

**KITTITAS COUNTY  
LAND USE HEARING EXAMINER**

<b>IN THE MATTER OF</b>	)	<b>FINDINGS OF FACT,</b>
	)	<b>CONCLUSIONS OF LAW,</b>
<b>LP-08-00029 SEPA APPEAL</b>	)	<b>DECISION ON SEPA APPEALS</b>
<b>Swiftwater Ranch LLC Performance Based</b>	)	<b>OF APPLICANT AND</b>
<b>Cluster</b>	)	<b>TEANAWAY RIVER RANCH</b>
	)	<b>OWNERS ASSOCIATION</b>
	)	<b>(TRROA)</b>

THIS MATTER having come on for hearing in front of the Kittitas County Hearing Examiner on March 11, 2010, on separate appeals by the applicant and TRROA of the SEPA Determination, that being the Mitigated Determination of Nonsignificance, the Hearing Examiner having taken evidence hereby submits the following Findings of Fact, Conclusions of Law and Decision as follows:

**I. FINDINGS OF FACT**

1. Swiftwater Ranch LLC and Duane Cameron, landowners, have applied for a 49-lot Performance Based Cluster Plat on approximately 85.86 acres of land zoned Rural-3. The applicant is proposing a Class A water system, community on-site septic systems, passive recreation facilities in the form of picnic areas and 35.06 to be dedicated to open space in perpetuity. (Staff report)
2. The applicant is Swiftwater Ranch LLC, Duane Cameron, c/o David Gleason, 18120 196<sup>th</sup> Ave. SE, Renton, WA 98058. (Application materials)
3. The proposed lot sizes range from 0.76 acres to 1.90 acres. The project is proposed to be served a Group 'A' water system and community onsite septic systems. (Staff report)

4. The project is located north of State Route 970, south of Red Bridge Road and west of Teanaway Road, Cle Elum, WA. and is located in portions of Sections 25 and 26, T20N, R16E, WM in Kittitas County. Map numbers 20-16-26000-0006, 20-16-25000-0013, 0055, 0065, & 0066. (Staff report)
5. Site Information:
 

Total Project Size:	85.86 acres
Number of Lots:	49
Domestic Water:	Group 'A' water system
Sewage Disposal:	Community on-site septic system
Power/Electricity:	Puget Sound Energy
Fire Protection:	Fire District #7.
Irrigation District:	Not applicable

 (Staff report)
6. Site Characteristics: The area is generally flat terrain, and. (Hearing evidence)
7. Surrounding Properties:
  - a. North: Residential
  - b. South: Vacant
  - c. East: Residential
  - d. West: Residential
 (Staff report)
8. The Comprehensive Plan designation is "Rural." (Staff report)
9. The subject property is zoned Rural 3, which allows for one residential unit per 3 acres. (Staff report)
10. A long plat application was submitted to Community Development Services on October 29, 2008. The Notice of Application for the preliminary plat application was issued on December 23, 2008 and an amended Notice of Application issued on January 16, 2009. This 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 submit written comments was on February 2, 2009. (Staff report)
11. In accordance with Kittitas County code 15A.030.110, this project was accurately posted with the "Land Use Action" sign as provided by Community Development Services. The Affidavit of Posting was signed on November 20, 2008 by the applicant and returned to Community Development Services, and is included as part of the record. (Staff report)

12. Kittitas County issued a Mitigated Determination of Nonsignificance (MDNS) on February 4, 2010 in accordance with WAC 197-11-355 (Optional DNS process). Two timely SEPA appeals pursuant to KCC 15A.04 were submitted on February 19, 2010 to the Kittitas County Board of County Commissioners. Appeals were filed by Traci Shallbetter and James Carmody. Attached in the record are the full appeals as submitted. (Staff report)
13. **Appellant Shallbetter issues:** Condition Number 4 of the Mitigated Determination of Nonsignificance issues for the Swiftwater Ranch Performance Based Cluster Plat (LP-08-00029) on February 4, 2010 is the basis of the appeal. Condition 4 reads as follows:

Levee Maintenance: The levee extending from Red Bridge Road to SR 970 shall be maintained by the Homeowners Association (HOA) through a recorded levee maintenance agreement. The HOA shall be required to maintain the entire length of the levee and shall secure a recorded levee maintenance easement from all property owners of land containing any portion of the levee. Prior to final plat approval, a copy of all signed and recorded levee maintenance agreements and levee maintenance easements shall be submitted to the County for review and approval. This condition shall also apply if the levee is relocated to another site on the subject property.

