



## COOKE SCIENTIFIC

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August 12, 2011

Steve Pilcher  
City of Black Diamond, Community Development Director  
PO Box 599  
Black Diamond, WA 98010

**RE: Response to Yarrow Bay's Written Response Pursuant to Hearing Examiner's Pre-Hearing Order II: Comments on the Lawson Hills and The Villages Development Agreements between the City of Black Diamond and BD Lawson Partners**

Dear Mr. Pilcher:

I have reviewed the rebuttal comments submitted by the Yarrow Bay Consultants on both **July** and August 12, pursuant to my public testimony during the hearing and my written comments and have prepared the following rebuttal:

**References Reviewed:**

- City of Black Diamond. Staff report Lawson Hills MPD. File # PLN09-0016.
- City of Black Diamond. Staff report The Villages MPD. File # PLN09-0017.
- City of Black Diamond. June 2009. City of Balck Diamond Comprehensive Plan.
- City of Black Diamond. December 2009. Lawson Hills MPD Final Environmental Impact Statement.
- City of Black Diamond. December 2009. The Villages MPD Final Environmental Impact Statement.
- City of Issaquah & Sougar Mountain East Village Partnership. 1999. Cougar Mountain East Village Development Agreement
- Otak, Inc. August 2010. Shoreline Analysis Report, Including Shoreline Inventory and Characterization for City of Black Diamond's Shoreline: Lake Sawyer. Prepared for the City of Black Damond
- Parametrix. 2008. City of Black Diamond Sensitive Areas Ordinance Best Available Science Review, Summary, and Recommendations for Code Update
- Parametrix. November 16, 2009. Technical Memorandum, Peer Review, EIS Element, Wetlands. Lawson Hills and the Villages MPD, EIS. Additional information.

Parametrix, August 27, 2008. Technical Memorandum, Peer Review, EIS. Wetlands Element. Lawson Hills and the Villages MPD, EIS.

Parametrix, June 29, 2009. Lawson Hills and the Villages MPD EIS EIS Element Vegetation and Wetlands Technical Peer Review.

City of Black Diamond, Wa and BD Village Partners L.P. September 2010. The Lawson Hills Master Plan Development, Development Agreement

City of Black Diamond, Wa and BD Village Partners L.P. September 2010. The Villages Master Plan Development,

Wetland Resources. September 24, 2009. The Villages MPD Draft EIS Review.

Wetland Resources. July 17, 2008. The Villages Wetland Assessment- Draft EIS Report.

Wetland Resources. May 2, 2008. Lawson Hills Wetland Assessment- Draft EIS Report.

Wetland Resources. July 21, 2009. The Villages Sensitive Areas Study.

Wetland Resources. July 21, 2009. Lawson Hills Sensitive Areas Study.

Yarrow Bay August 4, 2011. Yarrow Bay's Written Testimony Pursuant to hearing Examiner's Pre-Hearing Order II.

Yarrow Bay. August 12, 2011. Yarrow Bay's Written Testimony Pursuant to hearing Examiner's Pre-Hearing Order II.

### **Section 8.2.1 Scott Brainard's/Yarrow Bay's responses, August 4 and August 12:**

Yarrow Bay has asked Scott Brainard to provide rebuttal to both my oral and written public comments that a) the constraint maps are not specific enough (Section 8.2.1 "The wetland delineations and types outlined in the Constraints Map are deemed final and complete") (for providing a basis for wetland decisions in the Development Agreement) and b) Mr. Brainard and Yarrow Bay's contention that " The EIS for both The Villages and Lawson Hills have been deemed adequate in their entirety, including wetlands, buffers, and conceptual mitigation measures identified in.....".

I was not allowed to expand my oral testimony during the hearing so an expansion of my comments are provided below. I will outline multiple examples of why and where the development wetland maps are inaccurate and why the development agreement is not sufficient to protect critical areas under State Code RCW 90.48.

1. **One item of Mr. Brainard's and Yarrow Bay's comments is that " the EIS for both The Villages and Lawson Hills was deemed accurate in their entirety, including wetlands, buffers, and conceptual mitigation measures.....". My question here is Who has deemed the two EIS's "accurate in their entirety"? None of the agencies listed below with final approval review have examined the EIS (Pers. Comm. Muffy Walker, head regulatory section, Seattle District, US Army Corps of Engineers, Matt Bennett, SE King County lead, Regulatory Section, Seattle District, US Army Corps of Engineers, July 8, 2011); (pers. Comm. Patrick McGrainer SE King County Wetlands project reviewer, Wa. State Department of Ecology, July 8, 2011); Pers. Comm. Linda**

Storm, US Environmental Protection Agency, Seattle District, July 13, 2011).  
Therefore, this statement clearly not accurate or true.

