

Basis Statement for February 2006 Revisions to Chapter 1000
State of Maine Guidelines for Municipal Shoreland Zoning Ordinances

This Rule amends Chapter 1000, *State of Maine Guidelines for Municipal Shoreland Zoning Ordinances*, which contains the minimum standards for municipal shoreland zoning ordinances. Title 38 MRSA Section 438-A(1) of the Mandatory Shoreland Zoning Act (Act) requires the Board of Environmental Protection (Board) to adopt, and from time to time, update and amend, minimum guidelines for municipal zoning and land use controls for shoreland areas. Such controls are designed to further the maintenance of safe and healthful conditions; to prevent and control water pollution, to protect fish spawning grounds, aquatic life, bird and other wildlife habitat; to protect buildings and lands from flooding and accelerated erosion; to protect archaeological and historic resources; to protect commercial fishing and maritime industries; to protect freshwater and coastal wetlands; to control building sites, placement of structures and land uses; to conserve shore cover, and visual as well as actual points of access to inland and coastal waters; to conserve natural beauty and open space; and to anticipate and respond to the impact of development in shoreland areas.

Section 438-A(2) requires all organized municipalities to prepare and adopt zoning and land use ordinances that are consistent with, or are no less stringent than, the minimum Guidelines adopted by the Board.

The shoreland zone includes those areas within 250 feet, horizontal distance, of the normal high-water line of any great pond, river or saltwater body, within 250 feet of the upland edge of a coastal or freshwater wetland, or within 75 feet, horizontal distance, of a stream.

The current Guidelines, although having been amended several times in the past sixteen years, have not been closely reviewed and updated since March 24, 1990. There are several reasons for proposing the amendments at this time.

One of the primary reasons for amending the Guidelines is the need to include the legislatively approved state-wide timber harvesting standards found in Section 15(O-1) of the Guidelines. The Act now provides municipalities with various options for regulating timber harvesting in shoreland areas. These options are specified in the Guideline amendments.

The amendments also establish a new General Development District which requires a minimum water setback of 75 feet. This district will ensure that new commercial and industrial development that is not water dependent will maintain vegetative buffers. Another amendment will require setbacks for new principal structures to be measured from the top of unstable and highly unstable coastal bluffs, rather than from the edge of the coastal wetland. This measure will provide protection from mass movement of these bluffs and prevent pre-mature bluff movement or failure due to development.

The amendments also include a change to the criteria for establishing a Resource Protection district. The current Guidelines reference “waterfowl and wading bird habitat” ratings from a study done in 1973, more than thirty years ago. The amended language now refers to the wetlands ratings as available on a GIS data layer provided by the Department of Inland Fisheries and Wildlife or the Department of Environmental Protection. The use of this GIS data layer will ensure that towns are zoning wetlands according to more current data.

Basis Statement and List of Commenters
Page 2 of 4.

Among other amendments, the Department has: established requirements for replanting of vegetation when a structure is relocated; established a requirement for nonconforming structures to be relocated away from the water when any permanent foundation is added to the structure; provided the ability, in certain situations, for the placement of a small storage shed within the setback area when there is no other alternative location for the shed; adopted clearing standards that are more consistent with those required pursuant to the Natural Resources Protection Act; and provided additional guidance on what sections of the Guidelines are not required to be adopted. The Department has also strengthened the *Administration* section of the Guidelines, providing additional guidance relating to appeals.

The Board of Environmental Protection received testimony and comments on the proposed amendments during a public hearing on September 8, 2005 in Augusta, Maine. At the hearing the Board voted to extend the written comment period until October 19, 2005, and on October 6, 2005 the Board extended the written comment period further, until December 1, 2005 at 5:00 p.m.

The following persons provided either oral or written comments on the proposed amendments prior to December 1, 2005 at 5:00 p.m.

David VanWie	Mac-Tech Engineering and Consulting
Jeff Hammond	Town of Bucksport
Rich Casabona	Citizen
Brad Vassey	Town of Gouldsboro
Bill Seekins	Dept. of Agriculture
Kathleen Leyden	State Planning Office
Steve Dickson	Dept. of Conservation
Anne Krieg	Town of Bar Harbor
Gerry Mirabile	Central Maine Power
Peter Lowell	Lakes Environmental Association.
Mark Stadler	Department of Inland Fisheries and Wildlife
Laura Sewall	Citizen
Geoff Herman	Maine Municipal Association
Bill Seekins	Department of Agriculture
William Crandall	Citizen

Basis Statement and List of Commenters

Page 3 of 4.

