

BEFORE THE WASHINGTON STATE
UTILITIES AND TRANSPORTATION COMMISSION

BNSF RAILWAY COMPANY, a Delaware
Corporation,

Petitioner

vs.

CITY OF MOUNT VERNON

Respondents,

SKAGIT COUNTY, WSDOT, and WESTERN
VALLEY FARMS, LLC,

Intervenors.

DOCKET NO: TR-070696

PETITIONER BNSF RAILWAY
COMPANY'S RESPONSE TO
WESTERN VALLEY FARMS'
MOTION FOR RECONSIDERATION

1 Pursuant to the *Notice of Opportunity To File Answers To Motion For Reconsideration* issued by the Washington Utilities and Transportation Commission (WUTC) dated November 19, 2008, BNSF responds to Intervener Western Valley Farms' *Motion For Reconsideration* of the Commission's Final Order and respectfully requests that the motion be denied.

I. Introduction

2 Western Valley Farms' motion appears to focus on two primary issues: (1) an alleged lack of compliance with the State Environmental Policy Act (SEPA); and (2) a request for

continued use of the Hickox Road crossing by farm-related vehicles after it is closed as a public crossing, and appointment of a Western Valley Farms (WVF) representative to the diagnostic team being convened to propose the necessary safety measures, to address the farm's self-described "rights" to evacuate its animals and machinery over the Hickox Road crossing.¹

II. SEPA Compliance

3 To the extent that WVF's arguments regarding Washington State Department of Transportation's (WSDOT's) compliance with SEPA require any response at all, WSDOT would be the appropriate party to address those allegations. That said, BNSF flatly disputes the merit of WVF's arguments regarding SEPA compliance and joins in WSDOT's anticipated opposition to that portion of WVF's motion.²

III. Use of Hickox Road Private Crossing

4 As far as BNSF can tell, WVF's argument regarding farm related use of the private crossing contemplates two separate kinds of activity, neither of which warrants amending the Commission's Final Order. First, in addition to flood evacuation traffic, WVF refers to "milk trucks" and "large equipment" that are "expected to use the crossing."³ It is unclear why WVF makes that assertion, since the private crossing will be "closed to the public subject only to emergency use for flood prevention and control and for emergency services."⁴ Milk trucks and other large farm equipment do not fit that criteria and there is no reason to contemplate their use of the crossing except only conceivably as part of a flood-related emergency evacuation.

¹ WVF also raised the issue of whether the Hickox Crossing is within the boundaries of the City of Mount Vernon. (WVF's Motion, ¶ 3, 15) However, the finding in the Order is not erroneous, is definitely not significant, and cannot reasonably be deemed to be prejudicial to the farm.

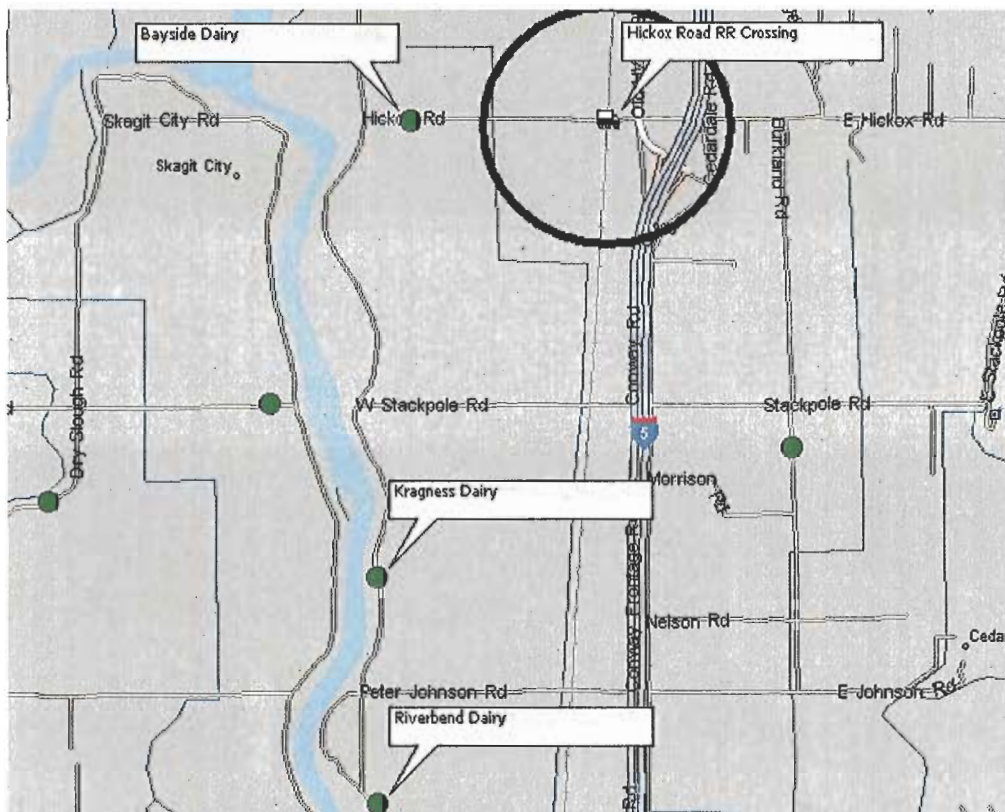
² See *BNSF Railway Company's Answer to Western Valley Farm's Petition for Administrative Review* pp. 3-5 ("the absence of environmental review by the [Surface Transportation Board] does not mean that the project is open to environmental review at the state or local level.").

