[Service Date September 17, 2007]

BEFORE THE WASHINGTON STATE
UTILITIES AND TRANSPORTATION COMMISSION

BNSF RAILWAY COMPANY, Petitioner, v. CITY OF MOUNT VERNON, Respondent, And SKAGIT COUNTY , WASHINGTON STATE DEPARTMENT OF TRANSPORTATION, WEST VALLEY FARMS LLC, and SKAGIT COUNTY, Intervenors. .	DOCKET TR-070696 MOUNT VERNON, COUNTY, WEST VALLEY FARMS, AND FIRE PROECTION DISTRICT NO. 3's REPLY TO BNSF, WSDOT AND WUTC STAFF RESPONSE

. . . . . .

I. INTRODUCTION

1 Respondent Mount Vernon, Intervenors Skagit County, West Valley Farms, and Fire Protection District 3, (hereafter referred to as "the Parties") jointly submit the following reply to BNSF and WSDOT's Joint Response as well as reply to WUTC staff's Response. It has been made clear from WSDOT's Response and Declaration attached thereto that significant and fatal procedural error has occurred during WSDOT's environmental review of the Siding Project involving the closure of the Hickox Road

City of Mount Vernon
910 Cleveland Avenue
Mount Vernon, WA 98273
360-336-6203
Fax: 360-336-6267

crossing which this Commission must reach decision. The error is fundamental in nature and results in denying Mount Vernon, Skagit County, West Valley Farms, Fire Protection District 3, and the general public from being made aware of WSDOT's Determination of Non-Significance before the limited 14 day window to provide comment began to run. Parties allege such formal notice is critical and relied on to ensure that the necessary individuals (including the SEPA responsible officials of Mount Vernon and the County) and general public have a reasonable opportunity to provide substantive comment in a timely manner, which in turn, would require WSDOT to reconsider their determination. This failure effectively prevented the City and County to allege lead agency status (in addition, it effectively precluded this Commission, an agency with jurisdiction, to assume lead agency if it so chose[1]) should that agency determine that the WSDOT Project is likely to have significant adverse environmental impacts and that an EIS is needed to evaluate the impacts.

2 The Parties strenuously and emphatically contend these errors are much more than mere technical irregularities. Rather, they result in preventing the Parties and the general public from meaningful input in a decision making process on a largely controversial issue. The Parties request that the WUTC exercise is substantive SEPA authority under RCW 43.21C.020, RCW 43.21C.030 and RCW 43.21C.060 and deny BNSF's petition

[1] Joint response of WSDOT and BNSF indicates that the DNS and Environmental checklist was sent July 16, 2007 to WUTC; *See* Joint Response at page 5*;* However, WSDOT's DNS was prepared on February 16, 2007 and allowed for comment until and assumption of lead agency status until March 6, 2007- four months *before* providing and giving notice of the DNS to the Commission.

City of Mount Vernon
910 Cleveland Avenue
Mount Vernon, WA 98273
360-336-6203
Fax: 360-336-6267

for failure to comply with SEPA. The Parties also submit this joint reply as to limiting the Scope of the Hearing

II. STATEMENT OF FACTS

3 The Parties incorporate by reference the Statement of Facts provided in its Motion for partial Summary Judgment and Motion in Limine and exhibits attached thereto filed August 28, 2008. The Parties also clarify and supplement declarations attached to BNSF and WSDOT in their joint response through the attached Declaration of Kevin Rogerson and exhibits in support of the Parties Reply.

III. ARGUMENT

A. The Environmental Review WSDOT and BNSF Asks The Commission to Rely On In Making its Decision Is Fatally and Fundamentally Flawed.

4 SEPA notice requirements are fundamental and are mandated by the SEPA rules and Ecology comments regarding compliance with those rules. The Washington Supreme Court, noting the public policy of SEPA, has stated that SEPA's procedural provisions "constitute an environmental full disclosure law." Norway Hill Preservation & Protection Ass'n v. King County Council, 87 Wn.2d 267, 552 P.2d 674 (1976). With regard to each specific proposal, full disclosure of the environmental information is required so that environmental matters can be given proper consideration during decision-making by a government agency taking action on that proposal. Id. at 273.

