[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

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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 required 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

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[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.

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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.

4 The Administrative Law Judge should note that prior to the DNS, the party named as the Respondent, Skagit County, had acted by its Board of County Commissioners in Resolution No.20060256 to request "WSDOT to seek any and all alternatives to said closure." Exhibit F to Jeffrey T. Schultz Declaration in Opposition. The Mayor and the Public Works Director of Mount Vernon had each written letters stating opposition. See Schultz Declaration in Opposition Exhibit "B".

5 The public safety issues which are related to transportation access over the Hickox Road BNSF intersection were clearly in need of study before February 2007 when the DNS was made, based on the Exhibits "A" Director of County Emergency Management, Exhibit "D"Skagit County Traffic Engineering, and Fire District No. 3 comments Exhibit "H" and Diking District No. 3_Exhibit "I"

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3 The DNS did not mitigate the environmental concerns. It did not give the UTC alternatives. WSDOT did not present a review of the issues which fulfills its duty as a SEPA lead agency.

III. ARGUMENT

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

6 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.

7 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 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

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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.

8 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:

9

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

10 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

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period is required, SEPA explicitly mandates that public notice and circulation requirements must be met in the following manner:

11 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).

12 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 Three 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 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

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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.

13 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:

14

> 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 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)

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

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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 .

15 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 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 I 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

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Vernon and the Fire District believed that provisions of public services would be impacted as a result of the closure.

16 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_________ Skagit County SEPA responsible official. Parties must also by implication and submit further evidence by declaration that the Fire Protection District No. 3 *failed* to receive notice, the DNS or the environmental checklist. *See* Exhibit 17 Declaration of _______.

17 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

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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 to 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 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

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

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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 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 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.

18 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

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

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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.

19 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:

> 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

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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?

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

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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 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

[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*

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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 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."

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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, 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]

[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

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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.

20 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 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,

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

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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.

21 **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.**

22 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, 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

23 Significant and fundamental error occurred when WSDOT issued a SEPA determination without following the notice as required under SEPA rules violating

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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 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.

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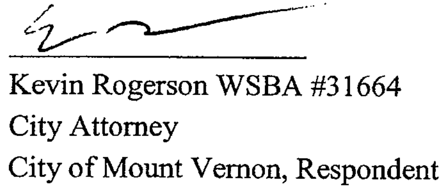
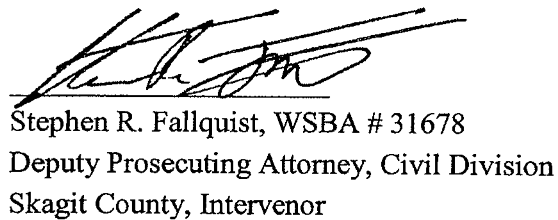
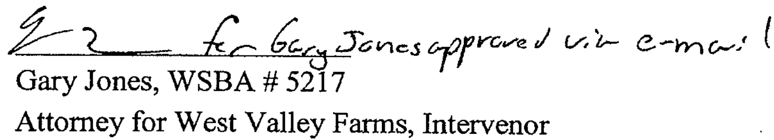
22 DATED this 17th day of September, 2007



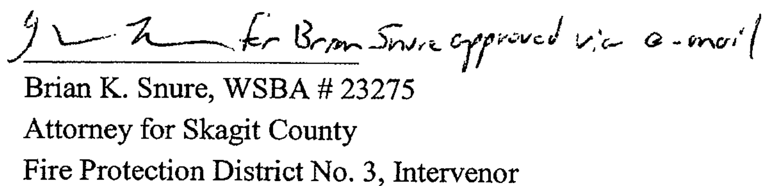
Kevin Rogerson WSBA #31664
City Attorney
City of Mount Vernon, Respondent



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



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



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4 **BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION**
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BNSF RAILWAY COMPANY, Petitioner vs. CITY OF MOUNT VERNON, Respondent And SKAGIT COUNTY, WASHINGTON STATE DEPARTMENT OF TRANSPORTATION, WEST VALLEY FARMS LLC, and SKAGIT COUNTY, Intervenors.	**DOCKET NO. TR-070696** **DECLARATION OF KEVIN L. ROGERSON IN SUPPORT OF REPLY TO BNSF, WSDOT AND WUTC RESPONSE**

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18 I, Kevin L. Rogerson, declare as follows:
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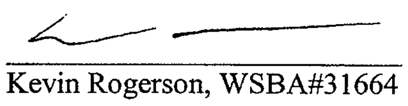
20 1. I am an attorney representing Respondent City of Mount Vernon in the above-
21 referenced matter. I make this declaration based upon my personal knowledge.
22
23 2. Attached to this declaration are true and correct copies of the following
24 documents in support of Petitioners Motion for Partial Summary Judgment and motion in
25 limine:
26

MOUNT VERNON CITY ATTORNEY
PO BOX 809
MOUNT VERNON, WASHINGTON 98273
(360) 336-6203 FAX (360) 336-6267

- Exhibit 13 Ecology's Sample Public Notice for a DNS.
- Exhibit 14 Declaration of Chrissy Sprouse
- Exhibit 15 Declaration of Jana Hanson Mount Vernon SEPA responsible official
- Exhibit 16 Declaration of Brandon Black Skagit County Designated SEPA Official
- Exhibit 17 Declaration of Krista Salinas

The Foregoing is true and correct to the best of my knowledge, under the penalty of perjury of the laws of the State of Washington.

EXECUTED this 17th day of September, 2007 in Mount Vernon, Washington.



