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VIA U.S. MAIL

Kittitas County Board of Adjustment
Chairman Akkerman, Ms. Larsen, Mr. Bossart, Mr. Kloss, and Mr. Goeben
c/o Mandy Weed, Clerk
Kittitas County Community Development Services
411 North Ruby W Street, Suite 2
Ellensburg, WA 98926

**Re: Teanaway Solar Reserve
SEPA Appeal of Issued MDNS
Conditional Use Permit Application (CU-09-00005)**

Dear Chairman Akkerman and Members of the Board:

The Applicant, Teanaway Solar Reserve, LLC ("TSR") submits this pre-hearing letter opposing the appeal of the Mitigated Determination of Significance ("MDNS") issued by Kittitas County Development and Community Services ("County") for the above referenced conditional use permit application. The County issued the MDNS based on the comprehensive environmental analysis conducted by TSR for its proposed solar energy project, the full review of that analysis by multiple state and local expert agencies, the Yakama Nation, and the public, the resulting voluminous record created in this matter, and the County's extensive consideration of the project's probable environmental impacts based on that record. TSR fully supports the County's MDNS, and incorporates by reference herein the substantive points contained in the County's August 4, 2010 Staff SEPA Appeal Report to the Board ("Staff SEPA Appeal Report").¹ For the many reasons contained in the Staff SEPA Appeal Report and the additional points provided below, we respectfully ask the Board to deny the appeal. The County's decision to issue a MDNS is afforded a substantial weight, and appellants fail to overcome their high burden of proving the County's SEPA determination is clearly erroneous.

¹ For purposes of this letter, TSR also adopts the County's August 4, 2010 Exhibit List. The Staff SEPA Appeal Report is identified therein as Exhibit 17. Pursuant to the accompanying Supplemental Exhibit List, TSR asks this letter be admitted into the record as Proposed Supplemental Exhibit 21.

71795-0001/LEGAL18908554.1

A. Introduction

This is an appeal of Kittitas County's threshold determination of mitigated nonsignificance for the Teanaway Solar Reserve project issued pursuant to the State Environmental Policy Act ("SEPA"), chapter 43.21C RCW and pertinent provisions of the Kittitas County Code ("KCC"). Based on the extensive record now before the Board, the County issued the MDNS on July 15, 2010. A Staff Report by the County dated July 14, 2010 accompanied the MDNS and is contained in the record (Exhibit 12).

As provided in KCC 15.07.010, appeals of SEPA determinations require a written, concise document identifying, among other things, the identity of the party or parties making the appeal, and the *specific reasons* why the appellant believes the determination to be wrong. On July 26, 2010, the County received an appeal of the MDNS by James Brose and Paige Dunn (collectively referred to as "Brose and Dunn" or "appellants"), two neighboring landowners.²

In sum, Brose and Dunn argue ten issues on appeal they claim render the County's SEPA determination and its underlying environmental analysis and mitigation is flawed. Appellants ask the Board to reverse the County's MDNS and require that TSR prepare an Environmental Impact Statement ("EIS"). In presenting their arguments, Brose and Dunn selectively ignore the extensive record reviewed and relied on by the County and expert agencies.³ As a result, Brose and Dunn provide no convincing reason or evidence beyond unsubstantiated speculation to support their contention that the proposed solar energy facility, as mitigated, will have a significant impact on the environment.

The record demonstrates that the County had more than sufficient information upon which to assess the potential environmental impacts from this proposal and that it considered all the appropriate environmental factors in analyzing the proposed project. The record shows that the proposal as mitigated will not have a significant impact upon the environment. The appellants' lack of evidence to the contrary demonstrates why they cannot overcome the substantial weight of deference owed the County and why, based on the *entire* record, they cannot show the County has made a clear mistake. Accordingly, TSR requests that the BOA affirm the MDNS and deny the appeal of Brose and Dunn.

² KCC 15A.07.010.1 provides that appeals must be filed within 10 working days of the decision. Accordingly, the period for filing appeals on the MDNS ended July 29, 2010. On August 3, 2010, a document purporting to be an appeal was filed with the County. This document has been added to the record (Exhibit 20), but appropriately dismissed by the County as untimely under the County Code. TSR joins the County in this dismissal, and respectfully reminds the Board that the scope of the MDNS appeal is limited by the July 26 Brose and Dunn appeal. KCC 15A.07.010.1.

³ As further explained in the Staff MDNS Report (Exhibit 12) and the Staff SEPA Appeal Report (Exhibit 17), the record before the Board has been made available to the public, including appellants, as soon as possible throughout the project's permitting processes.

B. Background

1. General Site and Project Description.

TSR proposes to construct a solar energy facility within approximately 982 acres of leased private land. The property is zoned Forest and Range, which permits solar energy facilities with conditional use approval.⁴ The site is located in a rural area approximately 4 miles northeast of Cle Elum in Township 20N, Range 16E, within Sections 22, 23, and 27. Upon completion the proposed solar facility will be capable of producing up to 75MWdc of renewable PV solar energy.⁵ The project will interconnect to the existing Bonneville Power Administration (BPA) Rocky Reach - Maple Valley Transmission Line, which crosses through the southern portion of the project site transmission lines and passes through both rural and urban areas of Kittitas County.

