

**From:** Mears, David

**Sent:** Sunday, February 05, 2012 5:53 PM

**To:** MacLean, Alex; Markowitz, Deb; Minter, Sue; Mackay, Noelle; Hollar, Jennifer; Miller, Lawrence; Campoli, Gina; Cole, Chris; Ross, Chuck; LaClair, Jolinda; Recchia, Chris; Johnson, Justin; Richards, Alyson

**Subject:** Lakes and pond shoreland protection

**Attachments:** 29 V S A Chapter 11 draft 1-31-12.docx

Alex: Per our discussion Thursday, I have attached the latest version of legislative language relating to the concept of increasing DEC jurisdiction to require minimum vegetation for shoreland properties in order to reduce flood hazards. The main operative language is at the end. There would be two ways in which DEC would exercise this authority, as conditions on shoreland encroachment permits, or through vegetation management permits where a person proposes to disturb natural vegetation on the shoreline.

There is a hearing Wednesday morning in the House on lake flooding I think. I will ask my staff to keep this idea in the holster until and unless I give them a green light which will in turn depend upon the response from the folks on this message and the Governor's perspective. David

David K. Mears, Commissioner  
Vermont Department of Environmental Conservation

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**From:** Warren, Susan

**Sent:** Wednesday, February 01, 2012 2:53 PM

**To:** Mears, David

**Cc:** LaFlamme, Pete; Borg, Mary; Hanna, Steven

**Subject:** T29 Chap 11

David,

Attached is are the proposed changes to the Shoreland Encroachment statute. The ideas are much the same as the last time you saw it, but we have put all the vegetation management pieces at the end in one section. I am preparing some accompanying info which I will get to you shortly.

I'm also wondering if this is what I can present next Wednesday the 8<sup>th</sup> to the HFWWR committee? Will this be part of the omnibus bill? You mentioned there might be a lakes bill, is that just separating out the lake pieces of the omnibus bill, or is it something else?

Thanks! Susan

Susan Warren

Lakes and Ponds Section Chief

VT DEC Watershed Management Division

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[www.vtwaterquality.org/lakes.htm](http://www.vtwaterquality.org/lakes.htm)

*The Water Quality Division is relocated to the VSAC office in Winooski near the Champlain Mill. Please call ahead if you plan to visit, as you'll need to arrange for someone to meet you at the security desk.*

*Note: the mailing address above still works.*

# The Vermont Statutes Online

## Title 29: Public Property and Supplies

### Chapter 11: MANAGEMENT OF LAKES AND PONDS

#### § 401. Policy

Lakes and ponds which are public waters of Vermont and the lands lying thereunder are a public trust, and it is the policy of the state that these waters and lands, and the adjacent shoreline shall be managed to serve the public good, as ~~defined~~ determined by section 405 of this title, to the extent authorized by statute. It is recognized that management of lake shorelines<sup>[NCK1]</sup> in a natural vegetated condition affects the resilience of these lands to erosive forces and enhances their long-term stability, and that shoreline management affects aquatic and terrestrial habitat. It is therefore considered in the public good to maintain or enhance naturally vegetated shorelines. ~~For the purposes of this chapter, the exercise of this management shall be limited to encroachments subject to section 403 of this title.~~ The management of these waters, ~~and~~ lands and shorelines shall be exercised by the department of environmental conservation in accordance with this chapter and the rules of the board. For the purposes of this chapter, jurisdiction of the department shall be construed as extending to all lakes and ponds which are public waters and the lands lying thereunder, which lie beyond the shoreline or shorelines delineated by the mean water level of any lake or pond which is a public water of the state, and to include shoreline areas adjacent to mean water level up to an elevation where flooding can be expected to occur, as such mean water level is determined by the board. With respect to Lake Champlain and Lake Memphremagog, and due to their significant water level variation over the course of the year, jurisdiction over encroachments shall extend to the mean annual maximum water level (NVGD 1929) as described in section 404(b). For the purposes of this chapter, jurisdiction shall include encroachments of docks and piers on the boatable tributaries of Lake Champlain and Lake Memphremagog upstream to the first barrier to navigation, and encroachments of docks and piers on the Connecticut River impoundments and boatable tributaries of such impounds upstream to the first barrier to navigation. No provision of this chapter shall be construed to permit trespass on private lands without the permission of the owner. (Added 1967, No. 308 (Adj. Sess.), § 1, eff. March 22, 1968; amended 1969, No. 281 (Adj. Sess.), § 1; 1975, No. 162 (Adj. Sess.), § 1, eff. March 15, 1976; 1981, No. 222 (Adj. Sess.), § 41; 1987, No. 76, § 18; 2003, No. 115 (Adj. Sess.), § 110, eff. Jan. 31, 2005; 2009, No. 117 (Adj. Sess.), § 1.)

