

**BEFORE THE WASHINGTON UTILITIES AND
TRANSPORTATION COMMISSION**

BNSF RAILWAY COMPANY,

Petitioner,

v.

CITY OF MOUNT VERNON,

Respondent

SKAGIT COUNTY, WASHINGTON
STATE DEPARTMENT OF
TRANSPORTATION, WEST VALLEY
FARMS LLC, and SKAGIT COUNTY,

Intervenors.

DOCKET NO. TR-070696

JOINT RESPONSE IN OPPOSITION
TO THE CITY'S MOTION IN LIMINE
AND MOTION FOR SUMMARY
JUDGMENT

Petitioner BNSF Railway Company (BNSF), formerly the Burlington Northern and Santa Fe Railway Company, and Intervenor Washington State Department of Transportation (WSDOT) jointly submit this brief in opposition to the City's Pre-Hearing Motion in Limine and Motion for Summary Judgment Requiring New SEPA Determination by the WUTC (City's motion).

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JOINT RESPONSE IN OPP. TO THE
CITY'S MOTION IN LIMINE AND
MOTION FOR SUMMARY JUDGMENT

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I. SUMMARY OF ARGUMENT

The City of Mount Vernon's (City) motion should be denied.

The City's motion asks the Washington Utilities and Transportation Commission (WUTC) to adjudicate a challenge to WSDOT's final determination of non-significance (DNS) to rule that it was insufficient and remove it.¹ The City then asks that the WUTC substitute itself for WSDOT as the State Environmental Policy Act (SEPA) lead agency for the project and to determine that the closure of the Hickox Road crossing constitutes a major action requiring an Environmental Impact Statement (EIS).²

Thus, the City's motion is an attempt to appeal WSDOT's threshold determination before the WUTC. The attempt must fail because the WUTC does not have jurisdiction to decide an appeal of WSDOT's compliance with SEPA. The WUTC could have sought lead agency status, but elected not to do so and is now time barred. Even if SEPA compliance was an issue properly before the WUTC in this crossing closure case, WSDOT satisfied its SEPA requirements.

The City's motion also asks the WUTC to expand the issues beyond those set forth in the two existing prehearing orders, apparently to include a Growth Management Act (GMA) challenge. The WUTC simply does not have jurisdiction to adjudicate a GMA challenge. Only evidence relevant to the issue over which the WUTC has authority to act in a crossing closure hearing should be admitted.

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¹ City's motion, ¶ 6, p. 3.

² City's motion, ¶ 23, p. 8.

II. ARGUMENT

A. The WUTC Does Not Have Jurisdiction to Set Aside WSDOT's SEPA Threshold Determination of Non-Significance

Regardless of how presented, the City's challenge to WSDOT's SEPA compliance can only be understood as an attempt to appeal WSDOT's action to the WUTC. Like all state agencies, the WUTC is limited in its powers and authority to those which have been specifically granted by the legislature. See *Washington Water Power Co. v. Washington State Human Rights Comm'n*, 91 Wn.2d 62, 586 P.2d 1149 (1978). The legislative grant of authority to the WUTC regarding rail crossings is that set forth in RCW 81.53.060.³ When deciding a petition to close a railroad crossing, the WUTC has the authority and duty to balance current public need against the danger posed by its use. Nowhere does the legislature grant to the WUTC the authority to adjudicate the sufficiency of a sister state agency's compliance with SEPA.

The proper means by which an aggrieved person may appeal action under SEPA is found in RCW 43.21C.075(d)(4) which provides in relevant part that a person aggrieved by agency action must use that agency's procedure for appeal when available. WSDOT's rule for SEPA review is in WAC 468-12-680. It provides for administrative review of some types of actions not relevant here, and states that all other actions of WSDOT are subject to judicial review. Judicial review of final agency action is governed by the Administrative Procedures Act (APA) in Chapter 34.05 RCW. Consequently, assuming for the sake of the City's motion that such an

³ See BNSF's Motion to Limit the Scope of the Subject Matter Before the Commission, pp. 4-8.

environmental challenge affecting interstate commerce is not preempted by federal law,⁴ the proper forum to seek review of WSDOT's final DNS would be the superior court under RCW 34.05.570(4).