Although the project area is 982 acres in size, TSR will only disturb up to 477 acres, defined as the "project site" which is less than one-half of the total project acreage. The remaining acreage will remain undisturbed and will be preserved throughout the life of the project as wildlife habitat.⁶ The 477 acres will be developed to include the project's components, including two solar array fields, a substation, a transmission line, and other supporting equipment.⁷ TSR has microsituated the project's components to avoid all sensitive or critical areas and their buffers, and to further lessen any visual impacts.⁸ The project has also been redesigned so that a corridor ranging between 700-1900 between the two solar fields will remain open and undeveloped to allow wildlife, especially elk, to continue to migrate through the project site.⁹ Moreover, the solar panels will be placed in rows with approximately 8-12 feet of separation which is wide enough to also allow wildlife migration.¹⁰ Disturbed areas will be reseeded with native grasses,

⁴ See, e.g., KCC 17.61.020.4; 17.61.020.6.

⁵ Recent State legislation chapter 19.285 RCW requiring energy from renewable resources suggests there will be an increased regional demand for solar-generated energy. See, e.g., RCW 19.285.040. The Northwest Power and Conservation Council's 6th Power Plan (February 2010) ("Power Plan") at page 3-2 also predicts that regional demand for electricity will increase by approximately 7,000 average megawatts by 2030. Pursuant to the accompanying Supplemental Exhibit List, TSR asks that a copy of the Power Plan this letter be admitted into the record as Proposed Supplemental Exhibit 23.

⁶ See, e.g., Exhibit 11 (Mitigation Agreement Between Washington State Department of Fish and Wildlife and Teanaway Solar Reserve LLC, dated April 18, 2010).

⁷ See, e.g., Exhibit 7.F (Updated Site Plan – Fig. 4) and Exhibit 5.A (Figures – Figure 4).

⁸ See, e.g., Exhibit 7.D (Updated Hydrologic Report – Appendix A, Figure 3); see also Exhibit 7.E – .F.

⁹ See, e.g., Exhibit 11 (WDFW Mitigation Agreement – Exhibit A).

¹⁰ See, e.g., Exhibit 5.F.x (Attachment J - Figures Referenced in Text; Figures 4b, 4c).

and low-growing, natural vegetation will be permitted to grow in between the rows of solar panels.¹¹ Notably, of the 477 acres that will be potentially disturbed by this proposal, less than one acre will be converted to impervious surfaces.¹²

2. The Proposed Solar Review Has Undergone an Extensive Environmental Review Over the Last Year.

a. The Initial August 2009 Application.

On August 19, 2009, TSR submitted a conditional use permit ("CUP") application for the proposed solar facility.¹³ The initial application proposed to utilize approximately 580 acres of the 982 acre site. TSR also submitted a 44-page, Expanded SEPA Environmental Checklist dated August of 2009 with its CUP application.¹⁴ The Expanded SEPA Checklist included a detailed explanation of the proposal's potential impacts to each of the environmental elements identified in the checklist and required under SEPA.¹⁵ In addition to the contents of the Expanded SEPA Checklist, TSR also prepared and submitted additional studies with the expanded checklist that further assessed the potential impacts to sensitive species, wetlands, cultural resources and aesthetics:

- Sensitive Species Report;
- Wetland Delineation Report;
- Cultural Resources Report; and
- Zone of Visual Influence Memorandum.

On August 22, 2009, Kittitas County determined that the land use application was complete.¹⁶ Kittitas County issued a Notice of Application ("Notice") to County officials, state agencies, the Yakama Nation, neighboring landowners and interested parties on September 3, 2009.¹⁷ The

¹¹ See, e.g., Exhibit 11 (WDFW Mitigation Agreement), pg. 5; Exhibit 13 (MDNS), pg. 6.

¹² See, e.g., Exhibit 5.F.vi (Attachment F, pgs 5-6 & Table 2).

¹³ Exhibit 1.

¹⁴ Exhibit 1.F. See compilation of resumes of CH2MHILL contributors to the Expanded Checklist and CUP Application, requested for admittance into the record as Proposed Supplemental Exhibit 29.

¹⁵ WAC 197-11-960.

¹⁶ Exhibit 2.

¹⁷ Exhibit 4.

notice included instructions on how to comment on the proposal and where more information could be found about the proposal. The notice further informed the public that written comments must be submitted to the County by 5:00 pm on September 18, 2009.

During the comment period, the County received comments from County departments, non-county agencies, and the public. The comments expressed both support and concern for the proposal. After the close of the comment period, TSR reviewed all of the comments and submitted a draft summary of the comments to the County.

b. TSR Carefully Reviewed Comments and Redesigned its Proposal in Light of the Comments.

