

**From:** [Oliver Orjiako](#)  
**To:** [Sonja Wiser](#)  
**Subject:** FW: Clark County is obligated to comply with the US Supreme Court Order on Wetlands  
**Date:** Monday, September 18, 2023 9:13:11 AM

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For the record on critical area ordinance. Thanks.

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**From:** Clark County Citizens United, Inc. <cccuinc@yahoo.com>  
**Sent:** Saturday, September 16, 2023 1:58 AM  
**To:** Karen Bowerman <Karen.Bowerman@clark.wa.gov>; Gary Medvigy <Gary.Medvigy@clark.wa.gov>; Michelle Belkot <Michelle.Belkot@clark.wa.gov>; Glen Yung <Glen.Yung@clark.wa.gov>; Sue Marshall <Sue.Marshall@clark.wa.gov>; Kathleen Otto <Kathleen.Otto@clark.wa.gov>; Oliver Orjiako <Oliver.Orjiako@clark.wa.gov>; Jose Alvarez <Jose.Alvarez@clark.wa.gov>; Jenna Kay <Jenna.Kay@clark.wa.gov>  
**Subject:** Clark County is obligated to comply with the US Supreme Court Order on Wetlands

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Clark County Council  
September 16, 2023  
P.O. Box 5000  
Vancouver, Washington 98666

FOR THE PUBLIC RECORD

**Re: Clark County is obligated to comply with the US Supreme Court Order on Wetlands**

Dear Councilors,

Clark County Citizens United, Inc. sees that Community Development is trying to bow out of complying with the recent United State Supreme Court decision regarding wetlands. The reasoning for doing that is fatally flawed. Whether the county is beholding to the Department of Ecology or the Shoreline Management Act, they are all interconnected with the federal regulation on wetlands. CCCU has copied and pasted excerpts from those documents for your review. Between each excerpt, CCCU comments are made.

Clark County Codes **CCC40.440, CCC40.450, CCC40.460** are not in compliance with the recent WOTUS ruling by the US Supreme Court. When reading the Department of Ecology Wetland rules and the Shoreline Management Act, it appears the county is not compliant with those documents, either. The county codes are in need of major changes in order to comply with the Supreme Court Order and Washington law.

This is the second time the Court has ruled on the topics of WOTUS and wetland. But in the Sackett case, the Justices ruled in far greater detail. The reason for their actions is because the EPA and the Corp of Engineers took it upon themselves to write their own regulations beyond what the Court directed in the first court action on

wetlands. The Court chided those agencies for doing so, and was very specific as to what they are directed to do now, and what they cannot do.

Clark County has not been compliant with the wetland language from the Department of Ecology or the Washington State Shoreline Management Act. Now they are attempting to opt out of the federal wetland regulations, but that is not an option. The county must come into compliance with DOE regulations, the Shoreline Management Act, and now, the United State Supreme Court Order on Waters of the United States and Wetlands.

Sincerely,

Carol Levanen, Exec. Secretary

Clark County Citizens United, Inc.  
P.O. Box 2188  
Battle Ground, Washington 98604

## COMMUNITY DEVELOPMENT

### Wetland and Review

#### Wetland Protection Remains in Effect In Clark County

On May 25, 2023, the U.S. Supreme Court issued a decision in the case of *Sackett v. Environmental Protection Agency (EPA)* that limits the extent of waters subject to the Federal Clean Water Act. EPA subsequently issued a revised Federal Rule on August 29, 2023 redefining [Waters of the United States](#) and limiting the applicability of Section 404 of the Federal Clean Water Act to wetlands that have been historically regulated under Federal Law.

**This change in Federal policy does not affect wetland regulations adopted by the state of Washington and Clark County.** You can visit the Department of Ecology's website [State regulations & applicant resources - Washington State Department of Ecology](#), review [Clark County Code 40.450](#), or email [WetlandHabitatReview@clark.wa.gov](mailto:WetlandHabitatReview@clark.wa.gov) for more information.

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Our Wetland and Habitat Review program administers the county's Wetland Protection and Habitat Conservation Ordinances, provides technical expertise for the administration of the Shoreline Master Program, and issues SEPA threshold determinations for projects that do not require Land Use or Shoreline Review or a Forest Practice Permit.

<https://clark.wa.gov/community-development/wetland-and-habitat-review>

**CCCU Notes: The change in Federal policy most certainly does affect wetland regulations adopted by the state of Washington and Clark County. The State wetland regulations, Revised definition of "Waters of the United States (WOTUS) reads,**

***"In light of this decision, the EPA and U.S. Army Corps of Engineers will interpret the phrase "Waters of the United States" consistent with the Supreme Court's decision in Sackett." "This final rule conforms the definition of WOTUS to the U.S. Supreme Court's May 25 decision in the case of Sackett v. Environmental Protection Agency" "Ecology has typically worked with federal agencies to streamline environmental permitting for waters under federal oversight. The agency will now use the same process for other waters that have state but not federal protections."***

## State wetland regulations

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### Revised definition of "Waters of the United States" (WOTUS)

On May 25, 2023, the U.S. Supreme Court issued its decision in the case of *Sackett v. Environmental Protection Agency (EPA)*. Per this decision, only those adjacent wetlands that are directly touching or have a continuous surface connection to a relatively permanent water are considered WOTUS. In light of this decision, the EPA and U.S. Army Corps of Engineers will interpret the phrase "Waters of the United States" consistent with the Supreme Court's decision in Sackett.