Kevin Rogerson, WSBA#31664

MOUNT VERNON CITY ATTORNEY
PO BOX 809
MOUNT VERNON, WASHINGTON 98273
(360) 336-6203 FAX (360) 336-6267

EXHIBIT 13

Figure 2. **Sample Public Notice for a DNS**

NOTICE OF DETERMINATION OF NONSIGNIFICANCE

(Agency name) issued a determination of nonsignificance (DNS) under the State Environmental Policy Act Rules (Chapter 197-11 WAC) for the following project: (project description and location) proposed by (applicant's name). After review of a completed environmental checklist and other information on file with the agency, (agency name) has determined this proposal will not have a probable significant adverse impact on the environment.

Copies of the DNS are available at no charge from (name), (address and/or phone number). The public is invited to comment on this DNS by submitting written comments no later than (date) to (name) at (address).

TIP:

Whenever possible, the lead agency should combine the public notice for the DNS comment period with the public notice for any comment period and/or public hearing held on the permit or license. See Figure 3 for an example of a combined public notice.

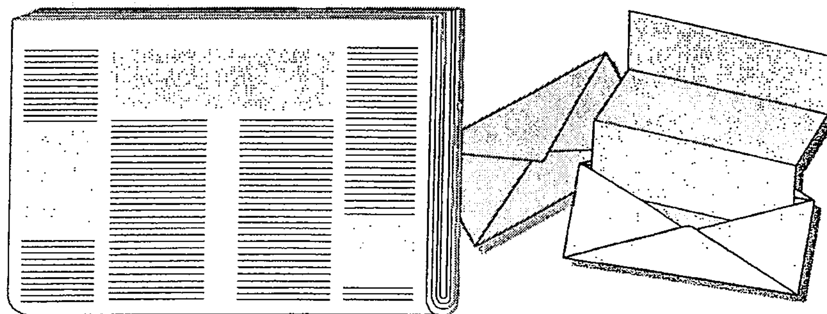


EXHIBIT 4

BEFORE THE WASHINGTON UTILITIES TRANSPORTATION COMMISSION

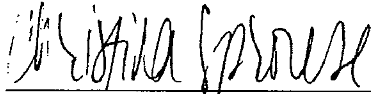
BSNF RAILWAY COMPANY, **Petitioner** **v.** **CITY OF MOUNT VERNON** **Respondent** **And** **SKAGIT COUNTY, WASHINGTON STATE DEPARTMENT OF TRANSPORTATION, and WEST VALLEY FARMS** **Intervenors**	)	**DOCKET NO. TR-070696** **DECLARATION OF CHRISTINA SPROUSE**

I, Christina Sprouse, do hereby declare the following:

1. That I am the Paralegal to Kevin Rogerson, City Attorney of Mount Vernon. I have been employed by the City for a period of 7 years and do hereby make this declaration in that capacity.
2. That on September 14, 2007 I called the Skagit Valley Herald, the local newspaper of general circulation for Skagit County, and spoke with Jeanette Kales in the classifieds section.
3. That I requested that she search the Herald Public Notices for the time period February 16, 2007 through March 6, 2007 using different search parameters including: Mount Vernon Siding Extension Project, Washington State Department of Transportation (WSDOT), Burlington Northern Santa Fe Railroad (BNSF).
4. That Ms. Kales stated that she was unable to find anything in the Herald's records for the above stated time period, or any time period, to show that the Determination of Nonsignificance (DNS) Notice for this proposal was published.

The below-signed does certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct at the time it was written.

DATED this day of September 14, 2007, 2007.



Christina Sprouse
Paralegal
for the City of Mount Vernon

City of Mount Vernon
Location Where Declaration

EXHIBIT 15

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION, STATE OF WASHINGTON

BSNF RAILWAY COMPANY, **Petitioner**	)	**DOCKET NO. TR-070696**
v.	)	
CITY OF MOUNT VERNON **Respondent**	)	**DECLARATION OF JANA HANSON**
And **SKAGIT COUNTY, WASHINGTON STATE DEPARTMENT OF TRANSPORTATION, and WEST VALLEY FARMS** **Intervenors**	)	

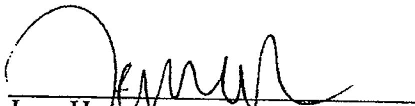
I, Jana Hanson, do hereby declare the following:

1. That I am the Community and Economic Development Director for the City of Mount Vernon and do hereby make this declaration in that capacity.
2. That I am also the SEPA Responsible Official for the City of Mount Vernon and I am listed by the Department of Ecology as the SEPA Responsible Official for the City of Mount Vernon and the Contact Person for Notices.
3. That, to the best of my recollection, I have neither seen, received via mail, nor was I made aware by any WSDOT official of the SEPA Determination of Non-Significance for the proposed Mount Vernon Siding Extension Project that was issued by WSDOT on or about February 16, 2007.
4. That the first time that I was made aware of the fact that a Determination was made was by the Mount Vernon City Attorney in late August on or about August 24th, 2007.
5. That I recall meeting with WSDOT officials regarding the proposed project, however SEPA process was not discussed at these meetings.

6. That, as the City's SEPA Responsible Official I am concerned with the potential environmental impacts that will result from the proposed action and in my capacity as the Responsible Official I would have considered and consulted with City Officials and submitted comments regarding those concerns had I been made aware of the SEPA comment period pursuant to the expected method of transmittal of the DNS.
7. That the proposed project is of great concern to the City of Mount Vernon Administration and many of our constituents and impacts such as the elimination of evacuation routes, emergency access to surrounding properties, economic impacts on future growth among other concerns would have been submitted in writing to WSDOT during the SEPA comment period.
8. That the City would have also considered the appropriateness of having WSDOT take the lead as the Responsible Official had we been made aware of this action.

The below-signed does certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct to the best of his or her knowledge at the time it was written.