#### § 402. Definitions

Whenever used in this chapter, unless a different meaning clearly appears from the context:

- (1) "Board" means the natural resources board.
- (2) "Department" means the department of environmental conservation.

(3) "Encroach" means to place or cause to be placed any material or structure in any lakes and ponds which are public waters or to alter, or cause to be altered, the lands underlying any waters, or to place or cause to be placed any bridge, dock, boathouse, cable, pipeline or similar structure beyond the shoreline as established by the mean water level of any lakes and ponds which are public waters under the jurisdiction of the board.

(4) "Navigable water" or "navigable waters" means those waters as defined in subdivision 1422(4) of Title 10.

(5) "Person" means any individual; partnership; company; corporation; association; joint venture; trust; municipality; the state of Vermont or any agency, department, or subdivision of the state, any federal agency, or any other legal or commercial entity.

(6) "Public good" means that which shall be for the greatest benefit of the people of the state of Vermont.

(7) "Public waters" means navigable waters excepting those waters in private ponds and private preserves as set forth in chapter 119 of Title 10. (Added 1967, No. 308 (Adj. Sess.), § 2, eff. March 22, 1968; amended 1975, No. 162 (Adj. Sess.), § 2, eff. March 15, 1976; 1981, No. 222 (Adj. Sess.), § 41; 1987, No. 76, § 18; 2003, No. 115 (Adj. Sess.), § 111, eff. Jan. 31, 2005.)

(8) "Shoreline" means the area in a lake that the water can be expected to cover on an annual basis between the annual mean water level and the annual mean maximum water level, and the area of terrestrial vegetation above this mark that can be affected by wave action during flooding events (higher than the annual maximum water level).

### **§ 403. Encroachment prohibited**

(a)(1) Except as provided in subsection (b) of this section, no person shall ~~encroach on any of those waters and lands of lakes and ponds under the jurisdiction of the board~~ without first obtaining a permit under this chapter.

(2) Except as provided in subsection (b) of this section, no person shall encroach on the following waters with a dock or pier without first obtaining a permit under this chapter:

(A) boatable tributaries of Lake Champlain and Lake Memphremagog upstream to the first barrier to navigation; and

(B) Connecticut River impoundments and boatable tributaries of such impoundments upstream to the first barrier to navigation.

(3) No permit shall be granted if the encroachment adversely affects the public good.

(b) A permit shall not be required for the following uses provided that navigation or boating is not unreasonably impeded:

(1) Wooden or metal docks for noncommercial use mounted on piles or floats provided that:

(A) the combined horizontal distance of the proposed encroachment and any existing encroachments located within 100 feet thereof which are owned or controlled by the applicant do not exceed 50 feet and their aggregate surface areas do not exceed 500 square feet; and

(B) concrete, masonry, earth or rock fill, sheet piling, bulkheading, cribwork, or similar construction does not form a part of the encroachment;

(2) A water intake pipe not exceeding two inches inside diameter;

(3) Temporary extensions of existing structures added for a period not to exceed six months, if required by low or shallow water;

(4) Ordinary repairs and maintenance to existing commercial and noncommercial structures, which does not include the removal and subsequent replacement of structure;

(5) Duck blinds, floats, rafts, and buoys.