5 WSDOT's response, with declarations attached, from WSDOT officials including its SEPA responsible official and environmental staff submitted jointly with Petitioner BNSF has made clear that WSDOT has failed to comply with fundamental SEPA notice

City of Mount Vernon
910 Cleveland Avenue
Mount Vernon, WA 98273
360-336-6203
Fax: 360-336-6267

requirements set forth in WAC 197-11-510, WAC 197-11-340 (2)(b) and WAC 468-12-510 (1). As a result of WSDOT's failure, the necessary individuals or officials responsible for making the decision regarding whether or not to provide comment and/or determine whether or not to assert lead agency status were unaware of WSDOT's decision and the start of the 14 day comment period until long after WSDOT's period identified in the DNS lapsed.

1. WSDOT Was Explicitly Required Under SEPA Rules to Provide Formal Public Notice of their DNS to Mount Vernon, the County, the Fire District and the General Public.

> If a comment period is required for a DNS, public notice and circulation requirements **must** be met. This ensures agencies with jurisdiction, affected tribes, and concerned citizens know about the proposal and have opportunity to participate in the environmental analysis and review. The Washington State's Department of Ecology's SEPA Handbook *September* 1998 updated 2003 at page 38 emphasis added.

6 SEPA rules promulgated under RCW 43.21C.110 shall be accorded substantial deference in the interpretation of SEPA. RCW 43.21C.095. With the exception of projects for which the optional DNS process is used, if *any* of the following criteria applies to a proposal, a 14-day comment period is required for the DNS prior to agency action:

7
> 1) There is another agency with jurisdiction (license, permit, or other approval to issue),
> 2) The proposal includes demolition of a structure not exempt under WAC 197-11-800(2)(f) or 197-11-880.
> 3) The proposal required a non-exempt clearing and grading permit
> 4) The proposal is change or mitigation measures have been added under WAC 197-11-350 that reduce significant impacts to a nonsignficant level (MDNS)
> 5) The DNS follows the withdrawal of a determination of significance for the proposal.

City of Mount Vernon
910 Cleveland Avenue
Mount Vernon, WA 98273
360-336-6203
Fax: 360-336-6267

6) The proposal is a GMA action. *See* WAC 197-11-340.

8 It is undisputed that the DNS issued on February 16, 2007 required a 14-day comment period. See Joint Response of BNSF and WSDOT pp. 6. Once a comment period is required, SEPA explicitly mandates that public notice and circulation requirements must be met in the following manner:

9

> The responsible official shall send the DNS and environmental checklist to agencies with jurisdiction, the department of ecology and affected tribes, and each local agency or political subdivision whose public services would be changed as a result of implementation of the proposal and shall be give notice under WAC 197-11-510. *See* WAC 197-11-340 (2)(b).

10 BNSF and WSDOT contend that the County and Mount Vernon do not have jurisdiction due to federal pre-emption. *See* Joint Response of BNSF and WSDOT at pp. 6. As argued previously in Mount Vernon's Response, BNSF and WSDOT have misapplied case law to the instant matter as federal preemption does not extend in cases involving grade crossings because, in part, of the effects such closure have to state public roads which are reserved to be regulated by the State's traditional police powers. *See* Mount Vernon's Response pp. 11-13. However, it is unnecessary for the Commission to determine preemption. It is clear, as previously submitted by the City in its response and declarations attached, that the County, Mount Vernon, and Fire Protection District 3 all are local agencies or political subdivision *whose public services would be changed as a result of implementation of the closure. See* WAC 197-11-340(2)(b). Under that separate criteria alone, WSDOT still had a duty to provide the DNS and checklist to those Parties

City of Mount Vernon
910 Cleveland Avenue
Mount Vernon, WA 98273
360-336-6203
Fax: 360-336-6267

mentioned above. "Agencies who fail to mail the DNS and the environmental checklist to Ecology and all agencies with jurisdiction **have not met SEPA requirements.**" *See* The Washington State's Department of Ecology's SEPA Handbook September 1998 updated 2003 at page 38 emphasis added. Ecology provides a sample public notice of DNS which should have been provided to the Parties when WSDOT made its DNS. *See* Exhibit 14 Ecology's Sample Public Notice for a DNS.