In February of 2010, TSR submitted a revised CUP application and Expanded SEPA Checklist in direct response to comments received during the comment period.¹⁸ The revised CUP application significantly reduced the footprint of the proposed solar reserve by reducing the amount of acres that would be disturbed from 580 acres to 477 acres.¹⁹ In preparing the February submittal, TSR carefully reviewed all of the comments received on the August 2009 submittal, and thoroughly analyzed each of the prior technical reports against the comments. As a result, TSR submitted six supplemental technical reports and studies to further analyze and address the potential impacts identified by the County, expert state agencies, Yakama Nation, and the public during the comment period including:

- A Geology and Soils Hazards Evaluation ;
- A Dust Control Plan;
- A Hydrologic Analysis;
- A Vegetation Management Plan;
- A Wildlife Mitigation Plan; and
- A Road Plan.

Each of these reports assessed potential environmental impacts from the proposed project and, if necessary, proposed voluntary mitigation measures that TSR would implement to further reduce potential impacts below a level of significance.

¹⁸ Exhibit 5. The County informed all interested parties of the February submittal, posted it on the County's website, and invited additional comments on the submitted materials (Exhibit 6).

¹⁹ See Exhibit 7.F (maps illustrating changes to site layouts between August 2009 submittal and February 2010).

Throughout the application process the County and TSR engaged a number of state expert agencies, including the Washington Department of Ecology ("Ecology"), Washington Department of Natural Resources ("WDNR"), and the Washington Department of Fish and Wildlife ("WDFW"), to review and assess the potential environmental impacts from the project, including those relating to hydrology (including runoff and drainages), air, wetlands, water quality, plants, and wildlife. These agencies were also utilized to identify additional ways to mitigate the project's environmental impacts. Working through the Office of Regulatory Assistance, TSR invited numerous representatives of WDFW, Ecology (including air, water quality, stormwater, and wetland experts), WDNR, and the County to visit the site in March 2010 to discuss the proposal, evaluate TSR's scientific studies of potential impacts and offer their recommendations to further reduce potential impacts. TSR has adopted these recommendations as voluntary mitigation measures and these measures, along with all the other mitigation measures required by Code or the County, are listed in the Staff SEPA MDNS Report (Exhibit 12).

Based on the review of the February materials by the County, state agencies, and the public, TSR also submitted additional environmental analysis and materials to the County on June 2, 2010.²⁰ The submittal included additional technical analyses, including a revised hydrology report and an analysis of the potential impacts from the transmission line's electric and magnetic fields ("EMF") on the adjacent landowners, in addition to other information requested by the County.

In addition to the extensive analysis of the project's impacts by TSR, the County, State agencies, and the public, the resulting supplemental materials, technical reports, and studies developed by TSR, and the adoption of numerous measures to mitigate the project's impacts, including lessening the overall footprint of the facility by over 100 acres and reconfiguring the site layout to further reduce visual impacts, TSR entered into agreements to further solidify its environmental commitments. On February 17, 2010, TSR, the lessors of the project area, and Kittitas County Fire Protection District No. 7 entered into an agreement for the provision of fire protection and other emergency services during the construction and operation of the project.²¹ The agreement also anticipates that the project area will be annexed into the fire district.

On April 22, 2010, TSR also executed a Mitigation Agreement with WDFW to resolve concerns raised by the agency over the project, and further reduce any environmental impacts to wildlife.²² Among other key provisions, TSR agreed to protect on-site habitat and migration corridors for elk, replace elk habitat by a ratio of 2:1, acquire up to 761 acres of off-site elk habitat for permanent protection, implement numerous design features to avoid or lessen potential impacts,

²⁰ Exhibit 7.

²¹ Exhibit 10. This is in addition to the fire protection services provided to the project area by WDNR.

²² Exhibit 11.

and ensure vegetative barriers are developed over time to lessen visual impacts. Having previously raised concerns 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, WDFW agreed that the Mitigation Agreement "addresses the mitigation that 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."

**c. After an Exhaustive Environmental Assessment of the Proposal
Kittitas County Issued a Mitigated Determination of Nonsignificance.**

After the comprehensive and extensive evaluation by local and state agencies, the Yakama Nation, and the public, as demonstrated in the record and highlighted above, the County issued the MDNS on July 15, 2010.²³ The County's analysis of the proposal and basis for the MDNS is set out in detail in its 42-page Staff MDNS Report (Exhibit 12) that specifically analyzes the project's potential impacts to each of the environmental elements identified in the Expanded SEPA checklist. TSR fully supports the detailed analysis presented in the Staff MDNS Report.

The Staff MDNS Report and Staff SEPA Appeal Report aptly explain the many reasons to conclude the County followed the SEPA procedural criteria in detail. In addition to the voluntary mitigation measures proposed by TSR, as well as those imposed by applicable laws, the County added over 55 additional conditions and sub-conditions under its SEPA authority to further reduce impacts.²⁴

Despite the exhaustive analysis conducted by TSR, the County and various state agencies, Brose and Dunn filed an appeal presenting ten unconvincing arguments why there has not been enough environmental review, why the MDNS is flawed, and why an EIS should be required. In addition to the points raised in the Staff SEPA Appeal Report, the many reasons to conclude appellants' arguments are particularly unconvincing are set forth below. Underlying Brose and Dunn's appeal are also two erroneous presumptions: (1) that the project is so large that an MDNS should be issued; and (2) that locations further away from their properties are better suited for alternative energy development. These presumptions are similarly addressed below, and the Board should not be compelled to lend them credence.

