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Comments

Protecting The Smile of the Great Spirit*: The Need for Increased Stewardship of New Hampshire's Shorelands

Andrew Herrold**

Foreword

In October, 2006, at the time of the original writing of this comment, a commission charged with reviewing the effectiveness of New Hampshire's Comprehensive Shoreland Protection Act ("CSPA" or "the Act") was nearing completion of its fifteen month assignment. The Commission presented its final report to state officials on November 30, 2006. The result of the commission's finding was the introduction of HB 383 and HB 663 in the New Hampshire House of Representatives. The bills proposed significant revisions to the original Act, which was the basis for this comment. The revisions were aimed at strengthening the

* "The Smile of the Great Spirit" is the meaning legendarily given by an Indian chief to Lake Winnepesaukee, New Hampshire's largest lake.

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effectiveness of the Act. The bills were signed into law on June 29, 2007.

As I am completing the final edits to this comment in May 2008, many of the regulations enacted under the revised Act are scheduled to take effect on July 1, 2008 (the initial effective date was April 1, but was later changed to July 1). The revisions have been incorporated into this comment along with possible predictions of their effect. However, it is clearly too soon to judge the impact of these changes in enhancing the Comprehensive Shoreland Protection Act's ability to protect the state's valuable shorelands.

I. Introduction

The New Hampshire Lakes Region has long been a popular retreat for vacationers from across the world.¹ Tucked between mountain ranges and lined by white pines, the Lakes Region lays claim to "America's Oldest Summer Resort"² and has been the site for popular films.³ Thousands of vacationers visit the region each summer to take advantage of its tranquil atmosphere, great fishing, and premier water-based recreation opportunities.⁴ The Lakes Region is also a popular destination as the leaves begin to change color in the fall,⁵ and the winter brings avid snowmobile riders and ice surfers to the frozen lakes.⁶

But the Lakes Region is not unique from other popular tourist destinations. Heavy use and development have put a strain on the environment of the Lakes Region. Where small cabins and cottages once dotted the shores of New Hampshire's lakes, mega-mansions are now beginning to overtake their small cottage neighbors. The new homes being built on the shores of New Hampshire's lakes often bring with them undesirable environmental impacts. Large trees and shrubs that once acted as natural buffers to erosion and runoff have given way to fertilized lawns that provide expansive views to homeowners.⁷ Many of the new homes also contain auxiliary buildings such as boathouses that

1. Meredith Area Chamber of Commerce, Meredith Area Guide to New Hampshire's Lakes Region, www.meredithcc.org (last visited Jan. 25, 2007).

2. Wolfeboro Area Chamber of Commerce, <http://www.wolfeboroonline.com/chamber/> (last visited Jan. 25, 2007).

3. The film *On Golden Pond* was filmed on Big Squam Lake in the 1970's. Squam Lakes Area Chamber of Commerce, <http://www.squamlakeschamber.com/> (last visited Jan. 25, 2007).

4. Wolfeboro Area Chamber of Commerce, *supra* note 2.

5. *Id.*

6. Lakes Region Association, <http://www.lakesregion.org/Activities/tabid/60/Default.aspx> (last visited Jan. 25, 2007).

7. Amy Quinton, *Lakeshore Protection Act Falls Short*, (New Hampshire Public Radio broadcast Aug. 22, 2006), <http://www.nhpr.org/node/11363>.

have been dug into the shoreline of the lakes, adding to the concern that development is putting a strain on one of New Hampshire's most valuable natural resources.⁸

In 1991, the New Hampshire General Court⁹ addressed the issue of environmental impact on New Hampshire waterways by passing the original version of New Hampshire Revised Statutes Annotated (N.H. Rev. Stat. Ann.) § 483-B or the Comprehensive Shoreland Protection Act¹⁰ ("CSPA" or "the Act"). In finding the state's shorelands to be both valuable and fragile, the legislature noted its interest in protecting the waters of the state, and cited the public trust doctrine as a basis for its authority.¹¹ The aim of the legislation was to address the potential environmental impacts to New Hampshire waterways by requiring permits that regulate or prohibit certain types of activities within a defined distance from the shore.¹²

Despite the legislature's attempt to address the environmental impacts of development on New Hampshire's waterways, some environmentalists and scientists have questioned whether the Act goes far enough to protect the health of the state's waterways. They have also raised concerns regarding recent levels and effectiveness of enforcement activities.¹³ Critics point to loopholes in the law that have allowed property owners to subvert what they claim to be the legislative intent of the bill, and in the process, have harmed the fragile waterfront environment.¹⁴ In some cases, this alleged lack of enforcement has resulted in environmental groups attempting to litigate a more vigorous enforcement process.¹⁵

This comment examines the history of the Act and its successes and failures. This comment also offers a historical analysis of enforcement of the Act. In considering the successes and possible shortcomings of the Act, the comment will take into account court decisions that have

8. See Paula Tracy, *Boathouse Requests in Drydocks*, NEW HAMPSHIRE UNION LEADER, Oct. 4, 2005, at B1.

9. New Hampshire General Court is the proper name for New Hampshire's state legislature. New Hampshire General Court, <http://www.gencourt.state.nh.us/ie/>.

10. Robert Cheney et al., *New Hampshire Regulatory Update: Shoreland Protection Update*, ENVIRONEWS, (Sept., 2002), available at <http://www.sheehan.com/sheehan.asp?id=580>.

11. N.H. REV. STAT. ANN. § 483-B:1 (1991).

12. Cheney et al., *supra* note 10.

13. See Press Release, Conservation Law Foundation, CLF Wins Fight for Enforcement of the Shoreland Protection Act, (Aug. 16, 2005), <http://www.clf.org/general/internal.asp?id=705>.

14. See Quinton, *supra* note 7.

15. Press Release, Conservation Law Foundation, New Hampshire Supreme Court to Decide CLF's Case to Enforce the Shoreland Protection Act, (Aug. 3, 2006), <http://www.clf.org/general/internal.asp?id=874>.

clarified its application. Administrative opinions of the Attorney General will be used to put pre-2008 levels of enforcement into context. Upon review of the Act itself and pertinent administrative and judicial proceedings, the comment will address revisions to the Act that were signed into law in 2007, and are scheduled to take effect on July 1, 2008 (hereinafter “the 2008 amendments” or “the amendments”). Finally, the comment will discuss the need for continued enforcement of the Act, both administratively and judicially.

II. The State’s Interest in Protecting Its Shorelands

A. *Environmental Concerns*

As noted above, the lakes of New Hampshire provide a tranquil, pristine environment that draws thousands of visitors each year. But humans are not the only species that find the crystal clear waters of New Hampshire’s lakes and their surrounding shores appealing. New Hampshire’s lakes and shorelines are home to countless species of wildlife. Potential degradation of the environment, that for so long has managed to adjust to use by humans, could prove catastrophic not only to human enjoyment of New Hampshire’s waters, but also to the many fish, birds, and other wildlife that rely on a healthy lake and river system for their survival. While there is little evidence that damage to New Hampshire lakes, rivers, and streams is beyond the point of no return, there is also little doubt that heavy human use has endangered the long-term health of these environmental assets.