11 WSDOT had a further duty to give the Public notice under WAC 197-11-510, (general notice requirements providing a list of reasonable methods to provide public notice) and WAC 468-12-510 (1) which sets forth WSDOT's public notice requirements:

12

> The department shall inform the public of actions requiring notice and invitation to comment under WAC 197-11-502 and 197-11-510 in the following manner:
>
> (a) For a determination of nonsignificance (DNS) or a mitigated DNS, issued under WAC 197-11-340(2) and 197-11-350 and requiring public notice under WAC 197-11-502 (3)(b); by (i) sending a copy of the DNS and the letter of transmittal sent to the department of ecology pursuant to WAC 197-11-508, to a newspaper of general circulation in the county, city, or general area where the proposed action is located, agencies with jurisdiction, affected Indian tribes, and each local agency or political subdivision whose public services would be changed as a result of implementation of the proposal; and (ii) any other agency, organization, or member of the public who has made a specific request for information on the proposed action in writing to the department. Each person requesting information shall submit such request individually in writing by mail.

Therefore, pursuant to Ecology SEPA rules and rules adopted by WSDOT, before the comment period began,[2] WSDOT was required to send a notice of

[2] Date of issuance per WSDOT is Feb 16th 2007. *See* Declaration of Elizabeth Phinney .

City of Mount Vernon
910 Cleveland Avenue
Mount Vernon, WA 98273
360-336-6203
Fax: 360-336-6267

determination, copy of the DNS and checklist, and the letter of transmittal to the following parties:

1) Ecology
2) Fire Protection District 3 (local agency whose public services would be changed as result of closure)
3) WUTC (agency with jurisdiction)
4) Skagit County SEPA Responsible Official listed by Ecology (agency with jurisdiction and/or agency whose public services would be changed as result of closure)
5) Mount Vernon SEPA Responsible Official listed by Ecology (agency with jurisdiction and/or agency whose public services would be changed as result of closure)
6) Newspaper of general circulation in Skagit County, Mount Vernon, or general area where the proposed action is located (i.e. Skagit County Herald)
7) Any other person, agency or organization who has made a request for information on the proposed action in writing to the Department.

2. WSDOT's Failed to Provide Required Notice to the Parties and Public Notice and Resulting in Preclusion of the Public, and the Parties to Provide Comment or Assert Jurisdiction .

13 WSDOT provided, attached to their joint response, in the form of declarations by WSDOT officials, what steps were taken in issuance of the DNS. It is clear that *prior* to the DNS issued on February 16, 2007, at various times, WSDOT officials discussed the project, potential permits, with various City, County, and Fire District Officials. *See Declarations of Jeffrey T. Schultz and Elizabeth Phinney in BNSF and WSDOT's brief.* It is further clear that as a result of those meetings, the Parties relayed significant and serious concerns regarding the competency of traffic study and the significant environmental impacts the closure may have, including impacts to agricultural activity, emergency services, and future planning and growth. *See* Exhibit 10 of Mount Vernon's

City of Mount Vernon
910 Cleveland Avenue
Mount Vernon, WA 98273
360-336-6203
Fax: 360-336-6267

Motion for SJ and In Limine - June 30th Letter of Esco Bell to Jeffrey Schultz; *see Also* Exhibit 3 of Mount Vernon's Motion for SJ and In Limine - letter from Gary Jones to Jeffrey Schultz regarding traffic study; and *see Also* Exhibit 5 Declaration of David Skrinde. Thus, prior to the formal DNS, WSDOT officials working and preparing the environmental documents had knowledge that the Parties did not agree and had serious concerns regarding impacts the closure would have and was placed on notice that Mount Vernon and the Fire District believed that provisions of public services would be impacted as a result of the closure.

14 Nevertheless, despite this knowledge, on February 16, 2007, it has now become clear *that WSDOT officials provided formal notice of a DNS on the Project only to The Department of Ecology***.** *See* Declaration of Elizabeth Phinney Item 6 and 7 attached to Joint Response. Per WSDOT's declarations submitted to the Commission, the Parties must by implication and submit further evidence that notice of the DNS was *not* sent to The Skagit Valley Herald to provide the general public notice of WSDOT's determination. *See* Exhibit 15 Declaration of Chrissy Sprouse. Parties must by implication and submit further evidence that the SEPA responsible officials of Mount Vernon and Skagit County listed on the Ecology's website as contact persons for such notice *did not* receive notice, the DNS or the environmental checklist. *See* Exhibit 15 Declaration of Jana Hanson Mount Vernon SEPA responsible official*; See* Exhibit 16 Declaration of Brandon Black Skagit County SEPA responsible official. Parties must also by implication and submit further evidence by declaration that the Fire Protection

City of Mount Vernon
910 Cleveland Avenue
Mount Vernon, WA 98273
360-336-6203
Fax: 360-336-6267

District No. 3 *failed* to receive notice, the DNS or the environmental checklist. *See* Exhibit 17 Declaration of Krista Salinas.