²³ Exhibit 13.

²⁴ See Exhibit 12, listing the many voluntary, Code-required, and SEPA mitigation measures.

C. Analysis of SEPA Appeal

1. SEPA Background

The State Environmental Policy Act ("SEPA"), chapter 43.21C RCW, is an environmental full-disclosure statute.²⁵ SEPA ensures that environmental factors are considered and if appropriate, mitigated through the imposition of conditions, or further evaluated through the preparation of an Environmental Impact Statement ("EIS"). SEPA does not dictate that a particular decision be reached; it simply requires that environmental values be given due consideration.²⁶

Under SEPA, the "responsible official" (here, the County) must make a threshold determination as to whether the proposal is a "major action significantly affecting the quality of the environment."²⁷ To facilitate that decision, the project proponent must complete and submit out an environmental checklist.²⁸ The responsible official must review that checklist as well as any additional information supplied and assess the projects potential to have a significant impact on the environment.²⁹ The "threshold determination" must be documented as either a determination of nonsignificance ("DNS") or a determination of significance ("DS").³⁰ Only if it is the latter must an EIS be prepared.

As an alternative, the responsible official may issue an MDNS. An MDNS involves changing or conditioning the proposal to eliminate its significant adverse impacts.³¹ The conditions may be imposed by the responsible official under his or her SEPA authority, voluntarily by the applicant, or as required by existing laws and regulations.³² An MDNS does not require the preparation of an EIS; as one court pointed out, the environmental studies and analysis leading to an MDNS can be comprehensive enough.³³

²⁵ *Norway Hill Preservation Protection Assoc. v. King County Council*, 87 Wn.2d 267, 272, 552 P.2d 674 (1976).

²⁶ *Anderson v. Pierce County*, 86 Wn. App. 290, 300, 936 P.2d 432 (1997).

²⁷ RCW 43.21C.030(2)(C).

²⁸ WAC 197-11-315.

²⁹ WAC 198-11-315(1)(a).

³⁰ WAC 197-11-310(5)(a), (b).

³¹ WAC 197-11-350; KCC 15.04.080 (adopting WAC 197-11-350 by reference).

³² *Id.*

³³ *Anderson*, 86 Wn. App. at 301.

2. Standard of Review

The standard of review governing the Board of Adjustment's consideration of the MDNS appeal is critically important. The Board must give "substantial weight" to the County's decision to issue an MDNS.³⁴ This is a highly deferential standard of review that requires that the Board to uphold the County's decision unless appellants prove that the County's decision is "clearly erroneous."³⁵ The Board may only find the decision clearly erroneous if it is left with the "definite and firm conviction that a mistake has been committed."³⁶ To prevail, the Appellants must prove that the record fails to demonstrate the County considered the relevant environmental factors in a manner sufficient to amount to prima facie compliance with the procedural requirements of SEPA and that the threshold determination was not based upon information sufficient to evaluate the proposal's environmental impact.³⁷

Accordingly, appellants' burden is a high one, and speculative arguments fall well short of the mark.³⁸ Brose and Dunn must present a sufficient amount of evidence that leaves the Board with definite and firm conviction that the proposal's impacts, as mitigated and evaluated by existing laws and regulations, rise to the level of significance.

3. The Potential Environmental Impacts Were Adequately Considered and Appellants Have not Presented any Evidence that Demonstrates that Further Study or Mitigation is Needed.

In sum, Brose and Dunn cannot meet their burden. Brose and Dunn's appeal simply questions the environmental analysis and the mitigation measures. As numerous courts in Washington have repeatedly noted, skepticism and speculation are not sufficient to overturn a decision to issue an MDNS.³⁹ Brose and Dunn present the BOA with no evidence that the proposal, as mitigated, will have a significant impact on the environment.

³⁴ WAC 197-11-680(3)(a)(viii); KCC 15.04.180 (adopting WAC 197-11-680 by reference). The high burden of "substantial weight" has led one commentator to note that "[c]hallenges to MDNS decisions are rarely successful." Settle, *State Environmental Policy Act-A Legal and Policy Analysis*, 13.01[4][f]

³⁵ *Moss v. City of Bellingham*, 109 Wn. App. 6, 13, (2001).

³⁶ *Id.*

³⁷ *See Anderson*, 86 Wn. App. at 302.

³⁸ WAC 197-11-060(4)(a) (SEPA requires attention to impacts that are likely, not speculative); *see also., Boehm v. Vancouver*, 111 Wn. App. 711, 719-20, 47 P.3d 137, 142 (2002) (lack of evidence and speculation insufficient to overturn MDNS); *Tugwell v. Kittitas County*, 90 Wn. App. 1, 12, 951 P.2d 272 (1997) (speculative impacts not within proper scope of SEPA analysis).

³⁹ *See, e.g. Anderson* 86 Wn. App. at 305.

