



COUNTY COMMISSIONERS

Cathy Wolfe
District One

Sandra Romero
District Two

Bud Blake
District Three

HEARING EXAMINER

Creating Solutions for Our Future

**BEFORE THE HEARING EXAMINER
FOR THURSTON COUNTY**

In the Matter of the Appeal of)	APPL No. 15-117887 VE
)	Project No. 2015103966
)	
Chris Nubbe and Alison Baker)	
on behalf of)	Verizon Wireless Vail Road
Deschutes Neighborhood Group)	Wireless Communications Facility
)	Special Use Permit
of the August 25, 2015 SEPA)	
Determination of Non-Significance)	
for the Verizon Wireless Vail Road)	
Wireless Communications Facility)	
Special Use Permit)	
)	
and)	
)	
In the Matter of the Application of)	
Verizon Wireless)	
)	FINDINGS, CONCLUSIONS, AND
for a Special Use Permit to build a)	DECISION
Wireless Communications Facility at)	
<u>16224 Vail Road SE, Yelm, WA</u>)	

SUMMARY OF DECISION

Because the balance of evidence in the record submitted shows probable adverse environmental impacts that appear to be significant in the proposed location, the determination of non-significance was clearly erroneous. The SEPA appeal is **GRANTED** and the environmental threshold determination is **REMANDED** to the SEPA Responsible Official for further study of impacts to priority species and habitats. Because the appeal is granted, the SUP application cannot be decided at this time.

SUMMARY OF RECORD¹

Request

Odelia Pacific on behalf of Verizon Wireless (Applicant) requested approval of a special use permit to construct a new unstaffed wireless communications facility. The proposal includes a 150-foot monopole, 12 wireless communications antennas, a microwave dish, and a structure to house all ground equipment all located in a 40-foot by 40-foot fenced area of an underlying 64.04-acre parcel. The proposed site is located at 16224 Vail Road SE in Yelm, Washington.

Thurston County Resource Stewardship Department reviewed the proposal for compliance with the requirements of the State Environmental Policy Act (SEPA) and issued a determination of non-significance (DNS) on August 25, 2015.

Issues on Appeal

On September 15, 2015, an appeal of the DNS was timely filed by Chris Nubbe and Alison Baker on behalf of the Deschutes Neighborhood Group (Appellants) through counsel, alleging the following (paraphrased, reorganized) errors in the DNS which were further developed in legal briefing and testimony on the record:

1. Human and wildlife health impacts resulting from radiofrequency emissions, including the electromagnetic hypersensitivity of at least one resident whose residence is adjacent to the proposed WCF;
2. Impacts to rural land use character, including property values, views of Mount Rainier, and failure to comport with US Fish and Wildlife Service and Thurston County's own standards for placement of communication towers in proximity to wetlands and endangered species habitat;
3. Failure to address the documented presence of endangered species and priority habitats, due to incomplete and inaccurate information provided on the SEPA checklist, and omission of evaluation of impacts from future collocation; and
4. Procedural error relating to failure to make the full file available for public review.

Hearing Date

The Thurston County Hearing Examiner conducted a consolidated open record public hearing on the SUP request and SEPA appeal on March 15, 2016. At the conclusion of the proceedings, the parties agreed to a schedule for post-hearing submission of closing argument in the appeal with the record closing on April 29, 2016 and a decision issuance date of May 13, 2016.

Testimony

At the open record public hearing, the following individuals presented testimony under oath:^{2, 3}

¹ Findings begin on page 13.

² For the sake of expediency, testimony of witnesses called by the parties was taken at one time and accepted as applicable to both the SEPA appeal and the SUP permit hearing, without the need to recall witnesses or hear duplicative testimony.

For the Appellants

Chris Nubbe
Alison Baker
Alex D. Foster, USDA Research Ecologist and local landowner

For the Applicant

Sarah Telschow, Land Use Planner, Odelia Pacific Corp
Jeffery S. Jones, Jones & Assoc, Inc., Certified Prof. Wetland Scientist & Wildlife Biologist
Mark Doman
Tim Bradley
Allen Safer

For the County

Tony Kantas, Thurston County Resource Stewardship
Arthur Saint, P.E., Thurston County Public Works
Dawn Peebles, Thurston County Environmental Health

Public Comment

Inge Piller	Christy White
Edson Holloway	Sue Danver
Wayne Vanderpol	Jean Marie Mason
Burgess Meredith	Bo Foster
James Pfaff	Debra Nimocks
Gerard Moore	Jason Nimocks
Diane Dondero	Terry Kram
Richard Krueger	Wally Brown
Dr. Eva Lester	Judy Chapman
Dillard Jensen	Dan Page
Adrienne Arias	Judy Andrew
Chantal LaFont	Rella Schafer
Lyn Quayle	Alison Baker
Marian Clements	Carolyn Chew
Thomas Mani	Chris Nubbe
Ann Kennedy	Deena Reeves

³ Public comment on the permit application was taken out of order at 1 pm, as advertised in hearing notice, in order to allow those who could not stay for the entire hearing to be able to attend at a specific time and testify. Audience members present were also informed that written comments could be submitted up until the close of the record.

Attorney Representation

Christopher John Coker, Attorney, represented the Appellants.

Charles E. Maduell, Attorney, represented the Applicant.

Donald R. Peters, Deputy Prosecuting Attorney, represented Thurston County.

Exhibits

The following exhibits were admitted in the record of this matter:

For the Appellants, Deschutes Neighborhood Group

- Exhibit D1 First Declaration of Alex D. Foster, dated November 30, 2015
- Exhibit D2 Supplemental Declaration of Alex D. Foster, dated December 15, 2015
- Exhibit D3 Second Supplemental Declaration of Alex D. Foster, dated December 22, 2015
- Exhibit D4 Email exchange between Tony Kantas, Sarah Telschow, and Michelle Tirhi, dated January 14, 2016
- Exhibit D5 Wildlife species list compiled by Alex D. Foster as part of first Declaration with additional pictures of the new 163rd Lane PHS Priority II Waterfowl Concentration Area and adjacent Smith Ranch Wetland Restoration Areas
- Exhibit D6 Email exchange between Rick Peters, Mike Kain, Tony Kantas, Theresa Nation, Darric Lowery, and Michelle Tirhi, dated December 1 through December 21, 2015
- Exhibit D7 Map of WDFW PHS Waterfowl Concentration areas near the proposed WCF with ~1000 foot buffers drawn around them including the new 163rd Lane Priority II concentration area, compiled January 24, 2016, by Alex D. Foster and approved by Michelle Tirhi, WDFW
- Exhibit D8 Black Hills Audubon Society – statement about tower effects to local birds and their habitats near the WCF site
- Exhibit D9 Albert Manville II, Ph.D. U.S. Fish and Wildlife Service. Commenting on effects to birds, threatened and endangered species, NEPA/SEPA, and other legal statute compliance regarding the Lake Lawrence cell tower proposal
- Exhibit D10 Bojana M. Foster statement on cell tower effects to property values of nearby land owners from cell towers
- Exhibit D11 Large area locator map poster for use during testimony at hearing

- Exhibit D12 Email exchange between Alex D. Foster and Lisa Chetnick Treichel, Office of Environmental Policy and Compliance, Office of the Secretary, US Department of the Interior concerning cell tower NEPA compliance, dated January 12, 2016
- Exhibit D13 NEPA compliance acknowledgement signed by Lelah Vaga for Verizon Wireless, dated March 3, 2015
- Exhibit D14 Current Wireless Coverage area maps and map showing proposed tower locations in the local area. Video and measurements of existing cell coverage in the subject area with pictures of telecommunications structures by Chris Nubbe. Photographs and measurements of existing cell towers located in the areas by Chris Nubbe, with URL for YouTube Video provided
- Exhibit D15 Declaration with attached exhibits of Mr. Thomas J. Mani regarding impacts of cell towers on bee populations and habitat
- Exhibit D16 Declaration with attachments prepared by Chris Nubbe showing wetland delineations and other boundaries within 1,000 ft. of the proposed tower site, and designation and site of tier 2 waterfowl concentration in vicinity of proposed cell tower
- Exhibit D17 Email exchange between United States Army Corp of Engineers and Chris Nubbe, dated January 11 through January 21, 2016
- Exhibit D18 Email exchange between SHPO officials and Chris Nubbe, dated January 11, 2016
- Exhibit D19 Resume of Alex D. Foster
- Exhibit D20 Resume of Chris Nubbe
- Exhibit D21 Resume of Thomas J. Mani
- Exhibit D22 Visual assessment of the Lake Lawrence cell tower compiled by Jean-Marie Mason (Including photographs)
- Exhibit D23 Declarations and Affidavits prepared by concerned members of the Deschutes Neighborhood Group objecting to proposed cell tower based on impacts to neighborhood character, impacts to critical areas and wildlife, and impacts to existing view corridors
- Exhibit D24 Styring report regarding bird habitats and bird movements near the WCF
- Exhibit D25 Written Testimony of Chris Nubbe

Exhibit D26 Alex D. Foster Hearing Testimony Outline

For the Applicant, Verizon Wireless

Exhibit V1 Resume of Jeffery S. Jones

Exhibit V2 Critical Area Feasibility Study prepared by Jeffery S. Jones, dated June 6, 2013

Exhibit V3 Habitat Assessment prepared by Jeffery S. Jones, dated March 16, 2015

Exhibit V4 Balloon Test Results/Photo simulations

Exhibit V5 Balloon test photos taken by Tim Bradley on May10, 2014

Exhibit V6 Photo simulations prepared by Tim Bradley Imaging

Exhibit V7 Letter from Tim Bradley, dated November 12, 2015 regarding balloon test/photo simulations

Exhibit V8 Architectural/Engineering drawings, dated June 17, 2015

Exhibit V9 Letter from Jeffery S. Jones to Tony Kantas, Associate Planner, dated February 15, 2016 regarding OLY Lake Lawrence, Thurston county Code Section 20.33.080(2)(e)(i)

Exhibit V10 Resume of Andrew H. Thatcher

Exhibit V11 Declaration of Jeffery S. Jones (without attached exhibits), dated December 14, 2015, submitted in support of Applicant's Response to Appellant's Motion to Require Withdrawal of DNS

Exhibit V12 Tree Heights Letter, Duneanson Company Inc., dated March 11, 2016

Exhibit V13 Thurston County Special Use Permit Required Findings

Exhibit V14 Letter to Surrounding Customers with Text Message Response, dated October 21, 2015

