KITTITAS COUNTY

LAND USE HEARING EXAMINER

In Re:	)	
	)	**CU 15-00006**
IRON HORSE SOLAR FARM	)	
	)	**APPELLANT'S RESPONSE**
	)	**MEMORANDUM REGARDING**
	)	**SEPA APPEAL**
	)	

"Save Our Farms! Say No to Iron Horse" ("Save Our Farms" or "Appellant") provides this response to OneEnergy Renewables ("OneEnergy" or "Applicant") Opening Legal Argument re Appeal of SEPA MDNS ("OneEnergy Response").

I. INTRODUCTION

This project proposal and process is of extraordinary significance to this community. OneEnergy has proposed the "largest photovoltaic solar farm in the State of Washington". The project proposes conversion of 68 acres of "prime farmland" to pervasive industrial land usage. The process followed and decision issued with respect to Iron Horse Solar Farm will be of significant precedence to other solar farm applications.[1] The project proposal has received unprecedented community opposition and comment. The magnitude of the proposal will not only remove significant "prime farmland" but will transform the rural character of the area. While

[1] The administrative record references an additional 40 acres solar development proposed within the Agriculture-20 zoning district. (Index #29 241-242). TUUSSO Energy, LLC commented with respect to a proposed 5 MW solar power project located on approximately 40 acres of property zoned Agriculture-20. Kittitas County has reviewed 2 prior solar farm project applications: (1) Teanaway Solar Reserve (CU-09-00005); and (2) Osprey Solar Farm Conditional Use Permit (CU-13-00004). Osprey Solar Farm was a much smaller project proposing a 13.6 acre photovoltaic solar powered generation facility. Project was located within the Agriculture-20 zoning district but did not include prime farmland and had significant buffering between the proposed project and adjacent land uses. There was minimal adverse comment with respect to the Osprey Solar Farm application.

these considerations are integral components of the conditional use review, they are also significant considerations in the environmental review process.

Save Our Farms has appealed Kittitas County's issuance of the Mitigated Determination of Nonsignificance (MDNS) for the Iron Horse Solar Farm Project. Environmental review recognized the presence of significant adverse impacts with the Iron Horse MDNS including 36 separate conditions intended to bring the project below a level of environmental significance. (Index #110). The conditions were developed following the close of the comment period and without the benefit of public comment. None of the conditions of mitigation measures were a part of the environmental record available for public comment. The public was denied the opportunity to comment because of the review process implemented by the County.

The environmental appeal addressed two separate but related components of the environmental threshold determination process: (1) compliance with procedural mandates for project environmental review; and (2) the basis and record for "threshold determination" issued by the SEPA Responsible Official. SEPA is our state's "environmental full disclosure law." Land use decisions are to be made by "deliberation, not default." And an integral component of the environmental review process is full and meaningful participation by both the public and agencies with jurisdiction. The process utilized in this proceeding deprived the public of legitimate opportunity to comment upon accumulated environmental information and mitigation concepts.

II. FACTUAL BACKGROUND AND RECORD

OneEnergy Resources submitted an application for approval of a photovoltaic project known as Iron Horse Solar ("Project"). The application proposed conversion of 68 acres of prime farmland into "...the largest solar farm in the State of Washington." The proposal is categorized under local ordinance as a "major alternative energy facility." KCC 17.61.010(9). And the project is viewed as precedential for significant solar farm projects within rural and agricultural

areas.[2] The process and analysis applied in this proceeding is of considerable significance to the community.

To begin, this project has drawn unprecedented opposition from the community. There can be no serious question about the significant impact of this large project on prime farmlands and the adjoining neighborhood. A proposal to cover 47.5 acres of prime farmland with photovoltaic panels, will fundamentally change the environment. It is interesting that OneEnergy failed to produce any photographic or simulated impression of the developed project.[3] The project proposes 100 percent lot coverage over 47.5 acres. Rather than include meaningful information on potential impacts at an early stage, OneEnergy has attempted to bolster its record with supplemental submissions on a variety of critical elements. (Index #98). [4] The practical result is the elimination of the public from the environmental from the environmental comment process. The public did not have an opportunity to address the "new information" or weigh in on a plethora of mitigation measures.