2. **In addition The EIS is written with all impacts related to what was required in the City's August 2007 Critical Areas Ordinance. This is a direct contradiction with SEPA law that requires a discussion of environmental impacts based on current scientific knowledge.** Instead, the DEIS discloses the legal impacts (violations) of each alternative under outdated law, not the true scientifically-based impacts of the proposed project. The SEPA official needs to know what the potential impacts are, not if the project is in compliance with an outdated ordinance. **Vesting does not impact the disclosure and analysis of scientifically-based environmental impacts in an EIS, even if affects the permitting process at a later date.** The delineation method used and the buffer section below describes two implication of this problem.
3. **The wetland boundaries have not been verified by the US Army Corps of Engineers, the ultimate authority for all wetland boundary verifications. "No final Jurisdictional Determination or final wetland boundary mapping can be made without this determination"** (Pers. Comm. Muffy Walker, head regulatory section, Seattle District, US Army Corps of Engineers, Matt Bennett, SE King County lead, Regulatory Section, Seattle District, US Army Corps of Engineers, July 8, 2011). Approval by the City makes no sense in light of the fact that all the wetland boundaries still have to be approved.
4. **It is highly likely that the wetland boundaries are not accurate, especially with respect to those determined as "isolated" from the larger Category I wetland, but which are in very close proximity to the Category I wetland.** Most of these "isolated" wetlands have been determined to be Category II, III, and IV wetlands, all of which conveniently have smaller required buffer widths. If any of these wetlands were found to be connected and the larger 225 foot buffer was applied then the area available for development would be reduced accordingly.
5. **The Corps of Engineers wetland boundary verification, statute of limitations is only 5 years.** The basis for this term is that wetlands are not static habitats. As groundwater discharge and recharge locations shift and surface water drainage patterns change wetland boundaries. The Corps and Department of Ecology would NEVER approve a boundary approval lasting longer then the 5 years. (Pers Comm. Muffy Walker, July 2011).
6. **Mr. Brainard states " BDMC 19.10 does not require that wetland boundaries be reviewed and/or approved by the US Amy Corps of Engineers (Corps) or the Washington State Department of Ecology (DOE)". Unfortunately, this statement is only accurate if the wetland in question is only under the jurisdiction of the local authority, where there will be less than 0.1 acre of impact proposed.** Since State jurisdiction supercedes local authority and federal jurisdiction supercedes both state and local jurisdiction in every instance if more than 01. acre of impact is proposed, his statement is not salient to these developments, which both are proposing well in excess of 01. acre of impact under all but the "No Action" scenario.
7. **Mr Brainard states that that wetland boundaries were delineated using the requirements in RCW 36.70.175 and 90.58.380 from 1997, which requires the use**

**of the Washington State Wetland Delineation manual.** This protocol was replaced and required to be used by both the DOE and the Army Corps of Engineers in 2008 with the publication on June 27, 2008 of the Interim Regional Supplement to the Corps of Engineers Wetland Delineation Manual: Western Mountains, Valleys, and Coasts). This was prior to the production and approval of the FEIS. Additionally, Ecology went one step further and repealed WAC 173-22-080 (the state delineation manual) and replaced it with a revision of WAC 173-22-035 that states delineations should be done according to the currently approved federal manual and supplements. The changes were effective, March 14, 2011, prior to the approval of the Development Agreement. The regional supplement methodology for determining wetlands is quite different in the criteria for soils, vegetation, and hydrology. The use of the wrong method and different criteria increases the chance that some of the wetland boundaries are incorrect and that impacts to wetlands can occur because development is planned in some areas that meet the wetland criteria, but which are identified as wetlands in the Development Agreement Maps.

**8. Mr Brainard stated that ‘Wetland boundaries have been delineated by Wetland resources and approved by the city and their third party reviewer. The third party review was conducted by qualified individuals from Parametrix. These reviewers looked at individual wetland flags, data, and wetland rating forms and deemed them accurate’. I feel it important to call the accuracy of these statements in question.**

a) The City of Black Diamond Staff review reports make no mention of performing a site verification for the wetlands boundaries nor do they discuss any details about review in the wetland reports. They simply state that the wetland boundaries are approved as shown in the Wetland resources Reports Further, the city has no qualified wetlands person on staff who has the training or knowledge to evaluate a wetlands delineation. So staff is simply not qualified to determine if the wetland maps and ratings are correct.

b) The third party reviewer stated in their peer review documents listed above that their review consisted of “a review of the technical report and brief field inspections of The Villages wetlands on June 9 and 10, 2008” and “Two biologists visited most of the accessible wetlands on the property. (Parametrix November 2009 peer review). This certainly does not constitute a thorough review that would be necessary for mapping wetlands whose boundaries would be without dispute for the next 15 to 20 years.