Executed in Mount Vernon, WA this 17th day of September, 2007



Jana Hanson
Director Community and Economic Development
City of Mount Vernon

EXHIBIT 16

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION, STATE OF WASHINGTON

BSNF RAILWAY COMPANY, **Petitioner** **v.** **CITY OF MOUNT VERNON** **Respondent** **And** **SKAGIT COUNTY, WASHINGTON STATE DEPARTMENT OF TRANSPORTATION, and WEST VALLEY FARMS** **Intervenors**	)))))))))))))))	**DOCKET NO. TR-070696** **DECLARATION OF BRANDON BLACK**

I, Brandon Black, do hereby declare the following:

1. That I am the Senior Planner Supervisor for the Skagit County Department of Planning and Development Services, and I do hereby make this declaration in such capacity.
2. Gary Christensen, Director for Skagit County Department of Planning and Development Services, is the SEPA Responsible Official for Skagit County and is listed by the Department of Ecology as the SEPA Responsible Official for Skagit County and the Contact Person for Notices.
3. Gary Christensen, as my supervisor, has delegated to me the responsibilities and duties of the SEPA Responsible Official for Skagit County, and I do hereby make this declaration in such capacity.

4. That, to the best of my recollection, I have neither seen, received via mail, nor was I made aware by any WSDOT official of the SEPA Determination of Non-Significance for the proposed Mount Vernon Siding Extension Project that was issued by WSDOT on or about February 16, 2007.

The below-signed does certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct to the best of his or her knowledge at the time it was written.

Executed in Mount Vernon, Washington, this 17th day of September, 2007

Brandon Black
Senior Planner Supervisor for the Department of Planning and Development Services
Skagit County

EXHIBIT 17

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

BNSF RAILWAY COMPANY	)	Docket No. 070696
PETITIONER,	)	DECLARATION OF KRISTA SALINAS
vs.	)	
THE COUNTY OF SKAGIT	)	
RESPONDENT	)	

I declare under penalty of perjury under the laws of the State of Washington that the following is true and correct.

1. I, Krista Salinas am the Secretary to the Board of Commissioners of Skagit County Fire Protection District No. 3. I have served as Secretary to the Board of Commissioners since January 2005.

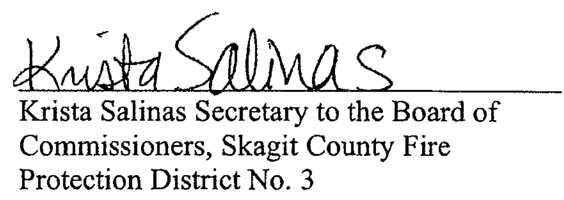
SNURE LAW OFFICE, PSC.
612 SOUTH 227TH STREET
DES MOINES, WASHINGTON 98198
(206) 824-5630
Fax: (206) 824-9096

1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26

2. I am the person responsible for processing all mail addressed to the District. I personally received and processed all mail delivered to Skagit County Fire Protection District No. 3 in January, February, March and April of 2007.

3. To the best of my knowledge, the District has, as of the date of this Declaration, not received any Notice via mail or any other delivery method from the Washington State Department of Transportation relating to WSDOT's SEPA Determination of Nonsignificance.

Dated: 9-17-07.



Krista Salinas Secretary to the Board of Commissioners, Skagit County Fire Protection District No. 3

SNURE LAW OFFICE, PSC.
612 SOUTH 227TH STREET
DES MOINES, WASHINGTON 98198
(206) 824-5630
Fax: (206) 824-9096

State v. Lake Lawrence Public Lands Protection Ass'n
Wash., 1979.

Supreme Court of Washington, En Banc.
STATE of Washington, Dept. of Natural Resources and Lake Lawrence, Inc., Respondents,
v.
LAKE LAWRENCE PUBLIC LANDS PROTECTION ASSOCIATION, Thurston County Board of County Commissioners, Respondents/Cross-Appellants.
No. 45816.

Oct. 4, 1979.

Appeal was taken from judgment of the Superior Court, Thurston County, Richard Pitt, J., which reversed the denial of a plat approval. The Supreme Court, Horowitz, J., held that: (1) fact that Shoreline Hearing Board had found the plat to be in accordance with Shoreline Management Act did not preclude rejection of the plat because of the effect which it would have on a bald eagle nesting area in the shoreline area; (2) county has the authority to deny a plat on environmental grounds under the State Environmental Policy Act; and (3) because the county had indicated that it would consider an application for less dense development, the denial of the plat approval did not amount to an unconstitutional taking.

Reversed.
West Headnotes
[1] Zoning and Planning 414 ⚷35

414 Zoning and Planning
414II Validity of Zoning Regulations
414II(A) In General
414k35 k. Spot Zoning. Most Cited Cases

Zoning and Planning 414 ⚷151

414 Zoning and Planning
414III Modification or Amendment
414III(A) In General
414k151 k. Power to Modify or Amend in General. Most Cited Cases

Request of board of county commissioners that planning department reconsider master program designation of a particular area as rural in view of evidence that it was a habitat for endangered birds did not amount to an attempted rezoning or spot zoning and was not zoning action.

[2] Environmental Law 149E ⚷577

149E Environmental Law
149EXII Assessments and Impact Statements
149Ek577 k. Duty of Government Bodies to Consider Environment in General. Most Cited Cases
(Formerly 199k25.5(9) Health and Environment)
Governmental decision-making body whose deliberation is subject to the requirements of the State Environmental Policy Act is empowered by that Act to deny a project application on environmental grounds. RCWA 43.21C.060.

[3] Environmental Law 149E ⚷595(2)

149E Environmental Law
149EXII Assessments and Impact Statements
149Ek584 Necessity for Preparation of Statement, Consideration of Factors, or Other Compliance with Requirements
149Ek595 Particular Projects
149Ek595(2) k. Land Use in General. Most Cited Cases
(Formerly 149Ek571, 199k25.5(4) Health and Environment)
State Environmental Policy Act was applicable to plat approval process as the county board was required by that Act to deliberate on environmental concerns as part of the platting decision. RCWA 43.21C.060, 58.17.110.