A significant consideration in the environmental appeal relates to the process utilized in the context of supplemental environmental submissions. Kittitas County chose to utilize the "Optional DNS Process" which limits agency and public comment on the environmental record to a single comment period. Agency and public comments are based upon the environmental documents available for review during the applicable comment period. In this case, OneEnergy Resources engaged in a procedural "bait and switch" process which resulted in the submission of

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[2] See comments from TUUSSO Energy regarding development of a 5 MW solar farm within the Agriculture-20 zoning district. (Index #29 241-242). The processes, procedures and determinations made in this proceeding will have direct impact on subsequent applications and potential conversion of rural farmlands.

[3] Comments from Craig Clerf and Patricia Clerf included photographs of existing lands with the proposed project improvements. (Index #54159-166). The project will result in a sea of solar panels covering 47.5 acres. This is an extraordinarily large project with literally 100 percent lot coverage. Zoning ordinances typically address matters of scale and size in the context of "lot coverage" standards. This project proposes 100 percent lot coverage for 47.5 acres. As an example, KCC 17.18.040 establishes a maximum lot coverage of 30 percent (30%) within the Residential Zone. A proposal for 100 percent lot coverage in a rural area is the antithesis of ordinance directives to "preserve rural character".

[4] Appellants will be prepared comparability of the referenced land uses in the context of the appeal hearing. None of the referenced uses are remotely applicable to this project proposal. Greenhouses and barns cover a minimal land area and the referenced gravel excavation operation is not located in an area containing prime farmland. We would suggest, however, that a gravel excavation operation covering 47.5 acres would be viewed as significant for purposes of aesthetics compatibility with a rural environment.

significant new environmental information after the close of the comment period. (Index #98). OneEnergy provided the following comment in the context of the supplemental submission:

> OER recognizes the volume of comments received during the public comment period and is furnishing additional information to support the project application and address areas of public concern. The purpose of the enclosed documentation is to ensure that the record reflects OER's response to the comments received by Kittitas County Community Development Services ("KCDS").

(Index #98 46). Neither agencies nor the public were allowed to review or comment on the significant new information and supplemental materials. An additional problem is that Kittitas County improperly deferred and delegated environmental review and decision-making to State of Washington Department of Fish and Wildlife ("WDFW"). Following the close of the comment period, WDFW submitted additional comments which included the following:

> This correspondence is requested by OneEnergy to be sent to Kittitas County that OneEnergy and WDFW is proceeding with working together to resolve issues that we raised in our June 6, 2016 letter to the county. We will be coordinating further on the riparian planting plan, vegetation restoration plan and incidental avian monitoring plan. WDFW will review the updated exhibits C and G that OneEnergy provided to WDFW on July 13 and on submitting comments back to OneEnergy by the end of next week, July 22, 2016.

(Index #98 69). The correspondence reflects updating of exhibits to the environmental documents as well as development of riparian planting plans, avian monitoring plans and vegetation management plans. Each of these plans has significant impacts on farming operations. More importantly, however, is the fact that these materials and plans were not made available for public review and comment. This is the antitheses of "full disclosure" as contemplated and required under SEPA.

The elimination of public comment is exacerbated by the issuance of the threshold determination. Kittitas County issued its Mitigated Determination of Nonsignificance (MDNS) on August 10, 2016 (Index #110). The MDNS includes 36 conditions designed to bring the project below the level of environmental significance. None of the mitigation measures were incorporated into a revised environmental checklist or permit application as required by WAC

197-11-350(2). More significantly, the "optional DNS process" is not available for threshold determinations involving issuance of a MDNS. KCC 15.04.120(3) requires public notice and a 14-day comment period. The public and commenting agencies were entitled to review and comment upon the new information and proposed mitigation measures. The review process implemented for the project denied the public these fundamental rights and resulted in a flawed environmental analysis.