The applicant, Swiftwater Ranch appeals Condition 4 for sixteen (16) reasons contained in their Notice of Appeal which is attached to the staff report. (Staff report)

14. **Appellant Carmody's issues:**
  - 14.1 The SEPA Responsible Official erroneously failed to incorporate and consider comments on prior application with respect to the performance based cluster plat proposals. Such comments and information identified significant adverse environmental impacts and proved information, data and comment with respect to the proposed subdivision.
  - 14.2 The Board of County Commissioner's denied prior applications for virtually identical subdivisions based upon significant environmental impacts. Such plat denial was affirmed on appeal by Judge Michael Cooper – Cameron, et al. v Kittitas County, Kittitas County Superior Court Cause No. 08-00161-2.
  - 14.3 The Record contains insufficient information to address significant adverse environmental impacts identified in comments and the administrative record. Unaddressed environmental impacts include flooding, potable water, habitat, and wastewater issues related to the proposal. Swiftwater Ranch is in a known flooded area and evidentiary submissions reflect the presence of

significant flooding of the properties. Documented flooding includes areas outside and in consistent with mapped flood plains. Such flood impacts have not been fully identified analyzed or evaluated in this record.

- 14.4 MDNS condition 12 improperly defers evaluation and assessment of cultural and archeological resource assessments. Subsurface testing and associated reporting are required in advance of decision-making and may not be deferred to an unspecified future time.
- 14.5 Insufficient information and data was provided with respect to potential impacts upon existing wells and ground water resources within the immediate area. Applicant has submitted three (3) applications for Change/Transfer of Water Rights for the purported purpose of year-round domestic use. Application contains insufficient information regarding such transfer amount, location and related matters. A change from seasonal irrigation to year-round use requires assessment and mitigation of impacts associated with the new season of use.
- 14.6 A substantial portion of the property is located immediately adjacent to Teanaway River and record lacks any analysis, assessment or mitigation with respect to impacts upon surface water resources. Environmental review should include study, information and data with regard to hydraulic continuity with Teanaway River and associated impacts from the proposed urban level development.
- 14.7 Insufficient information and analysis has been provided with respect to surface water impacts, hyporheic zones, ground water availability and flood plain impacts. Applicant improperly refused to provide such analysis, data or information based upon contentions that such issues are addressed by other regulatory provisions and processes.
- 14.8 Applicant further avoids required environmental review by asserting various conditions are “existing” and impacts need not be assessed as part of the environmental review process. Environmental review must include impacts upon all existing resources, facilities and conditions. The scope and extent of mitigation are the subject of decision-making based upon full and complete information and such analysis is not exempted from the environmental review process. Such impacts include but are not limited to flooding, levee and river functions, habitat conditions (viability of salmonid and fish populations) and related resources and functions.

- 14.9 Evidentiary record establishes inaccuracies in flood plain mapping. Applicant improperly argues that analysis of actual flood conditions that are inconsistent with mapping.  
(Staff report)
15. Staff conducted an administrative critical area review in accordance with KCC 17A and found that portions of the site are within the 100-year floodplain. (Staff report)
16. The following agencies provided comments during the comment period: Washington State Department of Ecology, Department of Fish & Wildlife, Department of Transportation, Yakama Nation, Kittitas County Department of Public Works, Kittitas County Public Health Department and Kittitas County Fire Marshal. (Staff report)
17. Written comments were received from the public submitted by several members of the public. (Staff report)
18. Public and agency comments that were received were considered by the Hearing Examiner in rendering this Decision. (Hearing Examiner finding based on the record)
19. The entire Planning Staff file was admitted into the record at the public hearing. (Public hearing record)
20. The Hearing Examiner conducted a site visit on March 11, 2010. (Open record public hearing)
21. Public hearing after due legal notice was held on March 11, 2010, regarding both SEPA Determination appeals. The following persons testified at this hearing:
- 21.1 Traci Shallbetter: Ms. Shallbetter provided evidence and testimony on behalf of the applicant in favor of the applicant's SEPA appeal and in opposition to TRROA's SEPA appeal.
- Ms. Shallbetter's argument and testimony at the open record public hearing was consistent with their appeal documents. Generally this appeal related to the condition contained in the Mitigated Determination of Nonsignificance that the applicant maintained the existing levee for the Teanaway River which would include maintenance of the levee that is on property not owned by the applicant/appellant.
- 21.2 Jason Smith, Washington Department of Transportation: Mr. Smith offered his testimony. His testimony was consistent with the January 6, 2009, comment letter by Washington State Department of Transportation and the