³ WVF's Motion, ¶ 23.

⁴ *Final Order* of WUTC, ¶ 76.

5 WVF’s reference to the “daily milk truck visits” to the WVF site is therefore confusing and bears no relation to flood events or emergency response use.⁵ As the Final Order rightfully found, suitable alternate access via Stackpole or Blackburn is available for the milk trucks.

6 The May 11, 2007 letter from Mr. Williamson of LTI, Inc. (Milky Way) and attached map of the dairies in the south Mount Vernon area does not support WVF’s request for relief either.⁶ In fact, the attached map shows the Hickox Road crossing and one dairy located on Hickox Road west of the crossing. The other two dairies shown on the map are both south of Stackpole Road. In other words, two of the three dairies are not affected at all by the Hickox



Exh. 200 (Comments on behalf of LTI, Inc., d/b/a Milky Way from Brad Williamson, dated 5/15/07).

⁵ See *WVF’s Motion*, ¶ 18, 21.

⁶ See *Letters In Support of WVF Motion*.

crossing closure and nothing of significance is demonstrated by WVF's new emphasis on the letter or the map.

A. Evacuation as part of a flood-related emergency

7 WVF seeks to distinguish its dairy herd and farm machinery from all other property that the local municipalities are responsible to protect as part of their flood prevention and evacuation plans and preparations. The testimony of Mount Vernon Mayor Bud Norris outlines the comprehensive emergency planning that is involved for flood events, and the implementation of those plans under emergency circumstances created by the threat of flood.⁷ The task of those agencies, including orders to evacuate, is necessary for the *protection of life and property*.⁸ Similarly, the prefiled testimony of Mikael Love, the Assistant Public Works Director for Mount Vernon, specifies the responsibilities of the various diking districts to “protect people and property” within Mount Vernon and the surrounding geographical areas.⁹ There is no apparent basis for distinguishing cows and farm machinery from other “property” located in the flood plain, and certainly none articulated by WVF in its motion.

8 However, it is apparent from WVF's motion that its owners are attempting to use this forum to undermine the local authorities in order to assert their own “rights to evacuate its animals and machinery” using the Hickox Road crossing.¹⁰ Yet WVF does not cite any legal authority to override the judgment and decision-making responsibility of the public entities charged with protecting people and property in flood emergencies. Neither has WVF established its own capability to supplant the expertise of the public authorities that plan, prepare and implement emergency measures for flood fighting and evacuation. For example,

⁷ See *Prefiled Testimony of Bud Norris*, pp. 3-4.

⁸ *Id.*, p. 4 (emphasis added).

⁹ *Prefiled Testimony of Mikael Love*, p. 5.

¹⁰ *WVF's Motion for Reconsideration*, ¶ 10.

