

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

BNSF RAILWAY COMPANY,

Petitioner,

v.

CITY OF MOUNT VERNON,

Respondent.

DOCKET NO. TR-070696

**COMMISSION STAFF'S RESPONSE TO CITY OF MOUNT VERNON'S MOTION
FOR SUMMARY JUDGMENT REQUIRING NEW SEPA DETERMINATION BY
THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION**

September 12, 2007

ROBERT M. MCKENNA
Attorney General

JONATHAN C. THOMPSON
Assistant Attorney General
Office of the Attorney General
Utilities & Transportation Division

1400 S Evergreen Park Drive SW
P.O. Box 40128
Olympia, WA 98504-0128
(360) 664-1225

TABLE OF CONTENTS

I. INTRODUCTION 1

II. ARGUMENT 1

 A. The City’s allegations of “new information” and requests for Commission action with regard to SEPA review should have been directed to the Commission’s designated SEPA responsible official, not to the ALJ or the Commissioners..... 1

 B. WSDOT, not the Commission, is the SEPA lead agency for the siding extension project, including the closely related proposal to close Hickox Road crossing 4

 C. Although the Commission must use WSDOT’s environmental document (*i.e.*, WSDOT’s environmental checklist and determination of non-significance) in deciding the petition before it, there is no requirement that the WUTC “adopt” WSDOT’s environmental document. Therefore, the City’s requests are based on an incorrect premise..... 6

 D. The Commission is not required to assume lead agency status from WSDOT, even assuming the truth of the City’s allegations of procedural defects by WSDOT or of “new information” indicating a probable significant adverse environmental impact..... 8

III. CONCLUSION 9

1 Commission Staff hereby responds to the City of Mount Vernon's motion of August
28, 2007, to the extent that it addresses compliance with the State Environmental Policy Act
(SEPA).

I. INTRODUCTION

2 For the reasons outlined below, the Commission should deny the City's motion to
the extent that it requests that the Commission assume SEPA lead agency status or make its
own SEPA threshold determination with respect to the siding extension project and the
related proposal to close the Hickox Road crossing.

3 The Commission's Director of Regulatory services, Chris Rose, filed a letter in this
docket, stating his conclusion that WSDOT is the appropriate lead agency for this proposal.¹
Because the Commission has delegated SEPA procedural determinations to its Director of
Regulatory services, there is no basis for the ALJ or the Commissioners to review Mr.
Rose's lead agency determination. But even if the ALJ and the Commissioners could
review Mr. Rose's determination, the City has failed to show that the determination was
incorrect, or that the Commission must attempt to assume lead agency status from WSDOT.

II. ARGUMENT

**A. The City's allegations of "new information" and requests for Commission action
with regard to SEPA review should have been directed to the Commission's designated
SEPA responsible official, not to the ALJ or the Commissioners.**

4 The Commission has delegated procedural determinations on SEPA matters to its
Director of Regulatory Services by designating him as the agency's SEPA "responsible
official."² Therefore, the City's motion, which is in effect a request or suggestion that the
Commission attempt to assert lead agency status against WSDOT, should be directed to the

¹ July 20, 2007, letter from Chris Rose, Director of Regulatory Services to Adam Torem, ALJ.

² The UTC has adopted SEPA rules and designated its director of regulatory services as its responsible official for matters affected by SEPA. WAC 480-11-010 through 030.

Commission's investigative and advocacy staff (headed by the Director of Regulatory Services), and not to the ALJ or the Commissioners. Under SEPA rules, "[t]he decision on whether to apply an optional provision rests with the responsible official."³ SEPA rules specifically state that "[administrative] appeal of the intermediate steps under SEPA (*e.g.*, *lead agency determination*, scoping, draft EIS adequacy) shall not be allowed."⁴

5 There are at least two reasons why it is appropriate that the Director of Regulatory Services is designated as the Commission's SEPA responsible official.

6 First, although it is a general rule of administrative law that final decision-making authority rest with the agency head, this is not the case under the SEPA rules. "The decision maker and responsible official are not necessarily synonymous, depending on the agency and its SEPA procedures."⁵ "'Responsible official' means that officer or officers, committee, department, or section of the lead agency designated by agency SEPA procedures to undertake its procedural responsibilities as lead agency (WAC 197-11-910))."⁶ "Depending on the agency and the type of proposal, for example, there may be a difference between the lead agency's responsible official, who is at a minimum responsible for procedural determinations [such as threshold determinations] and its decision maker, who is at a minimum responsible for substantive determinations [such as considering the alternatives in the relevant environmental documents when making a final decision on a proposal]."⁷

³ WAC 197-11-906(b).

⁴ Emphasis added. WAC 197-11-680(3)(a)(ii). It was, therefore, an error for Mr. Rose's letter to state that "If there is any dispute about whether a proposed action is reasonably related to the proposed closure, the parties should jointly seek guidance from the ALJ."

⁵ WAC 197-11-730.

⁶ WAC 197-11-788.

⁷ WAC 197-11-158.