15 WSDOT contends that "talking" and transmissions or e-mails with lower level staff from the County and City Planning Departments cures such procedural defects for those parities and any such procedural error it therefore harmless. *See* BNSF and WSDOT joint response pp. 9-10. This is disingenuous. Clearly only those officials responsible for handling such notices (i.e. SEPA responsible officials for County and City) have the authority, experience, and responsibility to provide comment on behalf of the City and County and assert jurisdiction. Notifying other, lower-level, officials will only result in erroneous conclusions being made and confusion and fails to rise to a similar level of providing appropriate and reasonable notice as is required by the SEPA rules. For instance, it is entirely predictable that WSDOT's oral, or by e-mail, informing Ms. Bradley-Lowell (who is not the SEPA responsible official, nor responsible for providing comment or asserting lead agency status) that WSDOT had issued a DNS *thirteen days after such DNS was issued* that Ms. Bradley-Lowell would presume WSDOT had already previously acted according to SEPA requirements.[3] In other words, that WSDOT had already sent the Notice, DNS, Checklist and transmittal letter to the City's SEPA responsible official whose responsibility it is to determine whether to assert jurisdiction or provide further comment.[4] In light of the circumstances, it is entirely predictable, and occurred in the instant matter, that lower level staff would not take action

[3] *See* declaration of Elizabeth Phinney attached to Joint Response

City of Mount Vernon
910 Cleveland Avenue
Mount Vernon, WA 98273
360-336-6203
Fax: 360-336-6267

based on this information to inquire further whether or not the appropriate official has been informed. *See* Exhibit 15 Declaration of Jana Hanson. To conclude that Mount Vernon and County planning staff should inquire whether WSDOT provided formal and gave appropriate notice to the right official is not reasonable. Informing lower level planning staff orally or by e-mail after a significant period of time for comment has lapsed falls well short of harmless. Parties contend that should the correct officials have received notice using proscribed methods (i.e. sending notice, DNS, Environmental Checklist, and letter of transmittal to SEPA responsible official when appropriate) comments would have been offered to WSDOT seeking reconsideration of the DNS. *See* Exhibit 15 Declaration of Jana Hanson; Exhibit 16 ,Exhibit 17 This is consistent and corroborated by the record that evidences a history of comments by the Parties and the public to WSDOT prior to the DNS issuance raising concerns involving environmental impacts. *See* Exhibit 10 of Mount Vernon's Motion for SJ and In Limine - June 30th Letter of Esco Bell to Jeffrey Schultz; *see Also* Exhibit 3 of Mount Vernon's Motion for SJ and In Limine - letter from Gary Jones to Jeffrey Schultz regarding traffic study; and *see Also* Exhibit 5 Declaration of David Skrinde. Moreover, parties ask the Commission to take note of the record in the instant matter and the large volume of comments received from the general public and Parties when appropriate public notice of the closure was given by the Commission. Taken in its totality, to suggest that no comments would have been submitted to WSDOT regarding involving its decision that closure would have no

[4] WSDOT contends it issued the DNS on February 16, 2007 while informing Rebecca Bradley-Lowell of such determination via telephone and e-mail on March 1, 2007.

City of Mount Vernon
910 Cleveland Avenue
Mount Vernon, WA 98273
360-336-6203
Fax: 360-336-6267

environmental impacts to the natural or built environment upon appropriate public and specific notice to these parties disregards the history of comments these interested Parties have previously submitted on the issue and the declaration attached hereto.

16 Should comment have been submitted within the 14 day period, SEPA rules require the responsible official to consider these comments. WAC 197-11-340(2)(f). The lead agency is then further required to either choose to retain the DNS, issue a revised DNS, or if significant adverse impacts have been identified, withdraw the DNS. Id. By WSDOT's failure to provide notice, it has avoided this critical responsibility.

