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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.

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

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I. INTRODUCTION

The fact that a project garners substantial public interest and may-- by some members of the public and regulators--be considered controversial or politically-disfavored does not permit local and state agency review bodies to subject that project to a unique and inherently insurmountable review process. In this case, the State of Washington managed the generation of a Final Environmental Impact Statement (“FEIS”) for the Millennium Bulk Terminals-Longview, LLC (“Millennium”) export terminal in Cowlitz County, Washington (“the Project”) to further its institutional policy preferences. The State and Respondent-Intervenors Washington Environmental Council, et al. (collectively “Respondents”) now seek to insulate permitting decisions based on that FEIS, which is replete with speculative conclusions about impacts that “could” result from the Project, from de novo review.

This appeal is about the correction of multiple legal and procedural errors committed by the State Shorelines Hearings Board (“Board”) in affirming the local Cowlitz County Hearing Examiner’s denial of Petitioner Millennium’s shoreline permits to construct and operate the Project. In appealing the Board’s decision, Petitioner-Intervenor BNSF Railway Company (“BNSF”) is not asking this Court to decide the ultimate outcome of Millennium’s shoreline permits application. Instead, BNSF simply requests that this Court reverse and remand the Board’s decision so that Millennium receives the full, fair, and transparent hearing

that it, like every other project, should be entitled to under the laws of the State of Washington.

Respondents, meanwhile, argue for this Court to ignore plain statutory and regulatory language, controlling judicial precedent, and Board precedent to deny Millennium's right to a full hearing before the Board. If Respondents' arguments were to prevail, it would establish an environmental review scheme fundamentally at odds with the State Environmental Policy Act's ("SEPA") goal of providing for balanced and responsible development and open the door to abuses of the environmental review system, to the detriment of property owners and developers in future projects.

First, Respondents misguidedly argue that the Board's scope of review is not de novo, ignoring clear statutory and regulatory directives and grave policy considerations courts have relied on when deciding to apply the clearly erroneous standard of review to SEPA substantive cases. The Board's failure to apply a de novo scope of review tainted the entire process before the Board and ultimately denied Millennium and BNSF an opportunity to present evidence necessary for the Board to reach an informed decision.

Second, in an effort to distract this Court's attention from the basic legal principles governing the Board's review procedures, Respondents accuse Millennium and BNSF of mounting a collateral attack on the FEIS, which is simply untrue. BNSF is *not* challenging the FEIS. Rather BNSF seeks only to highlight glaring instances where the Hearing Examiner

ignored--and the Board should have accepted--additional evidence necessary to evaluate the FEIS's vague or incomplete conclusions before leaping to the rare invocation of SEPA substantive authority to deny the Project. The FEIS is only one of many important sources of information the decision maker should consider to develop a reasoned conclusion.

Third, despite Respondents' unconvincing arguments to the contrary, the Hearing Examiner did not meet the required elements to use SEPA substantive authority to deny the permit. BSNF addresses each impact identified in the FEIS to highlight discrepancies between the FEIS's actual conclusions on the one hand, and the Hearing Examiner's representation of those conclusions and the Board's cursory acceptance of that representation on the other. Finally, Respondents avoid the real issue before the Court by arguing that Millennium unlawfully piecemealed the Project. This argument reflects Respondents' misunderstanding of the permitting process and, if accepted, would create dangerous precedent where any staged development must be permitted as whole. The fact remains that the "proposal" before the Hearing Examiner was for Stage 1 of the Project. In order to exercise SEPA authority to deny Millennium's proposal, he was required to find that Stage 1 of the Project would result in significant adverse impacts identified in the FEIS. Because he made no such findings, the Hearing Examiner's decision was clearly erroneous.

II. ARGUMENT

A. The proper scope of review is de novo.

The Board's rules expressly dictate that de novo is the appropriate scope of review in this case. The plain language of WAC 461-08-500(1) provides: "The scope and standard of review shall be *de novo* unless otherwise required by law." See also RCW 90.58.180(3) (the Board's procedures for review of permit denials are governed by the Administrative Procedure Act, RCW 34.05); RCW 34.05.410-494 (providing a de novo scope of review for adjudicative proceedings, with the ability to, among other things, conduct discovery, present evidence, and conduct cross-examination). SEPA undisputedly does not prescribe a scope of review, which the Board itself acknowledged and then proceeded to ignore. AR 2073. Thus, the Board was required by statute and its own rules to apply a de novo scope of review. Because the Board's decision to limit its scope of review to the record before the Hearing Examiner was based on an erroneous interpretation of the law, it should be reversed.

The policy rationale behind the Board's regulations governing the appropriate scope of review further demonstrate that the Board's error in failing to review the Hearing Examiner's decision de novo is reversible--not harmless--error. Under de novo review, the Board acts as if it were considering the issues presented for the first time, giving no deference to the decision below. See e.g., *Buechel v. State Dep't. of Ecology*, 125 Wn. 2d 196, 202, 884 P.2d 910 (1994) ("[T]he Board hears the matter de novo

and the Board's de novo review accords the local government's decision no particular deference."). The Board's default to de novo review as expressly provided for in WAC 461-08-500(1) is not some arbitrary selection plucked from the menu of available options, but rather a thoughtful, practical decision that reflects the fact that local governmental authorities are not bound by the state's Administrative Procedure Act ("APA") and are thus not required to conduct hearings in accordance with the APA. De novo hearings before the Board can cure procedural defects that may have occurred in review of shoreline applications by the local jurisdictions. *Yule v. Yarrow Point*, SHB No. 87-22 and 87-23 (1987); *Jamestown Klallam Tribe, et al., v. Clallam Cty.*, SHB No. 88-4 and 88-5 (1988).

