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**IN THE COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

MILLENNIUM BULK TERMINALS-LONGVIEW, LLC, et al.

Petitioners,

and

BNSF RAILWAY COMPANY,

Petitioner-Intervenor,

v.

STATE OF WASHINGTON SHORELINES HEARINGS BOARD, et al.,

Respondents.

**OPENING BRIEF OF PETITIONER-INTERVENOR BNSF
RAILWAY COMPANY**

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I. INTRODUCTION

Petitioner Millennium Bulk Terminals-Longview, LLC (“MBT-Longview”) is a developer that wants to construct and operate a coal export terminal in Cowlitz County, Washington (“the Project”). Petitioner-Intervenor BNSF Railway Company (“BNSF”) operates an interstate railway as a common carrier and owns rail lines that would be used to serve the Millennium project and locomotives and unit trains that would deliver shipments of coal to the proposed export terminal.

The Project would be developed in two stages. Under Stage 1 of development, MBT-Longview would construct a facility capable of exporting up to 25 million metric tons per year (“MMTPY”) of coal. BNSF would deliver up to five unit trains per day during Stage 1. After construction of Stage 1, MBT-Longview would then expand the export capacity of the facility to 44 MMTPY by constructing additional improvements. BNSF would deliver up to eight unit trains per day at full build-out of the Project. MBT-Longview submitted the entire development proposal for environmental review under the State Environmental Policy Act (SEPA).

Cowlitz County (the “County”) and the Department of Ecology (“Ecology”) issued a Final Environmental Impact Statement (“FEIS”) evaluating the potential adverse environmental impacts of a 44 MMTPY coal export facility. Based on worst-case scenarios for the proposed 44 MMTPY facility, the FEIS identified nine resource areas where

unavoidable, significant adverse environmental impacts could remain.

The FEIS recognized that rail-related impacts (e.g., rail transportation, rail safety, vehicle transportation, noise and vibration) could be mitigated. AR 988-1002 (FEIS Table S-2, list of potential impacts and mitigation).

Pursuant to the Shoreline Management Act (“SMA”) and the Cowlitz County Shoreline Master Plan (“Cowlitz SMP”), MBT-Longview submitted applications for a Shoreline Substantial Development Permit and a Conditional Use Permit for improvements necessary to construct the Stage 1 facility that would receive up to five unit trains per day. County staff considered MBT-Longview’s application for Stage 1 permits in light of the FEIS, the SMA, and the SMP and recommended approval of the permits subject to several conditions. MBT-Longview’s application was then forwarded to the Cowlitz County Hearing Examiner for review.

The Hearing Examiner held a public hearing on the application. At the hearing, County staff and MBT-Longview testified that MBT-Longview was only requesting permits to construct the Stage 1 facility. MBT-Longview submitted evidence and testimony explaining the distinction between Stage 1 and Stage 2, as well as the less significant impacts of Stage 1 when compared with Stage 2 (e.g., only five unit trains per day compared to eight unit trains per day), and the reasonable mitigation measures for impacts associated with Stage 1.

Despite the evidence of phased impacts and mitigation, the Hearing Examiner issued a 67-page decision denying MBT-Longview’s application for Stage 1 permits under SEPA. He determined that he must

deny the permits under SEPA because the FEIS concluded that the project (44 MMTY and up to eight trains per day) had unavoidable, significant adverse impacts and because he found that MBT-Longview had failed to provide reasonable mitigation for those impacts.

The Hearing Examiner's decision is incorrect and not based on the facts at hand. He erroneously rejected evidence about the impacts and mitigation specific to Stage 1 -- completely ignoring the implications of three fewer unit trains per day -- and instead based his decision solely on the FEIS's assessment of impacts and mitigation for full build-out. He also failed to consider evidence about realistic Project impacts and mitigation at full build-out.

These rulings were clearly erroneous and MBT-Longview and BNSF petitioned the Shorelines Hearings Board (the "Board") for review of the denial. The Board scheduled a two-week hearing of the case, including a one-day site visit at the commencement of the hearing. However the Board granted summary judgment before the hearing was conducted, before MBT-Longview and BNSF had a chance to present expert testimony, and while discovery was still ongoing.