Exhibit V15 Professional Summary of Alan Burt, Acoustical Consultant

Exhibit V16 Letter re: Likelihood of Catching Fire, dated November 16, 2015

Exhibit V17 Federal Airways and Airspace Summary Report

Exhibit V18 Professional Summary of Marc Doman

- Exhibit V19 Power Point Presentation, dated March 15, 2016
- Exhibit V20 Two Photo Simulations
- Exhibit V21 Three Photos Simulations
- Exhibit V22 Applicant's Memorandum of Law Regarding Compliance with Federal Communications ACT Requirements

For the County

Exhibit C1 Resource Stewardship Land Use & Environmental Section Report on Special Use Permit including the following attachments:

- A. Notice of Public Hearing
- B. Master Application, received May 12, 2015
- C. Special Use Permit Application, received May 12, 2015
- D. Vicinity Map – 2012 Aerial
- E. Zoning Map
- F. Wetlands Map
- G. Gopher Soils Map
- H. Prairie Soils Map
- I. Applicants Project Description (28 pages)
- J. Site/Structure Plan Set (20 pages)
- K. Application Submittal Routing Form (2 pages)
- L. Notice of Application, dated June 18, 2015 (3 pages)
- M. SEPA Determination of Non Significance, issued on August 25, 2015 (2 pages)
- N. Appeal of an Administrative Decision, received September 15, 2015
- O. Letter from the Appellants Attorney, dated October 27, 2015

- P. Thurston County Public Works SEPA Recommendation, dated August 18, 2015
- Q. Thurston County Public Works Special Use Permit Recommendation, dated August 19, 2015
- R. Thurston County Health Department Recommendation, dated August 5, 2015
- S. December 21, 2015 Email from Washington State Department of Fish & Wildlife
- T. Washington State Department of Ecology comment letter, dated June 12, 2015
- U. Washington State Department of Ecology comment letter, dated July 13, 2015
- V. Nisqually Indian Tribe comment letter, dated June 26, 2015
- W. Environmental Checklist (SEPA)
- X. Balloon Test Letter, dated April 23, 2014 to Surrounding Property Owners
- Y. Balloon Test Letter, dated April 16, 2014 to Thurston County
- Z. Balloon Test
- AA. Acoustical Report, dated April 21, 2015
- BB. MHz Bands License
- CC. Third Party Review, dated July 24, 2015
- DD. RF Documentation
- EE. Non-Ionizing Electromagnetic Exposure Analysis & Engineering Certification, revised April 12, 2015
- FF. TOWAIR Determination Results
- GG. Co-Location Statement
- HH. FAA Compliance Acknowledgment
- II. Property Owner Acknowledgment of Affidavit
- JJ. Tower Owner Affidavit

- KK. NEPA Compliance Acknowledgment
- LL. Availability of Tower Collocation, dated July 24, 2014 to AT&T, Sprint, and T-Mobile (3 Pages)
- MM. Color Sample
- NN. Letter from Odelia Pacific Corporation, dated July 1, 2015
- OO. Letter from Odelia Pacific Corporation, dated August 5, 2015
- PP. Critical Area Feasibility, dated June 6, 2013
- QQ. Habitat Assessment, dated March 16, 2015
- RR. Market Study, dated January 29, 2015
- SS. Communication Pole Design Calculations
- TT. Geotechnical Report dated February 16, 2015
- UU. Short Form Construction Stormwater Pollution Prevention Plan (SWPPP) Template
- VV. Abbreviated Stormwater Site Plan Report, dated June 12, 2015
- WW. Comment letters received in response to the Notice of Application:
 1. Wally Brown, dated June 17, 2015
 2. Matt Plowman, dated June 18, 2015
 3. Carla Willis, dated June 30, 2015
 4. Cathy & Jim Mathews, dated June 30, 2015
 5. Daniel Dodge, dated June 30, 2015
 6. Robert L. Hastings, dated June 25, 2015
 7. Mark Biever, Thurston County Water Resources, dated June 24, 2015
 8. Alex D. Foster, dated June 23, 2015
 9. Gerard H. Moore & Ursula U. Schanne, received July 1, 2015
 10. Shela & Harry Divelluss, dated July 2, 2015
 11. Carol Martin, dated July 5, 2015
 12. Alex D. Foster, dated July 3, 2015
 13. Jon Edmondson, dated April 25, 2015
 14. Nancy Westergaard, dated April 3, 2015
 15. Della & Dane Cabral, dated July 22, 2014
 16. Debra Southam, dated July 22, 2014
 17. Chawn Vance & Doyle Nickless, dated July 21, 2014
 18. Bob Hastings, dated May 28, 2014

19. Jim & Sandra Pfaff, dated May 10, 2014
20. Petition containing 162 Signatures, including attachments, received July 7, 2015
21. Wally Brown, undated
22. Mike Snider, President, Lake Lawrence Community Club, dated July 8, 2015
23. James & Sandra Pfaff, dated August 12, 2015
24. Karen & Gary Nylund, dated July 11, 2015
25. John & Sharon Gray, dated July 9, 2015
26. Erica, including attachments, dated October 26, 2015

XX. Comment letters received in response to the Determination of Non Significance:

1. Inge Piller, dated September 8, 2015
2. Roberto Mazarella, dated September 8, 2015
3. Virginia Sablan, dated September 8, 2015
4. Micheline Corteville, including attachment, dated September 8, 2015
5. Robin Love, dated September 8, 2015
6. Roberto Mazarella, dated September 8, 2015
7. Sandra Bocas, dated September 7, 2015
8. Don Schmidt, dated August 28, 2015
9. Tony Kantas to Alison Baker, dated September 4, 2015
10. Matt Plowman, dated August 26, 2015
11. Tom Dewell, dated August 28, 2015
12. Jean Handley, dated August 27, 2015
13. Don Schmidt, dated August 28, 2015
14. Bob Hastings, dated August 28, 2015
15. James Pfaff, dated August 28, 2015
16. Tom Dewell, dated August 29, 2015
17. Victoria Harper-Parsonson, dated September 1, 2015
18. Alex D. Foster, dated September 7, 2015
19. Alison Baker, including attachments, dated September 4, 2015
20. Janet McNamara, dated September 5, 2015
21. Stephen Mart, received September, 8, 2015
22. Dr. John Ruhland & Reverend Angela Ying, dated September 6, 2015
23. Lucille Ryan, dated September 6, 2015
24. David F. Weintraub, dated September 6, 2015
25. Sophie Sykes, dated September, 2015
26. Marian Clements, dated September 2015
27. Dan Page, dated September 6, 2015
28. David Biering, dated September, 2015
29. Bonnie Benore, dated September 7, 2015
30. Janet Price, dated September 7, 2015
31. Divina Klein & Douglas Mackar, received September 8, 2015
32. Carolyn Chew, received September 8, 2015

33. Lyn Quayle, received September 8, 2015
34. Carla Lowery, dated September 7, 2015
35. Gloria Peach, dated September 7, 2015
36. Micheline Corteville & Giovanna E. Mendiola, dated September 7, 2015
37. David Biering, dated September 6, 2015
38. Marian Clements, dated September 6, 2015
39. Victoria Harper-Parsonson, dated September 7, 2015
40. Lucille Ryan, received September 8, 2015
41. Diane Dondero, received September 8, 2015
42. Wally Brown, received September 8, 2015
43. Andrea Levanti, received September 8, 2015
44. Frances Daniels, received September 8, 2015
45. Caryl Combs, dated September 7, 2015
46. David Runners, dated September 7, 2015
47. Bonnie Benore, dated September 7, 2015
48. Jean Marie, dated September 8, 2015
49. Alison Baker, including petition with 56 signatures, dated September 8, 2015
50. Victoria Harper-Parsonson, dated September 7, 2015
51. Karen Yule, dated September 7, 2015
52. Douglas Mackar, dated September 7, 2015
53. Chris, dated September 7, 2015
54. Mary Atkinson, dated September 8, 2015
55. Chris Nubbe, dated September 7, 2015
56. Judith Lashley, dated September. 7, 2015
57. Clare Wade, dated September 8, 2015
58. Keshia Korman, dated September 8, 2015
59. Washington State Department of Ecology, dated September 8, 2015
60. Inge Piller, dated September 8, 2015
61. Douglas Mackar, dated September 8, 2015
62. Ruth Sparrow, dated September 7, 2015
63. Petition containing 162 Signatures, including attachments, received July 7, 2015

- YY. Comment letters received in response to the Notice of Public Hearing:
1. Cathy & Jim Matthew, dated January 13, 2016
 2. Richard Jacobson, dated January 11, 2016
 3. John Olson, dated January 11, 2016
 4. Alfred & Dorothy Hanson, dated January, 2016
 5. Wayne & Wava Vander Pol, including photo, dated January 12, 2016
 6. Melinda Henderson, dated January 11, 2016
 7. Melinda Henderson, dated January 12, 2016
 8. Dana & Della Cabral, dated January 11, 2016
 9. Doyle Nickless & Chawn Vance, dated January 11, 2016
 10. Hartmut & Carmen Seinsch, dated January 9, 2016

11. Carol Martin, dated January 9, 2016
12. Barry & Loma Halverson, dated January 9, 2016
13. Christina Bush, dated January 9, 2016
14. Richard Deering, dated January 8, 2016
15. Krista Marcum, dated January 8, 2016
16. Jon & Toni Carpenter, dated January 8, 2016
17. Jackie, dated January 8, 2016
18. Joan Patrick, dated January 7, 2016
19. Ronda & Steve Larson, dated January 7, 2016
20. Tara Cunningham, dated January 7, 2016
21. Wilfried, Delilah, Jason and Michelle Maass, dated January 14, 2016
22. Mark Barkley, dated January 17, 2016
23. Carlyn, Combs, dated January 16, 2016
24. Joan Patrick, dated January 15, 2016
25. Michael Louisell, dated January 12, 2016
26. Robert L. Hastings, dated January 19, 2016
27. Suzanne Shaffer, dated January 21, 2016
28. Joan Patrick, dated February 7, 2016
29. Joan Patrick, dated February 24, 2016
30. Jeremy Chenvert, dated March 2, 2016
31. Krista & Rodd Marcum, dated March 2, 2016

ZZ. WDFW email comments ending on January 15, 2016 with two attached articles in regards to migratory birds

AAA. February 15, 2016 letter and attachment from J.S. Jones and Associates, Inc., in regards to TCC 20.33.080(2)(e)(i)

BBB. WDFW email, dated February 22, 2016

CCC. Comment letter from Albert M. Manville, II, Ph.D., dated February 21, 2016

DDD. Submitted testimony of Albert M. Manville, II, Ph.D.

EEE. Applicant's proposed anti-nesting device

Exhibit C2 Photos of Public Hearing Notice

Exhibit C3 Four Photos of Onsite Vegetation

Exhibit C4 Four Photos of Offsite Wetland to the Northwest

Exhibit C5 16 Comment Letters received after Staff Report was sent out

Also included in this record are significant pre- and post-hearing submittals, motions, orders, and briefing detailed in appendices at the end of this decision.