B. WUTC Already Determined That WSDOT is the Proper Lead Agency

The City does not merely seek to have the WUTC set aside WSDOT's threshold determination. The City further asserts the WUTC is then required to substitute itself for WSDOT as the lead agency for SEPA, and issue a different threshold determination.⁵ There is no authority for such a requirement.

Under SEPA, the closure of the Hickox Road Crossing must be addressed in the same environmental document as the larger Mount Vernon Siding Project of which it is an interdependent part. The Hickox railroad crossing closure is necessary to eliminate a dangerous double railroad crossing that would otherwise result from the Mount Vernon Siding Extension. The crossing closure is a part of a single course of action which, by rule, must be evaluated in the same environmental document as the larger project. WAC 197-11-060(3)(b).

Because WSDOT is the state agency responsible for initiating this proposal, it is required to act as the lead agency under SEPA and is solely responsible for making the threshold determination. "When an agency initiates a proposal, *it is the lead agency for that proposal.*" WAC 197-11-926(1); (emphasis added). "The lead agency shall be the agency with the main

⁴ However, see BNSF's Motion to Limit the Scope of the Subject Matter Before the Commission, pp. 8-10 regarding the Surface Transportation Board's (STB) exclusive jurisdiction over environmental review of rail projects.

⁵ Without citation to authority, the City asserts: "SEPA requires WUTC as the responsible Agency with authority to determine whether or not the closure of the Hickox Road Crossing constitutes a major action significantly affecting the quality of the environment." City's motion, ¶ 23, p. 8.

responsibility for complying with SEPA's procedural requirements and *shall be the only agency responsible for the threshold determination.*” WAC 197-11-050(2)(a); (emphasis added).

Although only WSDOT could serve as the initial lead agency, the WUTC could have sought to assume that status had it timely elected to do so. Where, as occurred in this case, the responsible official for the lead agency determines that there will be no probable significant adverse environmental impacts from a proposal, the lead agency shall prepare and issue a DNS, send a copy of the DNS and Environmental Checklist to agencies with jurisdiction, and not act on it until 14 days after issuance. WAC 197-11-340(1)-(2).

A different “agency with jurisdiction” may assume lead agency status only within this 14 day period. “ ‘Agency with jurisdiction’ “means an agency with authority to approve, veto, or finance all or part of a non-exempt proposal (or part of a proposal.)” WAC 197-11-714(2). The WUTC is an “agency with jurisdiction” because RCW 81.53.060 vests it with the authority to approve the part of the Mount Vernon Siding Extension Project that involves closing the Hickox crossing. So the WUTC would have been authorized to seek to assume lead agency had it elected to do so within 14 days from the date WSDOT provided the DNS and Environmental Checklist.⁶ WSDOT provided WUTC the DNS and Environmental Checklist on July 16, 2007.⁷

The WUTC did not seek to become lead agency within 14 days. On the contrary, by letter dated July 20, 2007 to Judge Torem and copied to the parties in this case, the WUTC’s

⁶ As discussed later in this brief, federal preemption removes the City and Skagit County from the definition of “agency with jurisdiction” for this project.

⁷ See Declaration of L. Scott Lockwood in Support of Joint Response in Opposition to the City’s Motion in Limine and Motion for Summary Judgment (Lockwood Dec.).

responsible official, Chris Rose, declined to assume lead agency status and affirmatively determined that “WSDOT is the appropriate lead agency in this case.”⁸

Moreover, even had the WUTC wanted to assume lead agency status, it could not have done so unilaterally, or in the face of WSDOT’s objection, as is suggested by the City’s motion. If agencies with jurisdiction are unable to determine which agency should be the lead agency, under the SEPA rules an agency with jurisdiction may petition the Department of Ecology (DOE) to resolve the disagreement. WAC 197-11-946. There is no provision in the SEPA rules or elsewhere that would allow a third party, such as the City here, to remove one lead agency in favor of a different one.

