

Responsible Development

Phone: (650) 731-5611

PO Box 4057 Bellingham, WA 98227

March 16, 2014

To: City of Bellingham in care of Kim Weil Planning

Re: Lind/Wilken Wetland/stream permit

Comments of Responsible Development

A registered Not-for Profit Corp of Washington State

Kim,

The issue of mature forested wetlands being Category 1 wetlands is one that I believe we have resolved in the past. It is clear that Wetland A in this application is a mature forested wetland and is a Category 1 wetland as defined by the prior evaluation by Dr. Sarah Cooke in January of 2010, when she presented evidence that it met the criteria in a prior Hearing Examiner review of this situation. She presented information about its delineation; obligate wetland plant types, tree size and location and soil types, all of which definitively place this in the Category 1 definition. It is also contiguous with other wetlands of the Category 1 type, forming a mosaic of wetlands that warrant further protection.

Delineations by a developer's consultant that has in the past incorrectly identified wetland types around this same issue seems problematic. In addition to the testimony of Dr. Cooke, both Dr. John McLaughlin and Susan Myers (DOE) also provided additional information substantiating the fact that these are category 1 wetlands. And you may also recall that evidence of 18 trees with a diameter of 21" or more with their roots 100% within the delineated Wetland A was presented at that time. We believe the subdivision of wetlands is not allowed with different subsections being given different ratings. This has also been the subject of earlier clarification and the principles of which have not changed.

Sincerely,

A handwritten signature in black ink, appearing to read "Frank James".

Frank James for the
Members of the Board of Directors
Responsible Development

To: Kim Weil, kweil@cob.org City Council, Mayor's Office, Whatcom Land Trust Chuckanut Community Forest District

From SNA

Lind/Wilken Wetland/stream permit Comments from South Neighborhood Association

Kim, We believe the determination, that wetland A is not a mature forested wetland as claimed by the applicant's consultant Washington Forestry Consultants, Inc. is incorrect. We also believe the delineation of the wetland boundaries is incorrect. Wetland A is contiguous with the mosaic of wetlands, some of which have been determined Category I, in the Hoag pond, Interurban wetland, and Chuckanut Community Forest area. For that reason alone it requires the protection of category I wetlands.

We believe you should not rely on reports by consultants paid for by the developer to facilitate their project, especially when there is documented evidence from more qualified experts that contradict those reports. It should not be up to the neighbors and citizens concerned with protecting ecologically valuable wetlands to hire experts and lawyers to protect those wetlands, yet in preparation for the hearing before the Hearings Examiner in January 2010 we raised money to do just that. We hired Dr. Sara Cooke, perhaps the number one wetland scientist in the state, who contributed to the definition of Category I Mature Forested Wetlands. Dr Cooke determined that Wetland A is a category I wetland based on the mature trees present, wetland function, wetland soils and wetland plants. I spent some time in the field with Dr Cooke when she evaluated Wetland A. We were following the delineation line flagged by the Developer's previous consultant, Viki Jackson. At one point while we were following the south eastern delineation line Dr Cooke pointed out a clump of skunk cabbage 20' south of the delineation line. As you know by definition, if there is skunk cabbage, it is wetland. At that point the delineation was more than 20' north of where it should have been.

By the City's own CAO (BMC 16.55.280), wetland ratings must follow the DOE rating guide, which differ from the definition provided by Washington Forestry Consultants, Inc. Wetland A clearly meets Category 1 criteria in the DOE rating guide.

I expect you remember the hearing in January 2010 before the Hearings Examiner. During questioning by David Bricklin, who was hired by concerned citizens, you testified that in your best judgment you thought that because of the high functioning nature of the wetland, the buffer should be 100'. Your best judgment had been overruled by the Planning Director of the day and the required buffer allowed was an averaged 50'. Dr Sarah Cooke, Dr John McLaughlin, and Nick Sky were the wetland experts who provided testimony and evidence regarding the wetland conditions on the property and the inaccuracy of the Lind's (Viki Jackson) wetland assessment. Susan Myers (DOE) and Peter Fry testified as well. Mark Quenneville submitted a report showing photographic evidence of 18 trees with a diameter of 21" or more with their roots 100% within the delineated Wetland A.

Required actions in the Request for Information include determining the size of the wetland including maps of the entire wetland. The delineation provided of the south east border is incorrect so the size has not yet been determined. Mature trees in the wetland have not been accounted for. Please review the evidence provided at the hearing and look at the photos of the trees submitted by Mark Quenneville. Please contact Dr Sara Cooke and Dr John McLaughlin for more information. Please don't rubber stamp the developer's attempt to circumvent protection of wetlands.

