



**M E M O R A N D U M**

**TO:** James Townsend, Counsel  
**FROM:** Sarah Reynolds, Associate Counsel  
**RE:** Summary of Legal Guidance, April 2012 - September 2013  
**DATE:** September 5, 2013

Following are summaries of the legal guidance that has been given to staff since April 2012. I have included a list summarizing the guidance that codifies existing Agency law and practice, as well as a list summarizing new practices and interpretations. As possible, this information has been incorporated into our existing public flyers, available on the Agency website.

**Summaries of Existing Law/Agency Practice**

**Scope of Jurisdiction Under the APA Act:**

- Section 809(2)(a) of the APA Act requires Agency permitting of the projects listed in Section 810 of the Act. These provisions confer on the Agency two types of jurisdiction:
  - 1) jurisdiction limited to activities directly related to the listed land use or development projects; and
  - 2) broad jurisdiction over the listed subdivision projects, including review of related land use or development.

The Act and Agency regulations provide one major exception to these two types of jurisdiction: other than wetlands, Agency review is geographically limited by critical environmental area (CEA) boundaries where a land use or development or subdivision project is jurisdictional only because it will be occurring within a CEA.

**Subdivisions:**

- A subdivision is "any *division of land* into two or more lots... whether adjoining or not..." Under current merger and intervening ownership law, a division of land - and therefore a subdivision - occurs through the separate conveyance of:
  - 1) Lands owned under any number of deeds, provided that all of the deeds were held by the same party or parties on May 22, 1973, and all of the lands are physically joined;  
or
  - 2) Lands that are separated by an intervening fee ownership and do not touch at any point, provided the lands were held under a single deed on May 22, 1973.

**Shorelines:**

- The Agency must consider two "attached" structures to be a single structure when applying the shoreline setback restrictions. For this purpose, multiple structures are considered attached when they are either structurally integrated, meaning the structures are dependent on one another, or functionally integrated, meaning they are 1) located within 8-10 feet of each other and 2) used together to serve a single purpose.
- For Agency purposes, a river or stream is considered navigable if a boat with a capacity of one or more persons, including a canoe or kayak, could be operated when the waterbody is at its mean high water level. In some instances, a river or stream may be considered navigable even with natural or artificial interruptions to boat operation.
- 9 NYCRR §575.5, which establishes the rules for expanding existing structures within shoreline setback areas under the APA Act, also applies to the expansion of existing structures within designated river setback areas.

**Wetlands:**

- Wetlands that are less than one acre in size are regulated by the Agency if: 1) an adjacent waterbody is at least 6.6 feet deep; 2) an adjacent waterbody is at least 1 acre in surface area; 3) an adjacent waterbody and the wetland

together are at least one acre in surface area; or 4) an adjacent waterbody has a permanent surface water inlet or outlet.

**Tourist Accommodations:**

- Hotel/motel rooms and other tourist accommodation units "attached to a similar unit by party wall" count as one-tenth of one principal building each, regardless of their size. Free-standing tourist cabins containing less than 300 square feet of floor space also count as one-tenth of one principal building each. Free-standing tourist cabins containing more than 300 square feet of floor space are considered individual principal buildings.
- No tourist accommodation permit is required when: 1) only one party rents on a single lot at any time, and no other persons are living or renting on the lot at that time; 2) only lawfully existing structures are rented; and 3) no off-site services are advertised with the rental, such as catering or music for an event.

**Conversions:**

- Pre-existing structures may be eligible for exemption from the overall intensity guidelines and the shoreline restrictions of the APA Act if they are 1) permanently affixed to the land, and 2) suitable for conversion, based on the status of the structure when the conversion request is made.

Individual structures are generally converted at a 1:1 ratio, with large structures converted to contain multiple individual dwelling units at a rate of one new dwelling unit per 1,250 square feet of existing floor space. The Agency decides where a converted structure should be located, based on the purposes and policies of the statute.

**Summaries of New Guidance**

**Shorelines:**

- A fixed structure that conforms to the definition of the term "dock" cited in 9 NYCRR §570.3(j) is a dock at or below the mean high water mark of a waterbody and a

boardwalk, deck, or other accessory structure upland of the mean high water mark.

- Structure and wastewater treatment system setback requirements do not apply to new land use or development involving the shoreline of an artificial waterbody that is less than one acre in size, contains an impermeable floor, and functions independently of any natural water or hydraulic system.

Structure setback requirements also do not apply to new land use or development involving the shoreline of an artificial waterbody created as part of an authorized Stormwater Pollution Prevention Plan. However, wastewater treatment system setback requirements do apply for artificial waterbodies created as part of an authorized SWPPP, unless the waterbody contains an impermeable floor and functions independently of natural water or hydraulic systems.

