

**BEFORE THE WASHINGTON UTILITIES AND
TRANSPORTATION COMMISSION**

BNSF RAILWAY COMPANY, a Delaware
Corporation,

Petitioner,

v.

CITY OF MOUNT VERNON,

Respondent.

DOCKET NO. TR-070696

WSDOT'S ANSWER IN OPPOSITION TO
WESTERN VALLEY FARM'S MOTION
FOR RECONSIDERATION

1 The Washington State Department of Transportation (WSDOT) submits this answer
to Western Valley Farm's (WVF) Motion for Reconsideration to address WVF's request that
the Washington Utilities and Transportation Commission (WUTC or Commission)
adjudicate WSDOT's compliance with the State Environmental Policy Act (SEPA), set aside
WSDOT's threshold determination and void the Commission's Final Order.

I. Relief Requested

2 WSDOT respectfully requests the Commission deny WVF's Motion for
Reconsideration.

II. Earlier Briefing Incorporated

3 The issue of the WUTC's responsibility and role under SEPA in this case has already
been briefed and argued in response to the City of Mount Vernon's Pre-hearing Motion in
Limine and Motion for Summary Judgment Requiring New SEPA Determination by the

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WUTC filed August 28, 2007. A thorough analysis of this SEPA issue was presented by Commission staff as well as in a brief filed jointly by WSDOT and BNSF Railway Company (BNSF).

4 WSDOT asks that the Commission consider the response brief titled "*Commission Staff's Response To City Of Mount Vernon's Motion For Summary Judgment Requiring New SEPA Determination By The Washington Utilities And Transportation Commission*" filed on September 28, 2007; the brief captioned "*Joint Response In Opposition To The City's Motion In Limine And Motion for Summary Judgment,*" filed by WSDOT and BNSF on September 28, 2007; and, the declarations filed in support thereof. The authorities provided in these earlier briefs, which are summarized and supplemented below, demonstrate why the WUTC is not the proper forum to determine or adjudicate the sufficiency of WSDOT's compliance with SEPA.

III. Argument

5 WVF's Motion for Reconsideration alleges that the record in this case somehow establishes various defects in WSDOT's compliance with SEPA.¹ It then requests that the WUTC enter findings and conclusions to that effect, and declare its Final Order in this case void.

¹ Because the WUTC is not the proper forum to adjudicate WSDOT's SEPA compliance, WSDOT will not address the merits of WVF's conclusory and unsupported assertions that WSDOT failed in its environmental analysis to adequately consider traffic impacts, including potentially conflicting transportation uses or to consider alternatives to closure. However, the record shows that WSDOT's environmental analysis included, among other things, a thorough traffic impact analysis that assessed both impacts and alternatives. See especially the declarations filed in support of the Joint Response in Opposition to the City's Motion in Limine and Motion for Summary Judgment filed by WSDOT and BNSF on September 28, 2007.

6 The argument is premised on the erroneous assumption that because the WUTC is the agency having jurisdiction over rail crossing closures, it is the WUTC's responsibility to police WSDOT's compliance with SEPA for this siding extension project. This is not how SEPA works.

7 SEPA rules are carefully drafted to avoid having multiple agencies with overlapping jurisdictions issue potentially inconsistent or conflicting threshold determinations. This is accomplished in part, by providing for a single lead agency, from among those with jurisdiction, and, it is the lead agency which "shall be the only agency responsible for the threshold determination." WAC 197-11-050(A) (emphasis added).

8 As the agency responsible for initiating the Mount Vernon Siding Extension project, WSDOT is the agency that was required to act as the lead agency, unless another agency with jurisdiction timely acted to assume lead agency status pursuant to the prescribed rules. *See, e.g.*, WAC 197-11-926(1). The WUTC is an agency with jurisdiction under SEPA because of its regulatory authority to approve or veto the crossing closure, which is a part of the larger Mount Vernon Siding Extension project. However, the WUTC did not take any steps to assume lead agency status from WSDOT. On the contrary, the WUTC specifically determined that WSDOT was the appropriate agency to act as lead agency, and declined to assume that role.²

² It would have made little sense in this case for the WUTC to seek to assume lead agency status from WSDOT for the entire siding extension project on the basis of its jurisdiction to decide the related crossing closure petition. Closing the crossing is merely a part of the larger siding extension project and SEPA requires a lead agency to evaluate environmental impacts for this entire project in a single document. WAC 197-11-060.

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As lead agency under SEPA, it is WSDOT, not the WUTC that has the sole responsibility for the threshold determination. If an adversely impacted party disagrees with a lead agency's SEPA determination, their remedy is not to ask one of the other agencies with overlapping jurisdiction to adjudicate the lead agency's compliance. Rather, pursuant to RCW 43.21C.075(d)(4) their remedy is to appeal in accordance with the lead agency's prescribed procedures. In this case, the proper means for WVF to pursue its claim that WSDOT failed to comply with SEPA is to seek judicial review in superior court under Chapt. 34.05 RCW.³

IV. Conclusion

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WVF's assertions relating to SEPA are not grounds for reconsideration. WSDOT is the lead agency under SEPA for the Mount Vernon Siding Extension project with sole responsibility for the threshold determination. The legal authority to adjudicate WSDOT's compliance with SEPA in this case lies solely with the superior court.

DATED this 5th day of December, 2008.

ROBERT M. McKENNA
Attorney General



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³ In fact WVF has done exactly that. It challenged WSDOT's compliance with SEPA on this project by joining in a Petition for Review of Agency Action, filed in Skagit County Superior Court Cause No. 07-2-01813-4, which action is still pending.

DECLARATION OF SERVICE

Lisa M. Savoia 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 December 5, 2008, I caused to be served by first class mail, postage prepaid, a true and correct copy of the foregoing document on the following:

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DATED this 5th day of December, 2008 at Tumwater, Washington.



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