

**Public Trust Doctrine and Lake Management in New Hampshire**  
**Discussion Paper**  
**Approved by the Lakes Management Advisory Committee**  
**November 12, 2010**

**Purpose**

This document and appendix are intended to provide the Lakes Management Advisory Committee (LMAC) members with a common understanding of the background of public trust doctrine, how it has been applied in New Hampshire with regards to lake management issues, and what legislation, administrative rules and court rulings exist that impact lake management issues. This document and appendix should be used for educational and discussion purposes only and is not intended to provide legal advice about any specific matter.

Note: The referenced appendix will be available at a later date.

**Background**

The LMAC is charged with assisting the New Hampshire Department of Environmental Services implement the goals of the Lakes Management and Protection Program (LMPP), RSA 483-A, to “to insure the continued vitality of New Hampshire lakes as key environmental, social, and economic assets for the benefit of present and future generations”. It is the only committee in the state that provides advice and oversight regarding the comprehensive management of the state’s lakes and ponds, and includes representatives from all state agencies and several organizations that have either a direct or indirect role in lake management and protection.

To achieve this goal the LMAC has produced documents that emphasize a balance between competing interests and coordination amongst lake resource managers. In 2006, the LMAC participated in the State Agency Lakes Forum, where Governor John Lynch challenged attendees to develop next steps, to look at overlapping jurisdictions and for opportunities for agencies to coordinate and communicate more effectively. More recently, the LMAC has revisited the issue of ensuring that lake resources are protected for the public for a variety of uses.

At the LMAC March 2010 meeting, the committee revisited one of the issues identified at the 2006 State Agency Lake Forum pertaining to the public trust. Members expressed concern that the public, property owners, state agencies and the New Hampshire Legislature does not always have a clear understanding of the public trust. This discussion paper is intended to provide background and the current status of how public trust is related to lake management in New Hampshire.

**Public Trust Doctrine**

Public trust doctrine has its origins in Roman and English law with the idea that the public has the right to access certain resources, including the air, water and shoreland. This idea was further refined with the passage of the Magna Carta in 1215 which specifically limited the English king’s ability to restrict public access to navigable waters for transportation and fishing. While the king could not restrict public access he was also entrusted to protect the resource for the general public, hence the term “public trust”. Public trust doctrine moved its way into the United States legal system with many states, including New Hampshire, incorporating the doctrine into their state constitutions.

Public trust doctrine is a common, or case law, meaning that the law is not codified in statute, but is defined and continually being refined by court decisions on a case-by-case basis. While public trust doctrine has historically been used to maintain the public's right to use waterbodies for navigation and fishing, in the last century it has also been expanded to meet societal demands to include protection of water resources for recreation, aquatic life, and additional "uses and benefits".<sup>1</sup> Today, public trust doctrine is a governing principle to balance the competing uses of water resources between the public and riparian, or shoreline, property owners.<sup>2</sup> Public trust is referenced in multiple pieces of legislation, although by its very nature it cannot be defined in statute.

The State of New Hampshire holds in trust all the public waters, including all natural lakes and ponds of ten acres or more in size, navigable rivers, and tidal waters for the use and benefit of the people of the state.<sup>3</sup> Public waters can be used for a variety of uses, including boating, fishing, swimming, and "other lawful and useful purposes".<sup>4</sup> The courts have not concisely defined public waters. In addition to having public trust jurisdiction over public waters, the state also owns and controls the natural beds of all great ponds up to the natural high water mark.<sup>5</sup> Public trust doctrine is not defined in any state law, although it is referred to in multiple pieces of legislation.

In New Hampshire, one of the key provisions of public trust doctrine as it applies to water resources is the "reasonable use" of those resources. Reasonable use is generally taken to mean that a riparian property owner can use the water in such a manner that it does not unreasonably interfere with the water use of the public or another property owner regardless of which use was established first. Reasonable use, like the public trust doctrine, is continually being refined as standards established by the courts evolve as societal needs change.

### **Riparian Rights**

In New Hampshire, there are approximately 1,000 lakes and great ponds totaling an area of nearly 165,000 acres.<sup>6</sup> This results in thousands of miles of riparian property. The state owns in fee just over 400 miles of waterfront property.<sup>7</sup> Given the limited amount of shoreland owned by the state, and that the state has common law jurisdiction over most surface waters in New Hampshire, there is often confusion regarding the rights of the public versus riparian property owner rights to the water.

"Riparian" rights are derived from the English common law, and are part and parcel of the property rights enjoyed by owners of land adjoining navigable waters. Under the English common law, the bundle of riparian rights included the rights of access to the water, to wharf out (build a dock), to gain by accretions (and lose by erosion), and to replace land lost by avulsion. The right of access to the water is the most basic right of the riparian owner under which other riparian rights are created and protected.

The New Hampshire Supreme Court has held that riparian property-owners have rights which are more extensive than those of the public generally on certain areas of the water.<sup>8</sup> The right to "use and occupy the waters adjacent to their shore for a variety of recreational purposes" is an incidental property right associated with ownership of riparian property.<sup>9</sup> Riparian property-owners may "wharf out" to access the water, but they may not unreasonably interfere with the

public's use of the water. Such riparian rights, however, "are always subject to the paramount right of the State to control them reasonably in the interests of navigation, water storage and classification, health and other public purposes."<sup>10</sup>

The state cannot take away a riparian property-owner's rights, which are recognized as common rights, without compensation.<sup>11</sup> (To do so would be a violation of the Fifth Amendment of the U.S. Constitution and the New Hampshire Constitution [Article 12, Part I] provides that "no part of a man's property shall be taken from him, or applied to public uses, without his own consent, or that of the representative body of the people.") The New Hampshire Legislature "has the power to change or redefine the common law to conform to current standards and public needs, [however] property rights created by the common law may not be taken away legislatively without due process of law."<sup>12</sup> Extinguishment of a landowner's riparian rights for a public purpose may lead to a taking, thus requiring compensation.<sup>13</sup>

