

BEFORE THE WASHINGTON UTILITIES AND  
TRANSPORTATION COMMISSION

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BNSF RAILWAY COMPANY,	)	DOCKET NO. TR-090121
Petitioner,	)	
vs.	)	<b>RESPONSE TO BENCH REQUEST</b>
	)	<b>FOR SEPA UPDATE</b>
SNOHOMISH COUNTY,	)	
Respondent.	)	

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1 In response to Bench Request No. 1 dated July 8, 2009, petitioner BNSF and Commission Staff respond as follows:

- The SEPA lead agency will be the Washington Department of Transportation (WSDOT) and WSDOT confirmed that status on July 10, 2009.
- No further approval is required from the Army Corp of Engineers.

The SEPA chronology as follows (beginning with most recent):<sup>1</sup>

2 **July 10, 2009:** WSDOT (email) confirmed it has agreed to take SEPA lead agency role as funding agency; indicates it will send copy of SEPA document with 14-day public comment period to WUTC/SnoCo/BNSF/Lynn Logen. WSDOT also indicates it expects to have SEPA document to DOE on or around July 20, 2009.

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<sup>1</sup> Information provided by BNSF Project Engineer Rick Wagner.

3           **July 8, 2009:** IMR<sup>2</sup> submitted SEPA checklist and supporting documents to  
WSDOT for its assumption as SEPA lead agency, similar to WSDOT's lead agency  
status for Hickox Road closure/Mount Vernon siding extension project. WSDOT  
determined to be a proper lead agency since the WSDOT-funded crossing closure is  
part of the WSDOT/Amtrak Stanwood siding project, and to avoid further delay with  
WADOE and Snohomish County.

4           **July 3, 2009:** IMR's tentative agreement with SRSC's offsite wetland  
mitigation proposal and scope of work for completing the necessary documents for  
WADOE and Corps permit processing.

5           **June 30, 2009:** Corps Public Notice Comment Period over; Corps to wait one  
week for additional comments prior to forwarding any to BNSF for review/response.

6           **June 24, 2009:** Corps cc'd copies of its archaeologists' concurrence with  
submitted cultural resources report; submits concurrence requests to WA SHPO at  
tribes (Tulalip & Stillaguamish).

7           **June 16, 2009:** IMR requested a NPDES Public Notice be published in the  
Stanwood/Camano news.

8           **June 9, 2009:** WADOE forwarded the SEPA checklist to Snohomish County;  
states that SnoCo is SEPA lead.

9           **June 9, 2009:** IMR requested a NPDES Public Notice be published in the  
Stanwood/Camano news.

10          **June 8, 2009:** NPDES/SW Notice of Intent (NOI) submitted to WADOE  
Construction Stormwater Unit.

11          **June 5, 2009:** IMR submits SEPA Checklist on behalf of BNSF to WADOE;  
initiated development of a BNSF Clarification Letter for SnoCo regarding BNSF's  
preemption of state and local permits lacking federal nexus.

12          **June 3, 2009:** SnoCo email determines that it would be SEPA Lead (due to  
flood permit); described pre-application process, required application submittal fees,  
hourly rate for staff review; stated no timeline/schedule for SEPA processing, etc.  
Change of review apparently determined by Mr. Darryl Eastin & supervisors at  
County.

13          **June 2, 2009:** WADOE SEPA reviewers stated that if a County permit is  
applied for, then County becomes SEPA Lead.

14          **June 1, 2009:** SnoCo SEPA Coordinator stated that despite SnoCo's receipt  
of the Corp's ESA No Effect MFR and BNSF's BE, the FHP will still need to be  
applied for in order for SnoCo to determine that FHP not needed.

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<sup>2</sup> BNSF's contractor, InterMountain Resources.