In direct contravention to the distinctly superficial approach taken by Brose and Dunn, Kittitas County underwent an extensive and exhaustive analysis of the potential impacts. TSR prepared and submitted a 70-page Expanded SEPA Checklist that fully explained the proposal and its potential impacts to each of the environmental elements required under SEPA and listed in the checklist.⁴⁰ TSR also submitted over a dozen other technical reports and studies, which further analyzed the projects impacts and, if necessary, recommended voluntary mitigation measure to reduce the severity of the impacts.⁴¹

In their appeal, Brose and Dunn question the adequacy of that review, but notably, they do not present any site specific studies or analysis from qualified experts that would demonstrate that the proposed solar reserve, as mitigated, will have a significant affect on the environment. The letters submitted by Brose and Dunn from Mr. Jonathan Kemp are particularly unpersuasive, and unsupported by anything bearing semblance to evidence beyond skepticism and speculation. Like Brose and Dunn, Mr. Kemp simply criticizes the analysis conducted by TSR, but does not present any analysis of his own to demonstrate the studies and reports prepared by TSR are in error.⁴² Nevertheless, the specific issues argued by Brose and Dunn in their appeal, along with their erroneous presumptions, are addressed in the order they were raised.

a. Issue #1: Appellants Present No Evidence that the Proposal, as Mitigated, will Cause Significant Fire-Related Impacts, or that the County Failed to Adequately Assess Potential Fire Impacts.

Appellants contend that the MDNS is not warranted because the County did not consider the project's potential fire-related impacts. That is clearly not the case. The Kittitas County Fire Marshall's Office reviewed the proposal and submitted comments that were considered by TSR and the County.⁴³ The County's assessment of the fire risks is located on page 40 of the Staff MDNS Report. The assessment of potential fire-related impacts resulted in a number of mitigation conditions including, but not limited to:

- A service agreement with Kittitas County Fire District No. 7 to provide fire and emergency services to the property dated April 17, 2010;

⁴⁰ Exhibit 5.F.

⁴¹ *Id.*

⁴² In his December 10, 2009, Mr. Kemp asserts he has been on the project site three times since 2008. TSR also notes that it is informed by the landowner that neither appellants' nor their consultant have *ever* asked for permission onto the project site; apparently, Mr. Kemp's knowledge of actual on-site conditions is entirely from the benefit of deceit by trespassing onto private property.

⁴³ Exhibit 20.

- A condition requiring all access roads to be improved to fire code standards; and
- A condition requiring that TSR maintain a 50' cleared area around the solar field.

Appellants question this analysis on the basis that the County did not consider a second evacuation route. Yet, Brose and Dunn provide absolutely no evidence in the form of traffic studies or otherwise to refute the County's fire assessments, including the Fire Marshall's Office, or to support their implicit contention that the existing roads, once improved to fire code standards, will not be sufficient to evacuate the area in case of a fire.

Brose and Dunn's citation to *Lanzce G. Douglass, Inc. v. City of Spokane Valley*, 154 Wn. App. 408 (2010), does not help their position. That case involved the proposed development of 81 homes in a neighborhood that already had will over 1,000 homes. Moreover, the proposed development was located in area that had been identified by the County as having a high wildfire hazard and that suffered "numerous wildfires over the years" most recently in 1991. These facts are simply not present in this case.

In the case of the proposed solar facility, the area is sparsely populated and the only evidence of fire risk, albeit speculative, is Brose and Dunn's unsupported assertion that a fire may have impacted the area some 80 and 120 years ago. Moreover, TSR prepared a Transportation Road Plan concluding that the roads, once improved, will be able to accommodate the increase in traffic during construction.⁴⁴ Once construction is complete, there will be "virtually no daily traffic for operation and maintenance."⁴⁵ Accordingly, once the roads are improved, they will be able to accommodate the limited traffic demands from the project, and appellants over no evidence to refute this conclusion.

Brose and Dunn have not met their burden that fire related issues were not considered or adequately mitigated or that a secondary evacuation route is needed.

b. Issue #2: An Alternatives Analysis is Not Required for an MDNS.

Brose and Dunn also assert that an alternatives analysis is required. This argument is also misplaced. An alternatives analysis is only required as part of an EIS.⁴⁶ Here, the County has issued a comprehensive MDNS based on its consideration of the extensive record, and as

⁴⁴ Exhibit 5.F.ix (Attachment I - Transportation Plan) at pg 8.

⁴⁵ *Id.* at pg. 9.

⁴⁶ RCW 43.21C.030; WAC 197-11-440.

explained in the Staff MDNS Report, MDNS, Staff SEPA Appeal Report, and this letter, the preparation of an EIS is not warranted. Accordingly, an alternatives analysis is not required.

Moreover, Brose and Dunn misconstrue the purpose of the alternatives analysis. Brose and Dunn suggest that had an alternatives analysis been conducted TSR would have been forced to locate the facility elsewhere.⁴⁷ This is an incorrect interpretation of the alternatives analysis requirement. SEPA does not dictate a particular decision; it only requires that environmental impacts be considered.⁴⁸ Accordingly, the alternatives analysis is not a site selection tool as Brose and Dunn contend. Rather, the alternatives analysis is a means to further assess potential environmental impacts of a proposal in order to identify additional mitigation measures or project modifications that could further reduce environmental impacts while achieving the proposals' goals. Since Brose and Dunn are unable to point to any impact that has not been fully mitigated, an EIS and the alternatives analysis are not warranted.⁴⁹

c. Issue #3: Appellants Present no Evidence that the Proposal Will Not Comply with the Critical Areas Ordinance, or that the County Failed to Adequately Assess Impacts to Critical Areas.

