

BEFORE THE WASHINGTON UTILITIES AND  
TRANSPORTATION COMMISSION

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BNSF RAILWAY COMPANY,	)	DOCKET NO. TR-090121
Petitioner,	)	
vs.	)	<b>PETITIONER BNSF'S</b>
	)	<b>RESPONSE TO COMMENTS ON</b>
SNOHOMISH COUNTY,	)	<b>COMPLETION OF</b>
Respondent.	)	<b>ENVIRONMENTAL REVIEW</b>
	)	<b>PROCESS UNDER SEPA</b>

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**Although BNSF and WSDOT are in full voluntary compliance with SEPA,  
the WUTC lacks authority to regulate whether siding track projects  
comply with environmental laws.**

1 BNSF and WSDOT have fully and voluntarily met (and exceeded) SEPA's parameters with respect to the Stanwood siding extension.<sup>1</sup> That said, considerations about the siding track's environmental review process are outside of the scope of this proceeding.

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<sup>1</sup> See Exh. 30.

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The Surface Transportation Board (STB) has exclusive regulatory authority over rail line constructions under 49 U.S.C. § 10901, and, as it has stated, “as part of our regulatory review of such proposals, we conduct an environmental review of such activities under NEPA and adopt appropriate environmental mitigation.”<sup>2</sup> Congress in the ICCTA went out of its way, however, both to give the STB “exclusive” *jurisdiction* over “the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks, or facilities” *and* to confirm that “The Board does not have *authority* . . . over construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks.”<sup>3</sup>

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The law explicitly provides under 49 U.S.C. § 10906 that no authority from the STB is required to construct “side tracks.”<sup>4</sup> Where “no license is required, there is no environmental review conducted by the Board.”<sup>5</sup> *And the “absence of environmental review by the Board does not mean that the project is open to environmental review at the state or local level.”*<sup>6</sup> In other words:

the Board may not have regulatory authority under 49 U.S.C. 10901 or 49 U.S.C. 10906 but *state and local activity is preempted* under 49 U.S.C.

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<sup>2</sup> *Friends of the Aquifer – Pet. for Dec. Order*, STB Fin. Dkt. 33966, 2001 WL 928949 at \*4 (Aug. 2001); *see* 49 C.F.R. § 1105.6.

<sup>3</sup> 49 U.S.C. § 10501(b)(2) (emphasis added); 49 U.S.C. § 10906; *see also Friberg v. Kansas City Southern Ry. Co.*, 267 F.3d 439, 443 FN 13 (Ct. App. TX 2001) (Although railroad siding tracks are under the exclusive jurisdiction of the STB, “rail carriers do not need prior STB approval to construct and operate those tracks.”).

<sup>4</sup> *See also Friends of the Aquifer* at \*5 (“nothing in the Act requires Commission authorization of railroad construction projects solely because such projects are costly. It is the purpose and not the cost, of such projects which determines whether Commission approval is required.”) (quoting *Nicholson v. ICC*, 711 F.2d 364, 369 (1983), *cert. denied*, 464 U.S. 1056 (1984)).

<sup>5</sup> *Friends of the Aquifer* at \*4 (“Because we lack licensing authority over the project, the environmental review provisions of NEPA do not apply.”); *see also* 49 C.F.R. § 1105.5(b) (“A finding that a service or transaction is not within the STB’s jurisdiction does not require an environmental analysis under the National Environmental Policy Act. . .”).

<sup>6</sup> *Friends of the Aquifer* at \*4 (emphasis added).

10501(b) because of the Board's exclusive jurisdiction over rail transportation.<sup>7</sup>

4            *Friends of the Aquifer* involved the Hauser locomotive fueling facility in Spokane, which is located in a rail yard, and accordingly was not subject to the STB's regulatory authority.<sup>8</sup> The Friends argued that construction of the facility was subject to the STB's jurisdiction, so a NEPA review was required.<sup>9</sup> BNSF argued, first, to the district court that there is a clear distinction between the STB's exclusive jurisdiction and its regulatory authority.<sup>10</sup> Its exclusive jurisdiction meant that no one else could regulate construction of the fueling facility. The lack of regulatory authority meant that it could not regulate construction of the facility.<sup>11</sup> The court agreed.<sup>12</sup> The Friends then took their case to the STB, which confirmed that no STB approval or NEPA review was required.<sup>13</sup>

5            Even though no environmental review was required in this case, BNSF/WSDOT *voluntarily* conducted a SEPA environmental checklist and made a threshold

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<sup>7</sup> *Id.* (emphasis added). "[N]othing in section 10501(b) is intended to interfere with the role of state and local agencies in implementing Federal environmental statutes such as the Clean Air Act . . . unless the regulation is being applied in such a manner as to unduly restrict the railroad from conducting its operations or unreasonably burden interstate commerce." *Id.* (citing *Joint Petition for Declaratory Order – Boston and Maine Corporation and Town of Ayer, MA*, STB Finance Docket No. 33971 (May 2001)).

