

**MT. BAKER GROUP
WASHINGTON STATE CHAPTER SIERRA CLUB**

Chair

Rick Eggerth

Vice-Chair

Susan Kane-Ronning

Secretary

Lynn Colson

Treasurer

Ron Colson

At Large

Judith Akins/Mike Sennett

mtbaker@washington.sierraclub.org



May 21, 2021

Casey Hanell

State Geologist and Director

Dept. of Natural Resources

1111 Washington Street, SE

Olympia, WA 98504-7007

Re: Proposed Surface Mine Reclamation Permit 70-013279, Big Bear Mountain
SEPA File No. 20-092802: DNR Notice of Delayed Final Determination

Dear Mr. Hanell:

The Executive Committee of the Mt. Baker Group (MBG) of the Washington State Chapter, Sierra Club, represents many thousands of members and supporters in Whatcom, San Juan and Skagit counties. More than 3,000 members and supporters reside in Skagit County.

On February 15, 2021, we wrote to Hal Hart, Director of Skagit County Planning and Services (SPDS). You may recall that emailed letter, as you were one of the many people copied on it (those copied then are also copied on this letter, with the addition of Hilary Franz). That letter, a copy of which is attached for ease of reference, specifically addressed why SPDS is the appropriate agency to be handling Reclamation Permit 70-013729, *not* DNR. Today's letter, in replying to your May 7, 2021 Notice of *Delayed* Final Determination (NDFD), follows up on that theme and raises a number of concerns

with the NDFD. These concerns demonstrate, as we explain below, that the entire permit process needs to start over with SPDS as the lead agency.

Initially, the NDFD says the delay is because DNR is “gathering additional information and consulting with subject matter experts.” In the interests of transparency and full disclosure – and we know of no reason for a public agency like DNR, designed to benefit the public, not to be fully transparent – we ask you to immediately disclose the information you are gathering and the experts you are consulting. This may well benefit you because, if we know what you are investigating, we may be able to advise of additional information or individuals that could help the investigation.

The second concern arises from the NDFD, third paragraph, which states:

Should the applicant consider ***expanding this proposal*** that ***will require a revised surface mine reclamation permit and a new*** State Environmental Policy Act (***SEPA***) ***review***. [Emphasis added.]

In fact, the proposal has been expanded, as the sentence preceding the quote above states that “9.6 acres is proposed for talus removal,” while the SM-8A form (“Application for Reclamation Permit and Plan”) in the application states that the total area to be disturbed is 18 acres (# 13, SM-8A form). Given this apparent expansion, a revised permit and new SEPA review seem necessary.

The third concern also arises from the SM-8A form, and requires a new start to the review process for a different reason. The March 3, 2006 “County or Municipality Approval For Surface Mining (Form SM-6)” that accompanies the SM-8A says, in the right-hand box at the top of the page:

TOTAL ACREAGE AND DEPTH OF PERMIT AREA (Include all acreage to be disturbed by mining, setbacks and buffers, and associated activities during the life of the mine.) (See SM-8A.) [Emphasis in original.]

This requires that an SM-8A accompany the SM-6, as was done in the 2020 application: the 2006 SM-6 is accompanied by the 2020 SM-8A. An SM-6 and an SM-8A are necessary because the SM-6 deals with a mining permit, the province of the community where the mine is located, and the SM-8A deals with post-mining reclamation, the province of DNR.

But the 2006 SM-6 appears to have had *no SM-8A filed with it*. Numerous Public Document Requests and informal requests have failed to turn up the SM-8A that should have accompanied the SM-6 back in 2006. Lack of an SM-8A from 2006 should *invalidate the 2006 application*, because the SM-6, by its own terms, requires an SM-8A. Because the 2020 application relies on an invalid 2006 application, a new application process should start, with SPDS the lead agency as required for all new mining applications. If you know of clear authority to the contrary, please provide it.

At the same time, even if the 2006 SM-6 could, hypothetically, be matched with the 2020 application, it was originally intended for an entirely different mining process than the current application, with a much different scope than the current application. The County has not signed off on the current project, but rather an older, different one (if in fact they even signed off on that). An out-of-date SM-6, intended for a completely separate mining operation, cannot comfortably be transposed over the facts of the current application, and no one should try to do so. If you know of clear authority for such transposition, we would appreciate seeing it.

Our final concern arises from DNR's unsupported assertion that it must be the lead agency:

DNR is the SEPA lead agency authority per WAC 197-11-924 and WAC 197-11-930, as DNR is the only agency with a permit to issue for this project.

Merely asserting authority to be lead agency does not make DNR lead agency. The authority asserted must actually support that proposition, and the authority DNR relies on does not do that. The only part of WAC 197-11-924 that is relevant here is the first subsection, which explains that agencies must determine among themselves who should be lead, but does not explain *how* to determine the lead. Instead, it refers to WAC 197-11-926 through WAC 197-11-944 for criteria to determine the lead. WAC 197-11-930 is in that range of WAC sections, and is the only section relied on by DNR. But 197-11-930 does not support DNR's assertion that it is lead. It states, in its entirety:

For proposed private projects for which there is only one agency with jurisdiction, the lead agency shall be the agency with jurisdiction.

This does not apply here because there is more than one agency with jurisdiction: SPDS for the mining permit, and DNR for the reclamation permit. The NDFD does *assert* that "DNR is the only agency with a permit to issue," but this simply assumes the correctness of an unsupported, unexplained position. *How* is DNR the only agency with

a permit to issue? What supports this view? The WAC sections DNR relies on do not support that it is the only agency with jurisdiction.

Lead agency determination must proceed according to criteria contained in the WAC. DNR points to no such criteria, yet still insists it is the lead agency. It is not, and so any action it takes regarding Cunningham Crushing's Big Bear Mountain permit application is without authority, and so invalid. To put it another way: DNR has no authority regarding this permit application, and so must immediately stop processing this application and let SPDS take over its rightful role.

For all the reasons detailed in this letter, MBG requests that DNR immediately cease its unauthorized involvement in processing the application for Surface Mine Reclamation Permit 70-013279, and step aside so that SPDS may step in as rightful lead agency, process the application as new, and require an entirely new SEPA review.

Thank you. Please feel free to contact the undersigned if you have any questions.

Respectfully,

R. A. Eggerth

On Behalf of the Executive Committee of the Mt. Baker Group,
and William Gregory, Mt. Baker Group Skagit County Representative

Cc: Hal Hart, Director, Skagit County Planning & Devt. Services
Skagit County Planning Commission (kadams@co.skagit.wa.us)
Skagit County Board of Commissioners
Hilary Franz, Commissioner of Public Lands
Rian Skov, DNR Chief Reclamation Geologist
Joe Smillie, DNR Communications Manager
Robert Warinner, Asst. Regional Habitat Program Mgr., WDFW
The Hon. Robert Sutherland
The Hon. Carolyn Eslick
The Hon. Keith Wagoner
The Hon. Debra Lekanoff
The Hon. Alex Ramel
The Hon. Elizabeth Lovelett
Kara Briggs, Sauk-Suiattle Indian Tribe
Amy Trainer, Swinomish Indian Tribal Community
Scott Schuyler, Upper Skagit Indian Tribe

Marlene Finley, Pres., Evergreen Islands
Kyle Loring, Esq.