### **Lake Management and Regulatory Authority**

As the steward of public waters, the state safeguards the right to use and enjoy public waters by avoiding piecemeal on-water regulation.<sup>14</sup> In New Hampshire multiple state agencies have regulatory authority over activities affecting lakes and ponds; including the adjacent shoreland. "The state has an interest in protecting those waters and has the jurisdiction to control the use of the public waters and the adjacent shoreland for the greatest public benefit."<sup>15</sup>

The multiple state statutes concerning water resource management include clauses regarding protecting the public trust and reasonable use. The statutes, and associated administrative rules, give various state agencies the regulatory authority to protect the resources identified in statute. Although statutes may identify resources as included in the public trust, only the courts may define what public trust is. For example, the provisions of RSA 270:60 the Supervision of Navigation; Registration of Boats and Motors, Common Carriers by Water are intended to "maintain... jurisdiction to control the use of public waters for the greatest public benefit," by curtailing the "undue proliferation of moorings". The New Hampshire Department of Safety is charged with administering mooring permits.<sup>16</sup> Individual mooring permit applications require the applicant to list the length and width of existing docking structures together with the number of boating slips and explain why they are insufficient to meet the user's need. These provisions impel private dock users to exhaust available watercraft storage before seeking a mooring permit.<sup>17</sup>

Multiple other examples of regulatory authority related to public trust exist, including, shoreland development (RSA 483-B), boating speed limits (RSA 270-D), dock permits (RSA 270), etc. This, however, does not always translate into the various regulatory agencies in New Hampshire having the same vision for what is reasonable and what is unreasonable when it comes to protecting the public trust. General public trust doctrine principles as mentioned in this paper do exist, however the application of those principles amongst groups with different interests may not always be feasible. Determining what uses are to the "greatest public benefit" for the state's waters and shorelands will never be a simple process and will continue to evolve over time as societal needs and values change.

## **Application of Public Trust to Lake Management Issues**

As previously stated, various state agencies have been given regulatory authority by the New Hampshire Legislature to oversee particular aspects of the state's water resources for the uses and benefits of the citizens of the state.<sup>18</sup> The existing legislation and administrative rules, along with various court rulings, have defined certain boundaries associated with those water resources in order to protect the public trust and ensure reasonable use.

The attached appendix\* identifies known statutes, administrative rules and court rulings as they apply to a variety of specific lake management issues. For some issues, such as a riparian landowner's property ending at the high water mark, clear boundaries have been set in an effort to protect the public's use of the water.<sup>19</sup> In other cases, such as the location of swim rafts, very little has been defined in statute, administrative rules or by court ruling. The appendix is intended to provide a basic understanding of how public trust is being applied with regards to particular lake management issues today.

\*Note: The referenced appendix will be available at a later date.

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<sup>1</sup> New Hampshire Department of Justice. *Opinion of the Justices*, 139 N.H. at 90-91.

<sup>2</sup> State v. Stafford Company, 99 N.H. 92, 97 (1954),

<sup>3</sup> State v. Sunapee Dam Co., 70 N.H. 458, 460 (1900); RSA 271:20; New Hampshire Department of Justice. *Opinion of Justices*, 139 N.H. 82; St. Regis Paper Co. v. New Hampshire Water Resources Board, 92 N.H. 164 (1942).

<sup>4</sup> Hartford v. Gilmanton, 101 N.H. 424 (1958); State v. Sunapee Dam Co., 70 N.H. 458, 460 (1900).

<sup>5</sup> State v. Stafford Company, 99 N.H. 92, 97 (1954),

<sup>6</sup> New Hampshire Department of Environmental Service. 2008. *New Hampshire Water Resources Primer*.

<sup>7</sup> New Hampshire House Bill 710 Commission to Study Issues Relative to the Practice of Leasing State-Owned Real Estate on the Shores of Public Waters., Chapter Law 254, Laws of 2007- Final Report.

<sup>8</sup> Sundell v. Town of New London, 119 N.H. 839, 844 (1979)

<sup>9</sup> Donaghey v. Croteau, 119 N.H. 320, 323 (1979)

<sup>10</sup> State v Stafford Company, 99 N.H. at 97 (1954); see also RSA 483-A:3 (2001).

<sup>11</sup> Sundell v. Town of New London, 119 N.H. 839, 884 (1979).

<sup>12</sup> RSA 483-C, Public Use of NH Coastal Shorelands; Purdie v. Attorney General, 143 N.H. 661 (1999)

<sup>13</sup> NH Department of Justice Richard. Head Memo to NHDES Informal Opinion: Draft Instream Flow Rules. October 2, 2001.; Proprietors of the Piscataqua Bridge v. N.H. Bridge, 7 N.H. 35, 66-70 (1834).

<sup>14</sup> New Hampshire Department of Justice. *Opinion of the Attorney General*, No. 0-87-067 (August 2, 1989).

<sup>15</sup> RSA 483-B:1, II. New Hampshire Comprehensive Shoreland Protection Act.

<sup>16</sup> RSA 270:61; N.H. Admin. Rules, Saf-C 408.04.

<sup>17</sup> Lakeside Lodge v. Town of New London. 2008-247, N.H. 135 (2008).

<sup>18</sup> State v. Sunapee Dam Co., 70 N.H. 458, 460 (1900).

<sup>19</sup> State v. Sunapee Dam Co., 70 N.H. 458, 460 (1900); Hartford v. Gilmanton, 101 N.H. 424 (1958).