The problem with new and supplemental information is exacerbated by OneEnergy's submission to hearing examiner dated September 22, 2016. That submission included a "Glare Definition Calculation" dated August 18, 2016. The analysis purported to evaluate the presence of "disabling glare" at various locations. This study is subject to significant questions and concerns with respect to methodology, evaluation standards and environmental impacts. This information should have been included in the original environmental review materials and available for public comment.

The environmental review process has turned environmental review upside down. SEPA contemplates "full disclosure" and analysis of environmental impacts at the outset of the land use review process. The purpose of agency and public comments is to provide balanced input on environmental impacts in order that the decision makers can make informed land use decisions. By eliminating one half of the environmental review process (i.e. agency and public comment on significant environmental information), the decision makers deprived of full and complete comment and environmental analysis. SEPA Responsible Official is mandated with the responsibility of assuring acquisition of complete and sufficient environmental information as a prerequisite to final decision making processes. That process has failed in this case.

III. ARGUMENT AND AUTHORITIES

OneEnergy has engaged in a process of back-filling a deficient environmental record with supplemental and new information. The first came with post-comment submission of supplemental materials. (Index #98). The latest is a "Solar Glare Hazard Analysis Report" generated June 30, 2016 and published on August 18, 2016. This new information related to some of the most critical issues in this appeal – e.g. light and glare, impact on farmlands, noise and similar issues. SEPA did not contemplate environmental decision-making to be conducted

behind closed doors. Review was intended to be transparent with both agencies and the public afforded the right and responsibility to comment prior to threshold determinations and action on the underlying project applications. This right was denied in the present case.

A. Legal Standards Governing Review of Mitigated Determinations of Nonsignficance.

The courts have established a relatively complete set of rules for review of environmental threshold determinations. The review of threshold decisions involving mitigated determinations of nonsignificance (MDNS) involve review of both *procedural* compliance and the substantive threshold determinations. SEPA's purpose is to require consideration of environmental factos at the earliest possible stage in order to assure decision-making based on complete and sufficient environmental information. See e.g. *Lanzce G. Douglass, Inc. v. City of Spokane Valley*, 154 Wn. App. 408 (2010). An integral component of the SEPA review process is agency and public comment. WAC 197-11-500 et seq. WAC 197-11-502 (3)(b) establishes a general procedure for public comment on DNS's. An optional procedure may be utilized under WAC 197-11-355.

To begin, this case involves the issuance of a mitigated determination of nonsignificance. The court in *Anderson v. Pierce County,* 86 Wn. App. 290, 301-02 (1997) summarized the MDNS process as follows:

> An alternative threshold determination is the "mitigated determination of nonsignificance," or "MDNS," which involves changing or conditioning a project to eliminate its significant adverse environmental impacts. WAC 197-11-350. With a MDNS, promulgation of a formal EIS is not required, although, as here, environmental studies and analysis may be quite comprehensive. *An applicant may clarify or change a proposal by revising the environmental checklist and permit applications so that an MDNS can be issued for the revised project.* WAC 197-11-350(2). Alternatively, the governmental agency may specify mitigation measures and issue an MDNS only if the proposal is changed to incorporate those measures. WAC 197-11-350(3).[5]

[5] WAC 197-11-350 sets forth the regulatory guidelines with respect to a MDNS. The primary rules are as follows:

> The purpose of this section is to allow clarifications or changes to a proposal prior to making the threshold determination.

The implementation of mitigation measures requires revision of the environmental checklist and permit application. This is significant because the environmental checklist is the primary environmental document that serves as a basis for both agency and public comment as well as the ultimate threshold determination. The procedural requirements are clear and unambiguous.