Gordon Stuart	Hancock and Sand Pond Association
Ryan Pelletier	Town of St. Agatha
Joel Pratt	Town of Rocque Bluffs
Cliff Buuck	Town of Readfield
Stephen Polyot	Verizon
James Williams	Verizon
Michael Williams	Citizen
Mona E. Spear	Bangor Hydro-Electric Company
Thomas F. Osgood	Maine Public Service
Marie Varian	Town of Phippsburg
Bill Crain	Town of Pownal
George Perry	Citizen
Peter Garrett	Kennebec Messalonskee Trails
Tom Reeves	Citizen - Trail Advocate
Jennifer D. Burns	Maine Audubon
Christine Olsen	Department of Transportation
Cindy Bastey	Department of Conservation
Sarah Medina	Seven Islands Land Co.
Nick Bennett	Natural Resources Council of Maine
Charles Heinonen	Code Enforcement Officer, City of Old Town
James N. Katsiaficas	Attorney – Perkins, Thompson, Hinckley and Keddy
Sarazon Liebler	Town of Liberty
Rep. Stephen Hanley	District 59, Gardiner and Randolph
Jamie Oman-Saltmarsh	Southern Maine Regional Planning Commission

Basis Statement and List of Commenters
Page 4 of 4.

Annette Merrithew	Code Enforcement Officer, Town of Hermon
Peggy Morgan	Town of Hartland
Ronald Rowland	Town of Swans Island
Lewis Cousens	Town of Chapman
Peter Hilton	Registered Maine Guide
Eugene P. Corey	Landowner
Ralph Robbins	Snowmobile Club
Jon Holmes	Snowmobile Club
Bill Sawyer	Citizen
Donald Mansius	Department of Conservation
Dan Mitchell	Chairman, ATV Advisory Council
Christopher Dorion	Citizen
David Getchell	Citizen, Cofounder of Maine Island Trail
David Gould	Planning – City of Bangor
Bob Meyers	Maine Snowmobile Association
Charlie Corliss	Citizen
Michael Sackett	Sackett and Brake Survey, Inc.
Tex Haeuser	Planner – City of South Portland
Mark Blake	Citizen
Thomas Doak	Small Woodland Owners Association of Maine
Robert Cummings	Phippsburg Land Trust
Patrick Strauch	Maine Forest Products Council
Heather Clish	Appalachian Trail Club

Response to Comments on Chapter 1000
State of Maine Guidelines for Municipal Shoreland Zoning Ordinances

The following paragraphs contain summaries of comments in the record along with responses from the Department of Environmental Protection (Department).

General Comments

1. Comment: It is not clear which pieces of the Guidelines are required to be adopted, and which are optional.

Response: The Department has added “Notes” indicating those pieces which are deemed optional for the municipalities to adopt.

2. Comment: The Department should adopt an alternative Guidelines document that includes only the very minimum standards.

Response: The Department believes that many of the towns are interested in optional provisions, such as the allowance for limited timber harvesting adjacent to a great pond, and the allowance for a small shed on a residential lot even if the water setback requirement cannot be met. All of the available options should be included in Chapter 1000 so that municipalities can have all of the options readily identifiable. The “Notes” referenced in paragraph 1 above, will assist those municipalities that choose to adopt only the minimum requirements.

3. Comment: Most of the numerical standards in the Guidelines are listed in feet, while in a few places measurements are in meters. The Department should be consistent in its display of numerical standards.

Response: The reference to meters is found in the law. However, where meters are listed in the ordinance, we have now stated the numerical standard in feet also.

4. Comment: Two code enforcement officers commented that the rules are already complicated. Why is the Department making them more so?

Response: While the Department understands that the shoreland zoning rules are not simple, and that not all towns have full-time code enforcement officers, we have attempted to make the rules as clear as possible. Implementation of the state-wide timber harvesting standards and the revised clearing standards will require a significant educational effort. This is an effort that the staff is prepared to undertake. Furthermore, we believe that numerous sections of the Guidelines will be easier to administer due to clarifications. This is particularly true of the appeals procedures in Section 16.

Section 3. Applicability

5. Comment: One commenter suggested changes to Section 3 Applicability, clarifying that “all land areas” within 75 feet of a stream are in the shoreland zone. The commenter also noted that the statutory language allowing municipalities to regulate structures that extend seaward of the normal high-water line, uses the term “below” the water line, not “beyond” the water line.