BNSF appeals the Board's Order granting summary judgment to affirm the Hearing Examiner's denial of MBT-Longview's application for shoreline permits to construct the Stage 1 facility. The Board concluded that the Hearing Examiner did not err in denying the permits under SEPA and that there were no material issues of fact precluding it from granting summary judgment.

The Board's Order, like the decision of the Hearing Examiner, is fundamentally flawed and should be reversed and remanded. First, the Board erred in concluding that its scope of review was limited to the record before the Hearing Examiner. Second, the Board further erred in its determination that the Hearing Examiner complied with the strict requirements for denying a permit under SEPA substantive authority, despite ample record evidence that the Hearing Examiner's findings and conclusions fall short of those exacting requirements. Finally, the Board erred in granting summary judgment on that same issue, because genuine issues of material fact exist regarding the impacts of a Stage 1 facility, and the mitigation of those impacts.

Fundamentally, the Board's and the County Hearing Examiner's decisions suffer from the same fatal flaw: a complete disregard for the actual proposal presented for adjudication. By impermissibly expanding the scope of the proposal under review, the Board and the County Hearing Examiner ignored key facts directly pertinent to the proper exercise of SEPA substantive authority. Invocation of such a powerful tool -- the independent authority under SEPA to deny proposals -- demands an adequate record for disposition. As explained in detail below, these and other errors require reversal and remand by this Court.

II. ASSIGNMENTS OF ERROR

1. The Board erred as a matter of law in concluding that its scope of review was limited to the record created by the Hearing Examiner. AR 2073-74 (April 20, 2018 Order).

2. The Board erred in concluding that the Hearing Examiner's exercise of SEPA substantive authority under RCW 43.21C.060 and WAC 197-11-660 was not clearly erroneous. AR 2085-86 (April 20, 2018 Order).

3. The Board erred in granting Ecology's and WEC's Motions for Summary Judgment because genuine issues of material fact exist as to the impacts and mitigation of Stage 1. AR 2086 (April 20, 2018 Order).

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Is the Board's scope of review of a denial of a Shoreline Substantial Development Permit and a Shoreline Conditional Use Permit de novo under WAC 461-08-500(1)?

2. Did the Hearing Examiner act clearly erroneously when he rejected as "irrelevant" evidence of Stage 1 impacts?

3. Was the Hearing Examiner required to make specific, independent findings about what Stage 1 impacts would be?

4. Was the Hearing Examiner required to make a specific finding about whether reasonable measures existed to mitigate impacts of Stage 1?

5. Did the Hearing Examiner act clearly erroneously when he evaluated the mitigation of impacts of both Stage 1 and Stage 2, when the only application before him was for Stage 1?

6. Do genuine issues of material fact exist regarding impacts of a project where the non-moving party presented evidence that impacts of the project could be mitigated?

7. Is summary judgment regarding whether the Hearing Examiner

lawfully exercised SEPA substantive authority appropriate where genuine issues of material fact exist regarding the impacts and mitigation of such impacts?

IV. STATEMENT OF THE CASE

For purposes of judicial economy, BNSF adopts Petitioner's Statement of the Case.

V. STANDARD OF REVIEW

For purposes of judicial economy, BNSF adopts Petitioner's Standard of Review.

VI. ARGUMENT

A. The Board erred as a matter of law in holding that its scope of review was limited to the record created by the Hearing Examiner.

The Board's conclusion that its scope of review was "limited to the record created" by the Hearing Examiner is plain error. The scope of review for cases challenging the exercise of the SEPA substantive authority is de novo and the standard of review is clearly erroneous. *See e.g., Citizens for Sensible Growth v. City of Leavenworth*, SHB No. 98-24 (1998) (holding that scope of review is de novo and is not confined to the record made before the local government; that was so even though the standard of review was clearly erroneous). By constraining the scope of review to the record created by the Hearing Examiner, the Board precluded the consideration of relevant and material evidence and prevented development of a full and adequate factual record that would

allow for judicial review. *Nagatani Bros., Inc. v. Skagit Cty. Bd. of Comm'rs*, 108 Wn. 2d 477, 482, 739 P.2d 696 (1987). In the interest of judicial economy, BNSF adopts Petitioner's full discussion of the Board's scope of review. In addition, BNSF underscores a glaring inconsistency in the Board's reasoning.