The decision to issue an MDNS "is left to the sound discretion of the appropriate governing agency." *Anderson,* 86 Wn. App. at 302. While the decision to issue an MDNS is left to agency discretion, there is no discretion in application of procedural requirements with respect to SEPA. Those procedures are set forth in both the SEPA rules as well as county ordinance. Kittitas County has the burden of establishing "prima facie compliance with the procedural dictates of SEPA." *Ansderson v. Pierce County*, 86 Wn. App. 290, 302 (1997). In order to facilitate a "threshold decision", the applicant must prepare an environmental checklist which must provide information reasonably sufficient to evaluate the environmental impact of the proposal. *Anderson,* 86 Wn. App. at 301. The environment checklist is at the heart of the review process. SEPA is a legislative pronouncement of our state's environmental policy. It recognizes "the necessary harmony between humans and the environment in order to prevent and eliminate damage to the environment and biosphere, as well as to promote the welfare of humans and the understanding of our ecological systems." *Stempel v. Department of Water Resources*, Ed. 2 Wn. 2d 109, 117 (1973). While SEPA does not demand a particular substantive result in government decision-making, SEPA does require that "environmental amenities and values be

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> (1) In making threshold determinations, an agency may consider mitigation measures that the agency or applicant will implement.
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> (2) After submission of an environmental checklist and prior to the lead agency's threshold determination on a proposal, an applicant may ask the lead agency to indicate whether it is considering a DS. If the lead agency indicates a DS is likely, the applicant may clarify or change features of the proposal to mitigate the impacts which led the agency to consider a DS likely. *The applicant shall revise the environmental checklist as may be necessary to describe the clarifications or changes.* The lead agency shall make its threshold determination based upon the changed or clarified proposal. If a proposal continues to have a probable significant adverse environmental impact, even with mitigation measures, an EIS shall be prepared.

(Italics added).

given appropriate consideration in decision making along with economic and technical considerations." *Anderson*, 86 Wn. App. at 300.

Under SEPA, before local government processes a permit application for a private land use project, it must make a "threshold determination" of whether the project is a "major action significantly affecting the quality of the environment." RCW 43.21C.030(2)(c). The responsible official must thoroughly consider a proposal's potential environmental significance as documented in the environmental checklist. *Anderson*, 86 Wn. App. at 301. SEPA distinguishes between procedures applicable to DNS and those procedures applicable to MDNSs. WAC 197-11-350 sets forth rules for the issuance of an MDNS. Kittitas County has supplemented these rules with additional ordinance requirements. KCC 15.04.120. A MDNS specifically requires issuance of the MDNS under WAC 197-11-340 which requires a 14-day comment period. KCC 15.04.120(3).

The courts have established standards for review of threshold determinations involving mitigated determinations of nonsignificance.

> For the MDNS to survive judicial scrutiny, the [lead agency] must demonstrate that it actually considered relevant environmental factors before reaching that decision. Moreover, the record must demonstrate that the [lead agency] adequately considered the environmental factors "in a manner sufficient to be prima facie compliance with the procedural dictates of SEPA." *Lassila,* 89 Wn.2d at 814, 576 P.2d 54; *See also Anderson,* 86 Wn. App. at 302, 936 P.2d 432. Further, the decision to issue an MDNS must be based on information sufficient to evaluate the proposal's environmental impact. *Anderson,* 86 Wn. App. at 302, 936 P.2d 432; WAC 197-11-335.

Boehm v. City of Vancouver, 111 Wn. App. 711, 719 (2002). Kittitas County bears the burden of establishing "…prima facie compliance with the procedural dictates of SEPA." Appellant's challenge is to both procedural compliance and the substantive threshold determination.

Neither Iron Horse nor Kittitas County followed established process. Iron Horse did not revise the environmental checklist or identify mitigation measures necessary to reduce project impacts below the level of environmental significance. The MDNS was not circulated for public comment. Neither commenting agencies nor the public had an opportunity to review or comment upon mitigation measures either before or after the issuance of the MDNS. The

significance of the procedural error is that neither consulting agencies nor the public were given an opportunity to address the purported mitigation conditions.