February 28, 2010, comment letter. Mr. Smith testified that downstream of this levee is a bridge in which during the past 7 years nine emergency projects have occurred on this portion of SR 970.

Mr. Smith further testified that the primary concern in the Teanaway River is avulsion in that there is a historic propensity of the Teanaway River to be dynamic in its flow and its route. In other words, the Teanaway River has, historically, had significant variations in the amount of water flowing down the river as well as changes in the path of the river. He further testified that there is a comprehensive analysis as to the Teanaway River flood risks and avulsion that is not yet published but would be expected to be published in the next 60 days. The bottom line is that even with this old levee in place, the Teanaway River in the area of the vicinity of the applicant's project still undergoes significant flow changes and avulsion.

Mr. Smith further defined that avulsion of a river occurs when water moves across an area that did not previously have a primary channel and that there is a change of channels of a river. A river is determined to have "avulsed" where the channel of the river has moved over time. Mr. Smith further testified that the levee that currently is in place was likely constructed sometime in the 1930s.

Mr. Smith testified that the aerial photographs do show meander scars (dark marks) demonstrating the old Teanaway River channels. He agreed that while the SR 970 bridge over the Teanaway River has been an "issue" it does meet current standards and will adequately allow flow from a 100-year flood with the current conditions which include the existence of the levee.

- 21.3 Mark Steele: Also testifying is Mark Steele. Mr. Steele is a hay farmer and builder. He is employed by the applicant. He testified that he has never seen any portion of the property where the applicant's development is to occur (hereinafter "subject property") flood. He has not seen the existing levee leaking.
- 21.4 Randy Baseler: Mr. Baseler testified as to his observations of the dynamics of the river showing that from the 970 Bridge over the Teanaway River westward towards his property shows avulsion of the river on his property.
- 21.5 David Gleason of the Swiftwater Ranch LLC: Mr. Gleason provided public testimony that was based upon his conversations with Washington State Fish & Wildlife personnel. He testified as to his understanding of Fish & Wildlife's opinions as to the cause of the flooding of the Teanaway River. Mr. Gleason did not provide any testimony related to the consequence of the

failure of the levee on the environmental impact flooding would have on this project. However, he stated that Swiftwater Ranch LLC would be willing to undertake all maintenance of the levee but they are not allowed to go onto third-party property owner's land to maintain the levee without the third-party landowner's permission, which they have not been granted.

- 21.6 Ron Slater: Mr. Slater testified that he has 48 years experience as a contractor and land developer. From his observations, there is significant water flow that occurred in the January, 2009, event from the top of the hill to the north of the subject property, over Red Bridge Road down to where the applicant proposes to locate the homes in the development. He believes that this water source has not adequately studied and that upon failure of the levee, that impacts of flooding on the property of the septic systems has not been properly evaluated.
- 21.7 Mark Kirkpatrick: Mr. Kirkpatrick testified that there is no evidence that this development would impede Washington State Department of Transportation to improve SR 970 and the bridge over the Teanaway River.
- 21.8 Bill Johnson: Mr. Johnson testified that the January, 2009, flood caused minimal floodwaters on the subject property.
- 21.9 Arch Sandberg: Mr. Sandberg testified that he lives on the east side of the applicant's property and has not been approached by the applicant regarding maintenance of the levee that exists on his property.

