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"Building Partnerships – Building Communities"

STAFF REPORT

TO: Kittitas County Board of Adjustment

FROM: Kittitas County Community Development Services
Anna Nelson, AICP, Contract Planner

DATE: August 4, 2010 for August 11, 2010 Open Record Appeal Hearing

SUBJECT: Open Record Administrative SEPA Appeal of Issued MDNS– Teanaway Solar Reserve Conditional Use Permit (CU-09-00005)

I. Summary of Requested Action

On June 26, 2010 an appeal was filed challenging the SEPA Threshold Determination issued for the Teanaway Solar Reserve Conditional Use Permit (CU-09-00005). This appeal concerns the Mitigated Determination of Nonsignificance issued by the County's Responsible Official on July 15, 2010. This memo contains information on the SEPA Appeals Process, as well as the legal arguments that shall serve as the written testimony for the Responsible Official.

According to Kittitas County Code (KCC) KCC Title 15A, appeals of SEPA threshold determinations shall be heard by the body having decision making authority in an open record hearing.

II. Project Description

A. Proposal: Teanaway Solar Reserve LLC ("the applicant" or "TSR"), submitted a Conditional Use Permit application to construct and operate the Teanaway Solar Reserve ("the project"). As described in greater detail in the attached application materials, the project includes the following key components: solar modules; field inverters; field transformers; electrical conductors; electrical substation and switchyard; operations and maintenance (O&M) building and supervisory control and data acquisition (SCADA) system; overhead interconnection transmission line; and access and maintenance roads.

The Teanaway Solar Reserve will be constructed on an approximately 982 acre site, though only 477 acres will be involved in land disturbance and development. The project will be completed over a period of 2 to 3 years, with 7- to 9-month construction periods each year, weather dependent. The subject property is zoned Forest and Range. The project is proposed to generate up to 75MWdc of photovoltaic (PV) solar energy for distribution to utilities and communities in the region.

B. Location: The property site is located approximately 4 miles northeast of Cle Elum, Washington, in Township 20N, Range 16E, within Sections 22, 23, and 27. The site is located on the eastern slopes of the Cascade Mountains on Cle Elum Ridge, which runs generally from east to west at elevations ranging from approximately 2,200 to 2,600 feet. The Teanaway River is approximately 1 mile to the northeast of Cle Elum Ridge. The site is accessed from Highway 970 by way of county roads such as Red Bridge Road, and private roads such as Wiehl Road and Loping Lane. The site is also accessed via Wiehl Road, which is a dedicated public road but is not maintained by the County; it is maintained privately. The property is located in all of Section 22; the North Half of the Northeast Quarter, the Northwest Quarter and the North Half of the Southwest Quarter of Section 23; and Parcel 2 of that certain Survey as recorded May 6, 2003 in Book 28 of Surveys, pages 234, 235 and 236, under Auditor's File No. 200305060025, records of Kittitas County, Washington, being a portion of the Northeast Quarter of Section 27; all in Township 20 North, Range 16 East, W.M., in the County of Kittitas, State of Washington.

III. Issues on Appeal

In summary, the following issues have been raised by appellants. The complete appeal document is contained in the record.

A. Issue #1: The County failed to properly evaluate the fire protection plan
B. Issue #2: Failure to conduct an alternative site analysis is required under RCW 43.21C.030
C. Issue #3: Failure to ensure consistency with critical areas ordinance, which has not been updated as required by state law
D. Issue #4: Special and sensitive areas not properly mitigated
E. Issue #5: Failure to ensure compliance with wildlife laws
F. Issue #6: Failure to adequately consider potential impacts to water resources
G. Issue #7: Failure to consult with tribal governments
H. Issue #8: Failure to consider the precedent set by this project
I. Issue #9: Other concerns—Identified artifacts; carbon sequestration
J. Issue #10: Inadequate analysis of cumulative impacts

IV. Applicable Rules and Standard of Review

A governmental agency's threshold determination of "no probable environmental significance" ("DNS") is subject to review under the clearly erroneous standard.[1] In considering the Responsible Official's decision to issue an MDNS and not require an environmental impact statement, the Board shall not substitute its judgment for that of the administrative decision maker (in this case the County's Responsible Official) and will find the administrative decision clearly erroneous only if the Board is left with definite and firm conviction that a mistake has been committed.[2]

For a threshold determination to withstand appeal, the Responsible Official must demonstrate that it actually considered relevant environmental factors before reaching a decision.[3] The record must demonstrate that the County adequately considered the relevant environmental elements listed in WAC 197-11-444 "in a manner sufficient to be prima facie compliant with the procedural dictates of SEPA."[4] The decision to issue a determination of nonsignificance must be based on information sufficient to evaluate the proposal's environmental impact.[5]

The Board of Adjustment must give substantial weight to the County's decision to issue an MDNS. As stated in RCW 43.21C.090, "In any action involving an attack on a determination by a government agency relative to the requirement or absence of the requirement, or the adequacy of a 'detailed statement', the decision of the governmental agency shall be accorded substantial weight."[6]

As provided in KCC 15.04.210, SEPA threshold determinations issued in conjunction with a project permit application may be appealed following the procedures in Title 15A Project Permit Application Process. Specifically, Title 15A Table A establishes that an open record hearing before the Board of Adjustment shall be required for an appeal of a SEPA threshold determination, and Chapter 15A.07 sets forth procedures for appealing administrative decisions, such as a SEPA threshold determination.

According to KCC 15.07.030, the Board of Adjustment must issue a written decision on this appeal within 90 days of the appeal being filed. A timely appeal was filed on July 26, 2010; therefore the Board of Adjustment must issue its written decision no later than October 23, 2010.