When a responsible official of the initial lead agency makes a threshold determination, and no other agency with jurisdiction timely assumes lead agency status, that decision is final and binding on all agencies unless reversed on appeal. WAC 197-11-390. Since no other agency with jurisdiction assumed lead status, WSDOT’s threshold DNS is final and binding on all agencies, including on the WUTC.

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⁸ Lockwood Dec., ¶ 2.

C. WSDOT Complied With its SEPA Requirements

1. Standard of review

Finally, even if the WUTC was somehow the proper forum for a SEPA appeal (which we contend it is not), the City's motion does not show that WSDOT's threshold determination failed to satisfy SEPA requirements.

A reviewing court reviews final state agency action under the APA. *Northwest Steelhead & Salmon Council of Trout Unlimited v. Washington State Dep't of Fisheries*, 78 Wn. App. 778, 896 P.2d 1292 (1995). Review of a threshold determination that an EIS is not required is reviewed under the "clearly erroneous" standard. *Norway Hill Preserv. & Prot. Ass'n v. King Cy. Council*, 87 Wn.2d 267, 552 P.2d 674 (1976). Procedural errors under SEPA are reviewed under the rule of reason, and where such errors are of no consequence, they must be dismissed as harmless. *See, e.g., Thornton Creek Legal Defense Fund v. City of Seattle*, 113 Wn. App. 34, 52 P.3d 522 (2002).

2. WSDOT Exceeded SEPA Notice and Comment Requirements

The City raises two issues in its challenge to the sufficiency of WSDOT's threshold determination.

First, the City questions whether adequate notice and opportunity to comment was provided. SEPA rules require notice to "agencies with jurisdiction" and provide that "the lead agency must use reasonable methods to inform the public and other agencies that an environmental document is being prepared or is available and that public hearing(s) (if any), will be held." WAC 197.11.519(1).

In this case, neither the City nor Skagit County were entitled to notice under SEPA because neither is an agency with jurisdiction as that term is defined in the SEPA rules.⁹ Although the City and Skagit County would ordinarily be considered agencies with jurisdiction based on their permitting authority, such approval or veto authority is preempted in this case.

The federal government has nearly exclusive authority to regulate rail transportation.¹⁰ The Interstate Commerce Act (ICA) contains an express preemption clause providing that: “The jurisdiction of the Board¹¹ over transportation rail carriers” over any track that is part of the interstate rail network is “exclusive.” The term “transportation” is defined to include “a locomotive, car, vehicle, vessel, warehouse, wharf, pier, dock, yard, property, facility, instrumentality, or equipment of any kind related to the movement of property by rail” as well as “services relating to that movement.” 49 U.S.C. 10102(9). Consequently, the Federal Surface Transportation Board (STB) has exclusive jurisdiction over the construction of this rail siding project preempting the permitting authority of the local jurisdictions. *See, e.g., City of Auburn v. United States*, 154 F.3d 1025, 1031 (9th Cir. 1998).

Notwithstanding that WSDOT had no legal obligation under SEPA to provide notice to the City or Skagit County as agencies with jurisdiction, WSDOT engaged in extensive outreach

⁹ “ ‘Agency with jurisdiction’ “means an agency with authority to approve, veto, or finance all or part of a non-exempt proposal (or part of a proposal).” WAC 197-11-714(2).

¹⁰ The Commerce Clause of the United States Constitution (U.S. Const. art. I, § 8, cl. 3.) gives Congress plenary authority to legislate with regard to activities that affect interstate commerce. *Gibbons v. Ogden*, 9 Wheat 1, 196 (1824). The Interstate Commerce Act (ICA) now codified in pertinent part at 49 U.S.C. 701-227 (general provisions) and 10101-11908 (rail provisions) is “among the most pervasive and comprehensive of federal regulatory schemes.” *Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 101 S. Ct. 1124, 67 L. Ed 2d 258 (1981).