(Open record public hearing testimony)

- 22. Providing argument in opposition to the appeal by the applicant/appellant and in favor of the TRROA SEPA appeal was James Carmody. Mr. Carmody pointed out that the entire environmental review conducted by Kittitas County and the SEPA Determination of an MDNS was conditioned upon the future maintenance of the existing levee and it was only under that scenario that the flood issue could be minimized and mitigated. Mr. Carmody correctly analyzed that if there is a levee failure or if otherwise the levee were not in place, that an entirely different analysis as to the environmental impacts related to Teanaway River flooding and avulsion would need to be conducted. (Open record public hearing)
- 23. The following exhibits were admitted into the record at the open record public hearing:
  - 23.1 Exhibit 1: February 28, 2010, comment letter from Washington State Department of Transportation.



- 23.2 Exhibit 2: March 8, 2010, SEPA appeal brief by applicant.
  - 23.3 Exhibit 3: March 11, 2010, letter to the Hearing Examiner from Lynn Hatcher and Anne Watanabe.
  - 23.4 Exhibit 4: March 11, 2010, memorandum from SEPA appellant TRROA.
  - 23.5 Exhibit 5: Aerial photograph / map.
  - 23.6 Exhibit 6: Aerial photograph / map
  - 23.7 Exhibit 7: Photograph showing snow blanket in 2009.
  - 23.8 Exhibit 8: Depiction of the site plan overlapping the 100-year floodplain designation.
  - 23.9 Exhibit 9: Photograph.
  - 23.10 Exhibit 10: Written comments.  
(Open record public hearing testimony)
24. Based upon the Department of Fish & Wildlife comment letter dated January 5, 2009, the Hearing Examiner finds that dredge spoils have been placed on the bank of the Teanaway River between Red Bridge Road and the Highway 970 Bridge over the Teanaway River. The Hearing Examiner further finds that the currently designated 100-year and 500-year floodplains are inaccurate and highly influenced by the placement of these dredge spoils. The Hearing Examiner further finds that while the floodplain function has been curtailed by these spoils during routine storm events, it is not accurate that these spoils have cut off all hydraulic continuity. (WSDFW comment letter 1/5/2009)
25. There is a definite risk that in the event of a flooding event on the subject property, that septic systems could fail and in that event would likely contaminate groundwater. There has not been adequate environmental study conducted on this application regarding the impact of flooding on the proposed septic systems. (WSDFW comments)
26. A portion of the proposed residential development lies within the currently designated 100-year floodplain. However, as evidenced by the statements from Department of Fish & Wildlife and Chelan County Engineer, it is clear that these floodplains may no longer be accurate given the recent flooding activities on the subject property. Additionally, while the applicant may be correct that the majority of the proposed home sites are outside of the 100-year floodplain, it is also true that the stormwater



system and portions of the proposed septic systems do lie within the currently designated floodplain. (WSDFW and Kittitas County Engineer comments)

27. However, the Hearing Examiner wants to make it very clear that the overwhelming evidence is that this property is subject to repeated flooding events over the past several years, despite the existence of the levee. (Public testimony, Kittitas County Public Works testimony, WSDFW comments and testimony, WSDOT comments)
28. If during the new environmental analysis stage, the location of the floodplain is changed, it will be necessary to reevaluate this project relative to said changes. However, even if the floodplain does not change, this project needs to be environmentally evaluated as if the levee were no longer in place and/or functioning to its current level. (Hearing Examiner finding)
29. The flooding that occurred in January, 2009, on this site was not designated a 100-year event. (The source of this is December 16, 2009, memorandum from Kittitas County Department of Public Works.)
30. During the January, 2009, flood event, seepage was observed through the existing levee at two locations. (The source of this is December 16, 2009, memorandum from Kittitas County Department of Public Works.)
31. The subject property did have floodwaters on the subject property as a result of the January, 2009, event. It is unknown whether or not this water was generated on site, or was transported across Red Bridge Road or was the result of failure of the levee. (Aerial photographs, public testimony and Kittitas County Public Works comments)
32. Aerial photos of the subject property throughout the years contain evidence of frequent flooding over the subject property and in the vicinity of the subject property. (The source of this is December 16, 2009, memorandum from Kittitas County Department of Public Works.)
33. The current flood designation was completed taking the levee into account. However, because perpetual maintenance, repair and improvement of the levee cannot be assured, agencies with jurisdictions may elect to redesignate floodplains without taking into consideration the existing levee. (Hearing Examiner finding based on agency comments)
34. Additionally, a functional floodplain is a cornerstone of salmon/steelhead/bull trout recovery on the Teanaway River. (April 4, 2009, letter from Washington State Department of Fish & Wildlife to David Gleason).