[4] Environmental Law 149E ⚷142

149E Environmental Law
149EIV Water, Wetlands, and Waterfront Conservation
149Ek138 Administrative Agencies and Proceedings
149Ek142 k. Hearing and Determination. Most Cited Cases
(Formerly 199k25.5(4) Health and Environment)
Even though county commissioners did not appeal from it, decision of Shorelines Hearing Board that

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proposed development was adequate to protect bald eagles for purposes of a shoreline development permit did not bind the county commissioners so as to preclude them from denying plat approval on the ground that the plat as a whole did not provide adequate protection to the bald eagles. RCWA 90.58.140(2)(b).

[5] Environmental Law 149E ⚿577

149E Environmental Law
149EXII Assessments and Impact Statements
149Ek577 k. Duty of Government Bodies to Consider Environment in General. Most Cited Cases
(Formerly 199k25.5(1) Health and Environment)
Environmental determinations mandated by the State Environmental Policy Act are uniquely related to the particular decision being made and are not conclusive only for that purpose; they are not binding on other decision-making bodies. RCWA 43.21C.010 et seq.

[6] Environmental Law 149E ⚿132

149E Environmental Law
149EIV Water, Wetlands, and Waterfront Conservation
149Ek129 Permissible Uses and Activities; Permits and Licenses; Management
149Ek132 k. Coastal Areas, Bays, and Shorelines. Most Cited Cases
(Formerly 199k25.5(4) Health and Environment)
Even though Shorelines Hearing Board had found that proposed plat was consistent with the county's master program and the Shorelines Management Act, county could deny the proposed plat on the ground that it was inadequate to protect a perching and feeding site for endangered bald eagles. RCWA 43.21C.030, 58.17.110.

[7] Environmental Law 149E ⚿577

149E Environmental Law
149EXII Assessments and Impact Statements
149Ek577 k. Duty of Government Bodies to Consider Environment in General. Most Cited Cases
(Formerly 199k25.5(9) Health and Environment)
Because opportunity to be heard before the county commission was available and because judicial review was available, exercise by the board of commissioners of their power to deny a plat approval on environmental grounds under the authority of the State Environmental Policy Act was a proper exercise of delegated legislative authority. RCWA 43.21C.010 et seq.

[8] Eminent Domain 148 ⚿82

148 Eminent Domain
148II Compensation
148II(B) Taking or Injuring Property as Ground for Compensation
148k81 Property and Rights Subject of Compensation
148k82 k. Real Property in General. Most Cited Cases
Although property was owned by the state, so that there could be no unconstitutional taking with respect to the ownership of the land, lessee of the property had an interest which entitled it to raise the question of whether its leasehold had been taken for public use without compensation. U.S.C.A.Const. Amend. 5; RCWA Const. art. 1, § 16.

[9] Eminent Domain 148 ⚿2.1

148 Eminent Domain
148I Nature, Extent, and Delegation of Power
148k2 What Constitutes a Taking; Police and Other Powers Distinguished
148k2.1 k. In General. Most Cited Cases
(Formerly 148k2(1))
The determination of whether a regulation is an unconstitutional taking requires a balancing of the nature of the infringement of private property interests against the public interest in imposing the regulation; in considering the encumbrance on the property owner, court will consider both the type of encumbrance imposed and whether the owner is thereby prevented from making a profitable use of the property.

[10] Eminent Domain 148 ⚿2.27(1)

148 Eminent Domain
148I Nature, Extent, and Delegation of Power
148k2 What Constitutes a Taking; Police and Other Powers Distinguished
148k2.27 Environmental Protection
148k2.27(1) k. In General. Most Cited Cases
(Formerly 148k2(1.2))
Where county commissioners, in disapproving plat because of the effect which it would have on endangered bald eagles, left open the possibility that they would approve a less dense development of the land and indicated that they would entertain an

application for a plat which provided an adequate buffer zone for the protection of the eagles, the denial of the plat could not amount to an unconstitutional taking of the developer's leasehold interest in the property.

[11] Eminent Domain 148 2.27(1)

148 Eminent Domain
148I Nature, Extent, and Delegation of Power
148k2 What Constitutes a Taking; Police and Other Powers Distinguished
148k2.27 Environmental Protection
148k2.27(1) k. In General. Most Cited Cases
(Formerly 148k2(1.2))
Where action does not deny to those having an interest in the property all reasonable profitable use but only requires that the use be adapted to protecting important environmental resource, there is no taking of the property. U.S.C.A.Const. Amend. 5; RCWA Const. art. 1, § 16.

*658 **495 Philip P. Malone, Poulsbo, Roger M. Leed, Seattle, Charles B. Roe, Robert V. Jensen, Asst. Attys. Gen., Olympia, for petitioner.
Owens, Weaver, Davies & Dominick, Alexander W. Mackie, J. Lawrence Coniff, Jr., Asst. Atty. Gen., Patrick Sutherland, Pros. Atty., Richard Strophy, Deputy Pros. Atty., Olympia, Smith, Brucker, Winn & Ehlert, Thomas H. S. Brucker, Seattle, for respondent.
Slade Gorton, Jr., Atty. Gen., Olympia, for both parties.
HOROWITZ, Justice.
The central issue raised by this appeal is whether the Thurston County Board of County Commissioners, considering whether to deny a preliminary plat on environmental grounds, is bound by a finding of the Shorelines Hearing Board in a related proceeding that the plat is adequate to protect the environmental resource. We hold the County Board is not precluded from reaching a different conclusion on the environmental issue and denying the plat, and that the Board's decision to deny the plat did not violate the applicant's constitutional rights. We accordingly reverse.

