected shoreland that receive a permit in accordance with RSA 482-A shall not require a permit under this section.

IV-a. At the time of the permit application, the applicant shall provide postal receipts or copies, verifying that the governing body of the municipality or municipalities in which the property is located and all abutters have been notified of the application by certified mail.

V.(a) Within 30 days of receipt of an application for a permit or 75 days of receipt of an application for a permit that will require a variance of the minimum standard of RSA 483-B:9, V or a waiver of the minimum standards of RSA 483-B:9, the department shall request any additional information required to complete its evaluation of the application, and provide the applicant with any written technical comments the department deems necessary. Any request for additional information shall specify that the applicant submit such information as soon as practicable and notify the applicant that if all of the requested information is not received within 60 days of the request, the department shall deny the application.

(b) When the department requests additional information pursuant to subparagraph (a), the department shall, within 30 days of the department's receipt of the information: (1) Approve the application and issue a permit; (2) Deny the application, in whole or in part; or (3) Extend the time for response for good cause and with the written agreement of the applicant.

- (c) Where no request for additional information is made, the department shall, within 30 days of receipt of the application for a permit or 75 days of receipt of an application for a permit that will require a variance of the minimum standard of RSA 483-B:9, V or a waiver of the minimum standards of RSA 483-B:9, approve or deny the application, in whole or in part.
- (d) If the department fails to render a decision in the time frame provided in this paragraph, the application shall be deemed to be approved and a permit shall be issued.

It should be noted that the Shoreland Protection Act does not require a permit for tree clearing that is not related to any construction, excavation or filling activities. Such activities must be undertaken in accordance with the minimum standards set forth in RSA 483-B:9 and other provisions of the Act, but tree clearing by itself at an existing residential development does not require a permit.

However, it is also worth noting that DES has fairly consistently interpreted its statutory authority to require permits for pre-construction activities such as tree clearing even though a project developer has taken no steps such as filling, regrading or work within wetlands subject to jurisdiction under RSA 482-A. Thus, if a local official becomes aware of clearing activities within the protected shoreland that are not part of an ongoing forest management or bona fide timber harvesting operation, the activities may fall within the definition of “construction” under RSA 483-B:5-a, I.

In evaluating whether a timber harvesting operation is in fact exempt, local officials should consider the following factors, and any others relevant to whether the operation is in fact a bona fide timber harvesting operation, as opposed to pre-construction clearing subject to the permit requirements:

- **Best Management Practices.** RSA 483-B:5-a, II states that timber harvesting operations “in accordance with RSA 485-A:17, IV ... shall be exempt from the permitting requirement.” RSA 485-A:17, IV, in turn requires that timber harvesting operations be in compliance with a manual published by the state Department of Resources and Economic Development, titled *Best Management Practices for Erosion Control on Timber Harvesting Operations in New Hampshire*. (A copy is available on the DES Web site, <http://www.des.nh.gov>.) It follows that work performed not in accordance with the manual may trigger the permit requirement.
- **Wetlands jurisdiction.** Any timber operation in wetlands must also comply with Best Management Practices. See, for example, Env-Wt 304.05.
- **Subdivision or site plan.** Has the owner or developer met with representatives of the local planning board relative to a subdivision or site plan approval? If either has occurred, or will occur, it is likely that the clearing activities will be considered by DES to be part of a construction project requiring a permit.
- **Licensed forester.** Under RSA 227-J:4 it is unlawful to engage in timber harvesting operations except by a forester licensed under RSA 310-A. Any timber harvesting operations that are not conducted by construction contractors that are not licensed foresters would likely be subject to the permit requirements under RSA 483-B:5-a.
- **Other factors.** This list is by no means all inclusive!

## B. NOTICE TO ABUTTERS: A NEW APPROACH

In amending the Shoreland Protection Act, the Legislature took a new approach in defining the abutters to whom notice of permit application is required. RSA 483-B:4, I now states as follows:

“Abutter” means any person who owns property that is immediately contiguous to the property on which the proposed work will take place, or who owns flowage rights on such property. The term does not include those properties separated by a public road or more than ¼ mile from the limits of the proposed work. If contiguous properties are owned by the person who is proposing the work, then the term includes the person owning the next contiguous property, subject to the ¼ mile limitation.

This provision arose because it was theoretically possible under the prior definition of abutter for an applicant to own an adjacent parcel and avoid the requirement to provide notice to abutters. The exclusion of property owners separated by a public road or located more than one-quarter mile from the limits of the proposed work is also contained in the definition of abutter under DES wetlands regulations. Env-Wt 101.02.