¹¹ Surface Transportation Board.

providing actual notice greatly exceeding any that would have otherwise been required.¹²

WSDOT staff and/or their consultants met with the City and Skagit County public works departments; the Skagit County Fire District No. 3 staff and commissioners, and gave a presentation to the Skagit Sub-Regional Public Meeting. The Skagit Valley Herald ran a front page article on the project on September 24, 2006. There is a considerable body of correspondence exchanged with local residents and their representative officials regarding the potential or perceived impacts of this project.¹³ The Environmental Checklist and DNS were published on DOE's SEPA Register.¹⁴

Additionally, WSDOT emailed a copy of the DNS and Environmental Checklist to the senior planner for the City's Community & Economic Development Department on March 1, 2007, which was before the close of the 14-day comment period. The City did not comment or ask for additional time to comment. The senior planner simply noted that "it appears that you have already taken care of the SEPA and critical areas."¹⁵

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¹² See Declaration of Jeffrey T. Schultz in Support of Joint Response in Opposition to the City's Motion in Limine and Motion for Summary Judgment (Schultz Dec.) and Declaration of Elizabeth Phinney in Support of Joint Response in Opposition to the City's Motion in Limine and Motion for Summary Judgment (Phinney Dec.).

¹³ Schultz Dec.

¹⁴ Phinney Dec., ¶ 6

¹⁵ Phinney Dec., ¶¶ 11-14

WSDOT also sent a copy of the DNS and Environmental Checklist to the Skagit County Planning Department on March 1, 2007, and likewise did not receive any comment or a request for more time to comment.¹⁶ Additional notice and comment was provided as part of WSDOT's application to DOE for a 401 Water Quality Certification.¹⁷

The City has not shown any procedural deficiency relating to WSDOT's SEPA process. Even if WSDOT may have committed some procedural error relating to notice, such error was clearly harmless in light of the extensive notice actually provided and comments received. Procedural errors under SEPA are reviewed under the rule of reason and where such errors are of no consequence they must be dismissed. *Thornton Creek Legal Defense Fund v. City of Seattle*, 113 Wn. App. 34, 52 P.3d 522 (2002).

3. WSDOT Considered the Relevant Environmental Factors

The second issue upon which the City bases its SEPA challenge is that it believes WSDOT was not made aware that Hickox Road might be one of several that could be used by persons evacuating the area in the event of a flood or that the road is an efficient route to bring in quarry materials needed to maintain or repair the dike.¹⁸

However, the fact that Hickox Road is one of a number of roads that could be used for ingress and egress to an area that is subject to periodic flooding is not new information. Nor is it information that was not shared with WSDOT and considered prior to the issuance of the DNS.

¹⁶ *Id.*

¹⁷ Phinney Dec., ¶ 15

¹⁸ City's motion, ¶ 27, p. 9.

The Skagit County Diking District No. 3 sent a letter to Jeff Schultz on August 31, 2006, specifically alerting WSDOT as to this issue:

During a flood emergency it is often necessary to bring material, including rock from Meridian Aggregates to fight floods or repair flood damage. Closing the Hickox Road would result in the loss of an important corridor for carrying on the District's business in a flood emergency . . .¹⁹

SEPA rules did not require more. The rules set out a relatively simple picture of threshold determinations. WAC 197-11-330(1) states that an EIS is required for proposals for major actions significantly affecting the quality of the environment. The lead agency is to determine if "the proposal" is likely to have a probable significant adverse environmental impact based on the proposed action, the information in the checklist and any other information furnished under other rules. WAC 197-11-330(1)(b).