*659 At issue here is the proposal of Lake Lawrence, Inc. to develop a 14-acre parcel of land known as Wood Point on the shore of Lake Lawrence, a small lake in Thurston County. The shoreline of the lake is presently only partially developed. Wood Point is in a natural state, covered with second growth timber and dense underbrush. It is designated a " rural environment" in the County's Shoreline Master Program, allowing low-intensity land use, with residential development not exceeding two dwellings per acre. Title to the property is held by the State Department of Natural Resources in trust for the University of Washington. Desiring to make the land income-producing, the Department leased it to Lake Lawrence, Inc. for a term of 55 years. The parties intended that the lessee would develop the land into single-family residential units.

In January 1977 Lake Lawrence, Inc. applied to the County Board of Commissioners (the Commissioners) for approval of a preliminary plat and shoreline substantial development permit for its project. In the ensuing months the County Planning Commission gathered evidence and testimony regarding the proposal. A draft environmental impact statement (EIS) was prepared, public hearings were held, and in May 1977 a final EIS was filed with the Planning**496 Department. During the course of this investigation it became known to county planners that bald eagles use the Wood Point site for perching and feeding from the well-stocked lake. The EIS documented environmentalists' concern over the eagle habitat, and the conclusion of at least one consultant that development of Wood Point could drive bald eagles from the area. After visiting the site to observe perching eagles the planning staff recommended denial of the plat application. The Planning Commission itself, however, lacked a quorum to render a decision at its July 1977 meeting, and thus forwarded the proposal to the Commissioners with no recommendation.

[1] The Board of County Commissioners held two public hearings on the plat proposal in August and September *660 1977. On the date of the second hearing the developer submitted a revised plat intended to provide more protection to the wildlife habitat, particularly to the trees identified as favored perching sites for the eagles. The revised plat set aside three lots on the shoreline as an eagle preserve and created a 75-foot buffer zone along the shoreline, but maintained a density of 22 residential units in the 14-acre parcel. After receiving testimony from environmental experts as well as members of the community, the Commissioners voted unanimously to deny the application for a preliminary plat and shoreline development permit. The denial was based on the eagles' status as endangered birds in Thurston

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County, the County's comprehensive plan calling for preservation of the County's wildlife, and the Department of Game's recommendation that a buffer strip of 200 feet or more be required to preserve the site's value as a bald eagle habitat. The proposed plat does not provide such a buffer between the eagles' preferred perches and human habitation or development, and it also allows substantial development between these perches and a marsh area which is critical to the eagle habitat. The commissioners also voted at the September meeting to request the Planning Department to reconsider the master program designation of the area as rural in light of the evidence of its use as a habitat for endangered birds.[FN1]

FN1. Contrary to respondents' contention, the Commissioners' request does not amount to an attempted rezone or spot-zone. It is not in itself a zoning action. Nor does it create a classification different from and inconsistent with the classification of surrounding land, and not in accordance with the comprehensive plan which governs here. Cf. Smith v. Skagit County, 75 Wash.2d 715, 743, 453 P.2d 832 (1969).

Lake Lawrence, Inc. and the Department of Natural Resources (hereinafter referred to as respondents) sought review of the Commissioners' action through two separate and appropriate means. Review of the plat denial was sought in the Superior Court for Thurston County pursuant to RCW 58.17.180, a provision of the platting statute which provides for judicial review of any decision approving ***661** or denying a plat. Review of the denial of the shorelines substantial development permit was sought before the Shorelines Hearing Board (the Board) pursuant to RCW 90.58.180, a provision of the Shorelines Management Act of 1971 (the SMA).

In February 1979, before the matter of the plat denial had come to trial in Thurston County Superior Court, the Board held a hearing on the denial of the shoreline development permit. The Board received substantial testimony regarding the proposed project and the environmental issues it raised. In its findings of fact the Board noted that bald eagles have long been observed at Lake Lawrence and the Lake is an incidental perching area for these eagles. The Board also found that preservation of the perching trees together with a surrounding buffer was a proper condition of development of Wood Point. The Board found, however, that setting aside three waterfront lots as an eagle preserve, and maintaining a 75-foot buffer area along the shoreline provides adequate protection against significant adverse effect to the eagles. The Board concluded the proposed substantial development in the shoreline is consistent with the County's master program****497** and the SMA, and that a permit for the shoreline development should not be denied. The Board's order thus reversed the denial of the shoreline development permit and remanded to the County for further proceedings.

Following the Board's decision the Commissioners moved in superior court to have the record on review of the plat decision returned to permit reconsideration. After the motion was granted and the record returned, the Commissioners called another public hearing to take additional testimony and to reconsider approval or denial of the plat based on the new evidence and the Board's decision. On April 24, 1978, after hearing additional testimony, visiting the site, considering the record and arguments of counsel, and considering an alternate configuration for the project which preserved the 22-unit density, the Board once again unanimously denied the preliminary plat. The ***662** Commissioners entered detailed findings of fact and conclusions of law, and gave specific reasons for its denial, thus meeting the requirements for specificity imposed by this court in Parkridge v. City of Seattle, 89 Wash.2d 454, 573 P.2d 359 (1978), which had been decided in the interim between the Commissioners' first and second votes on the plat.

The Commissioners disagreed with the Shorelines Hearing Board that the plat was adequate to protect the eagle habitat, finding it would be disruptive to feeding and perching activities and would not assure continued availability of the site to the eagles.[FN2] The Commissioners detailed at length the features of the plat proposal which are unacceptable, particularly the developer's insistence that 22 residential units be included. The Commissioners concluded such a plan could not adequately mitigate the adverse effect on the birds, that the proposal was not in the " public interest" within the meaning of the platting statute, and that the plat must therefore be denied.

FN2. The Commissioners did not appeal the Board's finding, concluding the issuance of a shoreline substantial development permit was rendered moot by the denial of the plat.