B. The WUTC has Substantive SEPA Authority to Deny the Petition Based on Noncompliance with SEPA.

17 SEPA's basic policy is to encourage harmony between man and the environment, prevent damage to the environment, and enrich understandings of natural systems. RCW 43.21C.010. To carry out this policy, the legislature has mandated, that "it is the continuing responsibility of the state of Washington and all agencies of the state to use all practicable means, consistent with other essential considerations of state policy, to improve and coordinate plans, functions, programs, and resources" to promote the goals of SEPA set forth in statute. *See* RCW 43.21C.020 (2); *See Also* RCW 43.21C.030 (Directing to the fullest extent possible, that all branches of government of this state are to administer and interpret policies, regulations, and laws, in accordance with the policies set forth by SEPA) . The State Legislature has made it profoundly clear that the authority delegated to all agencies of the state is far more than procedural:

City of Mount Vernon
910 Cleveland Avenue
Mount Vernon, WA 98273
360-336-6203
Fax: 360-336-6267

> The legislature recognizes that each person has a fundamental and inalienable right to a healthful environment and that each person has a responsibility to contribute to the preservation and enhancement of the environment. RCW 43.21C.020(3).

Washington courts have repeatedly pointed out that SEPA is an overlay of law which supplements existing statutory authority. *See for example,* Bellevue v. Boundary Review Board, 90 Wn2d 856, 586 P.2d 470 (1978); Polygon Corp. v. City of Seattle, 90 Wn.2d 59, 578 P.2d 1309 (1978); Norway Hill Preservation and Protection Ass'n v. Kin County Council, 87 Wn.2d 267, 552 P.2d 674 (1976); Eastlake Community Council v. Roanoke Associates, 82 Wn.2d 475, 513 P.2d 36 (1973); *See Also* RCW 43.21C.060. It makes no difference that the statute that grants authority to the Commission to hear this Petition does not provide explicit authority to deny the Petition on environmental ground. *See* State Dept. of Natural Resources v Thurston County, 92 Wn.2d 656, 601 P.2d 494 (1979) (holding that Thurston County had authority to deny on environmental grounds even though the platting statute does not provide explicit authority to do so).

The question then remains, what legal effect does another Agency's finding of no significant environmental impact (i.e. WSDOT's environmental review and DNS) have on the Commission's substantive authority and continuing responsibility under SEPA when such review is, as argued above, clearly in violation of SEPA resulting in precluding comment by the affected Parties, the general public, and when those Parties have provided additional information to the Commission in order to assure adequate environmental review before a decision occurs?

City of Mount Vernon
910 Cleveland Avenue
Mount Vernon, WA 98273
360-336-6203
Fax: 360-336-6267

Petitioners and WSDOT contend that the Commission is bound by WSDOT's finding that the Project (which includes the closure which is at issue here) has no significant environmental impacts since Parties have yet to appeal WSDOT's decision. *See* Joint Response of BNSF and WSDOT pp. 3-6.[5] They maintain that the Commission is thus barred from receiving additional evidence on the issue and likewise is barred from reaching a different conclusion on the factual question of whether the closure will have significant probable adverse environmental impacts. Id. This argument misconstrues the nature of the SEPA mandate and the Commission's substantive SEPA authority which empowers it to review the environmental effects of the Project within its jurisdictional scope which is to examine whether the closure of the crossing contains adequate protection against adverse effects to the natural and built environment.

In State Dept. of Natural Resources v Thurston County, 92 Wn.2d 656, 601 P.2d 494 (1979), the Washington Supreme Court made clear that environmental determinations made by one agency *are not* binding on other decision-making bodies but are uniquely related to the particular decision being taken and are conclusive only for that purpose:

> In summary, the environmental determinations mandated by SEPA are uniquely related to the particular decision being taken, and are conclusive only for that purpose. They are not binding on other decision-making bodies. To hold otherwise would allow one decision-making body to preempt the authority of any other decision-making body considering a related question to evaluate a particular environmental issue, and would foreclose independent analysis and deliberation. Such a result could

[5] The parties to this reply reserve their right to appeal WSDOT's decision and have been only just been made aware of WSDOT's environmental review due to failure to provide formal notice of WSDOT's determination. *See Declaration of Jana Hanson*

City of Mount Vernon
910 Cleveland Avenue
Mount Vernon, WA 98273
360-336-6203
Fax: 360-336-6267

> contravene the clear intent of SEPA to infuse every governmental exercise of discretion with consideration of environmental amenities and values. See RCW 43.21C.030. State Dept. of Natural Resources v. Thurston County at 667.