- 15           **June 1, 2009:** Corps' Joint Public Notice published.
- 16           **May 26, 2009:** Corps sent ESA Coordinator's Memorandum for the Record (MFR) of "No Effect" for ESA.
- 17           **May 14, 2009:** Corps status email that ESA "No Effect" letter is pending, along with Public Notice. Both expected to be complete by May 18, 2009.
- 18           **May 4, 2009:** Informal concurrence from both WADOE and Corps (via emails) that the site visit and wetland boundaries were confirmed and that revised drawings and plans would be required for continued permitting. Includes wetland mitigation concept approval.
- 19           **April 30, 2009:** Submitted revised Wetland Report, Alternatives Analysis, And Concept Wetland Mitigation to Corps and WADOE for continued review.
- 20           **April 24, 2009:** Site visit with Corps and WADOE for review of site conditions, possible project impacts, and to concur re jurisdictional wetland boundaries.
- 21           **April 23, 2009:** IMR meeting with Skagit River System Cooperative (SRSC) re possible off-site wetland mitigation at Milltown Island project.
- 22           **April 6, 2009:** SnoCo Sr. Planner/Flood Hazard Specialist replied that SnoCo's SEPA Coordinator stated that a FHP needed to be submitted for SnoCo to deny the need for it. Specialist requests submission of FHP / fee / SEPA Checklist / BE / ESA "No Effect" statement when Corps concurs that the project would have no ESA effects.
- 23           **April 1, 2009:** SnoCo Sr. Planner/Flood Hazard Specialist emailed SSP stating that SnoCo's SEPA Coordinator would be reviewing the SEPA Lead trigger & replying shortly.
- 24           **March 30, 2009:** WADOE SEPA Policy Lead emailed "Roxanne, Regarding the SEPA lead agency determination for this project, I'm not familiar with the SEPA exemption you reference. Is it listed in the statute or the SEPA rules? If it's not in the statute, (RCW 43.21C) It's not clear to me why the County is not lead. If the entire proposal is not exempt from SEPA and the County has an 'action' (i.e. 'jurisdiction') then my read of the rules is that the County is lead – regardless of the exempt status of your specific type of agency decision here. The determination of SEPA lead does not usually depend upon what type of agency action or permit it is – it depends on whether or not SEPA is triggered for any part of the proposal and then follows the standard rule about lead agency starting with local government agencies with jurisdiction and then jumps to Ecology if there are no local agency with any sort of approval, license, funding etc."
- 25           **March 30, 2009:** Received email from SnoCo Sr. Planner/Flood Hazard Specialist stating "In looking at the project and the email that was sent by Barbara from DOE it is my opinion that Snohomish County will only be processing a flood

hazard permit for the Stanwood Siding permit. Since a flood hazard permit is a type 1 and is not subject to SEPA, Snohomish County cannot be the lead agency in the SEPA process.”

26           **March 26, 2009:** SSP spoke with SnoCo Sr. Planner/Flood Hazard Specialist who stated that the County Flood Hazard Permit (FHP) was needed only if NEPA was needed OR if there were ESA effects in the County Flood Areas, of which a portion of the BNSF Stanwood project is in a “Density Fringe” zone.

27           **March 25, 2009:** WADOE SEPA Coordinator suggested that there may be a County Flood permit needed that would trigger SnoCo to be SEPA Lead.

28           **March 25, 2009:** SSP spoke with SnoCo Engineer Jim Bloodgood to get a SnoCo contact for a courtesy contact with the County. He referred to Frank Scherf, Sr. Planner. SSP called Scherf, left voicemail. Scherf called back, referring SSP to Roxanne Pilkenton, SnoCo Sr. Planner/Flood Hazard Specialist.

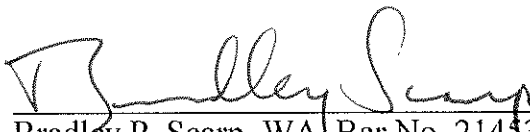
29           **March 16, 2009:** SSP spoke with WADOE SEPA Coordinator about submitting SEPA checklist to them. WADOE SEPA Coordinator said that it could be submitted at any time, but that mitigation needed to be determined prior to WADOE “noticing” it.

30           **January 19, 2009:** Cultural Resources Report submitted to Corps.

31           **December 5, 2009:** JARPA Submittal Package to Corps and WADOE. Included: Application, Wetland Report, BE, CZM Consistency Analysis, WQMP, and Proposed Work Plans.

DATED this 13<sup>th</sup> day of July, 2009.

Montgomery Scarp MacDougall, PLLC



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CERTIFICATE OF SERVICE

I am over the age of 18; and not a party to this action. I am the paralegal to an attorney with Montgomery Scarp MacDougall, PLLC, whose address is 1218 Third Avenue, Suite 2700, Seattle, Washington, 98101.

I hereby certify that the original and 12 copies of *BNSF'S RESPONSE TO BENCH REQUEST FOR SEPA UPDATE* has been sent via FedEx to David W. Danner at WUTC and Word Perfect and PDF versions sent by electronic mail to [records@wutc.wa.gov](mailto:records@wutc.wa.gov). I also certify that true and complete copies have been sent via Electronic mail and U.S. Mail to the following interested parties:

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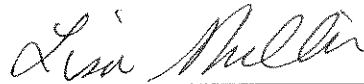
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I declare under penalty under the laws of the State of Washington that the foregoing information is true and correct.

DATED this 13<sup>th</sup> day of July, 2009 at Seattle, Washington.



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Lisa Miller, Paralegal