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Following this second denial of the preliminary plat the respondents filed a petition in superior court for a writ of mandamus to compel the Commissioners to issue a substantial development permit and to approve the plat. The petition was initially denied on the ground there was an adequate remedy at law. At the same time the court granted the motion of Lake Lawrence Public Lands Preservation Association, an association of interested local citizens, to intervene. At trial the court considered the full record before the Commissioners on remand, and also allowed respondents to reargue their mandamus claims. Upon entering findings of fact and conclusions of law, the court issued an order directing the Commissioners to issue a substantial development permit and to approve the preliminary plat.

***663** The court's findings which are central to this appeal are: (1) the Commissioners are bound by the Shorelines Hearing Board's finding that the proposed plat is adequate to prevent any significant adverse effect on the eagles using the site; (2) the Commissioners have no authority under the platting statute to deny a plat on environmental grounds, and the authority to do so under the State Environmental Policy Act (SEPA), RCW 43.21C, was preempted by the Board's decision on the matter; (3) the Commissioners' application of the " public interest" clause of the platting statute to deny the plat on environmental grounds renders the clause unconstitutionally vague; and (4) denial of the plat to preserve the perching and feeding site for the eagles is an unconstitutional taking.

We hold the Commissioners are not bound by the Shorelines Hearing Board finding, and that they have independent authority under SEPA to consider the environmental issue and deny the plat for environmental reasons. We further hold that denial of the plat in this case does not violate respondents' rights to due process, or constitute a taking of private property for public use without compensation.

I.

[2] The central question which emerges from this complex case is whether the 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 Commissioners' authority here. There is no longer any question that a governmental decision-making body whose deliberation is subject to the requirements of SEPA is empowered by that act to deny a project application on environment grounds. In Polygon Corp. v. City of Seattle, 90 Wash.2d 59, 578 P.2d 1309 (1978) this court recognized this substantive aspect of SEPA as a supplement to all other statutory authorization. The procedural requirements of SEPA for consideration of the environmental effects of proposed developments will not be rendered ***664** meaningless by denying the authority of the decision-maker to reject a proposal on the basis of the adverse environmental effects it has discovered through the process. See RCW 43.21C.060, a provision of SEPA recognizing the authority of the governmental decision-making body to condition or deny a request for action on the basis of specific adverse environmental impacts.

[3] Similarly, there can be no question of the application of SEPA to the plat-approval process. The Thurston County Board of County Commissioners is required by SEPA to deliberate on environmental concerns as a part of the platting decision process.Loveless v. Yantis, 82 Wash.2d 754, 513 P.2d 1023 (1973). The requirement of the platting statute in RCW 58.17.110 that the County Commissioners determine if " the public use and interest will be served by the platting" in fact serves to emphasize the significance of early inquiry into environmental matters.Loveless v. Yantis, supra, at 765, 513 P.2d 1023.

As noted in Loveless, the absence of environmental criteria from the platting statute is immaterial, for the obligation and authority to consider such matters is provided by SEPA.

As we have repeatedly pointed out, SEPA is an overlay of law which supplements existing statutory authority. See, for example, Bellevue v. Boundary Review Board, 90 Wash.2d 856, 586 P.2d 470 (1978); Polygon Corp. v. City of Seattle, supra;Norway Hill Preservation and Protection Ass'n v. King County Council, 87 Wash.2d 267, 552 P.2d 674 (1976); Eastlake Community Council v. Roanoke Associates, 82 Wash.2d 475, 513 P.2d 36 (1973). Thus, it makes no difference that the platting statute does not provide explicit authority to deny the plat on environmental grounds, because SEPA does provide such authority. The Commissioners here were required by SEPA to consider the possible adverse impact of the proposed plat on the use of Wood Point for eagle perching and feeding, and were empowered by SEPA to deny the plat on the ground the ***665**

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adverse impact was too great. The question remains, however, what legal effect the Shorelines Hearing Board's finding had on the Commissioners' reconsideration of the plat.

[4] It is respondents' contention that the Commissioners were bound by the Board's finding that the proposed plat provided adequate safeguards to protect the eagles, since they took no appeal from the Board's decision. They maintain the Commissioners were thus barred from receiving additional evidence on the issue upon reconsideration, and likewise were barred from reaching a different conclusion on the factual question. Since the Commissioners specifically found that the proposed plat met all requirements of the platting statute and the County Code, respondents maintain the Commissioners are therefore compelled to approve the application. This argument misconstrues the nature of the SEPA mandate for environmental consideration, and the scope of the Shorelines Hearing Board's jurisdiction.

The Board's jurisdiction under the Shorelines Management Act in this case was to determine whether the request for a substantial development permit is consistent with the County's Shorelines Master Program and the provisions of the SMA.RCW 90.58.140(2)(b). The Act provides for direct regulation of activities within the " shorelines" **499 of the state, which are defined to include the lands extending landward for 200 feet from the high water mark.RCW 90.58.030(2)(d), (f). In making its determination whether a permit for development within this Shoreline may issue, the Board is subject to the mandates of SEPA to consider environmental concerns.Sisley v. San Juan County, 89 Wash.2d 78, 569 P.2d 712 (1977). It is likewise empowered by SEPA to deny or condition the permit application on the basis of specific adverse environmental effects discovered in the process of these deliberations. See PolygonCorp. v. City of Seattle, supra ; RCW 43.21C.060. The scope of the Board's jurisdiction, however, is not broadened by the provisions of SEPA. The Board is empowered to *666 determine whether a shoreline substantial development permit should issue, and its deliberations under SEPA are confined to that purpose.

This fact was recognized by the Board in its Final Findings, Conclusions and Order. The Board specifically stated it was reviewing the denial of the shoreline permit " within the context of the Shoreline Management Act. . . . Other requirements and approvals for the proposal must nonetheless be met before the proposal can proceed." The Board also limited its conclusions of law to determination of the consistency of the proposal with the County's Master Program and the Shoreline Management Act.