Between 1995 and 1998, a group of volunteers formed the Public Advisory Group to “improve our understanding of the nature of current environmental risk” in New Hampshire.¹⁶ The group consisted of individuals with diverse backgrounds including business, environment, and public health. The group sought to identify and rank the 55 most serious environmental risks facing the state of New Hampshire.¹⁷ The group found that New Hampshire’s greatest environmental hazard was degradation of surface water habitat caused by development.¹⁸ It should be noted that this top environmental risk facing New Hampshire aligns closely with the purpose of the Comprehensive Shoreland Protection Act, which addresses the potential destruction of shorelines as a result of “uncoordinated, unplanned and piecemeal development.”¹⁹ The same

16. RANKED ENVIRONMENTAL RISKS IN NEW HAMPSHIRE, 2ND EDITION SEPTEMBER, 2002 1, (Katherine Hartnett and Carol R. Foss eds., 2002).

17. *Id.*

18. *Id.* at 14.

19. N.H. REV. STAT. ANN. § 483-B:1 (1991).

group found physical alteration of water and shoreland habitat as the fourth greatest environmental risk in New Hampshire.²⁰

The report of the Advisory Group's findings also underscores the importance of the Shoreland Protection Act by pointing out that while the federal Clean Water Act has successfully addressed point sources of pollution (identifiable sources of pollution²¹), the introduction of non-point source pollution has led to a change in the chemical makeup of New Hampshire's water bodies.²² Use of lawn fertilizers and removal of trees and shrubs surrounding water bodies, both activities that the Shoreland Protection Act seeks to address, have the effect of increasing phosphorous levels in lakes, rivers and streams.²³ This increase in phosphorous negatively affects both plant and animal life in and around lakes, rivers and streams.²⁴ While the Advisory Group report notes that elimination of runoff and restoration of vegetative buffer zones along shores can often reestablish healthy chemical balances, it also indicates that the continuation of intensive development along shorelines poses a serious risk to the environmental health of New Hampshire's waters.²⁵

An additional environmental impact to which the Shoreland Protection Act could provide great benefit is the health of a wide variety of wildlife species that rely on clean waters for habitat. The Public Advisory Group found that "one-third of New Hampshire wildlife species depend on aquatic or wetland habitats."²⁶ While not specifically aimed at the preservation of wildlife, through its efforts to maintain healthy waters, the Shoreland Protection Act undoubtedly has the potential to help preserve the natural habitat of New Hampshire's wildlife species.

B. *Economic Impact*

Although residential development along New Hampshire's lakes and rivers constitutes a healthy boost to local economies, it is only a small portion of the economic benefit that New Hampshire realizes from water-based activity. New Hampshire relies heavily on the close to \$2.5 billion that are spent on tourism each year within its borders. New

20. RANKED ENVIRONMENTAL RISKS IN NEW HAMPSHIRE, 2ND EDITION, *supra* note 16 at 14.

21. Creek Connections, Point vs. Non-point Source Pollution, <http://creekconnections.allegheny.edu/NationalWaterMonitoringDay/PointvsNonpoint.html> (last visited Jan. 25, 2007).

22. See RANKED ENVIRONMENTAL RISKS IN NEW HAMPSHIRE, 2ND EDITION, *supra* note 16, *NH Comparative Risk Project Technical Report on Ecological Integrity* at 22-23.

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.* at 9.

Hampshire residents and tourists alike cite the vast array of available activities and the quality of the state's freshwaters as important aspects of their enjoyment of the state's lakes and rivers.²⁷

Despite the apparent level of satisfaction among current users of New Hampshire's waterways, there are indications that if the environmental quality of New Hampshire's outdoor sources of recreation were to deteriorate, tourists would be less likely to spend as much money within the state.²⁸ Fifty eight percent of respondents from a recent poll indicated that commercial and residential development has led to a decline in overall beauty of the area around the State's waters.²⁹ Many of those who responded to the poll also indicated that if water quality or surrounding beauty were to suffer, they would likely decrease their use of the state's lakes and rivers, which could have significant negative impacts to New Hampshire's economy.³⁰

III. The Comprehensive Shoreland Protection Act

A. *The Act's Purpose and Basis of Authority*

Originally enacted in 1991, Chapter 483-B of the Revised Statutes Annotated of the State of New Hampshire, is commonly known as the Comprehensive Shoreland Protection Act.³¹ Part of the Act's stated goal is to "minimize shoreland disturbance so as to protect the public waters, while still accommodating reasonable levels of development in the protected shoreland."³² The Act is also designed to strike a balance between state and local control of New Hampshire's shores. While the Act encourages local officials to expand control of shoreland areas outside of the Act's authority,³³ the Act also provides for possible exemptions in the case of special circumstances encountered by a local municipality.³⁴ In the purpose of the Act, the General Court bases part of its authority to enact such a piece of legislation in the public trust doctrine,³⁵ which holds in title to the state all navigable waters.³⁶

27. LISA SHAPIRO ET AL., PUBLIC OPINION POLL RESULTS IN THE STUDY OF SELECT ECONOMIC VALUES OF NEW HAMPSHIRE LAKES, RIVERS, STREAMS, AND PONDS 26 (New Hampshire Lakes Association eds., Dec., 2004).

28. RANKED ENVIRONMENTAL RISKS IN NEW HAMPSHIRE, 2ND EDITION, *supra* note 16, *New Hampshire Comparative Risk Project on Economic Perspectives* at 14.

29. SHAPIRO ET AL., *supra* note 27.

30. *See id.* at 26.

31. N.H. REV. STAT. ANN. § 483-B:1, (1991).

32. § 483-B:9.

33. § 483-B:8.

34. § 483-B:12.

35. *See* § 483-B:1.

36. JOSEPH KALO ET AL., COASTAL AND OCEAN LAW: CASES AND MATERIALS 3 (West

Although not its only basis of jurisdiction, the public trust doctrine is likely a legitimate claim to jurisdiction for the state. The major focus of the Shoreland Protection Act deals with the lands above the “reference line”.³⁷ The reference line for natural freshwater bodies (those most affected by the Act) is defined as “the natural mean high water level.”³⁸ While the public trust doctrine traditionally applies to submerged lands below navigable waters,³⁹ not the land above the high water mark, the United States Supreme Court has held that states have the authority to define what lands it holds in public trust.⁴⁰ Accordingly, the New Hampshire General Court has codified that the title to submerged land shall be held by the state.⁴¹ Also, as held in *Illinois Central Railroad Co. v. Illinois*, although a state is free to grant parcels of submerged lands for certain private uses, the state may not give up its responsibilities granted to it under the public trust doctrine.⁴² In other words, New Hampshire is required to serve as trustee to its submerged lands.

The General Court of New Hampshire has taken a common law approach in establishing the public trust over its waters.⁴³ While the General Court initially announced its jurisdiction over coastal shores,⁴⁴ it has expanded the public trust jurisdiction to include all the water of New Hampshire, whether above or below ground.⁴⁵ The General Court has announced the right of the public to use the shores of the state’s water bodies for all lawful and useful purposes including recreation.⁴⁶ Stating that an adequate water supply is essential to health, safety, and welfare to New Hampshire citizens, the General Court has announced its authority to provide for stewardship over the waters within its boundaries.⁴⁷

The Shoreland Protection Act is an important tool in New Hampshire’s exercise of its control over state waters based on the public trust doctrine. Although many of the Act’s provisions focus on activities that take place on land rather than water, in order to properly fulfill its duty as the sole trustee of its waters, the state must be able to exercise control over activities on the shore that significantly impact the health of the state’s waters.⁴⁸ The Act’s attempt to preserve the water quality of

Group 2d ed. 2002).

