

**BEFORE THE WASHINGTON STATE  
UTILITIES AND TRANSPORTATION COMMISSION**

BNSF RAILWAY COMPANY,	)	DOCKET TR-070696
	)	
Petitioner,	)	ORDER 07
	)	
v.	)	ORDER ON RECONSIDERATION,
	)	GRANTING IN PART AND
CITY OF MOUNT VERNON,	)	DENYING IN PART
	)	RECONSIDERATION OF ORDER
Respondent.	)	GRANTING PETITION TO CLOSE
	)	HICKOX ROAD GRADE
	)	CROSSING SUBJECT TO
	)	CONDITIONS
.....	)	

1     ***Synopsis.** The Commission denies Western Valley Farms’ petition for reconsideration of the final order closing the crossing of Burlington Northern Santa Fe tracks at Hickox Road in Skagit County, Washington. This Order rejects Western Valley’s claim of violations of the State Environmental Policy Law (SEPA) and its contentions that it should be allowed to participate, in addition to local governments, in establishing a private crossing agreement and to join a post-order review panel authorized to recommend changes to the crossing configuration. The Commission denies Western Valley’s challenges to findings of fact and conclusions of law in the final order, but modifies the final order to require cul de sacs on both road approaches to the crossing unless a diagnostic team recommends, and the Commission agrees, that a second cul de sac is unnecessary.*

**I.     INTRODUCTION**

2     **Procedural History.** Burlington Northern Santa Fe Railway Company (BNSF or Burlington Northern) filed a petition on April 11, 2007, with the Washington Utilities and Transportation Commission (Commission) to abandon and close to public use a railroad-highway grade crossing located at Hickox Road, Mount Vernon, Skagit

County, Washington in accordance with RCW 81.53.060. The railroad seeks to close the crossing to address safety hazards associated with extension of a siding alongside main line tracks at the location of the crossing.

- 3 After conducting evidentiary hearings and reviewing post-hearing briefs submitted by the parties, Administrative Law Judge Adam E. Torem entered an initial order, Order 05, requiring the closure of the Hickox Road crossing to the public, but allowing limited emergency use of the crossing by local jurisdictions for public safety uses, including medical, police, and emergency services, including flood evacuation and control. The initial order also required the railroad to negotiate and enter into a private crossing agreement with Western Valley Farms, LLC (Western Valley Farms or Western Valley), a business operating a large dairy near the crossing, for limited continued use of the crossing for seasonal harvesting and transportation of its corn or other feed crops.
- 4 Western Valley Farms requested the Commission reverse the initial order's decision to close the crossing, arguing that it should remain open or that conditions should be modified: BNSF sought review of the order to remove the condition authorizing farm use and other conditions. Commission Staff, West Valley Farms, the Washington State Department of Transportation (WSDOT) and BNSF answered these petitions.
- 5 In the Final Order, Order 06, entered on November 4, 2008, the Commission affirmed the initial order, in part, but rejected arguments by Western Valley Farms that the crossing should remain open or that it should be allowed to use the crossing as a private crossing during harvest season.
- 6 Western Valley petitioned for reconsideration on November 14, 2008, raising several issues. The Commission called for answers on November 19, 2008, and indicated its intention to enter an order on reconsideration no later than January 16, 2009. BNSF, WSDOT, and Commission Staff answered the petition.
- 7 On reconsideration, the Commission denies the petition in part, and grants it in part.

8 **Appearances.** Bradley Scarp and Kelsey Endres, Montgomery Scarp MacDougall, PLLC, Seattle, Washington, represent BNSF. Kevin Rogerson, City Attorney, Mount Vernon, Washington, represents the City of Mount Vernon (Mount Vernon or the City). Stephen Fallquist, Civil Deputy Prosecuting Attorney, Mount Vernon, Washington, represents Skagit County (County). Scott Lockwood, Assistant Attorney General, Olympia, Washington, represents the Freight Systems Division of the WSDOT, Tumwater, Washington. Thomas Burke, Burke Law Offices Inc., P.S., and Brian Snure, Snure Law Office, PSC, both of Des Moines, Washington, represent Skagit County Fire Protection District No. 3 (Fire District No. 3), Conway, Washington. Gary T. Jones, Jones & Smith, Mount Vernon, Washington, represents David Boon, Yvonne Boon, and Western Valley (collectively “Western Valley Farms” or “Western Valley”). Jonathan Thompson, Assistant Attorney General, Olympia, Washington, represents the Commission’s regulatory staff (Staff).<sup>1</sup>

## II. MEMORANDUM

### A. Compliance with SEPA

9 Western Valley challenges the Commission’s compliance with the State Environmental Policy Act (SEPA), arguing that this agency violated its responsibility to conduct its own environmental review. The parties argued this issue and the administrative law judge resolved it in Order 03, finding that SEPA requires a single agency to act as lead agency for SEPA review purposes, and that, as project sponsor, WSDOT holds that responsibility. The order recites WSDOT’s commitment to issue a new SEPA determination. A procedural order entered during a proceeding is reviewable following entry of the final order unless the Commission grants interlocutory review under WAC 480-07-810. No party sought interlocutory review of the order.