Thank you,

Christopher Grannis

Peter Frye

Bobbie Carter

Monica Cassidy

Bob Dillman

President and board members of the South Neighborhood Association

Please keep us informed of all developments in this case. Will comments be available on line?

3/17/2014

• • •

Mark Quenneville
2702 30th Street
Bellingham WA 98225

Kim Weil
Planning and Community Development Department
210 Lottie Street
Bellingham, WA 98225

RE: Notice of Application
WET2005-00041, SUB2005-0098 & SEP2005-00105

Hearing Examiner Order HE-10PL-004: The Wetland Stream Permit and conditional Lot line Adjustment issued on 1/22/201 were remanded to the Director for further review. Specifically, "The wetland/stream permit, WET2005-00041, is remanded to the Director of Planning and Community Development for a determination of the category or categories of wetlands on the subject site and any modifications to the permit deemed appropriate as a result of categorization."

Finding of Fact #10: On June 21, 2006 the City requested additional information from Lind Bros. regarding the applications, including showing 100-foot buffers on wetlands A and B, the location of sewer or septic and other utilities, access road dimensions, location and design of storm water facilities, site plans showing setbacks, wetland and stream impacts from on and off-site development, and a completed SEPA checklist. This letter also **indicated that an increase in the required buffer to at least 100 feet was warranted because the wetlands performed at a relatively high level**, Wetland A scored 30 points for habitat function, and habitat functions are particularly sensitive to disturbance. (City's Exhibit D).

Also see HE Conclusion of Law 13 (P22, L1): "The Director's approval [of the wetland delineation] did not occur until issuance of the permit and that issuance was conditioned upon provision of additional information to determine the appropriate category for the wetland... The [planning] department was also aware that nearby property had been reclassified as a mature forested wetland."

The Application: During the wetland permit appeal hearing, it became evident that the Applicant pushed the boundaries of administrative compliance to the maximum, taking a speculative minimalist approach at every stage. The Application was filed at the close of the day December 5th 2005, only hours before the new CAO took effect. Being a Type I application, it portrayed the illusion that no environmental considerations were warranted. It was incomplete and went unnoticed by the City until 2008 when it was changed to a Type II

application. When the site plan was ultimately delivered, it showed 3 dwellings crammed into the frontage space of half the neighboring single dwelling. The poly-unusual lots were configured to accomplish the letter of the LLA law. Definitely a stark contrast to the very rural neighborhood plan adopted in the eighties.

The NEC Wetland Delineation report was later proven at the hearing to contain errors and omissions. Only 1 day before the Application was about to expire (2 years less a day) the Applicant submitted a completely different site plan and another incomplete wetland report which did not address the errors in delineation or wetland category of the first wetland report. Three credible wetland scientists testified that the south-east delineation was recorded more than 20 feet short of a patch of skunk cabbage and one lobe-shaped area scored as highland because the wrong slope-model was used in the NEC report. Kim Weil testified that this lobe, Wetland B, was known to be part of Wetland A¹. This indicates the erroneous nature of the delineation on the site drawing and thus, the buffers are mischaracterized as well. I have attached page 5 of Sarah Cooke's report (Exhibit Q3) which shows a sketch of what Sarah characterized as the delineation of an SC 4.0 Forested Wetland rated Category I and in her aural testimony.

The Applicant quibbled and delayed missing information or designs that clearly violated code and claimed the 100 foot buffer in the first MDNS rendered the site unbuildable equating it to a constitutional "Taking". The site plan, Exhibit A of the wetland permit, shows areas for septic fields and other activity in the wetland buffer contrary to 16.50.080 D. This unpermitted use was alarming enough to cause the former Director to specify acceptable uses of the buffer as a condition of the permit. It came to light in the appeal hearing that the approved site plan places a proposed building (situated by the appropriate setbacks) over-top of Wetland C and within the buffer of wetland A. **There is no way to construct the proposed building without certain net-loss of high functioning wetland.**

In summary, the site design, wetland delineations and mitigation plans do not meet BMC 16.50. The Applicant has argued-up the site plan to be marginal at best. In no way does this project benefit either the neighborhood or the environment. I strongly urge you to deny Wetland/Stream Permit number WET2005-00041, or at a minimum, condition it with the 100' buffers required under BMC 16.50.