37. N.H. REV. STAT. ANN. § 483-B:9 (1991).

38. § 483-B:4.

39. *KALO*, *supra* note 36, at 3.

40. *Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469, 475 (1988).

41. N.H. REV. STAT. ANN. § 483-C:1 (1995).

42. *Illinois Central Railroad Co. v. Illinois*, 146 U.S. 387 (1892).

43. § 483-C:1.

44. *Id.*

45. N.H. REV. STAT. ANN. § 481:1 (1985).

46. N.H. REV. STAT. ANN. § 483-C:1 (1995).

47. § 481:1.

48. § 483-B:2.

lakes and rivers, and thus to preserve the public's right to fish and conduct commerce on the lakes and rivers, fits within the state's role as trustee for the shorelands and waters within the state.

B. Basic Requirements of the Act

The Act specifically defines the area of protected shoreland as all the land located "within 250 feet of the reference line of public waters."⁴⁹ That is, the Act covers all lands from the mean high water mark of freshwater bodies up to the 250 foot line on a shore. The Act also covers construction of water dependent structures that alter the shore and extend into the public waters.⁵⁰

Within the defined protection area, the Act requires that permits be obtained before many activities can take place, and prohibits other activities altogether.⁵¹ The Act requires that all permits for work within the protected area must comply with the policies set forth in the Act. Failure to comply with the policies requires disapproval by regulatory agencies of the application for a work permit. In addition to mandating compliance with the Act, applicants for permits are also required to comply with other permit requirements such as local excavation permits or state dredge and fill permits.⁵² As should be expected, the requirements that have the greatest affect on residential development along the shores of New Hampshire's waterways have received the most attention among both supporters of the statute and those who have been limited in their actions because of it.

C. Provisions Regarding Primary Structures

In addressing the construction of primary structures, the Act requires a set back of fifty feet beyond the reference line.⁵³ A primary structure is one that is central to the "fundamental use of the property and is not accessory to the use of another structure."⁵⁴ While pre-existing nonconforming primary structures are not affected by the act, any repairs or renovations must maintain an equivalent functional use and be limited to the original footprint of the structure.⁵⁵

49. § 483-B:4.

50. § 483-B:6.

51. Cheney et al., *supra* note 10.

52. N.H. REV. STAT. ANN. § 483-B:6 (1991).

53. § 483-B:9.

54. § 483-B:4.

55. Cheney et al., *supra* note 10.

D. Provisions Regarding Water Dependent Structures

Another provision of the Act that has a significant impact on those who wish to develop the shorelands of New Hampshire's waters is the requirement that installation or construction of water dependent structures be approved and permitted by the Department of Environmental Services (DES).⁵⁶ While little evidence exists to indicate that many permits have been rejected, the provision has the potential to serve as a serious encumbrance to a landowner seeking to improve his or her property. The broad definition of water dependent structure includes docks, piers, breakwaters and wharfs or "other similar structure(s)."⁵⁷

Although not specifically prohibiting the construction of boathouses built into the shore through a process of dredging the lake bottom, some courts have interpreted the intent of the Act in such a way that requires the Department of Environmental Services to exercise jurisdiction over such "dug-in" boathouses and to restrict serious alteration of the shorelines, thus representing a potentially serious restriction on a homeowner's right to alter his or her land.⁵⁸

E. Provisions Regarding Natural Landscapes

The Shoreland Protection Act not only addresses physical structures built within the protected zone. The Act also addresses efforts of homeowners to alter the natural landscape along the shoreline. The 2008 amendments to the Act provide for three identifiable zones within the land bordering shorelines: the waterfront buffer zone; the natural woodland buffer zone; and the generally protected shoreland.⁵⁹

1. Waterfront Buffer

The waterfront buffer zone consists of the area up to 50 feet from the reference line.⁶⁰ "The purpose of this buffer shall be to protect the quality of public waters while allowing homeowner discretion with regard to water access, safety, viewscape, maintenance, and lot design."⁶¹ Within the waterfront buffer zone, homeowners face several restrictions relating to the modification and maintenance of the landscape. Unless specifically authorized by the Department of

56. § 483-B:6.

57. § 483-B:9.

58. See *Gordon v. New Hampshire Dep't of Envtl. Services Wetlands Council*, (Belknap County Superior Court, Docket No. 04-E-0218, 2005).

59. N.H. REV. STAT. ANN. § 483-B:9 (1991).

60. *Id.*

61. *Id.*

Environmental Services, homeowners are prohibited from removing rocks or stumps from the area.⁶² Additionally, homeowners are prohibited from using pesticides, and are restricted in their ability to use lawn fertilizers within the waterfront buffer.⁶³ Although allowed to construct a footpath to the water, the removal of natural groundcover is otherwise prohibited. Such ground cover may, however, be cut to a level no lower than three feet to provide the homeowner with a view of the water.⁶⁴

The Act also sets requirements for tree and sapling coverage in the waterfront buffer. In order to determine compliance, the Act sets forth a grid and point formula that calls for the waterfront buffer to be divided into 50 foot segments.⁶⁵ “Within each 50-foot segment a minimum combined tree and sapling score of at least 50 points shall be maintained.”⁶⁶ Points are calculated based on the diameter of each tree and sapling within a segment, “at 4½ feet above the ground.”⁶⁷ Tree cutting is allowed in a segment that exceeds the 50-point minimum, “as long as the sum of the scores for remaining trees and saplings in that segment does not total less than 50 points.”⁶⁸ Owners of properties that were legally developed prior to the July 1, 2008 effective date of the revisions, but that fail to meet the current standard, are encouraged—but not required—to enhance their current ground cover by planting native species of shrubs, saplings, and trees.⁶⁹

2. Natural Woodland Buffer

The second zone specifically addressed by the Act’s revisions, and encompassing the area up to 150 feet from the reference line, is the natural woodland buffer. The purpose of this zone is to minimize erosion, prevent siltation, prevent nutrient and chemical pollution, and respect “the overall natural condition of the protected shoreland.”⁷⁰ Within this buffer, at least 50 percent of the area not covered by impervious surfaces must remain undisturbed.⁷¹ Those owners whose lots were previously developed beyond the 50 percent requirement are

62. *Id.*

63. *Id.* (homeowners may use only limestone fertilizer within 25 feet of the reference line and “low phosphate, slow release nitrogen fertilizer or limestone” beyond the 25 foot mark).

