

From: [Oliver Orjiako](#)
To: [Jeffrey Delapena](#)
Cc: [April Furth](#)
Subject: FW: Clark County Staff must follow the law when it comes to Wetland and Critican Land Designations
Date: Thursday, June 27, 2024 8:19:11 AM

Jeff for the record and April for your information. Thanks.

From: Clark County Citizens United, Inc. <cccuinc@yahoo.com>
Sent: Wednesday, June 26, 2024 6:27 PM
To: Gary Medvigy <Gary.Medvigy@clark.wa.gov>; Michelle Belkot <Michelle.Belkot@clark.wa.gov>; Karen Bowerman <Karen.Bowerman@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>
Subject: Clark County Staff must follow the law when it comes to Wetland and Critican Land Designations

EXTERNAL: This email originated from outside of Clark County. Do not click links or open attachments unless you recognize the sender and know the content is safe.

Clark County Council
June 26, 2024
P.O. Box 5000
Vancouver, Washington 98666

FOR THE PUBLIC RECORD AND THE COMPREHENSIVE PLAN

Re: Clark County Staff must follow the law when it comes to Wetland and Critican Land Designations

Dear Councilors,

Clark County Citizens United, Inc., a 501c-4 non-profit representing approximately 6,000 Clark County Citizens, has forwarded concerns regarding incorrect wetland and habitat determinations imposed upon landowners. To date, CCCU has gotten no response to those concerns. These landowners are being held hostage and being blackmailed by mandatory permanent covenants on their land, based on flawed information. In order for that covenant to be applied, county staff is fabricating wetlands and critical lands and holding back the occupancy permit, unless the landowner performs enhanced mitigation and files a permanent covenant on their land.. What staff has been doing is clearly illegal and demonstrates regulatory and policy laundering. They are going beyond their jurisdictional bounds and are obligated to follow the law.

Given the explicit parameters of all state and federal regulations, it is clear what is

expected of local governments when determining wetlands and critical lands. Yet, Clark County staff trespasses on a parcel of land, walks the land for five minutes and declares the land a wetland with hundreds of feet of buffers that have to be mitigated and then “protected” by a permanent covenant on the entire lot. The reason given is that the land has hydric soil. Or if not soil, it has wetland vegetation. Or if not vegetation, it has hydrology or an imaginary stream. But staff is mandated to only determine wetland with a predominance of all three parameters, soil, plants and water. Here is just a few examples of what is happening.

1. The Traffie family used a DNR cutting permit to harvest trees in preparation for construction of a home. County staff recommended AshEco be brought in for review. Staff then claimed they had a fish bearing stream on their land, and a wetland with large buffers. Neither circumstances were true, as the water on their land was stormwater runoff adjacent to a county right of way. There was a fish barrier of over 100 feet vertical drop, and there was no hydric soil. Clearly staff was wrong in this determination. Yet, the occupancy permit is still being held hostage to a permanent covenant.

2. The Halstrom family bought a ten acre parcel in the five acre zone. The intent was for brothers to divide the land and build homes on the lots. Staff did a cursory examination of the land and had AshEcho brought into the picture. The first plan was agreed upon by the owners, but two more plans were created, with no knowledge by the landowner. They protested those changes, but were ignored. The area determined to be a stream was storm water drainage from the adjoining property culvert and there was no wetland soil in the areas of a determined wetland and buffer. That case is still pending, but they too, are required to sign a permanent covenant on their land.

3. The Halberg family applied for a building permit approximately six years ago. During that time, the county was processing a wetland and critical land permit. Each time he was told to do something, he did it, but more and more requirements were applied. A map of his land was approved by the county that showed a dotted line traveling through the center of his land, with a non-fish stream determination. But no such stream is on the DNR stream maps or county stream maps. He confirmed there was no stream. The staff placed a 75 foot buffer along the line, and then extended it to both property lines, an additional 150 feet, which included more than 50% of his land. It was the area on his land where he had trees growing. That map shows none of his development infringed on the buffer area, yet he was told to plant 38 mitigation trees and now a permanent covenant, if he wants the occupancy permit.