The same policy reasons that courts have used to support the application of the clearly erroneous standard of review to substantive SEPA decisions, instead of the more deferential abuse of discretion standard of review, also support applying a de novo scope of review. In *Polygon Corp. v. City of Seattle*, the court held that the less deferential clearly erroneous standard of review applied to substantive SEPA decisions because "[i]t has long been recognized that substantive and procedural safeguards are necessary to protect property owners from abusive and arbitrary land use regulations" and "[t]hat potential for abuse is even stronger where the decision must be made in a climate of intense political pressures." 90 Wn. 2d 59, 69, 578 P.2d 1309 (1978). Further, the court held that "[i]n applying the clearly erroneous test to an

administrative decision, we examine the entire record *and all the evidence* in light of the public policy contained in the legislation authorizing the decision.” *Id.* (emphasis added).

The same rationale applies to scope of review. In politically-charged cases such as this, substantive and procedural safeguards are particularly necessary to limit biased decisions and ensure a fair hearing. If the reviewing board was barred from considering any evidence outside of an EIS, the lead agency could fill an EIS with baseless, conclusory findings and the reviewing board would be forced to accept those findings at face value. Ensuring that the reviewing board considers *de novo* any and all relevant information needed to come to a fair and considered decision is critical to protecting applicants against any potential abuses.

Ecology unconvincingly tries to distinguish *Polygon* and related cases¹ on the basis that those cases occurred in the context of appellate review, as opposed to review by the Board, or because they arose under the APA. This argument is unavailing because the legal principles relied upon in these cases are not unique to appellate review or to the APA. In fact, *Polygon*, which is not an APA case, relied on *Ancheta*, an APA case, in discussing why the clearly erroneous standard of review must apply. All of these cases show that, regardless of context, clearly erroneous review requires the reviewing body to consider the entire record before determining whether a decision was clearly erroneous. *See Tunget v. State*

¹ See *Ancheta v. Daly*, 77 Wn. 2d 255, 461 P.2d 531 (1969); *Tunget v. State Emp’t Sec. Dep’t*, 78 Wn. 2d 954, 481 P.2d 436 (1971).

Emp't Sec. Dep't, 78 Wn.2d 954, 956, 481 P.2d 436 (1971) (“*Ancheta* makes it abundantly clear that a reviewing court may reverse the commissioner’s decision as ‘clearly erroneous’ only after the court has considered the ‘entire record.’”). Ultimately, Ecology fails to cite any cases to the contrary.²

At the outset of the appeal before the Board, the Board set the expectation that it would review de novo Millennium’s appeal of the Hearing Examiner’s decision. The Board’s pre-hearing order provided deadlines for identification of witnesses and exhibits, as well as a deadline for discovery. AR 423-32. If the record before the Hearing Examiner was the complete universe of relevant materials for the Board’s decision, the Board would not have issued such an order. Furthermore, the parties relied on the expectation of de novo review. Millenniums’ pre-hearing submittal noted numerous experts it would call on topics including air quality, vehicle transportation, rail transportation, and the Project’s social benefits. AR 356-57. Ecology also identified fourteen witnesses, none of whom offered testimony before the Hearing Examiner. AR 346-47. And BNSF, in its opposition to Respondent’s motion for summary judgement, declared its intent to offer expert testimony on rail issues and mitigation.³ AR 1960-61.

² Respondents’--and the Board’s--reliance on *Cook v. Clallam County*, 27 Wn. App. 410, 618 P.2d 1030 (1980), is misplaced for the simple and inescapable reason that the *Cook* case was not before the SHB and thus the scope of review rule in WAC 461-08-500(1) did not apply in that case.

³ Respondents inaccurately state that all parties moved for summary judgement before the Board. See Ecology Brief at 29. This is incorrect.

The Board's failure to apply a de novo scope of review tainted the entire process before the Board and ultimately denied Millennium and BNSF an opportunity to present evidence necessary for the Board to reach an informed decision. At least one member of the Board recognized this, stating that the Board "must review a local government's action to deny a shoreline permit when the denial relies solely on the substantive authority of the State Environmental Policy Act, de novo." AR 2089-90 (Board Order on Motions for Summary Judgment, Dissent). For this reason alone, this Court should reverse the Board's decision and remand the case for full consideration in line with the appropriate de novo scope of review.

B. BNSF is not challenging the FEIS; rather, BNSF is challenging the decision to ignore information needed to add context to the equivocal findings in the FEIS.

In its decision, the Board concluded that "the FEIS's determination of adverse environmental impacts associated with the Project and their significance cannot be challenged in this proceeding." AR 2078. At the same time, the Board acknowledged that "the Hearing Examiner's use of the FEIS can be challenged in addressing whether the exercise of SEPA substantive authority was clearly erroneous." *Id.* BNSF is not challenging the adequacy of the FEIS. Instead, BNSF is challenging the Board's affirmation of the Hearing Examiner's decision to deliberately ignore information necessary to flesh out the contours of the FEIS conclusions.

BNSF never moved for summary judgment, electing only to oppose summary judgement due to the existence of genuine issues of material fact. AR 1960-61.

The FEIS is one helpful document among many that could and should have been considered. See WAC 197-11-400(4) (“An environmental impact statement is more than a disclosure document. It shall be used by agency officials *in conjunction with other relevant materials and considerations* to plan actions and make decisions.”) (emphasis added); WAC 197-11-448(1) (“[A]n environmental impact statement analyzes environmental impacts and must be used by agency decision makers, *along with other relevant considerations or documents*, in making final decisions on a proposal. The EIS provides a basis upon which the responsible agency and officials can make the balancing judgment mandated by SEPA, because it provides information on the environmental costs and impacts. *SEPA does not require that an EIS be an agency’s only decision making document.*”) (emphasis added); WAC 197-11-660 (consider other regulatory programs when deciding if and how to mitigate impacts). Contrary to Respondents’ arguments, the FEIS does not represent the complete universe of relevant information necessary to make this decision. *Id.* Offering additional evidence does not amount to a collateral attack on the adequacy of the EIS; instead, it provides clarity and additional context to better understand many of the vague or incomplete conclusions in the FEIS. See *Residents Opposed to Kittitas Turbines v. EFSEC*, 165 Wn.2d 275, 313, 197 P.3d 1153 (2008) (“FEIS’s are critical evaluative tools for decision makers, but nothing in SEPA requires decision makers to rely solely on the information contained in the FEIS’s when making decisions.”)