64. *Id.*

65. N.H. REV. STAT. ANN. 483-B:9 (1991).

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.*

71. N.H. REV. STAT. ANN. 483-B:9 (1991).

encouraged- but not required- to increase the undisturbed area of their lot.⁷² Accordingly, owners of such previously developed land are prohibited from further decreasing the area of undisturbed land.⁷³ Although allowing for the removal of dead or unsafe vegetation, homeowners are again generally encouraged by the Act to plant native species of vegetation in the zone. Importantly, the Act also specifically notes that the dead or unsafe vegetation exception may not be used in a way that “contravene[s] the intent of the law.”⁷⁴

3. Protected Shoreland

The area not covered within either the waterfront buffer or the natural woodland buffer, but extending to 250 feet from the reference line, makes up the rest of the protected shoreland under the Act. Like the natural woodland buffer, the Act limits impervious surface cover within the protected shoreland. “No more than 20 percent of the area of a lot located within the protected shoreland shall be composed of impervious surfaces,”⁷⁵ with a few specific and limited exceptions based on amount of tree removal and stormwater management.⁷⁶ In addition to impervious surface restrictions, the Act also limits the number of residential structures that may be constructed within the protected shoreland.⁷⁷ For properties that rely on on-site sewage systems, or septic systems (which many waterfront homes do), only one residential unit will be permitted for every 150’ of shoreland.⁷⁸ The Act also addresses septic systems within the protected shoreland, providing setback requirements for systems based on the soil in which they will be placed.⁷⁹

4. Pre-2008 Standards

Although significantly enhanced by the Act’s recent revisions, it is worth noting some of the early standards that have been retained. Notably, the original standards strictly prohibit the expansion of “salt storage yards, automobile junk yards, and solid or hazardous waste facilities” along the shoreline.⁸⁰ Also, the earlier requirement of construction standards for water dependent structures has been

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.*

77. N.H. REV. STAT. ANN. 483-B:9 (1991).

78. *Id.*

79. *Id.*

80. *Id.*

maintained,⁸¹ as well as the requirement of a 50 foot setback for primary structures.⁸²

The Act continues to restrict the use of all fertilizers except natural limestone within twenty-five feet of the reference line.⁸³ Homeowners are also limited to low phosphate, slow release nitrogen fertilizers or limestone between the twenty-five feet mark and the edge of 250 foot protected area.⁸⁴

IV. Enforcement of the Act: A Mixed Record

“We must ensure that the CSPA is un-ambiguous, comprehensive (addressing all potential impacts to public waters), and enforceable. To do otherwise is to act irresponsibly, and thereby jeopardize the value of the Public Trust for the use and enjoyment of future generations.”⁸⁵

A. Enforcement Overview

Although the Shoreland Protection Act places significant and detailed restrictions on shorefront property owners, enforcement of the Act has been lukewarm at best, and at times in its history, nearly nonexistent.

Early enforcement of the Shoreland Protection Act drew criticism and skepticism among pro-business advocates and the General Court itself. Shortly after passage of the initial version of the Act, the Act was completely unfunded.⁸⁶ Despite passage of the statute, many lawmakers refused to appropriate funds for enforcement officers.⁸⁷

The General Court of New Hampshire has periodically revisited the Shoreland Protection Act, and in some instances, attempted to strengthen the Act. Most recently, the revisions discussed above, passed as Chapter Laws 276 and 268 of 2007, have provided significant enhancements to the Act, and for the first time, provided a funding mechanism for enforcement of the Act.⁸⁸ Additionally, the funding provides for

81. *Id.*

82. *Id.*

83. N.H. REV. STAT. ANN. 483-B:9 (1991).

84. *Id.*

85. New Hampshire Lakes Association, *Comprehensive Shoreland Protection Act: Problems and Solutions*, White Paper, available at http://des.nh.gov/cspa/CSPACommissionReport/AppendixG/NHLA_comments_and_solutions.pdf.

86. *Water Protection Act Not Enforced*, NEW HAMPSHIRE UNION LEADER, May 16, 1994, at 4.

87. *Id.*

88. N.H. REV. STAT. ANN. 483-A:3 (1990) (providing funding through dredge and fill permits for the purpose of protecting the shorelands covered by the Shoreland

educational outreach by Department of Environmental Services staff.⁸⁹ Presumably, as awareness of the Act becomes more universal as a result of these educational efforts, a brighter future for the Act may lie ahead. However, the obstacles to enforcement that follow must also be addressed.

B. Enforcement Obstacle: Lack of Capacity

Lack of capacity has been a major obstacle to meaningful enforcement of the CSPA since its passage. Within New Hampshire's borders there are over nine hundred bodies of water that are ten acres in size or larger, which have been designated as public waters to be held in trust by the state for public use.⁹⁰ Despite the remarkable number of bodies of waters and their thousands of miles of shoreline, oversight and review of violations and complaints of the Shoreland Protection Act was left up to just one enforcement official prior to the most recent revisions of the Act.⁹¹ With nearly one hundred Shoreland Protection Act files opened each year,⁹² it was not possible for the lone enforcement official to handle each case. In fact, many files remained open for several years,⁹³ and nearly half of all Shoreland Protection Act complaints or files received no enforcement action whatsoever.⁹⁴

While House Bill 663 of 2007, a wetlands bill that contained provisions relating to the Shoreland Protection Act, provides for a minimum of four DES staff positions devoted to the continued implementation and enforcement of New Hampshire's water laws,⁹⁵ it is by no means clear that the increase will solve the enforcement capacity issues described above. A new state-level permitting process established by the 2008 amendments may consume much of the officials' time, leaving little time to attend to violations and complaints on the close to 1000 waterways for which they are responsible. Additionally, continued heavy development of the State's shores will result in little, if any, net gain of enforcement capacity based on the new positions.

protection Act) (revision made in Chapter Law 0267 available at <http://www.gencourt.state.nh.us/legislation/2007/HB0383.html>).

89. *Id.*

90. New Hampshire Lakes Association, *supra* note 85.

91. D. Forst, *DES Wetlands Bureau Documented Violations Within the Protected Shoreland*, Presentation at the Comprehensive Shoreland Protection Act Commission meeting, Dec. 12, 2005, http://des.nh.gov/cspa/CSPACommissionReport/AppendixF/presentation_documented_violations121205.pdf.

92. *Id.*

93. *Id.*

94. *Id.*

95. N.H. House Bill 0663 (Chaptered Law 269), available at <http://www.gencourt.state.nh.us/legislation/2007/hb0663.html>.

C. *Lack of Understanding and Cooperation*

Prior to the scheduled July 1, 2008 effective date of the CSPA's revisions, the Act's provisions depended upon state and local officials to enforce CSPA standards through other, related permitting programs. However, state and local officials were not always clear about the extent of their jurisdiction, and many were not even familiar with the Act's restrictions and regulations.⁹⁶ The following case illustrates the type of practical problems encountered under that type of disbursed regulatory system.

1. Case In Point: Enforcement Through Permitting

In *Merrymeeting Lake Ass'n v. New Hampshire Dep't of Env'tl. Services*, opponents of a state proposed boat ramp sought to stay construction of the ramp through a complaint based on the Shoreland Protection Act.⁹⁷ The State of New Hampshire applied to the New Hampshire Department of Environmental Services, Wetlands Bureau for a wetlands permit to construct the ramp. The permit was approved but subject to the provision that "all activity . . . be in accordance with the Shoreland Protection Act."⁹⁸ By claiming that the boat ramp did not comply with the Shoreland Protection Act, the Merrymeeting Lake Association, a local organization developed to promote a healthy lake environment, sought reconsideration by the New Hampshire Department of Environmental Services' Wetlands Council (note the Wetlands Bureau and the Wetlands Council are not the same entity).⁹⁹ The Wetlands Council, however, rejected their appeal, claiming that the agency had not accepted jurisdiction over matters arising under the Shoreland Protection Act.¹⁰⁰ In essence, the Council disclaimed any responsibility for enforcement of the Act. Based on the denial of their appeal, the plaintiff's sought court review of the agency's decision to not accept jurisdiction over Shoreland Protection Act claims.