B. Kittitas County Failed to Follow SEPA Procedures Regarding New Information and MDNS Processes.

At the heart of this SEPA appeal is the public's right to comment on new environmental information and adopted mitigation measures.

> The law does not bar OneEnergy from submitting information responsive to public comments, especially under SEPA, where the County may continue to consider information to determine whether to issue an MDNS, or potentially require an EIS. Neither SEPA nor Ch. 36.70B RCW is intended to stifle the opportunity for OneEnergy to continue its efforts with the County to lessen environmental impacts, clarify the development proposal, or offer and agree to additional mitigation measures that may be part of an MDNS or permit conditions.

Applicant's Response – 13. The issue is not whether OneEnergy can supplement its environmental submissions but rather whether the submission of "new information" or "supplemental information" give rise to an obligation to reopen the application for agency and public comment. The courts have recognized that the procedural provisions of SEPA constitute and environmental full disclosure law. *Norway Hill Pres. & Prot. Ass'n v. King County Counsel,* 87 Wn.2d 267, 272 (1976). The procedural duty as been summarized as follows:

> The procedural duties imposed by SEPA – full consideration to environmental protection – are to be exercised to the fullest extent possible to ensure that the "attempt by the people to shape their future environment by deliberation, not default" will be realized.

Klickitat County Citizens Against Imported Waste v. Klickitat County, 122 Wn.2d 619, 640 (1993); *Eastlake Community Council v. Roanoke Associates, Inc.,* 82 Wn.2d 475, 490 (1973). An integral component of the review process is public and agency comment. WAC 197-11-500 (providing that the public must be given the opportunity for consultation and comment on environmental documents). See also, *Klickitat County Citizens Against Imported Waste,* 122 Wn.2d at 636. These rights are a matter of procedural compliance.

1. **Agencies and Public are Entitled to Comment on New Information and Proposed Mitigation Measures.** Kittitas County utilized the "optional DNS process" of WAC

197-11-355. The record is uncontroverted that OneEnergy submitted significant new information and analysis subsequent to the close of a public comment period. Kittitas County then issued an MDNS with 36 specific conditions.[6] The MDNS was not circulated for public comment.

Iron Horse begins with an inconsistent and incongruent argument with respect to the threshold determination process and impact of new or supplemental information. The argument attempts to split hairs in terminology and neglects the substance of the regulatory authority. The argument is as follows:

> The appellants' appeal rests on a misapplication and misquote of the applicable SEPA rules, relating to how the MDNS process works. Purporting to quote WAC 197-11-340 (which explicitly applies to DNSs, not to the MDNS process), the Appellants slip in an "M" into the quoted language before "DNS," evidently to convince the reader that this rule applies to MDNSs. WAC 197-11-340 does not apply to the MDNS process. It refers to the DNS process, not the MDNS process. This is a material issue, and this deficiency in the appellants' argument undermines their appeal.

OneEnergy Response – 3. OneEnergy's argument is that the regulatory guidance regarding new information in the threshold determination process applies only to a DNS. It is argued that the principals do not apply to a MDNS. The hair-splitting over technicalities ignores the substantive purpose of the obligation.

WAC 197-11-340 deals with a situation where there are either substantial changes in a proposal or "...significant new information" with respect to probable significant adverse environmental impacts. The substance of the rule is that "new information" may give rise to reinstitution of the environmental review process so that agencies and the public have reasonable opportunity to comment upon the "new information". The rule is mandatory – "shall" – and requires an agency to make "...a new threshold determination and notify other agencies with jurisdiction of the withdrawal and new threshold determination." WAC 197-11-340(3)(c).

The essence of Iron Horse's argument is that the regulations do not allow for reinstitution of the review process because of "new information" where the threshold process yielded a

[6] It is significant that the MDNS improperly transferred lead agency responsibility to WDFW with respect to development of an avian monitoring plan, vegetation management plan and riparian planting plan. (Index #110-Conditions 2, 15 and 17.).

