

What is an “Impoundment”?

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17 October 2022

The Town of Madbury requested an expert opinion from me on the definition of an impoundment, and in the specific case of the LandCare application, whether the subsurface gravel wetland would be considered an impoundment.

Commonly when challenged in defining something, I first turn to Merriam-Webster. They present:

Definition of impoundment

- 1 : the act of impounding : the state of being impounded
- 2 : a body of water formed by impounding

This definition unfortunately lacks any temporal context or permanence to the impounded water, but more fundamentally, that in some fashion water is held back either permanently or temporally. This makes such a definition very broad. For example it would include a small dam in a stream as well as a stormwater pond, household gutters, or a rain barrel.

In order for a governmental entity to regulate something, there needs to be a definition of the thing that is to be regulated in order to clearly distinguish what does and does not fall under the definition and therefore the regulations.

When reviewing the definition of impoundment at the federal level (with respect to water), definitions either refer to waters of the United States and impoundments of such waters or impoundments associated with waste products (dredge material, waste treatment systems, sludge, disposal wetlands, waste lagoons, etc.).

At the state level, the rules do have a definition of detention basin, and via Env-Wq 1508.17 which includes in-ground and underground facilities. The rules also define in-ground basin as a subset of a detention basin. Underground basin is not formally defined. The state of NH does have specific minimum dimensions, if exceeded, that determine whether a structure is a dam (RSA 482:2, II & Env-Wr 101.09, Revised 09/11/2009), however the state of NH does not have a formal definition of an impoundment or the minimum criteria to consider something an impoundment, which gets back to the vague definition of impoundment by Merriam Webster.

The head of the NHDES Alteration of Terrain program (which program regulates stormwater in the state) Ridge Mauck, was asked about whether stormwater systems such as subsurface gravel wetlands, bioretention systems, and ponds, were considered impoundments. His opinion was that he considered detention basins synonymous with impoundments, and

therefore he was comfortable saying that in general stormwater systems are considered impoundments.

Here are some relevant stormwater definitions from New Hampshire statutes

Env-Wq 1502.15 "Detention basin" means a structure designed to hold stormwater.

Env-Wq 1502.37 "In-ground basin" means a basin that is in the ground but open to the atmosphere.

Given all of the previous text, it would follow that stormwater systems are considered impoundments. In the present absence of an official definition of impoundment, the Town of Madbury can certainly enforce Administrative Gloss to the issue until such definition is developed.

*The doctrine of administrative gloss is a rule of statutory construction. An "administrative gloss" is placed upon an ambiguous clause when those responsible for its implementation interpret the clause in a consistent manner and apply it to similarly situated applicants over a period of years without legislative interference. If an "administrative gloss" is found to have been placed upon a clause, the municipality may not change its de facto policy, in the absence of legislative action, because to do so would, presumably, violate legislative intent. Nash Family Inv. Prop. v. Town of Hudson, 139 NH 595, 602 (1995)*

If there's some ambiguity in a law (including a Zoning Ordinance), and the relevant administrative officials have consistently acted as though it had a particular meaning over the years, then, in effect, that interpretation -- the "administrative gloss" -- becomes a binding interpretation of the law.

In summary, stormwater systems may be considered impoundments. The Town of Madbury may want to formalize a definition for impoundment in order to specifically discriminate which systems should fall under their regulations.