Response: The Department agrees and has made the recommended changes.

6. Comment: The shoreland zone should extend up the watershed to include smaller streams.

Response: The shoreland zone is established by the Legislature. The Department cannot extend the shoreland zone further up the watershed unless the Legislature amends the law.

Section 4. Effective Date

7. Comment: A member of a planning board raised a concern regarding Section 4 Effective Date of the Guidelines. He is concerned that a new effective date may result in certain non-conforming conditions that were not legally created being grandfathered.

Response: This person's concern can be addressed by creating a new definition for "non-conforming condition" which encompasses all legally existing nonconforming lots, structures and uses. This definition of a "non-conforming condition" has been added to Section 17.

Section 7. Conflict with Other Ordinances

8. Comment: One commenter objected to the language in Section 7 Conflicts with Other Ordinances, which states that where "this Ordinance conflicts with or is inconsistent with another provision in this Ordinance or any other ordinance.....the more restrictive provision shall control."

Response: This is standard language in most ordinances. One ordinance's less restrictive standards should not supersede a more restrictive ordinance or law.

Section 10. Interpretation of District Boundaries

9. Comment: The Maine Municipal Association suggested clarifying language for the Note in Section 10 pertaining to the Maine Supreme Judicial Court's rulings on the interpretation of district boundaries.

Response: The Department agrees with comment and has made the recommended change.

Section 12. Non-conformance

10. Comment: A commenter agreed with the change to Section 12(C)(1)(b) that will result in nonconforming structures being relocated further from the water or wetland, when any permanent foundation is added to a structure. Previous language required relocation only when a full basement is added.

Another commenter agreed with the new requirement in Section 12(C)(2) requiring replanting of the area from which a structure is moved, if within the setback area.

Response: The Department agrees with the comments.

11. Comment: One commenter noted that in Section 12(C)(2)(a) the provision requiring more than one tree species be planted is unfulfillable if only one tree must be planted.

Response: The Department agrees with the commenter and reworded the paragraph so that the different species requirement only applies when five or more trees are to be planted.

Response to Comments

Page 3 of 14.

12. Comment: Another commenter noted that in Section 12(C)(2)(b), that the replanted area should be “an area at least”....., rather than “an area.....”. It shouldn’t be implied that the area to be replanted can’t be more than required.

Response: The Department agrees and has made the recommended change.

13. Comment: One commenter stated that there needs to be more guidance regarding the provision in Section 12(C)(2) requiring a structure to be relocated to meet the setback requirement “to the greatest practical extent”. Another person stated that the requirement removes the ability of the planning board to use its judgment.

Response: The Guidelines already contain a list of criteria that the planning board must consider in making its “greatest practical extent” determination. The Department, however, plans to develop an “Issue Profile” to further assist municipal officials with this matter. The Department disagrees with the comment that the “greatest practical extent” determination removes the ability of a planning board to use its judgment. The rather subjective criteria clearly allow the planning board to do so.

14. Comment: At Section 12(C)(3), a person noted that the phrase “at or less than” should be changed to “less than”.

Response: The Department agrees. Whereas, the phrase pertains to nonconforming structures, only those structures that are “less than” the setback requirement are nonconforming.

15. Comment: In Section 12(C)(3), there is an allowance for the planning board to have a “designee” make the determination of setback to the “greatest practical extent”. A commenter stated that the term designee should be defined.

Response: The Department has chosen not to define designee. Although the typical designee would be the code enforcement officer, a town may have another qualified individual that the planning board may choose to designate.

16. Comment: One person stated that already purchased lots should be grandfathered from the shoreland zoning dimensional requirements.

Response: The Department believes that the existing grandfathering language (shore frontage and lot area) for of legally existing lots is adequate. Where setback requirements cannot be met, it is appropriate to require a variance before legal building can start.

17. Comment: The twelve (12) month time period established for obtaining a permit to replace or reconstruct a nonconforming structure is too brief. There are times when, it takes a substantial amount of time to recover losses from insurance companies. Eighteen (18) months should be allowed.

Response: The Department believes it is reasonable to increase the time period from 12 to 18 months, and has done so.

18. Comment: Two parties expressed displeasure with the new requirement that would apply the 30% expansion limitation to tributary streams, noting that there are many such streams that flow into shoreland areas.

