

**BEFORE THE WASHINGTON STATE  
UTILITIES AND TRANSPORTATION COMMISSION**

BNSF RAILWAY COMPANY,	)	DOCKET NO. TR-070696
	)	
Petitioner,	)	
	)	
v.	)	INTERVENOR'S REPLY TO
	)	RESPONSE OF JOINT RESPONSE IN
	)	OPPOSITION TO CITY'S MOTION
CITY OF MOUNT VERNON,	)	IN LIMINE AND MOTION FOR
	)	SUMMARY JUDGMENT
Respondent.	)	
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COME NOW the Boon Intervenors, Western Valley Farms, LLC and by their attorney, GARY T. JONES of JONES and SMITH, reply to the Joint Response in Opposition to the City of Mount Vernon Motion in Limine and the Motion for Summary Judgment.

**I.**

This matter has been characterized by solicitation of public opinion by Washington State Department of Transportation (WSDOT) without the SEPA processes of pre-application conference, determination of applicability of SEPA, determination of lead agency, evaluation of proposal. Essentially the WSDOT process jumped to threshold determination as to the grade crossing closure in February 2007. That fact is obscured in the response. A defective

environmental review process which does not comply with the State Environmental Policy Act (SEPA) has resulted.

There are two distinct matters here: (1) Mount Vernon Siding Track Extension. (2) Closure of the Hickox Road grade crossing. The environmental review should encompass both matters.

## II. ISSUES

- A. Whether the issuance of a determination of non-significance is clearly erroneous?
- B. Whether Washington Utilities and Transportation Commission (WUTC) should require a draft environmental impact statement in order to assemble the relevant environmental impact information and give the WUTC a proper basis for deciding the Petition filed by Burlington Northern Santa Fe (BNSF).

## III. DISCUSSION

Intervenors agree with WUTC Directory of Regulatory Services, Chris Rose's July 20, 2007 letter attached to Declaration of Scott Lockwood, that grade crossing closures expressly are not categorically exempt from the State Environmental Policy Act. WAC 197-11-865(2). WAC 197-11-865(2) provides as follows: "All actions of the utilities and transportation commission under statutes administered as of December 12, 1975, are exempted, except the following: ...

(2) Authorization of the openings or closing of any highway / railroad grade crossing, or the direction of physical connection of the line of one railroad with that of another;". Like Chris Rose, the Intervenors believe that the checklist submitted by WSDOT does not address the environmental impact of all potential construction activities associated with the project.

This was a problem in a previous Skagit County / WUTC case with Burlington Northern Railroad Company, WUTC Docket No. TR-940282 which ordered closing Green Road crossing.

Mr. Rose does not point out that the dismissal of four nearby railroad crossing road petitions filed when the Green Road petition was filed by BNSF. The present crossing closure is not an isolated event with no significant impact on the environment. Rather it is a single event in a series of events, the cumulative impact of which are a major action significantly affecting the environment. Ironically the primary impacts are transportation impacts owing to the proximity of the railroad crossing closure to Interstate 5, Old Highway 99 South, the infrastructure for the City of Mount Vernon and the rich agricultural land which lies south of Mount Vernon in the Skagit River floodplain on both sides of Interstate 5 and the BNSF tracks.

Although Chris Rose does not acknowledge the cumulative impacts cited above, the Director of Regulatory Services does say that WSDOT should complete a supplemental environmental checklist, and if necessary a environmental impact statement, with respect to any action proposed by a party that is reasonably related to the proposed closure of the crossing. Page 3 of attachment to Scott Lockwood Declaration in Support. The delay of this environmental review is contrary to the SEPA. RCW 43.21C.030. As pointed out in the Intervenor's Response, SEPA directs a "systematic interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decision making which may have an impact on man's environment"; RCW 43.21C.030(a).

It should be the aim of the WSDOT, as lead agency, to study, develop and describe appropriate alternatives to recommended courses of action in any proposal which includes unresolved conflicts concerning alternative uses of available resources; RCW 43.21C.030(e). The approach being taken by WSDOT is a piece meal approach condemned by the law and regulations. RCW 43.21C.110. WAC 197-11-055(2) and WAC 197-11-784.

An additional issue has to do with whether or not the traffic study, wetland study and other environmental documents cited in the environmental checklist by WSDOT have been “adopted” WAC 197-11-600(4)(a). If so, the determination of non-significance must be combined with or attached to the documents. WAC 197-11-340(1); WAC 197-11-360(2). WSDOT has an obligation to state why the adopted environmental documents are being chosen. The Intervenors believe that the agency did not follow the procedure for adoption of an existing EIS or study, such as the Struthers traffic study.