Note: The open record appeal hearing will consider an administrative decision made by County staff. Therefore,

[1] *Leavitt v. Jefferson County*, 74 Wn. App. 668, 875 P.2d 681 (1994).
[2] *Klickitat County Citizens Against Imported Waste v. Klickitat County*, 122 Wn.2d 619, 860 P.2d 390, amended on denial of reconsideration.
[3] See RCW 43.21C.030(2)(c); *Lassila v. Wenatchee*, 89 Wn.2d 804, 813, 576 P.2d 54 (1978); *Juanita Bay Valley Cnty. Ass'n v. City of Kirkland*, 9 Wn. App. 59, 73, 510 P.2d 1140.
[4] *Lassila*, 89 Wn.2d at 814; *see also Anderson v. Pierce County,* 86 Wn. App. 290, 302 936 P.2d 432 (1997).
[5] See *Anderson*, 86 Wn. App. at 302; WAC 197-11-335.
[6] *Anderson*, 86 Wn. App. at 302; *Indian Trail Prop. Owner's Association v. City of Spokane*, 76 Wn. App. 430, 442, 886 P.2d 209 (1994)

communication prior to the hearing between Board of Adjustment members and County Staff concerning this matter is not allowed. In order to ensure appearance of fairness and avoid ex-parte communication, please contact the Prosecutor's Office prior to the open record hearing with any questions relating to this appeal.

V. Department Response and Analysis to Issues on Appeal

The analysis below shall serve as the Responsible Official's written testimony in support of Kittitas County Community Development's procedural compliance Kittitas County Code.

A. Application Review

In reaching its threshold determination, the County undertook an iterative process with the applicant and other agencies to ensure that potential environmental impacts associated with the project were identified, considered, and adequately addressed. The County relied on information available in a number of documents to conclude that no probable significant adverse environmental impacts would occur as a result of the proposed project. The following documents were the primary documents relied upon. All documents below are contained in the official record.

- *Teanaway Solar Reserve Conditional Use Permit Application submitted August 18, 2009*

- *Expanded SEPA Environmental Checklist,* submitted August 18, 2009, including the following attachments:
    - *Sensitive Species Report*
    - *Wetland Delineation Report*
    - *Cultural Resources Report*
    - *Zone of Visual Influence Memorandum*

- *Teanaway Solar Reserve Conditional Use Permit Application Supplement, submitted February 2010*

- *Supplemented Expanded SEPA Environmental Checklist,* submitted February 2010, including the following attachments:
    - *Sensitive Species Report*
    - *Wetland Delineation Report*
    - *Cultural Resources Report*
    - *Geology and Soils Hazard Evaluation*
    - *Fugitive Dust Control Plan*
    - *Hydrololgic Analysis*
    - *Vegetation Management Plan*
    - *Wildlife Mitigation Plan*
    - *Transportation and Road Plan*
    - *Potential Visual Impact Assessment*
    - *Fire Protection Agreement*
    - *Economic Impact Analysis*

- Additional materials submitted by the applicant June 2, 2010, including additional hydrology and stormwater runoff modeling and executed agreements between TSR and Washington Department of Fish and Wildlife and the Kittitas County Fire Protection District #7

- Comments submitted by the Public Works Department, Fire Marshal's Office, Department of Public Health, and comments submitted by government agencies relating to fish and wildlife, vegetation, cultural resources, and stormwater.

- Public comments submitted by various interested parties during and after the public comment period.

- *Mitigation Agreement Between Washington State Department of Fish and Wildlife and Teanaway Solar Reserve LLC*, dated April 18 2009

- *Fire Protection Agreement (Teanaway Solar Reserve)*, dated April 17, 2010
- Draft *Tree Planting Plan*, dated June 2010
- Teanaway Solar Reserve SEPA Staff Report, dated July 14, 2010

The potential issues identified by the County based on its initial review of the application materials and the SEPA environmental checklist were: (1) impacts to wildlife and vegetation; (2) impacts to views and aesthetics; (3) road impacts, including construction impacts to roads; (4) stormwater runoff; (5) emergency access and services.
After reviewing the application and supplemental materials provided by applicants and other agencies, the County is satisfied that all of these issues have been adequately addressed by code, voluntary, or SEPA mitigation and none will result in probable significant adverse environmental impacts requiring an Environmental Impact Statement under SEPA. The County's threshold determination includes several conditions to ensure any potential impacts are mitigated to the point of no probable significant impacts. The full list of SEPA mitigation conditions required by the County is included in the MDNS document, and the full list of the voluntary mitigation measures proposed by the Applicant and code mitigation measures is provided in the County's July 14 Staff Report.

B. Procedural Compliance

Further, as detailed below, the County has complied with all procedural requirements of KCC Title 15 Environmental Policy and KCC Title 15A Project Permit Application Process:

1. On August 18, 2009 Teanaway Solar Reserve, LLC submitted to Kittitas County Community Services Department an application for a Conditional Use Permit ("CUP"), a draft Development Agreement ("DA") for the project, and an expanded SEPA Environmental Checklist dated August 14, 2009. The expanded SEPA Checklist included a *Sensitive Species Report*; a *Wetland Delineation Report*, a *Cultural Resources Report*, and a *Zone of Visual Influence Memorandum*.