### C. NOTICE TO MUNICIPALITIES

Members of local conservation commissions will surely be disappointed with the notice requirements contained in the Shoreland Protection Act. Unlike the wetlands statute, RSA 482-A, which requires that the original application and four copies of all applications and plans be submitted to the town clerk prior to filing with DES (RSA 482-A:3, I), the Act requires only that an applicant provide notice of the application to the local governing body. RSA 483-B:5-a, IV-a. Also unlike the wetlands statute (RSA 482-A:11, III), there is no express statutory authority for local conservation commissions to conduct an investigation, suspend, intervene and comment on an application.

The Act also imposes relatively stringent time limitations for DES to act upon an application which are likely to have the practical effect of denying municipal governing bodies and conservation commissions the opportunity to comment on applications before DES. For example, in the case of applications that do not involve requests for a waiver, DES must approve or deny the project within 30 days, unless it requests additional information. RSA 483-B:5-a, V(a). Upon receipt of such additional information, DES must approve or deny the project within 30 days. RSA 483-B:5-a, V(b).

Without a requirement that an applicant submit the application to the town clerk or other appropriate officials, it is difficult to envision how local officials and boards that are required to discuss matters in open public meetings under RSA 91-A will be able to effectively participate in the review of applications to develop property within the protected shoreland, except to the extent that they already may do so under existing procedures for the review of wetlands impacts, zoning, subdivision and site plan review.

The absence of an integrated approach for local review and comment during review by DES may be a missed opportunity, particularly in light of the Shoreland Protection Act's invitation for DES to “devise a system whereby municipal officials may voluntarily assist with the permitting process” under RSA 483-B:7. Unfortunately, it appears that in the final analysis, local participation in DES's permitting process was deemed less important than the need for rapid turn-around of permit decisions. Such concerns are, of course, understandable insofar as the Legislature is accountable for both the needs for protection of the environment and economic development. However, the omission of even basic elements for local participation, such as a requirement that an application be submitted at the local level, is in this author's view a missed opportunity to integrate state and local review, to the detriment of both developers and local government.

In the interest of full disclosure, however, readers should note that the author of this article serves as chairman of the Newington Conservation Commission, which has significant shoreland on Great Bay subject to the Shoreland Protection Act.

#### **D. WHICH COMES FIRST: THE STATE OR THE MUNICIPALITY?**

The Shoreland Protection Act presents a question already commonly faced by developers and local officials alike: should state permits be sought in advance of local requirements or after local requirements have been met? Some statutes, such as the state's subdivision statute, RSA 485-A:28, require that approvals be obtained first at the local level prior to any application to DES. However, the state's subdivision regulations are unusual in that regard, and this requirement does not appear to be contained in other environmental or water management statutes such as RSA 482-A concerning dredge and fill in wetlands, or RSA 485-A:17 concerning alteration of terrain.

The Shoreland Protection Act has no specific requirements relative to the order in which state and local approval are sought. However, there are still ways in which a municipality may utilize the provisions of the Act to protect its shorelands or other interests during the local review process. Most notably, RSA 483-B:5, II, allows a municipality to impose additional conditions to protect public waters even after DES has issued a shoreland permit under RSA 483-B:5-a, thereby allowing local officials the opportunity to address any local impacts not adequately addressed during DES review.

#### **E. CONSISTENCY REQUIREMENT AND LOCAL APPROVALS UNDER THE SHORELAND PROTECTION ACT**

##### **1. Generally**

The Shoreland Protection Act contains a "consistency" requirement which appears to prohibit local officials or boards from issuing approvals or permits that violate the "policies" of the Act. This provision, RSA 483-B:3, states in relevant part that:

- I. All state agencies shall perform their responsibilities in a manner consistent with the intent of this chapter. State and local permits for work within the protected shorelands *shall be issued only when consistent with the policies of this chapter.*
- II. When the standards and practices established in this chapter conflict with other local or state laws and rules, *the more stringent standard shall control.* (emphasis added).

This provision clearly seems calculated to prohibit local officials from issuing permits that are inconsistent with the policies established by the Act. What is interesting, however, is that the Act requires that whenever local regulations conflict with state requirements, "the more stringent standard shall control." RSA 483-B:3, II. In theory at least, this provision could require the state to apply a more stringent local requirement during its own permit process under RSA 483-B:5-a.