The Board said that it was "limited to the record created" by the Hearing Examiner, but the Board scheduled a two week hearing during which parties were planning to present expert testimony. For example, BNSF intended to produce expert testimony at the hearing specifically addressing the lower impacts of Stage 1 of the Project that was limited to five unit trains and mitigation measures for rail impacts in general. AR 1961. Further, discovery was ongoing at the time the Board issued its letter notifying the parties that it would be resolving the case on summary judgment. AR 429; AR 2050-51. It is logically inconsistent to allow for expert testimony and discovery if review is "limited to the record created" by the Hearing Examiner. Despite its assertions to the contrary, the Board clearly contemplated reviewing other evidence in addition to the Hearing Examiner's record. Indeed, it was required to do so pursuant to controlling law governing the Board's scope of review. *See e.g., Save Our Industrial Land v. City of Seattle*, SHB No. 95-41 (1996) (SEPA appeal is not limited to the administrative record before the agency).

B. The Board erred in affirming the Hearing Examiner’s exercise of substantive SEPA authority to deny the permits.

The Hearing Examiner denied MBT-Longview’s shoreline permits pursuant to SEPA substantive authority. The Board affirmed the Hearing Examiner’s denial under SEPA, concluding that he complied with the procedural requirements for exercising substantive SEPA authority and that there were no genuine issues of material facts. As detailed below, the Board erred with respect to both of those conclusions.¹

1. The Hearing Examiner’s denial of the permits under SEPA substantive authority was clearly erroneous.

The Board erred in concluding that the Hearing Examiner’s denial of MBT-Longview’s permits under SEPA complied with the requirements of RCW 43.21C.060. SEPA authorizes decision makers to condition or deny proposals based on the potential environmental impacts identified in the SEPA review documents, subject to certain, strict requirements described in RCW 43.21C.060. To deny a *proposal* under this chapter, the decision maker “*must* find that: (1) The proposal *would result* in significant adverse impacts identified in a final or supplemental

¹ BNSF does not address whether or not the FEIS can be challenged; BNSF is not challenging the FEIS. BNSF is only challenging the Hearing Examiner’s use of the FEIS in the exercise of his SEPA substantive authority; a distinction the Board itself has highlighted and approved. AR 2078 (“The Board concludes that the FEIS’s determination of adverse environmental impacts associated with the Project and their significance cannot be challenged in this proceeding . . . [but] the Hearing Examiner’s use of the FEIS can be challenged in addressing whether the exercise of SEPA substantive authority was clearly erroneous.”).

environmental impact statement prepared under this chapter; and (2) reasonable mitigation measures *are insufficient to mitigate* the identified impact.” RCW 43.21C.060 (emphasis added). As explained below, the Hearing Examiner failed to meet either of these mandatory prongs. Thus, his exercise of SEPA substantive authority was clearly erroneous.

a. The Hearing Examiner failed to establish that MBT-Longview’s Proposal for Shoreline Permits would likely result in significant adverse impacts identified in the FEIS.

The Hearing Examiner failed to make the impact finding necessary to deny the permits under SEPA. MBT-Longview filed its shoreline permits proposal with Cowlitz County for Stage 1 of the Project, which was limited to the construction of improvements necessary for a 25 MMTPY facility, receiving service from only up to five unit trains per day. AR 710. Under RCW 43.21C.060, in order to deny MBT-Longview’s proposal, i.e., application for Stage 1 permits, the Hearing Examiner had to find that issuing the Stage 1 permits would result in the potential significant impacts identified in the FEIS. This point cannot be stressed enough because the conclusions in the FEIS, regarding rail impacts in particular, as equivocal as they are, were based on impacts associated with service to the facility of eight unit trains per day; not the up to five unit trains per day contemplated in MBT-Longview’s proposal. SEPA requires that the decision maker make specific, independent findings based on evidence in the record. *See Nagatani Bros.*, 108 Wn. 2d at 482 (governmental action may be denied under SEPA “only on the basis

of specific, proven significant environmental impacts”). Thus, under this first element, the decision maker may not merely cite to the adverse environmental impacts identified in the FEIS; instead, the decision maker must find that potential impacts identified in the FEIS would result from specific proposal at issue.