Ecology argues that there is no merit to the argument that the Hearing Examiner did not consider Millennium's testimony because he discussed that testimony in each of the resource areas impacted and "properly refused to credit" it. Ecology Brief at 39. But, the Hearing Examiner's decision makes clear that he did not merely "discredit" the testimony Millennium offered; rather, he refused to consider it altogether based on a misunderstanding of the effect of the unchallenged FEIS on his decision making. He concluded that the testimony was "largely irrelevant" because the FEIS had not been appealed. AR 56. As shown above, that is a misunderstanding of the law. As such, it was clearly erroneous not to fully consider evidence outside of the FEIS.

C. The Hearing Examiner did not meet the requirements for exercise of substantive SEPA authority.

Exercising substantive SEPA authority requires more than just rote statements of each element required by the statute; it requires specific findings based on evidence. However, out of a 57 page decision, the Hearing Examiner's analysis was less than six pages and was conclusory at best. AR 56-61. To deny a proposal using SEPA substantive authority, the decision maker "*must* find that: (1) The proposal *would result* in significant adverse impacts identified in a final or supplemental 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 described in more detail below, the Hearing Examiner did not meet either of these

requirements. As such, his exercise of SEPA substantive authority was clearly erroneous, and it was error for the Board to conclude otherwise.

Relying solely on the FEIS, the Hearing Examiner concluded that “[t]he Project, as conditioned, fails to reasonably mitigate the ten unavoidable significant adverse environmental impacts identified in the FEIS.” AR 63. Putting aside the fact that the FEIS only identifies *nine* impacts,⁴ this statement is unsupported. In reality, the FEIS does not conclude that significant adverse environmental impacts *would* occur. Rather, it concludes 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). Respondents’ consistently loose and imprecise use of “would” where the FEIS used “could” creates an inaccurately dire picture of the effects of the Project that is inconsistent with what the FEIS actually says.⁵ In fact, Elaine Placido, the Cowlitz County co-lead for the FEIS, offered sworn testimony to highlight this key

⁴ 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. As we noted in our opening brief, 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 goes beyond the four corners of the FEIS.

⁵ Ecology Brief 9-15; WEC Brief 10-13.

point: “Ecology ... states that the ‘EIS concluded the project *would* have significant adverse effects on the local community that cannot be reasonably mitigated.’ This is a mischaracterization, inasmuch as the FEIS at S-41 actually stated there are proposed mitigation measures that would reduce impacts and suggesting only that ‘impacts *could* remain.’” AR 1952 (emphasis in original). Based on the County’s understanding of the impacts described in the FEIS and reasonable, available mitigation measures, the County staff recommended approval of the Project. AR 18. To elucidate exactly what the FEIS concludes for each of the identified impacts, we address each in turn below.⁶

Rail Transportation. BNSF routinely makes capacity improvements and infrastructure upgrades when and where they are needed to accommodate rail traffic growth; simply, it is in BNSF’s business interest to increase rail capacity. BNSF testified before the Hearing Examiner that “BNSF makes capacity improvements and infrastructure upgrades when and where they are reasonably needed . . . [BNSF is] already making capacity improvements -- and [has] long done so. Capacity expands in response to demand . . . If [BNSF] see[s] demand, then [it] will make the necessary investments in [its] railroad.” AR 1840. Further, the FEIS does not say that the Project *would* result in

⁶ The FEIS describes impacts and mitigation measures related to social and community resources that are duplicative of those for rail transportation, air quality, and noise and vibration. AR 988. As discussed in those sections and addressed more fully below, BNSF already addresses all of those impacts and there is no evidence in the FEIS suggesting that these mitigations measures could not or would not be implemented.

an unavoidable and significant impact on rail but rather that “[w]ithout improvements to rail infrastructure to expand capacity, the Proposed Action *could* result in an unavoidable and significant adverse impact on rail.” AR 997. In fact, the FEIS states that “it is expected that BNSF would make the necessary investments or operating changes” to rail infrastructure and does not develop any facts that suggest otherwise. AR 1743. BNSF was and is prepared to provide expert testimony that would facilitate the Board’s understanding of rail capacity impacts and mitigation. AR 1961.

Rail Safety. Rail safety is of critical importance to BNSF and BNSF works tirelessly to improve its safety record year after year. AR 1841. For example, BNSF has “special detection technology along key routes on [its] network sending back thousands of messages daily as they monitor for early signs of potential problems that could cause premature equipment wear or failure.” AR 1842. BNSF annually invests millions of dollars to improve its operations, infrastructure, and safety efforts; indeed, BNSF’s inspection program consistently exceeds federal requirements. *Id.* Put simply, BNSF’s “commitment to safety is unwavering. The [Federal Railroad Administration] has concluded that the last three years have been the safest on record for the rail industry, and [BNSF’s] approach, investments, and processes will help to ensure that this trend continues.” *Id.* Further, the FEIS presents a worst case scenario about rail safety and, even under that worst case scenario, the FEIS only concludes that “[w]ithout improvements to rail infrastructure to improve rail safety, the

Proposed Action *could* result in an unavoidable and significant adverse impact.” AR 998. The FEIS does not conclude that significant adverse impacts “would” occur. Nor does the FEIS include any evidence suggesting the railroads would not be able to complete the needed infrastructure improvements. BNSF was and is prepared to provide expert testimony that would facilitate the Board’s understanding of rail safety impacts and mitigation. AR 1961.

Noise and Vibration. BNSF regularly works with local communities to establish quiet zones and has testified that it remains willing to work with stakeholders to establish quiet zones consistent with past practices. AR 1848. Even at full build-out, BNSF does “not anticipate that noise or vibration will be greater than what is typically experienced on BNSF’s system.” *Id.* The FEIS concluded that significant and adverse noise impacts would occur *only* “absent the implementation of a Quiet Zone or other measures to reduce train-related noise.” AR 999. The FEIS also noted that the County plans on working with Millennium to establish a quiet zone and Millennium would fund the necessary infrastructure to establish a quiet zone. *Id.* The FEIS did not develop any evidence showing that Millennium and the County would not be able to implement a quiet zone. Further, the FEIS also acknowledges the possibility of and pathway for identifying alternatives to quiet zones, stating that if a quiet zone is not implemented, Millennium will fund a sound reduction study to identify alternative ways to mitigate train-related noise impacts. AR 1312. BNSF was and is prepared to provide expert

testimony that would facilitate the Board’s understanding of noise impacts and mitigation. AR 1961.