Brose and Dunn contend that the MDNS is in error because the proposal is not consistent with Kittitas County's critical areas ordinance ("CAO"), KCC Title 17A. This is again not the case. Brose and Dunn do not point to a single portion of the proposal that is inconsistent with the CAO. Contrary to Brose and Dunn's unfounded assertions to the contrary, the proposal wholly complies with the County's CAO and was specifically designed to avoid disturbing all critical areas and their buffers as established in the KCC.

In addition to the information provided in the Expanded SEPA Checklist, TSR provided specific studies that assess the potential for impacts to critical areas. Those studies include a Sensitive Species Report, Wetland Delineation Report, Cultural Resources Report, Geology and Soils Hazards Evaluation, Hydrologic Analysis, and a Wildlife Mitigation Plan. The County reviewed all of these materials and its evaluation of the material and potential critical area impacts may be found in the Staff MDNS Report:

⁴⁷ Appellants also seem to imply it is within the scope of SEPA to require an alternatives analysis because alternative sites may be more lucrative for the project, in this case, sunnier sites with less snow. While TSR can certainly present evidence as to why appellant's assumptions are substantively incorrect, such a dialogue entirely misses the point of SEPA. The Board must decide whether the County complied with its SEPA obligations, not whether alternative sites, if they exist, present a greater likelihood of financial success.

⁴⁸ See Section C.1 *supra*.

⁴⁹ See *Anderson*, 86 Wn. App. at 305 (noting that an MDNS may actually provide more effective environmental protection than promulgation of an EIS because an EIS does not automatically require substantive mitigation).

- Steep Slopes and Soils—Staff MDNS Report at page 3-7.
- Wetlands and Streams—Staff Report at page 8-11.
- Plants and Species (including Threatened or Endangered Species)—Staff Report at page 11-20.

The County had sufficient information upon which to assess potential impacts, thoroughly evaluated the information presented, and appropriately concluded that the project, as mitigated, would not significantly impact any critical areas, including wetlands.⁵⁰

Brose and Dunn also make the rather remarkable statement that the County has not made available "any applicable analysis of potential impacts to critical areas" and then complain that they have not had the opportunity to review any such analysis. The claim is disingenuous at best. The County specifically notified Brose and Dunn of the Notice of Application and made the application, SEPA checklist, all of the technical reports and studies prepared by TSR, and other information publicly available as soon as possible throughout the project's permitting process.

d. Issue #4: Appellants Present no Evidence that the Proposal will Significantly Affect Environmentally Sensitive Areas, or that the County Failed to Adequately Assess Impacts to Sensitive Areas.

Like the other "issues" raised by appellants, their claim that TSR and the County did not properly mitigate impacts to sensitive areas is also entirely without basis. Brose and Dunn unilaterally assert that the proposal "would likely cause significant impacts to multiple sensitive areas in the vicinity" including the Teanaway River, Cle Elum Ridge and Yakima River Gorge. Yet true to appellants' unfounded approach, they point to no study, analysis or scientifically verifiable report of their own to support their own conclusion.

TSR, WDOE, and the County, on the other hand, have reviewed the potential downstream hydrology impacts in detail and as a result, have imposed conditions designed to eliminate significant impacts to downstream resources. As evidenced in the record, TSR submitted a number of studies and plans to assess potential impacts to critical areas and "sensitive" areas.⁵¹

⁵⁰ The County's assessment was also based on the extensive review of the project, including several site visits, by non-County expert agencies, including WDOE. *See e.g.*, compilation of correspondence with WDOE regarding TSR's wetlands analysis. Pursuant to the accompanying Supplemental Exhibit List, TSR asks that a copy of the compiled correspondence be admitted into the record as Proposed Supplemental Exhibit 24.

⁵¹ *See, e.g.*, Exhibit 5.F.i (Sensitive Species Report), .ii (Wetland Delineation Report), .iv (Geology and Soil Hazards Evaluation), vi (Hydrologic Analysis), viii (Wildlife Mitigation Plan); and Exhibit 7.D (Updated Teanaway Solar Reserve Hydrologic Analysis Report).

Brose and Dunn list several "sensitive areas" and express their skepticism over whether the potential impacts were analyzed enough. For example, they claim that aspen stands needs to be "better characterized"); streams "appear" to be intermittent; question the accuracy of the wetland study; and claim amphibians "may" be present within the project site.⁵² Brose and Dunn, however, have not presented and studies or reports of their own to support or confirm these suspicions. Skepticism and speculation is not sufficient to overturn the County's SEPA decision. Brose and Dunn have presented no direct evidence that the proposal, as mitigated, will have a significant impact on sensitive areas and fail to meet their burden.

e. Issue #5: Appellants Present no Evidence that the Proposal will Violate Federal Wildlife Laws, or that the County Failed to Adequately Assess Potential Wildlife Impacts.