Based upon the record developed at the open record hearing, the Hearing Examiner enters the following findings and conclusions. The following findings are applicable to the SEPA appeals and the requested permits.

FINDINGS

Proposal, Description of Site, and Surroundings

1. Odelia Pacific on behalf of Verizon Wireless (Applicant) requested approval of a special use permit to develop a wireless communications facility (WCF) comprised of the following primary features: a 150-foot monopole with 12 panel antennas with a 156-foot antenna height; microwave dish; remote radio units, AC units, and surge protectors to be housed in seven equipment cabinets; and a 30kw diesel back-up generator. The generator and its 210-gallon diesel tank would be housed in the equipment area. The monopole and antenna/attachments would be painted a dark green grey color with a non-reflective finish. The proposal includes a landscape plan with a 20-foot planted buffer. In addition, a 50-foot wide tree retention buffer would be provided around all sides of the fenced enclosure, only interrupted by the access. No water or sanitary facilities are proposed for the unstaffed facility. The proposed enclosure would be surrounded by a six-foot tall chain link fence topped with three strands of barbwire and fitted with green privacy slats. Anti-climbing devices would be installed on the tower. Access would be from an existing driveway serving the subject property. A portion of the existing private driveway would be required to be extended and upgraded to include an emergency vehicle hammerhead turnaround near the fenced WCF enclosure. The equipment area would have work safety lights used only during night maintenance or repair visits; the lights would have a timer and would automatically go off within an hour. Maintenance would be performed approximately once per month for an average of four hours by one or two technicians. *Exhibit C1.I; Telschow Testimony*. A structure added to the top at the request of WDFW to exclude osprey nesting (hazing device) would add 83 inches or seven feet of height, for a total WCF height of 163 feet. *Exhibits D4, pages 7-10, and C1.ZZ, pages 4-5*.

2. The subject property is addressed as 16224 Vail Road SE in Yelm, Washington.⁴ It and the adjacent parcels to the south and west are zoned Long-Term Agriculture (LTA). Adjacent properties to the north are zoned Rural Residential Resource one dwelling Unit per Five Acres (RRR 1/5), and adjacent properties to the east are zoned Residential LAMIRD two dwelling units per acre (RL 2/1). *Exhibits C1 and C1.E*. Agriculture is intended to be the primary use in the LTA zone; other uses must be sited so as to minimize their impact on, or conflicts with, surrounding agricultural uses. *TCC 20.08A.010*.

⁴ The legal description of the subject property is a portion of Sections 19/20/29/30, Township 16N, Range 2E; also known as Tax Parcel No. 22629220201. *Exhibit C1*.

3. The proposed facility meets the definition of an unstaffed wireless communications facility, which is allowed in the LTA zone subject to special use permit approval. *TCC 20.54, Table 1 and TCC 20.08A.25; Exhibit C1*. Pursuant to TCC 20.33.080(2)(a), WCFs are prohibited in residential zones unless there is no alternative; the LTA zone is not considered a residential zone in this code section. *Exhibit C1*.
4. To the north, surrounding land uses are comprised primarily of rural residences and agriculture uses on parcels generally five acres in size or larger. The owner of the subject property also owns two adjacent parcels totaling 39.26 acres northeast of the proposed WCF location. Approximately 2,800 feet to the east is a single-family residential development known as the Plat of Edwards Lake Lawrence. Adjacent to the south of the subject property and bordering the Deschutes River is a 185-acre former agricultural property known as the Smith Ranch restoration site, owned by the cities of Yelm, Olympia, and Lacey, which is currently undergoing restoration and enhancement to serve as a mitigation project for municipal water rights acquisition; planned improvements include wetland creation, stream channel restoration and alteration, and native plantings, at a total projected cost between 1.4 and 1.7 million dollars, resulting in a wildlife refuge area. *Exhibits C1, C1.D, C1.BBB, and D1. D, Initial Acquisition and Restoration Assessment of Smith Ranch, prepared for Cities of Lacey, Olympia, and Yelm, and D26*.
5. The underlying 64.04-acre subject property, still owned by Mr. Smith, contains a wetland approximately 1,900 feet to the east of the proposed WCF location. The proposed project site is not within the jurisdiction of the Shoreline Master Program for the Thurston Region (SMPTR) or within any critical areas or associated buffers regulated by the Thurston County critical areas ordinance (CAO). There is a 27-acre off-site wetland approximately 500 to 600 feet to the west/northwest, referred to in these proceedings as the 163rd Lane wetlands; it has been identified as a Priority 2 waterfowl concentration area by WDFW, one of only eight in the County. The Deschutes River and associated riparian wetlands are located approximately 800 to 900 feet to the south and southeast of the proposed WCF. Lake Lawrence is located approximately 4,200 feet east of the site; it is a Priority 1 waterfowl concentration area. *Exhibits C1, C1.D, V2, Figure 2, USFWS National Wetlands Inventory map, D4, D6, D7 page 5, D8, and D26*.
6. The portion of the subject property on which the cell tower is proposed is slightly sloped with the highest elevation near Vail Road. The proposed WCF site is flat. The single-family residence nearest to the project site is 310 feet to the northwest. *Exhibit C1*.

Procedural Background

7. The special use permit application for a proposed wireless communications facility was submitted together with an environmental checklist May 12, 2015. Notice of application and the checklist were mailed to all property owners within 2,600 feet of the subject property, as well as to the Washington State Department of Fish and Wildlife (WDFW), the US Army Corps of Engineers (ACOE), the Washington State Department of Ecology (DOE), the Nisqually Tribe, the Chehalis Tribe, the Olympic Region Clean Air Agency (ORCAA), and to several Thurston County review departments. *Exhibits C1, C1.K, and C1.L*.

8. Pursuant to the State Environmental Policy Act, the Thurston County Resource Stewardship (RDS) Department was designated lead agency for review of the proposal's environmental impacts. The SEPA Responsible Official issued a determination of non-significance (DNS) on August 25, 2015, with a 14-day comment period and a seven-day appeal period. There were 63 comment letters submitted during the DNS comment period, including many attached documents and a petition. *Exhibits C1 and C1.M.*
9. On September 15, 2015, the Deschutes Neighborhood Group (Appellants) submitted a timely appeal challenging the County's DNS. The appeal asserted the following (paraphrased) impacts were not adequately mitigated by the DNS: impacts relating to health effects to people and wildlife, and electromagnetic hypersensitivity of at least one resident in close proximity to the proposed WCF; impacts to the rural land use character of the area, including aesthetic impacts such as impeded views of Mount Rainier and decreased property values; failure to address the documented presence of endangered species and priority habitats, due to incomplete and inaccurate information provided on the SEPA checklist, and omission of evaluation of impacts from future collocation; and that the County had erred in not making the full file available for public review. In pre-hearing submittals, Appellants also argued that there is adequate coverage available in the area both in-home and out of doors and that there is no need for the proposed WCF. The neighborhood group submitted that the proposed cell tower is likely to result in significant adverse environmental impacts and asked that the issuance of the DNS be overturned and an environmental impact statement (EIS) be required. *Exhibit C1.N.*
10. Apprised of the appeal for scheduling purposes, the Thurston County Hearing Examiner convened a pre-hearing conference, set to be held on October 6, 2015. The conference was eventually conducted by telephone on November 10, 2015. The Appellants, Applicant, and County were represented by counsel during the conference. A schedule for pre-hearing exchange of witness and exhibit lists and exhibits themselves was agreed to and memorialized in a pre-hearing order issued on the date of the conference. *Appendix A, Pre-Hearing Orders dated September 30, 2015 and November 10, 2015.*
11. Both the Appellants and the Applicant submitted dispositive motions asking to address various issues prior to hearing. On December 28, 2015, an order was issued ruling on the motions and setting the matter to be heard on January 19, 2016. This order denied Appellants' motion to require the DNS to be withdrawn and it granted the Applicant's motion to exclude all issues relating to environmental impacts from RF emissions, as such issues are outside the scope of the authority of the undersigned. This Order retained the previously established timeline for pre-hearing witness and exhibit list exchange, briefing, and exhibit exchange prior to hearing. *Appendix A, Pre-Hearing Order dated December 28, 2015.*
12. Consistent with the pre-hearing schedule, the Applicant and the County timely submitted witness and exhibits lists on January 6th that conformed to the requirements established in the earlier order. Appellants' witness and exhibit list failed to name specific people, instead stating categories of witnesses that would be presented: ecologist, landscape

architect, City of Lacey representative, residents adjacent to site, etc. On January 7, 2016, the Applicant submitted a motion objecting to the Appellants' witness list and asking that Appellants be required to provide names of specific witnesses. On the same day, the County submitted a motion to strike the Appellants' witness list. On Friday January 8, 2016, Appellants notified the Hearing Examiner through the hearing clerk that their attorney had withdrawn and that they requested the hearing be continued 45 days to allow them to retain new counsel and to allow new counsel to get up to speed. *Appendix A, Pre-Hearing Order, dated January 14, 2016.* The matter was set to be heard on March 7, 2016. *Appendix A, Pre-Hearing Order, dated January 26, 2016.*

13. On February 16, 2016, Resource Stewardship Staff issued a letter to the Applicant indicating that based on new information from Washington Department of Fish and Wildlife (WDFW), additional study was required to address the requirements of TCC 20.33.080(2)(e)(i). This letter stated that the hearing presently scheduled for March 7, 2016 would need to be postponed in order to allow WDFW time to review the report and respond. The Applicant objected to any postponement. In follow up communications, counsel for Resource Stewardship indicated that review of the new information by WDFW could lead to a change in the SEPA threshold determination that is the subject of the instant appeal. The County's counsel asserted that it was in all parties' best interests to postpone the consolidated hearing until a decision could be made as to whether or not the current SEPA determination must be changed. Given the unusual nature of the County's strong request so late in the process to postpone, their position that the issue could potentially result in a change to the threshold determination, and that it was arguably necessary to receive a reply from WDFW prior to going forward, the hearing was postponed indefinitely. *Appendix A, Pre-Hearing Order, dated February 22, 2016.*
14. Unexpectedly, WDFW responded the same day as the order continuing indefinitely was issued. Resource Stewardship Staff determined there would be no change in the SEPA environmental threshold determination. The consolidated hearing on the SEPA appeal and SUP permit application was set for the next available hearing date of March 15, 2016. *Appendix A, Pre-Hearing Order, dated February 29, 2016.*
15. At the outset of the appeal hearing, based on Appellants' witness and exhibit lists offered prior to hearing, counsel for the Applicant requested that the undersigned exclude testimonial evidence on the health effects of RF emissions on both humans and wildlife and evidence on property values, consistent with the previous order ruling on dispositive motions. This request was granted, as RF health effects are preempted by federal law and property value impacts are not within the zone of interests regulated under SEPA.