In Thurston County, the Shoreline Hearings Board determined that a development requiring a shoreline development permit as well as plat approval with the County, provided adequate mitigation under SEPA against significant effect to eagles within the area. Id. at 661. The County did not appeal the Board's finding. Id. at 661 (footnote 2). Instead, following the Board's decision, the County called a public hearing to take additional testimony to reconsider plat approval based on the new evidence and the Board's decision. Id. After hearing additional testimony, visiting the site and reviewing the Board's findings, the County disagreed with the Board that the plat was adequate to protect the eagle habitat and denied the proposed plat based, in part, on environmental grounds, finding that the proposal could not adequately mitigate the adverse effect on the birds. Id. at 662. The Supreme Court found that "The central question which emerges from this complex case is whether the Commissioners [The County Board of Commissioners] have the authority to deny a preliminary plat on environmental grounds and, if so, what effect the Shorelines Hearing Board's finding had on the Commissioner's authority here." Id. at 663.

Ruling that the County was not pre-empted from taking additional evidence or finding differently than the Board, the Supreme Court specifically cited to substantive aspect of SEPA citing specifically to RCW 43.21C.060 which grants authority of the governmental

City of Mount Vernon
910 Cleveland Avenue
Mount Vernon, WA 98273
360-336-6203
Fax: 360-336-6267

decision-making body to condition or deny a request for action on the basis of specific adverse environmental impacts. Id. at 664. The Court found that such authority must be used in context with the scope of the agency's jurisdiction. Id. at 665. Thus, the Court found, SEPA decisions are conclusive only to the extent and scope of an agency linked with the jurisdiction to make that determination and such determination is "conclusive only for that purpose."

The Commission has exclusive jurisdiction to hear matters involving petitions for closure of at grade railroad crossings. *See* RCW 81.53.060. WSDOT has further acknowledged that fact within their environmental review by placing such closure contingent upon a hearing and decision with this Commission. *See* Exhibit 9 WSDOT's Determination of Non-Significance and Environmental Checklist page 13. Just as the Court in Thurston County ruled that only the County, by grant of jurisdiction under the platting statute, may make a conclusive environmental determination uniquely related to the particular decision of plat approval leaving other agency decisions as non-binding to the particular question; so here in the instant matter only the Commission, by grant of jurisdiction under RCW 81.53 et. seq., may make a conclusive environmental determination whether the closure of Hickox Road results in probable significant adverse environmental impacts. As briefed previously in Mount Vernon's original motion, WAC 197-11-600 (3) (b)(ii) provides the framework in which WUTC should assert proper SEPA review in the matter:

> ***Any*** agency acting on the same proposal shall use an environmental document unchanged, except in the following cases…For DNSs and EISs,

City of Mount Vernon
910 Cleveland Avenue
Mount Vernon, WA 98273
360-336-6203
Fax: 360-336-6267

> preparation of a new threshold determination or supplemental EIS ***is required*** if there are… (ii) New information indicating a proposal's probable significant adverse environmental impacts. (This includes discovery of misrepresentation or lack of material disclosure.) " WAC 197-11-600(3)(b)(ii) emphasis added.[6]

The plain language of the SEPA rule above is clear and consistent with the previous case cited above. Rather than limiting changes to a DNS solely to an Agency which assumes lead agency status (which results in pre-empting another's SEPA authority), as argued by WSDOT, BNSF and WUTC, SEPA rules require *any* agency acting on the same proposal use an environmental document unchanged; except however, that for a DNS, preparation of a new threshold determination *is required* if there is new information indicating a proposal's probable significant adverse impact (including discovery of misrepresentation or lack of material disclosure.). Should the WUTC find, as the Parties contend, that new information and lack of material disclosure of the DNS has occurred, WUTC, as with any other agency, is required and has an independent obligation to prepare a new threshold determination within the scope of their jurisdiction over the matter which, in this case, relates to the environmental impacts of the petition for closure.