¹ Page 553 - Vol III VERBATIM REPORT OF PROCEEDINGS
FRIDAY, JANUARY 28, 2011 THE HONORABLE DAWN STURWOLD, HEARING EXAMINER

The Applicant also had the opportunity to argue that the conditions of the permit represented a "Taking" and the Applicant also complained about the high cost of wetland permit conditions as well as the cost of litigating the permits to usable status. The Hearing Examiner rejected these hardship arguments and "remanded the wetland permit to the Director of Planning and Community Development for a determination of the category or categories of wetlands on the subject site and any modifications to the permit deemed appropriate as a result of categorization" only. It should be noted that the Hearing Examiner's Order also struck wetland permit condition #8 which allowed buffer averaging and mitigation.

16.50.080 - Buffers: Even before the subject application was complete and the City had site design information, the planning department was aware that the subject area contained irreplaceable or rare wetland types in the Puget Sound Basin and asserted its right (and obligation as custodians of Hoag Pond and other greenway wetlands) via BMC 16.50.080 to protect against a net loss of regulated wetland and stream functions. **"The buffer requirement must be applied to provide the most effective protection of the wetland/stream system based on actual site circumstances."** The City's due diligence to increase in the required buffer to at least 100 feet was warranted because the wetlands performed at a relatively high level.

Environmental Scientists & Experts: You heard Dr. Sarah Cooke, Dr. John McLaughlin, Nick Sky, Kim Weil and Susan Myer, a wetland specialist with the Department of Ecology testify that this very rare mosaic of wetlands is connected at many environmental levels. These same wetland experts testified that a 50-foot buffer is insufficient to protect against net loss of this sensitive wetland. Kim Weil recommended a 100-foot buffer regardless of the wetland categorization; I or II. John McLaughlin, PhD testified:

...**"The view of the scientific literature, I
9 believe even in one of the exhibits states that for
10 all functions associated with wetlands, a buffer of 50
11 feet is not adequate and for some of the functions you
12 need at least 200 feet for this kind of wetland."**²

Dr. Sarah Cooke, co-author of Washington State DOE Wetland Buffers: Use and Effectiveness³, testified and presented her report. She stated that a 50 foot buffer would not be sufficient to protect this particular type of wetland (she rated it as Category I) and testified:⁴

² VOL II Page 270 VERBATIM REPORT OF PROCEEDINGS, WEDNESDAY, JANUARY 5, 2011, THE HONORABLE DAWN STURWOLD, HEARING EXAMINER

... Doctor Cooke.

7 A. So 50 feet is not sufficient from an ecological
8 perspective.

9 Q. And -- and how large of a wet -- of a buffer might, I
10 mean what are you talking 60 feet, 100 feet, 200 feet,
11 I mean what -- what do you have in mind in terms of
12 what might be adequate.

13 A. Well, the literature says 300 feet and from my
14 observation that's about what it would take to protect
15 the wetland edge.

16 Q. All right.

17 A. From those trees coming down. Under the 2004 code,
18 it's stated 100 feet.

Issue Summary: The Applicant's delineation of Wetland A is indisputably wrong. Kim Weil, John McLaughlin and Sarah Cooke all agree. Sarah provided a sketch that more accurately depicts the boundary. Attachment A.

Five credible wetland scientist/specialists, including Susan Myer DOE agree under oath that a 50-foot buffer is insufficient protection for the subject wetlands. Environmental science literature supporting 100-foot, 200-foot and 300-foot buffers was presented to the City before and during the hearing. A proposed building encroaches on Wetland C causing certain net loss of wetland. The septic fields are nearer than 100 feet to the Fish & Wildlife protected creek and other surface water. All five of these wetland specialists stated that Wetland A was incorrectly scored as Category II and all stated that it meets the criteria for Category I.

Request 1: Susan Myer, Department of Ecology testified that the DOE would have the authority under section 401 of the Clean Water Act to regulate or intervene due to the proximity of the septic beds to surface water and the issue where the proposed building encroached on Wetland C. She said that the DOE would want these issues clarified [resolved] before any permits are issued. Since there is no change to the placement of the septic beds relative to the surface water and no change to the site drawing showing that the proposed building not encroaching on Wetland C, please do not issue the wetland permit until DOH's concerns have been satisfied.

³ Castelle, A.J., C. Conolly, M. Emers, E.D. Metz, S. Meyer, M. Witter, S. Mauermann, T. Erickson, S.S. Cooke. 1992. Wetland Buffers: Use and Effectiveness. Adolfson Associates, Inc. Shorelands and Coastal Zone Management Program, Washington Department of Ecology, Olympia, Pub. No. 92-10.