In short, the Board's finding that the proposed plat was adequate to protect against adverse effects to the eagles is limited in its relevance and binding effect to the narrow jurisdiction which the Board is empowered to exercise. Implicit in the Board's finding that the plat is adequate is the qualification that the finding is made For the purposes of a shoreline development permit. It cannot bind the County Commissioners in their determination of an entirely different question whether the preliminary plat should be approved. This conclusion follows from the limited and differing jurisdictions of the decision-making agencies, and from the unique nature of SEPA as a supplement to the statutory authority of each agency.

In contrast to the jurisdiction of the Shorelines Hearing Board to inquire into the consistency of a proposed shoreline development with the County's Master Program and the Shoreline Management Act, the County Commissioners must inquire " into the public use and interest proposed to be served" by the plat.RCW 58.17.110. Its jurisdiction is not restricted to consideration of the project's effect on the waters and the relatively narrow strip of land bordering them. Indeed, in this case, some of the perching trees used by the eagles at Wood Point are outside the 200 foot area of the shoreline, and are therefore beyond the power of the Shoreline Hearing Board to directly regulate. See RCW 90.58.140, .180. These trees and the rest of ***667** the eagle habitat are the special concern of the Commissioners in determining whether to approve the preliminary plat, however, and in considering the plat's effect on this habitat they must bring a broader view of the project to bear.

[5] 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

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independent analysis and deliberation. Such a result could 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.

[6] It follows from our conclusion that the Commissioners are not bound by the finding of the Shorelines Hearing Board that they had authority to take additional testimony for the purpose of reconsidering the plat proposal, and had authority to deny the plat on the ground it was inadequate to protect the County's valued resource of a ****500** perching and feeding site for the endangered bald eagle.

II.

[7] The trial court held the Commissioners' determination that approval of the plat was not in the " public interest" was an unconstitutionally vague application of the platting statute. Since we are not concerned here with a regulatory statute prohibiting certain types of conduct and imposing sanctions for violation of its standards, the vagueness doctrine as such is not applicable. See Blondheim v. State, 84 Wash.2d 874, 878, 529 P.2d 1096 (1975). We interpret the trial court's conclusion to be a determination that the authority granted to the Board of Commissioners to deny a plat in the public interest does not meet constitutional standards for a delegation of legislative power. As ***668** noted above, the Commissioners' authority to deny the plat on environmental grounds derives essentially from SEPA, and not from the platting statute alone.

The validity of SEPA as a delegation of substantive legislative authority to apply its standards in a particular case was specifically upheld in Polygon Corp. v. City of Seattle, supra, 90 Wash.2d at 66, 578 P.2d 1309. The court held that SEPA provides constitutionally adequate guidelines for governmental decision-making under the act, and that procedural safeguards are adequate if an opportunity to be heard is provided, and judicial review of the entire record is available. That is the case here. We therefore conclude there is no constitutional objection to the Commissioners' exercise of their authority under SEPA to deny the plat on environmental grounds.

III.

[8] The remaining issue is whether the trial court erred in its determination that denial of the plat on the ground it was inadequate to protect the eagle habitat was an unconstitutional taking of private property for public use, in violation of Const. art. 1, s 16 and the Fifth Amendment to the United States Constitution. As a preliminary matter, the Commissioners raise the question whether the taking provisions apply in this case, since the property at issue is owned by the state. Under the rule of Moses Lake School Dist. 161 v. Big Bend Community College, 81 Wash.2d 551, 503 P.2d 86 (1972) there can be no unconstitutional taking when the property taken is public and not private. While this rule may preclude respondent Department of Natural Resources from complaining, Lake Lawrence, Inc., as lessee of the land, has a private real property interest which entitles it to raise the question whether its leasehold has been taken for public use without compensation.

[9] The determination whether a regulation is an unconstitutional taking requires a balancing of the nature of the infringement of private property interests against the public interest in imposing the regulation in question.***669**Maple Leaf Investors, Inc. v. Dept. of Ecology, 88 Wash.2d 726, 565 P.2d 1162 (1977). In considering the encumbrance on the property owner, the court will consider both the type of encumbrance imposed and whether the owner is thereby prevented from making a profitable use of the property.

[10] Of crucial importance in this case is the fact that the Commissioners' decision to deny the plat leaves open the possibility of approving a less dense development of Wood Point. The Commissioners have consistently maintained they would entertain an application for a plat which provided an adequate buffer zone for protection of the eagles' preferred perching and feeding areas. It should be noted that the Commissioners did not find any adverse impact from development of eleven of the proposed lots. Moreover, the findings provide specific guidelines for planning a buffer zone the Commissioners would find acceptable. Finally the decision left open the possibility of an alternate cluster configuration for the development a configuration specifically favored by the County's Comprehensive Plan.

****501** Thus, while it is clear the Commissioners will not approve a plat providing the single-family unit density proposed by respondents here, specifically because that degree of density does not provide

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adequate protection for the eagle habitat, the decision leaves open the possibility of a less dense development which would preserve the eagle perching resource. The facts apparent from the record in this case do not support a conclusion that " there is no present, possible, and reasonably profitable alternative use to which his property is adaptable." Carlson v. Bellevue, 73 Wash.2d 41, 51, 435 P.2d 957, 963 (1968).

We also note there is no physical intrusion or damage created by the regulation, no public project is enhanced, and no public use of the land is created. See Rains v. Dept. of Fisheries, 89 Wash.2d 740, 575 P.2d 1057 (1978); Maple Leaf Investors, Inc. v. Dept. of Ecology, supra, 88 Wash.2d at 733, 565 P.2d 1162.

