



EARTHJUSTICE

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NORTHWEST ROCKY MOUNTAIN WASHINGTON, D.C. INTERNATIONAL

March 31, 2015

Via Email and First Class U.S. Mail

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STATE OF WASH.
UTIL. AND TRANSP.
COMMISSION

RE: TR-150189—Closure of Highway-Grade Rail Crossing;
Valley View Road, Whatcom County

Dear Mr. Pratt:

This is a letter of objection to the above-named road closure and request for hearing pursuant to RCW 81.53.070 and WAC 480-07-660(1) on behalf of RE Sources for Sustainable Communities, Washington Environmental Council, Sierra Club, ForestEthics, Evergreen Islands, and Climate Solutions (hereinafter, "RE Sources"). These groups seek to participate in this proceeding as interested parties pursuant to WAC 480-07-660(3) and respectfully request courtesy copies of all filings filed after the date of this letter. As required by these rules, full addresses for these organizations are included at the end of this letter; however, communications and filings should be directed to undersigned counsel.

We ask that the road closure be denied and request an opportunity to elaborate on these concerns at a public hearing. There are several reasons why denial is appropriate here.

First, we have significant concerns that the proponent and its partners are engaging in unlawful "piecemealing" of legally connected projects to avoid thorough review under the State Environmental Policy Act ("SEPA"). SEPA regulations explicitly forbid division of a project "into exempted fragments" that "avoid discussion of cumulative impacts." WAC 197-11-060(5)(d); *see also* WAC 480-11-020 (UTC incorporating Ecology SEPA regulations). As the court stated in *Merkel v. Port of Brownsville*, 8 Wn. App. 844 (Wash. App. Div. 2, 1973), "[t]he question, therefore, is whether the Port may take a single project and divide it into segments for purposes of SEPA and SMA approval. The frustrating effect of such piecemeal administrative approvals upon the vitality of these acts compels us to answer in the negative." *Id.* at 850-51. "Piecemeal review is impermissible where a 'series of interrelated steps [constitutes] an integrated plan' and the current project is dependent upon subsequent phases." *Murden Cove Preservation Council v. Kitsap Cnty.*, 41 Wn. App. 515, 526 (Wash. App. Div. 1 1985); *see also* *Manza v. Shorelines Hearings Bd.*, 128 Wn. App. 2d 1023 (Wash. App. Div. 2 2005) ("Any

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project significantly affecting the environment and the shorelines of the state should be reviewed comprehensively to ensure that all of the environmental aspects of the project have been fully considered.”).

The concern over “piecemealing” is relevant here. The proposed road closure is a component of a construction project to extend the size of the rail sidings along the Custer Spur. The stated purpose of the closure is to allow existing customers using the line to receive and depart “full length trains” without blocking the main line, switches, or roads. However, it appears that the line has served existing customers for many years without causing such blockages. This situation evidently changed when Whatcom County and other agencies authorized construction of crude-by-rail facilities at two refineries, enabling them to receive mile-plus-long unit trains of crude oil via the Custer Spur. Tellingly, in the SEPA documentation for those projects, the proponents claimed that they would not require additional infrastructure improvements or impact existing traffic patterns. For example, in the MDNS for the Phillips 66 Crude Unloading Rail Project, issued in April 2013, the County relied on the proponent’s claim that the project “will not result in any undue conflicts or congestion.”¹ Similarly, the MDNS for the BP Rail Logistics Project concluded that “existing roadways will not be blocked during transfer operations.”² In the SEPA checklists for both projects, proponents asserted that no future additions or expansions were planned.

Now that both projects have been built and begun operations, that picture has evidently changed. BNSF claims that it is necessary to build additional sidings—and permanently close Valley View Road—to accommodate the mile-long unit trains that now use the Custer Spur to reach the two refineries. Community members have long suspected that proponents of terminal projects have manipulated project descriptions to avoid full disclosure of project impacts and to facilitate controversial projects. This road closure request raises precisely those questions.

Similarly, the closure of Valley View Road (and the extension of sidings at Intalco) is also an explicit part of the controversial Gateway Pacific Terminal coal export project. The 2011 Project Information Document identifies construction of sidings to accommodate 8,500 foot long trains through Intalco Yard and Valley View Road, to “avoid blockage of at-grade public crossings or blocking of the BNSF Railway’s main lines.” This component of the project is part of the ongoing full SEPA review required by that project.

Accordingly, given what appear to be unfounded claims that the refinery projects would not require additional track construction, and given that this work appears to be part of the ongoing GPT SEPA review, we believe it would be inappropriate to move ahead with authorizing this project in the interim. At a minimum, BNSF should be required to explain, in

¹ Whatcom County, Phillips 66 SEPA Mitigated Determination of Non-significance, SEP2013-0005 (Apr. 29, 2013) at 3.

² Whatcom County, BP SEPA Mitigated Determination of Non-significance, SEP2012-00059 (Oct 18, 2012) at 3.

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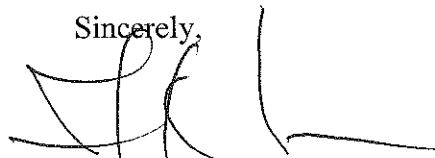
detail, why additional siding was not included in the SEPA documentation for the refinery projects. If those projects could not accommodate mile-long trains without either blocking the rail line, or without substantial new construction that closes Valley View Road, why was this not disclosed at the time and made part of the public review? Given the failure to disclose the need for additional infrastructure, why shouldn't the refineries simply receive shorter trains until the siding construction is fully reviewed as part of the GPT process?

A second reason to deny the requested road closure is that the application appears to contain significant factual errors. Specifically, while BNSF claims that the average daily traffic over the tracks is 90 vehicles, the County has reported a significantly higher number. A traffic analysis prepared for the GPT project, which specifically analyzed the closure of Valley View Road, stated that the road has a volume of 48 vehicles per hour, and that closure of the crossing could cause congestion at the Main Street crossing nearby.³ Plainly, there are factual questions that need further analysis before proceeding.

Finally, the request does not meet the standard for road closure included in RCW 81.53.060, which is based on a single consideration: public safety. There is no evidence presented in the petition that public safety requires closure of Valley View Road: indeed, the public's safety would be compromised by such closure due to the increase in emergency response times. Instead, the closure appears to be solely a convenience for BNSF and its customers. The Commission should consider whether the impact to the community is warranted in light of the small number of trains using the Custer Spur and the availability of other options to reduce blockage of the main line by crude oil unit trains. The community should not have to bear the impact of BNSF's preference to run longer trains, and its inability to schedule deliveries so that blockage of the main line is necessary. With only four trains per day under current conditions, there should be ample room to accommodate both the volume of traffic and leave Valley View Road open. Closure of the road should be addressed as part of the GPT process, not before.

Thank you for the opportunity to share our concerns on this matter.

Sincerely,



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³ <http://eisgatewaypacificwa.gov/sites/default/files/content/files/20120727-REP-CusterSpurTrafficStudy.pdf>.

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