

## Debbie Beadle

---

**From:** Evan Maxim  
**Sent:** Monday, April 29, 2013 2:49 PM  
**To:** Melonie Anderson; Debbie Beadle  
**Cc:** Kamuron Guroi; Susan Cezar; Kathy Curry  
**Subject:** FW: Letter to Evan Maxim, City of Sammamish  
**Attachments:** Letter to Evan Maxim, City of Sammamish.pdf

Public Comment

*Evan Maxim  
Senior Planner  
City of Sammamish  
425.295.0523*

Effective March 1<sup>st</sup>, my email address is: [emaxim@sammamish.us](mailto:emaxim@sammamish.us). Emails sent to my old email address are being forwarded temporarily, however please update your email address for me accordingly.

---

**From:** David Gee [mailto:[dgee@gsblaw.com](mailto:dgee@gsblaw.com)]  
**Sent:** Monday, April 29, 2013 2:31 PM  
**To:** Evan Maxim  
**Cc:** David Gee; [meggee@comcast.net](mailto:meggee@comcast.net); Kamuron Guroi  
**Subject:** Letter to Evan Maxim, City of Sammamish

Please see attached response to the letter to you from the Department of Ecology, dated April 23, 2013. Please also provide a copy to the City Council.

Unless expressly stated otherwise, any federal tax advice contained in this communication (including attachments) is not intended to be used, and cannot be used, for the purpose of avoiding federal tax penalties.

This e-mail is for the sole use of the intended recipient(s). It contains information that is confidential and/or legally privileged. If you believe that it has been sent to you in error, please notify the sender by reply e-mail and delete the message. Any disclosure, copying, distribution or use of this information by someone other than the intended recipient is prohibited.

**DAVID W. GEE**

Owner | Tel: 206.464.3939 ext 1351 | Mobile: 425.760.9312 | Fax: 206.464.0125 | [dgee@gsblaw.com](mailto:dgee@gsblaw.com)

GARVEY SCHUBERT BARER | 18th Floor | 1191 Second Avenue | Seattle, WA 98101 | ► [GSBLaw.com](http://GSBLaw.com)

EXHIBIT NO. CC38



SEATTLE OFFICE  
eighteenth floor  
second & seneca building  
1191 second avenue  
seattle, washington 98101-2939  
TEL 206 464 3939 FAX 206 464 0125

OTHER OFFICES  
beijing, china  
new york, new york  
portland, oregon  
washington, d.c.  
GSBLAW.COM

GARVEY SCHUBERT BARER

Please reply to DAVID W. GEE  
dgee@gsblaw.com TEL EXT 1351

April 29, 2013

**Via Electronic Transmission**

Mr. Evan Maxim  
Senior Planner  
City of Sammamish  
801 - 228th Avenue SE  
Sammamish, WA 98075

**Re: Response to Department of Ecology Letter concerning Isolated Wetlands**

Dear Mr. Maxim:

I am writing to object to the letter dated April 23, 2013, from Mr. Patrick McGraner of the Washington Department of Ecology (DOE), posted Friday at the City website, setting forth Mr. McGraner's recommendations concerning Isolated Wetlands.

1. Authority of the City of Sammamish. My primary objection is to the inaccuracy of Mr. McGraner's statements purporting to limit the authority of the City of Sammamish to determine whether or how wetlands in Sammamish will be regulated. The City should respectfully decline to adopt the changes recommended by Mr. McGraner. There is simply no legal or other justification for the City to cede its authority to regulate wetlands to the U.S. Army Corps of Engineers (USACE).

Mr. McGraner recommends that the City of Sammamish amend its proposed Critical Area Ordinance (CAO) to require the City to ask the U.S. Army Corps of Engineers (USACE) to determine whether any wetland in the City of Sammamish is isolated before the City could regulate that wetland under its local code. In essence, Mr. McGraner asks the City to cede its authority over wetlands to the federal government. His request confuses the independent power of the City of Sammamish under the Growth Management Act (GMA) and the Shoreline Management Act (SMA) to control wetlands with the separate federal responsibilities of the USACE under the Federal Clean Water Act.

Specifically, Mr. McGraner inaccurately cautions that neither the City nor its citizens may rely upon the determination of a "qualified professional" that a given wetland is or is not "isolated":

*A qualified professional does not have the authority to determine whether or not a wetland is isolated with regards to federal jurisdiction under the Clean Water Act. Only the USACE can make this determination based on its interpretation of the Clean Water Act. The language under .320(1) that refers to a qualified professional should be deleted accordingly. Codifying this language as currently drafted could lead citizens to falsely believe that a determination by a*



*private consultant would preclude the need to comply with federal and/or state regulations with regards to filling small wetlands.*

Under Mr. McGraner's misguided proposition, the City would be required to resort to engaging the United States Army Corps of Engineers (USACE) to make any and all determinations in the City's administration of wetlands in Sammamish. Mr. McGraner's position also renders invalid any of the determinations the City's own staff might offer in this regard, however well qualified the City staff may be.