It is unclear whether the Shoreland Protection Act intended the consistency requirement to operate in reverse, that is, that the state could only issue a state permit under section I if the applicant complied with the more stringent local requirement. If this turns out to be the case, it

is conceivable that the Act could be used to make local shoreland ordinances apply to projects such as highway projects where the state is the applicant, and therefore normally exempt from local zoning regulations. In effect, under RSA 483-B:3, II, the more stringent local requirement would apply as a matter of state law, and the state approval could not be issued unless it was consistent with this policy.

However, a court of law could also construe the “more stringent” language in RSA 483-B:3, II to restate the proposition that the Shoreland Protection Act is not intended to preempt either local land use regulations or other state laws where they may apply. The Act contains repeated references to the maintenance of local authority to regulate within the protected shoreland. Most notably, its requirements are generally referred to as minimum standards, suggesting in the strongest of terms that municipalities may impose more stringent requirements. RSA 483-B:9, V. In addition the Act states that “[m]unicipalities may adopt land use control ordinances relative to all protected shorelands which are more stringent than the minimum standards contained in this chapter.” RSA 483-B:8, I. Municipalities are “encouraged to adopt land use control ordinances for the shorelands of water bodies and water courses other than public waters.” RSA 483-B:8, II. The Act requires that any person intending to “[c]onduct an activity regulated under a local zoning ordinance shall obtain all necessary local approvals.” RSA 483-B:6, I(F).

This is just one of the many questions that may play itself out during the review of projects by DES and that may be addressed either a court of law or in a subsequent legislative amendment.

## **2. Policies versus Provisions**

The consistency requirement under RSA 483-B:3 applies to the “policies” of the Shoreland Protection Act, not its specific provisions. This raises a question as to how the two can be distinguished in practice. Is it the policy that primary structures shall be set back 50 feet from the reference line in all cases, or does the fact that the Act allows for variances and waivers mean that a municipality may permit a structure that appears to be consistent with the intent of the law, even though it may not meet a specific requirement?

There is, unfortunately, no clear answer to this question. On one hand, a good argument can be made that it is the role of the Legislature to establish the policies of the State of New Hampshire, and those policies are reflected in the provisions it has enacted. To allow regulators the authority to decide which of the provisions adopted by the Legislature are enforceable would contradict the principle that we are a “nation of laws, not men.” However, it is equally true that had the Legislature intended to require that all decisions by state and local officials comply with all of the provisions of the Shoreland Protection Act, the statute could have stated as much.

The meaning of the consistency requirement is likely to remain unanswered until it is either revisited by the Legislature, or it is examined more closely by a court of law.

## **3. Effect of the Consistency Requirement on Review by Local Authorities**

The language requiring that local permits be issued only when consistent with the policies of the Shoreland Protection Act likely creates more of an opportunity for local planning boards than an obstacle. Local regulatory bodies enjoy a high degree of immunity in the reasonable performance of their responsibilities as public officials, and a requirement that local officials implement shoreland regulations may also run afoul of the New Hampshire Constitution. (Article 28-a, which prohibits unfunded mandates, comes to mind.)

As an opportunity for local planning boards and zoning boards of adjustment, the Shoreland Protection Act is a significant resource. In cases where a permit has not yet been issued by DES for work within the protected shoreland, it effectively allows a planning board or zoning board of adjustment to deny a project because it would violate a “policy” of the state. Even if a local board chooses to approve a project, a municipality has broad discretion under the Act to “attach reasonable conditions to [local] approvals or permits ... to protect the public waters or the public health, safety or welfare” so long as those conditions are “related to the purposes” of the Act. RSA 483-B:6, II.

These provisions, taken together, alter the landscape for issuance of local permits in several key respects:

- A local zoning board of adjustment or planning board could deny a local approval on the grounds that it was inconsistent with the policies of the Act, if warranted under the circumstances, even if the project met the underlying criteria for issuance of a special exception, variance, site plan, subdivision or other local approvals.
- A local zoning board of adjustment or planning board could impose conditions to protect public waters of the state even if the project met all other state and local criteria for approval, so long as those conditions were “reasonably related” to the purposes of the Shoreland Protection Act.

As with other sections of the Shoreland Protection Act, the interaction with other state and local laws is to a large extent untested and in some areas open to interpretation. However, it seems clear that a municipality’s authority to impose conditions or even deny projects within the protected shoreland has been greatly expanded under RSA 483-B:3 and :6, II. To what extent municipalities will use these provisions and how courts of law will review those decisions remains to be seen.