Determination of Non-Significance

16. As stated in the DNS, the Department's threshold determination of non-significance was based on review of information included in (not necessarily limited to) the following documents:

- Thurston County Master Application, dated May 12, 2015

- Special Use Permit Application, dated May 12, 2015
- Environmental Checklist, dated May 12, 2015
- Critical Areas Feasibility Study, dated June 6, 2015
- Habitat Assessment, dated March 16, 2015
- Project Description
- Communication Pole Design Calculations
- Geotechnical Report, dated February 16, 2015
- Market Study, dated January 29, 2015
- Property Owner Acknowledgment of Affidavit, dated April 21, 2015
- Tower Owner Affidavit, dated April 3, 2015
- Oly Lake Lawrence – RF Documentation
- Acoustical Report, dated April 21, 2015
- ALS License
- Non-Ionizing Electromagnetic Exposure Analysis & Engineering Certification, revised April 12, 2015
- Paint Sample
- FAA Compliance Acknowledgment, dated April 3, 2015
- FAA Lighting Documentation – TOWAIR Determination Results
- Co-Location Statement, dated April 3, 2015
- Availability of Tower for Collocation
- NEPA Compliance Acknowledgment, dated April 3, 2015
- Letter from Verizon Wireless, dated April 23, 2014
- Third Party Review by ADCOMM Engineering Company, dated July 24, 2015
- Site Photos
- Site Plans
- Notice of Application, dated June 22, 2015 (Mail Radius 2,600 feet)
- Comment Letters and Emails received in Response to Notice of Application
- Response Letter from Odelia Pacific Corporation, dated August 5, 2015
- Response Letter from Odelia Pacific Corporation, dated July 1, 2015
- Comment Letter from Washington State Department of Ecology, dated June 12, 2015
- Comment Letter from Nisqually Indian Tribe, dated June 26, 2015
- Comment Letter from Washington State Department of Ecology, dated July 13, 2015
- Memorandum from Thurston County Public Health, dated August 5, 2015
- Memorandum from Public Works, dated August 18, 2015

Exhibit C1.M.

17. The SUP application and DNS were "put on hold" after Resource Stewardship Staff received comments from WDFW District Biologist Michelle Tirhi, indicating that

wetlands within 1,000 feet of the proposed tower site had been identified as a priority 2 waterfowl concentration area. In her comment, Ms. Tirhi stated that she suspected waterfowl using the wetland identified as the 163rd Lane wetland in this record traveled from it to Lake Lawrence, another waterfowl concentration area. Ms. Tirhi stated that she would consider this bird flight path a migratory flyway, but she did not know whether it met the County definition of that term. She submitted the position that the Applicant would need to demonstrate that the proposed tower location would not have a significant impact on waterfowl. *Exhibit C1.ZZ, pages 1-3*. This email is the comment that caused Staff to request a postponement of the scheduled hearing in order to allow additional information from the Applicant and to have that information reviewed by WDFW prior to determining whether or not the DNS would be amended or withdrawn. *Appendix A, Items 21 and 23*.

18. In response, the Applicant's expert Jeffery Jones submitted an additional report addressing compliance with TCC 20.33.080(2)(e)(i), dated February 15, 2016. *Exhibit C1.AAA*. This report was forwarded to WDFW for comment. WDFW's response was submitted to the County on February 22, 2016. *Exhibit C1.BBB*. Resource Stewardship's decision to go forward with the DNS as issued was based on that February 22, 2016 email from WDFW. *Kantas Testimony*.

Arguments and Evidence on Appeal
Appellants' Case

19. On behalf of the Deschutes Neighborhood Group, Alex Foster presented evidence as a neighbor and as a research ecologist with the U.S. Department of Agriculture specializing in riparian systems, wetlands, and species conservation. Mr. Foster testified that he moved to the vicinity in 2005 expressly for the purpose of being near the wetlands and the associated diverse wildlife presence. Mr. Foster stated that the wetlands near the proposed tower site are some of the largest river-connected aquatic features of their kind along the Deschutes River, with surface water present year round. With regard to the 163rd Lane wetland, Mr. Foster testified that cattails are prominent on the east end of the wetland; the cattails form floating mats that drift throughout the 27-acre wetland depending on the breeze. In his more than 10 years in the neighborhood, Mr. Foster has observed and documented the presence of many Washington State species of concern in the wetlands surrounding the site, including three mammals, five birds, one reptile, eight invertebrates, and six plants that are state sensitive, candidate, threatened, or endangered. Two of these species observed in the 163rd Lane wetland are federally as endangered: checkerspot butterfly and water howellia. In addition, Mr. Foster has also observed and documented the presence of at least 36 additional raptor, waterfowl, and other bird and mammal species within 1,000 feet of the WCF site. Of these 36, eight are WDFW priority bird species, including osprey, band-tailed pigeon, great blue heron, common goldeneye, wood duck, trumpeter swan, bufflehead (duck), and hooded merganser. Mr. Foster calculated the average tree height in the immediate vicinity of the project site from the Applicant's site plan at 108 feet and calculated that the tower would stick up about 50 feet above the average tree height not including an osprey hazing device. *Exhibits D1, D5, D26, and D26.B; Foster Testimony*.

20. Mr. Foster offered information about the Smith Ranch restoration project, which would restore, increase the size of, and enhance existing wetlands between the WCF site and the Deschutes River. Mr. Foster stated that the restoration work in progress will attract additional waterfowl and other WDFW priority species to the wetlands near the site. Mr. Foster testified to his concerns that the location of the WCF in the direct path between the marsh wetlands at 163rd Lane, a priority 2 waterfowl concentration area and the priority 1 waterfowl concentration area at Lake Lawrence would result in a flight obstacle for waterfowl and priority species moving between the two resources. Mr. Foster presented a graphic depicting the WCF site surrounded by a 1,000-foot radius circle and showing the extent to which the nearby wetlands intrude into such a circle, based on USFWS National Wetlands Inventory Polygons. He argued that the 163rd Lane wetlands, the Smith Ranch restoration area, Lake Lawrence, and the Deschutes River, all within a couple thousand feet of one another, are highly connected resources used by wildlife, especially waterfowl. Once the historical changes wrought by agricultural activity at Smith Ranch are remediated, the habitats would all be relatively pristine, with minimal human encroachment. He asserted that this location is not appropriate for a cell tower. *Exhibits D1, D1.A, D1.C, D1.D Figure 1, D1.F, D5, and D26; Foster Testimony.*
21. Chris Nubbe, Appellant, testified in his capacity as a neighbor and as a civil engineer with experience dealing with construction and critical areas located in Thurston County. Mr. Nubbe testified that he has prepared many project site plans like the one for the instant project, a dozen or more of which have been in Thurston County; because of this, he is familiar with the GIS program and knows how to set its scale and perform distance measurements. Mr. Nubbe contended that a close review of Thurston County GeoData maps shows that surrounding wetlands are only 427 feet to the north, 575 feet to the northwest, and 900 feet to the south along the Deschutes River, all within 1,000 feet of the proposed WCF site. He asserted that the 100 year floodzone of the Deschutes River comes within 250 feet of the proposed tower site, and that Smith Ranch restoration efforts currently underway are within 980 feet of the site, while planned future wetland restoration between Lake Lawrence and the WCF would be as close as 410 feet. He argued that birds would fly between the 163rd Lane wetland and the new wetland areas to the east, as well as to Lake Lawrence, a priority 1 waterfowl concentration area, and that the WCF would result in bird collisions and violate the WCF siting regulations in TCC Chapter 20.33. In his professional opinion, the County applied a higher standard of review in the earlier cases with which he's been involved than to this case. *Exhibits D16 (see Figures 6 and 7 on pages 22 and 23), D20, D25, C1.BBB; Nubbe Testimony.*
22. Appellants submitted a statement by Alison Styring, PhD, a wildlife biologist, ornithologist, and faculty member at The Evergreen State College teaching undergraduate and master's level courses. Doctor Styring was not present at hearing; however, at the request of Appellants, Dr. Styring conducted a site visit on February 20, 2016 encompassing the 163rd Lane wetland, Smith Ranch, and Lake Lawrence. At the 163rd Lane wetland, Dr. Styring observed 13 avian species including six waterfowl species, despite February being a month of low waterfowl presence in the region due to seasonal migratory behaviors. At Lake Lawrence, she observed a flock of 10 Ruddy Ducks, a

species not widely found in Washington State. She also observed four Great Blue Herons fly in to the vicinity of the lake from the east, from the direction of the 163rd wetlands area. Her Smith Ranch stop left Dr. Styring with the understanding that, once completed the restored site, which borders the Deschutes River and is very close to the tower site, could potentially host winter waterfowl and migratory shorebirds in spring and fall. She determined that the combination of Lake Lawrence, the Deschutes River, the Smith Ranch restoration site, and the 163rd Lane wetlands is an impressive corridor of wetland habitat that will increase in its importance to birds over time. Dr. Styring submitted the opinion that the presence of a cell phone tower in that corridor would have the potential to disrupt movement patterns of birds migrating along the Pacific Flyway and also those moving daily among the wetlands, river, and lake. She submitted that it would be better for bird survival to locate the tower outside of the resulting corridor, or at the least, that a series of surveys be conducted in the area during spring and autumn migration to determine the species composition and abundances of birds using these wetland areas during critical periods of their annual cycles. She stated that such surveys should occur in the morning from dawn until mid-morning and at dusk to maximize the detection of territorial and secretive species that may vocalize primarily at dawn and to observe any movements to or away from the wetland for feeding or roosting. *Exhibit D24.*

23. Albert M. Manville, PhD, worked as a federal wildlife biologist for 17 years, retiring in June 2014 from his position as a Senior Wildlife Biologist with the USFWS Division of Migratory Bird Management. Dr. Manville did not appear at hearing. In his written testimony, he stated that bird collisions with an unlit un-guyed monopole WCF 50 feet taller than the average of surrounding trees in the proposed location are likely, especially when birds fly at night on a daily basis and during inclement weather. Dr. Manville authored the current 2013 USFWS Revised Voluntary Guidelines for Communication Tower Design, Siting, Construction, Operation, Retrofitting, and Decommissioning. These federal guidelines state: "Towers should not be sited in or near wetlands, other known bird concentration areas (e.g., state or federal refuges, staging areas, rookeries, and Important Bird Areas), in known migratory, daily movement flyways, areas of breeding concentration, in habitat of threatened or endangered species, or key habitats for Birds of Conservation Concern. Disturbance can result in effects to bird populations which may cumulatively affect their survival." *Exhibits D26.D and C1.CCC.*
24. The fourth appeal issue listed in the appeal itself (Exhibit C1.N) relating to procedural error from the County's failure to make the full file available for public review was not argued at hearing.