Response: It is no less appropriate to apply the 30% expansion limitation to the small streams that flow within the shoreland zone, than it does to apply the water setback requirement adjacent to these streams. The stormwater runoff that flows to the tributary streams will quickly flow to the receiving water body. The loss of vegetated buffer between a structure and the water should be strictly limited.

Section 13. Establishment of Districts

19. Comment: The new General Development II District in Section 13 will encourage residential use only.

Response: The Department disagrees. The new district will simply require new uses and structures to be built at least 75 feet from the water. Even if the commenter is correct, it is not bad to have commercial and industrial uses locate away from surface waters.

20. Comment: Creation of the General Development II District, with its 75 foot setback requirement is good.

Response: The Department agrees. This new district will help to preserve vegetative buffers regardless of the type of use proposed.

21. Comment: Four commenters, including the Department of Inland Fisheries and Wildlife, commented that the Department should not be bringing the Beginning with Habitat program into the Guidelines as it has proposed in Section 13. That program was established as a non-regulatory program, and any direct link to regulations should not be proposed.

Another person commented that using updated waterfowl and wading bird habitat ratings is appropriate, rather than using ratings from 1973. Another person suggested that the Guidelines include any future wetland ratings updates by including the phrase “or latest revision” in the criterion. Yet another suggested that the Department provide more information on how to obtain the necessary GIS information.

Response: The Department has removed reference to the Beginning with Habitat Program and has replaced it with the waterfowl and wading bird habitat ratings as listed on the GIS system maintained by the Department of Inland Fisheries and Wildlife or the Department of Environmental Protection as of March 1, 2006. We cannot simply state “or latest revision” as this will constitute an improper delegation of authority pertaining to ordinance amendments to the Department of Inland Fisheries and Wildlife. If adopted as proposed, the Department will conduct an educational program to inform the municipal officials on how to obtain and use the wetlands ratings.

22. Comment: One commenter was concerned over the amount of new area that will be zoned for Resource Protection due to updated waterfowl and wading bird habitat.

Response: The new ratings will certainly result in additional shoreland areas adjacent to wetlands being designated for Resource Protection. The Department believes there will be a greater effect in northern areas where more complete wetlands ratings were not available in the 1970's when the initial wetlands ratings were conducted. Even if more areas are affected by the change in criteria, it is important to preserve the riparian areas for waterfowl feeding and nesting, and protect them from disturbance.

Section 14. Table of Land Uses

23. Comment: Four utility companies commented that the permitting requirements for distribution lines are too cumbersome. The current Table of Land Uses in Section 14 requires a permit from the planning board for all essential services in all districts. The utility companies suggested a permit should not be required for the construction of roadside distribution lines that are 34.5 kV and lower. The justification for that stance is that the poles and wires will not result a great deal of additional disturbance, as the road is the major disturbance and is already located there. They further argued that non-roadside (cross-country) lines involving 10 or less poles should be permitted by the code enforcement officer. No change was recommended for more than ten poles.

The utility companies also argued for an exemption from permitting for replacement of utilities. They cited the potential for conflict when a line is down due to a storm or accident. In those situations the utility does not have time to seek a permit. It must get the line restored promptly.

Response: The Department accepts most of the proposed recommendations regarding the permitting authority. However, in the Resource Protection District and the Stream Protection District the Department recommends that even roadside distribution lines should have a review by the code enforcement officer. We have retained a permitting requirement for lines in those districts. However, we have established an exemption for replacement of existing lines.

24. Comment: In Section 14, Table of Land Uses, the Department has proposed that a permit for a land management road in a Resource Protection District be obtained from the planning board, consistent with other road construction. The Maine Forest Products Council argues that this is inconsistent with the statewide timber harvesting standards, in that they do not require a permit for land management roads.

Response: A land management road, if improperly constructed, can result in damage to water quality and to wildlife habitat. Requiring a permit from the municipal planning board before construction in a Resource Protection District is not unreasonable, and will not conflict with the construction standards. This is simply an issue of ensuring review of the project before it happens.

25. Comment: One commenter noted that "driveway" construction in the Table of Land Uses was removed from item 26, where it had been listed with "road and driveway" construction. The commenter asked who, if anyone, now issues permits for driveways.

Response: The commenter did not see that permitting of driveways was moved to item 15.A, “One and two-family residential, including driveways”.

Section 15. Land Use Standards

26. Comment: A “Note” has been added to the Guidelines stating that in a General Development District where municipal water and sewer is present, the Department will consider approving greater development densities than established in the Guidelines. The commenter suggested that the Department specify what densities are approvable.