To further explain our objection to Mr. McGraner's request, the following review of the applicable law may be helpful to the City.

The current process to amend the City's present CAO has been undertaken to fulfill the City's obligations under the GMA (Chapter 36.70A RCW). These amendments are also being considered for use within shoreline areas of the City by amending the City's Shoreline Master Program (SMP); a requirement of the SMA (Chapter 90.58 RCW).

The GMA and the SMA are Washington state laws. These state laws are not adopted pursuant to any federal laws, regulations or requirements.

Although these state laws impose specific obligations upon local governments, neither the GMA nor the SMA references the federal Clean Water Act or any regulations adopted by the USACE concerning wetlands. Rather, the GMA's critical area provisions require local governments to designate and protect critical areas, including wetlands. (RCW 36.60A.030, 060; 170). SMPs adopted under the SMA are required to provide a level of protection to critical areas, including wetlands, located within shoreline area that will assure no net loss of shoreline ecological functions necessary to sustain shoreline natural resources. (RCW 36.70A.480).

Federal government regulation of wetlands under Section 404 of the federal Clean Water Act (33 U.S.C. § 1344(a)) is wholly independent of the regulation of wetlands by the City of Sammamish under the GMA and SMA. Moreover, the USACE has its own set of federal regulations that govern the fill or dredging of federally regulated wetlands. (33 CFR Parts 320-332). Moreover, the United States Supreme Court, in two important cases, specifically limited the USACE's authority to regulate certain isolated wetlands and certain wetlands that are not adjacent to permanent waters nor have a significant nexus with such waters. (*Solid Waste Agency of Northern Cook County v. Army Corps of Engineers*, 531 U.S. 159, 121 S. Ct. 675, 148 L.Ed.2d 576 (2001); *Rapanos v. U.S.*, 547 U.S. 715, 126 S. Ct. 2208, 165 L.Ed.2d 159 (2006)).

Although the GMA and SMA, as well as DOE's implementing regulations, do require the boundaries of wetlands regulated by Washington cities under CAOs or SMPs to be delineated using the 1987 USACE Manual (36.70A.175; RCW 90.58.380; WAC 173-22-035), the references to the USACE Manual within the GMA, SMA and DOE regulations pertain solely to marking the location and size of a wetland. The USACE Manual specifically does not dictate whether or how the wetlands within the City are to be



regulated—that remains for the City Council to determine. Indeed, nothing in the USACE Manual even addresses “Isolated Wetlands.”

Accordingly, the City is well within its charter to enact the proposed changes to the CAO with regard to Isolated Wetlands that were thoroughly deliberated by the Planning Commission, City staff and citizen stakeholders.

Note that the legal analysis provided above also accords with the legal opinion of the City Attorney requested by and provided to City staff and the Planning Commission during the Planning Commission’s review of the ECA, on or about September 28, 2012. Please pardon the extensive excerpt, but Mr. Gurol’s report of that legal counsel, provided in his memorandum to the Planning Commissioners, dated September 28, 2012 (I have bolded certain statements for emphasis) states as follows:

*A public comment (logged as Comment #71) was submitted on April 19, 2012 and at the planning commission meeting that night, related to information provided by the City’s consultant, AMEC. The e-mail indicated that the statement, “Wetlands that do not have a continuous surface connection to traditional navigable waters (are “isolated”) may still be regulated by the USACE under the Clean Water Act,” was incorrect, and that AMEC’s description of the law might suggest bias on their part. A link was attached to a WSDOT guidance document.*

*The City’s attorneys were consulted on this issue, and have indicated agreement that AMEC correctly stated the law. This is supported first by the same WSDOT guidance document cited in the April 19 e-mail. The first sentence of that document states, “After a U.S. Supreme Court ruling in the 2001 Solid Waste Agency of Northern Cook County v. Army Corps of Engineers (SWANCC) case, federal agencies no longer regulated isolated wetlands that lack a surface water connection to a navigable water body.” The next sentence of the WSDOT report goes on to acknowledge that “Based on the Supreme Court’s decisions on the combined Rapanos and Carabell (2006) cases, isolated wetlands may come under federal regulation on a case-by-case basis, depending on the presence of a significant nexus to a traditionally navigable water of the US.” (Emphasis added).*