Applicant Case

25. The professional wetland scientist and wildlife biologist who performed site visits and generated the Applicant's critical area feasibility report and habitat assessment is Jeffery S. Jones. Mr. Jones appeared at hearing to discuss his reports and address the Appellants' claims. Mr. Jones testified that he has done several hundred habitat studies over the years. He stated that his use of the WDFW priority species data base is an industry

standard method of determining the likely presence of priority species. *Exhibits VI, V2, and V3; Jones Testimony.*

26. Mr. Jones testified that during his initial site visit, he talked to Mr. Smith and he looked for wetlands, other habitat, and species of interest. Knowing there was a wetland across Vail Road, and that paved public right-of-way breaks a wetland buffer, he measured that it was 165 feet to the road. The largest wetland buffer plus setback required in Thurston County would measure 315 feet. He reviewed the project site for wetland characteristics and found it to be on a hill top with excessively drained soils and forested with mature trees, although the project site had previously been cleared. He determined that the site did not meet wetland criteria. He also made wildlife observations while he was there and observed for Mazama pocket gopher presence, finding none. The site's habitat was not unique; there were no large stick nests. While on site he measured tree heights with a clinometer and determined the trees around the site to be 110 to 120 feet in height. In defending his listing of priority species listed in the habitat assessment that would not be affected by the WCF, he testified that the impact of project is very small because no trees would be removed and it is only a 40- by 40-foot area with no unique habitat on site. He concluded that no endangered or threatened species in the surrounding area would be impacted. *Exhibit V2; Jones Testimony.*
27. When asked to address the concerns expressed by WDFW and the Appellants regarding the newly designated waterfowl concentration area at the 163rd Lane wetlands and the wildlife connection to the restoration of Smith Ranch, Mr. Jones noted that Smith Ranch is not completed now, that it may or may not become a wildlife refuge, and that it is not necessarily going to be a designated critical area. He also stated that there is no designated flyway in the County other than the Pacific Flyway, which covers all of western Washington and cannot be avoided by any development. Mr. Jones does not consider the wetlands in the vicinity of the cell tower site to be waterfowl staging areas, although he acknowledges that another wildlife biologist could. He testified that even if they are staging areas, the proposed WCF would not impact them. He stated that the only potential impact is the risk of bird collision. Regarding the risk of bird collision, he stated that there is no research showing a monopole of this height creates a significant risk, and that the Appellants have brought forward only professional opinion to the contrary, not evidence. He submitted that this cell tower would not interfere with bird flight between waterfowl concentration areas. *Jones Testimony.*
28. Reviewing Mr. Foster's exhibits, Mr. Jones stated that even if his species list is correct, there is no significant risk to birds flying past this tower. Dr. Styring's letter did not cause him to reconsider his position. He testified that he disagrees that the WCF would be within an established wildlife corridor or have potential to disrupt movement patterns of birds, stating that birds will avoid the tower just like they avoid trees, even in poor weather. Addressing the materials submitted by Dr. Manville, Mr. Jones testified that the studies submitted by Dr. Manville do not talk about the kind of tower proposed here, and that high bird mortality rates were not related to this type of WCF. Mr. Jones critiqued

Dr. Manville's cited references. Regarding the USFWS guidelines, Mr. Jones disagrees that his habitat study is inconsistent with them. *Jones Testimony*.

29. When asked to specifically address WDFW's January 15, 2016 request for additional study, Mr. Jones stated that he would have to make observations over a long period of time to accomplish what Ms. Tirhi suggested. He stated that she shouldn't have commented on compliance with the County's WCF code. He admitted on cross examination that he did not look into whether or not birds would fly between these bodies of water, repeating that even if they do, they will fly around the tower. Mr. Jones testified that he had conducted a total of three site visits, one in 2013 and two in 2015, in preparing his two reports. He testified that he made another site visit after being forwarded Ms. Tirhi's January 15th request for more study, and that during site visit, he made additional observations that are not referenced in his supplemental report dated February 15, 2016. He testified that he spent two hours there in the morning; no one was with him and he did not make notes. He testified that did not observe anything of significance. *Jones Testimony*.
30. Looking more closely at Mr. Jones' June 6, 2013 report, alternately called "Critical Areas Feasibility" or "Critical Areas - Wetland Analysis" by the parties, the document is comprised of one paragraph total. The paragraph states that the site contains no wetlands and that there are no wetlands or streams within 315 feet of the project site. Attached is a wetland determination data form; this form does not document time of day or duration of site visit, nor whether any wildlife was observed. Among the other attachments is also a USFWS National Wetlands Inventory map of Oly Lake Lawrence showing the presence of Freshwater Forested/Shrub wetlands north and south of the Deschutes River due south of the project site within 1,000 feet. *Exhibit C1.PP*.
31. Mr. Jones' March 16, 2015 habitat assessment is comprised of two pages (excluding project description and site location information) and disclaims that it is limited to species listed on the WDFW Priority Habitats and Species Online Report for "an approximate 1 mile box around the proposed lease area." Priority Species addressed include Coho, Chinook, steelhead, and cutthroat trout. The assessment mentions the Deschutes River and Lake Lawrence in one sentence each, without reference to their distance from or any possible relationship with the site. This report does not reference any wetlands, existing or under restoration. It mentions waterfowl concentrations in two sentences reading: "Lake Lawrence has waterfowl concentrations. Impact to waterfowl are unlikely because it is not in close proximity to the lease area." The assessment makes no management recommendations regarding waterfowl concentrations. In a section titled Palustrine Aquatic Habitat, the document quotes generalized definitions and in site specific analysis states: "Aquatic buffers do not extend into the subject parcel. Construction activities will not impact aquatic habitats or their buffers." For management recommendations, it states: "Follow best management construction practices for erosion and sediment control. Control storm drainage runoff by compliance with the stormwater design manual and approved engineering plans." *Exhibit C1.QQ*.

32. In response to Ms. Tirhi's January 15, 2016 email and the County's letter dated February 16, 2016 postponing the scheduled hearing and requesting "additional study" in the form of a "bird evaluation report" (*Appendix A, Item 21*), Mr. Jones submitted his third report, which is about two pages in length and dated February 15, 2016.⁵ Addressing wetlands, staging areas, or rookeries supporting priority and listed bird species, and/or species of local concern within 1,000 feet of the project site, the report stated:

The proposed [WCF] is not within 1,000 feet of any staging areas or rookeries. [description of attached map] A portion of the wetland system west of Vail Road is approximately 600 feet west of the proposed WCF. This is the only location where a wetland is within 1,000 feet... . The area within 1,000 feet is dominated by dense cattails. It is identified as PEMC... [Palustrine, emergent, seasonally flooded]. ...The open water habitat is more than 1,000 feet from the proposed WCF. The wetland is privately owned and is not a publicly owned wildlife refuge. Field observations for priority species at and near the proposed WCF were performed during site visits. The small portion of the wetlands within 1,000 feet... has dense cattails. Most waterfowl prefer open water and need room to take off and land. The areas where they may be present are more than 1,000-foot from the proposed WCF. The proposed [WCF] will not have a significant impact on birds within the wetland areas within 1,000 feet to the west.

Exhibit C1.AAA.

33. Addressing publicly owned wildlife refuges within 1,000 feet of the WCF, the report stated:

The proposed WCF is not within 1,000 feet of a publicly owned wildlife refuge. The nearest national refuge is the Billy Frank Jr. Nisqually Wildlife Refuge. Washington State WDFW has several wildlife areas identified in Thurston County, none of which are within 1,000 feet of the proposed WCF.

Exhibit C1.AAA.

34. Addressing effect on priority bird species or species of local concern, the report stated:

Other than the wetland system west of Vail Road, the proposed [WCF] is not within 1,000 feet of wetlands, staging areas, or rookeries. ... The limited areas [of the wetland to the west] within 1,000 feet are dominated by dense cattails which do not support the open water aquatic habitats water fowl (including cavity nesting bufflehead, common merganser, wood ducks, and cormorants etc). Other bird species of local concern, either are not present and/or will not be impacted by the proposed tower installation. The proposed [WCF] would not have a significant impact on the wetlands and/or priority and listed bird species and/or species of local concern.

Exhibit C1.AAA.

⁵ It was not clearly established in the record why Mr. Jones' report is dated the day prior to the County's letter requesting it.

35. Addressing effect on migratory flyways documented by state or federal agencies, the report stated:

The Pacific Flyway is the only official state and federally identified migratory flyway in Western Washington. It is the primary north/south migration pattern for migratory birds in the western third of North America. ... Waterfowl heading inland for winter refuge from Puget Sound storms, such as cormorants, wood ducks, and buffleheads, are not following the pattern of the Pacific Flyway. The same species can also be year round residents. Patterns of bird movement from Puget Sound to upland lakes and along rivers may fall within the broad definition of migration, but they are not migratory movements associated with the Pacific Flyway. The proposed [WCF] will not interfere with any migratory flyways documented by state or federal agencies.

It is my professional opinion that the likelihood of bird strikes on the proposed WCF tower by priority and listed bird species is very low and does not pose a significant risk to birds. My opinion is based on observations of other monopole towers less than 200 feet tall, the absence of guy wires, the ability of birds to avoid collisions of monopole in most weather conditions, the location of the tower in a forest, and the absence of aircraft collision avoidance lighting. The proposed WCF complies with the US Fish and Wildlife Service Interim Guidelines for Recommendation on Communications Tower, Siting, Construction, Operation and Decommissioning, see attached. ... The monopole will not have any guy wires. The tower will be located within an existing stand of 110 to 130-foot tall Douglas fir trees. ... The tower is visible to birds during the day and on clear moonlit nights. Nocturnal flights and periods of fog are two conditions when significant bird mortality has been document for other types of towers. WCF monopoles, under 200 feet in height, have been found by studies to not pose a significant impact hazard to migratory birds.

Exhibit C1.AAA.