<sup>8</sup> See *Flynn v. BNSF Corp.*, 98 F.Supp.2d 1186 (E.D. Wa. 2000); *Friends of the Aquifer*, 2001 WL 928949 (August 2001).

<sup>9</sup> *Flynn* at 1197.

<sup>10</sup> See *id.* at 1188-90 ("*Railroad Regulatory Scheme*") (emphasis in original).

<sup>11</sup> See also *Cities of Auburn & Kent, WA – Pet. for Decl. Judg.*, 2 S.T.B. 330, 1997 WL 362017 at \*7 (July 1997) ("When sections 10906 and 10501(b)(2) are read together, it is clear that Congress intended to remove [STB] authority over the entry and exit of these auxiliary tracks, while still preempting state jurisdiction over them, leaving the construction and disposition of auxiliary tracks entirely to railroad management.").

<sup>12</sup> *Flynn*, 98 F.Supp.2d at 1189-90; see also *Port City Prop. v. Union Pac. R.R. Co.*, 518 F.2d 1186, 1189 (10<sup>th</sup> Cir. 2008); *Cities of Auburn & Kent* at \*7 ("Thus, although we may not regulate the construction and disposition of spur and switching tracks, it is equally clear that state and local authorities may not regulate those activities either.").

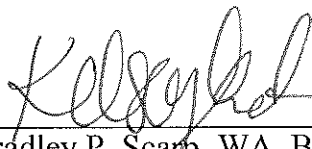
<sup>13</sup> See generally *Friends of the Aquifer*, 2001 WL 928949.

Determination of Nonsignificance (DNS).<sup>14</sup> WSDOT also prepared an optional Stanwood Siding Notice of Action (NAT).<sup>15</sup> This does not salvage potential WUTC involvement, however, since “there is no authority for the proposition that BNSF [or WSDOT] is precluded from voluntarily complying with local permitting regulations.”<sup>16</sup>

6 BNSF believes its petition to close the Logen Road crossing was proper, and reiterates that closure is the only solution due to the exceptionally hazardous conditions that will exist at the crossing once the siding track is extended. SEPA compliance—although fulfilled—is not required and therefore should not affect the WUTC’s decision.

DATED this 10<sup>th</sup> day of September, 2009.

Montgomery Scarp MacDougall, PLLC

  
\_\_\_\_\_  
Bradley P. Scarp, WA. Bar No. 21453  
Kelsey Endres, WA. Bar No. 39409  
Attorneys for BNSF Railway Company  
1218 Third Ave., Ste. 2700  
Seattle, WA 08101  
Tel. (206) 625-1801  
Fax (206) 625-1807  
[brad@montgomeryscarp.com](mailto:brad@montgomeryscarp.com)  
[Kelsey@montgomeryscarp.com](mailto:Kelsey@montgomeryscarp.com)

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<sup>14</sup> See Exh. 30.

<sup>15</sup> See Exh. 30.

<sup>16</sup> *Flynn*, 98 F.Supp.2d at 1189.

**CERTIFICATE OF SERVICE**

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

I hereby certify that the original and 8 copies of *PETITIONER BNSF'S RESPONSE TO COMMENTS ON SEPA COMPLETION* have been sent via FedEx to David W. Danner at WUTC and Word Perfect and PDF versions sent by electronic mail to [records@wutc.wa.gov](mailto:records@wutc.wa.gov). I also certify that true and complete copies have been sent via Electronic mail and U.S. Mail to the following interested parties:

Adam E. Torem  
1300 S. Evergreen Park Dr. SW  
P.O. Box 47250  
Olympia, WA 98504-7250

Jonathan Thompson  
Assistant Attorney General  
1400 S. Evergreen Park Dr. S.W.  
PO Box 40128  
Olympia, WA 98504

Justin Kasting  
Deputy Prosecuting Attorney  
3000 Rockefeller Avenue  
M/S 504  
Everett, WA 98201

Lynn Logen  
15017 S.E. 43<sup>rd</sup> Place  
Bellevue, WA 98006-2413

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

DATED this 18<sup>th</sup> day of September, 2009 at Seattle, Washington.

  
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Lisa Miller, Paralegal