

Wetlands protection in NH after the Supreme Court ruling

State law and regulations still give state the tools to protect wetlands and their critical functions

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by

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In late May, the U.S. Supreme Court issued a ruling in a case brought by landowners in Idaho in which the court dramatically changed a portion of the purview of the 1972 Clean Water Act.

The “Sackett Case” challenged the authority of the U.S. Environmental Protection Agency (EPA) and U.S. Army Corps of Engineers — which jointly administer the part of the Clean Water Act that regulates wetland dredging and filling — over the denial by the EPA of the Sacketts’ permission to fill in a wetland lot adjacent to a lake in Idaho.

There has been much made of the court’s ruling. The majority opinion redefined what is considered a water or wetland that is covered by the act. Under the new ruling, a wetland must have “a continuous surface connection to navigable waters” to be under the jurisdiction of the law.

The court also ruled on this subject previously, and the rulemaking associated with that SCOTUS decision was and is the subject of controversy.

The Obama administration wrote a definition that recognized the ecological and hydrological links of wetlands to surface waters even if they are not connected on the surface. The Trump administration withdrew that rule, substituted a developer-friendly version, and a federal court threw it out. Another version, more protective of wetlands and ephemeral streams, has been proposed by the Biden administration.

This most recent SCOTUS decision has created considerable reaction and poses uncertainty about how the Clean Water Act will be applied to wetlands across the United States.

Questionable definition

Aside from the legal arguments, many expert scientists and conservation interests have decried the court's definition. While there are wetlands that are isolated and unconnected to navigable surface waters, it's clearly wrong to presume that if a wetland doesn't have a surface water stream or lake connection that what happens to it doesn't impact surface waters.

Lakes, ponds, streams and rivers are inextricably linked to underground water as it flows through sand and gravel and even bedrock. What happens in a wetland near a stream, even if the only connection is through groundwater, has a direct and significant impact on the quality and quantity of water in the stream. Drain or fill a wetland and it no longer can hold flood waters, store surface waters that slowly percolate into the ground, and provide inflows to keep streams clean, cold and flowing.

Allowing unregulated dredging and filling in wetlands, especially in river valleys, will inevitably damage the water quality of the river, in direct opposition to the goals of the Clean Water Act.

The court's decision goes against the basic goals of the Clean Water Act.

'Nothing changes, right now'

For us in New Hampshire, the question arises: "Will this change how we protect and regulate wetlands in our state?" To get a read on the answer, it's useful to know the history of wetland regulation in New Hampshire.

Before the Clean Water Act, the NH Legislature passed a water pollution control law in 1969 (RSA 482-A) that resulted in the establishment of rules and regulations over the dredging and filling of wetlands. That authority now resides in the wetlands bureau of the NH Department of Environmental Services. The bureau recently sent out a communication that says the SCOTUS decision does not affect either

the enforcement of our New Hampshire law or the state's definition of wetlands.

Ted Diers, assistant director of the NHDES water division, has said simply, "Nothing changes, right now."

That said, we don't know what changes in federal regulations might be forthcoming from the EPA or the Corps of Engineers, and some projects in New Hampshire need both state and federal permits. Those permits are administered jointly by the state and feds.

There will be more to come on this issue. But Diers said one thing that's very important to remember: "The way to protect wetlands is to really protect them." That happens at the local level. Towns and cities can adopt wetlands buffers, setbacks and aquifer protection ordinances. Wetlands can be permanently conserved with conservation easements and public ownership.

Diers reminded us that the state wetlands law comes into play "at the end of the pipe." It regulates how and where wetlands are impacted when a development is proposed. Our wetlands law does not say "no development" but rather NHDES can only determine how the impacts are dealt with.

While it's fair to complain that the Supreme Court is wrong on the science and its decision will result in the destruction of important wetlands in many parts of America, we are fortunate here in New Hampshire to have the tools to both protect wetlands and their critical functions, and when that's not possible, minimize or mitigate the impacts in order to ensure the myriad of benefits our wetlands provide are not lost.

For now, at least, the battle over wetlands protection and the Clean Water Act will play out primarily in other states.

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