Representing the agencies, the State argued before the Strafford County Superior Court that the two agencies were not in a position to make substantive decisions related to potential violations of the Shoreland Protection Act in the permit reviewing process because "the Act is not enforced through the wetlands permitting process and because

96. New Hampshire Lakes Association, *supra* note 85.

97. See *Merrymeeting Lake Association v. N.H. Dep't of Env'tl. Services Wetlands Council*, (Strafford County Super. Ct., Docket No.: 99-E-160, at 3, 2002).

98. *Id.*

99. *Id.* at 4.

100. *Id.* at 7.

the Wetlands Bureau cannot predict future violations of the Act.”¹⁰¹ The State further argued that violations of the act may only be adjudicated after the violation has occurred, and that in such a case it may not be adjudicated by a private plaintiff.¹⁰²

The court, in a step toward more stringent enforcement of the Act, rejected the State’s contention. The court agreed with the plaintiff’s position that when a project, taken as a whole, effects land that falls within the definition of shoreland under the Act, there must be a substantive decision made as to whether the activity will violate the Act.¹⁰³ The court specifically held that “all state agencies” must comply with the Shoreland Protection Act.¹⁰⁴ Noting that the original permit issued to the State by the Department of Environmental Services required compliance with the Act, the Court expressed its concern that if a requirement in a permit served only as a warning that potential violations of the statute would have to be remedied should the statute not be complied with, the requirement within the permit would be meaningless.¹⁰⁵ The case marked an important point in the history of the Act and its enforcement. The court seemingly left no question that State agencies are required to comply with the Act in the permitting process.¹⁰⁶ However, despite the court’s apparent mandate in *Merrymeeting Lake*, questions persisted as to the proper level of enforcement among state agencies and municipalities.

2. Local Enforcement Efforts

At the same time that several State agencies were reluctant to enforce the Act, most local officials were not clear in their understanding of the role that local municipalities were to play in the enforcement of the Act. While the 2008 amendments create a specific permitting role for DES, they do not dissolve enforcement authority by local officials. These local officials have the potential to provide a significant boost to enforcement capacity issues discussed above. However, for this to happen, local officials must be educated as to their role in proper enforcement. Although the new provisions of the Act provide more detailed measures in the permitting and enforcement process, the State must provide proper education to these local officials, who may have just been starting to get a feel for the original act’s requirements.

101. *Id.* at 10.

102. *Merrymeeting Lake Ass’n*, (Strafford County Super. Ct.) at 10.

103. *Id.* at 11.

104. *Id.* at 11.

105. *Id.* at 11.

106. *Id.*

D. Enforcement Obstructed by Confusing Language

Apart from questions about the mandated role of state and local officials in the permitting process, some of the Act's original language was likely a complicating factor relative to enforcement.

Prior to the 2008 amendments, tree and sapling density standards were tied to a formula for "basal area" that is both highly technical and difficult to compute.¹⁰⁷ In fact, the term basal area is generally used in describing large forested areas, not small acreage residential lots as it was in the original Act.¹⁰⁸ Calculation issues were compounded by the use of a twenty year time span to regulate tree cutting limits.¹⁰⁹ Even if a vigorous enforcement program had been in place, it would have been difficult to call this particular criterion into question. Little evidence would have existed to establish a start or stop point on the twenty-year "clock," especially when a change of ownership of the property occurred.

As described above, the Act now calls for the use of a grid and point system to determine compliance with the Act relative to tree and sapling density.¹¹⁰ Although this new language holds some potential for mitigating the challenge of the Act's earlier confusing language, early reaction to the new language is mixed at best. At a public hearing in January, 2008, when DES officials previewed the pending amendments, some members of the public who spoke at the meeting said they thought the new requirements were more difficult to understand than the original standards.¹¹¹ This is significant. Although the amendments may provide enforcement officials with a more exact way of judging compliance, it is important that local citizens also be able to interpret the statute. Citizen compliance is essential to the ultimate success of the Act's purpose; protection of New Hampshire's shorelands.

Also, just before the originally proposed April 1 effective date of the amendments, State Senator Martha Fuller Clark, speaking on behalf of an effort to delay implementation, said, "'changes in the Shoreland Protection Act are difficult to understand,' and 'for the health of our environment, and the health of our economy, we need to have additional time to solve the ambiguities here and to educate the public.'"¹¹² In an

107. See N.H. REV. STAT. ANN. § 483-B:9 (1991).

108. New Hampshire Lakes Association, *supra* note 85.

109. § 438-B:9.

110. NEW HAMPSHIRE DEPT. OF ENV. SERVICES, RSA 483-B Comprehensive Shoreland Protection Act Standards, available at http://www.des.state.nh.us/cspa/pdf/CSPA_StandardsSummary.pdf.

111. Paula Tracy, *Critics: Public Unaware of Effect of Shoreland Rules*, NEW HAMPSHIRE UNION LEADER, Jan. 17, 2008, at A17.

112. Editorial, *Senate: Delay Enforcement of Shoreland Protection Act*, NEW HAMPSHIRE UNION LEADER, Mar. 28, 2008, at A2.

editorial piece, a leading state Newspaper commented, “the Department of Environmental Services and developers cannot agree on what some of the regulations mean.”¹¹³ These comments reveal the potential difficulties that will be faced with the amendments. Once again, education will be an important part of ensuring that, despite potentially confusing language, the Act’s purpose is fulfilled both by government officials and the public at large.

E. Government Efforts To Improve CSPA Enforcement

Despite the relative lack of guidance regarding enforcement responsibilities early in the Act’s history, lawmakers and the New Hampshire Attorney General have, more recently, recognized the need to provide clearer direction to those responsible for the Act’s compliance. In replying to a 2004 request for clarification from the Commissioner of New Hampshire Department of Environmental Services, the office of New Hampshire Attorney General Kelly Ayotte directed the Commissioner to better comply with the Act.¹¹⁴ The Attorney General’s office noted that it was not enough to rely on an applicant’s claim that an action would not violate the Act. Rather, the Attorney General advised that DES should modify its current practices in order to affirmatively assure that an action is in compliance with the Act.¹¹⁵ The Attorney General also made clear that enforcement after the fact is not sufficient. Agencies must establish, prior to the approval of permits, that the action will comply with the Act.¹¹⁶

The 2008 amendments support the Attorney General’s understanding of the Act. Importantly, the 2008 amendments establish a permit program that is specific to the CSPA. Unlike the earlier version of the Act, which relied exclusively on existing, disbursed permitting programs to carry out the purpose of the Act, the current version requires that a State Shoreland permit be acquired through the Department of Environmental Services before any “construction, excavation, or filling activities” are undertaken within the protected shoreland.¹¹⁷ This essentially establishes DES as the single clearinghouse for review of project proposals that fall within the protected shorelands. Although other local and state permitting bodies are still required to consider

113. Editorial, *Delay Shoreline Rules: Regulations Need More Airing*, NEW HAMPSHIRE UNION LEADER, Apr. 2, 2008, at A6.

114. See Jennifer Patterson, Office of N.H. Att’y Gen. Kelly Ayotte, Opinion Letter to Commissioner of New Hampshire Department of Environmental Services, No. OPN-04-0002, Sept. 2, 2004, <http://doj.nh.gov/publications/opinions/040002.pdf>.

