

From: [David McDonald](#)
To: [Oliver Orjiako](#)
Cc: [Ann Foster](#); [Gary Medvigy](#); [Michelle Belkot](#); [Karen Bowerman](#); [Glen Yung](#); [Sue Marshall](#); [Kathleen Otto](#); [Christine Cook](#); [Jose Alvarez](#); [Sonja Wiser](#); [Rebecca Messinger](#)
Subject: March 26, 2024-Separate Business Item #1
Date: Monday, March 25, 2024 5:30:34 PM
Attachments: [Council-Ltr-BERK Contract-240325.pdf](#)

Dr. Orjiako:

Ms. Foster requested that I send this letter to you regarding the BERK consulting contract that is on the Separate Business items (#1) for tomorrow's Council meeting.

Please contact her if you have questions.

Thank you for your attention to this matter.

Best Regards,

David



Friends of Clark County

PLANTING THE SEEDS OF RESPONSIBLE GROWTH

March 25, 2024

Clark County Councilors
Public Services Building
1300 Franklin Street
6th Floor
Vancouver, Washington 98660

Via pdf and e-mail to Oliver.Orjiako@clark.wa.gov

Re: March 26, 2024 Separate Business Item # 1 and For the Record—FRDU

Dear Councilors:

My name is Ann Foster, and I am President of Friends of Clark County (FOCC). FOCC is providing this letter to request that the Council not approve the FRDU consulting contract with BERK several reasons.

First, we incorporate by this reference the letter sent by FOCC on January 9, 2024 requesting the County put a hold on any further efforts regarding the railroad operation and/or FRDU until the issues with the operator are resolved.

Second, the County should not be spending citizen's tax dollars to engage in a process that would provide a financial public benefit for the current operator. According to the County, the implementation of the Freight Rail Dependent Use as part of the comprehensive plan update is currently inextricably intertwined with PVJR through the lease agreement¹. The County Manager has stated the following "The lease between the County and PVJR does state that PVJR must comply with all applicable local, state and federal laws". However, the president of PVJR has written scores of letters and emails, not just to the County but to the state and federal regulatory agencies, that state PVJR is exempted from complying with those laws.

In fact, the County told the operator to stop work without obtaining the appropriate permits on October 17, 2023. Previously, the state DOE had told the operator to stop work in a letter dated August 16, 2023. DOE and the USACE again wrote non-compliance letters to the operator in October 2023, but the operator still refused to cooperate with, much less comply with the requests by the County, the state agencies and the federal agencies.

On November 7, 2023, the County determined that PVJR trespassed onto county land and, according to the County's report to DPOE dated December 19, 2023,

¹ FOCC disputes the position that the County has taken that they cannot terminate the lease under §3.12.1.1 but the County is stating that it is waiting for the state and federal agencies to finish their investigations.

Activities documented at the site included unauthorized placement of rock on county property, burying of county manholes with rock, modifications to a county-owned stormwater facility fence, as well as modifications to conveyance infrastructure resulting in turbid discharge from PVJR’s project site² to the Curtin Creek Natural Area³

Further, the report went on to state the following:

The stormwater facility FA2855 impacted by PVJR discharge had a turbidity level of 60 NTU, which was well above upstream samples, indicating a source of turbid discharge in the vicinity of the PVJR project site, and a violation of state water quality standards. Follow-up water quality samples were collected on December 1, 2023 and December 6, 2023 documenting continuing exceedance of turbidity water quality standards due to continued discharge of sediment/erosion from the PVJR site....Due to associated land clearing activities⁴, the stie was referred to the Department of Ecology, Army Corps, Washington Department of Fish and Wildlife, and the Environmental Protection Agency. A joint site visit⁵ was held on November 16, 2023 to tour the PVJR site at Barberton. Significant land clearing, wetland filling, and modification to existing stormwater conveyances were observed at the project site including installation of new ditches and culverts to convey water towards FA2855 from adjacent parcels.⁶

.....
Clark County met with Ecology on December 7, 2023 to discuss this unique situation. During the December 7, 2023, meeting Department of Ecology officially determined that the County’s noncompliance requiring a G20 to be submitted within 30 days.
.....