Response: The Department does not propose to include specific density allowances due to the diversity of conditions that must be considered, including but not limited to, the soils, slopes, the quality and vulnerability of the water body, and the surrounding development.

27. Comment: A commenter expressed support for the 75-foot setback requirement in the new General Development District in Section 15(B). Also, three parties, including the Maine Geological Survey, expressed support for Section 15(B)(1)(b), which requires setbacks for new principal structures to be measured from the top of “unstable” and “highly unstable” coastal bluffs.

Response: The Department agrees.

28. Comment: Section 15(B)(1)(d) provides a new allowance for a small storage shed where the water setback requirement cannot be met. There was positive comment on this provision, provided that the clearing and lot coverage standards are not violated. One person commented that the Department should allow the shed to be closer to the water than the principal structure.

Response: While the Department supports the allowance of a small shed, without the need to obtain a variance when setbacks cannot be met, we do not support allowing a further encroachment to the water by permitting the structure to be placed closer to the water than the principal structure.

29. Comment: Section 15(B)(5) contains a new allowance for a low retaining wall on existing lawn areas, under certain circumstances. There are several conditions that must be met in order to construct the wall, including at least a 25 foot setback from the water body. This new subsection received supporting comments, but it was noted that it would create a new responsibility for the code enforcement officer, and that it should be an optional provision.

Response: The Department has added a “Note” before this subsection making it clear that the retaining wall allowance is optional for municipalities to adopt. The town can then decide whether its code enforcement officer will be tasked with permitting of the retaining walls.

30. Comment: In Section 15(C), relating to piers, docks and wharfs, one person objected to the six foot width limitation for temporary docks in non-tidal waters. There was concern that the creation of a “T” at the end of the dock would be considered to be a dock wider than 6 feet.

Response to Comments

Page 7 of 14.

Response: The Department does not consider a “T” dock to count toward the maximum width requirement, and is not proposing to amend this section. The six-foot width limitation is consistent with standards in the Natural Resources Protection Act.

31. Comment: A “Note” was added to Section 15(F) stating that 22 MRSA section 1471-U requires municipal ordinances that apply to pesticide storage, distribution or use be filed with the Department of Agriculture’s Board of Pesticides Control (BPC). One person asked if the Department really expected all towns to forward their shoreland zoning ordinances to the BPC.

Response: The Department only expects those towns that have more inclusive regulation of pesticides than the Guidelines standards to forward their ordinances to the BPC. Furthermore, the Department is not the agency that would enforce the reporting requirement.

32. Comment: The Department is proposing that driveways be constructed in accordance with the same standards that apply to roads in the shoreland zone. One commenter objected to this new requirement.

Response: In the shoreland zone, both road and driveway construction must be accomplished in an environmentally sound manner, so that surface waters are well-protected from sedimentation and phosphorus runoff. A driveway (up to 500 feet in length) improperly constructed within 250 feet of a water body can have the same effects on water quality as a poorly constructed road.

33. Comment: One person suggested that the code enforcement officer be authorized to increase septic system setbacks. Another person suggested that Guidelines include additional standards that are already contained in the Subsurface Wastewater Disposal Rules.

Response: The Department has not made the recommended changes. The regulation of septic systems is overseen by the Department of Health and Human Services’ Health Engineering Division. The Department does not wish to interfere with that agency’s program through these rules.

34. Comment: The Department is proposing a prohibition on the use of holding tanks in the shoreland zone for new residential construction. One commenter stated that existing holding tank ordinances adopted by municipalities for shoreland areas should be “grandfathered”. Another stated that the Department should not be eliminating the use of holding tanks in the shoreland zone.

Response: The Department is not proposing to eliminate the use of holding tanks in the shoreland zone. We are only proposing to prohibit the use of holding tanks for first-time systems. If a lot is so wet, or has so little soil, that a subsurface disposal system cannot be constructed, the lot should not be developed based on the use of a tank to hold the wastes. This will open up too much opportunity for improper disposal of septic wastes.

35. Comment: The Department of Agriculture (DOA) recommended that the Guidelines no longer use the term “disposal” of manure. The agency does not consider manure as a waste.

