

From: [Christine Cook](#)
To: [Oliver Orjiako](#); [Jeffrey Delapena](#)
Subject: FW: Public Comment Item 5.2 August 21, 2024 Meeting
Date: Wednesday, September 4, 2024 1:35:52 PM
Attachments: [image001.png](#)
[image002.png](#)
[Second Order of Stay FOCC v Clark CountyGraniteBRP.pdf](#)

Hello, Oliver and Jeff,

Oliver, have you seen the below messages from Howsely?

Rebecca tells me that Jeff does not have these email messages in a record, or on the department's webpage. Is that correct? If so, please post it with comments re Chelatchie Bluff, and please enter it into the record of Chelatchie Bluff compliance.

Thank you,
Chris

Christine M. Cook,
Senior Deputy Prosecuting Attorney

Clark County Prosecuting Attorney's Office,
Civil Division,
P.O. Box 5000,
Vancouver, WA 98666-5000
564-397-4775

From: James D. Howsley <jamie.howsley@jordanramis.com>
Sent: Wednesday, August 21, 2024 12:22 PM
To: michelle.belkot@clatk.wa.gov
Cc: James D. Howsley <jamie.howsley@jordanramis.com>; Gary Medvigy <Gary.Medvigy@clark.wa.gov>; Christine Cook <Christine.Cook@clark.wa.gov>
Subject: FW: Public Comment Item 5.2 August 21, 2024 Meeting

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.

Dear Councilor Belkot:

I mistyped your email address so resending this to make sure you see this before the Work Session.

Many apologies.

Best,

Jamie

James D. Howsley | Attorney
OR Direct: (503) 598-5503
WA Direct: (360) 567-3913

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From: James D. Howsley <jamie.howsley@jordanramis.com>
Sent: Wednesday, August 21, 2024 12:17 PM
To: gary.medvigy@clark.wa.gov; michell.belkot@clark.wa.gov; Karen Bowerman <Karen.Bowerman@clark.wa.gov>; Glen Yung <glen.yung@clark.wa.gov>; sue.marshall@clark.wa.gov; 'Cook, Christine' <Christine.Cook@clark.wa.gov>
Cc: pmullaney@schwabe.com; Ordon-Bakalian, Keenan <KOrdon-Bakalian@schwabe.com>; ramona.monroe@stoel.com; James D. Howsley <jamie.howsley@jordanramis.com>
Subject: Public Comment Item 5.2 August 21, 2024 Meeting

Dear Chair Medvigy and Councilors Belkot, Marshall, Yung and Bowerman:

We are submitting this public comment in regards to item 5.2 on today's agenda. And for your convenience I have attached a copy of the Second Order of Stay from the GMHB.

1. Before the County Council takes any action you should request that staff engage with DOE so that DOE more fully understands the timing and posture of this case and that the Growth Board has stayed compliance.
2. The attached Order from the Growth Board clearly states that "The Board's FDO and associated compliance proceedings... shall be stayed until such time as the pending judicial appeal is resolved."
 - a. In the rationale of the decision the Growth Board understands that the parties have the right to appeal and that should the Growth Board lose that the invalidity goes away

- b. And that taking additional compliance actions, such as repealing the ordinance, would “...render the Court of Appeals review moot and would not be a good use of judicial or administrative resources.” Page 4 of attached order
 - c. In other words, there is a recognition to preserve the status quo until the appeal is resolved and the state granting agencies should understand that
3. The County and private parties have proceeded forward with due speed in the appeal:
- a. Getting a direct review by the Court of Appeals, Division II
 - b. Which upon no input from the parties to the case got transferred to Division I which has delayed this case even though it was briefed almost a year ago.
 - c. The oral argument date suggested by Division I had to get moved because the Friends of Clark County’s attorney was not available even though all other parties were

There are interim measures that should be taken to talk with state agencies as the Growth Board clearly recognizes the rights of the parties to appeal the case and not wanting to inadvertently cause the case to be mooted. We appreciate your thoughtful consideration of these brief comments.