36. The USFWS Interim Guidelines on siting communication towers attached to Mr. Jones' report and cited in his testimony are not the same as the version cited by Mr. Foster and attached by Dr. Manville (their author) to the latter gentleman's written submission. The version used by Mr. Jones does not have a legible date, but the footer of the document encourages readers, "*This is your future. Don't leave it blank. Support the 2000 Census.*" This statement seems to suggest these guidelines predate the 2013 document referenced by Mr. Foster and Dr. Manville. Mr. Jones' version does not contain the section cited in Finding 22, above, regarding not siting communications towers near wetlands or known bird concentration areas. *Exhibit C1.AAA.*

County Case

37. With regard to the Appellants' expressed concern about the proximity of wetlands to the proposed cell tower, Resource Stewardship Staff indicated that all construction would be conducted beyond the largest regulated wetland buffer required by the critical areas ordinance (CAO, TCC Title 24). Regarding the proximity of the proposed WCF to

gopher soils and prairie species, Staff indicated that the project location is located over 700 feet away from gopher soils in a forested portion of a 64-acre property. The site plan was reviewed by the County Biologist and the Planner who has been facilitating gopher reviews, neither of whom found any issues that would require the application to be reviewed by United States Fish & Wildlife (USFW) for gopher presence or by the County for prairie species. Regarding Appellants' assertion that the Deschutes River was not mentioned in the SEPA checklist and/or application materials, Tony Kantas, Planner for the project, stated that the County was aware that the river is approximately 880-feet away from the cell tower site and that the river was illustrated on the site plan vicinity map. Because this proximity to the river does not trigger any type of shoreline permit, its omission from the checklist was not viewed as critical. Mr. Kantas indicated that the CAO does not require any kind of buffer from the floodplain or flood zone associated with a river, but rather only requires a setback from a wetland or river's ordinary high water mark. *Exhibits C1, C1.D, and C1.G; Kantas Testimony.*

38. With regard to the County's review of the SUP application and SEPA materials, Resource Stewardship Staff indicated that the Applicant submitted a critical area feasibility report and a habitat assessment report, which were prepared by a wetland and wildlife biologist and were accepted. *Exhibit C1.PP and C1.QQ; Kantas Testimony.* These reports were sent to WDFW and no comments were received from the state agency prior to the issuance of the SEPA DNS. After DNS issuance, WDFW submitted comments. *Exhibits C1.S, C1.ZZ, and C1.BBB.* The state wildlife agency's first comment indicated their biggest concern was that the cell tower proximity to a wetland and a large body of water would attract osprey, which are highly attracted to cell towers and will often forgo a natural nest locations to nest on a tower, resulting in various problems. WDFW recommended placing hazing structures on the proposed WCF to prevent osprey from nesting there. *Exhibit C1.S; Kantas Testimony.* Hazing structures were required in a recommended condition of SUP approval, but not in the DNS. *Exhibit C1.*
39. Subsequently, WDFW submitted comments indicating that additional review was needed to study potential impacts to waterfowl from the WCF. *Exhibit C1.ZZ.* Mr. Kantas testified that he was surprised to receive this comment based on earlier comments. Resource Stewardship forwarded the request for additional information to the Applicant, placing the already scheduled hearing on hold. *Appendix A, Item 21.* The Applicant's consultant responded with a report dated February 15, 2016, detailed in Findings 31 through 35 above. *Exhibit C1.AAA.*
40. After the Applicant consultant's February 15th report was routed to WDFW for comments, WDFW Staff responded on February 22, 2016. Resource Stewardship and other County staff interpreted this email comment as approving or accepting to the Applicant consultant's February 15th submittal because of the sentence that states that WDFW "supports the project proponent in adhering to USFWS guidelines for reducing potential impacts to birds." *Exhibit C1.BBB; Kantas Testimony.*

41. On cross examination, Mr. Kantas agreed that the February 15th Applicant consultant report did not contain any information about site visits, field observations, or additional studies performed by the Applicant's consultant in response to the WDFW request for more study. He agreed that the document doesn't say when, how many times, or for how long field observations were conducted. *Kantas Testimony*.

Washington Department of Fish and Wildlife Emails

42. On closer review, selected relevant emails to and from WDFW during the County's SEPA process read as follows:

Michelle Tirhi email to Tony Kantas, dated January 15, 2016, 12:57 pm

Wetlands less than 1000 ft from the proposed cell tower location have been identified as a WDFW priority species location (waterfowl concentration area). Additionally, WDFW strongly suspects that waterfowl are likely moving between these wetlands and another waterfowl concentration area, Lake Lawrence. The later has not been studied or proven but is highly likely (and could be studied or proven, if necessary). What I don't know is how Thurston County is defining "migratory flyways".⁶ If you mean the official Pacific flyway (<http://www.pacificflyway.gov/> map below), then yes, this location is within the larger flyway zone. If "migratory flyway" includes movement corridors for waterfowl from one high use area to another, the area from the wetlands to Lake Lawrence also qualify. Based on this information, it appears the location of this cell tower contradicts two requirements of Thurston County code and thus would not be a DNS:

1. *WCFs/antenna support structures shall not be located within one thousand feet of wetlands, staging areas, or rookeries supporting birds listed as priority species by the Washington Department of Fish and Wildlife...*
2. *... Where possible, WCFs/antenna support structures shall not be located where they would interfere with migratory flyways documented by state or federal agencies.*

In order to approve at this location according to code, the applicant would need to demonstrate that the location will not have a significant impact on waterfowl (*"unless the applicant demonstrates that the proposed location will not have a significant impact on such birds..."*).

The proposed location of the tower is actually within a straight line distance from the wetlands and Lake Lawrence (see attached⁷). Thanks Tony.

Michelle Tirhi, Washington Department Fish and Wildlife
District Biologist, Pierce/Thurston/North Lewis County

⁶ Neither "flyway" nor "migratory flyway" is defined in TCC Title 20 (Zoning), TCC 20.33 (Wireless Communications Facilities), or TCC 24 (Critical Areas).

⁷ The figure attached to Ms. Tirhi's email can be found in the record at Exhibit D4, page 3.

Exhibit C1.ZZ (highlight in the original).

Tony Kantas email to Michelle Tirhi, dated January 15, 2016, 12:07 pm

This is currently under appeal, and if WDFW thinks any “further” analysis would result in something other than a DNS, let us know NOW so we can withdraw our determination. Or, we need to know if WDFW does not believe the application can meet the below requirement to approve the Special Use Permit in regards to the migratory flyways for threatened or endangered bird species. Does WDFW not agree with the submitted reports? It appears the cell tower location would be between the wetlands and the river and not the wetland and the lake, if this makes a difference.

Tony Kantas, Associate Planner, Thurston County

Exhibit C1.ZZ.

Michelle Tirhi email to Tony Kantas, dated January 15, 2016, 5:16 pm

I’m not suggesting WDFW would do this study; we have not budgeted in time nor staff to do this. There is a wealth of published data on habitat and landscape use by waterfowl (e.g. how waterfowl move across a landscape, try <http://222.nwrc.usgs.gov/wdb/pub/wmh/contents.html>). I’ve attached a few articles here...but there are more. The community group might be available to conduct this study. Or the applicants might want to hire a consultant if they wish to disprove the literature. At minimum, it could involve someone doing 4 hour monitoring surveys and records the vanishing barring as waterfowl leave the wetlands. A more elaborate study would be to have several monitors set at both wetland and lake and between to record the movement pattern of waterfowl. Again, it seems like the community group might be available to assist as needed.

Michelle Tirhi, Washington Department Fish and Wildlife
District Biologist, Pierce/Thurston/North Lewis County

Exhibit C1.ZZ.

Tony Kantas email to Darric C. Lowery, dated February 17, 2016, 8:21 am

Please see the attached comments from the applicant’s biologist. Please provide comments within two weeks of this email.

Thank you, Tony

Tony Kantas, Associate Planner, Thurston County

Exhibit C1.BBB.

Darric C. Lowery email to Tony Kantas, dated February 22, 2016, 12:58 pm

Tony,

WDFW does not have substantial additional comments related to “OLY Lake Lawrence-Project No. 2015103966”, except to reaffirm our comments made to you in previous email correspondences (now a part of record) related to this project.

Having spoken and corresponded with Michelle Tirhi, WDFW District Biologist for Pierce/Thurston/North Lewis county, she has asked that I call attention to the below:

Attached letter response to 1) states “The proposed Verizon Wireless tower is not located within 1,000 feet of any staging areas or rookeries.” WDFW has already identified and commented that the site is within 1,000 feet. Michelle sent you an email documenting the nearby wetlands as a priority 2 waterfowl concentration areas (PHS category) and as a potential “staging area”. She believes that any wetland value should not be discounted simply because it contains or doesn’t contain open water in that area. Wetlands are valuable despite their condition and that there is plenty of published literature on subject. WDFW supports the project proponent in adhering to USFWS guidelines for reducing impacts to birds.

I would like to call attention to my prior comments regarding the new publicly owned wildlife refuge at the “Smith Ranch” floodplain area that is directly adjacent to and within 1,000 feet of the proposed project site. The cities of Olympia, Yelm, and Lacy acquired the property as a part of Washington State Department of Ecology mitigation requirement connected to a recent water rights agreement. The “Smith Ranch Wildlife Area” is actively undergoing site restoration and wetland rehabilitation/enhancement efforts. I have this knowledge because I have been providing technical assistance for the past year to the stakeholder group that is designing and implementing the mitigation efforts. During my site visits at the “Smith Ranch Wildlife Area” I have observed geese, ducks, beavers, coyotes, songbirds, herons, and salmonids species that area actively using the available priority habitat. Upon the completion of the proposed wetland rehabilitation I presume that the wildlife area will attract a more diverse and larger abundance of wildlife.

Thank you for the continued opportunity to provide comments regarding this project!

Respectfully,

Darric Lowery

WA Department of Fish and Wildlife

Region 6 – Habitat Biologist

Exhibit C1.BBB.

43. In an earlier email, Mr. Lowery had informed Resource Stewardship Staff: "I have visited the area surrounding the proposed project site and found that it was within 1000 feet of wetlands or staging areas supporting fish and wildlife (including birds) listed as priority species by the Washington Department of Fish and Wildlife and is located within one thousand feet of a publicly owned wildlife refuge. The project site is not located within a documented migration route, yet the site is located within a presumed flyway." *Exhibit D6, page 2*. Mr. Lowery explained in a later email that the publicly owned wildlife refuge to which he was referring was the Smith Ranch project. "I have been working with the cities associated with the water rights mitigation and their consultants to develop restoration strategies and a wildlife management plan for the mitigation property. The intent, from my understanding, is to develop a publicly owned refuge for fish and wildlife management." *Exhibit D5, page 1*.

Limited Special Use Permit Findings

44. Written notice of the public hearing was sent to all property owners within 2,600 feet of the site and to others who had requested notice on March 1, 2016. It was published in The Olympian, and posted on site on March 4, 2016. *Exhibits C2 and C3*.
45. Public comment offered at hearing and the written comments offered before and during the hearing relating to the special use permit application expressing the following (paraphrased) concerns:

Health impacts: Many were concerned with potential health impacts referencing various news articles and studies. One individual whose residence is near to the proposed tower location testified that she has a permanently implanted medical device, the operation of which could experience EMF-related interference, which could impact her health significantly if a WCF is approved so near her residence.