- Minor rearward and minor height expansions of lawfully non-conforming shoreline structures do not increase non-compliance with the shoreline restrictions, and therefore do not require a variance. The definition of a minor rearward or minor height expansion differs depending on the type of structure being expanded:
  - o For single family dwellings and mobile homes, an increase of up to two feet in height, an increase of up to 250 square feet of footprint to the rear (non-shoreline side), and the addition of a stoop no larger than 25 square feet providing access to the rear or side of the structure are considered minor expansions.
  - o For pre-existing accessory structures other than decks, boathouses, retaining walls, and dams, and pre-existing principal buildings other than single family dwellings and mobile homes, an increase of up to two feet in height and an increase of up to 100 square feet of footprint to the rear (non-shoreline side) are considered minor expansions.
  - o For decks, an increase in height to allow for the construction of a railing that meets the minimum requirements established by the New York State Building Code and, for pre-existing decks, an increase

of up to 100 square feet of footprint to the rear (non-shoreline side) are considered minor expansions.

- o For boathouses lawfully in existence prior to December 31, 2008, an increase of up to two feet in height and an increase of up to 100 square feet of footprint to the rear (non-shoreline side) are considered minor expansions.
- o For retaining walls, an increase in footprint to the rear (non-shoreline side) caused by the replacement of the wall with different materials is considered a minor expansion. In addition, retaining walls that are constructed of dry laid stone or untreated natural logs may be increased beyond the 100 square foot limit, provided they comply with the criteria established in 9 NYCRR ' 575.4(f).
- o For dams, an increase in height and footprint pursuant to engineered plans and an engineer's certification showing that 1) the modified dam will result in the same "normal pool elevation" for the impoundment and 2) the modified dam has been designed in accordance with the engineering criteria for New York State Department of Environmental Conservation dam safety is considered a minor expansion.
- Replacement or repair of a public or private bridge that lawfully existed on August 1, 1973, or at some point since that date is not an expansion requiring a shoreline setback variance, provided the replacement or repaired bridge will be located in the immediate vicinity of the original bridge.

**Wetlands:**

- Pursuant to 9 NYCRR §578.3(n)(3), a permit is required for the creation of any subdivision lot that contains wetlands or adjoins another subdivision lot that contains wetlands, unless:
  - a. all new lot boundaries are located at least 200 feet from wetlands;
  - b. all subdivision roads providing access for more than one subdivision lot are located at least 50 feet from wetlands;

- c. available wetland mapping indicates that all non-wetland areas not already accessible by lawfully existing road could be reached by access roads constructed at least 50 feet from wetlands; and
- d. any proposed lot containing an existing principal building also contains the existing wastewater treatment system as well as an area for a replacement system that is at least 1,500 square feet in size, no more than 60 feet in length, with slopes of 15 percent or less, and located greater than 100 feet from all waterbodies and wetlands.

**Commercial Uses:**

- A change from one lawfully existing commercial use to another commercial use does not require a permit as a new commercial use, except pursuant to prior permit condition, the abandonment provisions of 9 NYCRR § 573.6(f), or where a lawfully existing commercial use is being converted into an accessory portion of a larger new commercial use.

A permit must be obtained where the wastewater design flow for an existing commercial use is being increased by twenty-five percent or more pursuant to the DEC's current Design Standards, or where the footprint of the commercial use principal building structure(s) is being increased by twenty-five percent or more.

**Dwelling Units:**

- For Agency purposes, a "dwelling unit" is a single unit providing complete independent living facilities for one or more persons, including permanent provisions for living, sleeping, eating, cooking, and sanitation. A structure that does not contain all of these amenities cannot be considered a single family dwelling, mobile home, or multiple family dwelling unit.

**Group Camps:**

- With rare exceptions, group camp structures containing more than 1,250 square feet of floor space constitute principal buildings. Group camp structures containing 1,250 feet of floor space or less are generally accessory.

James Townsend, Counsel

September 5, 2013

Page 7

**Agricultural Land Clearing:**

- Tree-cutting is not timber harvesting requiring a clearcut permit when:
  1. the land cut is not located within a designated Wild river area;
  2. the federal Natural Resources Conservation Service has issued a non-wetland (NW) certified wetland agricultural program determination for the area; and
  3. the Commissioner of the New York State Department of Agriculture and Markets has issued an opinion pursuant to Section 308(4) of Agriculture and Markets Law that the cutting is "agricultural in nature."