Best,

Jamie

James D. Howsley | Attorney
OR Direct: (503) 598-5503
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1 BEFORE THE GROWTH MANAGEMENT HEARINGS BOARD
2 WESTERN REGION
3 STATE OF WASHINGTON
4

5 FRIENDS OF CLARK COUNTY,

6
7 Petitioner,

8 v.
9

10 CLARK COUNTY,

11 Respondent,
12

13 and

14 GRANITE CONSTRUCTION COMPANY

15 and
16

17 BRP MINERAL, LLC,

18 Intervenor.
19
20

Case No. 22-2-0002

SECOND ORDER OF STAY

21 This matter comes before the Board on Respondent Clark County's (County)
22 Statement of Actions Taken to Achieve Compliance (SATC) and Motion to Stay
23 Compliance Proceedings (County's SATC) filed on October 2, 2023. The County requests
24 the Board issue an Order of Stay pending resolution of an appeal with the Court of
25 Appeals.
26

27 The Board issued an earlier Order of Stay on October 16, 2023, however, that Order
28 was issued prematurely and was later withdrawn as Petitioner was not given an adequate
29 opportunity to respond. Petitioner has since filed its Response to County's Statement of
30 Actions Taken to Achieve Compliance and Opposition to Motion to Stay Compliance
31 Proceedings (Petitioner's Response).
32

1 In response to the County's report of issues with its computer networks to the Board,
2 the Board granted the County additional time to reply.

3 Intervenor Granite Construction Company and BRP Mineral, LLC (Intervenors)
4 together filed Intervenor's Response to County's Statement of Actions Taken to Achieve
5 Compliance (Intervenors' Response) on October 30, 2023. The County filed its Response
6 to Objections to Statement of Actions to Achieve Compliance (County Response to
7 Objections to SATC) on November 13, 2023.

8
9 WAC 242-03-860 provides:

10
11 The board pursuant to RCW 34.05.550(1) may stay the effectiveness of a
12 final order upon motion for stay.

13 A stay may be granted if the presiding officer or board finds:

14 (1) An appeal is pending in court, the outcome of which may render the
15 city or county compliance efforts futile or unduly burdensome; and

16 (2) Delay in application of the board's order will not substantially harm the
17 interest of other parties to the proceedings; and

18 (3)(a) Delay in application of the final order is not likely to result in actions
19 that substantially interfere with fulfillment of the goals of the GMA,
20 including the goals and policies of the Shoreline Management Act or the
21 State Environmental Policy Act; or

22 (b) The parties have agreed to halt implementation of the noncompliant
23 ordinance and undertake no irreversible actions regarding the subject
24 matter of the case during the pendency of the stay; and

25 (4) Delay in application of the final order furthers the orderly
26 administration of justice.

27 The board's order granting a stay will contain appropriate findings and
28 conditions. The board may require periodic status reports from the
29 parties. An order denying stay is not subject to judicial review.

30 BOARD ANALYSIS

31 In this Board's March 22, 2023, Final Decision and Order (FDO), the Board struck
32 down Clark County's approval of a comprehensive plan map amendment that designated
certain properties with a surface mining overlay (SMO). The Board found that the County
failed to complete adequate environmental analysis prior to the adoption of Ordinance

1 No. 2022-07-01(B). The Board found that the continued validity of Ordinance No. 2022-07-
2 01(B), in particular, Section 2(5) that amended the County Comprehensive Plan and zoning
3 designation Forest Tier 1 (FR-80) to add a SMO on four parcels totaling 330 acres,
4 substantially interfered with Goal 10 of the Growth Management Act (GMA) and this
5 rendered the Ordinance invalid under RCW 36.70A.302.
6

7 Subsequently, the County's responsible official withdrew the determination of non-
8 significance (DNS) under the State Environmental Policy Act (SEPA) that he had
9 previously issued regarding the mining overlay application and issued a determination of
10 significance (DS) in its place.
11

12 The County reports that it and Intervenors have petitioned for judicial review of the
13 Board's decision. Clark County Superior Court certified direct review for transfer to Division
14 II of the Court of Appeals. The Court of Appeals has accepted review and final briefing from
15 the parties is due in December.¹ As the County points out, if the appeal is sustained, the
16 effect would be to overturn the FDO on Issue 1, SEPA, eliminating the sole basis for which
17 the Board ordered the County to come into compliance.
18

19 Petitioner raises concerns about the consequences were the Board to rescind
20 invalidity.² As explained further in this Order, that will not happen at this time.
21

22 Regarding the County motion for a stay, Petitioner points out the that the outcome of
23 an ultimate decision from the Courts is unknown, however, that is true in any appeal. Next,
24 Petitioner argues that "delay in application of the final order will frustrate the purpose of the
25 FDO since the County knows how to come into compliance (repeal the ordinance) but has
26 firmly stated that it does not want to come into compliance."³ This statement is subject to
27 some interpretation. Clearly, County staff have requested that the mine operators prepare
28 an Environmental Impact Statement (EIS), and considering the pendency of an appeal,
29

30 _____
31 ¹ County's SATC at 3-4.