Neighborhood character/Property Value Impacts: Many stated that they live in the area expressly for the enjoyment of a rural quiet neighborhood with an abundance of nature and wildlife. Others asserted their property values would be negatively impacted. One real estate broker testified that it is proven that buyers avoid homes that are near wireless communication facilities.

Impacts to views: Evidence was offered by project opponents challenging the adequacy of the Applicant's visual assessment evidence and contending that the project would result in a WCF that would not comply with TCC 20.33.080(2)(b)(i) and (ii). Some comment asserted that the proposed WCF would impede views of Mount Rainier and that the Applicant failed to demonstrate, through balloon tests at alternate sites, that a less view impacting site is not available. Several people who commented stated that viewing the WCF would negatively impact the rural character of the area.

Impacts to wildlife, critical areas, and properties: Several people testified that they are concerned for environmental effects to the wetland areas and harmful effects to

wildlife. A beekeeper and another person testified to the potential harm to bees noting studies have shown that navigation patterns of bees are affected by electromagnetic fields (EMF). The beekeeper testified that his livelihood would be negatively impacted.

Support for WCF: Many individuals also wrote or testified in support of the facility citing a need for improved cellular coverage, particularly for security and to facilitate prompt emergency response for those with health conditions or more advanced years.

Testimony of Inge Piller, Edson Holloway, Wayne Vanderpol, Burgess Meredith, James Pfaff, Gerard Moore, Diane Dondero, Richard Krueger, Dr. Eva Lester, Dillard Jensen, Adrienne Arias, Chantal LaFont, Lyn Quayle, Marian Clements, Thomas Mani, Ann Kennedy, Christy White, Sue Danver, Jean Marie Mason, Bo Foster, Debra Nimocks, Jason Nimocks, Terry Kram, Wally Brown, Judy Chapman, Dan Page, Judy Andrew, Rella Schafer, Alison Baker, Carolyn Chew, Chris Nubbe, and Deena Reeves; Exhibits C1.WW, C1.XX, C1.YY, D10, and D22.

46. Specifically with regard to human health effects of WCFs, Section 332(c)(7) of the Federal Telecommunications Act of 1996 preempts local decisions premised directly or indirectly on the environmental effects of radio frequency (RF) emissions, assuming that the provider is in compliance with the federal RF rules. The Applicant submitted required power density calculations and other information effectively demonstrating compliance with FCC requirements. Resource Stewardship Staff had this information reviewed by a third party reviewer to confirm compliance with FCC guidelines, consistent with TCC 20.33.060. The County's third party reviewer confirmed that the proposal was capable of complying with FCC requirements. *Exhibits C1, C1.CC, C1.DD, and C1.EE.* Because of this compliance, all issues raised with regard to human health in both the SEPA appeal materials and in public comment are outside the scope of the authority of any local land use decision maker.

CONCLUSIONS

Jurisdiction

The Hearing Examiner has jurisdiction to decide this Special Use Permit application under Sections 2.06.010 and 20.54.015 of the Thurston County Code, and Section 36.70.970 of the Revised Code of Washington. The Examiner is authorized to decide appeals of environmental threshold determinations made pursuant to the State Environmental Policy Act pursuant to TCC 2.06.010(E) and TCC 17.09.160(A).

Criteria and Standards for Review

SEPA Appeal

The State Environmental Policy Act (Chapter 43.21C RCW or “SEPA”) specifies the environmental review procedures the County must follow for proposals that may have an impact on the environment. *RCW 43.21C.030(b).* The SEPA threshold determination is a determination

as to whether a proposal is “likely to have a probable significant adverse environmental impact.” WAC 197-11-330. Pursuant to WAC 197-11-330(3), in determining an impact's significance the responsible official must take into account the following (among other considerations): that the same proposal may have a significant adverse impact in one location but not in another location; that several marginal impacts when considered together may result in a significant adverse impact; and whether a proposal may to a significant degree:

- (i) Adversely affect environmentally sensitive or special areas, such as loss or destruction of historic, scientific, and cultural resources, parks, prime farmlands, wetlands, wild and scenic rivers, or wilderness;
- (ii) Adversely affect endangered or threatened species or their habitat; [and/or]
- (iii) Conflict with local, state, or federal laws or requirements for the protection of the environment;

The lead agency must make its threshold determination “based upon information reasonably sufficient to evaluate the environmental impact of a proposal.” WAC 197-11-335.

For an environmental threshold determination to survive judicial scrutiny, the record must demonstrate that "environmental factors were adequately considered in a manner sufficient to establish prima facie compliance with SEPA," and that the decision to issue a MDNS was based on information sufficient to evaluate the proposal's environmental impact. *Pease Hill Community Group v. County of Spokane*, 62 Wash.App. 800, 810 (1991).

Clear error is the standard of review applicable to substantive decisions under SEPA. *Cougar Mt. Assocs. v. King County*, 111 Wn.2d 742, 747, (1988). The determination by the governmental agency is clearly erroneous only if the reviewing tribunal is left with “the definite and firm conviction that a mistake has been committed.” *Id.* at 747 (quoting *Polygon Corp. v. Seattle*, 90 Wn.2d 59, 69, (1978)). The burden of proof is on the Appellant to show that the proposal will have probable, significant adverse environmental impacts. *Boehm v. City of Vancouver*, 111 Wn. App. 711, 719, (2002). The procedural determination of the County's Responsible Official shall be accorded substantial weight in appeals. TCC 17.09.160.1.2; TCC 17.09.160.S; RCW 43.21C.075(3)(d); RCW 43.21C.090.

Special Use Permit Criteria for Review

The Hearing Examiner may approve an application for a Special Use Permit only if the following general standards set forth in TCC 20.54.040 are satisfied:

- A. Plans, Regulations, Laws. The proposed use at the specified location shall comply with the Thurston County Comprehensive Plan, and all applicable federal, state, regional, and Thurston County laws or plans.
- B. Underlying Zoning District. The proposed use shall comply with the general purposes and intent of the applicable zoning district regulations and subarea plans. Open space, lot, setback and bulk requirements shall be no less than that specified for the zoning district in which the proposed use is located unless specifically provided otherwise in this chapter.

C. Location. No application for a special use shall be approved unless a specific finding is made that the proposed special use is appropriate in the location for which it is proposed. This finding shall be based on the following criteria:

1. Impact. The proposed use shall not result in substantial or undue adverse effects on adjacent property, neighborhood character, natural environment, traffic conditions, parking, public property or facilities, or other matters affecting the public health, safety and welfare. However, if the proposed use is a public facility or utility deemed to be of overriding public benefit, and if measures are taken and conditions imposed to mitigate adverse effects to the extent reasonably possible, the permit may be granted even though said adverse effects may occur.
2. Services. The use will be adequately served by and will not impose an undue burden on any of the improvements, facilities, utilities, or services existing or planned to serve the area.

Wireless Communications Facilities Standards

Pursuant to 20.33.080, the following standards apply to freestanding WCFs and remote freestanding WCFs/antenna support structures.

1. Evaluation of Alternative Sites. Prior to submission of an application for a WCF/antenna support structure, the Applicant is encouraged to meet with residents of the search area for the proposed WCF/antenna support structure for the purpose of evaluating alternative sites and exploring the possibility that other technically feasible sites may be available that would be more acceptable to the community.
2. Siting.
 - a. Freestanding WCFs and other antenna support structures regulated by this chapter shall not be permitted in residential districts unless ...(not applicable);
 - b. WCFs and other antenna support structures shall be located, designed and screened, to the extent feasible, to blend with the immediate surroundings so as to reduce visual impacts.
...
 - c. WCFs and other antenna support structures shall be located so they do not narrow the sidewalk width ... (not applicable)
 - d. WCFs and other antenna support structures shall be located, designed, and screened to maintain property values and neighborhood character.
 - e. WCFs and other antenna support structures shall be sited consistent with the provisions of the Thurston County Agricultural Uses and Lands Critical Areas

Ordinance (Chapter 17.15 TCC), the Thurston County Critical Areas Ordinance (Title 24)...;

- i. To minimize the potential for birds to collide with towers, WCFs/antenna support structures shall not be located within one thousand feet of wetlands, staging areas, or rookeries supporting birds listed as priority species by the Washington Department of Fish and Wildlife, listed as endangered or threatened species under the federal Endangered Species Act (64 FR 14307), listed in Title 24 TCC or Chapter 17.15 TCC as species of local importance, and as amended, or within one thousand feet of publicly owned wildlife refuges, unless the applicant demonstrates that the proposed location will not have a significant impact on such birds. Where possible, WCFs/antenna support structures shall not be located where they would interfere with migratory flyways documented by state or federal agencies. (*emphasis added*)

Conclusions Based on Findings

1. SEPA Appeal

In order to prevail, the Appellants must prove that the MDNS was clearly erroneous in the face of the deference due to the SEPA Responsible Official's determination. *TCC 17.09.160.I.2; Cougar Mt. Assocs. v. King County*, 111 Wn.2d 742, 747, (1988). Washington courts have held that a determination of non-significance must be upheld if the record demonstrates that "environmental factors were adequately considered ... and that the decision... was based on information sufficient to evaluate the proposal's environmental impacts." *Anderson v. Pierce County*, 86 Wn. App. 290 (1997).

The instant consolidated SEPA appeal and project permit hearing - the subject of several months' worth of pre-hearing procedure - was postponed upon receipt of new information from the Washington Department of Fish and Wildlife. Thurston County assigned so much weight to the concerns expressed by Ms. Tirhi in her emails of January 15, 2016 that County Staff requested and ultimately obtained an indefinite continuance of the hearing in order to require "additional study" in the form of a "bird evaluation report" to address WDFW's concerns. WDFW's communications, included verbatim in Finding 41, conveyed that two state wildlife biologists believed that waterfowl were likely traveling between the waterfowl concentration areas of the 163rd Lane wetland and Lake Lawrence, which route WDFW Staff would consider a flyway, and that WDFW biologists believed the 163rd Lane wetland to be a waterfowl staging area. If either or both were true, the proposal would conflict with that County WCF siting regulations, which in WDFW Staff's opinion would mean that a DNS was not appropriate.

In the January 15th comments, WDFW recommended at a minimum a professional consultant doing four hour surveys, recording the vanishing barring as waterfowl leave the wetlands. Alternatively, a more elaborate study suggested would involve several monitors at the wetland, the lake, and in between to record the movement patterns of

waterfowl. It was WDFW's specific request for more information that caused the postponement of the hearing to obtain additional information expressly to determine whether the DNS would be withdrawn or amended.

The February 15, 2016 letter submitted by the Applicant consultant contained no bird monitoring data or any other site specific data addressing bird travel between the two priority waterfowl concentration areas requested by WDFW. The Applicant consultant did not perform any bird monitoring, and when asked to explain this, he stated that he would have to make observations over a long period of time.