Mitigated Determination of Nonsignificance (MDNS). This argument makes little sense. The essence of the MDNS process is "mitigation" of acknowledged significant adverse impacts based upon information available to the SEPA Responsible Official. The subsequent acquisition of "new information" should raise even more questions with respect to the threshold determination and invite agency and public comment.

2. **Optional DNS Process Not Available Followed For MDNS.** Iron Horse argues that WAC 197-11-340 applies only to DNSs because the regulation refers only to "DNSs". Kittitas County adopted supplemental ordinance provisions related to "Mitigated DNS." KCC 15.04.120. The adopted ordinance provisions specifically require distribution of the MDNS with a fourteen-day comment period and public notice. KCC 15.04.120(3) specifically provides:

> 3. A mitigated DNS is issued under WAC 197-11-340(2) requiring a fourteen-day comment period and public notice.

The "optional DNS process" is not available where there is issuance of an MDNS. Kittitas County violated its specific ordinance requirements with respect to comment and public notice.

Second, the SEPA Responsible Official has authority under WAC 197-11-355(4) to allow further public comment. Kittitas County erroneously denied a second comment period. Kittitas County's process was contrary to established procedures.

Third, the lynchpin for environmental review is the environmental checklist. WAC 197-11-355 requires that the environmental checklist be revised to incorporate proposed mitigation measures. The use of the "optional DNS process" mandates circulation of the environmental checklist with a revised notice of application. WAC 197-11-355(2)(d). Kittitas County failed to revise the environmental checklist as required by WAC 197-11-350. The MDNS process requires clarification and changes together with revisions of "...the environmental checklist as may be necessary to describe the clarifications or changes." Iron Horse did not follow this procedure and the Environmental Checklist contains no specific indication with respect to project mitigation in the context of environmental review. The issuance of an MDNS triggers a second SEPA comment period and opportunity for agencies and the public.

OneEnergy makes the following argument with respect to opportunity to comment.

> The comment deadline is statutory, intended to enable the local decision-maker to make its decisions informed by the public, other agencies, and the applicant. However, nothing in either SEPA or RCW 36.70B.110 prohibits the County from continuing to engage the public, other agencies, or OneEnergy in undertaking its responsibilities for informed environmental and regulatory review of development permit applications.
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> *The law does not bar OneEnergy from submitting information responsive to public comments, especially under SEPA, where the County may continue to consider information to determine whether to issue an MDNS, or potentially require an EIS. Neither SEPA nor Ch. 36.70B RCW is intended to stifle the opportunity for OneEnergy to continue its efforts with the County to lessen environmental impacts, clarify the development proposal, or offer and agree to additional mitigation measures that can be made part of an MDNS or permit conditions.*

OneEnergy Response 12-13. This statement is correct to a degree. What is missing from the argument is the fact that OneEnergy failed to follow the process required for issuance of an MDNS – WAC 197-11-355. The environmental checklist was not revised to include additional information or project clarifications. WAC 197-11-355 provides the option for additional comment and such comment is appropriate under the circumstances.

3. **Kittitas County Failed to Comply with WAC 197-11-350 Regarding Mitigated Determination of Nonsignificance.** Kittitas County issued a MDNS for the project. That process is subject to specific procedures. WAC 197-11-350(2) provides:

> (2) After submission of an environmental checklist and prior to the lead agency's threshold determination on a proposal, an applicant may ask the lead agency to indicate whether it is considering a DS. If the lead agency indicates a DS is likely, *the applicant may clarify or change features of the proposal to mitigate the impacts which led the agency to consider a DS likely. The applicant shall revise the environmental checklist as may be necessary to describe the clarifications or changes. The lead agency shall make its threshold determination based upon the changed or clarified proposal.* If a proposal continues to have a probable significant adverse environmental impact, even with mitigation measures, an EIS shall be prepared.

(Italics added). OneEnergy did not follow this process. The environmental checklist was not revised in a manner necessary to describe the clarifications or changes.