Vehicle Transportation. BNSF testified that “trains serving Millennium are not going to create unique crossing delays. The length of a unit coal train is not any different than other trains that travel on [its] railroad.” AR 1849. Further, “the down times listed in the EIS for a grade crossing are pretty minimal and frankly, are not that unusual for a community that has a railroad in it.” *Id.* The FEIS concluded that vehicle transportation impacts *could* occur but were not likely because of planned improvements. AR 1743. The FEIS expressed uncertainty about the timing and implementation of proposed infrastructure improvements, but it in no way concludes that vehicle transportation impacts would occur. *Id.* Nor does the FEIS include any evidence suggesting that the planned infrastructure improvements would not be implemented. BNSF was and is prepared to provide expert testimony that would facilitate the Board’s understanding of vehicle transportation impacts and mitigation. AR 1961.

Tribal Resources. BNSF has already created an access program for tribal members seeking to access traditional fishing, hunting, and gathering sites by crossing BNSF rights of way in recognition of treaty rights of tribes and their members. AR 1852. The FEIS never discusses this program. Further, the FEIS conclusions about tribal impacts are vague at best. The FEIS concludes that Project activities “could result in indirect impacts on tribal resources” and that the effects of the Project on tribal fishing are “difficult to quantify.” AR 1743. The FEIS did not say

that there were unavoidable and significant adverse impacts. Critically, the FEIS expressly states that it does not make “a determination of significance related to treaty-reserved rights.” *Id.* BNSF was and is prepared to provide expert testimony that would facilitate the Board’s understanding of tribal resources impacts and mitigation. AR 1961.

Air Quality. BNSF already implements several mitigation-like measures that would reduce air quality impacts from locomotives that would service the proposed Millennium project. AR 1845-7. For example, BNSF deploys idling reduction technology, an Automatic Emission Shutdown System, in more than 98% of its locomotive fleet that automatically shuts down a locomotive not in use to reduce idling emissions and improve surrounding air quality. AR 1846-47. This technology was not considered in the FEIS. The FEIS concluded that, based on a worst-case scenario model that did not take into account BNSF-specific efforts to reduce air quality impacts, diesel particulate matter emissions from train traffic at full build-out would result in areas of increased cancer risk of 10 cancers per million and that would be an unavoidable and significant adverse impact. AR 1744. BNSF continues to make investments and improvements in its locomotive fleet that would further reduce emissions and have corresponding benefits to air quality. For example, nearly 40 percent of BNSF’s locomotive fleet has been replaced within the last ten years and BNSF’s fleet is the newest and cleanest in North America. AR 1846-47. BNSF was and is prepared to

provide expert testimony that will facilitate the Board's understanding of air quality impacts and mitigation. AR 1961.

The FEIS also contains non-rail impacts and related mitigation measures. For Vessel Transportation, the FEIS says that while no mitigation measures can "completely eliminate the possibility of an incident," the risk of a serious vessel-related incident is "very low." The FEIS found that vessel-related incidents are exceptionally unlikely, concluding that the likelihood of a project-related collision is one every 39 years. AR 1271 (emphasis added). For Community Resources, the FEIS notes that development of the Terminal would redevelop the Reynolds Metals Reduction Plant Historic District.⁷ But, the FEIS concluded that that "the Corps expects a Memorandum of Agreement will be signed" that would mitigate this impact in compliance with Section 106 of the National Historic Preservation Act of 1966. AR 1078. No facts were developed during the EIS process that suggested that this MOA would not be signed.

Despite all of this evidence, the Hearing Examiner unreasonably concluded that these impacts were unavoidable, significant and adverse to the environment. He misinterpreted the conclusions and evidence in the FEIS, and dismissed all other evidence as "largely irrelevant." AR 56.

⁷ The Reynolds Metals Reduction Plant has been evaluated as a historic district because the "buildings and structures are associated with the aluminum industry's major growth periods during World War II and through the 1960s" and because it "represents the aluminum industry's development in the Pacific Northwest." AR 1083-84. Of the 53 buildings, structures, and landscape features included in the historic district, 14 have already been altered or post-date the historic period. *Id.*

Ecology seems to believe, and the Hearing Examiner seemed to agree, that if it is not the agency responsible for overseeing a mitigation measure, then that mitigation measure will not happen. For example, Ecology asserts that because the Federal Railroad Administration must approve a quiet zone, then that mitigation measure will not happen. Ecology Brief at 11. That assertion is unfounded and ignores the reality of permitting complex projects. Complex projects require permits and oversight from multiple federal and state agencies. It is impossible for one agency to oversee and have control over every component of a complex project such as the Millennium Project. Taking Ecology's argument to its logical conclusion would lead to the absurd result that no complex project involving rail impacts (which requires federal oversight) would ever be mitigatable. The law does not and cannot require that all adverse impacts be eliminated because then "no change in land use would ever be possible." *Marantha Mining, Inc. v. Pierce Cty.*, 59 Wn. App. 795, 804, 801 P.2d 985 (1990). Ecology's argument also ignores SEPA regulations governing the use of substantive authority to impose mitigation requirements. *See* WAC 197-11-660(1)(e) ("Before requiring mitigation measures, agencies shall consider whether local, state, or federal requirements and enforcement would mitigate an identified significant impact.").