115. *Id.*

116. *Id.*

117. N.H. REV. STAT. ANN. § 483-B:5 (1991).

CSPA compliance in granting other permits, this specific permitting requirement will hopefully help to reduce jurisdictional ambiguity.

Other revisions address problems such as confusing language. The revisions to the Act remove all reference to “basal area,”¹¹⁸ which, as noted above, was a confusing and cumbersome measurement formula. The new standards, with their use of the three protection zones and a grid and point system for maintaining a healthy amount of ground cover, although not perfect, with the proper education do have potential to provide a more workable system. The hope is that this will also result in stricter compliance among citizens.

The addition of four Environmental Services officials for statutory enforcement purposes finally overcomes the General Court’s history of leaving the Act with virtually no enforcement teeth. Again though, it remains to be seen whether this increase will be sufficient to cover all aspects of enforcement—permit management, compliance monitoring, violation review, etc.—for all of New Hampshire’s extensive shoreline.

In 2005, “State Bill 83 ‘established a commission to study the effectiveness of the comprehensive shoreland act and to explore standards that are better suited to local and state resource needs and to preservation of the public waters of the state.’”¹¹⁹ The Commission found that the CSPA was not providing adequate protection to the state’s shorelands, and offered a series of recommendations for improvement.¹²⁰ The 2008 revisions to the Act have addressed many of the Commission’s findings and reflect the Commission’s recommendations.¹²¹ The revisions appear to provide tools and resources that will increase the Act’s potential to protect New Hampshire’s shorelands. However, as of this writing, it is too early to predict or judge the actual impact of the revisions.

F. Enforcement in Practice, Pre-2008: Dug-in Boathouses

One activity that has significantly affected both the natural surroundings of New Hampshire’s shores and the quality of the water itself is the use of dug-in boathouses. In 1986, New Hampshire banned the construction of boathouses protruding out over the surface of the

118. § 483-B:9.

119. NEW HAMPSHIRE DEPT. OF ENV. SERVICES, FINAL REPORT OF THE COMMISSION TO REVIEW THE EFFECTIVENESS OF THE COMPREHENSIVE SHORELAND PROTECTION ACT (November 30, 2006) www.des.state.nh.us/cspa/CSPACommissionReport/final_report11-28-06.pdf

120. *Id.*

121. *See generally* N.H. House Bill 0663 *supra* note 95; N.H. House Bill 383 *infra* note 141.

water.¹²² However, property owners were still permitted to build boathouses into their shoreline.¹²³ This is done through dredging a significant portion of the shore as well as portions of the existing waterbed around the area that will house the boathouse. Environmental groups claim that this process leaves an area particularly susceptible to Milfoil, an insidious plant that has invaded many of New Hampshire's lakes,¹²⁴ and other environmental dangers.

Initial court rulings on the issue acknowledged the potential affect that such structures could have on New Hampshire's shores, and considered the implications of the CSPA.¹²⁵ In one such ruling against the state Department of Environmental Services, the New Hampshire Superior Court of Belknap County ruled that the agency did not strictly apply the Comprehensive Shoreland Protection Act in granting permits for dug-in structures.¹²⁶

The suit was brought by lakefront property owners and the Conservation Law Foundation, a New England Based environmental advocacy group¹²⁷, in an attempt to block the construction of a dug-in boathouse on Big Squam Lake.¹²⁸ The boathouse would have required dredging 962 cubic feet of the lake's bottom and would have extended forty-seven feet across the shoreline.¹²⁹ Appeals aimed at blocking the construction of the boathouse were denied by both the New Hampshire Wetlands Bureau and the Wetlands Council.¹³⁰ However, it should be noted that the agencies did require adherence to the Shoreland Protection Act as part of their permit approval.¹³¹

Despite the requirements put forth in the permit that the project comply with the Shoreland Protection Act, Belknap County Superior Court Judge Harold Perkins found that safeguards of the Act had not been properly applied or enforced. The court found that as a matter of law, the Wetland's Bureau had jurisdiction to enforce the Shoreland Protection Act beyond the banks of New Hampshire Waters.¹³² In requiring strict application of the Shoreland Protection Act's provisions, as well as other state and local laws that are more stringent, the court

122. Tracy, *supra* note 8.

123. *Id.*

124. Conservation Law Foundation, *supra* note 13.

125. See Gordon v. N.H. Dep't of Envtl. Services Wetlands Council, (Belknap County Super. Ct., Docket No. 04-E-0218, 2005).

126. *Id.* at 9.

127. Conservation Law Foundation, www.clf.org.

128. Gordon, (Belknap County Super. Ct.) at 1.

129. *Id.* at 3.

130. *Id.*

131. *Id.*

132. *Id.* at 10.

added teeth to a law that for quite some time had lacked legitimate enforcement.

Although the Superior Court of Belknap County found that the plain language of the Act conferred enforcement jurisdiction of the Act to the Department of Environmental Services, the question of final enforcement authority was apparently not fully resolved. While it appeared that the ruling all but did away with potential dug-in boathouse permit approvals, the evidence is to the contrary. In December, 2006, the Executive Council of the State of New Hampshire¹³³ met and approved permits for two dug in boathouses.¹³⁴ Only a month prior to the December approvals, hotel executive J.W. Marriot Jr., with the help of a company lobbyist, also obtained a permit from the council to add a dug-in boathouse to a compound of multi-million dollar homes that he owns on Lake Winnepesaukee.¹³⁵ Although some members of the Council pointed to the ruling by the court and urged denial of the permit, a majority of council members voted to approve the boathouses pending an appeal by the Attorney General.¹³⁶

A New Hampshire Supreme Court opinion, issued in July 2007, reversed the Superior Court ruling, allowing the property owners to proceed with the construction of a dug-in boathouse.¹³⁷ The court determined that the boathouse would not meet the CSPA definition of a water dependent structure because the dredging process would move the structure fully landward of the reference line, and not “over, on or in the waters of the state.”¹³⁸ The court reasoned that the boathouse “was now located over a dredged inlet, and no longer required an RSA Chapter 482-A dredge and fill permit,”¹³⁹ which was one of the qualifying characteristics of a water dependent structure prior to the 2008 amendments. Ironically, in its holding, the court seemed to hint at their

133. “The Executive Council of the State of New Hampshire has the authority and responsibility, together with the Governor, over the administration of the affairs of the State as defined in the New Hampshire Constitution, the New Hampshire statutes, and the advisory opinions of the New Hampshire Supreme Court and the Attorney General.”—Official New Hampshire Government Website, *Overview, New Hampshire Executive Council*, <http://www.nh.gov/council/overview.html>

134. Tom Fahey, *Lake Boathouse Policy Getting Council Debate*, NEW HAMPSHIRE UNION LEADER, Dec. 13, 2006.

135. *Id.*

136. *Id.*

137. Cayten et. al. v. N.H. Dep’t of Env’tl. Services, (N.H. Sup. Ct. Docket No. 2006-577, 2007), <http://www.nh.gov/judiciary/supreme/opinions/2007/cayte096.pdf>.