Why Resource Stewardship Staff accepted the February 15, 2016 letter as adequate response to WDFW's request was not clearly established at hearing, but they did and they passed it back to WDFW for comment. Also not satisfactorily answered is the question of why County Staff interpreted WDFW's February 22, 2016 email as acceptance or approval of the February 15th report.

WDFW does not have substantial additional comments related to “OLY Lake Lawrence-Project No. 2015103966”, except to reaffirm our comments made to you in previous email correspondences (now a part of record) related to this project.

Having spoken and corresponded with Michelle Tirhi, WDFW District Biologist for Pierce/Thurston/North Lewis county, she has asked that I call attention to the below:

Attached letter response to 1) states “The proposed Verizon Wireless tower is not located within 1,000 feet of any staging areas or rookeries.” WDFW has already identified and commented that the site is within 1,000 feet. Michelle sent you an email documenting the nearby wetlands as a priority 2 waterfowl concentration areas (PHS category) and as a potential “staging area”. She believes that any wetland value should not be discounted simply because it contains or doesn't contain open water in that area. Wetlands are valuable despite their condition and that there is plenty of published literature on subject. *WDFW supports the project proponent in adhering to USFWS guidelines for reducing impacts to birds.*

I would like to call attention to my prior comments regarding the new publicly owned wildlife refuge at the “Smith Ranch” floodplain area that is directly adjacent to and within 1,000 feet of the proposed project site. The cities of Olympia, Yelm, and Lacy acquired the property as a part of Washington State Department of Ecology mitigation requirement connected to a recent water rights agreement. The “Smith Ranch Wildlife Area” is actively undergoing site restoration and wetland rehabilitation/enhancement efforts. I have this knowledge because I have been providing technical assistance for the past year to the stakeholder group that is designing and implementing the mitigation efforts. During my site visits at the “Smith Ranch Wildlife Area” I have observed geese, ducks, beavers, coyotes, songbirds, herons, and

salmonids species that area actively using the available priority habitat. Upon the completion of the proposed wetland rehabilitation I presume that the wildlife area will attract a more diverse and larger abundance of wildlife.

How the County focused on the one sentence (italics above) and disregarded the balance of the email "reaffirming" earlier comments requesting more study for the protection of wildlife resources and the nearby presence of staging areas and a wildlife refuge under development was not adequately explained at hearing, although County Staff was asked to explain its interpretation multiple times.

The Applicant's February 15th letter claimed that the project would be consistent with USFWS guidelines for tower siting. These guidelines expressly recommend:

Towers should not be sited in or near wetlands, other known bird concentration areas (e.g., state or federal refuges, staging areas, rookeries, and Important Bird Areas), in known migratory, daily movement flyways, areas of breeding concentration, in habitat of threatened or endangered species, or key habitats for Birds of Conservation Concern. Disturbance can result in effects to bird populations which may cumulatively affect their survival.

WDFW's February 22nd email didn't mean the project complies with the above, which the record shows it clearly does not. Taken in context, the sentence in the final WDFW email meant that the state wildlife agency supports the project proponent *to the extent that* they comply with the USFWS guidelines.

The County halted these proceedings to require further study to address WDFW's concerns. The Applicant consultant's February 15, 2016 letter does not constitute further study. Because that one sentence in WDFW's February 22nd email was the basis for concluding that the Applicant had sufficiently addressed the requirement for additional study, the undersigned has a definite, firm conviction that a mistake has been made.

Also contributing to this conviction is the breadth of scientific opinion supporting the requirement for more information prior to environmental threshold determination and/or project approval. Appellants submitted undisputed information, provided by a wetland scientist who works for a federal agency based on first hand observations, that the 163rd Lane wetland is used by eight WDFW priority species and hosts two federally listed endangered species. Even without considering the adjacent Smith Ranch project and whether what WDFW biologists consider to be a flyway is the "migratory flyway" contemplated in the WCF siting criteria (the term is not defined in code), the proposed WCF placement would conflict with TCC 20.33.080(2)(e)(i) unless the Applicant can show that the proposed location will not have a significant impact on birds. The Applicant has asserted that there will be no significant impact on birds but in the record presented, has not shown this.

The Applicant's critical area documentation is scant on site-specific detail, containing a significant percentage of quotes from online resources and/or statements of general applicability. The Applicant's first two reports (with a combined length of less than three pages excluding project description and site location information) do not address waterfowl or any kind of birds observed on or near the site. Five times as many lines of text are given to fish species as waterfowl; no one has suggested impacts to fish. In the February 15th letter and in testimony, the Applicant consultant stated field observations for priority species were conducted during site visits; yet, no notes taken during field observations were provided, not even after being specifically requested. None of the Applicant's reports considers the presence of and interrelationship with the existing wetlands along the Deschutes River, which are also within 1,000 feet of the project site.

In contrast, the Appellants presented the opinions of a 17-year USFWS bird specialist who wrote the federal guidelines for communications tower siting, a PhD ornithologist and professor, and a USDA research ecologist who specializes in riparian ecosystems, species conservation, and land management to guide public policy. The latter two conducted site visits. All three asserted that the project proposed in this location would disrupt bird movement patterns and/or result in bird collisions. All three agreed with the two WDFW biologists that further study must be done prior to reaching an environmental threshold determination.

In another rural portion of the County, the proposed WCF could comply with the requirements of the County code. In the proposed location, the monopole would stand somewhere between 43 and 55 feet above the average tree line directly in the path between two high priority waterfowl concentration areas, as well as within 1,000 feet of the riparian wetlands along the Deschutes River and immediately adjacent to an ongoing project that is considered by WDFW biologists to be a publicly owned wildlife refuge. The record as a whole shows that the WCF in the location proposed would be a flight obstacle resulting in bird collisions and disruptions to bird movement patterns.

In determining an impact's significance, the responsible official must take into account whether the underlying proposal conflicts with local, state, or federal laws or requirements for the protection of the environment. The proposal conflicts with the wireless communications facilities siting standards at TCC 20.33.080(2)(e)(i). In review of the record as a whole, the undersigned is left with a definite and firm conviction that environmental factors were not adequately considered and that DNS issuance was not based on information sufficient to evaluate the proposal's probable adverse environmental impacts. For the reasons above, the deference typically given to the Responsible Official's determination is not due in this case. The SEPA appeal is granted.

Findings 1, 4, 5, 10, 11, 12, 13, 14, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 38, 40, 41, 42, and 43.

2. Special Use Permit

Because the record presented shows probable, adverse environmental impacts involving conflict with the use-specific siting standards applicable to WCFs and the environmental threshold determination is remanded, the application for special use permit cannot be decided at this time.

DECISION

Based on the foregoing findings and conclusions showing probable, adverse impacts that are significant in the proposed location, the SEPA appeal is **GRANTED**. The DNS is **REMANDED** to the SEPA Responsible Official for further study of impacts to priority habitats and species. Because the appeal is granted, the SUP cannot be decided at this time.

DECIDED May 18, 2016.



Sharon A. Rice
Thurston County Hearing Examiner

Appendix A Pre-Hearing Documents

1. Order Requiring Pre-Hearing Conference, dated September 30, 2015
2. Notice of Appearance, dated October 2, 2015
3. Order Setting Hearing and Pre-Hearing Scheduling, dated November 10, 2015
4. Appellants' Motion to Require Withdrawal of SEPA Determination of Non-Significance, dated December 1, 2015, including the following: Declaration of Alex D. Foster with Exhibits A - F, Declaration of Jay A. Goldstein with Exhibits G - K, and Exhibit 4 Public Comment Letter
5. Applicant's Motion to Dismiss SEPA Issues, dated December 1, 2015, including the following: Declaration of Charles E. Maduell with Exhibits 1 - 4
6. Thurston County's Response to Appellant's Motion to Require Withdrawal of DNS, December 7, 2015, including the following: Declaration of Tony Kantas
7. Applicant's Response to Appellants' Motion to Require Withdrawal of DNS, December 15, 2015, including the following: Declaration of Jeffery S. Jones with Exhibits A - C
8. Appellants' Response Memorandum re Motion to Withdraw SEPA DNS, December 15, 2015, including the following: Supplemental Declaration of Foster, Supplemental Declaration of Jay A. Goldstein, and Exhibits L, M, and N
9. Appellants' Reply Memorandum to Motion to Withdraw SEPA DNS, dated December 22, 2015 including the following: Second Supplemental Declaration of Foster and Declaration of Chris Nubbe including exhibits A - G
10. Thurston County Exhibit List, dated January 6, 2016
11. Thurston County Witness List, dated January 6, 2016
12. Applicant's Witness and Exhibit List, dated January 6, 2016
13. Appellants' Witness and Exhibit List, dated January 6, 2016
14. Applicant's Objection to Appellants' Witness List, dated January 7, 2016
15. Thurston County's Notice and Motion to Strike Appellant's Witness List, dated January 7, 2016
16. Notice of Attorney's Intent to Withdraw, dated January 8, 2016
17. Order Continuing Hearing and Ruling on Motion to Strike, dated January 14, 2016
18. Appellants' Notice of Appearance, dated January 15, 2016
19. Order Setting Hearing, dated January 26, 2016
20. Appellants' Witness & Exhibit List, dated February 1, 2016

21. On-Hold with Further Information Needed and Postponed Hearing Date, dated February 16, 2016
22. Applicant's Objection to Continuance and Request to Retain Hearing Date, dated February 17, 2016
23. Order Continuing Hearing and Striking Pre-Hearing Schedule, dated February 22, 2016
24. Applicant's Amended Witness and Exhibit List, dated March 7, 2016
25. Appellants' Amended Witness and Exhibit List, dated March 7, 2016, including the following: Declaration of Albert M. Manville, Ph.D., dated February 10, 2016, Alex Foster Credentials, Alison R. Styring Credentials, Bojana Foster Credentials, Chris F. Nubbe Credentials, Susan C. Danver Credentials, and Thomas Jurg Mani, Ph.D. Credentials

Appendix B Post-Hearing Documents

1. Post Hearing Order, dated March 18, 2016
2. Post Hearing Brief of Appellants, dated March 29, 2016
3. Closing Argument of Thurston County, dated April 12, 2016
4. Applicant's Post Hearing Brief in Opposition to SEPA Appeal, dated April 12, 2016
5. Appellants' Reply Brief, dated April 19, 2016
6. Applicant's Motion to Exclude Statement of Albert Manville, or Allow Rebuttal by Jeffery Jones, dated April 26, 2016⁸
7. Declaration of Jeffery S. Jones, dated April 26, 2016

⁸ No new evidence was requested in the post-hearing briefing phase and Dr. Manville's post-hearing comments are not admitted in the record.