² The “project site” is the 20-acre parcel where PVJR engaged in all of the unpermitted and unlawful activities that are currently the subject of investigations by local, state and federal agencies for multiple violations of environmental laws.

³ This is the area the County recently spent millions of dollars to restore and has place heavy emphasis on its importance-- https://clark.wa.gov/sites/default/files/dept/files/public-works/Stormwater/Capital_Projects/CurtinCreekSign-11-7-13.pdf.

⁴ In a January 9, 2024 email, Councilor Yung asked April Furth “Am I correct the trees removed from the Barberton PVJR property that if permitting would have taken place would not have been able to be removed?” to which Ms. Furth replied “Yes, anyone else would have had to mitigate for the oaks and riparian habitat that was impacted”.

⁵ This would be the second joint site visit and the third site visit by DOE.

⁶ Please note that this operator has claimed on numerous occasions his desire to protect the environment and only use the highest and best standards in his work activities. To be snide, if this is highest and best effort at compliance to protect the environment, we shutter to think what his poor efforts would look like on the ground.

PVJR's modifications to stormwater flows from their Barberton Project Site at Curtin Creek have resulted in unlawful discharge to the county's stormwater infrastructure that would not normally meet Phase 1 minimum requirements⁷

Thus, DOE found Clark County in violation of state law due to, in part, "Clark County's inability to enforce county stormwater and development code requirements S5.C.5 Controlling Runoff from New Development, Redevelopment, and Construction sites on a private property owned by the Portland Vancouver Junction Railroad (PVJR) due to PVJR's **refusal to adhere to local development permitting by claiming federal pre-emption.**".

At bottom, PVJR emasculated a pristine environmental site without any permits, defied multiple requests from state and local agencies to comply, trespassed on county lands, destroyed county property, and diverted stormwater discharge directly into the Curtin Creek Natural area. The result is that the County is in violation of state law for failure to enforce its county stormwater laws and had to file non-compliance reports and notices with DOE. However, after all the operator's illegal and unpermitted actions, the County merely "requested" that the operator meet the 9 minimum requirements set forth in the code.

On November 17, 2023, DOE sent its third letter of non-compliance to PVJR.

On December 8, 2023, the County had a meeting where the operator claims that "agreements" were made. Yet, no "agreements"⁸ have been posted to the County FAQ site and, therefore, the public does not know what was agreed to in terms of liability and fixing the damages outlined in the County's report.

On December 18, 2023, the United States Army Corps of Engineers issued a railroad cease and desist order. On December 26, 2023, the EPA accepted lead agency status for obtaining compliance of PVJR.

On January 4, 2024, despite the Cease-and-Desist order, and the prior damages done to county property and the Curtin Creek environment, the operator sent an email to the County stating it was moving forward with its project in Chelatchie and provided the county with an illustrative rendition of his intentions. The status of the County's response is unknown.

On January 12, 2024, just over two months from the "discovery" by the County of the unlawful, unpermitted, and unauthorized activities in Barberton, the County sent a second notice to the operator. In that notice the County stated:

As stated above, the county's intent is to ensure compliance with the lease agreement. Pursuant to sections 3.12, 5.1 and 10, you are required to comply with all applicable federal, state and local laws

⁷ There are 9 minimum requirements. The County has stated in this report that it "has **requested** PVJR walk through the nine minimum requirements for new development". It is unclear why there is a simple "request" or what "walk through" means.

⁸ It is likely that some of those agreements involved the county's "request" that the operator "walk through" the 9 minimum requirements.

and regulations. Failure to do so constitutes a material breach of the terms and conditions of the lease agreement....In sum, the County expects PVJR to fully cooperate with each of the aforementioned regulatory agencies. Moreover, if any of these agencies establish and affirmative finding of a violation, or if any penalties are imposed against PVJR, **the county will consider this a material breach of the lease and will invoke sections 3.12 and 14 of the agreement.**

The operator's response to that letter was:

I acknowledge receipt of this email but do not agree that the properties owned by others, properties owned by PVJR which are not under the lease, nor work performed by PVJR on these properties, nor work performed by PVJR on these properties, nor work performed by subcontractors on ANY property is covered by the breach clause. Only PVJR operations on Leased property are subject to the breach clause, none of which at question under this letter from the Army Corp (sic).