7 Second, there is a preference under SEPA rules that the responsible official be someone other than the officer or division of the agency that first becomes aware of the proposal when an application (or petition) is filed, or later still, when the matter is set for hearing.⁸ Within the Commission's organizational structure, the employees whose job is to investigate the details of matters that may come before the Commission for adjudication (*e.g.*, on a petition) are supervised by the Director of Regulatory Services. Unlike the investigative staff, the agency's decision makers (including the Commissioners and ALJs) must be cautious not to gain knowledge of facts outside of the record.⁹

8 As discussed in further detail below, the City is essentially asking the Commission to attempt to assume SEPA lead agency status over the siding extension project that includes the proposed closure of Hickox Road crossing.

9 The Commission's Director of Regulatory services filed a letter in this docket stating his determination that WSDOT is the lead agency in this case. Because the Commission has delegated SEPA procedural determinations to its Director of Regulatory services, it is not appropriate for the City to try to seek administrative review of Mr. Rose's determination.

10 As described below, even if the ALJ and the Commissioners could review Mr. Rose's decision, the City has failed to show that the decision was incorrect, or why the Commission should attempt to assume lead agency status from WSDOT.

⁸ WAC 197-11-910 ("designation of the first department within the agency to *receive an application* as the responsible official will not be sufficient." Emphasis added.

⁹ See RCW 34.05.455 (prohibiting presiding officer in an adjudication from communicating regarding any substantive issue in the proceeding, with any employee of the agency or with any person not employed by the agency who has a direct or indirect interest in the outcome of the proceeding, without notice and opportunity for all parties to participate); RCW 34.05.458 (requiring separation of agency advocacy and decision-making functions in administrative adjudications).

B. WSDOT, not the Commission, is the SEPA lead agency for the siding extension project, including the closely related proposal to close Hickox Road crossing.

11 Under Department of Ecology rules, grade-crossing closures expressly are not categorically exempt from SEPA.¹⁰ This means that an agency with jurisdiction (usually, but not necessarily the WUTC) must make a threshold determination as to whether a proposal to close an at-grade crossing requires the preparation of an environmental impact statement.

12 Under the circumstances of the present proposal to close Hickox Road crossing, the City is incorrect that “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.”¹¹

13 To be clear, the WUTC is an “agency with jurisdiction”¹² with respect to petitions for closure of grade crossings. But as explained below, because of the nature of this action, it is not the “lead agency”¹³ with authority to determine whether the siding extension project, including the proposed closure of Hickox Road crossing, requires an environmental impact statement.

14 In this case, because the proposed crossing closure is part of the siding extension project, SEPA rules require that the environmental impact of the siding extension and the proposed crossing closure be evaluated in one document. Under the Department of Ecology’s SEPA rules, “[p]roposals or parts of proposals that are related to each other

¹⁰ WAC 197-11-865(2).

¹¹ City’s Motion at para. 23.

¹² WAC 197-11-714(3): “Agency with jurisdiction’ means an agency with authority to approve, veto, or finance all or part of a nonexempt proposal (or part of a proposal).”

¹³ WAC 197-11-050(2): “The lead agency shall be the agency with main responsibility for complying with SEPA’s procedural requirements and shall be the only agency responsible for: (a) The threshold determination; and (b) Preparation and content of environmental impact statements.”

closely enough to be, in effect, a single course of action” must be evaluated in one document.¹⁴ “Closely related” proposals, or parts of proposals, are further defined as those that are “interdependent parts of a larger proposal and depend on the larger proposal as their justification or for their implementation.”¹⁵ Under these rules, and the theory advanced by the petition proponents, the environmental impacts of closing Hickox Road crossing should be evaluated in the same document that assesses the environmental impact of the siding extension. The City appears to agree that the proposed closure of Hickox Road depends on the siding extension project as its justification. Therefore, there is no basis to conclude that the proposed crossing closure should not be evaluated in the same document as the siding extension.

15 Because WSDOT is a public agency, and because it initiated the siding extension project, SEPA rules require that it be the lead agency. Specifically, Department of Ecology rules provide that “when an agency initiates a proposal, it is the lead agency for that proposal.”¹⁶ Additionally, when “the primary sponsor or initiator of the project is an agency,” the project shall be considered a public project.¹⁷ WSDOT is providing the funding for the siding extension project. As such, it has properly assumed the lead agency role, completed an environmental checklist, and published a threshold determination of non-significance for the siding extension project.¹⁸

¹⁴ WAC 197-11-060(3)(b).

¹⁵ WAC 197-11-060(3)(b)(ii).

¹⁶ WAC 197-11-926.

¹⁷ WAC 197-11-928.

¹⁸ SEPA Register, February 16, 2007.

C. Although the Commission must use WSDOT's environmental document (i.e., WSDOT's environmental checklist and determination of non-significance) in deciding the petition before it, there is no requirement that the WUTC "adopt" WSDOT's environmental document. Therefore, the City's requests are based on an incorrect premise.