In addition to making misleading arguments about mitigation, Respondents cite extensively to factual information outside the record. This is in violation of RAP 10.3(5). Moreover, the submission of this

evidence is directly contradictory to Respondents’ argument against de novo review. If the Court decides to consider Respondents’ extra-record evidence, then the Court should also consider critical information from parallel federal litigation. Specifically, the Court should consider the declaration of Elaine Placido, Cowlitz County co-lead for the FEIS, because it touches on issues of fundamental importance to this case, including Ecology’s questionable and hostile conduct during the EIS process. Decl. of Elaine Placido at ¶ 5, *Lighthouse Resources Inc. et al v. Inslee et al*, 3:18-cv-05005-RJB (W.D. Wash. 2018).⁸ Placido states that “[b]ased on [her] experience working on the DEIS and FEIS,” the FEIS describes “a fully permissible project” and “the Ecology project team openly agreed that each of the nine impacts *potentially* caused by the Terminal were avoidable and subject to reasonable mitigation.” *Id.* at ¶¶ 7, 13 (emphasis in original). But, throughout the process, Ecology “routinely sidelined the [co-lead] County during meetings and decision-making, including on the significance findings.” *Id.* at ¶ 11. Ecology also successfully pressured the County and Project contractor to replace the FEIS project lead because she did not agree that there was support for certain significance findings Ecology requested. *Id.* at ¶ 12. Further, Placido, “[a]s co-author and co-lead of the FEIS” was surprised by Ecology’s decision to deny Millennium’s Section 401 certification request because Ecology never consulted the County. *Id.* at ¶ 13. Placido’s declaration shows that Ecology did not cooperate with the County or contractors on the EIS and

⁸ Attached as Appendix A.

pushed for its own conclusions even when both its co-lead and the Project contractor disagreed, leading Placido to conclude that Ecology treated “Millennium more like an adversary than a permit applicant throughout the environmental review process.” *Id.* at ¶ 12.

This evidence is particularly relevant to this case because the Hearing Examiner begins his decision by stating “I concur with Ecology,” referencing Ecology’s Section 401 certification denial, issued only six weeks before the Hearing Examiner’s decision. AR 9 (“Ecology denied the Applicant a Section 401 Water Quality Certification . . . I concur with Ecology”). And, just like “Ecology distorts the FEIS findings,” the Hearing Examiner does as well. Decl. of Elaine Placido at ¶ 14.

Ultimately, the FEIS did not provide enough information to reasonably support a conclusion that the Project *would result* in significant adverse impacts that could not be mitigated. The FEIS is one document that the Hearing Examiner should have considered, but not the only one. Given the vague conclusion language (“could” *not* “would”) and lack of detail about mitigation (for example, failing to include BNSF’s tribal access plan), the Hearing Examiner needed to consider--not dismiss out of hand as “largely irrelevant”--other information to meet the standard for the exercise of SEPA authority to deny Millennium’s shoreline permits. Not doing so was clearly erroneous and the Board erred in concluding otherwise.

D. The Board compounded the legal errors noted above by affirming the Hearing Examiner’s exercise of SEPA authority to deny Stage 1 permits based on total Project impacts;

further, Respondents' arguments that Millennium unlawfully piecemealed the Project have no merit.

The preceding arguments establish grounds to reverse the Board's decision and remand this matter to the Board for a de novo review of Millennium's shoreline permit applications. Moreover, the Board, without citing any legal authority, concluded that it was not clearly erroneous for the Hearing Examiner to deny Millennium's shorelines permits for Stage 1 based on impacts from the entire Project. AR 2078-80. This too is reversible error.

As articulated in BNSF's Opening Brief, pursuant to RCW 43.21C.060, in order to deny a "proposal" using SEPA authority, the Hearing Examiner was required to find that the "proposal" would result in significant adverse impacts identified in the FEIS. BNSF Opening Brief at 8-11. There is no reasonable dispute that the "proposal" in question is Millennium's application for shoreline permits for Stage 1 of the Project. It is also beyond reasonable dispute that Stage 1 involves fewer impacts than Stage 2. At the hearing before the County Hearing Examiner, Elaine Placido testified as much, explaining that the purpose of the hearing was to consider shoreline permits for Stage 1 of the Project. AR 18. Millennium's pre-hearing memorandum submitted to the County Hearing Examiner clearly describes Stage 1 of the Project, including that Stage 1 operations would involve five trains per day (as opposed to the eight trains per day contemplated for Stage 2), and that Stage 2 facilities and operations would be the subject of a later shoreline permits application.

AR 462-63. Additional documents further describe the phased review of the Project and the difference between Stage 1 and Stage 2. *See* AR 704-06 (Declaration of Elaine Placido stating that “the proposed [Project is] being submitted in two, distinct phases”); AR 1934-37 (Testimony of Kristin Gaines, Vice President of Environmental Planning and Services, Millennium, describing the differences between Stage 1 and Stage 2).

Despite this information, the Hearing Examiner made no attempt to assess the proposal before him for Stage 1 permits. As such, it was impossible for him to make the requisite findings that Stage 1 of the Project would result in significant adverse impacts identified in the FEIS. With very little analysis, and without so much as a reference to the requirements in RCW 4.21C.060 that the decision maker must make findings with respect to the “proposal” at issue, the Board held that it “is not left with the definite and firm conviction that Hearing Examiner committed a mistake when he considered the Project as a whole.” AR 2080.

In an effort to prop up the Board’s conclusion, Respondents argue that Millennium unlawfully piecemealed the Project and thus it was not error for the Hearing Examiner to exercise SEPA authority to deny Stage 1 permits based on impacts for the entire Project. Ecology Brief at 33-38; WEC Brief at 30-33. For the sake of judicial economy, BNSF adopts Millennium’s full response to Respondents’ incorrect assertions that Millennium is trying to unlawfully piecemeal the Project. Put simply, SEPA’s prohibition on piecemealing is inapplicable for the basic reason

that the entire Project, Stages 1 and 2, was in fact submitted for environmental review under SEPA as reflected in the FEIS. Similarly, the Shoreline Management Act's prohibition on piecemealing is inapplicable because the Project has not been divided into two stages to avoid shoreline review. As noted above, development of Stage 2 improvements, if pursued, would require another shoreline development permit. *See* AR 1934-37. Nor does permitting only Stage 1 of the Project coerce or dictate the result of permitting for the remainder of the Project, as the terminal as contemplated at the completion of Stage 1 can operate independently of Stage 2. This is not a situation where permitting Stage 1 would, by necessity, require emergency permits for the completion of Stage 2.