The threshold determination must be based upon information reasonably sufficient to determine the environmental impact of a proposal. WAC 197-11-335. Contrary to the City's suggestion that all relevant information must be discovered and considered, lead agencies are empowered to determine whether "reasonably sufficient" information to assess adverse impacts is available. If a lead agency determines that there is not sufficient information, it has a wide variety of options, including requiring more information on subjects contained in the checklist, conducting its own further study, consulting with other agencies, or committing to future review. *Id.*; See also *Brown v. City of Tacoma*, 30 Wn. App. 762, 766, 637 P.2d 1005 (1981) (acknowledging the agency's latitude in assessing environmental impacts, without necessarily

¹⁹ Schultz Dec., Exhibit I.

weighing benefits against adverse impacts). WSDOT's approach provided reasonably sufficient information and was adequate under SEPA. There is at least a dispute of material fact whether flood related issues are new and the City does not establish as a matter of law that WSDOT failed to comply with SEPA. The City's Motion for Summary Judgment should be denied.

D. The WUTC Correctly Prescribed the Proper Scope of This Hearing in its Two Prehearing Orders

The City's Motion in Limine is intended to expand the issues beyond those set forth in the two existing prehearing orders, apparently to include a GMA challenge. The prehearing orders already entered correctly limit the issues to be addressed in this hearing to those over which the WUTC has authority to act under RCW 81.53.060 as interpreted by our courts and in similar proceedings conducted by the Commission.

As Judge Torem has already observed:

[d]espite the tangential relevance of the potential impacts of closure of this grade crossing on regional land use planning efforts under the Growth Management ACT (GMA), expanding the issues to be litigated before the Commission in this matter to include those best taken up by a Growth Management Hearings Board cannot be justified under the governing statute or under prior Commission actions

...²⁰

And, as Judge Torem has already ruled:

The issues to be presented at the hearing on the merits in this case shall generally be: . . . Public Convenience and Necessity of Use of Hickox Crossing, *including*: Impact of Closure on Existing Regional Transportation . . .²¹

²⁰ Prehearing Conference Order; Notice of Second Prehearing Conference, ¶ 9, pp. 3-4.

²¹ Second Prehearing Conference Order; Notice of Third Prehearing Conference, ¶ 6, pp. 2-3.

The WUTC simply does not have jurisdiction to adjudicate a GMA challenge. Any evidence or argument relating to GMA policy not directly related to whether the present public need for the crossing might be so great that it outweighs the safety risks posed by keeping it open would only increase the time and cost of the hearing and tend to confuse the issues. There will be some factors that are relevant to comprehensive planning for the immediate area of the Hickox crossing that are also relevant to public convenience and necessity of the existing use of that crossing. However, planning under the GMA is intended to address not only existing regional traffic, but also future potential growth and occurrences that may or may not ever occur. Potential impacts on plans looking to a remote and uncertain future are too speculative to be relevant. Only evidence relevant to the issue over which the WUTC has authority to act in a crossing closure hearing should be admitted.

III. CONCLUSION

For the reasons set forth above, the WUTC is not the proper forum to adjudicate a challenge to WSDOT's threshold determination under SEPA. WSDOT's SEPA determination is binding on the WUTC. The City's Motion for Summary Judgment should be denied.

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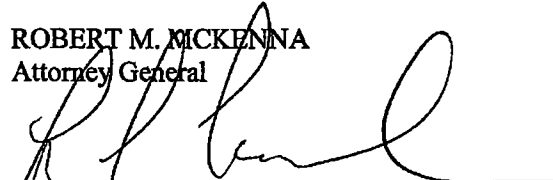
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The WUTC is likewise not the proper forum to adjudicate a GMA challenge. The WUTC has consistently focused its inquiry on the public's present need, rather than on a hypothetical future need. The City's Motion in Limine should also be denied.

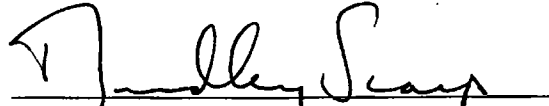
DATED this 12 day of September, 2007.

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DECLARATION OF SERVICE

Lisa M. Savoia declares I am a citizen of the United States of America, over 18 years old and competent to testify to the matters herein. On September 12, 2007, I served by e-mail and first class mail, postage prepaid, a true and correct copy of the foregoing document on the following:

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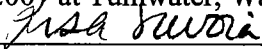
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