DETERMINATION OF NONSIGNIFICANCE

Description of proposal:

The proposed **Mount Vernon Siding Extension Project** will extend the existing 6,000-foot BNSF Railway siding in Mount Vernon an additional 3,700 feet to the south.

The total siding length of 9,700 feet will allow long freight trains to pull off the main line track and permit faster passenger trains and other faster freight trains to pass. The existing siding is located on the east side of the main line track.

As part of the extension project, two at-grade railroad street crossings (one private and one public) are anticipated to be closed.

Proponent:

Washington State Department of Transportation (WSDOT)

Location of proposal, including street address, if any:

The project site is located on the BNSF main line railroad tracks at the southwestern limits of Mount Vernon and into Skagit County, between Railroad Mileposts 66.07 and 76.08, Bellingham Subdivision of the Northwest Division of BNSF. Hickox Road and Pederson Lane, two at-grade railroad street crossings, cross over the railroad tracks within the project site. The project site is located in Section 31, township 34 N, range 4 W; and section 6; township 33 N; range 4 W.

Lead agency:

Washington State Department of Transportation (WSDOT)

For engineering questions, please contact:
Kevin Jeffers, P.E., Rail Projects Engineer
WSDOT Rail Office
PO Box 47407
Olympia WA 98504-7407
360-705-7982; jefferk@wsdot.wa.gov

For environmental questions, please contact:
Elizabeth Phinney, Rail Environmental Coordinator
WSDOT Rail Office
PO Box 47407
Olympia WA 98504-7407
360-705-7902; phinnec@wsdot.wa.gov

The lead agency for this proposal has determined that it does not have a probable significant adverse impact on the environment. An environmental impact statement (EIS) is not required under RCW 43.21C.030(2)(c). This decision was made after review of a completed environmental checklist and other information on file with the lead agency. This information is available to the public on request.

This DNS is issued under WAC 197-11-340(2); the lead agency will not act on this proposal for 14 days from the date below.

Comments must be submitted by **March 6, 2007.**

Please send comments to:
Elizabeth Phinney
WSDOT Rail Office
PO Box 47407
Olympia WA 98504-7387
phinnee@wsdot.wa.gov

Responsible official: Kenneth M. Uznanski, Jr.

Position/title: Manager, WSDOT Rail Office **Phone:** 360-705-7905

Address: PO Box 47407
Olympia WA 98504-7407

Date: 02/16/07 **Signature:** Kenneth M Uznanski Jr.

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

BNSF RAILWAY COMPANY, Petitioner, v. CITY OF MOUNT VERNON, Respondent SKAGIT COUNTY, WASHINGTON STATE DEPARTMENT OF TRANSPORTATION, WEST VALLEY FARMS LLC, and SKAGIT COUNTY, Intervenors.	DOCKET NO. TR-070696 DECLARATION OF L. SCOTT LOCKWOOD IN SUPPORT OF PETITIONER'S RESPONSE IN OPPOSITION TO THE CITY'S MOTION IN LIMINE AND MOTION FOR SUMMARY JUDGMENT

L. Scott Lockwood declares and says:

I am an Assistant Attorney General and counsel for the Washington State Department of Transportation (WSDOT) in this matter. I have personal knowledge of the matters related below.

1. On July 17, 2007, working as counsel for WSDOT, I provided a true and correct copy of the final Environmental Checklist and Determination of Non-significance (DNS) prepared by WSDOT for Mount Vernon Siding Extension Project to Assistant Attorney General

ATTORNEY GENERAL OF WASHINGTON
Transportation & Public Construction Division
7141 Cleanwater Drive SW
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Jonathon Thompson in his capacity as counsel to the Washington Utilities and Transportation Commission (WUTC).

2. Attached to this declaration is a true and correct copy of a letter from Chris Rose, acting in the capacity of the WUTC's responsible official under the State Environmental Policy Act (SEPA) to Judge Torem dated July 20, 2007, and copied to all parties, stating, among other things, his conclusion that WSDOT is the appropriate lead agency in this case.

I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

Dated this 7th day of September, 2007, at Olympia, Washington.

L. Scott Lockwood

ATTORNEY GENERAL OF WASHINGTON
Transportation & Public Construction Division
7141 Cleanwater Drive SW
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Olympia, WA 98504-0113
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DECLARATION OF SERVICE

Lisa M. Savoia states and declares that I am a citizen of the United States of America, over 18 years old and competent to testify to the matters herein. On September 12, 2007, I caused to be served by e-mail and first class mail, postage prepaid, a true and correct copy of the foregoing document on the following:

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1218 THIRD AVENUE, 27TH FLOOR
SEATTLE WA 98101
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MOUNT VERNON, WA 98273
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DATED this 12 day of September, 2007 at Tumwater, Washington.

Lisa Savoia

Lisa Savoia, Legal Assistant

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STATE OF WASHINGTON
WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION
1300 S. Evergreen Park Dr. S.W., P.O. Box 47250 • Olympia, Washington 98504-7250
(360) 664-1160 • TTY (360) 586-8203

July 20, 2007

Subject: ***BNSF Railway Company v. The City of Mount Vernon*, Docket No. TR-070696**

Dear Judge Torem:

This letter responds to your request for a statement of Staff's intention for compliance with the requirements of the State Environmental Policy Act (SEPA) in this case.