32 ² Petitioner's Response at 2.

³ *Id.* at 18.

1 they have refused. But in absence of a reversal by the Courts, the purpose of the FDO will
2 not be frustrated, as no permits will be issued in the meantime.

3
4 Petitioner's concern seems to be focused on the suggestion that "if the requirement
5 for compliance is 'stayed' and the Order of Invalidity is lifted, then Granite could come in,
6 produce an EIS and then file an application for mining because the SMO is still in full force
7 and effect absent the Order of Invalidity."⁴ However, because the Board is not lifting the
8 order of invalidity, that concern is not well placed.

9
10 Petitioner's third concern that "if the Board either finds compliance, or stays
11 compliance, but does not leave the Order of Invalidity in place, then there is no 'freeze' on
12 the positions"⁵ is also not a basis for denying the motion for a stay. As explained below,
13 the Board will not be finding compliance nor lifting invalidity at this time.

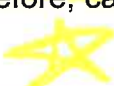
14
15 Finally, the Board disagrees with Petitioner's assertion that the fact that the Board's
16 FDO is now on judicial review is not a sufficient reason (when considering the other factors)
17 to grant the stay. As the County points out, requiring it to take additional compliance
18 actions, while the FDO is on appeal, would render the Court of Appeals review moot and
19 would not be a good use of judicial or administrative resources. In addition, the Board takes
20 notice that the expense of completing detailed environmental review consistent with the
21 Board's FDO is not inconsiderable. Staying the compliance proceedings while the FDO is
22 on appeal is a reasonable step.
23

24 The Stay

25
26 Under the present scenario, the County has demonstrated compliance with each of
27 the criteria for a stay set out in WAC 242-03-860 and the Board finds:
28
29
30

31 ⁴ *Id.* (emphasis omitted).

32 ⁵ *Id.* at 19.

- 1 1. The pending appeal, as it focuses on the sole area on which the Board found
2 non-compliance, could render County efforts futile should the County and
3 Intervenor prevail in that appeal.
- 4 2. Delay in application of the Board's FDO would not substantially harm the
5 interests of the parties to the proceedings in that Intervenor Granite has not
6 completed an EIS and, therefore, cannot currently apply for project permits to
7 mine the property. 
- 8 3. A stay would not substantially interfere with GMA goals or policies as
9 Intervenor do not currently have the ability to engage in mining activity on
10 the properties at issue.
- 11 4. Delay in the application of the FDO, i.e., staying the compliance proceedings
12 pending appeal, furthers the orderly administration of justice.
13
14

15 Compliance

16
17 It ought to be sufficient to end here, as further direction regarding the County's
18 actions must await the resolution of the judicial appeal. However, the County suggests that,
19 by withdrawing the DNS, the County has now come into compliance with SEPA.⁶
20 Intervenor go further and urge the Board now issue an order "finding that Ordinance
21 No. 2022-07-01(B) ... complies with the Board's order requiring a detailed analysis of the
22 environmental impacts pursuant to SEPA, and respectfully requests that the Board issue
23 an order finding compliance in this regard."⁷ The County and Intervenor apparently
24 misconstrue the purpose of environmental review in the context of comprehensive plan
25 amendments.
26

27
28 SEPA requires that local governments, such as the County, "Include in every
29 recommendation or report on *proposals* for legislation and other major actions significantly
30

31 ⁶ See County's SATC at 2.

32 ⁷ Intervenor's Response at 1-2.