Manure is managed and is spread as a fertilizer. The agency also requested the Department to include reference to the Manure Management Law, which applies to all farms with more than 250 animal units. The DOA also noted that Soil and Water Conservation Plans are now referred to as Conservation Plans. Finally, the agency expressed concern over the proposed change in Section 15(O)(5) which would require all livestock grazing to be conducted in accordance with a Conservation Plan, rather than just those with grazing areas that do not meet water setback requirements. The concern centered on the number of new plans that would be required. It would be difficult for the Conservation Districts to handle this new requirement.

Response: The Department agrees with the comments submitted by DOA and has made the recommended changes.

36. Comment: 17 MRSa section 2805.4 requires a municipality to provide the Commissioner of Agriculture, Food and Rural Resources with a copy of any proposed ordinance that impacts farm operations. The law further requires the Commissioner to review the proposed ordinance and advise the municipality if the proposed ordinance would restrict or prohibit the use of best management practices. The Department should note this requirement in Section 15.N, Agriculture of the Guidelines.

Response: The Department has added the recommended Note.

37. Comment: Three commenters voiced direct support for implementation of the statewide timber harvesting standards in Section 15(P-1), while one voiced concern over the level of flexibility of those standards. The person noted that zoning ordinances should contain specific standards, rather than flexible and subjective standards that may be difficult to enforce.

Response: While the Department recognizes that the statewide standards are more flexible than most ordinance standards, these standards have been adopted by the Department of Conservation and have been legislatively approved. The Department is not free to develop its own more specific standards.

38. Comment: Four commenters stated that it is not clear how the statewide timber harvesting standards will be implemented. Two suggested that the Department recommend warrant language for the adoption of the standards.

Response: The Department has written the Guidelines in a form that can be used by municipalities that wish to adopt the new statewide standards. We have also provided a detailed "Note" within the Guidelines giving towns direction on how to proceed if a town wishes to repeal timber harvesting regulation entirely. We have also noted that a municipality may elect to keep its existing standards if it so chooses. While the Department will be providing detailed instruction and assistance to the municipalities, the drafting of warrant language should be left to the municipalities and their legal counsel.

39. Comment: The Bureau of Forestry recommended that the Department make reference to Forestry Best Management Practices within the timber harvesting standards in Section 15(P-1).

Response: The Department agrees with the recommendation and has done so.

40. Comment: The Bureau of Forestry commented that Section 15(P-1)(4) does not contain the exception from the timber harvesting standards in shoreland areas of streams draining less than 300 acres and wetlands adjacent to such streams.

Response: The Department has now included the exception, but few shoreland areas will fall under this exception due to the small drainage area. Most shoreland zoned flowing waters have greater drainage areas.

41. Comment: There are some places in the rule where 4 inch diameter trees are used as the basis for measuring certain parameters, such as the volume of trees. In other places 4 ½ inch diameter trees are used as the basis for the measurements. There should be just one diameter used throughout the ordinance.

Response: The Department agrees with the commenter. However, this inconsistency stems from inconsistencies in the different laws which are the basis for the rules. The Department will seek amendments through the legislature to bring consistency.

42. Comment: The Department should make it clear that the allowance for timber harvesting within 75 feet of a great pond zoned for resource protection (Section 15(P)(1)) is an optional provision for municipal ordinances. It was also argued that when cutting is permitted in a resource protection area within 75 feet of a great pond, the prohibition on wheeled or tracked equipment should be removed.

Response: The Department has added a "Note" stating that the allowance for timber harvesting in a resource protection area adjacent to a great pond is an optional provision. The prohibition on wheeled or tracked equipment within 75 feet of the great pond is a statutory requirement which cannot be allowed through regulation.

43. Comment: Brush and pole fords are not specifically mentioned in the Guidelines, but are listed as a best management practice for forestry activities. Also, stream crossings are permitted without a bridge or culvert where there is a "hard surface". A commenter suggested that the term "hard surface" be defined.

Response: The "Crossings of waterbodies" in Section 15(P-1)(6) are adequately written for the allowance of brush and pole fords. Also, the Department believes that there is no compelling need to define "hard surface" within the Guidelines. The paragraph where "hard surface" is used is worded "All crossings of flowing water shall require a bridge or culvert, except in areas with low banks and channel beds which are composed of gravel, rock or similar hard surface which would not be eroded or otherwise damaged."

44. Comment: A commenter noted that in Section 15(P-1)(5)(b), (d) and (h) of the Timber Harvesting standards there is a requirement that the applicant go to both the local planning board and the Bureau of Forestry for permitting activities. It was argued that only one permitting authority needs to be involved.