Brose and Dunn assert that the County has failed to ensure compliance with wildlife laws. First, the issue of whether the proposal complies with other applicable laws is not properly before the Board. In fact, WAC 197-11-158 allows the Responsible Official to rely upon compliance with applicable laws in reviewing a proposal's environmental impacts and rendering a threshold determination, including a MDNS.

Second, even if the issue were properly before the Board, which it is not, Brose and Dunn again fail to present any direct evidence with respect to how this proposal will violate federal law.⁵³

Third, wildlife experts have extensively reviewed this project, and none have raised any such concerns.⁵⁴

f. Issue #6: Appellants Present no Evidence that the Proposal will Affect Water Resources, or that the County Failed to Adequately Assess Potential Fire Impacts.

TSR, the County, and WDOE have carefully assessed the project's potential impacts to the hydrology. Using the U.S. Army Corps of Engineers HEC-HMS 3.1.0 software, a model was

⁵² Brose and Dunn Letter of Appeal, pg. 8-9.

⁵³ TSR does not, of course, accept appellants' legal interpretations regarding the scope of the federal laws they cite, or the events and proof necessary to require a permit or approval under those laws, or constitute any sort of "violation," prospective or otherwise. Such blanket recitations offer nothing of substance and are wholly irrelevant to this proceeding. Nor should it be necessary to explain to appellants that the types of decisions and conclusions they raise under the cited federal laws decisions reside within the absolute prosecutorial discretion of the federal agencies that administer and enforce those laws.

⁵⁴ See, e.g., Exhibit 11 (Mitigation Agreement Between Washington State Department of Fish and Wildlife and Teanaway Solar Reserve LLC, dated April 18, 2010).

created to simulate the proposed site conditions. The models were then used to determine pre- and post-development peak rainfall runoff rates and volumes for 2-, 10-, and 100-year 3-hour storm events and 10-, 25-, and 100-year, 24-hour storm events. The pre- and post-development runoff rates were then compared to determine the hydrologic impact of the development and it was determined by WDOE that once stormwater controls are installed significant stormwater impacts from construction and operation of the Teanaway Solar Reserve facility are not expected.⁵⁵

Using the Center for Watershed Protection's methodology presented in the Stormwater Management Manual for Eastern Washington in Section 4.2.7: Rain-on-Snow and Snowmelt Design, an analysis was also completed to determine the pre- and post-development rain-on-snow volumes and it was determined by WDOE the magnitude of runoff from a rain-on-snow event is not expected to significantly increase as a result of the project.⁵⁶

TSR has carefully sited and designed its project to maintain existing grades. Moreover, before construction may commence, TSR must apply for an individual State Wasted Discharge and National Pollution Discharge Elimination System ("NPDES") permit. As part of the NPDES permit, TSR will have to design, construct, and maintain stormwater retention devices. Those stormwater retention devices must be designed to prevent any increased water runoff.

g. Issue #7: Appellants Present no Evidence that Meaningful Tribal Consultation Has Not Been Completed.

Brose and Dunn simply have their facts wrong. The County sent notice of the application and SEPA checklist to state agencies and specifically to the Yakama Nation which has submitted comments on the proposal.⁵⁷ These comments have been considered and, as appropriate, incorporated as conditions for the project.⁵⁸ Tribal consultation has been extensive, the Yakama Nation did not appeal the MDNS, and the County wholly fulfilled its tribal consultation

⁵⁵ See compilation of correspondence with WDOE regarding TSR's hydrologic analysis. Pursuant to the accompanying Supplemental Exhibit List, TSR asks that a copy of the compiled correspondence be admitted into the record as Proposed Supplemental Exhibit 25.

⁵⁶ See *id.*

⁵⁷ Exhibit 20.

⁵⁸ Exhibit 12 at pg. 35 (shovel testing on site will be conducted). Other issues raised in the letter dated August 6, 2010 from the Yakama Nation regarding sensitive species and priority habitats offer no evidence of unidentified or unmitigated SEPA impacts. Moreover, TSR is surprised the letter arrived so late in the permitting process, especially in light of the numerous failed attempts by the County and TSR to speak with the Tribe about any concerns it may have. TSR has prepared a compilation of its attempts to speak with the Tribe about any concerns it may have regarding the project. Pursuant to the accompanying Supplemental Exhibit List, TSR asks that a copy of compiled emails to the Yakama Nation be admitted into the record as Proposed Supplemental Exhibit 26.

commitments and obligations. Even the August 6, 2010, letter from the Yakama Nation does not contend that they were not properly consulted.

h. Issue #8: Appellants Present no Evidence that the Proposal will Set Precedence.

Brose and Dunn also complain that an EIS is warranted because the County failed to consider how this project might establish a precedent for future actions in other counties. Again, the contention is without merit and is insufficient to reverse the MDNS.

As previously noted, the proposed solar facility is permitted as a conditional use in the current zoning district. The project does not establish any new precedent that is not already permitted by the Kittitas County Zoning Code. As the County Staff Report notes, Kittitas County planning staff reviews each application on a case-by-case basis, and approval of one project does not establish a precedent for approval of other similar projects. Rather, the County, as is required by the County Code, reviews each application independently based upon the application and site-specific characteristics.