2. The application was deemed complete on August 22, 2009. In compliance with WAC 197-11, RCW 36.70B, and KCC 15A, a Notice of Application was issued on September 2, 2009. This notice was mailed to government agencies, the Yakama Nation, adjacent property owners, and the applicant. The public notice period lasted from September 3, 2009 to September 18, 2009. Notice was published in the official county paper of record and was mailed to jurisdictional government agencies, adjacent property owners, and other interested parties. Written comments were received and included in the record for consideration. The project site was accurately posted with the Land Use Action sign as provided by Community Development Services and in compliance with KCC 15A.03.110. The signed Affidavit of Posting was placed in the project file.

3. Community Development Services conducted a complete and thorough review of a completed environmental checklist and attachments, including materials submitted after initial application (including supplemental materials received February 2010 and June 2010), and determined that the project does not have a probable significant adverse impact on the environment. An Environmental Impact Statement (EIS) is not required under RCW 43.21.030(2)(c).

4. On July 15, 2010 Kittitas County issued a SEPA Mitigated Determination of Non-significance (MDNS). The notice of the SEPA determination was provided to all required parties of record pursuant to 43.21C RCW, published in the official county paper of record, and mailed to jurisdictional government agencies, adjacent property owners, and other interested parties. The last day to appeal this decision was July 29, 2010 at 5:00 PM.

5. A Notice of Public Hearing for the Conditional Use Permit was issued on July 15, 2010 and published in the official County newspaper of record. The notice was also mailed to all parties on the Notice of Application listing. The Public Hearing was scheduled to be heard by the Board of Adjustment on August 11, 2010 and, if necessary, August 12, 2010.

6. A timely SEPA Appeal pursuant to KCC 15A.04 was submitted on July 26, 2010 with $500.00 to the Kittitas County Board of County Commissioners. The appeal was filed by James Brose and Paige Green Dunn in their individual capacities.

7. A Notice of SEPA Appeal Hearing was issued on July 29, 2010. The notice was mailed to all parties on the Notice of Application listing and other interested parties. It was also published in the official County newspaper of record on July 29, 2010 and August 5, 2010, and in the Northern Kittitas County Tribune on July 29, 2010 and August 5, 2010. A consolidated Hearing is scheduled for August 11, 2010 and, if necessary, August 12, 2010 at the Kittitas County Fairgrounds in Ellensburg, WA, 98926.

C. Response to Issues on Appeal

In KCC 15.04.190 the County adopts the SEPA Appeal procedures from the Washington Administrative Code, including 197-11-680(3)(a)(viii), which states that "procedural determinations made by the responsible official shall be entitled to substantial weight." Further, KCC 15A.07.010.2.c states, "…The appellant shall bear the burden of proving the decision was wrong." The appellant's written statement contains the arguments in support of its claims. Below is the County's response to these claims.

Issue #1: The County failed to properly evaluate the fire protection plan

The appellants state that the County did not properly consider the potential for harm due to lack of appropriate evacuation routes during a fire, citing *Lanzce v. City of Spokane Valley*.

Lanzce v. City of Spokane Valley involved a proposed 81-unit Planned Unit Development to an existing 1,200 lot neighborhood in an area of high fire risk. The court held that it was within the authority of the Hearing Examiner to reverse a mitigated determination of nonsignificance and order an environmental impact statement because concerns about public services including fire protection were not properly addressed during SEPA review. In that case, the court of appeals approved the Hearing Examiner's decision to reverse an MDNS based upon evidence in the record that indicated that traffic from the 1,200 lot neighborhood could not be safely evacuated.

Responsible Official Response:

The appellants' claim that the County did not adequately consider fire protection is incorrect. The record contains a letter dated June 14, 2010 from the Kittitas County Fire Marshal, which was prepared following an evaluation of the project for compliance with fire safety standards. The record also contains a Fire Protection Agreement dated February 17, 2010 between the Kittitas County Fire Protection District No. 7, the landowners and TSR LLC to have the District provide emergency fire, supportive medical and other standard services as are currently enjoyed by the residents and businesses within the District boundaries.

The Department of Public Works submitted a letter on June 22, 2010, which was prepared following an evaluation of the project for compliance with road and stormwater standards, including provisions to ensure emergency access according to the International Fire Code. The Public Works Department and the applicant agree upon SEPA conditions to bring the level of impact to transportation infrastructure below a level of significance. For example, access roads Wiehl Road and Loping Lane are required to be resurfaced and in some cases widened to meet International Fire Code standards. Currently segments of these roads do not meet the minimum IFC standard and SEPA conditions will result in improved emergency access and evacuation.

As demonstrated above and in the July 14, 2010 SEPA Staff Report (see Part IX: Public Services and Part VIII: Transportation), the County carefully considered fire safety and transportation impacts and included a combination of voluntary, code, and SEPA mitigation measures to bring the level of impact below significant. See SEPA MDNS, Part VIII: Transportation, Conditions 11-15 and Part IX: Public Services, Conditions 1-3.

Issue #2: Failure to conduct an alternative site analysis is required under RCW 43.21C.030

The applicant states the County failed to conduct an alternative site analysis, citing as support RCW 43.21C.030.

Responsible Official Response:

The appellants' claim that the County should have complied with RCW 43.21C.030 when making its threshold determination is incorrect. The RCW 43.21C.030 cited by the appellants applies only during preparation of an EIS. The County was not required to include a statement of alternatives in its MDNS threshold determination.

Understanding the County is not required to include alternatives in its MDNS threshold determination, the County did work with the applicant to consider various alternatives in site design during the review process prior to its threshold determination. Alternatives such as the size of the project area, location of access roads and facilities buildings, and design of fire breaks and buffers were discussed and in many cases incorporated into the current proposal. For example, the applicant reduced the overall size of the impacted area from 580 acres as proposed in the August 2009 *SEPA Checklist*, to 477 acres, as proposed in the supplemental February 2010 *SEPA Checklist.*

Issue #3: Failure to ensure consistency with critical areas ordinance, which has not been updated as required by state law

This issue contains two claims. First, the appellant claims that the County did not ensure consistency with the critical areas ordinance. Second, the appellant claims the County's critical areas ordinance has not been updated as required by state law.