Response: The Department agrees with the comment and has changed the authority to the planning board.

45. Comment: A person commented that in Section 15(P-1)(6)(e), Notification to Bureau of Forestry, cross-referencing Chapter 21, *Statewide Standards for Timber Harvesting and Related Activities in Shoreland Areas*, “makes little sense, given that these are the same rules in a different venue”.

Response: The Department agrees, but also added the specific requirements for the written notice.

46. Comment: The new “point system” for establishing a well-distributed stand of trees, in Section 15(Q)(2)(b) is too cumbersome. What is the advantage of the new point system? Why not just say “Leave a well-distributed stand of trees.”?

Response: The new point system is no more cumbersome than the point system being replaced. In fact, it contains more guidance on how it is implemented. The reason for proposing the new point system is to establish a standard point system for all shoreland zoned setbacks, as well as the buffer standards pursuant to the Natural Resources Protection Act (NRPA). Pursuant to the NRPA, the point system applies even to small streams that are not in the shoreland zone. The point system provides a specific measure for determining whether a well-distributed stand of trees had been maintained. The term “well-distributed stand of trees” in itself, is too subjective to be enforceable.

47. Comment: Another commenter expressed general support for the new point system.

Response: The Department agrees.

48. Comment: A person associated with a lake association recommended that the Guidelines use the term “shoreland buffer” instead of “vegetated buffer”. He also suggested that we make it clear that “native vegetation” does not mean ornamental and other vegetation used in landscaping.

Response: While there may be some merit to creating a separate term “shoreland buffer” to distinguish natural or native buffers from landscaped vegetated buffers, we are concerned that a new term may confuse the regulated community and the regulators as well. Therefore, the Department has proposed to keep using the term “vegetated buffer”. However, we do see merit in defining what constitutes “native vegetation”. We have added that definition to Section 17.

49. Comment: In Section 15(Q)(3), it states “In no event shall cleared openings for any purpose, including but not limited to, principal and accessory structures, driveways and sewage

disposal areas, exceed in the aggregate, 25% of the lot area within the shoreland zone or ten thousand (10,000) square feet, whichever is greater.....” A person suggested that it should be made clearer that even areas revegetated with low vegetation such as lawns count toward the cleared area limitation.

Response: The Department has added the word “lawn” as another example of what constitutes a cleared area.

50. Comment: Section 15(B)(1), which establishes a 100-foot setback requirement for structures adjacent to great ponds, conflicts with Section 16(E) which permits a structure not less than 75 feet from a water body.

Another commenter supported the prohibition on the ability to obtain a variance from the maximum floor area standard for a home that is permitted by special exception in a Resource Protection district. One person, however, suggested that the Department change the phrase “shall not be reduced by variance” to “shall not be altered by variance”.

Response: Section 16(E) allows, by special exception, a single family home in a Resource Protection district if there is no other location on the property to construct a home, and among other conditions, the lot is undeveloped and was a lot of record when it was designated for Resource Protection. Seventy-five feet was established as the minimum setback in this instance to better ensure that the establishment of the Resource Protection district will not be deemed a “taking” of land. No change is necessary.

Regarding the recommended change in wording from “not reduced by variance” to “not altered by variance”, the Department has accepted that recommendation.

Section 16. Administration

51. Comment: Section 16(H)(2) includes a provision for obtaining a “disability variance” for access to a residence. The proposed amendments to the Guidelines require the removal of any structure constructed for access to the residence, pursuant to the disability variance provision, to be removed when the person who is disabled no longer uses the residence. A commenter stated that the required removal of the structure is more restrictive than the statute. The statute, 30-A MRSA section 4353(4-A) states that the board **may** require the removal of the structure when the person using the residence no longer needs it, or no longer resides at the residence.

Response: The Department has modified Section 16(H)(2) to be consistent with the statute.

52. Comment: Decisions of the board of appeals should be forwarded to the code enforcement officer by the board of appeals.

Response: The Department agrees, and has added this requirement.

53. Comment: Sections 16(H)(4) and 16(H)(5) have been misnumbered.

Response: The Department has corrected this by renumbering the sections to 16(H)(5) and 16(H)(6), respectively.

54. Comment: A municipality should be able to make its own decisions on whether to allow appeals of enforcement decisions, and whether an appeal hearing is held as a “de novo” or an “appellate” hearing (Section 16(H)(1)(a)).

Response: The Department agrees and has so noted that these issues may be decided by the municipalities.