(c) Existing encroachments shall not be enlarged, extended, or added to without first obtaining a permit under this chapter, except as provided in subsection (b) of this section.

(d) This chapter shall not apply to encroachments subject to the provisions of chapter 43 of Title 10, concerning dams, or regulations adopted under the provisions of 10 V.S.A. § 1424 concerning public waters.

(e) This section shall not apply to the installation on lake bottoms of small filtering devices not exceeding nine square feet of disturbed area on the end of water intake pipes less than two inches in diameter for the purpose of zebra mussel control. (Added 1967, No. 308 (Adj. Sess.), § 3, eff. March 22, 1968; amended 1975, No. 162 (Adj. Sess.), § 3, eff. March 15, 1976; 1981, No. 222 (Adj. Sess.) § 41; 1993, No. 233 (Adj. Sess.), § 52, eff. June 21, 1994; 2009, No. 117 (Adj. Sess.), § 2.)

#### **§ 404. Application for construction**

(a) An application for a permit to encroach shall be filed with the department. The application shall set forth the location, type, size and shape of the encroachment and the plans and specifications to be followed in the construction.

(b) The department may conduct hearings, investigations, examinations, tests and site evaluations necessary to verify information contained in the application. An applicant shall grant the department permission to enter upon his land for these purposes. (Added 1967, No. 308 (Adj. Sess.), § 4, eff. March 22, 1968; amended 1981, No. 222 (Adj. Sess.), § 41.)

#### **§ 405. Investigation and determination of public good**

(a) Written notice of each application shall be given by the department to abutting property owners, the selectmen of the town in which the proposed encroachment is located, and other persons as it considers appropriate. The notice shall provide a brief description of the proposed encroachment and the address where complete information about it may be obtained. Notice shall provide not less than 10 days for the filing of written comments by any interested persons. Upon receipt within the notice period of a request from a municipality, or 25 or more persons in interest, the department shall hold a public information meeting. Notice of the meeting shall be provided to anyone required to receive notice by this subsection, to all persons who have filed written comments within the notice period, and to other persons as the department considers appropriate.

(b) In determining whether the encroachment will adversely affect the public good, the department shall consider the effect of the proposed encroachment as well as the potential cumulative effect of existing encroachments on water quality, [shoreline stability](#), fish and wildlife habitat, aquatic and shoreline vegetation, navigation and other recreational and public uses, including fishing and swimming, consistency with the natural surroundings and consistency with municipal shoreland zoning ordinances or any applicable state plans. If the department determines, after reviewing the applications, the written comments filed within the notice period and the results of the investigation, that the proposed encroachment will not adversely affect the public good, the application shall be approved.

(c) The department shall give written notice to the applicant, the municipality in which the encroachment is located, the abutting property owners and other persons considered appropriate, of the action taken in approving a permit or denying the application. Notice shall be given within five days of taking action. The notice shall explain the reasons for the action and shall include findings as to the effect of the encroachment on each element of the public good set forth in subsection (b) of this section. The action of approving or denying an application shall not be effective until 10 days after the department's notice of action. (Added 1967, No. 308 (Adj. Sess.), § 5, eff. March 22, 1968; amended 1975, No. 162 (Adj. Sess.), § 4, eff. March 15, 1976; 1981, No. 222 (Adj. Sess.), § 41.)

#### **§ 406. Appeals**

Appeals of any act or decision of the department under this chapter shall be made in accordance with chapter 220 of Title 10. (Added 1967, No. 308 (Adj. Sess.), § 6, eff. March 22, 1968; amended 1975, No. 162 (Adj. Sess.), § 5, eff. March 15, 1976; 1981, No. 222 (Adj. Sess.) § 41; 2003, No. 115 (Adj. Sess.), § 112, eff. Jan. 31, 2005.)