Responsible Official Response

The appellants' first claim that the County did not ensure consistency with the critical areas ordinance is incorrect. The County's critical areas policies are contained in KCC Title 17A. After conducting an administrative critical areas review, the project site was found to contain wetlands, geologically hazardous areas, and wildlife habitat. Prior to making its threshold determination, the County reviewed the application and expanded SEPA Checklist, including studies and reports listed in V.A. above; reviewed public comments relating to critical areas impacts; and reviewed letters submitted by state agencies concerning critical areas impacts.

The County then analyzed the impacts of the proposal on the applicable critical areas included in the SEPA Staff Report, including: wetlands (Part 3: Water); geologically hazardous areas (Part 1: Earth); and habitat (Part 3: Water; Part 4: Plants; and Part 5: Animals). The SEPA Staff Report lists voluntary, code, and SEPA mitigation to bring the level of impact below significant.

Specifically concerning impacts to critical areas, the County considered comments from the Department of Fish and Wildlife and the Department of Ecology—state agencies with expertise in critical areas— and materials prepared by the applicant's technical experts pertaining to critical areas, including, but not limited to:

- *Sensitive Species Report* (August 2009)
- *Wetland Delineation Report* (August 2009)
- *Sensitive Species Report* (February 2010)
- *Wetland Delineation Report* (February 2010)
- *Vegetation Management Plan* (February 2010)
- *Wildlife Mitigation Plan* (February 2010)
- *Geology and Soil Hazards Evaluation* (February 2010)
- *Hydrologic Analysis* (February 2010)
- *Hydrologic Analysis* (June 2010)

The County further reviewed and relied on the *Mitigation Agreement Between Washington State Department of Fish and Wildlife and Teanaway Solar Reserve LLC*, dated April 18 2009. The agreement contains the following statement:

> *Washington Department of Fish and Wildlife (WDFW) has a mandate to preserve, protect, manage, and perpetuate the state's fish and wildlife resources including habitat. WDFW has reviewed the impact of the Project as proposed on the date of this agreement and agency staff previously provided input regarding impacts to habitat for elk and other wildlife, surface water runoff, vegetation management, and other environmental issues, including the potential need for an environmental impact statement. Pursuant to the commitments and conditions herein, the CUP, DA [Development Agreement] and associated SEPA documentation, this Mitigation Agreement addresses the mitigation this is required to mitigate adverse*

impacts associated with the project proposal to fish and wildlife resources, including elk habitat, to a less than significant level.

The appellants' second claim that the County's critical areas ordinance has not been updated is an issue outside the jurisdiction of the Board of Adjustment. If such a claim is to be made, it would need to be brought before the Growth Management Hearings Board for review. RCW 36.70A.280.

Issue #4: Special and sensitive areas not properly mitigated

The appellants claim the County did not consider impacts to specific environmentally sensitive or special areas and that impacts were not properly mitigated.

Responsible Official Response

The appellants' claim that the County did not consider impacts to sensitive or special areas is incorrect. As shown in the 42-page SEPA Staff Report, the County conducted a diligent and careful analysis of the full-range of environmental elements before making its threshold determination.

As stated above in the Responsible Official's response to Issue #3, the County conducted a careful review of critical areas, also known as sensitive environmental areas, and after consultation with WDFW determined that impacts to wildlife had been mitigated. In addition, a review of historic and cultural resources was conducted by the applicant, as described in the SEPA Staff Report, Section 13 Historic & Cultural Resources. Comments on this report were received from the Yakama Nation in a letter dated April 5, 2010. The Yakama Nation concurred with the conclusions of the applicant's *Cultural Resources Report,* namely that sub-surface shovel testing shall be conducted. As a SEPA mitigation condition, the County is requiring the applicant comply with the recommendations of this *Cultural Resources Report* (see MDNS Part XIII: Historic & Cultural Resources, Condition 1). The shovel testing is required to be completed prior to construction and all work shall stop if during construction any potential cultural resource is found.

To the extent that potential project impacts were identified during the County's review, the County worked with the applicant to identify voluntary, code, and SEPA mitigation necessary to bring the level of impacts below significant.

Issue #5: Failure to ensure compliance with wildlife laws

The appellants disagree with specific conclusions made by the applicant's wildlife analysis, claim the County should require a more detailed bird study on the project site, and claim the applicant's SEPA Environmental Checklist does not demonstrate compliance with the following regulations: The Bald Eagle Protection Act; the Federal Bald and Golden Eagle Protection Act; the Endangered Species Act; and the Migratory Bird Treaty Act.

Responsible Official Response:

The appellants' claim that the County has failed to ensure compliance with wildlife laws is incorrect. See response to Issue #3 above concerning the County's thorough review of impacts to habitat and wildlife.

The County's threshold determination does not constitute a project approval, and in no way exempts a project from complying with all applicable local, state, and federal laws. In making its threshold determination, state law permits the County to assume that the proposed project will abide by all applicable local, state, and federal laws, and that the application of such laws will sufficiently mitigate against any adverse impacts. WAC 197-11-158(2)(c). In the absence of any evidence to the contrary, applicant's compliance with the federal laws cited by appellant exceeds the scope of SEPA and the County's jurisdiction. Nonetheless, after thoroughly reviewing the applicant's submitted material, and after further consultation with state agencies, the County determined that impacts to wildlife are mitigated through voluntary measures proposed by the applicant, applicable codes and laws, and the additional SEPA mitigation measures imposed by the County. The SEPA MDNS contains multiple conditions pertaining to wildlife, including: Part III: Plants, Conditions 1 and 2; and Part IV: Animals, Conditions 1-7.