The FEIS assists the agency’s evaluation of this first element, but it is only informational: “The primary function of an [F]EIS is to identify adverse impacts to enable the decision maker to ascertain whether they require either mitigation or denial of the proposal.” *Victoria Tower P’ship v. City of Seattle*, 59 Wn. App. 592, 601, 800 P.2d 380 (1990); WAC 197-11-400(2) (“An [F]EIS shall provide impartial discussion of significant environmental impacts and shall inform decision makers and the public of reasonable alternatives, including mitigation measures, that would avoid or minimize adverse impacts or enhance environmental quality.”)

In this case, the FEIS does not tell the whole story. Because the FEIS only looks at the impacts for full-build out, the Hearing Examiner needed further analysis and evidence to decide whether the impacts are significant and adverse for Stage I. MBT-Longview and BNSF both put on evidence at the public hearing to help the Hearing Examiner understand this distinction. For example, BNSF testified that at full build-out MBT-Longview is expected to receive eight unit trains per day but, by comparison, during Stage I MBT-Longview is only expected to receive five trains per day. AR 1839. Inappropriately, the Hearing Examiner summarily dismissed that evidence as “largely irrelevant” because MBT-

Longview and BNSF did not challenge the FEIS. AR 56. Regardless of whether MBT-Longview and BNSF challenged the FEIS's conclusions, those conclusions do not fully address the issue at hand: specifically, whether Stage I impacts were unavoidable, significant, and adverse. Thus, the FEIS conclusions as they relate to the specific proposal for Stage 1 shorelines permits merit further inquiry, inquiry the Hearing Examiner refused to undertake.

Further, the Hearing Examiner's assertion that the FEIS could not be challenged is disingenuous considering that he challenged and rejected an FEIS conclusion in making his impacts finding. The Hearing Examiner asserted that:

[MBT-Longview] has presented the testimony of several experts whose opinions are in conflict with the FEIS, but in the absence of any appeal, this testimony is largely irrelevant to the issue of whether the *ten* unavoidable, significant adverse impacts identified in the FEIS can be reasonably mitigated."

AR 56 (emphasis added). The FEIS did not identify *ten* unavoidable, significant adverse impacts that could remain, it identified *nine*. The Hearing Examiner rejected the FEIS's conclusion that the Project's net greenhouse gas emissions did not constitute an unavoidable, significant adverse environmental impact and decided instead that greenhouse gas emissions did constitute an unavoidable, significant adverse environmental impact. AR 2068. He added the tenth impact in contravention of the findings in the FEIS. The hearing examiner cannot treat the FEIS as

inviolate when he substituted his own conclusion for that in the FEIS while rejecting evidence from BNSF because it conflicts with the FEIS.

b. The Hearing Examiner also failed to make the required finding regarding mitigation.

The Hearing Examiner failed to find that that reasonable mitigation measures are insufficient to mitigate the impacts of Stage 1. The Board incorrectly concluded that the Hearing Examiner complied with this requirement. AR 2086.

Denial of a permit under SEPA requires a finding that the significant adverse environmental impacts of the proposed action *cannot* be sufficiently mitigated. *See Cougar Mountain Assocs. v. King Cty.*, 111 Wn. 2d 742, 755, 765 P.2d 264 (1988) (to deny a proposal under SEPA, the decision maker must “specifically set forth reasonable mitigation measures to counteract [the identified] impacts, or, if such measures do not exist, ... specifically state why the impacts are unavoidable and development should not be allowed.”).

The FEIS conclusions use vague and ambiguous language about mitigation of environmental impacts for full build-out of the Project. For example, the FEIS states that if mitigation measures were implemented, then “[u]navoidable and significant adverse environmental impacts *could* remain for nine environmental resource areas: social and community resources; cultural resources; tribal resources; rail transportation; rail safety; vehicle transportation; vessel transportation; noise and vibration; and air quality.” AR 518 (emphasis added). The FEIS does not state that

the significant adverse environmental impacts *would* remain after mitigation measures were implemented, but only that they *could* remain.

