Journey to the Legal Horizon

Septic systems and the Wetlands Act

The editor of The Habitat, Tom ODell, has asked me to reflect on the following scenario. After I sent in my original column our colloquy continued and is incorporated in the column.

Editor: When a proposed septic system in the upland review area is approved by the local health departmen,t the wetlands agency can feel pressure to approve the system, because the health department approval is included as part of the application. The agency then needs some scientific reason to document the adverse effect a septic system can have when constructed close to a wetland or watercourse. Some conservation commissions react by urging their wetlands agency to deny approval for septic systems in the upland review area because of the future need for repair work.

The applicant offers proof that the septic system has local health department approval. What's an agency to do? We live in a time of information overload. We do a computer search and within a nanosecond there are more than 200 hits, of varying relevance to the topic searched. We have to actively cull through the links, filtering out the information that doesn't fit our context. That's what a wetlands agency has to do with septic system approval. Compliance with the public health code is very relevant to the applicant. Without it, the project can't go forward. However, it's not relevant at all to the wetlands agency. The local health department uses the public health code to determine if the septic system can be approved. But because it does not include consideration of impacts to wetlands or watercourses, the health department approval doesn't shed light on the task before the wetlands agency.

The scenario envisions that the wetlands agency *then* needs expert input to document the adverse effect the septic system will have on the wetland or watercourse. Actually, the wetlands agency *always* needs documentation of the adverse effect in order to deny the application. It is not the existence of the local health department approval which sets a higher standard for the wetlands agency review. Perhaps members on the commission feel more highly scrutinized, but the task has always been to (1) identify the impacts, if any, of the proposed project, (2) determine if the impacts at this site are or will be adverse, and then weigh the relevant considerations. The courts often point to the language in the legislative policy of the wetlands act itself, pointing out that the act provides "an orderly process to balance the need for the economic growth of the state and the use of its land with the need to protect its environment and ecology." [i]

At the same time, the courts have long acknowledged that a project may be subject to numerous regulatory schemes. "It is not unusual for one seeking a permit for a certain use or operation to apply to and be given such permission or license by more than one agency of government."[ii] So, the health department approval of the septic system is a fact, but not a relevant fact.

If an applicant wishing to gain wetlands agency support from a health department approval is one extreme on the continuum then a conservation commission urging that all septic systems in the upland review area be denied based on the need to repair the system in the future is the other extreme. Activity in the upland review area, per se, is not what can be denied. The

court has reminded us that "the 'buffer,' 'set back area,' protected area' and 'regulated area,' is not a protected or regulated area but rather an upland review area where certain activities *may be regulated because of the activities' likely impact or effect on the nearby wetlands and watercourses.*"[iii] Again, the wetlands agency's job is site-specific: will the septic system proposed at that location in the upland review area likely affect the nearby wetland or watercourse in an unacceptable manner? There are no shortcuts for the wetlands agency to take. Site-specific review and evaluation are the tasks that wetlands agency members face, even if the applicant or other commissions urge them to act otherwise.

Editor: If the system is approved for an upland review area, would a repair require another application? Another application may take too long--yet it would be important for all controls for reducing erosion and sedimentation be in place to protect wetlands. Can the original approval place conditions on future repairs?

If a repair is needed for an approved septic system and the activities fall into the definition of "regulated activity," as far as the wetlands act is concerned, a permit is required. But you bring up valid, practical points: the waiting time for a permit is too long for emergencies, such as repair of a leaking septic system. In fact, the wetlands act is silent as to emergencies, which means, emergencies aren't acknowledged. Yet, life must go on; the repairs must occur and often quickly.

This is a practical problem and I decided to call on the real-life experiences of some staff and agents. The background information I received reflects some practices in the northeast, northwest and coastal towns. It, too, runs the gamut. In some towns, the local health department is in control. An engineer deals directly with the health department and the wetlands agency may never even learn of the situation. In two towns I learned that the local sanitarian approving the repairs is also a certified soil scientist. While the public health code doesn't require consideration of wetlands and watercourses, the background and sensitivity of such a dually-trained professional certainly will be helpful -- especially in a town where the wetlands agency is not likely to be aware of the emergency.

Sometimes the staff or agent for the wetlands agency learns of the emergency nature of the repairs and verbally authorizes the work. The agent realizes that there isn't exactly a provision for these authorizations, but stopping the work can also be harmful to wetlands or watercourses. In some of those towns the agent informs the agency at the next monthly meeting. The agency can decide whether to require the owner to file an after-the-fact permit.

Another approach I encountered was the issuance of what I'd like to term a friendly cease and restore order. In that town the staff has been delegated the authority to issue cease and desist orders. In a town where staff is on good terms with (i.e., not hostile to) contractors, the contractors will inform the land use office of what work they need to perform for a septic repair. The staff will issue a cease and restore order which orders that the repairs occur, that

sedimentation and erosion be put in place and that the owner show up at the next wetlands agency meeting to report on the matter.

What I like about issuing the order is that the homeowner is authorized by the order to undertake the work which he wants to do, the staff gets to put in place simultaneously sedimentation and erosion controls. This is a win-win situation. The homeowner gets swift "authorization" by means of the immediate issuance of the order and the agency, through its staff/agent gets the "permit conditions" it would otherwise require through a permit process. And finally, the public, at the next meeting is informed at a public meeting of the nature of the emergency and what occurred.

But the situation requires a lot of trust. Contractors come in to this staff person and ask what they should do to be acceptable. That means the contractor trusts that the staff person won't require: (fill in the blank) native plantings, a conservation easement on other land, etc., etc when repairs are necessary. (Is this sounding like your town?) The agency also trusts the staff person's judgment. This trust will be earned through the staff's continued training, above and beyond the meager statutory training requirements. The agency will have to trust that the staff/agent is part of the team to implement the wetlands act. In some towns, for a variety of reasons, the agency/staff relationship won't be based on trust. In those towns, less beneficial outcomes in emergency situations may be the norm.

More than one agent I spoke to noted the major problem that failed septic systems around lakes can be. Bringing those emergency septic repairs into the agency's regulatory ambit by a cease and restore order may be a very viable vehicle. Letting the health department be the only regulatory agency weighing in on the repairs might not provide the protection needed to the lake.

And as one agent underscored, septic systems aren't the only emergencies that can arise implicating the wetlands act. Removal of beaver dams by public works departments can rise to an emergency when public roads are flooded.

Lastly, I don't think that the wetlands agency can legally authorize in the original permit how repairs are to be undertaken at an unknown time when the exact nature of the repairs aren't known or even knowable. Even if legal, it is most likely that the repairs will be needed *after* the permit has expired.

Having an opportunity for agencies to share experiences of how they deal with emergencies with an opportunity for legal response may be a good workshop to include at an annual meeting.

Thanks to all of the staff and agents who took time to impart their experiences.

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[i] Aaron v. Conservation Commission, 183 Conn. 532, 538-39 (1981).
[ii] Aaron v. Conservation Commission, 183 Conn. 532, 552 (1981).
[iii] Cornacchia v. Environmental Protection Commission, 109 Conn. App. 346, 357 (2008).