4. **Kittitas County improperly transferred lead agency authority to WDFW.**

A significant consideration in the environmental review and mitigation process was development of avian monitoring plan, riparian planting plan and vegetation management plan. Kittitas County established three (3) conditions within the MDNS that transferred responsibility for environmental compliance to WDFW. The conditions were as follows:

> 2) The applicant shall develop a Riparian Planting Plan in conjunction with and approved by Washington State Department of Fish and Wildlife (WDFW).
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> 15) The applicant shall develop and Incidental Avian Monitoring Plan in conjunction with, and approved by, the Washington State Department of Fish and Wildlife (WDFW). The plan and program shall be required to be in effect for a period of five years. The plan will designate thresholds and metrics to establish if additional monitoring is required beyond the period of five years.
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> ***
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> 17) The Vegetation Management Plan submitted as Appendix C within the Project Narrative shall be utilized as the foundational document for mitigation measures with respect to Vegetation Management, Weed Management, and Fire Protection. Final approval of the Conditional Use Permit will be subject to the approval as adjusted by the WDFW and the applicant for vegetation management, and the Kittitas County Noxious Weed Board and the applicant for weed management is noted in supplemental discussions, comments, exhibits, and submissions.

These plans should be disclosed and available for public comment within the environmental review process. More significantly, the determination and implementation of mitigation measures with respect to a "major alternative energy facility" rests with Kittitas County and those responsibilities may not be delegated or assigned to other agencies. It is imperative that the environmental and project review processes retain jurisdiction with Kittitas

County and are subject to comment and public participation rights by those impacted by the land use decision

C. Iron Horse Incorrectly Argues That "Appellants Had A Full and Fair Opportunity To Comment on the MDNS."

Iron Horse makes a straight forward argument that Appellants "...had a full and fair opportunity to comment on the MDNS." The argument is as follows:

> Apparently, this argument boils down to a contention that OneEnergy may not continue to respond to questions raised by the public or an agency after the Notice of Application is issued and ***before the SEPA environmental decision is issued.*** There is no authority for this proposition, and appellants (now represented by competent legal counsel) were clearly not deprived of any opportunity to fully participate in the public process, to provide comment, or to pursue this appeal.

OneEnergy Response – 12. This argument fails on a number of levels.

First, neither agencies nor the public had an opportunity to "comment on the MDNS" since the MDNS was issued after the close of the comment period. The administrative record and environmental documents (including environmental checklist) available during the comment period contained no information, proposals or mitigating conditions. In fact, the Notice of Application states that Kittitas County "expects to issue a Determination of Non-Significance (DNS) for this proposal." There was simply no discussion of any mitigation for the project. All facts and proposals regarding mitigation occurred after the close of the comment period.

Second, Iron Horse acknowledges that the Notice of Application "...is not the MDNS." The argument is as follows:

> The Notice of Application is just that – a notice that an application had been filed. The Notice of Application is not an SEPA document; it is not the MDNS. It is a mandatory requirement under RCW 36.70B.110, to provide substantial and comprehensive notice to the public, providing an opportunity for comment prior to issuance of the SEPA decision and any other agency decision or recommendation.

OneEnergy Response – 12. The issue is not a matter related to the Notice of Application under RCW 36.70B.110 but rather the decision to utilize the "Optional DNS process" set forth in WAC

197-11-355. A decision was made to deny an opportunity to comment and that decision was wrong. The plethora of new information coupled with extensive mitigation mandates an additional opportunity to comment.

D. OneEnergy Acknowledges Submission of Supplemental Environmental Information.

OneEnergy acknowledges submission of supplemental environmental information. A significant impact of the proposed solar farm relates to light, glare and esthetic effects of the project. Significant supplemental submissions were made following the environmental comment period and included: (1) the effect of solar reflection and glare as explained in OneEnergy's supplemental materials. (Index Ex. 98; Appn. B pp. 10-13); and (2) OneEnergy's additional report entitled "Glare Definition and Calculation, August 18, 2016". The environmental information continues to flow in on this critical component.