The following examples regarding impacts from rail operations at full build-out demonstrate the equivocal nature of the findings in the FEIS:

- Three segments on the BNSF main line routes in Washington State (Idaho/Washington State Line–Spokane, Spokane–Pasco, and Pasco–Vancouver) are projected to exceed capacity with projected baseline rail traffic in 2028. Proposed Action-related trains would contribute to these three segments exceeding capacity in 2028, based on the analysis in this EIS and assuming existing infrastructure. It is expected that BNSF would make the necessary investments or operating changes to accommodate the rail traffic growth, but it is unknown when these actions would be taken or permitted. *If improvements to increase capacity were not made, Proposed Action-related trains would contribute to these capacity exceedances and could result in an unavoidable and significant adverse impact on rail transportation. [FEIS S.7.4].*
- Proposed Action-related trains would add rail traffic along rail routes in Cowlitz County and Washington State, which would increase the potential for train accidents. LVSF, BNSF, and UP could improve rail safety through investments or operational changes, but it is unknown when those actions would be taken or permitted. Therefore, the Proposed Action *could* result in an unavoidable and significant adverse impact on rail safety. [FEIS S.7.5].
- With current track infrastructure on the Reynolds Lead and BNSF Spur, four public at-grade crossings would operate below the benchmark used for the analysis if one Proposed Action-related train travels during the peak traffic hour in 2028. With planned track improvements to the Reynolds Lead and BNSF Spur, two public at-grade crossings would operate below the benchmark used for the analysis if two Proposed Action-related trains travel during the peak traffic

hour in 2028. While improvements for rail and road infrastructure have been proposed, it is unknown when these actions would be permitted and implemented. Therefore, the Proposed Action at full operations in 2028 *could* result in an unavoidable and significant adverse impact on vehicle transportation at certain at-grade crossings in Cowlitz County. [FEIS S.7.6].

- The Proposed Action would add 16 trains per day on the Reynolds Lead and BNSF Spur and increase average daily noise levels. Noise levels would exceed applicable criteria for noise impacts at noise sensitive locations. The noise impacts would occur near at-grade crossings on the Reynolds Lead from train-horn noise intended for public safety. Railroad noise is exempt from Washington State and local noise standards; however, it is possible for communities to work with the Federal Railroad Administration to apply for and implement a Quiet Zone to limit train horn sounding. The Applicant will work with the City of Longview, Cowlitz County, LVSU, the affected community, and other applicable parties to apply for and support the implementation of a Quiet Zone. However, *if a Quiet Zone is not implemented and Proposed Action-related train horns are sounded for public safety, then the noise impacts would remain* and would be an unavoidable and significant adverse impact. [FEIS S.7.8].

AR 1743-44.

Because denying a permit under SEPA authority requires a finding that “reasonable mitigation measures are insufficient to mitigate the identified impact” the conclusion in the FEIS that impacts “could remain” begs for more consideration and more evidence to determine whether those impacts were in fact likely to occur. This is true even when examining the proper exercise of SEPA substantive authority to permits for full build-out of the Project, never mind the lower impacts for the Stage 1 proposal -- e.g., service from five unit trains compared to eight at

full build-out -- described in MBT-Longview's Shorelines permit applications. However, the Hearing Examiner completely ignored relevant evidence about mitigation measures that could address the impacts identified in the FEIS.

For example, BNSF presented evidence that it could work with local communities to create quiet zones which would mitigate the noise impacts identified in the FEIS. AR 1848. BNSF also presented evidence that it can split trains for emergency responders to ensure their paths aren't blocked by stopped trains and that the majority of its trains are already equipped with anti-idling technology. AR 1849, 1846-47. The list goes on. But, without sufficient explanation, all that evidence was dismissed as "largely irrelevant." AR 56. As such, the Hearing Examiner's findings about mitigation were plainly insufficient under RCW 43.21C.060 to deny MBT-Longview's shoreline permits under SEPA, and the Board erred in concluding otherwise.

2. There remain genuine issues of material fact regarding the impacts of and mitigation for the Project.

In addition to the reasons cited above, the Board's grant of summary judgment was erroneous because genuine issues of material fact exist regarding the impacts of and mitigation for the Project.