Assistant Fire Marshal Brautaset lists the exhaustive preparations and plans that include 1500-2000 people who participate in flood fighting and the numerous tasks that are involved.¹¹ And Assistant Chief Brautaset specifies that “[k]eeping transportation routes available during a flood fight is imperative.”¹² These appear to be the same purposes over which WVF seeks to have some type of unilateral right or control.

9 Protection of persons and property is already within the scope of the duties and responsibilities of the local authorities in flood events. Any evacuation of livestock or machinery would be part of the public authorities’ comprehensive plans, expertise and duty as to how they direct and regulate evacuations in a safe and orderly manner. WVF asks the Commission to override that authority and give the farm carte blanche permission to open the gate and transport its cows, equipment and milk trucks upon its own subjective whim. That request should be denied.

B. Diagnostic team and cul-de-sac

10 The third part of WVF’s request for relief as it relates to crossing use is to have a WVF representative appointed to the diagnostic team to review the private crossing’s safety and configuration.¹³

11 As a preliminary matter, the parties to the private crossing agreement (BNSF, City of Mount Vernon, Skagit County, and Skagit County Rural Fire District No. 3) have already held an on-site diagnostic meeting pursuant to the time constraint imposed by the Final Order, on December 2, 2008.¹⁴ The efforts of WVF at this point would therefore primarily obstruct the

¹¹ See *Prefiled Testimony of Glenn Brautaset*, p. 3-5.

¹² *Id.*, p. 6.

¹³ *WVF’s Motion*, ¶ 12; see also *WUTC Final Order*, ¶ 81.

¹⁴ *WUTC Final Order*, ¶ 80; *Declaration of Megan McIntyre*, ¶ 2.

orderly and timely progression of the diagnostic team's work to implement the safety measures required by the Commission's Order.

12 As set forth above, WVF has not established any expertise to warrant inclusion into the decision-making process of the public entities charged with protecting people and property in flood emergencies, or to plan and implement emergency measures for flood events. Neither has it established any expertise in analyzing the safety features at a railroad crossing.¹⁵ Rather than demanding appointment to the diagnostic team, it might be appropriate for WVF to communicate its concerns to the public entities with the responsibility to serve *all* public safety and property interests and not just the narrow scope of WVF's concerns.

13 WVF requests a cul-de-sac on the west side of the private crossing. The issue of cul-de-sacs at both sides of the private crossing at Hickox Road has been addressed in the initial meeting of the diagnostic team.¹⁶ However, WVF's motion and supporting letters do not provide a basis to institute such a requirement, and it is at best premature for the Commission to implement that provision until the diagnostic team makes its final recommendations.

IV. Conclusion

14 BNSF joins WSDOT's arguments in opposition to the portion of WVF's motion that challenges the sufficiency of compliance with the State Environmental Policy Act (SEPA).

15 The Commission's Final Order granting BNSF's petition to close the Hickox Road crossing subject to emergency response and flood event conditions is proper. The Order makes clear that mitigating the impact on flood events and emergency response with an emergency-use only locked gate is the only acceptable solution short of full closure. WVF's arguments regarding non-emergency farm use are simply misplaced, and WVF's effort to insinuate itself

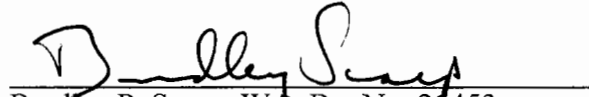
¹⁵ *WVF's Motion*, ¶ 24 ("Western Valley Farms still believes that the public interest would be served by an open crossing").

¹⁶ *Declaration of Megan McIntyre*, ¶ 2.

into the broader domain of public safety, an area in which it has no authority, responsibility or expertise, should be rejected. Accordingly, BNSF respectfully requests that the Motion For Reconsideration by the Intervener, Western Valley Farms, be denied.

DATED this 5th day of December, 2008.

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CERTIFICATE OF SERVICE

I am over the age of 18; and not a party to this action. I am the assistant 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 12 copies of *Petitioner BNSF Railway Company's Response To Western Valley Farms' Motion For Reconsideration* has been sent by FedEx to the Executive Secretary at WUTC and PDF and Word Perfect versions sent by electronic mail. I also certify that true and complete copies have been sent via electronic mail and U.S. Mail to the following interested parties:

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

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



Lisa Miller, Paralegal