In other words, the operator told the County to p—s off.

On January 30, 2024, the county had a long call with all of the agencies. There are no notes, or “read out”, from that call.

On February 14, 2024, the EPA sent a letter to PVJR. Although the letter is extensive, what is very telling is the following:

Lastly, the EPA is aware that PVJR and/or others acting on its behalf or at its direction may be continuing work on one or both sites subject to this action. **The EPA hereby advises you to cease and desist** from any further unauthorized discharges into any waters of the United States, including wetlands, at the Sites. Work in the waters of the United States, including wetlands, without violations that would subject PVJR to civil and/or criminal penalties.

The crux of that paragraph is that despite being under the microscope by citizens, local county officials, state agencies and federal agencies, the federal agency in charge believes that PVJR continues to violate the December 18, 2023 cease and desist order.

The EPA letter gave PVJR until February 28th to provide the documentation required by the letter if PVJR wanted to attempt to resolve the matter and gave a 90-day timeline for resolution. It is unknown if PVJR is attempting in any way to comply with the letter's directives. So far, 40 days have passed giving PVJR 50 days to come to a resolution or face enforcement actions set forth in the letter.

Thus, the continuing failure of the Railroad Operator to comply with local, state and federal laws means that going forward with the implementation of development regulations will put in place a mechanism for development in the current overlay. Taking such action means the County

will be dependent upon the railroad operator, who has engaged in a year-long battle with the County regarding its obligations under the lease agreement and what the lease agreement covers, to operate the railroad. In addition, it means that the County will be dependent upon an operator who continues to be non-compliant with local, state and federal directives regarding environmental and development laws.

According to the County, they are limited by the lease agreement to actions that can be taken. At this juncture, the County seems to be waiting for the agencies to finish their investigations which, it appears from all public documents, will be difficult because not only does PVJR believe it is covered by local, state, and federal laws, PVJR continues to be in non-compliance. We urge the County to just press pause, save the \$100,000 paid to BERK and wait for the agencies to come to their conclusions.

Second, BERK should not be the selected consultant. As some may recall, BERK was the consultant on the RILB. During that process, many citizens were heavily involved and, given the ultimate report, BERK mostly ignored the comments and gave the “green light” to the County approving the RILB over the objections of many citizens. The County, based upon BERK’s recommendation, approved the RILB and then spent the next several years in litigation as both the GMHB and the Washington Court of Appeals found that the RILB violated the Growth Management Act, invalidated the RILB and, ultimately, the county repealed the RILB. Thus, the consultant the county is proposing to use, gave approval to what was later found to violate the Act. In addition, BERK has already decided that these AG lands should be industrialized. Thus, the county is proposing to hire a consultant who has a pre-determined bias to find that industrialization is appropriate no matter what the citizens contribute to the process.

Third, the scope of work in exhibit A includes Task 2 which includes consulting with utilities to provide urban services. Since 2017, the County PA’s office has consistently stated that SB 5517 does not provide for the allowance of urban services in the FRDU, and the Exhibit A should make it clear that any utilities to be considered do not include urban services including public sewer and water. In addition, Task 3, especially given the current Growth Board determination regarding the Chelatchie Bluff SMO should have that an EIS may be required as part of the SEPA determination.

Thank you for allowing us to comment on this Separate Business item #1.

Sincerely,

Ann Foster

Ann Foster, President
On Behalf of Friends of Clark County

Cc: Councilors (via email)
Kathleen Otto, County Manager (via email)
Christine Cook, SDPA (via email)
Jose Alvarez, Project Manager (via email)
Sonja Wiser (for FRDU record) (via email)
Rebecca Messinger (for FRDU record) (via email)