## VII. ENFORCEMENT

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### A. ENFORCEMENT IN COOPERATION WITH STATE AGENCIES

The Shoreland Protection Act provides state inspectors with the power to “for cause, enter upon any land or parcel at any reasonable time to perform oversight and enforcement duties provided for in this chapter.” RSA 483-B:5, II. Typically, DES inspectors will use this authority to enter property not posted as “no trespassing” to perform their statutory responsibility to monitor and inspect for violation of the Shoreland Protection Act. In the event that an owner of property refuses access to a site, the state has the power to obtain an administrative search warrant based on a showing of probable cause of a violation under RSA 595-B. (See RSA 595-B:2. A discussion of administrative inspection warrants is beyond the scope of this article.) In most cases, particularly where the state does not seek criminal enforcement or penalties, state inspectors are willing to allow municipal officials to accompany, observe or even participate in inspections.

There are significant advantages to encouraging the state to play an active role in enforcement. For example, where violations of the state Shoreland Protection Act have occurred, the state and in particular the DES typically requires that a person found to have violated the law retain a qualified consultant to prepare a restoration plan to bring the property into compliance with the Act. In cases where the state orders a property owner in violation of the Act to retain a qualified

consultant to bring a property into compliance with its provisions, it is not unreasonable to expect that the same consultant will want to address local permitting and zoning requirements.

Moreover, state inspectors have considerable resources and experience to bring to bear in any enforcement case involving shoreline property that may not be available to municipalities. In cases where substantial violations of both the state Shoreland Protection Act and local zoning ordinances have occurred, there are significant advantages to coordinating local enforcement with the New Hampshire Department of Environmental Services.

In cases where the state issues a letter of deficiency or administrative order, or seeks enforcement by petition to the superior court, DES is required by RSA 483-B:5, IV, to provide copies of documents filed in the case to the local governing body.

## **B. LOCAL ENFORCEMENT OPTIONS – ORDERS AND PENALTIES**

The Shoreland Protection Act provides for enforcement by municipalities in much the same manner as the state is authorized to seek a petition for injunctive relief and penalties for violations of the Act. This may be a particularly valuable tool where the state has already issued a letter of deficiency or administrative order, or made other findings that are indicative of liability under the Act. Statutory authority to bring such an enforcement action is provided in RSA 483-B:8, III, which states as follows:

Municipalities in which protected shoreland is situated may enforce the provisions of this chapter by issuing cease and desist orders and by seeking injunctive relief or civil penalties as provided in RSA 483-B:18, III(a) and (b). Civil penalties and fines collected by the court shall be remitted within 14 days to the treasurer of the municipality prosecuting said violations, for the use of the municipality. Any municipality electing to enforce the provisions of this chapter shall send copies of any pleading to the attorney general at the time of filing.

The Shoreland Protection Act provides for penalties in the amount of up to “\$20,000 for each day of each continuing violation.” DES maintains a document titled the *Compliance Assurance Response Policy* (CARP) that provides guidance as to the reasonableness of any particular penalty sought by a municipality. The CARP is primarily a guidance document and does not purport to bind the authority of a court of law to modify any penalty sought by a municipality. Under the Shoreland Protection Act, the Attorney General likely retains the common law authority to appear in any enforcement case and dismiss enforcement by declaring *nolle prosequi*. (Cf. *State v. Dover*, 153 N.H. 181 (2006).)

The Shoreland Protection Act does not provide for recovery of attorney’s fees by the municipality, as is the case in the enforcement of local zoning ordinances and regulations. RSA 676:17. However, if violations of the Shoreland Protection Act are concurrent with violation of any municipal ordinances and regulations, and the municipality prevails on those claims, it seems likely that fees could be recovered for the cost of local enforcement.

# CONCLUSION

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The New Hampshire Legislature has clearly found expansion of the Shoreland Protection Act to be necessary to protect one of the state's most valuable natural and economic resources. Its provisions superimpose state-wide regulations on the very use and enjoyment of the land in ways that, even many years after the Act's adoption, are still untested. In many areas the Shoreland Protection Act presents opportunities to play an expanded role in the protection of natural resources. It provides municipalities with the authority to impose a broad range of conditions on projects within the protected shoreland, even when those projects meet all existing local requirements. In other areas, uncertainty in the language contained in the statute may make those opportunities difficult to realize.

As projects move through this new and challenging regulatory process, the history of the Shoreland Protection Act suggests that the legislature will revisit its provisions once again in the future. Municipalities that host significant public waters should use the Act as an opportunity to protect those resources and share their success and failure with their elected representatives so that future amendments improve its provisions. The need for such changes seems most important insofar as the law establishes a permit system that provides for only a limited role to be played by municipal officials and conservation commissions during the review process.