4. The Leontiy family went to Clark County Community Development to ask if a 5 acre parcel on the edge of Battle Ground, Washington had wetland on it. The county agent confirmed that it did not. The family bought the lot and began the process for a building permit. The land was historically farm land and produced quality hay in 2023. They intended to continue farming the land, and chose a house site on the NE corner of the lot. County staff then claimed most of the parcel was a wetland, with large buffers. The Leonitys had to re-design the home, driveway, shop and septic, three times, before staff was satisfied. Their home is now in the middle of the lot,

destroying the farmland for productive hay. Staff is now requiring them to plant approximately 1,000 trees and plants, as mitigation, creating a completely forested area. The lot has some wetland soil, but is devoid of wetland plants and inundated soil. Their occupancy permit is being held hostage to a permanent covenant.

5. The Higgins family 16 year old son had a tragic accident that cut off both legs. The family had to create ADA compliant housing for him. They decided to remodel the garage into a large room with an ADA bathroom. Labor and Industries paid for personal housing, but not for a remodel. They bought an ADA tiny home for his bedroom, that accesses the remodel. They had to excavate that space behind the remodel to make it flat, and a few trees were removed. County staff trespassed onto the lot, and when told by the construction workers to come back when the owner was there, continued onto the land. She claimed "*she was the county, and she could do what she wanted*". After a brief time, she left. Staff then claimed the Higgins infringed on a wetland buffer, from what they called a "wetland", on the adjacent property. This was actually a stock water/storm water pond. It was mapped a wetland in 2000, via trespass. They were accused of removing two Oaks behind the house, according to GIS photos. But, Oak shows as dark green and no dark green trees were present in that location.. But on the adjacent lot, a Big Leaf Maple shows as dark green, confirming that only a visit to the site determines tree species. This family must plant 38 Oak, next to the house and into the septic area, and sign a permanent covenant, before they will receive an occupancy permit.

In these instances, county staff made a mistake in their designations and these determinations need to be reversed. But more important is the flagrant way county staff is determining wetland and critical lands, with huge buffers, outlandish mitigation and holding a permanent covenant over landowners heads that say, do what staff says, or they will suffer the consequences. False and flawed wetland and critical land determinations are not legal, and must not be tolerated by the Clark County Council. All these cases must be reversed, and occupancy permits issued.

Sincerely,

Carol Levanen, Exec. Secretary

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

CCCU has been studying all state and federal documents that would apply to local governments as it regards the designation of critical land and wetland. One only needs to go to the Washington Department of Ecology' Washington State Wetland Delineation Manual, to confirm that staff is not compliant to the law. Here is a link to that document, for your review.

https://proprights.org/PDFs/workshop_2011/References/Manuals/Wetland%20Manuals/Washington%20State%20Delineation%20Manual.pdf

In particular is the mandatory definition of what a wetland is, according to all federal and state agencies, connected to wetland management. Staff argues that they do not have to follow the US Supreme Court definition for wetland, as they are under the Shoreline Management Act. But, that document gets its directives from the Environmental Protection Act (EPA), Clean Water Act (CWA) and the Corp of Engineers, and the Washington Department of Ecology, who are mandated to follow orders by the US Supreme Court. In effect, they are all one in the same. Consider what all of the agencies definition for a wetland pertains to:

Washington State Wetlands Identification and Delineation Manual

Prepared by:

Washington State Department of Ecology March 1997 Publication No. 96-94

Scope 6.

“This manual is intended to assist users in identifying areas that meet the definition of wetlands found in state law (**Shoreline Management Act, Growth Management Act**) and **the regulations of the federal Clean Water Act**. Use of this manual is intended to identify the same areas identified in **the Corps of Engineers 1987 Wetlands Delineation Manual** and subsequent revisions. For purposes of the **Clean Water Act** this manual is limited in scope to wetlands that are a subset of “waters of the United States” and thus **subject to Section 404**. The term “waters of the United States” has broad meaning and incorporates both deepwater aquatic habitats and special aquatic sites, including wetlands (Federal Register 1982), as follows:”

e. All others waters of the United States not identified above, such as isolated wetlands and lakes, intermittent streams, prairie potholes, and other waters that are not a part of a tributary system to interstate waters or navigable waters of the United States, **the degradation or destruction of which could affect interstate commerce**. Determination that a water body or wetland is subject to interstate commerce and therefore is a **“water of the United States”** for purposes of federal jurisdiction shall be made independently of procedures described in this manual.