Brose and Dunn point to no evidence to support their self-serving conclusion that approval of this project will create a precedent for approval of other projects in this or any other county.

i. Issue #9: Appellants' Other Concerns Are Equally Specious and Unsupported by Evidence.

Like the other issues identified in the appeal, the "other concerns" raised by Brose and Dunn lack any specific evidentiary support, are wholly contrary to the record, and are not sufficient to overcome their high burden.⁵⁹ TSR did commission a Cultural Resources Survey that, pursuant to state law, must remain confidential.⁶⁰ Moreover, the Cultural Resources Survey was forwarded to the Yakama Nation which has not expressed concern over the proposal's plans to address the discovery of any culturally significant artifacts during construction.⁶¹

Brose and Dunn present no evidence that this proposal will have an impact on carbon emissions. TSR agrees with the County's points in the Staff SEPA Appeal Report regarding the lack of any

⁵⁹ In fact, it appears that appellants simply copied this entire section from the Enco Letter dated March 17, 2010.

⁶⁰ See, e.g., RCW 42.56.300; RCW 27.53.070. Appellants' insistence on removing this protection and freely disclosing the contents of the Cultural Resources Survey to the public in disregard of the necessities of protecting this information only further undermines the credibility of their purported expertise and claims.

⁶¹ In the event cultural artifacts are discovered TSR is required to stop all work in the area of the discovery until a qualified archaeologist can assess the site and determine whether protective measures should be implemented. See Exhibit 12 at pg. 35.

federal, state, or local standards or requirements to assess the significance of such impacts. TSR does note, however, that it voluntarily committed itself to replace the trees removed from the site on a 3:1 basis. Moreover TSR will reseed land areas disturbed; will maintain a large, undeveloped open corridor between the solar fields; will preserve approximately 193 acres under a conservation easement; will acquire and preserve approximately 761 acres in off-site habitat; and will at the end of the project restore the area to its preconstruction conditions under a decommissioning plan secured by a bond.⁶² Even if the impacts to carbon sequestration were capable of being quantified, which they are not, this proposal more than offsets whatever potential impact the proposal could have on carbon emissions and sequestration.

Brose and Dunn again contend that other sites—that are not in a location that they consider as "their backyard"—would be better for this proposal. Again, SEPA does not provide a mechanism to choose one site over another. It only requires that the potential environmental impacts on the chosen site be adequately considered and, if necessary, mitigated.

Brose and Dunn also recite their concerns over impacts to wildlife habitat which have been addressed above. Brose and Dunn also contend, without meaningful support or evidence, that in their experience (and it is not clear what the experience is) decommissioning of a site is not successful. TSR has committed to restoring the site after the project is terminated under an approved plan, and will provide a performance bond to the County in the amount 110% of the estimated costs to decommission the site.⁶³ On that basis they contend that a different site will "fewer natural environmental features" should be chosen. As is explained above, SEPA is not a site selection tool.

j. Issue #10: Appellants Present no Evidence that the Proposal Creates the Need for Cumulative Impacts Analysis.

A cumulative impacts analysis need only occur when there is some evidence that the project under review will facilitate reasonably foreseeable future actions that will result in additional impacts.⁶⁴ Brose and Dunn present no evidence that this project will facilitate any future actions that will result in additional impacts that need to be considered.⁶⁵ Appellants also assert that the MDNS is in error because of the cumulative impacts of each of the issues they raise in their appeal. Yet, as explained above, Brose and Dunn present no evidence or analysis of any kind that the project, as mitigated, will create any probable significant adverse environmental impacts,

⁶² See Exhibit 12, pg. 11-15.

⁶³ Exhibit 13, pg. 6 (Section IV.5.r).

⁶⁴ *Boehm v. Vancouver*, 111 Wn. App. 711, 720, 47 P.3d 137, 142 (2002).

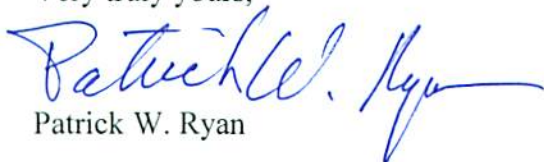
⁶⁵ See also Exhibit 8.

or that those less than significant impacts collectively rise to a level of significance. Although appellants generally complain of a failure to identify and mitigate adverse impacts they present *no* evidence that this project, as mitigated, has or will have any probable significant impacts on the environment.

D. Conclusion.

TSR, the County and State agencies have spent the better part of a year thoroughly assessing the project's potential environmental impacts and creating mitigation measures that will ensure that the proposed solar facility will not have a significant impact on the environment. Appellants have presented no compelling argument, reason, or evidence sufficient to overturn the County's MDNS. We join the County, and respectfully request the Board of Adjustment to deny the SEPA appeal filed by Mr. Brose and Ms. Dunn.

Very truly yours,



Patrick W. Ryan

cc: Dan Valoff, CDS Staff Planner
Anna M. Nelson, Land Use Planner
Nichole Seidell, CH2MHill
Howard Trott, Teanaway Solar Reserve, LLC