*In addition, some recent rulings of the Ninth Circuit Court of Appeals issued subsequent to Rapanos and Carabell conclude that the Corps may regulate wetlands that lack a surface water connection to navigable waters. In another, very recent case, San Francisco Baykeeper v. West Bay Sanitary District, the Ninth Circuit held that federal jurisdiction extended to sloughs and streams adjacent to San Francisco Bay, even though the streams ran dry for parts of the year, or were blocked by tide gates from the Bay. Copies of both cases are attached.*

*It is also important to note that the City of Sammamish’s legal authority to regulate environmentally critical areas flows from state law — not federal. The City is required by the Growth Management Act, RCW 36.70A.060(2) and .170 to designate critical areas and adopt*



Mr. Evan Maxim  
City of Sammamish  
April 29, 2013  
Page 4

*development regulations that protect them. Under RCW 36.70A.030(5), "Critical areas" include wetlands, areas with a critical recharging effect on aquifers used for potable water, fish and wildlife habitat conservation areas, frequently flooded areas, and geologically hazardous areas.*

\* \* \*

*Sammamish has an independent obligation under state law to regulate wetlands, and the City's authority is not limited by whether the U.S. Army Corps of Engineers has related federal jurisdiction under the Clean Water Act.*

Finally, not only does Sammamish have no legal obligation to cede its right to govern wetlands to USACE (or to DOE), but such deference would also be a mistake as a practical matter. It would be imprudent for the City to choose to become entangled with the confused state of affairs regarding federal wetland regulation or to empower the federal government to oversee the City's regulation of wetlands. Following the United States Supreme Court decisions in *SWANCC* and *Rapanos*, there has been much confusion about the federal government's authority to regulate wetlands. In April 2011, the Environmental Protection Agency (EPA) and the USACE released draft guidance to clarify the scope of wetland regulation under the federal Clean Water Act. They received a reported 230,000 public comments on that draft guidance. The debate and confusion over the scope of federal wetland regulations has absolutely nothing to do with the City of Sammamish's authority or ability to regulate wetlands in Sammamish and would further impair the City's ability to establish specific and appropriate regulations to govern Sammamish wetlands.

Despite Mr. McGraner's misplaced admonition, the City has the right and the authority to decide whether and how it will determine that a particular wetland meets the City's definition of Isolated Wetlands. We strongly support the City's decision to follow the Planning Commission's recommendations and retain the definition that has been in place and applied in Sammamish for years. Moreover, to assure consistency with the other steps to technical delineation of Category and Size of Wetlands proposed by the draft Code, the determination of whether a wetland is "isolated" should be made as part of the assessment performed in each case by a "qualified professional" and designated "in a written and approved critical areas study meeting the requirements of SMC 21A.50.130 [and using] the adopted Washington State Wetland Rating System for Western Washington."

2. Inconsistent Guidance. My additional objection to Mr. McGraner's letter is that, as you are aware, it contravenes and undermines the extensive efforts of the City and the Planning Commission to address the DOE's commentary on this topic (in spite of the significant variability and inconsistency of those comments). In light of the great expenditure of time and resources of all of the Planning Commission, City staff and citizen stakeholders throughout most of last year to arrive at the proposed Section 21A.50.320, you will acknowledge that it is frustrating that Mr. McGraner's latest comments simply disregard our collective efforts to develop and advance to the City Council the pending revision to Section 21A.50.320, as a good faith compromise of widely competing concerns and interests. In particular, you and Mr. Gurol worked extensively with DOE (including Mr. McGraner) to obtain DOE's assent to the "strategy for protecting small wetlands and allowing buffer reductions" that was advanced by the Planning Commission, the very plan Mr. McGraner now criticizes. Not unlike the variable and inconsistent public comments provided by DOE throughout the course of the Planning Commission's



G A R V E Y S C H U B E R T B A R E R

Mr. Evan Maxim  
City of Sammamish  
April 29, 2013  
Page 5

year-long review, Mr. McGraner's latest comments further contradict DOE's previous receptivity to the substantially equivalent draft of Section 21A.50.320 that you and Mr. Gurol presented to DOE at your meeting DOE in late November, 2012.

It is unfortunate that despite significant efforts by the City to accommodate DOE's preferences, DOE now seeks to discredit those efforts. Nevertheless, as with Mr. McGraner's attempt to limit the City's authority to administer its own wetland regulations, the City should reject Mr. McGraner's remaining criticisms of the City's thorough and deliberate approach to protecting its small wetlands.

Very truly yours,

GARVEY SCHUBERT BARER

By

David W. Gee

cc: Sammamish City Council

SEA\_DOCS:1099956.1