***670** [11] The strong public policy interest being advanced by this regulation of respondent's use of the leasehold is the preservation of a valuable environmental resource which is identified as such in the County's Master Program. Where, as here, the Commissioners' decision does not deny to respondent all reasonably profitable uses, but only requires that the use be adapted to protect an important environmental resource, we find no taking in violation of the state and federal constitutions.

Our decision that the County Board of Commissioners' denial of the preliminary plat application is valid renders moot the question whether the trial court erred in issuing a writ of mandamus. We also need not reach the other assignments of error made by the appellant Commissioners. Respondents raised new questions in their briefs regarding the Commissioners' compliance with due process requirements in conducting the hearings on remand. These arguments were not made below, and the court entered no findings on the question. It is apparent, however, from the additional material provided in the Commissioners' reply brief that respondents were fully accorded due process through notice and opportunity to be heard.

Reversed.

UTTER, C. J., ROSELLINI, WRIGHT, BRACTENBACH, DOLLIVER, HICKS and WILLIAMS, JJ., and HUNTER, J. Pro Tem., concur.
Wash., 1979.
State v. Lake Lawrence Public Lands Protection Ass'n

92 Wash.2d 656, 601 P.2d 494, 10 Envtl. L. Rep. 20,849

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2.8.2. DNS Comment Period

With the exception of projects for which the optional DNS process is used[42], if any of the following criteria applies to the proposal, a 14-day comment period is required for the DNS prior to agency action.

- There is another agency with jurisdiction (license, permit, or other approval to issue).
- The proposal includes demolition of a structure not exempt under WAC 197-11-800(2)(f) or 197-11-880.
- The proposal requires a non-exempt clearing and grading permit.
- The proposal is changed or mitigation measures have been added under WAC 197-11-350 that reduce significant impacts to a nonsignificant level (mitigated DNS).
- The DNS follows the withdrawal of a determination of significance (DS) for the proposal. (This applies even if the DNS and the withdrawal are issued together.)
- The proposal is a GMA action.

If a comment period is not required, the lead agency is not required by SEPA to provide public notice or circulate the DNS[43]. The lead agency may simply add the DNS to the project file, so that it will be available for review if requested. Agencies may also choose to send the DNS and checklist for the proposal to the Department of Ecology's SEPA Unit for inclusion in the SEPA Register. (See **Additional Resources** in Appendix C for additional information on the SEPA Register.)

2.8.3. Public Notice and Circulation of a DNS

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 an opportunity to participate in the environmental analysis and review.

[42] See discussion on page 94.

[43] Agencies using the Optional DNS Process are required to send the DNS to the Dept. of Ecology, agencies with jurisdiction, and any persons who had requested it, though a comment period is not required.

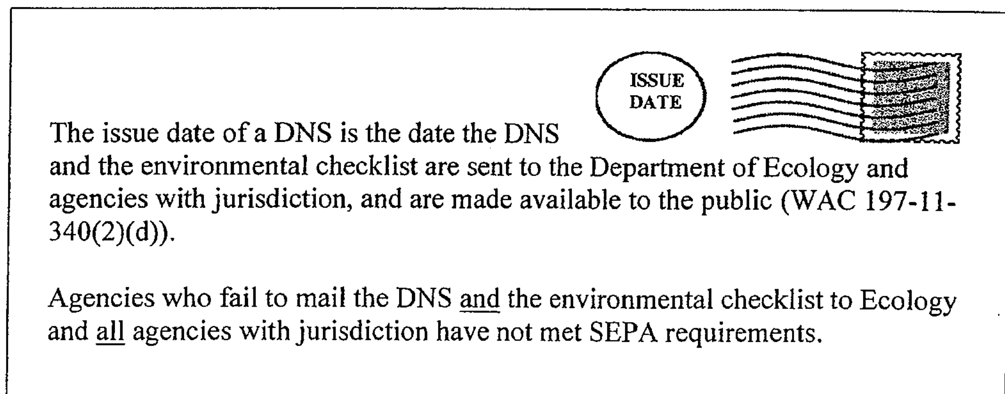
The DNS and the checklist must be sent to:

- The Department of Ecology;
- All agencies with jurisdiction;
- Affected tribes; and
- All local agencies or political subdivisions whose public services would be affected by the proposal[44].

Public notice procedures should be stipulated within the lead agency's adopted SEPA procedures. A list of reasonable methods to provide public notice is included in WAC 197-11-510(b). Those agencies that have no stipulated SEPA public notice procedures are required at a minimum to:

- Post the property, for site-specific proposals; and
- Publish notice in a newspaper of general circulation in the area where the proposal is located[45].

Additional public notice efforts are not required, but are encouraged for important or controversial proposals—regardless of environmental significance. Public hearings or meetings can provide additional avenues for public involvement, comment, and discussion. Many agencies have developed innovative means to "get the word out" to affected community members that may not be reached by more traditional methods. Examples include distributing bilingual flyers or advertising on non-English radio stations.



The issue date of a DNS is the date the DNS and the environmental checklist are sent to the Department of Ecology and agencies with jurisdiction, and are made available to the public (WAC 197-11-340(2)(d)).

Agencies who fail to mail the DNS and the environmental checklist to Ecology and all agencies with jurisdiction have not met SEPA requirements.

[44] WAC 197-11-340(2)(b)
[45] WAC 197-11-510(2)

DECLARATION OF SERVICE

Chrissy Sprouse states and declares as follows:

I am a citizen of the United States of America, over 18 years of age and competent to testify to the matters set forth herein. On September 17, 2007, I hereby certify that I have this day served by first class mail, postage prepaid, a true and correct copy of the foregoing document(s) upon all parties of record in this proceeding entitled *JOINT REPLY TO BNSF, WSDOT and WUTC RESPONSE* with attached *DECLARATION OF SERVICE* on the following:

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