

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

BNSF RAILWAY COMPANY,

Petitioner,

v.

CITY OF MOUNT VERNON,

Respondent.

DOCKET TR-070696

COMMISSION STAFF'S ANSWER
TO WESTERN VALLEY FARMS,
L.L.C.'S PETITION FOR
RECONSIDERATION

1 Commission Staff submits the following Answer to Western Valley Farms, L.L.C.'s November 14, 2008, petition for reconsideration.

I. STANDARD FOR RECONSIDERATION

2 Within 10 days after being served with a final order, a party may file a petition for reconsideration stating the specific grounds upon which relief should be granted.¹ A petition for reconsideration is intended only to correct obvious mistakes in the order and should not be used by the parties to reargue the case. Consequently, filing a petition for reconsideration is not a prerequisite for obtaining judicial review and the denial of a petition for reconsideration is not subject to judicial review.²

¹ RCW 34.05.470(1); WAC 480-07-850.

² RCW 34.05.470(5); *see also* RCW 34.05.534(2).

II. ANSWER

- A. The Commission’s responsible official for purposes of the State Environmental Policy Act (SEPA) already determined that the Washington State Department of Transportation (WSDOT) is the proper SEPA lead agency and the Commission already correctly determined that it has no authority to hear an appeal of WSDOT’s determination of non-significance under SEPA.**

3 In its petition for reconsideration, Western Valley Farms argues that the closure of Hickox Road at the railroad grade crossing will diminish the utility of the nearby Interstate-5 interchange by making travel between the interchange and the agricultural land east of the railroad tracks less direct. Based on this premise, Western Valley Farms argues that WSDOT’s SEPA review of the siding construction project and associated closure of the Hickox grade crossing was deficient because it allegedly failed to consider alternatives to the closure of Hickox Road that might have preserved the utility of the I-5 interchange. On this theory, Western Valley Farms asks the Commission to find:

that its authority exercised pursuant to RCW 81.53.060 is subject to the State Environmental Policy Act (“SEPA” hereafter) and that the Washington State Department of Transportation (“WSDOT” hereafter) determination of non-significance initially made February 16, 2007 and repeated on the 17th day of July 2007 violated RCW 43.21C.030(2)(a) by failing to use systematic and multi-disciplinary approaches to reconcile conflicting uses of transportation resources and in particular failing to discharge its duty under subsection (e) to study, develop and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning the alternative use of available resources.³

Although Commission determinations under RCW 81.53.060 are subject to SEPA, in this particular case, the SEPA “threshold determination” of whether an environmental impact statement (EIS) was required, and the preparation of an EIS if one were required, was solely

³ Petition for Reconsideration, ¶ 1. See also ¶¶ 4, 7, 13, 16, 20, and 25.

the responsibility of WSDOT.⁴ There is no legal basis for the Commission to grant the relief Western Valley Farms requests regarding WSDOT's actions under SEPA.

4 In the beginning stages of this case, the City of Mount Vernon moved for summary determination, contending that WSDOT had failed to comply with SEPA and that the Commission must prepare its own threshold determination prior to going forward to consider BNSF's petition. In denying the motion for summary determination, Judge Torem's order stated:

Even if WSDOT had not agreed to issue a new SEPA determination, the City's Motion for Summary Judgment failed to articulate any jurisdictional basis for the presiding officer or for the Commissioners themselves to act in an appellate authority of another agency's SEPA determinations. Therefore, even if not made moot by WSDOT's subsequent actions, the City's Motion for Summary Judgment and the relief sought could not have been granted.⁵

For the reasons stated in Staff's Response to the City's Motion for Summary Determination and also stated in Chris Rose's July 20, 2007, letter to ALJ Adam Torem, this finding is correct. The Commission should deny Western Valley Farms' SEPA-related requests in its petition for reconsideration on the same basis.