15. Use .

This manual is for use by individuals needing to identify and delineate wetlands for federal, state or local regulatory purposes. [For determining federal jurisdiction on agricultural lands, the Natural Resources Conservation Service uses the Food Security Act Manual, Third Edition (180-V-NFSAM, Third Ed., March 1994) to identify and delineate wetlands. This manual is similar to the 1987 Corps of Engineers manual but does have some differences.]

16. Three key provisions of the definition of wetlands (see paragraph 26a) include: a. Inundated or saturated soil conditions resulting from permanent or periodic

inundation or saturation by ground water or surface water.

b. A prevalence of vegetation typically adapted for life in saturated soil conditions (hydrophytic vegetation).

c. The presence of “normal circumstances.”

17. Explicit in the definition is the consideration of **three environmental parameters: hydrology, soil, and vegetation.** Positive wetland indicators of all three parameters are normally present in wetlands. Although vegetation is often the most readily observed parameter, sole reliance on vegetation or either of the other parameters as the determinant of wetlands can sometimes be misleading. **Many plant species can grow successfully in both wetlands and nonwetlands,** and hydrophytic vegetation and hydric soils may persist for decades following alteration of hydrology that will render an area a nonwetland. **The presence of hydric soils and wetland hydrology indicators in addition to vegetation indicators will provide a logical, easily defensible, and technical basis for the presence of wetlands.** The combined use of indicators for all three parameters will enhance the technical accuracy, consistency, and credibility of wetland determinations. **Therefore, all three parameters were used in developing the criteria for wetlands and all approaches for applying the criteria embody the multiparameter concept.**

21. Flexibility

However, the basic approach for making wetland determinations should not be altered (i.e. the determination should be based on the **dominant plant species, soil characteristics, and hydrologic characteristics of the area in question).**

24. The following definition of wetlands includes the language found in the **federal Clean Water Act regulations. It also includes additional language found in the Shoreline Management Act (SMA) and Growth Management Act (GMA) which specifically excludes several types of “artificial” wetlands.** Many of these areas specifically excluded in the definition will meet the technical requirements for being a wetland (i.e. will meet all three criteria). This manual identifies all areas that meet the necessary wetland criteria and does not attempt to distinguish these “artificial” wetlands. If necessary, the user will need to independently determine if a wetland as identified by this manual fits in any of the categories of “artificial” wetlands specifically excluded in the SMA/GMA definition.

25. Wetlands

The following definition, criteria, and technical approach comprise a guideline for the identification and delineation of wetlands:

a. Definition. **The Corps of Engineers (CE) (Federal Register 1982), the Environmental Protection Agency (EPA) (Federal Register 1985), the Shoreline Management Act (SMA) and the Growth Management Act (GMA) all**

define wetlands as:

“Those areas that are inundated or saturated by surface or ground water 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. In addition, the SMA and GMA definitions add: “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.”

b. Wetlands meet the following criteria:

(1) Vegetation.

The prevalent vegetation consists of macrophytes that are typically adapted to areas having hydrologic and soil conditions described in a above. Hydrophytic species, due to morphological, physiological, and/or reproductive adaptation(s), have the ability to grow, effectively compete, reproduce, and/or persist in anaerobic soil conditions.* Indicators of vegetation associated with wetlands are listed in paragraph 35.

(2) Soil.

a. “All Histosols** except Folists; or b. Soils in Aquic suborders, great groups, or subgroups, Albolls suborder, Aquisalids, Pachic subgroups, or Cumulic subgroups that are: (1) Somewhat poorly drained with a water table equal to 0.0 foot (ft) from the surface during the growing season, or (2) Poorly drained or very poorly drained and have either: (a) A water table equal to 0.0 ft during the growing season if textures are coarse sand, sand, or fine sand in all layers within 20 inches(in), or for other soils (b) A water table at less than or equal to 0.5 ft from the surface during the growing season if permeability is equal to or greater than 6.0 in/hour in all layers within 20 in, or (c) the water table is at less than or equal to 1.0 ft from the surface during the growing season if permeability is less than 6.0 in/hour in any layer within 20 in, or c. Soils that are frequently ponded for long or very long duration during the growing season; or * Species (e.g. *Alnus rubra*) having broad ecological tolerances can occur in both wetlands and nonwetlands. ** Soil nomenclature follows Keys to Soil Taxonomy (current edition). Washington State Wetlands Delineation Manual 11 d. Soils that are frequently flooded for long duration or very long duration during the growing season.”