Respondents' arguments to the contrary, if accepted, create dangerous precedent where any staged development must be permitted as a whole. This could have serious adverse ramifications for BNSF, which in any given year may undertake important, related rail infrastructure projects throughout the State of Washington. Requiring an entity, like BNSF, to permit such a project as one, complete project could undermine its ability to plan for and address critical infrastructure needs in a practical and efficient manner.

III. CONCLUSION

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

Respectfully submitted this 1st day of April, 2019.

K&L GATES LLP

By s/ Bart J. Freedman
Bart J. Freedman, WSBA #14187
Endre M. Szalay, WSBA #53898
Francesca M. Eick, WSBA #52432

Attorneys for Petitioner-Intervenor BNSF Railway Company

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 April 1, 2019, 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 1st day of April, 2019 at Seattle, Washington.

s/ Lori Moltz

Lori Moltz, Practice Specialist

APPENDIX A

THE HONORABLE ROBERT J. BRYAN

1
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4
5
6 UNITED STATES DISTRICT COURT
7 WESTERN DISTRICT OF WASHINGTON
8 AT TACOMA

9 LIGHTHOUSE RESOURCES INC.;
10 LIGHTHOUSE PRODUCTS, LLC; LHR
11 INFRASTRUCTURE, LLC; LHR COAL,
12 LLC; and MILLENNIUM BULK
13 TERMINALS-LONGVIEW, LLC,

14 Plaintiffs,

15 and

16 BNSF RAILWAY COMPANY,

17 Plaintiff-Intervenor,

18 vs.

19 JAY INSLEE, in his official capacity as
20 Governor of the State of Washington; MAIA
21 BELLON, in her official capacity as Director
22 of the Washington Department of Ecology;
23 and HILARY S. FRANZ, in her official
24 capacity as Commissioner of Public Lands,

25 Defendants,

26 and,

27 WASHINGTON ENVIRONMENTAL
28 COUNCIL, COLUMBIA RIVERKEEPER,
FRIENDS OF THE COLUMBIA GORGE,
CLIMATE SOLUTIONS and, SIERRA
CLUB,

Defendant-Intervenors.

NO. 3:18-cv-05005-RJB

**DECLARATION OF ELAINE
PLACIDO, DIRECTOR OF
COMMUNITY SERVICES,
COWLITZ COUNTY**

1 I, Elaine Placido, pursuant to 28 U.S.C. § 1746, do hereby state and declare as follows:

2 1. My name is Elaine Placido, and I am the Director of Community Services at the
3 Department of Building and Planning for Cowlitz County, Washington. I am over the age of
4 18 years and competent to testify in all respects.

5 2. I have worked in permitting and environmental review for eight years. I have
6 worked at the Cowlitz County Department of Building and Planning since 2011, and I have
7 been the Director since July 2013. Prior to my role as Director, I was the Operations Manager
8 at the Cowlitz County Department of Building and Planning. I have a doctorate in Public
9 Administration from Valdosta State University.

10 3. As Director, I led or co-led preparation of three Environmental Impact Statements
11 for projects in Cowlitz County. I routinely review and issue a variety of state and local permits
12 including shoreline permits, conditional use permits, and critical areas permits. I'm familiar
13 with state and local impact evaluation, mitigation, and permit decision-making processes,
14 including State Environmental Policy Act (SEPA) review. I've led, co-led, or participated in
15 hundreds of SEPA reviews. I also routinely work with the Washington State Department of
16 Ecology (Ecology) on permitting and environmental review.

17 4. I am very familiar with the proposed Millennium Bulk Terminals-Longview
18 (Millennium) coal export terminal (the "Terminal") and have been personally involved with
19 the environmental review and permitting of the Terminal since 2013. When I became Director
20 in 2013, Cowlitz County and Ecology had just started work, as co-lead agencies, on a SEPA
21 Draft Environmental Impact Statement (DEIS) for the Terminal. As Director, and as the
22 Cowlitz County (the County) SEPA responsible official, I was directly involved in the process
23 of drafting and approving the DEIS, which was published for public comment on April 30,
24 2016, and the subsequent Final Environmental Impact Statement (FEIS), which was published
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1 on April 28, 2017. I worked directly with Ecology and ICF International, Inc. (ICF), the
2 environmental consulting firm contracted to help prepare the DEIS and FEIS for the Terminal.

3 5. I was personally involved with virtually all of the important documents,
4 communications, meetings, and decision-making associated with the DEIS, FEIS, and
5 environmental review of the Terminal.

6 6. During the DEIS and FEIS process, Millennium was responsive, timely, and
7 engaged. They provided requested information quickly and if they couldn't, they worked with
8 the Co-Leads to explain why and provide what they could, when they could.

9 7. Based on my experience working on the DEIS and the FEIS, the Ecology project
10 team openly agreed that each of the impacts *potentially* caused by the Terminal were avoidable
11 and subject to reasonable mitigation.

12 8. Under Ecology's instruction, in many respects the DEIS and FEIS documents
13 present worst-case scenario analyses. It is therefore misleading for Ecology in its 401 decision
14 to point to the FEIS as presenting findings that *would* occur if the Terminal were built, as
15 opposed to presenting those findings as ones that *could* occur.

16 9. Also, insofar as Ecology's decision to deny Millennium a 401 water quality
17 certification (the 401 Denial) relies on the FEIS, the decision is inconsistent with the FEIS and
18 Ecology's agreements to the findings in the FEIS. For example, the FEIS described "potential"
19 rail transportation, rail safety, and vehicle transportation impacts that "could" occur because
20 Ecology, the County, and ICF deliberately decided that language—and not something else—
21 appropriately describes the uncertainty of the described impacts.

22 10. Based on my experience working on the FEIS, I can only conclude that those
23 aspects of the 401 Denial relying on the FEIS are pretext, and that the real reason for the permit
24 denial is to further unstated State policy preferences. I am unaware of any other instance in
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1 which Ecology or another state agency denied a permit based on potential impacts similar to
2 those outlined in the FEIS. I believe that if these indirect impacts were truly significant and not
3 mitigable, then state and local agencies would be forced to deny all manner of port, shipping,
4 and transportation permits.