WSDOT could incorporate by reference an existing environmental document. Its location must be identified and its relevant content described. In this case, the Struthers traffic study did generate comments. No reference is made to the comments in the checklist, only the study itself. Again WSDOT seems not to have followed the proper process to incorporate by reference. WAC 197-11-365.

The process described in the Declaration of Elizabeth Phinney ignores the fact that the Board of County Commissioners adopted their resolution in opposition of the proposed closure of Hickox Road No. 70000 rail grade crossing. Resolution No. R20060256 Exhibit “F” to Jeffrey T. Schultz Declaration in Opposition to Mount Vernon. In that Resolution the Board of County Commissioners “encourages WSDOT to seek any and all alternatives to said closure”. The checklist fails to identify any alternatives or any work which has been done to satisfy the requirements of the Board of County Commissioners expressed in Resolution No. R20060256 attached hereto. Richard Smith and S & B Farms, Inc. were represented at the Board of County Commissioners hearing when the Resolution was adopted and expressed opposition to the closing. For WSDOT, as lead agency to rely on an intake person, Tawney Bosman, at the

planning office when they know that there is a County Board Resolution opposing the grade crossing closure and demanding alternatives is committing a clear error.

In the Elizabeth Phinney Declaration in support of the joint response, mention is made of NEPA documents. These documents should be part of the record before the WUTC. One of the functions of SEPA is to coordinate the environmental documentation. Rather than do so, WSDOT seems to be confusing and compartmentalizing the consideration given to the proposal. Categorical exemption is claimed in the only reference that has come to light. Local government have requested an opportunity, along with the citizens to use environmental policy act coverage to find alternatives. At page 6 of the Elizabeth Phinney Declaration, she says:

“I conferred with Ken Uznanski, the Manager of the Rail Office at the time, and Jeffrey T. Schultz, the Project Manager for the Mount Vernon Extension Project. All three of us discussed the potential impacts of the project, and were in agreement that environmental impacts were non-significant.”

As of March 28, 2006, one year prior to the decision WSDOT was considering closures of as many as four rail crossings in the area including Hickox Road, Peter Johnson Road, Stackpole Road and Dave Christianson’s property. Jeffrey Schultz was advised by Legislative staff of the Senate that:

1. WSDOT may not have an accurate understanding of the volume at the crossings because traffic data was counted during non-harvest time.
2. Emergency service delivery delays isolating the fire department from parts of the community.
3. Failure to assess traffic patterns / impact of closure because of the special size and safety considerations applicable to agricultural vehicles using the crossing (i.e. safe turning radii, safest routes and visibility).

4. The safety values for retaining a crossing with rail crossing arms.

5. The proposal is not clear as to whether the crossing closure was permanent or temporary.

Jeffrey Schultz was definitely told by Senate Transportation Committee staff that the preference is for Hickox Road crossing to remain open because of the recited impacts. Alternatives including additional project costs for keeping the Mount Vernon Siding Extension and Hickox Road crossing open with crossing arms were identified as an important alternative to grade crossing closure. Failure to respond to these clear directions was clearly erroneous application of the SEPA process, inconsistent with the DNS determination described in the Response to the City's Motion.

The fact that there is no NEPA document does not excuse the failure to prepare a draft environmental impact statement under SEPA. Both the Utilities Transportation Commission and the Washington Department of Transportation are recognized under the SEPA rules as agencies "possessing special expertise relating to those categories of the environment under which they are listed: ...

12) Transportation.

(a) Department of Transportation.

(b) Utilities and Transportation Commission." WAC 197-11-

When the Department of Transportation forfeits its responsibility to prepare a draft environmental impact statement, the Utilities and Transportation Commission can recognize the impact of the decision before it and order additional environmental review.

Quoting the Washington Lawyers Practice Manual (2007) III Procedural Requirements.

B. Activities Subject to SEPA e. Timing of Environmental Review:

INTERVENORS REPLY - 6

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“On the one hand environmental review should commence as early as possible so that environmental considerations are taken into account early in the decision making process. On the other hand, the review process should not begin until the proposal is sufficiently well defined to allow meaningful – rather than speculative – environmental review. See Indian Trail Property Owners Association v. City of Spokane, 76 Wn. App. 430, 886 P2d 209 (1994).”