---

<sup>1</sup> In formal proceedings such as this, the Commission’s regulatory staff functions as an independent party with the same rights, privileges, and responsibilities as other parties to the proceeding. There is an “ex parte wall” separating the Commissioners, the presiding Administrative Law Judge, and the Commissioners’ policy and accounting advisors from all parties, including regulatory Staff. *RCW 34.05.455*.

10 Western Valley cites a prior Commission order in *BNSF v. Skagit County*, Docket TR-940282, in which the Commission was responsible for SEPA compliance. There, the project involved the closure of several crossings, and no other construction project (except to implement closure) was proposed. Therefore, no other agency was involved and the Commission was the lead agency. Here, in contrast, WSDOT is sponsor of a project creating a siding track, which in turn requires other governmental action including this proceeding. As WSDOT points out in its answer, WSDOT is therefore required under WAC 197-11-050 to be the only agency responsible for SEPA compliance, to the exclusion of the Commission. Any review of WSDOT's SEPA process related to the crossing must be made pursuant to WSDOT procedural rules and applicable statutes. As we lack authority and jurisdiction to address Western Valley's claim, we deny the petition for reconsideration on this issue.

**B. Participation in the Private Crossing Agreement.**

11 The Commission's Final Order 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."<sup>2</sup>

12 Western Valley contends that the Order erred in failing to include it as a party to the private crossing agreement because the farm may need to evacuate its animals and machinery over the Hickox Road crossing in the event of a flood. Western Valley argues that failure to provide for the protection and evacuation of farm animals will result in their proceeding to the higher ground of the railroad tracks, causing death of animals and rail accidents.

13 We find no error. BNSF points in its answer to the testimony of Mount Vernon's mayor<sup>3</sup> reflecting legal requirements that the local emergency protection agencies, including those responsible for flood response, are charged with comprehensive planning, including to protect life and property of affected citizens during emergencies. Those agencies engage in exhaustive planning involving multiple tasks,

---

<sup>2</sup> Final Order, ¶ 80.

<sup>3</sup> Norris, Exh. No. 28, at 3-4.

including transportation needs that would include use of the private crossing.<sup>4</sup> The term “local emergency response to flood-related events,” in the Final Order includes the evacuation of livestock and other property in addition to people to the extent that emergency agencies deem that to be an appropriate priority for this crossing during a flood emergency.

14 The local agencies, not the Commission, have the responsibility to determine emergency response priorities and to conform available resources with priority needs. Western Valley’s rights, just as those of every other similarly situated entity, are protected through the participation of local emergency agencies in the post-decision process and in those agencies’ other programs affecting potential crossing use. It is both unnecessary and inappropriate to include Western Valley in the direct management of the crossing.

**C. Asserted factual errors.**

15 Western Valley challenges the Final Order’s Finding of Fact No. 15 relating to the location of the crossing and asserts failure to find other facts.

16 First, it asserts that the finding should state that the crossing is within the city limits of Mount Vernon rather than “near” those city limits, as the finding is phrased.

17 We reject Petitioner’s challenge. The first order in this proceeding, Order 01, resulted in revision of the caption to recognize Mount Vernon’s jurisdiction at the location of the crossing pursuant to RCW 81.53.060. The phrasing of the finding is accurate: It could have no effect on jurisdiction in any event, and the proposed correction is therefore immaterial.

18 Second, Western Valley argues that the Final Order errs by failing to make a finding of fact that the nearest alternative (remaining) crossings are 2.5 miles apart, arguing that the distance deprives traffic from the western side of the track of direct access to a highway interchange. We reject this contention. The Order finds in paragraph 16 that the Stackpole Road crossing is about one mile south of the Hickox Road crossing, and finds in paragraph 17 that the Blackburn Road crossing is about 1.5

---

<sup>4</sup> Brautaset, Exh. No. 23, at 3-6.

miles to the north. Simple mathematics indicates that the two are about 2.5 miles apart.