55. Comment: Two parties commented on the length of time that a permit is valid. One stated that two years is too little, while one stated that the Department should maintain the current standard. The current standard has no permit expiration date if 30% of the project is finished within a year of obtaining the permit.

Response: The Department remains supportive of the proposed permit expiration language. The current proposal is to allow one year from the date of the issuance of the permit to obtain a “substantial start”. If a substantial start is reached, the applicant will have one additional year to complete the project, for a total of two years. No change is warranted.

56. Comment: The Maine Municipal Association (MMA) raised concerns over Section 16(H)(2)(f) which requires the board of appeals to submit copies of a variance application and all supporting information to the Department at least 20 days prior to the board of appeals taking action on the decision. MMA views this requirement as a mandate, but it did not receive the necessary two thirds majority vote in the legislature.

Another person suggested that the deadline for submitting variance applications to the DEP be reduced from 20 days to 15 days.

Response: The Department has been advised by the Attorney General’s office that the requirement for the board of appeals to send variance applications is valid and is in effect. The Department does not have the authority to modify the time frame for submitting variance applications, as this is a statutory requirement.

57. Comment: A commenter stated that, contractors must be held liable for violations of the ordinance.

Response: The ordinance already allows a municipality to cite a contractor for violations of the shoreland zoning ordinance.

Section 17. Definitions

58. Comment: The definition of “coastal wetland” is confusing. Some towns are measuring setbacks based on a specific tidal elevation, rather than the more fully descriptive coastal wetland definition.

Response: The Department has added “Notes” to assist in understanding what constitutes a coastal wetland. Coastal wetland is a statutory definition that cannot be changed by rule.

However, the Department has approved ordinances that use a specific tidal height as the basis for measuring setbacks provided that that height is at least as great as the highest annual tide.

59. Comment: One commenter stated that the definition of a “tributary stream” is not defined well enough. Another stated that the Department should maintain the current definition as contained in the Guidelines. Still another stated that the current and proposed definitions are inconsistent with the statewide timber harvesting standards.

Response: The Department believes the proposed amended definition to the definition of “tributary stream” is well enough defined. The proposed definition is the same as that in the Natural Resources Protection Act. However, to be consistent with the stream definition in the statewide timber harvesting standards, the Department is recommending the adoption of the definition of stream as found in the statewide timber harvesting standards. This definition is very similar to the definition contained in the current Guidelines. The waters that are intended to be regulated will be nearly the same as before these amendments, and the definition will fit well with the timber harvesting standards.

60. Comment: The definition of “structure” exempts utility poles from that definition. However, any associated guy wiring and guy anchors are not exempted, but should be.

Response: The Department agrees and has added the guy anchors and guy wires to the exemption.

Appendix A. Alternative to 30% Expansion Rule

61. Comment: In Appendix A *Alternative to 30% Expansion Rule Pursuant to 38 MRSA Section 439-A Subsection 4-A*, it is not clear whether the floor area limitations in Sections 12(C)(1)(a)(iii) and 12(C)(1)(a)(iv) apply only to the portions of the buildings that are within the setback area, or to the whole building or buildings even if only a portion of the building is within the setback area.

Response: The Department has modified those sections to clarify that the floor area limitation applies only to those portions of the building that are within the setback area.

Appendix B. Significant River Segments Identified

62. Comment: The bridge in Fort Kent over the Fish River has been rebuilt 1800 feet downstream of the original bridge. The new location, because the bridge defines the location of the Significant River Segment Associated with the Fish River has now been extended by 1800 feet.

Response: The boundaries of the Significant River Segments have been established by law. The Department cannot change the statute directly, but will discuss this matter with the Department of Conservation and the State Planning Office to determine if a legislative change should be recommended.

Section 15(I). Recreational Trails

63. Comment: Many parties commented in opposition to Section 15(I), Recreational Trails. Only two comments were received in direct support of the Recreational Trail standards.

Parties in opposition to the proposed trail standards included individuals, the Bureau of Parks and Lands, ATV clubs, snowmobile clubs, and primitive hiking trail organizations, including the Appalachian Trail Club. The reasons for opposition are diverse.

Response: While the Department believes that it has crafted a set of trail standards that are quite flexible and reasonable, the extent of the opposition to the standards as drafted, has convinced the Department that it should remove these proposed standards from Chapter 1000 at this time, and revisit this issue later. The Department does not wish to slow the adoption of the other amendments to Chapter 1000.