**9. Wetland ratings for both MPD’s have been established without examination of offsite wetlands.** This is in direct violation to protocol which specifically states that the entire wetland must be evaluated before a rating is assigned. (Pers. Comm. Tom Hruby, Author *Wetland Rating for Western Washington*, 2004, April 2006). This is important because buffer widths are established based on the wetland rating.

One such example (but by no means the only example) is identified in the Parametrix report where “With regard to wetland buffers, wetlands K and F on the Main Property are designated as headwater wetlands in the City’ SAO. The MPD application submitted in support of Alternative 2 does not characterize these wetlands as

headwater wetlands, and instead utilized the Washington State Rating System for Western Washington to calculate required buffers for these wetlands. As designated headwater wetlands, under City codes these wetlands require 225 foot wide buffers. The application materials assign a 110 foot buffer to wetland F and a 60 foot buffer to wetland K.”

10. The actual wetland mapping is not consistent between maps produced by the City. An examination of the Best Available Science wetland mapping (Parametrix (attached) and the Constraint maps shows many areas where the wetlands and their buffers differ between the two. It is necessary to make a comparison of these two maps to see many examples of inconsistencies. There are areas where lobes of wetlands are cut off with no buffers assigned and no impact identified, there are areas where wetlands are in very close proximity but deemed isolated when it is most likely they are contiguous in the field, there are areas where a reduced buffer has been assigned but no reason identified other than it increases the associated lot size for development.

#### **In summary,**

An adverse environmental impact that is specifically attributable to the Development Agreement is the fact that the Development Agreement locks into place for a period of fifteen years or more the sensitive area delineations and buffers that are identified in the MPD permit approval. This can result in reductions to wetlands size, and functions in the following ways:

- The delineations have not been reviewed by other agencies with regulatory authority
- The delineations incorrectly characterize wetlands as isolated instead of as part of a network of associated and connected wetlands.
- The mapping of the sensitive areas are not internally consistent with other documents in the record including the Parametrix study and the FEIS.
- Associated buffers and therefore protections for the wetlands are inconsistent between the City’s own maps

The MPD permit approval did not fully 'lock-in' the delineations and buffer widths, but rather left it to the Development Agreement to do so. **Any changes in the sensitive areas extent or location over time will not be accommodated and therefore impacts to critical areas WILL OCCUR and are will be fully attributable to the Development Agreement.**

The city has a duty to be in compliance with all applicable regulations and rules on the State and Federal levels. For the city to knowingly violate one or more of these requirements puts them at risk for legal action. The City and Yarrow Bay will have to obtain NPDES, Section 404b, ESA and other approvals on the State and Federal levels. By approving development agreements that are not in compliance with State and Federal regulations, the city is, in effect, engaged in an unlawful contract with Yarrow Bay. The city cannot agree to findings that contradict its inherent

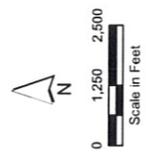
responsibility under State and Federal law as a member of a regional collective of agencies.

The implementation of the Clean Water Act rests on the good faith efforts of the local governments. Since the Clean Water Act, relies on science to set development constraints to protect Waters of the US and Best Available Science is by nature constantly updating and changing, the city's effort to freeze the critical areas locations and regulations for the 15 to 20 year duration of the development agreements severely limits the City's ability to propose appropriate development constraints with which to comply with the Clean Water Act.