Issue #6: Failure to adequately consider potential impacts to water resources

The appellants claim the applicant's Environmental Checklist fails to properly evaluate the potential impacts of the proposed action on water, particularly those involving run-off impacts, erosions of the hillside along Red Bridge Road, runoff from creeks, and habitat and flooding impacts to the Teanaway River.

Responsible Official Response:

The appellants' claim that the County failed to adequately consider potential impacts to water resources, including runoff, is incorrect. Prior to making its threshold determination, the County reviewed the applicant's submitted materials and studies, including the SEPA Checklist and the *Hydrologic Analysis* (February 2010) and the *Hydrologic Analysis* (June 2010) to assess the potential impacts on water resources. The County and the applicant also consulted with the Department of Ecology, who reviewed the project and provided comments in letters dated March 25, 2009, September 18, 2009, September 23, 2009, and July 1, 2010. Based on the level of review and comment from Ecology, the County was confident that the project's stormwater system could be design to meet the runoff demands of the project site and vicinity.

The applicant worked with the Department of Ecology to refine its stormwater calculations, and submitted additional information responding to Ecology on July 26, 2010 and July 29, 2010. On July 30, 2010 the Department of Ecology responded to the applicant, stating that newly submitted material adequately addressed stormwater treatment and control, and provided direction for final design.

The County and Ecology have required that the applicant apply for and obtain a NPDES individual permit prior to commencing construction. The terms of the NPDES Permit will require the applicant engineer a stormwater system that meets the requirements of the *Stormwater Management Manual of Eastern Washington,* as well as County code provisions pertaining to stormwater in Title 12.

As stated in the *SEPA Checklist,* no ground or surface water withdrawals are proposed for this project.

Issue #7: Failure to consult with tribal governments

The appellants claim the County failed to consult tribal governments during the review of this project.

Responsible Official Response:

The appellants' claim that the County failed to consult with tribal governments is incorrect. The County has had contact with the Yakama Nation throughout the review process. The County notified the Yakama Nation when this project application was filed and has notified the Yakama Nation of all subsequent SEPA actions through mailed notices. The County also contacted the Yakama Nation following the applicant's February 2010 resubmittal to confirm receipt of the proposal for comments on the submitted Cultural Resources Report. The Yakama Nation submitted a comment letter on April 5, 2010.

Issue #8: Failure to consider the precedent set by this project

The appellants claim that the County failed to properly consider the degree to which issuance of a SEPA mitigated determination of significance on this project may establish a precedent for review of other large-scale quasi-industrial solar facilities in other counties.

Responsible Official Response:

This project has no precedent setting effect within or outside of the County. The KCC requires that the County consider the merits of each application for a project against the applicable criteria on a case-by-case basis. Mitigation conditions for this project may not necessarily apply to other proposed solar farms. The County's review of this application is no indication for how future proposals may be reviewed or processed.

Issue #9: Other concerns—Identified artifacts; carbon sequestration; other considerations

The appellants note: there have been reports of cultural resources discovered near the project site; the value of carbon sequestration capabilities on the project site is not clearly understood; and the site contains important wildlife

habitats and species and interconnected habitat areas. The appellants state that the applicant provides conceptual and limited representation of the property including variations in climate throughout the year and that the project is likely to significantly impact various sensitive species. The appellants state that the primary reason for requesting an EIS is not based entirely on the size of the project; rather it is due to concern of impacts to wildlife, habitat, wetlands, streams, riparian zones, plants, biodiversity, connectiveness [sic], open space, and identified cultural artifacts on the propose site.

Responsible Official Response:

a. Cultural Resources
See response to Issue # 4 above.

b. Carbon Sequestration
Neither the United States Environmental Protection Agency, nor the State of Washington, nor Kittitas County have regulations that provide specific guidance on how to assess impacts of climate change, loss of carbon sequestration, and associated greenhouse gas emissions at the individual project level.

Declaring an impact significant or not significant implies an ability to measure incremental effects of global climate change. The body of research and law necessary to connect individual land uses, development projects, operational activities, etc. with the broader issue of global warming remains weak. Scientific research and analysis tools sufficient to determine a numerical threshold of significance are not available at this time and any conclusions would be speculative. For these reasons, it is impossible to conclude that proposed project will have a significant and unavoidable adverse impact on carbon sequestration.

c. Other issues…
See responses Issues #3, #4, and #5 above concerning impacts to wildlife habitat, critical areas, and sensitive areas.

Issue #10: Inadequate analysis of cumulative impacts

Appellants claim that the likelihood of an accumulation of adverse impacts of the proposed project must be considered in the County's SEPA analysis, and the 10 points articulated in the appeal letter have the cumulative effect of requiring a Determination of Significance.

Responsible Official Response:

SEPA does not require review of cumulative impacts under SEPA unless proposals are interdependent with one another. According to *Boehm vs. Vancouver*[7], "A cumulative impact analysis need only occur when there is some evidence that the project under review will facilitate future action that will result in additional impacts." The County finds no evidence that this project will facilitate future actions triggering the necessity for a cumulative impacts analysis.

In addition, as stated in the MDNS and described in the SEPA Staff Report, the County has determined that the project's impacts on the various environmental elements, when mitigated, are not significant. There is no WAC or KCC authority to require an EIS when the project's impacts to the environment are determined to be below a level of significance.