"The summary judgment procedure is designed to eliminate trial if only questions of law remain for resolution, and neither party contests the facts relevant to the legal determination." AR 2072 (citing *Rainier Nat'l Bank v. Sec. State Bank*, 59 Wn. App. 161, 164, 796 P.2d 443 (1990)). As

the moving parties, Ecology and WEC were required to demonstrate that there were no genuine issues of material fact and that they were entitled to judgment as a matter of law. In evaluating Ecology's and WEC's motions for summary judgment, the Board was required to view all facts and inferences in favor of MBT-Longview and Cowlitz County, as the non-moving parties. *See Jones v. Allstate Ins. Co.*, 146 Wn.2d 291, 300, 45 P.3d 1068 (2002). Although the Board recited the correct summary judgment standard, it didn't apply it.

Both MBT-Longview and BNSF presented evidence to the Board creating genuine issues of material fact regarding whether the significant, adverse impacts that "could remain" were likely to occur. MBT-Longview presented evidence from BNSF that significant, adverse impacts to rail capacity, rail safety, air quality, traffic, access, and train noise are unlikely to occur or would be mitigatable. AR 1837-1867. For example, with respect to rail capacity, BNSF testified that:

BNSF has adequate capacity--both now and into the future--to accommodate freight rail traffic in Washington. Again this is true for future growth. The final FEIS even acknowledged that there shouldn't be any capacity limitations until 2028 -- more than 10 years out. And even then, the capacity investments we're making now will ensure we are in good shape in 2028 and beyond.

AR 1843. With respect to air quality, BNSF testified that:

[I]dling reduction technology is required by federal law, and the EIS inaccurately assumes that BNSF locomotives at Millennium would continuously run. That simply is not true. The truth is that over 98 percent of our locomotives

are equipped with an Automatic Emission Shutdown System, which automatically shuts down a locomotive when it is not in use. This reduces idling emissions.

AR 1846-47. *See also* 1925 (confirming that cancer risk calculations in the FEIS were based on overstated exposure assumptions and that cancer risk for diesel emissions estimated to be present “are not significant”). With respect to train noise, BNSF testified that “BNSF regularly works with communities that wish to establish a quiet zone, including assisting with their applications to the [Federal Railroad Administration].” AR 1848. MBT-Longview also presented evidence from BNSF that it has created an access program for tribal members seeking to access traditional fishing, hunting, and gathering sites that would mitigate impacts to tribes. AR 1852. And, BNSF further detailed all the ways it could ensure that impacts to traffic and safety would be mitigated. AR 1841-1842, 1848-49.

In addition, BNSF planned to produce additional expert testimony regarding Stage 1 rail impacts, diesel emissions, tribal impacts, and reasonable mitigation measures at the two-week hearing scheduled for March 19-30, 2018. AR 1961; AR 425. Further, discovery was on-going at the time of summary judgment briefing before the Board. AR 429; AR 2050-2051.

At a minimum, viewing this evidence in the light most favorable to MBT-Longview and BNSF, there are genuine disputes of fact about the extent and likelihood of impacts (both for Stage 1 and for full build-out) and whether such impacts could reasonably be mitigated. The Board erred in granting Ecology and WEC summary judgment on the issues of

whether the Hearing Examiner’s exercise of SEPA substantive authority was clearly erroneous because genuine issues of fact precluded summary judgment. The Board’s decision should be reserved and remanded so that an adequate record can be made in order to allow for judicial review. *Nagatani Bros.*, 108 Wn. 2d at 482 (“An adequate record, including intelligible findings based upon the evidence presented to the decision makers, must be made to allow required judicial review.”).

VII. CONCLUSION

For the reasons set out above, the Court should reverse the Board’s order dismissing MBT-Longview’s petition and remand the case to the Board for a full hearing.

Respectfully submitted this 28th day of December, 2018.

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DECLARATION OF SERVICE

Lori Moltz declares as follows:

1. I am over the age of 18 and am competent to testify herein.
2. I am a practice assistant at the law firm of K&L GATES LLP.
3. On December 28, 2018, I caused the foregoing document to be

filed electronically with the court and also to be served on the parties
below through the Washington State Appellate Courts' eFiling Portal:

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

Dated this 28th day of December, 2018 at Seattle, Washington.

/s/ Lori Moltz
Lori Moltz
Practice Specialist

K&L GATES LLP

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