5 11. The FEIS uses a very conservative approach which overstates the potential
6 environmental impacts caused by the Terminal. For the Terminal's SEPA review, Ecology
7 was the "co-lead" with Cowlitz County. In actual practice, however, Ecology and their partner
8 state agencies dominated the lead role, the SEPA process, and the decision making regarding
9 the "significance" findings in the FEIS (that is, whether potential environmental impacts were
10 significant, avoidable, or able to be mitigated), especially in areas where they claimed a
11 statewide interest. Ecology routinely sidelined the County during meetings and decision-
12 making, including on the significance findings. Ecology also ignored issues I raised about
13 overly broad impact review, held meetings with tribal groups and the Defendant-Intervenors
14 without inviting any County representatives, and directed ICF work without first consulting
15 me or my staff, particularly on areas of statewide interest.

16
17 12. I also witnessed Ecology disagree with ICF staff members such as Linda Amato
18 and Darren Muldoon, who were the former ICF leads on the DEIS and FEIS for the Terminal,
19 and who were responsible for the team that conducted the technical analyses supporting the
20 DEIS and FEIS. In those instances, ICF personnel disagreed with Ecology over the
21 significance findings that Ecology wanted to draw in the chapters of the FEIS. Sally Toteff,
22 the SEPA responsible official for Ecology, eventually pushed the County and ICF to replace
23 Ms. Amato as project manager after several heated discussions between her and Ms. Amato
24 regarding the DEIS. Ecology ultimately deemed that it alone would make significance
25 findings, though in some instances after ICF personnel disagreed with those findings, Ecology
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1 changed them. I witnessed Ecology treat Millennium more like an adversary than a permit
2 applicant throughout the environmental review process, and especially as it drew to a close and
3 moved into the permitting phase.

4 13. Ecology did not consult the County before denying Millennium's section 401
5 certification application with prejudice. As co-author and co-lead of the FEIS, I did not expect
6 Ecology to deny Millennium's 401 certification request. Despite regular County-Ecology
7 meetings after publication of the FEIS, Ecology never consulted the County about the 401
8 Denial. When I signed the FEIS on behalf of Cowlitz County, my analysis and my staff's
9 analysis was that the FEIS describes a project that satisfies all applicable state and local laws.
10 I was surprised that Ecology denied the 401 certification request with prejudice, and I believe
11 that if Millennium proposed to ship anything other than coal, Ecology would have granted the
12 Section 401 water quality certification. In short, my staff's analysis and my analysis is that the
13 FEIS describes a fully permittable project.

14 14. In the 401 Denial, Ecology distorts the FEIS findings. To deny a permit under
15 SEPA, a proposal must be *likely* to result in significant adverse environmental impacts—
16 identified in an environmental impact statement—for which reasonable mitigation measures
17 are insufficient to mitigate those impacts. The FEIS, which I signed with Ecology, does not
18 make those kinds of findings. The 401 Denial discounted the expected, planned, and likely
19 mitigation available for potential environmental impacts and interpreted the FEIS findings to
20 make it appear that the FEIS had determined that certain environmental impacts, including
21 indirect impacts outside the control of the applicant, were definitively significant and
22 unavoidable when they were not.

23
24 15. More specifically, the 401 Denial recasts multiple FEIS potential impacts that
25 "could" occur as impacts that "would" occur. These are unjustified changes from language that
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1 even Ecology previously agreed upon. This is an after-the-fact re-write of the FEIS.
2 Throughout the DEIS and FEIS process, the County emphasized to Ecology that it was only
3 comfortable describing the impacts as the FEIS does: emphasizing their contingent and
4 uncertain nature. "Would" describes the impacts far more certainly than the Co-Leads intended
5 and does not accurately describe the FEIS's analysis. Impacts that "could" "potentially" occur
6 are very different than impacts that "would" occur. This is a material difference. There was, to
7 my knowledge, no post-FEIS investigation, analysis, or additional fact-gathering that supports
8 the 401 Denial's conclusions. Had Ecology sought to describe the FEIS impacts as the 401
9 Denial does, I would not have signed the FEIS.

10 16. The FEIS's conservative, over-stated, worst-case scenario air quality analysis does
11 not describe reasonably likely impacts. Ecology finalized the FEIS's new air quality findings—
12 which radically departed from the DEIS findings—largely independent of ICF and the County.
13 Further, because Ecology finalized the updated air quality analysis shortly before release of
14 the FEIS, as part of the FEIS process, Millennium did not have a legitimate opportunity to
15 present types of mitigation available for this potential impact caused by project-related
16 locomotives. Neither Millennium nor BNSF were made aware of this new FEIS impact
17 analysis before release of the document.

18 17. As another example, the 401 Denial's vehicle transportation findings depart from
19 the FEIS's findings. The FEIS appropriately determined that vehicle transportation impacts
20 *could* result, but are not likely because of planned improvements. By ignoring these "planned,"
21 reasonably likely improvements, Ecology's 401 Denial reaches a wholly different conclusion
22 than the FEIS. The FEIS does not describe reasonably likely vehicle transportation impacts
23 that "would" occur.
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1 18. Another example is that Ecology's 401 Denial noise and vibration findings also
2 depart from the FEIS findings the County signed. The FEIS found that significant and adverse
3 noise impacts would occur *only if a quiet zone is not implemented*. As the FEIS says, the
4 County plans on working with Millennium to establish a quiet zone, and Millennium would
5 fund the necessary infrastructure to establish a quiet zone. I have no reason to believe a quiet
6 zone cannot or will not be implemented, and no facts were developed during the DEIS or FEIS
7 process that would prevent establishment of a quiet zone. Ecology altered the FEIS findings
8 on noise and vibration in its 401 Decision. The FEIS states that the Terminal is not reasonably
9 likely to create significant and adverse noise and vibration impacts that cannot be mitigated.

