KITTITAS COUNTY COMMUNITY DEVELOPMENT SERVICES
411 N. Ruby St., Suite 2, Ellensburg, WA 98926
CDS@CO.KITTITAS.WA.US
Office (509) 962-7506
Fax (509) 962-7682
"Building Partnerships – Building Communities"

Findings of Fact and Decision
Teanaway Solar Reserve - SEPA Appeal
CU-09-00005

Applicant: Teanaway Solar Reserve, LLC

Project: Teanaway Solar Reserve

Location: The project 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 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.

This matter having come before the Kittitas County Board of Adjustment upon the above referenced Conditional Use Application from Teanaway Solar Reserve, LLC, land lessee, the Board of Adjustment makes the following Findings of Facts, Conclusions at Law and Decision related to the above referenced matter:

I. FINDINGS OF FACT

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 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."[1]

24. A governmental agency's threshold determination of "no probable environmental significance" ("DNS")

[1] *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).

is subject to review under the clearly erroneous standard.[2] 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.[3]

25. For a threshold determination to withstand appeal, the Responsible Official must demonstrate that it actually considered relevant environmental factors before reaching a decision.[4] 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."[5] The decision to issue a determination of nonsignificance must be based on information sufficient to evaluate the proposal's environmental impact.[6]

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;
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.[7] 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.

---

[2] *Leavitt v. Jefferson County*, 74 Wn. App. 668, 875 P.2d 681 (1994).
[3] *Klickitat County Citizens Against Imported Waste v. Klickitat County*, 122 Wn.2d 619, 860 P.2d 390, amended on denial of reconsideration.
[4] *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.
[5] *Lassila*, 89 Wn.2d at 814; *see also Anderson v. Pierce County,* 86 Wn. App. 290, 302 936 P.2d 432 (1997).
[6] See *Anderson*, 86 Wn. App. at 302; WAC 197-11-335.
[7] *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).

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 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.

II. DECISION

The SEPA Appeal is denied.

Daryl Akkerman, Chairman, Board of Adjustment

08/12/2010
Date