5 The Commission's Director of Regulatory Services, who serves as the Commission's "responsible official" for SEPA matters,⁶ determined that WSDOT was the lead agency for purposes of the siding extension project that included the proposed closure of Hickox Road crossing.⁷ A SEPA responsible official's determination of lead agency status is not subject to administrative review. WSDOT is the lead agency and is the sole agency responsible for making a threshold determination as to whether an EIS is required. Moreover, Staff

⁴ See Staff's Sept. 12, 2007, Response to the City's Motion for Summary Determination and Mr. Chris Rose's July 20, 2007, letter to ALJ Adam Torem in this docket.

⁵ Order 03, ¶ 19 (October 2, 2007).

⁶ WAC 480-11-030.

⁷ See fn. 4, *supra*.

understands that the City of Mount Vernon filed suit in Skagit County Superior Court challenging the adequacy of WSDOT's SEPA review and that the matter is still pending before that court.

6 Even if it were true that WSDOT's environmental checklist (and that agency's subsequent determination of non-significance) did not do enough to considered alternatives to the closure of the Hickox Road grade crossing, the question of alternatives to closure of Hickox was the very focus of the proceeding before this Commission, and all parties had a full opportunity to present proposed alternatives to closure of the crossing. The parties, including Staff, did present alternatives to closure and the Commission fully considered the pros and cons of the alternatives presented, weighing safety considerations against the public need for the crossing as required under RCW 81.53.060.

7 The location of the siding track, on the other hand, is not a matter within the purview of the Commission; the Commission had to take the construction of the siding as a given. To the extent that Western Valley Farms is arguing that the Commission should have considered alternative locations for a siding track, that issue was not and could not be considered by the Commission.

B. The Commission should not *require* that emergency evacuation of cattle from Western Valley Farms be included in the terms of the private crossing agreement (let alone ordinary harvest season use which the Final Order properly rejected), nor should the Commission require that Western Valley Farms be included in the crossing safety diagnostic team that develops the terms of that agreement.

8 The Commission's Final Order properly conditions closure of the Hickox Road grade crossing on the requirement that BNSF negotiate with the City, County and Fire Protection District to draft a private crossing agreement "that ensures continued access across the tracks for local emergency response to flood-related events, as well as incidents

where the health, safety, and welfare of local residents would be affected.”⁸ In its petition for reconsideration, Western Valley Farms asks the Commission to modify its conclusions of law “to recognize the necessity of Western Valley Farms, L.L.C. having rights to evacuate its animals and machinery over Hickox Road grade crossing as a farm emergency use which is concurrent with the emergency use for flood prevention and control and for emergency services”⁹

9 Staff believes that the term “local emergency response to flood-related events,” as stated in the Commission’s final order, may be interpreted to include evacuation of livestock (in addition to people and property) if emergency responders deem that to be an appropriate use of the crossing during a flood emergency. Staff believes that the Commission should allow the local governments to determine the appropriate priority of use of the private crossing in the event of a flood emergency. For example, there was testimony in the case that Hickox could be used as a corridor for evacuating resident from the city of Mount Vernon in the event of a flood, as well as a route for bringing in truckloads of rock from a quarry east of tracks to reinforce the dike located west of the tracks. There was also testimony that some of the farm equipment used by Western Valley Farms occupies more than a single lane on the narrow roadway. It is unclear, therefore, whether these uses would be compatible in all instances. Therefore, Staff recommends that the Commission deny Western Valley Farms’ request to require the use of the crossing for evacuation of animals and machinery in the event of a flood emergency, but clarify that evacuation of animals and equipment may be part of the “local emergency response to flood-related events.”

⁸ Final Order, ¶ 80.

⁹ Petition for Reconsideration, ¶ 10, and also ¶¶ 2 and 5, among others.

10 In its petition for administrative review of the Initial Order, BNSF includes a lengthy excerpt from the U.S. Department of Transportation Federal Highway Administration's *Railroad-Highway Grade Crossing Handbook*, pp. 62-63, 70 (Rev. 2nd Ed. 2007).¹⁰ It is clear from that excerpt that the FHWA *Handbook* does not contemplate or recommend including members of the general public in a diagnostic team. Technical and administrative expertise is the aim of the diagnostic process. The Commission may assume that the local government entities will consider the emergency needs of their respective constituents, including Western Valley Farms, and consult with Western Valley Farms to the extent necessary. Therefore, the Commission should deny Western Valley Farms request to be included as a member of the safety diagnostic team for the private crossing.