Virtually every other aspect of the application has been covered by supplemental information. Despite the continuing and ongoing submission of information (to which OneEnergy is entitled), the public and agencies have been denied the opportunity to provide meaningful comment and review of the significant components. This process renders public comment inconsequential and irrelevant. And it is certainly not in keeping with SEPA's stated purpose to serve as "environmental full disclosure" act.

E. Environmental Review must consider the precedential impact of the Project.

OneEnergy argues that consideration of "precedent" of this project is unnecessary. *OneEnergy Response 19-20.* The argument is as follows:

> Contending that the MDNS is deficient in failing to consider the "precedent set by this project," appellants contend that a precedent will be established "that large-scale quesi-industrial solar facilities may be constructed without significant environmental review for impacts of significant impacts on farmlands and alternative site considerate to scenic resources within the county."
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> OneEnergy disagrees with everything about this characterization of this facility, which is a relatively benign, relatively small, environmentally positive renewable energy

> facility, proposed in a rural area where such land use is allowable, with no negative impacts on any designated resource area, wilderness area, or other uniquely or particularly sensitive visual resources....Moreover, the environmental review here is not precedential for a future application.

To begin, SEPA requires consideration of whether the proposal will serve as a precedent for future actions. WAC 197-11-060(4)(d) specifically states that "...[a] proposal's effects include direct and indirect impacts caused by a proposal. Impacts include those effects resulting from growth caused by a proposal, *as well as the likelihood that the present proposal will serve as a precedent for future actions."* The administrative record discloses the significance of this decision as a precedent for future actions. TUUSSO Energy was tracking the application because it was working on a similar 5 mw solar farm on 40 acres.

OneEnergy argues that this proposal is "...a relatively benign, relatively small, environmentally positive renewable energy facility,...." The fact is that this proposal is for the "...largest solar facility installation in the State of Washington." This proposal is not benign or relatively small- it is significant in size within our state.

Finally, OneEnergy argues that this is a matter of "...subjective community displeasure at a particular location." *OneEnergy responds – 20.* This is partially true- there is significant opposition to conversion of prime farmland and the impacts of a 47.5 acre industrial facility within this area. These are appropriate considerations in the context of conditional use permit applications. KCC 17.60A.015. Second, the comments and arguments submitted are based upon substantive and objective facts. And finally, the courts have recognized that opposition of the community may be given substantial weight, but it alone cannot justify a local land use decision. *Sunderland Family Treatment Services v. City of Pasco*, 127 Wn. 2d 782, 797 (1995).

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Conclusion

Appellant respectfully requests that Kittitas County's Mitigated Determination of Nonsignficance (MDNS) be reversed and the matter remanded for appropriate procedural compliance including provision of notice and opportunity to comment on supplemental environmental materials and proposed mitigation measures.

Dated this 12 day of October, 2016.

MEYER, FLUEGGE & TENNEY, P.S.
Attorneys for Petitioners

James C. Carmody, WSBA 5205
Meyer, Fluegge & Tenney, P.S.
230 South Second Street
P.O. Box 22680
Yakima, WA 98907-2680
509.575.8500
carmody@mftlaw.com

CERTIFICATE OF SERVICE

I hereby declare under penalty of perjury under the laws of the State of Washington that on the date stated below I served a copy of this document in the manner indicated:

Andrew L. Kottkamp Kittitas County Hearing Examiner	Email: andy@wenatcheelalw.com
Timothy L. McMahan Stoel Rives Attorneys for OneEnergy Development LLC	Email tim.mcmahan@stoel.com
Neil Caulkins Kittitas County Prosecutor	Email: neil.caulkins@co.kittitas.wa.us
Doc Hansen Kittitas County Community Development	Email: doc.hansen@co.kittitas.wa.us
Jeff Watson Kittitas County	Email: jeff.watson@co.kittitas.wa.us

DATED at Yakima, Washington, this 6 day of October, 2016.

Deborah Girard

Deborah Girard, Legal Assistant

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