⁴ VOL III Page 422 VERBATIM REPORT OF PROCEEDINGS, WEDNESDAY, JANUARY 5, 2011, THE HONORABLE DAWN STURWOLD, HEARING EXAMINER

Request 2: BMC 16.50.060 gives the Director the authority to require adjustments to the wetland boundaries. [delineation] The same section puts the approval of the applicant's determination of the wetland boundary squarely on the Director. He/she has the ability to jointly select a wetland specialist who will delineate the disputed boundary in accordance with the Federal Manual for Identifying and Delineating Jurisdictional Wetlands. Regardless of the final determination of Wetland A category, please accept the input from the credible wetland scientists who have gone on record to dispute the delineation. Correcting the delineation will also better serve the wetland functions by providing accurately placed buffers.

Request 3: If the Director is unable to correct Wetland A delineation, use the Directors authority under BMC 16.50.080 and the enabling HE Order to increase the buffer from the minimum specified to a size that is appropriate for the subject wetland which is sensitive to disturbance. **"The buffer requirement must be applied to provide the most effective protection of the wetland/stream system based on actual site circumstances."**

Request 4: Regardless of the final determination of Wetland A category, exercise the Directors authority under 16.50.080 to set the minimum buffer to at least 100 feet. The Hearing Examiner's Order provides the Director with the ability to make and any modifications to the permit deemed appropriate as a result of categorization."

Request 5: Please consider that the Applicant's marginal designs were barely vested in obsolete environmental code. If constructed with the same carelessness and disrespect for the public demonstrated during the application process, certain risk, not just to Wetland A, but the entire connected wetland landscape including Hoag Pond, the Chuckanut Community Forest Park District and other greenways west of the subject property. An appropriate sized buffer is the Director's only line of defense for the connected wetlands and public interest.

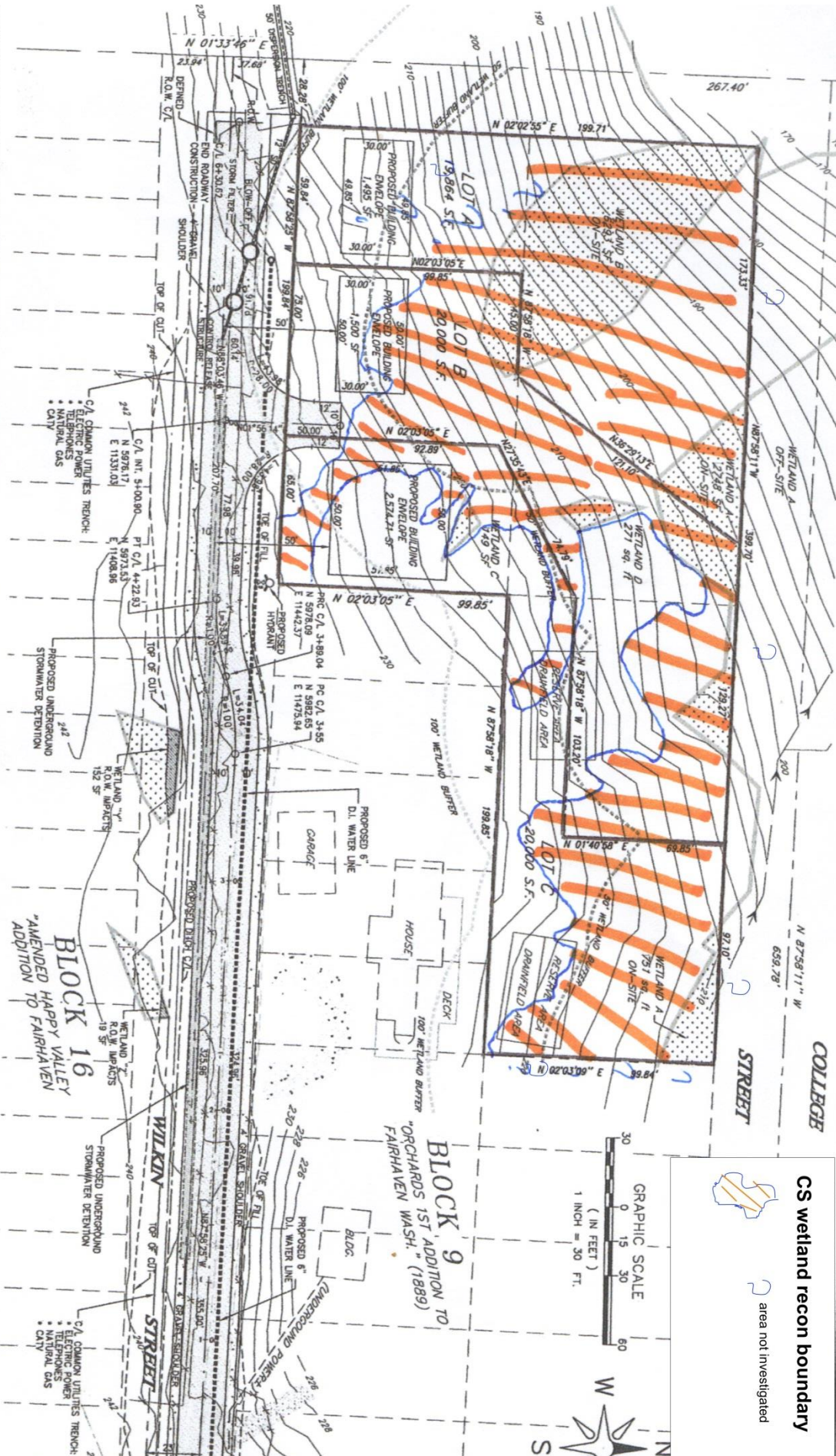
Thank you for the opportunity to provide input on this crucial civic issue.