VI. Conclusion and Recommendation

The appellants have submitted a timely appeal meeting the requirements of KCC 15A.07.010. It is the responsibility of the Board of Adjustment to review this appeal and determine whether the County's decision to issue a Mitigated Determination of Nonsignificance was "clearly erroneous." A finding is "clearly erroneous" when the reviewing body [in this case the Board of Adjustment] on the entire record is left with the firm and definite conviction that a mistake has been committed.[8]

[7] *Boehm v. City of Vancouver,* 111 Wash.App. 711, 47 P.3d 137.
[8] *See State Dep't of Ecology v. PUD No. 1 of Jefferson County*, 121 Wn.2d 179, 201 849 P.2d 646 (1993), *affirmed*, 511 U.S.

As demonstrated in Section V.B. of this Staff Report, the Kittitas County Community Development Services Department, acting as the Responsible Official, has met all procedural requirements contained within KCC 15A, WAC 197-11, RCW 43.21C, and RCW 36.70B.

As demonstrated in Section V.C. of this Staff Report, the appellants have not met the burden of proof that the actions taken by the Responsible Official were clearly erroneous (KCC 15A.07.010.2.c).

The Responsible Official has met all procedural requirements under SEPA and has not been shown to have made a clearly erroneous threshold determination. Therefore, staff recommends that the Kittitas County Board of Adjustment deny the appeal of the July 15, 2010 SEPA Mitigated Determination of Nonsignificance.

VII. Recommended Findings of Fact, Conclusions of Law, and Decision

This matter having come before the Kittitas County Board of Adjustment upon the above referenced SEPA Appeal of the MDNS for CU-09-00005, staff recommends the Board of Adjustment make the following Findings of Facts, Conclusions of Law and Decision related to the above referenced matter:

General Description of Proposal

1. Teanaway Solar Reserve LLC ("the applicant" or "TSR"), has submitted a Conditional Use Permit application to construct and operate the Teanaway Solar Reserve ("the project"). The project includes the following key components: solar modules; field inverters; field transformers; electrical conductors; electrical substation and switchyard; operations and maintenance (O&M) building and supervisory control and data acquisition (SCADA) system; overhead interconnection transmission line; and access and maintenance roads.

2. The Teanaway Solar Reserve will be constructed on an approximately 982 acre site, though only up to 477 acres will be involved in land disturbance and development. The remaining acres are currently undeveloped open space. Approximately 193 acres onsite will be preserved with a conservation easement as part of the Applicant's wildlife mitigation plan, and an open corridor will be maintained to allow for wildlife migration through the site.

3. The project will be completed over a period of 2 to 3 years, with 7-to 9-month construction periods each year, weather dependent.

4. The project is proposed to generate up to 75MWdc of PV solar energy for distribution to utilities and communities in the region.

5. The Comprehensive Plan's Land Use Element designates the subject parcel as Rural.

6. The subject property is zoned Forest and Range. The surrounding properties are zoned Commercial Forest, Forest and Range, and Rural-3.

7. The purpose and intent of the Forest and Range zone is to provide for areas of Kittitas County wherein natural resource management is the highest priority and where the subdivision and development of lands for uses and activities incompatible with resource management are discouraged.

8. The solar farm is considered a "Major Alternative Energy Facility," (KCC 17.61.010.9) and certain components of the solar farm (overhead transmission line and substation) considered "special utilities" (KCC 17.61.010.2). According to the KCC, a "Major Alternative Energy Facility" (KCC 17.61.010.9) and "Special Utilities" (KCC 17.61.020.6) are allowed with a Conditional Use Permit in the Forest and Range zoning district, subject to the conditions set forth in Chapter KCC 17.60A Conditional Uses and KCC 17.61 Utilities.

9. An administrative site analysis was completed by the staff planner in compliance with Kittitas County Code Title

700, 114 S.Ct.1900, 1282. Ed 2d 716 (1994).

17A, Critical Areas. Limited amounts of wetlands, wildlife habitat areas, and geologically hazardous areas were identified onsite.

Procedural Background for the Subject Application

10. On August 18, 2009 Teanaway Solar Reserve, LLC ("TSR" or "the applicant") submitted to Kittitas County Community Services Department ("CDS") an application for a Conditional Use Permit ("CUP"), a draft Development Agreement ("DA") for the project, and an expanded *SEPA Environmental Checklist* dated August 14, 2009. The expanded *SEPA Checklist* included a *Sensitive Species Report*; a *Wetland Delineation Report*, a *Cultural Resources Report*, and a *Zone of Visual Influence Memorandum*.

11. On August 22, 2009 the County deemed the application complete and sent a letter to the application stating this conclusion.

12. On September 3, 2009 a Notice of Application was issued. This notice was mailed to government agencies, adjacent property owners, and the applicant. The public notice period lasted from September 3, 2009 to September 18, 2009. A notice of application was published in the official county paper of record and was mailed to jurisdictional government agencies, adjacent property owners, and other interested parties. Written comments were received and included in the record for consideration.

13. On September 2, 2009, the applicant's authorized agent signed an Affidavit of Posting, confirming that in accordance with Kittitas County Code 15A.03.110, this project was accurately posed with the "Land Use Action" sign as provided by Community Development Services. The Affidavit of Posting was returned to the planner and is included as part of the record.

14. The County reviewed the comments with TSR and requested that additional studies addressing the public comments be submitted by February 22, 2010.