1 affecting the quality of the environment, a detailed statement by the responsible official on:
2 (i) the environmental impact of *the proposed action*.⁸ That is, environmental review under
3 SEPA is intended to inform decision making. The Board invalidated Ordinance No. 2022-
4 07-01(B) due to the County's failure to complete adequate environmental review *prior* to its
5 passage. The County has withdrawn the DNS and issued a DS, and now will require the
6 applicant to complete an EIS regarding the subject property.⁹ Yet, as the County notes,
7 "Granite has not responded to the DS by submitting an EIS or any other additional
8 environmental information" ¹⁰ While this may be understandable given that the Granite
9 has appealed the DS to the County Hearing Examiner, and the Board's FDO is on appeal
10 to the Court of Appeals, the fact remains that the EIS has not been completed. The
11 inadequacy of the environmental review that preceded the adoption of Ordinance No.
12 2022-07-01(B) has not been cured. One might optimistically hope that if the EIS is
13 completed, County staff and elected officials will consider it going forward, which is the
14 purpose of environmental review documents, after all. It is not to create a *post hoc*
15 rationalization for past decisions of the County. Unless and until the Board's FDO is
16 reversed, and the applicants complete the environmental review required by the County,
17 the County has not come into compliance.
18
19
20

21 Despite the Petitioner's concern that the Board might rescind the determination of
22 invalidity made in the FDO, the County has not requested that step.¹¹ Nor would the Board
23 consider it at this stage. However, while noting that is has not requested a rescission of
24 invalidity, *merely* a finding of compliance, the County requests that the Board determine
25 that the County has complied with SEPA.¹² This makes no sense. Pursuant to
26

27 _____
28 ⁸ RCW 43.21C.030(c)(i) (emphasis added).

29 ⁹ County's SATC at 2.

30 ¹⁰ *Id.*

31 ¹¹ Although the County has not requested a rescission of a determination of invalidity, it asks the Board to find
32 the County in compliance with regard to SEPA. The County does not explain how the Board would find
compliance yet maintain invalidity *simultaneously*.

¹² County's Response to Objections to SATC at 2-3.

1 RCW 36.70A.302 (1)(a),¹³ the Board may determine that part or all of a comprehensive
2 plan or development regulations are invalid if the Board makes a finding of noncompliance
3 and issues an order of remand. The Board imposed invalidity because the County adopted
4 the SMO without adequate environmental review. As the County admits, that
5 environmental review (the EIS) has not been completed, nor has Ordinance No. 2022-07-
6 01(B) been repealed.¹⁴ Finding the County has complied with SEPA in the context of the
7 GMA, but preserving invalidity, would be irrational. Both the Board's findings of
8 noncompliance and invalidity remain in place.
9

10
11 **ORDER**

12 The Board's FDO and associated compliance proceedings in Case No. 22-2-0002
13 shall be stayed until such time as the pending judicial appeal is resolved. The parties are to
14 file a joint status report by May 20, 2024 or sooner should the Court of Appeals render a
15 decision before that date.
16

17 For the present time, the Board expressly does not find that that County has come
18 into compliance with the GMA or SEPA, nor does the Board lift the order of invalidity with
19 regard to Ordinance No. 2022-07-01(B).
20


21 DATED this 28th day of November, 2023.

22 

23 _____
24 James J. McNamara, Presiding Officer

25 

26 _____
27 Rick Eichstaedt, Board Member

28 

29 _____
30 Bill Hinkle, Board Member

31 ¹³ See also WAC 242-030-820(3).

32 ¹⁴ County's SATC at 2-3.

1 **BEFORE THE GROWTH MANAGEMENT HEARINGS BOARD**
2 **WESTERN WASHINGTON REGION**

3 Case No. 22-2-0002

4
5 Friends of Clark County and BRP Minerals LLC v. Clark County

6 **ELECTRONIC DECLARATION OF SERVICE**

7
8 I, JAMIE MERLY, under penalty of perjury under the laws of the State of Washington,
9 declare as follows:

10 I am the Director of Legal and Administrative Services to the Growth Management
11 Hearings Board. On the date indicated below a copy of the SECOND ORDER OF STAY in
12 the above-entitled case was sent to the following via email and CMS:

13 David T. McDonald
14 Sherlag De Muniz LLP
15 david@sherlagdemuniz.com
16 carol@pdxparalegal.com

Jamie Howsley
Jordan Ramis PC
jamie.howsley@jordanramis.com
Darlene.ferretti@jordanramis.com

17 *Representing Petitioner Friends of Clark*
18 *County*

Representing Intervenor Granite
Construction Company

19 Christine M. Cook
20 Deborah R. Wechselblatt
21 Clark County
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25 *Representing Respondent Clark County*

and

Ramona Monroe
Stoel Rives
ramona.monroe@stoel.com

Representing Intervenor BRP Minerals,
LLC

26
27
28
29
30 DATED this 28th day of November 2023.

31
32 
JAMIE MERLY