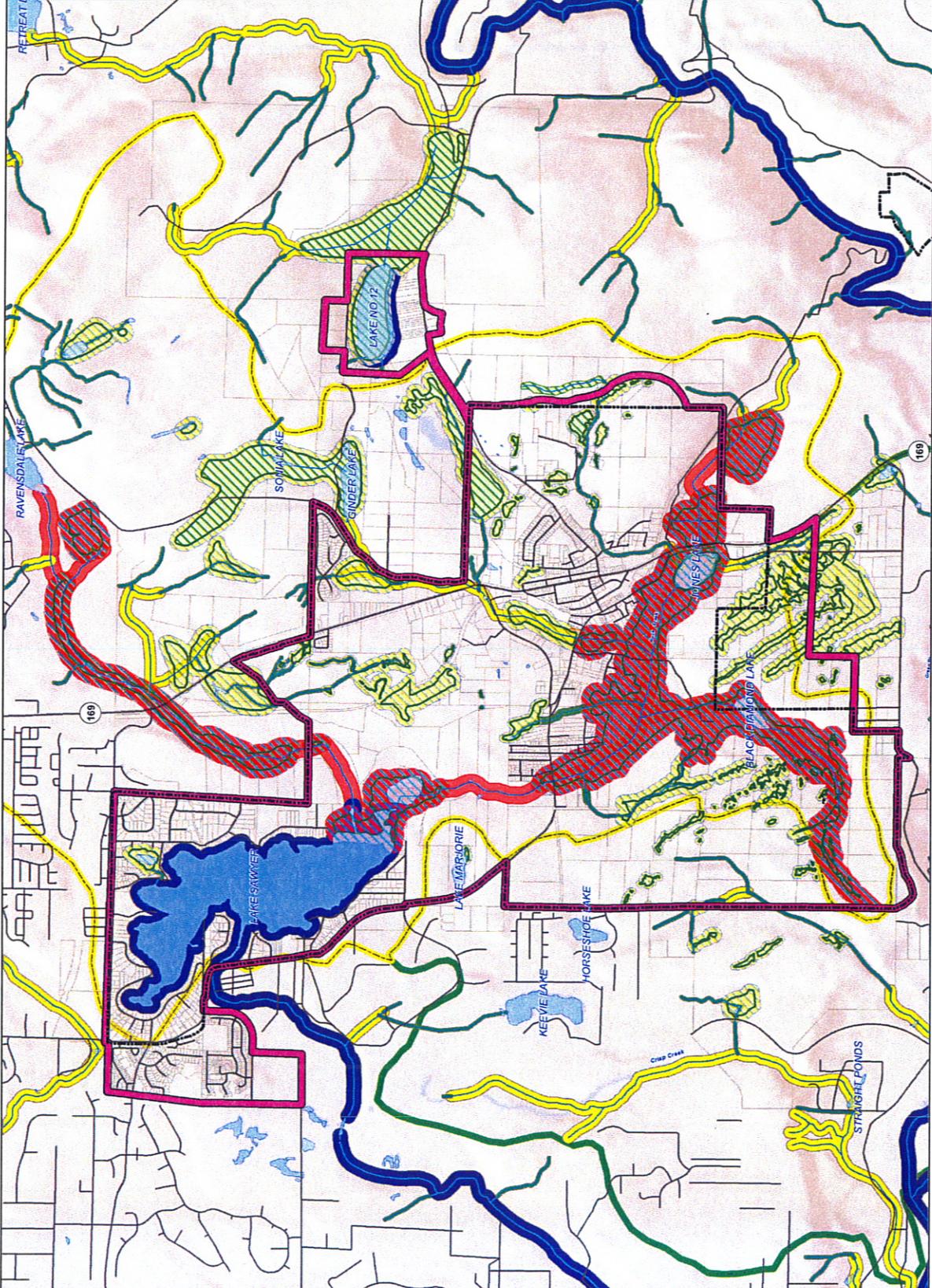
Please contact me if you have additional questions.

A handwritten signature in black ink, appearing to read "Sarah Cooke". The signature is fluid and cursive, with the first name "Sarah" being more prominent and the last name "Cooke" following in a similar style.

Sarah Cooke  
Professional Wetland Scientist,  
Fellow, Society of Wetland Scientist



- Legend**
- Black Diamond City Limits
  - UGA Boundary
  - SR 169
  - Road
  - Water Body
  - WADNR Streams
  - CAO Wetland boundaries
  - Wetland Buffer Alternative C
  - Category and Buffer Distance
  - Headwaters - 225 ft
  - CORE - 225 ft
  - I - 180 ft
  - II - 150 ft
  - III - 80 ft
  - IV - 50 ft
  - Stream Buffer Alternative C
  - Category and Buffer Distance
  - CORE - 225 ft
  - S - 200 ft
  - F - 150 ft
  - Np, Ns - 50 - 100 ft
  - Study Area
  - Lake Sawyer Watershed
  - Green River Watershed



Data Source: King County GIS, WA DNR

**Figure 1-1**  
**Core Area**  
**Most Intensive Processes**  
**Black Diamond UGA**

Sensitive Area Ordinance Update  
City of Black Diamond, WA