15. In February 2010, TSR supplemented its Conditional Use Permit Application and Expanded SEPA Checklist with additional reports and information in response to the comments that were received. TSR prepared, reports, including, but not limited to, a Geology and Soils Hazard Evaluation, a Fugitive Dust Control Plan, a Vegetation Management Plan, a Wildlife Mitigation Plan, and a Transportation and Road Plan.

16. TSR submitted additional materials on June 2, 2010, which included additional hydrology and stormwater runoff modeling, and executed agreements between TSR and WDFW and the Kittitas County Fire Protection District #7.

17. On July 15, 2010 the County issued a SEPA Mitigated Determination of Non-significance (MDNS). The Board finds that the notice of said determination was provided to all required parties of record pursuant to 43.21C RCW and that said notice was published in the official county paper of record and was mailed to jurisdictional government agencies, adjacent property owners, and other interested parties. The last day to appeal this decision was July 29, 2010 at 5:00 PM.

18. On July 26, 2010, a timely SEPA Appeal pursuant to KCC 15A.04 was submitted with $500.00 to the Kittitas County Board of County Commissioners. The appeal was filed by James Brose and Paige Green Dunn, adjacent property owners to the proposed Teanaway Solar Reserve.

Conduct of Hearing

19. On August 11, 2010 a consolidated open record hearing was held to consider the SEPA Appeal and the underlying Conditional Use Permit. Testimony was taken from those persons present who wished to be heard. On July 29, 2010, due notice of this SEPA Appeal public hearing was given as required by law, and the necessary inquiry was made into the public interest to be served by this proposed project.

20. The public hearing was conducted in the standard manner for a Board of Adjustment consolidated hearing to consider a SEPA appeal and application for a conditional use permit. County staff presented an overview of the

project and summarized its Staff Report on the SEPA Appeal. SEPA appellants presented their case. The applicants made their presentation opposing the MDNS appeal.

SEPA Appeal

21. As provided in KCC 15.04.210, SEPA threshold determinations issued in conjunction with a project permit application may be appealed following the procedures in Title 15A Project Permit Application Process. Specifically, Title 15A Table A establishes that an open record hearing before the Board of Adjustment shall be required for an appeal of a SEPA threshold determination, and Chapter 15A.07 sets forth procedures for appealing administrative decisions, such as a SEPA threshold determination.

22. A timely appeal of the County's SEPA Determination for the project was filed by two neighboring landowners, James Brose and Paige Green Dunn (appellants) on July 26, 2010. The appellants' request that the MDNS be withdrawn, a Determination of Significance issued, and demand that an environmental impact statement (EIS) be required.

23. The Board of Adjustment must give substantial weight to the County's decision to issue an MDNS. As stated in RCW 43.21C.090, "In any action involving an attack on a determination by a government agency relative to the requirement or absence of the requirement, or the adequacy of a 'detailed statement,' the decision of the governmental agency shall be accorded substantial weight."[9]

24. A governmental agency's threshold determination of "no probable environmental significance" ("DNS") is subject to review under the clearly erroneous standard.[10] In considering the Responsible Official's decision to issue an MDNS and not require an environmental impact statement, the Board shall not substitute its judgment for that of the administrative decision maker (in this case the County's Responsible Official) and will find administrative decision clearly erroneous only if the Board is left with definite and firm conviction that a mistake has been committed based on the record.[11]

25. For a threshold determination to withstand appeal, the Responsible Official must demonstrate that it actually considered relevant environmental factors before reaching a decision.[12] The record must demonstrate that the County adequately considered the relevant environmental elements listed in WAC 197-11-444 "in a manner sufficient to be prima facie compliant with the procedural dictates of SEPA."[13] The decision to issue a determination of nonsignificance must be based on information sufficient to evaluate the proposal's environmental impact.[14]

26. The appellants' statement contained the following claims (in summary):
    Issue #1: Failure to properly evaluate the fire protection plan;
    Issue #2: Failure to conduct an alternative site analysis is required under RCW 43.21C.030;
    Issue #3: Failure to ensure consistency with critical areas ordinance, which has not been updated as required by state law;
    Issue #4: Special and sensitive areas not properly mitigated;
    Issue #5: Failure to ensure compliance with wildlife laws;
    Issue #6: Failure to adequately consider potential impacts to water resources;
    Issue #7: Failure to consult with tribal governments;

[9] *Anderson*, 86 Wn. App. at 302; *Indian Trail Prop. Owner's Association v. City of Spokane*, 76 Wn. App. 430, 442, 886 P.2d 209 (1994).
[10] *Leavitt v. Jefferson County*, 74 Wn. App. 668, 875 P.2d 681 (1994).
[11] *Klickitat County Citizens Against Imported Waste v. Klickitat County*, 122 Wn.2d 619, 860 P.2d 390, amended on denial of reconsideration.
[12] *See* RCW 43.21C.030(2)(c); *Lassila v. Wenatchee*, 89 Wn.2d 804, 813, 576 P.2d 54 (1978); *Juanita Bay Valley Cnty. Ass'n v. City of Kirkland*, 9 Wn. App. 59, 73, 510 P.2d 1140.
[13] *Lassila*, 89 Wn.2d at 814; *see also Anderson v. Pierce County,* 86 Wn. App. 290, 302 936 P.2d 432 (1997).
[14] See *Anderson*, 86 Wn. App. at 302; WAC 197-11-335.

Issue #8: Failure to consider the project would establish a precedent for future actions with significant effects or unknown risks;
Issue #9: Other concerns—Identified artifacts; carbon sequestration; and
Issue #10: Inadequate analysis of cumulative impacts.