#### **§ 407. Repealed. 2003, No. 115 (Adj. Sess.), § 119(b), eff. Jan. 31, 2005.**

#### **§ 408. Permit**

(a) A permit may contain any conditions that the department considers necessary to protect the public good. [Insofar as land uses immediately upland of an encroachment may be integral to a proposed project and may potentially impact the public good, a permit may include requirements on these related land use activities in the immediate upland shoreline area of a proposed project](#)

as necessary to protect the public good. Conditions necessary to protect the public good may include shore stabilization designs that incorporate woody vegetation, mimic the natural shoreline and protect or enhance fish and wildlife habitat.

(b) No person granted a permit under this chapter is relieved of the responsibility to comply with any other applicable federal, state, and local laws, regulations, and permits.

(c) A permit may be revoked by the department in the event of violation of any condition attached to the permit.

(d) Temporary emergency permits may be issued, pursuant to subsection 2822(c) of Title 3. (Added 1967, No. 308 (Adj. Sess.), § 8, eff. March 22, 1968; 1975, No. 162 (Adj. Sess.), § 7, eff. March 15, 1976; 1981, No. 222 (Adj. Sess.), § 41; 2003, No. 82 (Adj. Sess.), § 7; No. 115 (Adj. Sess.), § 113, eff. Jan. 31, 2005.)

### **§ 409. Injunction**

Any person aggrieved by any violation of this chapter, or the attorney general at the request of the department, may institute any appropriate action in the superior court of the county in which a proposed or existing encroachment is located to prevent, restrain, correct, or abate any violation of this chapter or of the conditions of any permit issued under this chapter. (Added 1967, No. 308 (Adj. Sess.), § 9, eff. March 22, 1968; amended 1969, No. 281 (Adj. Sess.), § 2; 1971, No. 185 (Adj. Sess.), § 208, eff. March 29, 1972; 1975, No. 162 (Adj. Sess.), § 8, eff. March 15, 1976; 1981, No. 222 (Adj. Sess.), § 41; 2003, No. 115 (Adj. Sess.), § 114.)

410. Repealed. 1989, No. 98, § 4(d).

### **§ 411. Policy with Respect to Vegetation Management for Shoreline Stability**

With respect to public water lakes and ponds, jurisdiction over shoreline vegetation management is established as necessary to maintain or enhance natural shoreline vegetation (mix of trees, shrubs and non-turf groundcover) to ensure greater shoreline and bank stability. It is considered in the public interest to either retain existing natural shoreline vegetation or encourage its re-establishment where already removed. The Department shall establish a rule for the protection and enhancement of a naturally vegetated condition on the shorelines of Vermont's lakes and ponds and shall establish criteria for the issuance of permits under section 412. A permits shall not required pursuant to §412 until after development of such a rule.

### **§412. Permit for Vegetation Management.**

An application for activities<sub>[m2]</sub>]<sub>[sjw3]</sub> that will reduce, disturb or eliminate the naturally vegetated condition of shorelines, where present, shall be filed with the department. This jurisdiction shall apply either in conjunction with an encroachment application under section 404(a) or whenever the shoreline vegetation is proposed for reduction, disturbance or elimination. The application shall set forth the manner in which vegetation density criteria developed by the Department under the rule making process shall be met. Jurisdiction will include:

(i) On Lake Champlain up to an elevation of 104 feet (NVGD 1929) or a distance of 30 horizontal feet from 100' whichever is less; or

(ii) On Lake Memphremagog up to an elevation of 685 feet (NVGD 1929) or a distance of 30 horizontal feet from 684', whichever is less; or

(iii) On all other Vermont lakes and ponds 30 horizontal feet or four vertical feet, whichever is less, from the mean summer water level as evidenced by water level records, a Water Resource Panel or other Rule, or the extent of terrestrial vegetation.

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