(3) Hydrology.

Areas which are **inundated and/or saturated to the surface for a consecutive number of days for more than 12.5 percent of the growing season* are wetlands, provided the soil and vegetation parameters are met.** Areas inundated

or saturated to the surface for a consecutive number of days between 5 percent and 12.5 percent of the growing season in most years (see Table 3) may or may not be wetlands. **Areas inundated or saturated to the surface for less than 5 percent of the growing season are non-wetlands.** Wetland hydrology exists if field indicators are present as described in Part III below. c. Technical approach for the identification and delineation of wetlands. Except in certain situations defined in this manual, **evidence of at least one positive wetland indicator from each parameter (hydrology, soil, and vegetation) must be found in order to make a positive wetland determination.**

Nonwetlands

27. The following definition, criteria, and technical approach comprise a guideline for the identification and delineation of nonwetlands:

a. Definition. Nonwetlands include uplands and lowland areas that are neither deepwater aquatic habitats, wetlands, nor other special aquatic sites. They are seldom or never inundated, or if frequently inundated, they have saturated soils for only brief periods during the growing season, and, if vegetated, they normally support a prevalence of vegetation typically adapted for life only in aerobic soil conditions.

b. Criteria. Nonwetlands meet the following criteria:

(1) Vegetation. The prevalent vegetation consists of plant species that are typically adapted for life only in aerobic soils. These mesophytic and/or xerophytic macrophytes cannot persist in predominantly anaerobic soil conditions.*

(2) Soil. Soils, when present, are not classified as hydric, and possess characteristics associated with aerobic conditions.

(3) Hydrology. Although the soil may be inundated or saturated by surface water or ground water periodically during the growing season of the prevalent vegetation, the average annual duration of inundation or soil saturation does not **preclude the occurrence of plant species typically adapted for life in aerobic soil conditions.**

c. Technical approach for the identification and delineation of nonwetlands. **When any one of the criteria identified in b above is present, the area is a nonwetland.**

CCCU Notes: This is what is posted on the Clark County Website

Wetland and Habitat 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 for more information.

*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.*

The work is field intensive and requires our staff to have expertise in botany, soil science, hydrology, fish and wildlife biology, and ecology. Staff identifies, maps, and assesses wetlands and priority habitats, reviews and approves technical studies and mitigation plans prepared by consultants, develops mitigation plans for residential building permits, and provides expert testimony at Land Use and Code Enforcement hearings. The biologists also provide customer service and intake services in the Permit Center and attend Pre-application Conferences.

*We also work with the Washington Department of Fish and Wildlife, **Ecology**, **The Department of Natural Resources**, and the **US Army Corps of Engineers** on individual development and mitigation projects as well as mitigation banking efforts in Clark County.*

CCCU Notes: This is what the Washington Department of Ecology has to say about the Shoreline Master Program.

*Shoreline Master Programs (SMPs) are **local land-use policies** and regulations that guide use of Washington **shorelines**. SMPs apply to both public and private uses for Washington's more than 28,000 **miles of lake, stream, and marine shorelines**. They protect natural resources for future generations, provide for **public access to public waters and shores, and plan for water-dependent uses**.*

*We review and approve SMPs for local governments and provide guidance and technical assistance to help governments develop their SMPs. We work with local governments to help create and update these SMPs to ensure they comply with the state **Shoreline Management Act** and state **Shoreline Master Program Guidelines***

More than 260 cities and counties have SMPs. They are a valuable tool for the management of these important areas.

Managing the use and development of state shorelines is crucial. It helps preserve what people in Washington value while protecting life and property

-

CCCU Notes: This is what the Washington Shoreline Management Act says:

(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.

Clark County Citizens United, Inc. P.O. Box 2188 Battle Ground, Washington 98604
E-Mail cccuinc@yahoo.com