18 As stated above, a necessary predicate for WUTC to make a new threshold determination requires a finding of the WUTC that the new information indicates the

[6] WUTC staff has taken the position that adoption of existing documents is not appropriate. *See* WUTC staff brief para. 19. Parties agree that adoption is WSDOT DNS is inappropriate. Parties further agree that WUTC may use existing environmental documents. However, to the extent new information is provided or lack of material disclosure or misrepresentation exists , WAC 167-11-600(3)(b)(ii) no longer makes it

City of Mount Vernon
910 Cleveland Avenue
Mount Vernon, WA 98273
360-336-6203
Fax: 360-336-6267

proposal's significant adverse impact or discovery of misrepresentation or lack of material disclosure. WAC 197-11-600(3)(b)(ii). Parties contend this requires a decision maker responsible for the agency to make substantive determinations before engaging in the process of a new threshold determination. However, should the Commission decide that it is necessary that this request be directed to the WUTC Responsible Official, Parties have sent copies of pleadings to the WUTC responsible official and have formally, and in the alternative, directed this request to WUTC responsible official, Chris Rose.

19 **C. The Commission Must Allow For The Parties to Present Evidence of Future Need for the Crossing Which Includes Reasonably Foreseeable Conditions For Growth As Codified within Local Jurisdictions Planning Policies.**

20 A majority of BNSF and WSDOT joint response is devoted to whether the Commission should undergo a new threshold determination as requested by the Parties. However, the response further asks that the WUTC limit the hearing to present need when admitting evidence relating the public convenience and necessity for the closure. *See* BNSF and WSDOT Joint Response at pp. 14. The Parties, as argued in Mount Vernon's response, ask the WUTC to follow the Washington Supreme Court's ruling in Northern Pac. Ry. Co. v. Department of Public Works, 144 Wash. 47, 256 P. 333 (1927) which explicitly allows that evidence of reasonably foreseeable future needs for the crossing not only can but *should be* admitted. Northern Pac. Ry. Co. at 54. Such evidence would necessarily include, but not be limited to any planning documents,

---

discretionary on the part of WUTC to prepare a new threshold determination as this requirement applies to *any agency*.

City of Mount Vernon
910 Cleveland Avenue
Mount Vernon, WA 98273
360-336-6203
Fax: 360-336-6267

transportation plans, evacuation plans, emergency planning, and the studies in which they are based, that direct growth on a 20 year planning horizon adopted by the local jurisdictions charged under the GMA to manage and regulated such growth.

IV. CONCLUSION

21 Significant and fundamental error occurred when WSDOT issued a SEPA determination without following the notice as required under SEPA rules violating SEPA's "full disclosure" requirement. In no manner can such error be considered minor in light of the resulting prejudice to the Parties whose responsible officials were not aware of such determination to place them on notice to provide comment or assert jurisdiction. It is fair to say that closure of the crossing can be characterized as a controversial issue, in light of the anticipated impacts to the local community, and the comments provided from the public to the Commission to date. Lack of notice to the local jurisdictions whose public services would be affected, who may assert jurisdiction or conduct their own supplement EIS on the proposal, and lack of notice to the general public, violates the full disclosure policy in which SEPA is based. BNSF and WSDOT ask the Commission to rely on such a flawed determination. Because of a lack of material disclosure and new information the Commission must prepare a new threshold determination and EIS if appropriate.

City of Mount Vernon
910 Cleveland Avenue
Mount Vernon, WA 98273
360-336-6203
Fax: 360-336-6267

22 DATED this 17th day of September, 2007

_____

Kevin Rogerson WSBA #31664
City Attorney
City of Mount Vernon, Respondent

_____

Stephen R. Fallquist, WSBA # 31678
Deputy Prosecuting Attorney, Civil Division
Skagit County, Intervenor

_____

Gary Jones, WSBA # 5217
Attorney for West Valley Farms, Intervenor

_____

Brian K. Snure, WSBA # 23275
Attorney for Skagit County
Fire Protection District No. 3, Intervenor

City of Mount Vernon
910 Cleveland Avenue
Mount Vernon, WA 98273
360-336-6203
Fax: 360-336-6267