27. The Board of Adjustment heard the appellants' case challenging the SEPA MDNS, including written testimony, presentation of witnesses, and the opportunity to cross examine witnesses of the County and applicant.

28. According to KCC 15.07.030, the Board of Adjustment must issue a written decision on this appeal within 90 days of the appeal being filed. A timely appeal was filed on July 26, 2010; therefore the Board of Adjustment must issue its written decision no later than October 23, 2010.

29. After careful consideration of appellants' case and the record before the Board on this matter, the Board finds that Kittitas County Community Development Services Department, acting as the Responsible Official, did follow and comply with all procedural requirements contained within KCC 15A, WAC 197-11, RCW 43.21C, and RCW 36.70B, and did consider all relevant environmental factors.[15] The appellants failed to meet their burden of demonstrating otherwise. Therefore the Board upholds the Mitigated Determination of Nonsignificance (MDNS) as issued by the Responsible Official. The Board provides the following findings and conclusions with respect to the specific issues raised by appellants.

30. Issue #1: The Board of Adjustment finds that the appellant has not met its burden of proving the Responsible Official did not properly consider fire hazards, fire evacuation routes, and other fire safety issues. To the contrary, the record contains letters from the Kittitas County Fire Marshall, a Fire Protection Agreement with Fire District No. 7, and additional analysis in the SEPA Staff Report demonstrating a thorough consideration of this issue.

31. Issue #2: The Board of Adjustment finds that the appellants' claim that an alternative site analysis should have been conducted pursuant to RCW 43.21C.030 is legally incorrect, because this provision applies only to the preparation of an EIS. RCW 43.21C.030; WAC 197-11-440.

32. Issue #3: The Board of Adjustment finds that the appellant has not met its burden of proving the Responsible Official did not properly consider compliance with its critical areas ordinance. To the contrary, the Responsible Official reviewed studies and reports on wetlands and waters, habitat, and geologically hazardous areas contained in the record, and provided an analysis of these impacts in its SEPA Staff Report. Appellants also claim the County's critical areas ordinance is inadequate or outdated. The Board of Adjustment has not jurisdiction to rule on the adequacy of the adopted critical areas ordinance. If such a claim is to be made, it must be made before the Growth Management Hearings Board according to applicable procedures.

33. Issue #4: The Board of Adjustment finds that the appellant has not met its burden of proving the Responsible Official did not properly mitigate impacts to special and sensitive areas. To the contrary, in addition to reviewing studies and reports included in the expanded SEPA Environmental Checklist, the Responsible Official relied on a wildlife mitigation agreement Washington Department of Fish and Wildlife, in which the WDFW concludes the mitigation contained within that agreement is sufficient to bring the level of impact to wildlife habitat below a level of significance. Impacts to cultural and historic resources were analyzed in the applicant's *Cultural Resources Report*, and the County has condition approval upon compliance with the recommendations of that plan, which include conducting sub-surface testing in areas likely to contain historic artifacts and halting construction work if ever an artifact is discovered. The Responsible Official has demonstrated in an exhaustive 42-page SEPA Staff Report that special and sensitive areas were carefully considered and probable impacts mitigated below a level of significance.

34. Issue #5: The Board of Adjustment finds that the appellant has not met its burden of proving the Responsible Official failed to ensure compliance with wildlife laws. To the contrary, the Responsible Official has shown the proposal was reviewed closely by the Washington Department of Fish and Wildlife, who have reached a wildlife

[15] *Anderson*, 86 Wn. App. at 302; *Indian Trail Prop. Owner's Association v. City of Spokane*, 76 Wn. App. 430, 442, 886 P.2d 209 (1994).

mitigation agreement with the applicant. Regardless of SEPA determination, the proposal will be required to comply with applicable local, state, and federal laws pertaining to wildlife.

35. Issue #6: The Board of Adjustment finds that the appellant has not met its burden of proving the Responsible Official did not properly consider impacts to water resources. To the contrary, the Responsible Official reviewed stormwater plans, hydrology reports, and stormwater runoff models submitted by the applicant, and relied on review (including site visits) and comments from the Department of Ecology to conclude the probable impacts on water resources, particularly stormwater, would be mitigated below a level of significance.

36. Issue #7: The Board of Adjustment finds that the appellant has not met its burden of proving the Responsible Official did not properly consult with tribal governments. To the contrary, the record contains letters and emails between the Responsible Official and the Yakama Nation concerning this project and the Yakama Nation is included on the mailing distribution list for all public notices.

37. Issue #8: The Board of Adjustment finds that the appellant has not met its burden of proving the Responsible Official did not properly consider the precedent set by this project. To the contrary, the Responsible Official has shown that the proposal's potential environmental impacts were carefully assessed and considered, and concluded the proposed project did not have a significant impact on the environment, involve unique or unknown risks or affect public health and safety. The KCC requires that each proposal be assessed independently in light of the site-specific factors and the proposal's details. This MDNS does not create a precedent for a future action.

38. Issue #9: The Board of Adjustment finds that the appellant has not met its burden of proving the Responsible Official did not properly consider carbon sequestration. There currently is no federal, state, or county standard determining when a potential impact to carbon sequestration should be considered significant and it is therefore not possible to determine whether the impacts to vegetation as they relate to carbon sequestration can be consider significant.

39. Issue #10: The Board of Adjustment finds that the appellant has not met its burden of proving the Responsible Official did not properly consider the cumulative impacts of this project. A cumulative impact analysis is required when the project under review will facilitate future development.

40. The Board of Adjustment finds that the appellant has not met its burden of proving the Responsible Official acted in a clearly erroneous manner in its threshold determination of mitigated nonsignificance; and therefore denies this appeal.