This is not a case where a document prepared under NEPA, the National Environmental Policy Act of 1969, has resulted in an adequate detailed statement previously prepared. In this case BNSF has excused itself from preparing even a checklist by reference to the categorical exemption. This does not preclude Washington State from applying its SEPA process to determine the probable adverse impacts on the environment and engage experts to determine what alternatives support a decision. RCW 43.21C.150. Because of the cumulative affect of closing railroad grade crossings, the preparation of a comprehensive environmental document would be appropriate for WUTC decision makers. The DNS determination by WSDOT makes it less likely that such information will be gathered so that it can be applied in the public interest.

Skagit County railroad crossings near the Hickox Road crossing, except for recent annexation of Hickox Road into the City of Mount Vernon Urban Growth Area and City limits, were present in Docket No. TR-940282. That docket number was initiated by Burlington Northern Railroad, predecessor to BNSF filing a petition to close six Skagit County on grade road crossings. In the order served December 13, 1996, the Commission granted leave to withdraw the petition as to four crossings that did not go to hearing, specifically West Johnson Road, also known as Peter Johnson Road, West Stackpole Road, Spruce Street in Conway and Milltown Road. The December 13, 1996 order by Administrative Law Judge Lisa Anderl of the Office of Administrative Hearings followed a Commission order closing Boe Street on May 26, 1995. The Findings of Fact, Conclusions of Law and Order closing Green Road crossing was

continued pending completion of a Commission Staff determination of whether there is an environmental impact of closing the crossing. The Memorandum of Decision states as follows:

“In September 1996, the Commission issued a mitigated determination of Non-significance with respect to BNRR’s proposal to close the Green Road crossing. The determination states that the proposal does not have a probable significant impact on the environment, but lists the following required mitigation: construction of a cul-de-sac on Green Road within the existing railroad / county right of way to county standards as approved by the county engineer; necessary grading and filling; and compliance of the project with Skagit County Critical Area Ordinance 14.36.”

This previous action of the Commission in Skagit County is consistent with the State Environmental Policy Act. It presumes that the Commission has authority to administer SEPA concurrent with authority under Chapter 81.53 RCW.

In TR-940282 and specifically with regard to the Green Road closure Skagit County Engineer and Public Works Director requested SEPA review. Commission staff conducted their environmental review and a mitigated determination of non-significance, required mitigation measures as part of the UTC Order.

City Ordinances and the WAC 197-11-908(2) are further grounds for expanding the coverage of the State Environmental Policy Act. Floodplain and wetland critical area considerations provide independent grounds for SEPA review.

### **III. AUTHORITIES CONCERNING THE APPLICATION OF THE STATE ENVIRONMENTAL POLICY ACT**

The Department of Ecology is the agency designated to resolve disputes about jurisdiction when questions arise about lead agency in the application of the SEPA rules. When a series of exempt actions that are functionally related to each other and that together have a probable significant adverse environmental affect in the judgment of the agency with



jurisdiction, in this case City of Mount Vernon. The City should be allowed to petition the Department of Ecology to resolve disputes pursuant to WAC 197-11-946.

WUTC action taken without SEPA compliances is unlawful and invalid. State vs. Grays Harbor County 122 Wn.2d 244, 256 N.12 857 P.2d 1039 (1993). All parties in all position to the BNSF petition to close Hickox Road crossing are ready, willing and able to take the necessary steps to appeal the SEPA DNS. Because no process exists within the regulations of the UTC the crossing closure opponents anticipate that they will be allowed to challenge any decision to grant the petition based on the failure to comply with SEPA.

#### IV. CONCLUSION

No combination of categorical exemption under NEPA, determination of non-significance by WSDOT or restriction of its scope by WUTC can escape the challenge of the decision ultimately made under the State Environmental Policy Act. If it is not compliant then the decision is invalid.

**DATED** this \_\_\_\_\_ day of September 2007.

JONES & SMITH

By: \_\_\_\_\_  
GARY T. JONES, WSBA #5217  
Attorney for Intervenor Boon

DECLARATION OF SERVICE

Llewella Faye Davis states and declares as follows:

I am over the age of 18; and not a party to this action. I am the assistant to Gary T. Jones of Jones & Smith whose address is PO Box 1245, Mount Vernon, Washington 98273.

I hereby declare that the original REPLY TO BNSF has been sent by U.S. mail to Carole J. Washburn at Washington Utilities and Transportation Commission, 1300 S. Evergreen Park Drive, S.W., PO Box 47250, Olympia, WA 98504-7250. I also declare that true and complete copies have been sent via U.S. Mail to the following interested parties:

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

DATED this \_\_ day of September 2007 at Mount Vernon, Washington.

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Llewella Faye Davis, Legal Assistant