138. *Id.*

139. *Id.* The Court’s reference to RSA Chapter 482-A refers to the Water Management and Protection Act, which addresses dredge and fill of wetlands. According to the Shoreland Protection Act, a water dependent structure requires approval under the Water Management and Protection Act.

belief that this type of activity might be ripe for coverage by the permitting process of at least the wetlands regulations (which would therefore trigger the CSPA), and acknowledged the legislature's authority to mandate such regulation.¹⁴⁰ In its 2008 amendments to the CSPA, the General Court removed the prerequisite that an activity require an RSA 482-A dredge and fill permit to fit the definition of a water dependent structure.¹⁴¹

Although the 2008 amendments will theoretically provide greater clarity to conflicts such as the one described by requiring CSPA specific permits, as noted above, the ultimate result of the amendments cannot yet be known. Also, it should be noted that as of the summer of 2008, new dug-in boathouses continue to appear on New Hampshire's shores, albeit not as frequently as was once the case.

G. Enforcement Neglect: What it Looks Like

In 2001, ten years after initial passage of the bill, the effects of lack of enforcement could be seen on the shores of Lake Winnepesaukee.¹⁴² As David Schaarsmith, a staff lobbyist for the New Hampshire Lakes Association, toured Lake Winnepesaukee with New Hampshire Public Radio, he pointed out a home being built in Wolfeboro, a popular town on the lake. The front yard of the home contains only a spattering of trees and the grass is lush and green.¹⁴³ The obvious implication from the description is that neither the fertilizer restriction nor the requirement to maintain half of the original vegetation are being adhered to. The example provided by New Hampshire Public Radio conforms to analysis that indicates that a majority of violations of the Act occur within the Natural Woodland Buffer described in § 483-B:9 of the Act.¹⁴⁴ Violations such as removal of old tree stumps, construction over the setback requirement, and loss of a variety of shrubs and trees along the shore lead to obstacles such as erosion control and siltation.¹⁴⁵ The possible effects of such degradation of the natural woodland buffer are notable. The New Hampshire Lakes Association asserts that "a natural vegetated buffer zone consisting of trees, shrubs, and ground cover is the single most effective strategy in preventing surface run-off and hence

140. *See id.*

141. N.H. House Bill 383 (Chaptered Law 267), available at www.gencourt.state.nh.us/legislation/2007/hb0383.html.

142. Doug MacPherson, *NH's Shoreland Protection Act*, (New Hampshire Public Radio Interview, Sept. 4, 2001), www.nhpr.org/node/1553.

143. *Id.*

144. *Id.*

145. *See* Forst, *supra* note 91.

maintaining lake water quality.”¹⁴⁶ Because the waterfront buffer and natural woodland buffer consist of the area directly beyond the shoreline, it is also likely to have the greatest effect on maintaining a natural look and feel to those enjoying New Hampshire lakes by boat.

V. Analysis

A. *Comments on the Issue of Compliance*

New Hampshire, a state that prides itself on its motto of “Live Free or Die,” has placed significant restrictions on private property rights along the shores of its lakes, streams, and rivers based on the importance of these resources to the state. However, a law that few people know about, and even fewer people observe, does little to advance the legitimacy of the legislature’s efforts to address water quality within the state. Fortunately, the state appears to be taking the right steps to address some of the enforcement problems. The 2008 amendments have added a much needed funding mechanism for ongoing support of an expanded group of enforcement officers.

The judicial system has also played an important role in the Act’s history. Although not always holding as environmentalists might hope, the courts have added much needed interpretation to the Act and have, at times, mandated enforcement of its provisions.¹⁴⁷ A 2007 ruling by the Supreme Court of New Hampshire upheld a \$50,000 civil penalty for a violation of the Act’s prohibition against building within 50 feet of the reference line without a waiver from DES, and upheld the constitutionality of the Act in spite of charges of impermissible vagueness and delegation of legislative authority to DES.¹⁴⁸

1. A Lack of Public Awareness

Despite the efforts of the NH legislature and Courts to ensure enforcement of the Act, these two entities cannot be solely responsible for the success of the Act. A broad public initiative is needed. Currently, it appears that a major obstacle to meaningful and successful compliance with the Shoreland Protection Act is a lack of understanding and awareness among both private citizens and local public officials. Notwithstanding New Hampshire’s motto “Live Free or Die,” it should

146. New Hampshire Lakes Association, *supra* note 85.

147. See *Merrymeeting Lake Ass’n* (Strafford County Super. Ct.); *Cayten* (N.H. Sup. Ct.).

148. N.H. Dep’t of Env’tl. Services v. Marino, (N.H. Sup. Ct. Docket No. 2006-761, 2007), <http://www.courts.state.nh.us/supreme/opinions/2007/marin103.pdf>.

not be assumed that all violations of the Shoreland Protection Act are a willful attempt to resist government regulation. In fact, the more likely scenario is that in many circumstances the violator is not even aware that the law exists. At a January 2007 public hearing on proposed amendments to the Act, a general contractor made the observation, "I would say 90 to 95 percent of the property owners don't have a clue this [the Act] exists."¹⁴⁹ At that same hearing, a DES representative indicated that it is difficult to reach property owners with the information needed to fully understand the Act, because there is no database of shorefront property owners, and many property owners live much of the year out of state.¹⁵⁰

As noted above, the pre-2008 terms and calculations used to define natural vegetation stands were quite obscure and complex. Although the amendments provide a property owner with a more workable formula, inadvertent non-compliance might remain a difficult issue to address. It is easy to imagine the scenario of a property owner who begins clearing overgrown bushes unaware of CSPA and its restrictions regarding the natural landscape. Meaning only to accomplish some spring or fall cleanup, the property owner might quickly eliminate a significant amount of vegetation and in so doing, violate the Shoreland Protection Act. Even if the property owner subsequently becomes aware of the Act and the potential violation that occurred, re-growth of the removed bushes and saplings will not occur overnight.

Likewise, the limitation on fertilizer use within the protected shoreland could be both easy for property owners to overlook, and nearly impossible for state or local officials to enforce. While removal of trees and bushes from a shore creates a visible alteration to the property that could alert enforcement officials, use of fertilizers on a lawn must be left almost fully to self regulation among property owners.

2. Willful Disregard for the Act

While inadvertent violation of the Shoreland Protection Act is likely prevalent among well intentioned homeowners, there are also surely some property owners who willfully subvert both the letter and the intent of the Shoreland Protection Act.

The 2008 amendments will presumably address many of the willful violations that once went unpunished as a result of lack of enforcement capacity. The provision for funding of more enforcement officers is a major first step to reducing such violations. Quite apparently, education

149. Tracy, *supra* note 111.

150. *Id.*

is less effective at deterring those who seek to willfully break the law. However, education can in fact play an important role in addressing willful violations by equipping individuals with the knowledge to report potential violations occurring near their homes to DES. It should not be forgotten that waterfront neighbors have a vested interest (both recreationally and economically) in maintaining healthy shorelands and waters adjacent to their properties.