C. The Commission may grant Western Valley Farms' request to require the closure proponents to fund the construction of turnarounds on both approaches to the crossing. If the Commission requires funding for only one cul-de-sac turnaround it should leave the location of that turnaround to the road authorities' discretion.

11 In its petition for reconsideration, Western Valley Farms requests that the Final Order (paragraphs 68 and 79) be modified to require the proponents to fund the construction of cul-de-sac turnarounds on both the east and west approaches.¹¹

12 Western Valley Farms request is consistent with arguments Staff made in its Post Hearing Brief, at ¶ 31. Staff also stated in its Answer to the Petitions for Administrative Review that:

the Initial Order at ¶ 77 would only require BNSF to provide funding for the construction of *one* cul-de-sac turn around. This is inconsistent with the recommendation of the proponents (WSDOT and BNSF) as stated in the testimony of Mr. Norris. TR. 772:16-773:9. The Commission should correct the Initial Order

¹⁰ A copy of this document is included in the record as Exhibit 101.

¹¹ Petition for Reconsideration ¶ 9, and also ¶¶ 18, 21.

to reflect a requirement that the proponents fund the construction of two cul-de-sac turnaround on both sides of the crossing.¹²

The Final Order did not explain its reasoning for requiring only one cul-de-sac turnaround, nor did it specify which approach (east or west) it was referring to in paragraphs 68 and 79.

13 If the Commission wishes to require the proponents (BNSF and/or WSDOT) to fund only one cul-de-sac turnaround, then Staff suggests that the Commission leave it to the respective road authorities to decide where a turnaround is most needed. (As an aside, Staff does not believe the Commission order erred as Western Valley Farms asserts¹³ by stating that the crossing is “near the city limits of Mount Vernon.” The crossing surface is indeed within the city of Mount Vernon, but it is near the boundary or “limits” of the City’s jurisdiction.¹⁴)

14 In general, the Commission should only require the closure proponents to provide funding for improvements to the surrounding road network that the local governments actually choose to construct. The road authorities have ultimate discretion as to roadway design. (Generally, in a case such as this, the Commission’s authority to order a road authority to make changes extends only to the “approaches” of a public crossing.¹⁵) The Commission may, however, condition closure of a crossing on the proponent’s agreement to

¹² Staff’s Answer to Petitions for Administrative Review, at 2, fn. 5.

¹³ Petition for Reconsideration ¶ 3.

¹⁴ The Petition for Reconsideration seems to be interpreting the word “limits” as “the place enclosed within a boundary” rather than simply “the boundary.” Both are possible definitions of “limits.” See Merriam-Webster’s Online Dictionary, <http://www.merriam-webster.com/dictionary/limits>.

¹⁵ RCW 81.53.060 speaks to “or an alteration in the method and manner of an existing crossing and its approaches, or in the style and nature of construction of an existing over-crossing, under-crossing, or grade crossing, or a change in the location of an existing highway or crossing, the closing or discontinuance of an existing highway crossing, and the diversion of travel thereon to another highway or crossing.”

provide funding for improvements to the surrounding road network, as it has properly done in this case.¹⁶

III. CONCLUSION

15 For the reasons stated above, the Commission should (1) deny Western Valley Farms' requests as they pertain to WSDOT's review of the siding extension project and related closure of Hickox Road, (2) deny Western Valley Farms' request to include evacuation of its farm animals and equipment in the terms of the private crossing agreement (but clarify that such use is within the discretion of the local jurisdictions), (3) deny Western Valley Farms request to be included in the safety diagnostic team for the private crossing, and (4) clarify the issue regarding the required funding of one or more cul-de-sac turnarounds at the termini of Hickox Road.

DATED this 5th day of December, 2008.

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¹⁶ Staff understands that WSDOT will address whether it is necessary and, if so, how the environmental impact of constructing turnarounds should be taken into account under SEPA.