Sincerely,



Mark Quenneville

Attachment A: sketch of delineated category I wetland by Sarah Cooke



From: Mark Quenneville
Sent: Tuesday, March 18, 2014 5:00 PM
To: kweil@cob.org
Subject:

RE: Notice of Application

WET2005-00041, SUB2005-0098 & SEP2005-00105

Hearing Examiner Order HE-10PL-004: The Wetland Stream Permit and conditional Lot line Adjustment issued on 1/22/201 were remanded to the Director for further review. Specifically, "The wetland/stream permit, WET2005-00041, is remanded to the Director of Planning and Community Development for a determination of the category or categories of wetlands on the subject site and any modifications to the permit deemed appropriate as a result of categorization."

See HE Conclusion of Law 13 (P22, L1): "... The [planning] department was also aware that nearby property had been reclassified as a mature forested wetland."

Dear Kim,

With all of the activity, opinions, emails and arguments about Category I wetland in play today, I thought that you might appreciate some clarification about the methodology of characterizing mature forests from the de facto subject matter expert, Tom Hruby.

The City's CAO and request for information letter calls for the determination of mature forested wetland performed in accordance with:

Hruby, T. 2004. Washington State wetland rating system for western Washington –

Revised. Washington State Department of Ecology Publication # 04-06-025.

The City's letter correctly defines mature forested wetlands as those wetlands at least one acre in size or larger with at least eight trees 21 inches in diameter at breast height (DBH) and/or 80 years old.

I notice that reports submitted by Galen Write are referring to **average** diameters (DBH) exceeding 21 inches and the **average** diameter of trees in a stand. It also refers to areas having at least 8 trees **per acre** having a DBH exceeding 21 inches. According to Tom Hruby, this is mis-interpreting the WSWRSWW to mean the entire unit must have 8 trees per acre having an average diameter of 21" DBH. I believe Vicky Jackson of NES made the same mistake when evaluating the Wetland categorizations of Fairhaven Highlands.

Please see the attached clarification from Mr. Hruby where he basically says, "read the manual".

Thank you.

Mark Quenneville

Tedd Judd
To kweil@cob.orgMe
Mar 16 at 11:00 PM
Dear Kim Weil:

Here are my comments regarding the WET2005-00041, SUB2005-00098, & SEP2005-00105 Wilken street Wetlands/stream permit application. I live at 2521 Broad St. in front of Hoag's Pond. Hoag's creek coming out of Hoag's Pond flows through my property and the proposed construction is on wetlands flowing into Hoag's pond. I am one of the Park Stewards for Hoag's Pond. I walk around the pond and through the surveyed wetlands on average once a week and have done so for the past 14 years and so I know the area well. I need boots at least half the year because large portions of the trail are very muddy and many stretches have to be crossed on logs most of the year, particularly on the East side of the pond, the area in question.