- 19 Western Valley also argues that the Final Order's failure to enter findings that emphasize the utility of Hickox Road for freeway access constitutes error. We disagree. The locations of the respective roads and freeways are clear in the record, as are traffic counts and vehicle use information. No change is required to the Final Order.

**D. Description of potential crossing use.**

- 20 Western Valley objects to a description of crossing use contained at paragraph 48 of the Final Order, which sets out the process for unlocking private crossing gates, traversing the crossing, and then relocking the gates to prevent public use. It contends that the proposed scenario is unsupported by evidence and that a flag person would be employed at times of heavy use to minimize stops and delays.
- 21 The existence of a private crossing described in the record involves a mechanism to bar public use because the crossing has been found unsafe for public use. Chains and locks are described in the record as mechanisms for barring such use. The steps described in the Order to unlock and relock crossing gates is a reasonable and fair description of that process rooted in the record evidence. The fact that other options, such as the possible use of a flagger in some circumstances, might be available is not reflected in any record evidence. Further, it requires speculation about when a flagger would be required, the adequacy of flagging to assure safety in various possible scenarios, and other possible issues not addressed in the record.
- 22 We find no error in the factual basis for the challenged description of the crossing process. Nor is there any error in declining to address the hypothetical use of a flagger raised for the first time here.

**E. Inclusion of Western Valley Farms in post-order diagnostic team.**

23 The Final Order authorized a diagnostic team effort to review appropriate crossing signalization, protection, and use protocols, and to make recommendations to the Commission for applicable terms. The Order required team representation by the railroad, WSDOT, Skagit County, the City of Mount Vernon, and the Commission Staff.

24 Western Valley objects to the Order's failure to include it as a member of the diagnostic team. It argues that its position as a potential significant user of the crossing and as a business with large investments in real and personal property, including livestock subject to evacuation in the event of flooding, give it a special entitlement to participate in developing terms for use of a private crossing.

25 The same factors applicable to Western Valley's proposed participation in the private crossing agreement, discussed above, apply here. In addition, the diagnostic team is not composed of crossing users with many potential needs, it is composed of agencies and the railroad, all with expertise in professional fields related to crossing configuration to meet the public needs. Western Valley has demonstrated no such expertise. The interests that Western Valley identifies are within the jurisdiction of the public agencies that are directed to participate in the diagnostic team. The Final Order did not err in excluding Western Valley.

**F. Cul de sac placement and funding.**

26 The Final Order accepts the requirement proposed in the Initial Order that BNSF provide funding only for a cul de sac on the eastern approach to the Hickox Road crossing, but not the western approach. Western Valley argues that the Final Order errs in failing to require a cul de sac on both approaches because the distance from the track to the nearest parallel road is long, and a cul de sac is needed for traffic that erroneously enters the road. Staff also suggests that we modify the Initial Order to require funding for cul de sacs on both sides of the crossing, consistent with a joint BNSF-WSDOT concession.

27 BNSF suggests that the Final Order stand, subject to a review of crossing needs by the diagnostic team. We note that the earlier agreement to provide funding did not involve a review of public need, and we believe it is appropriate to consider evaluations of need when weighing requirements for substantial public investment. Relevant need factors would involve not only the frequency of likely mistaken entry, but also potential needs for turn-around during flood or other emergencies.

28 Consequently, we modify the Final Order to require a cul de sac on both the eastern and western road approaches to the private crossing, unless the diagnostic team determines and the Commission agrees that the second cul de sac is unnecessary.

**G. Conclusion.**

29 We grant Western Valley's petition for reconsideration in part and modify the Final Order to address the need for cul de sacs on both road approaches. In all other respects, the petition for reconsideration is denied.

**ORDER**

**THE COMMISSION ORDERS:**

- 30 (1) Western Valley Farms, LLC's petition for reconsideration is granted, and Order 06 is modified, to require cul de sacs on both approaches to the private Hickox Road crossing, and Burlington Northern Santa Fe Railroad and State Department of Transportation funding of both cul de sacs, unless the diagnostic team established in Order 06 recommends, and the Commission agrees, that a cul de sac is unnecessary for the western approach.
- 31 (2) Western Valley Farms, LLC's petition for reconsideration, in all other respects, is denied.



- 32 (3) The Commission retains jurisdiction over the subject matter of and the parties to the proceeding to effectuate the terms of this Order.

Dated at Olympia, Washington, and effective January 14, 2009.

**WASHINGTON STATE UTILITIES AND TRANSPORTATION COMMISSION**

**MARK H. SIDRAN, Chairman**

**PATRICK J. OSHIE, Commissioner**

**PHILIP B. JONES, Commissioner**