10 19. Ecology's 401 Denial misrepresents the FEIS's rail transportation analysis, too. In
11 the 401 Denial, Ecology states that the Terminal "would" result in significant rail
12 transportation impacts. This is inconsistent with the FEIS. As the FEIS states, it is "expected"
13 that BNSF will make improvements to rail infrastructure that will mitigate these potential
14 impacts. No facts were developed in the FEIS process to suggest otherwise. The Terminal is
15 not reasonably likely to result in significant and adverse rail transportation impacts that cannot
16 be mitigated.

17 20. Nor do the FEIS and 401 Denial rail safety analyses align. Ecology fully discounts
18 FEIS mitigation findings and recasts key language. During the environmental review process,
19 the Co-Leads commissioned a worst-case scenario analysis to learn the potential accident rates
20 that could occur in the event that the Terminal were built. During that analysis, we learned
21 that BNSF, Union Pacific, and Longview Switching Company (LVSW) planned on making
22 track improvements to accommodate Terminal-related rail traffic, which would improve rail
23 safety. That finding is reflected in the FEIS, which as a result, determined that significant
24 adverse impacts "could" occur in light of the conservative, worst case scenario-type analysis
25

1 and the unlikely event that BNSF, UP, or LVSW somehow were prevented from completing
2 the improvements. But the 401 Denial departs from the FEIS's analysis, instead stating that
3 the Terminal "would" negatively impact rail safety. This is inconsistent with the FEIS. The
4 analysis does not show that adverse rail safety impacts "would" occur.

5 21. Ecology's vessel transportation finding is also inconsistent with the FEIS. The FEIS
6 found that the risk of a serious vessel-related incident is "very low" but no mitigation measures
7 can "completely eliminate the possibility of an incident." This describes any and every vessel-
8 related project in Washington State. But the 401 Decision refashions the FEIS's vessel
9 transportation findings, changing the FEIS's conclusion that the risk of a serious vessel
10 accident is "very low" to simply "low." Yet the FEIS found that vessel-related incidents are
11 exceptionally unlikely; for example, the FEIS concludes the likelihood of a project-related
12 allision is one every 39 years. The FEIS intentionally describes vessel-related risks as "very
13 low," and not merely "low." In no case does the FEIS support a finding of a significant,
14 unavoidable, unmitigable adverse impact caused to vessel transportation. Had Ecology
15 insisted on this significant change during the FEIS process, I would not have agreed to it.

16 22. The 401 Denial's cultural resources analysis, too, does not accurately reflect the
17 FEIS or local reality. Development of the Terminal would redevelop the Reynolds Metals
18 Reduction Plant Historic District, but Ecology did not consider the conclusion that "the Corps
19 expects a Memorandum of Agreement [(MOA)] will be signed" that would mitigate this
20 impact. No facts were developed during the DEIS or FEIS process that demonstrated that the
21 MOA would not be signed. It did not occur to me that the MOA would not be signed. The
22 area on which the Terminal would be built is an underutilized brownfield area more than a
23 historic district. And as Ecology is undoubtedly aware, the Corps would require resolution of
24 cultural resource impacts as a condition of any Clean Water Act Section 404 permit. It is
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1 surprising that Ecology would deny a permit because Millennium proposes to remediate a
2 derelict brownfield site retaining little, if any, of its former historic character, the impacts of
3 which were being further studied in a separate NEPA analysis. The FEIS does not describe
4 reasonably likely cultural resource impacts.

5 23. The FEIS also does not describe a significant, tribal resource impact. The FEIS
6 explicitly avoided making a determination of significance for tribal resources. And I am
7 unaware of any post-FEIS investigation or analysis that justifies Ecology's departure from the
8 FEIS in this area. In any event, tribal resources are more appropriately analyzed in the federal
9 National Environmental Policy Act review process.

10 24. Ecology's decision to deny the 401 water quality certification request was
11 especially surprising to me and my staff because the FEIS unequivocally found no unavoidable
12 and significant adverse impacts—potential or otherwise—on water quality. Based on the FEIS,
13 there is no question the company can satisfy all local and state water quality standards. That is
14 what the FEIS concluded.

15 25. Ecology ignored or discounted mitigation that, as co-author and co-lead of the
16 FEIS, I believe would very likely mitigate or eliminate the impacts identified in the 401 Denial.
17 In my years of experience, I am unaware of any regulatory agency, Ecology included, denying
18 a permit because the regulatory agency argued that expected or planned mitigating
19 circumstances were less than 100 percent certain. Likewise, I am unaware of any regulatory
20 agency rejecting mitigation because it requires an applicant to work with other agencies, obtain
21 additional permits, or contract with a third party. In my experience, many types of mitigation
22 are less than 100 percent certain, and require working with third parties. For example, wetlands
23 mitigation requires identifying available third-party mitigation sites and contracting with those
24 third-parties to obtain mitigation credits. And Ecology accepted Millennium's fish impact
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1 mitigation, despite it requiring the company to work with third-parties to conduct studies and
2 implement monitoring with non-Ecology agencies.

3 26. Ecology's stance on mitigation also extended to not giving Millennium the usual
4 and customary treatment that other applicants receive; that is, mitigation is usually built into
5 permits that issue. This is the first time in my career I've seen any regulatory agency wholly
6 exclude an applicant from mitigation discussions. Mitigation is usually the product of the
7 various permit review and approval processes. Air quality mitigation, for example, is usually
8 included in air quality permits, not water quality permits. Here, the County could have
9 addressed Ecology's purported concerns by requiring mitigation in one of the local permits yet
10 to issue for the Terminal. Ecology did not give Millennium the opportunity that usually is
11 provided to other applicants.

12 27. Based on the above, the 401 Denial for the project is not consistent with the FEIS.

13 I declare under penalty of perjury that the foregoing is true and correct

14 Executed on 2/28/18 in Helso, Washington.

15
16 By:  _____

17 Elaine Placido

K&L GATES LLP

April 01, 2019 - 3:52 PM

Transmittal Information

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Comments:

Reply Brief of Petitioner-Intervenor BNSF Railway Company and Appendix A.

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