35. At the conclusion of the open record public hearing, the Hearing Examiner left the record open for the submittal of additional argument and evidence to March 29, 2010. All evidence submitted up to that date is a part of the file of record and was considered by the Hearing Examiner in rendering this Decision. (Public hearing record)
36. Regarding the TRROA appeal of the SEPA Determination, Mr. James Carmody, attorney for TRROA, provided argument and comment on the evidence that had been presented. He correctly commented that removal of the levee had not been considered as part of the SEPA review process because of the assumption that the applicant would maintain this levee. (Open record public hearing testimony)
37. As the applicant has pointed out, the applicant cannot maintain those portions of the levee that are located on property that is not owned by the applicant. (Open record public hearing testimony and Swiftwater SEPA appeal documents)
38. Therefore, the continued ability of the existing levee to control the Teanaway River during flood events and against future avulsion cannot be assured. (Hearing Examiner finding based on review of MDNS, agency comments and applicant's materials)
39. Because there has not been environmental analysis performed related to the impacts of the Teanaway River and the flooding of the Teanaway River on the subject property, in the event the levee is not capable of controlling the avulsion of the Teanaway River on the subject property, the MDNS is clearly erroneous. (Hearing Examiner finding based on totality of evidence)
40. Testifying from the public was Mike Caulkins, original partner of the Swiftwater group. He testified that the applicant has met and exceeded all of the County's requirements. (Open record public hearing testimony)
41. James Carmody, attorney for appellant TRROA provided testimony related to habitat and environment issues. He also provided testimony that there is no established water right for this property. It was the appellant TRROA's position that further environmental review was necessary because of the issue that the applicant did not have a current water supply for the water needs of the development. Mr. Carmody argued that environmental review on the withdrawal of water has not been conducted because the applicant does not have a final, approved, source of water for the project. (Open record public hearing testimony)
42. Although there was a prior application for development of the subject property that is similar in nature to the present proposal, this new application is to be decided upon its

own merits and that the doctrines of collateral estoppel and res judicata do not apply. (Hearing Examiner finding based on review of TRROA appeal documents)

43. Aerial photos from WDFW indicate the flooding in January, 2009, occurred at the northern portion of the property. Overland flooding occurred at the upland areas above the site. Aerial photos of past events indicate flooding at the northern side of the property occurs regularly. The County road and adjacent properties also experienced flood damage. The most significant flooding occurred on January 7 and 8. These photos do not depict the maximum intensity of the January 2009 flood event. Aerial photos from 1977 also indicate this type of flooding occurs regularly. (WDFW comments)
44. In the flood event of January, 2009, water overtopped the streambank. This water approached the levee at the applicant's property. Evidence of seepage through the levee was observed at two locations. This seepage resulted in settlement of the levee at one location. Portions of the site landward of the levee appear to be lower than the streamside. Levee adequacy verification is needed. (Kittitas County Public Works comments)
45. Water draining along the landward side of the levee can be seen on the aerial photos from January 9, 2009. Some of this water may be from storm water generated on-site and what was transported across Red Bridge Road. Some may be generated by levee seepage. (Kittitas County Public Works comments)
46. The flooding of January 2009 was not designated a 100-year event. Therefore, it is likely flooding experienced on-site will be greater than what was observed during the January 2009 flood. (Kittitas County Public Works comments)
47. Flood area denoted as Zone B was not depicted on the report by Encompass. According to the FEMA map, this area may be a part of the 100-year flood plain that experiences less than 1-foot of water. This zone may also be protected by a levee from the base flood. This area may still flood during a 100-year event. Additional analysis and research is needed to verify what Zone B actually depicts. (Kittitas County Public Works comments)
48. It appears the flood storage in the report addresses flooding in the A0 zone only. It does not address the flood water in the B zone. The flood storage area should also consider the impacts of this zone. (Kittitas County Public Works comments)
49. The attorney's report stated the floodplain designation does not consider the levee existence. The levee is located adjacent and parallel to the floodplain designated by A0 Zone. The flood water also extends to the east away from the levee much more significantly than to the west. The levee was most likely constructed during the

channelization of the stream to its current location. (Kittitas County Public Works comments)