I am not a forestry expert, but I have read the 12/16/10 report by Galen Wright of Washington Forestry Consultants, and it was hard to recognize the woods that I know by his report. Mr. Wright gives no indication of how the boundaries of the wetland were determined and freely admitted that "The size of this forested wetland has not been accurately determined." Clearly, therefore, this represents inadequate data. He gives no further indication as to how he chose the portion of the wetland he surveyed, but it appears that he picked out a small portion to be able to give the best possible report for the developers who hired him. In other words, it looked like he cooked the data.

As I read his map, his report is highly inaccurate in that he indicates that this sector he surveyed consisted only of red alder and cottonwood. There are a number of large, mature Western red cedars and Douglas fir in that sector that go unmentioned. He said there were no logs that were larger than 12 inches at the smaller end. Well, duh! Even if a giant Sequoia falls it's going to be smaller than 12 inches at the smaller end. He said that there are no snags. That would be news to the piliated woodpeckers who have been systematically taking apart a snag right next to the trail and the feeder stream to Hoag's Pond in the sector sampled. And there are many others, as well. He said that there are some trees over 21 inches in diameter but most trees are young and small. Well, duh, again. It is a truism of every forest, immature to old growth, that most trees are young and small. Even in old growth there are lots of small trees that never get to grow up because of the few large trees that shade them out. He says that the large trees occupy less than a half acre as determined by the arial photo, but, again, does not indicate what area he is taking into account in making that determination. Also, the arial photo is undated, so it is unknown if it represents the forest at the time of his survey. From what I can tell from the structures in the photo, it appears to pre-date my time here and so is probably at least 14 years old and perhaps much older. He must have worked hard to find the spot to take photo A, because it is not at all representative of the forest. I invite you to come out and see for yourself. I'll be happy to show you the large trees, snags, logs, and diversity. How about Wednesday?

The 9/26/10 report by Dr. Sarah Cooke very specifically addresses the issues of the boundaries of the wetlands and Mr. Wright appeared unaware of or entirely indifferent to this information.

The forest in question is also relatively free of invasive species, and is a high-quality ecosystem and a jewel in our park system. Hoag's Pond in it's rich diversity of wildlife and habitat is a delight to its many visitors, but it is filling in and eutrophying, speeded, in part, by previous upstream development, including freeway construction. Further inadequately mitigated and protected development in this wetlands and watershed threatens this urban gem. We have been working over the past 14 years to remove invasive species and shade the stream towards the day when anadromous fish may be able to return to this watershed. Such development would also threaten this project.

I urge you to reexamine the quality of the science applied to this project and recognize that this is a mature forest and a Class I wetlands and was at the time of the application and all such protections should be applied.

I would like to know the outcome of the decision on this.

--

Tedd Judd, PhD, ABPP-CN

Diplomate in Clinical Neuropsychology

Certified Hispanic Mental Health Specialist

Cross-Cultural Specialist

12 Bellwether Way #223

Bellingham, WA 98225 USA

360 255 2505 X101 scheduler X111

teddjudd@gmail.com

From: Peter Frye
Sent: Tuesday, March 18, 2014 11:04 AM
To: 'kweil@cob.org'
Cc: 'jthomas@cob.org'
Subject: WET2005-00041

Dear Ms. Weil,

I am writing about Wetland/Stream Permit number WET2005-00041.

As you are aware from testimony at the January 2010 hearing, wetland scientists, with considerably more expertise than the one hired by the applicant, stated that the wetlands on this site are Category I Mature Forested Wetlands that require a 100' buffer under BMC 16.50. These same experts also stated that these wetlands have a high enough function rating to qualify as Category I without mature trees. At this hearing, you also stated that due to the high function rating of these wetlands, a 100' buffer is necessary to provide adequate protection. If this application had been filed under the current Critical Areas Ordinance, which utilizes the best available science, the buffers would be doubled. Finally, there is ample evidence that these wetlands are part of a contiguous wetland connected to Hoag's Pond and Chuckanut Ridge, where we know there are Category I wetlands, and therefore they must carry the same rating.

There is simply no comparison between the level of expertise of Dr. Sarah Cooke, one of the preeminent wetland scientists in the state, and Katrina Jackson. Furthermore, any consultant hired by the applicant has a built-in financial incentive to minimize the findings in order to benefit the applicant, and it should not be up to concerned citizens to hire experts at their own expense to produce unbiased reports.

In no way does this project benefit either the neighborhood or the environment. I strongly urge you to deny Wetland/Stream Permit number WET2005-00041, or at a minimum, condition it with the 100' buffers required under BMC 16.50.

Thank you,

Peter Frye

2402 30th Street

Bellingham, WA 98225