- 16 The City makes various requests for relief with regard to SEPA:
1. "City respectfully requests, based on the new information presented by the Respondent and Intervenors, that WUTC remove WSDOT's DNS and conduct its own supplemental environmental analysis involving how the closure will impact the natural and built environment."¹⁹
 2. "City would request that WUTC condition any adoption in whole or in part of WSDOT's previous environmental review upon a showing of compliance with procedural requirements set forth by the Department of Ecology's regulations."²⁰
 3. "Based on the information and Declarations herein, the WUTC should not adopt WSDOT's DNS. Rather, the WUTC should seek supplemental review in order to make a threshold determination so that adequate review of the potential environmental impacts to Petitioners [sic.] proposal occurs."²¹

17 These requests are based on an incorrect premise that the WUTC is required to prepare its own environmental documents or at least to "adopt" WSDOT's documents with regard to the siding extension proposal.

18 As stated above, WSDOT is the lead agency for the larger project that includes the proposed crossing closure. The SEPA rules state that the "responsible official of the lead agency shall make the threshold determination, which shall be made as close as possible to

¹⁹ City's motion at para. 29.

²⁰ *Id.* at para. 32.

²¹ *Id.* at para. 40.

the time an agency has developed . . . a proposal.”²² Further, “The lead agency shall be the agency with main responsibility for complying with SEPA’s procedural requirements and shall be the *only* agency responsible for: (a) The threshold determination; and (b) Preparation and content of environmental impact statements.”²³

19 In some instances, agencies are allowed to “adopt” or to amend preexisting environmental documents (such as determinations of non-significance) to meet SEPA requirements. But there is no requirement that a non-lead agency with jurisdiction over some aspect of a project “adopt” the lead agency’s environmental document. Again, SEPA requires only *the lead agency* to make a threshold determination with respect to a proposal.²⁴ The general rule is that “Any agency acting on the same proposal shall use an environmental document unchanged, . . .”²⁵ Additionally, “[a]gencies acting on the same proposal for which an environmental document was prepared are not required to adopt the document.”²⁶

20 Thus, while the WUTC should *use* the environmental document prepared by WSDOT in evaluating the petition to close the Hickox Road crossing,²⁷ the WUTC does not have an independent obligation to *make* a threshold determination or to “adopt” WSDOT’s threshold determination.

²² WAC 197-11-310(3).

²³ Emphasis added. WAC 197-11-050(2).

²⁴ WAC 197-11-310(3).

²⁵ WAC 197-11-600(3).

²⁶ WAC 197-11-600(4)(a).

²⁷ For example, WAC 197-11-165 states that “[r]elevant environmental documents, comments, and responses shall accompany proposals through existing agency review processes, as determined by agency practice and procedure, so that agency officials use them in making decisions.” Further, “[w]hen a decision maker considers a final decision on a proposal: (a) The alternatives in the relevant environmental documents shall be considered.”

D. The Commission is not required to assume lead agency status from WSDOT, even assuming the truth of the City's allegations of procedural defects by WSDOT or of "new information" indicating a probable significant adverse environmental impact.

20 Under SEPA rules, "[w]hen the responsible official makes a threshold determination, it is final and binding on all agencies."²⁸ Thus, the Commission is bound by WSDOT's threshold determination. There are, however, two exceptions to this rule that appear to be raised by the City's filing.

21 The first exception is that an agency with jurisdiction assumes lead agency status from another agency with jurisdiction.²⁹ This process is available when a second agency with jurisdiction over a project concludes that the initial lead agency's determination of non-significance was incorrect.³⁰ Just because an agency attempts to assume lead agency status does not mean it will prevail.³¹

22 The second exception is that "preparation of a new threshold determination . . . is required if there [is] . . . [n]ew information indicating a proposal's probable significant adverse environmental impacts. (This includes discovery of misrepresentation or lack of material disclosure.)"³²

23 Neither of these exceptions *requires* the Commission to try to assume lead agency status. Note that the rule regarding "new information" does not require *a second agency* to prepare a new threshold determination if new information comes to light indicating a proposal's probable significant impact. WSDOT may take the allegedly new information into account and decide for itself, as the lead agency, whether a new threshold determination is required.

²⁸ WAC 197-11-390.

²⁹ WAC 197-11-948.

³⁰ See WAC 197-11-985.

³¹ See WAC 197-11-946 (DOE resolution of lead agency disputes).

³² WAC 197-11-600(3)(b).

24

As the initiator of this proposal, WSDOT is staffed to be the lead agency for this project. If that agency's environmental determinations and environmental documents are not adequate, the City's remedy is to pursue judicial appeal of WSDOT's determination of non-significance, once WSDOT publishes a "notice of action."³³

III. CONCLUSION

25

The Commission should deny the City of Mount Vernon's SEPA motion to the extent that it is an attempt at administrative review of the Commission's responsible official's lead agency determination. Even assuming the Commission could provide administrative review of the lead agency determination, the determination was clearly correct and SEPA rules do not require the Commission to attempt to assume lead agency status from WSDOT.

DATED this 12th day of September, 2007.

ROBERT M. MCKENNA
Attorney General



JONATHAN C. THOMPSON
Assistant Attorney General
Counsel for Washington Utilities and
Transportation Commission Staff

³³ RCW 43.21C.075; RCW 43.21C.080.