*B. Moving Forward from America's Oldest Summer Resort;
Recommendations for Strengthened and Continued Enforcement of
the Shoreland Protection Act*

As written, the Shoreland Protection Act has the potential to mitigate the heavy burden that development and human use are putting on New Hampshire's waterways. However, concerned citizens and public officials will have to work together to overcome the factors chronicled throughout this comment that have limited the Act's effectiveness to date. The good news is that with relatively minor changes and advancements in implementation efforts, the Act will finally begin to *comprehensively* protect New Hampshire's shorelands and the quality of the state's bodies of water, as its name suggests.

1. The Continued Need for Education

As noted above, education about the Act has been a major obstacle to its implementation and effectiveness. To ensure success of the Act, The Department of Environmental Services must seek to ensure that citizens, tourists, and local municipal leaders are fully aware of the requirements of the Act.

Although the Act specifically requires that local work permits comply with the Act, at least early on, there were indications that local officials were not fully aware of their role in enforcement of the Act. The DES must ensure that local officials are receiving the proper information and training in how to spot violations of the Act. Additionally, it must be made clear to local officials that they retain the authority to implement even stricter permitting requirements as they see fit. This provision is especially important for the towns that have experienced the heaviest growth in shoreland development. Despite the legislature's addition of more state enforcement officials, a major tool in the successful implementation of the Shoreland Protection Act will continue to be local officials, but this requires that they fully understand the Act.

Education is also essential among the State's citizens and tourists. Though there has been notable coverage of the 2008 amendments,¹⁵¹ it remains to be seen whether such coverage will translate into better awareness among NH citizens. A major hurdle in such public awareness is the fact that many owners of shorefront property utilize their properties as vacation homes. These property owners typically live out of state, and might only visit their vacation home for a few weeks out of the year. Despite local coverage of the Act, it is unlikely that these summer residents will be knowledgeable and have a clear understanding of the Act's requirements. In this instance, an observant neighbor who can alert part-time residents to their potential violations might provide the needed boost of awareness among private citizens. Again, property owners have a vested interest in compliance among their surrounding neighbors.

2. The Need for Enhanced Enforcement Capabilities

In order for the Shoreland Protection Act to accomplish its goal, the insufficient enforcement capacity that has historically accompanied it must be addressed. While the addition of enforcement officers enabled by the recent amendments is a good first step, it is very unclear whether the measure will be enough to keep up with the continued growth and development along New Hampshire's shores. Assuming education issues discussed above are addressed, local officials stand to play a major role in an enhanced enforcement capacity.

The state should also consider enlisting the aid of environmental protection groups to help monitor New Hampshire's shores for potential violations of the Act. Groups such as The Loon Preservation Committee, The Lake Winnepesaukee Watershed Association, and the Lakes Region Conservation Trust could all directly or indirectly benefit from a more successful Shoreland Protection Act. The goals of each of these groups relate in some way to the goals of the Act. Accordingly, the State should work with these and other groups and encourage them to aid in the enforcement effort. Trained volunteers could alert DES enforcement officials to the need for further investigation and action. This use of volunteers would not only provide a cost effective method of building compliance capacity, but also likely expand education efforts.

Ultimately, just as with education, the future success of the Act will turn on the level of enforcement capacity. The State must continue to fund an adequate number of enforcement officials to meaningfully

151. See Tracy, *supra* note 111; *Senate: Delay Enforcement of Shoreland Protection Act*, *supra* note 112.

administer regulations and address violations. As well, local officials must be held accountable to do their part in enforcing the Act. Finally, the use of volunteer groups has the potential to add another layer of enforcement capacity at little or no extra-cost.

3. Dug-In Boathouses

Unfortunately, the 2008 amendments to the Shoreland Protection Act did not place an outright ban on dug-in boathouses. Although the amendments removed the additional element that a building “requires a permit under RSA 482-A” (a dredge and fill permit) to be considered a water dependent structure, it has not eliminated altogether the possibility of dug-in boathouses.¹⁵² While the New Hampshire Supreme Court was seemingly correct at the time to not apply the water dependent structure requirements to the boathouse, in *Cayten et. al. v. N.H. Dep’t of Env’tl. Services*, the decision also illustrated the need for reconsideration of the issue. Unfortunately, in simply removing the additional element required to meet the definition of a water dependent structure, the General Court did not go far enough.

In order to truly address the health of the State’s shorelands, the General Court should have eliminated altogether the construction of dug-in boathouses. It is hard to think of an activity that would disrupt the natural state of the shoreline more than a dug-in boathouse. As noted in the *Cayten* case, the construction of that particular dug-in boathouse would result in a dredge of 45 cubic yards of lakebed and an excavation of 156 square feet of the bank of the lake.¹⁵³ It should not be forgotten that, as currently written after the 2008 amendments, a 1000 square foot dug-in boathouse must only meet the same requirements as a 25 foot long dock.

As of the writing of this comment, dug-in boathouses continue to be built on the shores of Lake Winnepesaukee. Although administrative rule making might lead to a ban on such structures at some point, the General Court should take the initiative and ban all dug-in boathouses immediately, to further improve the Shoreland Protection Act.

4. The Courts

The courts have the potential to play an integral role in the success of the Shoreland Protection Act. All of the precedent to date is based on the pre-2008 amendments to the Act. Moving forward, it is important

152. New Hampshire Dept. of Env. Services, Shoreland Protection Program, *Changes to the CSPA Effective July 1, 2008*, <http://www.des.state.nh.us/CSPA/>.

153. *Cayten*, (N.H. Sup. Ct.).

that the judicial branch continue to hold both DES and local officials responsible for their role as enforcers of the Act. Thus far, courts have often been willing to take the lead where agency and local officials have not. However, the courts have rightfully restrained themselves to the letter of the law. Some of the constraints that the courts once faced due to the language of the Act have been removed.¹⁵⁴ Such changes signify the legislature's desire to enhance the effectiveness of the Act and the courts should reason accordingly. The courts must continue to hold responsible those tasked with the enforcement of the Act and see to it that homeowners are held accountable for their failure to comply with the Act. The courts hold the final piece of the Shoreland Protection Act puzzle.

VI. Conclusion

To the lawmakers who initially passed the Comprehensive Shoreland Protection Act in 1991, the legislation very likely seemed innovative and proactive in addressing the need to protect New Hampshire's valuable water resources. However, the increased use and significant changes in the character of development along New Hampshire's lakes and rivers has challenged the effectiveness of the Shoreland Protection Act. Fortunately for the health of New Hampshire's waters, the apathy and lack of funding that was once a hallmark of the Shoreland Protection Act has begun to give way to increased awareness and enforcement. The recent changes made to the Act by the General Court have the potential to greatly enhance the effectiveness of the Act, although it is far too early to judge their success. It remains to be seen whether enforcement efforts will truly increase, and whether any such increases will be sufficient to keep up with the ever-growing environmental stresses that burden New Hampshire's waters. Public awareness and support for healthier shorelands is essential to the future success of the Act. As the Act enters its second generation, the New Hampshire courts will also continue to shape its effectiveness. Their past willingness to hold agency officials accountable for enforcement must continue; the future of New Hampshire's most valuable resource may depend on it.

154. See *id.*; see also New Hampshire Dept. of Env. Services, *supra* note 152.