## ENDNOTES

- <sup>1</sup> See, for example, RSA 482-A:14-b (wetlands); RSA 485-A:22, III-a (terrain alteration); RSA 485-A:44, II (sewage disposal); RSA 149-M:15, VIII (Solid Waste Management).
- <sup>2</sup> See *NHDES v. Marino*, 155 N.H. 709, 713 (2007) (Noting that “the Shoreland Protection Act functions state-wide as an additional layer of regulation, which overlays existing state and municipal permitting schemes, such as building permits, wetlands permits, and septic system approvals”)(quotations and citations omitted).
- <sup>3</sup> Likely no. In fact, as discussed in Section V.E, RSA 483-B:3 is unclear but could be read to require DES to comply with more stringent local standards when issuing state permits under the Shoreland Protection Act.
- <sup>4</sup> Likely no under RSA 483-B:3 and 483-B:6, III.
- <sup>5</sup> Likely yes, if such conditions are “reasonably related” to the protection of water quality. See RSA 483-B:6, I(f) and II (A municipality “shall grant, deny, or attach reasonable conditions to approvals or permits ... to protect the public waters or the public health, safety or welfare. Such conditions shall be related to the purposes of this chapter.”).
- <sup>6</sup> DES does maintain an official list. However, under RSA 483-B:4, XVI, the list has no official status under the law.
- <sup>7</sup> September 19, 2006, *Minutes of the Commission to Study the Shoreland Protection Act*, page 2.
- <sup>8</sup> The amendments to the Shoreland Protection Act provide that “[s]tarting from the northerly or easterly boundary of the property, and working along the shoreline, the waterfront buffer shall be divided into 50 by 50 foot segments.” RSA 483-B:9, V(a)(1)(D).
- <sup>9</sup> The Commissioner of DES has the sole authority to issue waivers from any of the minimum standards imposed under RSA 483-B:9.
- <sup>10</sup> A permit system was originally contemplated in early versions of RSA 483-B prior to 1996. However, the permit requirements were removed prior to the first effective date of the Shoreland Protection Act, and thus were never implemented.
- <sup>11</sup> November 13, 2006, *Minutes of the Commission to Study the Shoreland Protection Act*, page 18.
- <sup>12</sup> *Id.*, at page 18.
- <sup>13</sup> *Id.*, at pages 18-19.
- <sup>14</sup> As of this printing, DES regulations are currently in draft form. Effective date based on author’s personal communications with DES staff.
- <sup>15</sup> There is a potential “Catch 22” in this provision in that if areas such as parking lots and buildings are made to infiltrate stormwater and become pervious, a greater portion of the lot could become subject to the 50 percent unaltered state requirement. It is assumed that DES would agree with this reading of the statute. This has not been confirmed however and remains a potential problem under the statute that may impact this project to some extent.
- <sup>16</sup> The four uses of the term “waive” or “waiver” are contained in: RSA 483-B:5-a, V(a); RSA 483-B:5-a, V(c); RSA 483-B:6, III; and RSA 483-B:11, II.
- <sup>17</sup> DES’s administrative regulations, however, require that applications for a variance from the Department include a statement as to how a “proposed variance meets the criteria which govern the grant of a variance by a zoning board of adjustment under RSA 674:33, I(b), *as those criteria have been interpreted by the N.H. supreme court.*” Env-Wq 1409.01(b) (emphasis added). This rule, if given weight by a court of law, would mean that the *Simplex* and *Boccia* criteria apply under the Shoreland Protection Act.
- <sup>18</sup> See *Env-Wq 1409.01* (application for Shoreland permit must be submitted with a variance request); and *Env-Wq 1406.09* (plans required for all Shoreland permit applications showing “[a]ll other applicable local and state setbacks”).

<sup>19</sup> *NHDES v. Marino, supra*, 155 N.H. at 713, (RSA 483-B “overlays existing state and municipal permitting schemes, such as building permits, wetlands permits, and septic system approvals”); RSA 483-B:3, I (“State and local permits for work within the protected shorelands shall be issued only when consistent with the policies of this chapter.”).

<sup>20</sup> As discussed in Section III, the legislative history and study committee minutes related to RSA 483-B:9, IV-b make clear that public roads are also exempt from the permitting requirements under the Shoreland Protection Act. However, public roads are subject to permit requirements under other laws enforced by DES, such as those related to wetlands protection, RSA 482-A, and terrain alteration, RSA 485-A:17, and must be consistent with the policies of the Act, even if exempt from its specific provisions.