On Aug. 29, 2023, the federal agencies adopted a final rule that amends the 2023 rule defining WOTUS. This final rule conforms the definition of WOTUS to the U.S. Supreme Court's May 25 decision in the case of *Sackett v. Environmental Protection Agency*. You can visit EPA's [Waters of the United States Status](#) webpage for more information.

Ecology has typically worked with federal agencies to streamline environmental permitting for waters under federal oversight. The agency will now use the same process for other waters that have state but not federal protections. [Ecology is planning to expand the staff and resources](#) it devotes to reviewing development proposals to deal with the additional workload, and will then issue administrative orders to approve or condition a project before work can begin. See below for more information on the permitting process.

We regulate wetlands in Washington state regardless of federal jurisdiction. Wetlands are protected and managed through multiple state laws, including the state [Water Pollution Control Act](#) and the [Shoreline Management Act](#).

**CCCU Notes: Clark County's webpage does not demonstrate the same language that the Department of Ecology State wetland regulations, determined. The words have been changed to appear that Clark County does not have to comply with the federal mandate. But that is false.**

## **[RCW 90.58.010](#)**

Short title.

This chapter shall be known and may be cited as the "**Shoreline Management Act of 1971**".

[RCWs](#) > [Title 90](#) > [Chapter 90.58](#) > [Section 90.58.030](#)

(e) "**Shorelines**" means all of the water areas of the state, including reservoirs, and their associated shorelands, together with the lands underlying them; **except** (i) shorelines of statewide significance; (ii) **shorelines on segments of streams upstream of a point where the mean annual flow is twenty cubic feet per second or less and the wetlands associated with such upstream segments;** and (iii) **shorelines on lakes less than twenty acres in size and wetlands associated with such small lakes;**

(h) "**Wetlands**" means areas that are **inundated or saturated by surface water or groundwater** at a frequency and duration sufficient to support, and that under normal circumstances do **support, a prevalence of vegetation** typically adapted for life in **saturated soil conditions**. Wetlands generally include swamps, marshes, bogs, and similar areas. **Wetlands do not include those artificial wetlands intentionally created from nonwetland sites, including, but not limited to, irrigation and drainage ditches, grass-lined swales, canals, detention facilities, wastewater treatment facilities, farm ponds, and landscape amenities, or those**

wetlands created after July 1, 1990, that were unintentionally created as a result of the construction of a road, street, or highway. Wetlands may include those artificial wetlands intentionally created from nonwetland areas to mitigate the conversion of wetlands.

#### RCW [90.58.290](#)

Restrictions as affecting fair market value of property.

The restrictions imposed by this chapter shall be considered by the county assessor in establishing the fair market value of the property.

#### RCW [90.58.300](#)

Department as regulating state agency—Special authority.

The department of ecology is designated the state agency responsible for the program of regulation of the shorelines of the state, including coastal shorelines and the shorelines of the inner tidal waters of the state, and is authorized to cooperate with the federal government and sister states and to receive benefits of any statutes of the United States whenever enacted which relate to the programs of this chapter.

#### RCW [90.58.380](#)

Adoption of wetland manual.

The department by rule shall adopt a manual for the delineation of wetlands under this chapter that implements and is consistent with the 1987 manual in use on January 1, 1995, by the United States army corps of engineers and the United States environmental protection agency.

#### RCW [90.58.590](#)

Local governments authorized to adopt moratoria—Requirements—Public hearing.

(iv) Provide that all lawfully existing uses, structures, or other development shall continue to be deemed lawful conforming uses and may continue to be maintained, repaired, and redeveloped, so long as the use is not expanded,

under the terms of the land use and shoreline rules and regulations in place at the time of the moratorium.

**RCW [90.58.610](#)**

**Relationship between shoreline master programs and development regulations under growth management act governed by RCW [36.70A.480](#).**

RCW [36.70A.480](#) governs the relationship between shoreline master programs and development regulations to protect critical areas that are adopted under chapter [36.70A](#) RCW.

**RCW [90.58.620](#)**

**New or amended master programs—Authorized provisions.**

(1) New or amended master programs approved by the department on or after September 1, 2011, may include provisions authorizing:

(a) Residential structures and appurtenant structures that were legally established and are used for a conforming use, but that do not meet standards for the following to be considered a conforming structure: Setbacks, buffers, or yards; area; bulk; height; or density; and

(b) Redevelopment, expansion, change with the class of occupancy, or replacement of the residential structure if it is consistent with the master program, including requirements for no net loss of shoreline ecological functions.

(2) For purposes of this section, "appurtenant structures" means garages, sheds, and other legally established structures.

**CCCU Notes: Clark County claims they are not beholden to the federal regulations on wetlands, but instead are regulated by the Washington State Shoreline Management Act. But that document is guided by the Department of Ecology and the federal government. Even so, Clark County has not been compliant to that document, either, as you can see in the various excerpts from the Department of Ecology and RCW 90.58 Shoreline Management Act.**

Clark County Citizens United, Inc. P.O. Box 2188 Battle Ground, Washington 98604 E-Mail [cccuinc@yahoo.com](mailto:cccuinc@yahoo.com)