50. The Hearing Examiner finds that the mapped flood plain analysis considered the levee, and assumed the levee would continue to function, and be maintained. (Kittitas County Public Works comments)
51. The river is CWA section 303 listed, impaired water for temperature. If the applicant was to perform in-stream work, construction may require vegetation removal. Such removal could increase the temperature of the stream at that reach by removing the shadow cast by the trees. Any stream work requires analysis of the likelihood of the need and justification for proposed channel work or not. (Kittitas County Public Works comments)
52. Maintaining the levee and streambank would require coordination with neighbors including WDFW. Easements required for such maintenance are not known to exist. (Kittitas County Public Works comments)
53. Page 6 of the storm water report assumes a channel along the northern side of the property can accept overflow from storm events. If this channel is an irrigation canal, storm water cannot be drained into it. There is not enough known about this channel to determine whether storm water can be transported to it. If this channel drains directly to the river, water quality in addition to allowable flow rate and erosion control must also be addressed in further environmental review. (Kittitas County Public Works comments)
54. The storm water report attempts to address storm water generated on-site but not any that flows onto the site from the north. Such stormwater must be addressed to control flooding on the home sites in addition to how these floodwaters will be transported. This water must not be simply transported off-site, flooding others. Storm water was also transported to the site via an irrigation canal located north of Red Bridge Road. This storm water should also be addressed. (Hearing Examiner finding base on agency comments and review of applicant's hydrolic reports)
55. Any Conclusion of Law that is more correctly a Finding of Fact is hereby incorporated as such by this reference. (Hearing Examiner finding based on the record)

## **II. CONCLUSIONS OF LAW**

1. The Hearing Examiner has been granted authority to render this recommended decision.

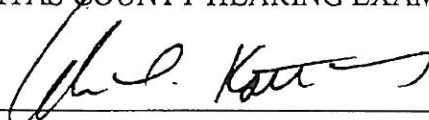
2. Substantial weight is to be afforded to the SEPA reviewing agency's environmental determination.
3. The SEPA reviewing agency's environmental determination may only be overturned if it is clearly erroneous. Without the assurance that the existing levee will be maintained and improved as necessary to control the flow of the Teanaway River, then the Mitigated Determination of Nonsignificance is clearly erroneous in failing to adequately address the impacts of eventual flooding of the Teanaway River over the subject property and over the proposed development including impacts on the homes, septic system, stormwater plan.
4. The applicant timely filed a SEPA Determination appeal.
5. TRROA timely filed a SEPA Determination appeal.
6. Washington law prohibits conditioning approval of a project upon a condition that requires a third party to grant their approval for a mitigation condition.
7. Condition No. 4 in the MDNS improperly requires the applicant to maintain the entire length of the existing levee and to secure permission from all property owners of land containing any portion of the levee to join into this recorded levee maintenance agreement.
8. Because the SEPA reviewing authority did not undertake environmental study as to the impacts of Teanaway River flooding and/or avulsion on the subject property in the event that the levee no longer functions to provide protection from Teanaway River flooding and/or avulsion, the SEPA Mitigated Determination of Nonsignificance is clearly erroneous.
9. TRROA's argument that this application is barred by the doctrine of collateral estoppel and/or res judicata is without legal merit.
10. Any Finding of Fact that is more correctly a Conclusion of Law is hereby incorporated as such by this reference.

## DECISION

Based upon the above Findings of Fact and Conclusions of Law, the applicant's appeal is hereby **GRANTED** and TRROA appeal is also **GRANTED**. This matter is remanded to Kittitas County Community Development Services to reevaluate its existing environmental determination, for additional environmental study and if necessary for the issuance of a Determination of Significance and completion of an environmental impact statement as may be consistent with this Decision.

Dated this 13<sup>th</sup> day of April, 2010.

KITTITAS COUNTY HEARING EXAMINER



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Andrew L. Kottkamp