As the Director of Regulatory Services, I oversee the Commission's advocacy Staff and I am also the Commission's designated "responsible official" for matters affected by SEPA. Neither I, nor other Commission advocacy Staff members are allowed *ex parte* discussions of the merits of this petition with the Commissioners or the administrative law judge in this case. *See* RCW 34.05.458 (requiring separation of agency advocacy and decision-making functions in administrative adjudications), WAC 197-11-730 ("The decision maker and responsible official are not necessarily synonymous, depending on the agency and its SEPA procedures").

SEPA's primary requirement is that state and local agencies "include in every recommendation or report on proposals for legislation and other major actions significantly affecting the quality of the environment," a statement describing the environmental impacts and alternatives to the proposal. RCW 43.21C.030(c).

The first step in the SEPA compliance process is to determine whether the proposed government decision or activity constitutes a covered action. Under Department of Ecology rules, all actions of the WUTC are categorically exempt, with certain exceptions. Grade crossing closures expressly *are not* categorically exempt from the State Environmental Policy Act. WAC 197-11-865(2). Therefore, SEPA requires a lead agency to make a threshold determination as to whether a proposed crossing closure is a "major action significantly affecting the quality of the environment." Unless the responsible official of the lead agency makes a threshold determination of non-significance after completing an environmental checklist, SEPA requires an environmental impact statement.

The WUTC has adopted SEPA rules and designated its director of regulatory services as its responsible official for matters affected by SEPA. WAC 480-11-010 through 030. It is not necessarily the case, however, that the WUTC is the proper SEPA lead agency when a proposal is made to close a grade crossing. For reasons described below, I conclude that WSDOT is the appropriate lead agency in this case.

The proponents of the petition to close the Hickox Road crossing, BNSF and WSDOT, assert that granting their request will facilitate a larger public/private project, funded by WSDOT, to lengthen a BNSF side track by some 3,500 feet, including across the location where Mount Vernon's Hickox Road intersects BNSF's mainline track. In its petition to intervene, WSDOT states that elimination of the crossing will "allow for the construction of [the] siding extension."

Under the Department of Ecology's SEPA rules, proposals required to be evaluated in one document are those "that are related to each other closely enough to be, in effect, a single course of action . . . ." WAC 197-11-060(3)(b). "Closely related" proposals are further defined as ones that are "interdependent parts of a larger proposal and depend on the larger proposal as their justification or for their implementation." WAC 197-11-060(3)(b)(ii). Under these rules, and the theory advanced by the petition proponents, the environmental impacts of closing Hickox Road crossing should be evaluated in the same document that assesses the environmental impact of the siding extension.

WUTC has no permitting, or other review authority, over construction of the siding. Its authority is limited to deciding whether the public safety requires the closure of the Hickox Road crossing, RCW 81.53.060, and whether "travel thereon [should be] diverted to another channel, or any other change that the commission may find advisable or necessary," RCW 81.53.070.

Department of Ecology rules provide that "when an agency initiates a proposal, it is the lead agency for that proposal." WAC 197-11-926. Additionally, when "the primary sponsor or initiator of the project is an agency," the project shall be considered a public project. WAC 197-11-928. WSDOT is providing the funding for the siding extension project. As such it has already taken the lead agency role, completed an environmental checklist, and published a threshold determination of non-significance for the siding extension project. SEPA Register, February 16, 2007.

WSDOT's checklist acknowledges the possibility, depending on the outcome of the WUTC proceeding, that the siding extension project will include the closure of the Hickox Road crossing. The checklist also incorporates a traffic analysis to address the traffic impacts of closing the Hickox Road crossing. However, the checklist does not address the environmental impact of all potential construction activities that might be required if the Commission orders the closure of the crossing (such as the construction of a cul-de-sac turnaround at the point where the road previously crossed the tracks, *see Burlington Northern Railroad Co. v. Skagit County*, WUTC Docket No. TR-940282, Order Closing Green Road Crossing, pp. 7, 8 (Dec. 13, 1996)). I do not find this to be a flaw in WSDOT's determination, however, because this appears to be a case in which phasing of environmental review is appropriate due to the need to reconcile the twin goals of performing review: (1) early enough to allow environmental values to be incorporated throughout the decision making progress; and (2) late enough to allow meaningful review of a concrete proposal or project. WAC 197-11-060(5); Wash. Practice, Environmental Law and Practice, § 17.18; *Organization to Preserve Agricultural Lands v. Adams County*, 128 Wn.2d 869, 879-881, 913 P.2d 793 (1996). The design details of the crossing closure, if it is ultimately granted by this Commission, remain to be determined. Parties to the RCW 81.53.060

proceeding may propose measures to mitigate traffic problems created by the proposed closure and those traffic mitigation measures may have some environmental impact (although perhaps not a significant impact, even when considered as a cumulative effect of the siding extension project as a whole).

WSDOT should complete a supplemental environmental checklist, and if necessary an environmental impact statement, with respect to any action proposed by a party that is reasonably related to the proposed closure of the crossing, but not already considered in the existing checklist. This should occur before the case is submitted to the Administrative Law Judge for decision (that is, after the pre-filing of written testimony, cross-examination of witnesses based on that testimony, and post-hearing briefing, but before the ALJ begins preparing an initial order). If there is any dispute about whether a proposed action is reasonably related to the proposed closure, the parties should jointly seek guidance from the ALJ.

Chris Rose
Director of Regulatory Services
Washington Utilities and Transportation Commission