APPEAL: Whidbey Environmental Action Network (WEAN) has appealed a final SEPA Threshold Determination of Non-Significance on a proposal by CRSTOL Whidbey Corporation to construct a twenty foot wide access road through a Category A Wetland and associated buffer. The road will access off of Ewing Road along the western perimeter of four parcels owned by CRSTOL Whidbey Corporation.

DECISION: The appellant has failed to establish that there are probable significant adverse impacts from this proposal which will not be mitigated by existing regulations and conditions on required permit approvals. The appeal should be denied. The SEPA determination of the Responsible Official should be upheld.

FINDINGS OF FACT

INTRODUCTION

The following Findings of Fact and Conclusions of Law are based upon consideration of the exhibits admitted herein and evidence presented at the public hearing on June 19, 2008.

I.

PRELIMINARY INFORMATION

Appellant: WEAN / Marianne Edain

Property Location: Feeks First Plat of Island Farm Lots 5, 6, 7, 8, 9, 10, 11 & 12. North of Ewing Road, located in the Southwest ¼ of Section 21, Township 29 North, Range 3 East on Whidbey Island, Island County, Washington.

SEPA: A SEPA Final Mitigated Determination of Non-significance was issued by Island County on December 10, 2007.
Publication of Hearing: June 4, 2008

Mailing of Notice of Hearing reschedule: March 7, 2007

Sign Posted: July 9, 2005

Mailing of Staff Report: February 19, 2008 and June 17, 2008

Date of Applications: June 21, 2004

Hearing Date: June 19, 2008

Exhibit Log:

1. Staff Report
2. Pre-Application Conference application, rcv’d 10/10/03
3. Consent Agreement, rcv’d 10/10/03
4. Quarter section map with notation provided by applicant
5. Application for Access to County Road Right of Way, rcv’d 10/10/03
6. Section 21, Township 29 North, Range 3 East map with Description, Dedication & Acknowledgement
7. Zoning quarter section map
8. GIS map
9. Critical area map
10. Figures
11. Wetlands delineation, dated 6/20/02, rcv’d 10/10/03
12. Appendix A, Data Form 1 Routine Wetland Determination, dated 5/21/03, rcv’d 10/10/03
13. Appendix B, Results of the Preliminary Reconnaissance and Delineation of Wetland Boundaries on Olsen Property, dated 1/7/91, rcv’d 10/10/03
14. CRSTOL Corp. Feek’s Island Farm Development Plot Plan
15. Request for comment dated 10/13/03
16. Parcel Data Sheet
17. Pre-App Notice from Cindy White, Island County P&CD to Kathy White, dated 10/13/03
18. Quarter section map
19. Account Summary Snapshot, parcel S6625-00-00005-0
20. Account Summary Snapshot, parcel S6625-00-00009-0
21. Quarter section map with parcels marked for property owners with easements with owners name, address & parcel # info
22. Letter from Anathalie Dawkins, Island County Public Health to CRSTOL Whidbey Corp., Kathy White, dated 11/14/03 with 2 attached Code sections cited in letter
23. 6 photos taken by Code Enforcement, dated 11/25/03
24. Letter from Bill Poss, to Justin Erickson, Island County P&CD, dated 12/11/03
25. Letter from Justin Erickson to Kathy Lester dated 12/15/03 with attached copy of COV 437/03 Initial Enforcement Order
27. Letter to Matt Kukuk, from Kathy Lester, dated 1/20/04
28. Memorandum from Justin Craven, Critical Areas Planner to Matt Kukuk, Code Enforcement, dated 1/20/04
29. Memorandum from Matt Kukuk, to Michael Bobbink, Island County Hearing Examiner, dated 1/21/04
30. Letter from Phil Bakke, Island County P&CD, to CRSTOL Whidbey Corporation, dated 1/27/04
31. Copy of receipt of $1,500 Code violation civil penalty payment received 1/27/04 from CRSTOL Whidbey
32. Note from Kathy White to Justin Erickson, dated 2/2/04
33. Letter from Cindy White, Island County P&CD to Kathy White, dated 2/2/04
34. Memorandum from Michael Bobbink, Island County Hearing Examiner to Matt Kukuk, dated 2/9/04
35. Memorandum from Justin Craven to Justin Erickson, dated 2/11/04
36. Pre-Application sign-in sheet, dated 2/12/04
37. Review letter from Justin Erickson, to Kathy White, dated 2/12/04
38. Letter from Vincent Sherman, Island County Health Department to CRSTOL Whidbey Corp., dated 4/26/04
39. Email from Bill Poss, to Justin Craven, dated 5/5/04
40. Clearing & Grading / Timber Harvest Applicability and Process, rcv’d 6/21/04
41. Plot Plan CRSTOL Acres, dated 6/12/04, rcv’d 6/21/04
42. Fig. 1 – Island County Planning Dept. Plat Map of Feek’s Plat of Island Farm
43. Fig. 2 – Quarter section map
44. Fig. 3 – Phase 1 Access Road Grading Detail, rcv’d 6/21/04
45. Fig. 4 – Sketch for information purposes
46. Fig. 5 – Schedule B-001 pg. 1 & 2
47. Copy of 368759 recorded Grant of Easement (Kirkham)
48. Declaration of Easement - 85007618
49. Alternate Access Denial, series of 4 letters from property owners
50. Environmental Checklist, rcv’d 6/21/04
52. Drainage Narrative from Davido Consulting Group, Inc., rcv’d 6/21/04
53. Request for Comment, dated 6/25/04
54. Parcel Data Sheet - S6625-00-00005-0
55. Parcel Data Sheet - S6625-00-00009-0
56. Parcel Summary Report - S6625-00-00009-0
57. Permit Snapshot - S6625-00-00009-0
58. Series of 6 Quarter Section / Zoning maps
59. Parcel Summary Report - S6625-00-00005-0
60. Permit Snapshot - S6625-00-00005-0
61. Auditor’s Search Results for S6625-00-00009-0, warranty deed
62. Notice of Complete Application, dated 6/25/04
63. Affidavit of Publication dated 7/7/04
64. Affidavit of Publication dated 7/17/04
65. Public comment email from Marianne Edain / WEAN, dated 7/30/04
66. Public comment letter from Diane & Greg Stone, dated 7/30/04
67. Public comment letter from Nancy Waddell, dated 8/2/04
68. Public comment letter from Rachel & Amber Kizer, dated 8/2/04
69. Public comment letter from John Hastings, Maxwelton Salmon Adventure, dated 8/2/04
70. Public comment letter from Diane & Greg Stone, dated 8/2/04
71. Review Comments from Bill Poss to Kathy White, dated 8/6/04
72. Memorandum from Justin Craven to Bill Poss, dated 8/6/04
73. Letters to POR from Bill Poss, dated 8/6/04
74. Email from Bill Poss to Diane & Greg Stone, dated 8/18/04
75. Letter from Kathy Lester to Justin Craven, dated 8/23/04
76. Email from Justin Craven to Kathy White, dated 8/23/04
77. Print out from Susan Zwinger to Bill Poss, rcv’d 8/27/04
78. Email from Bill Poss to Nancy Waddell, dated 10/6/04
79. Email from Glover Kenny Associates/Bluff House Retreats to Bill Poss, dated 10/13/04
80. Annual Monitoring Report from Kathy Lester to Justin Craven, dated 12/6/04
81. Letter from Kathy White, to Justin Craven, rcv’d 4/25/05 with attached letters denying access to the CRSTOL property with accompanying map
82. Letters to POR from Bill Poss, dated 5/3/05
83. Memorandum from Bill Poss to Justin Craven, dated 5/3/05
84. Letter from Bill Poss to Kathy White, with attached Memorandum from Justin Craven to Bill Poss, both dated 5/6/05
85. Copy of exhibit 84 with notation it was sent to POR 5/9/05
86. Email dated 5/26/05 from Kathy White to Bill Poss, with attached Wetland Mitigation Proposal, dated 5/25/05
87. Email dated 5/26/05 from Kathy White to Bill Poss, with attached Biological Assessment dated July 2004
88. Email dated 5/26/05 from Kathy White to Bill Poss, with attached letter from Kathy White dated 5/26/05
89. Email dated 5/26/05 from Kathy White to Bill Poss, with attached copy of Kirkhill Road Easement 94013640
90. Memorandum from Bill Poss, to Justin Craven, dated 5/31/05
91. Letters sent to POR from Bill Poss, dated 5/31/05
92. Memorandum from Justin Craven to Bill Poss, dated 6/3/05
93. Letter from Bill Poss, to Kathy White, dated 6/6/05
94. Letters to POR from Bill Poss, dated 6/6/05
95. Email from Jody Hill to Bill Poss, dated 6/7/05
96. Public comment email from Robert Kenny to Bill Poss, dated 6/7/05
97. Email from Julia Glover to Bill Poss, dated 6/8/05
98. Email from Will Keepin to Bill Poss, dated 6/8/05
99. Email from Kim Kalvelage to Bill Poss, dated 6/8/05
100. Email from Robert Kenny to Bill Poss, dated 6/10/05
101. Email from Bill Poss, to Marianne Edain /WEAN, dated 6/17/05
102. Email from Christian Spencer, Code Enforcement to Marianne Edain /WEAN, dated 6/17/05
103. Email from Steve Erickson /WEAN to Christian Spencer, dated 6/17/05
104. Email from Diane Stone to Bill Poss, dated 6/20/05
105. Wetlands Mitigation Proposal Addendum, dated 6/29/05
106. 11 x 17 format of Figure 1 from exhibit # 105; Plot Plan, CRSTOL Acres Mitigation Site Plan, revised 6/30/05
107. Large version of Figure 2 from exhibit # 105; Phase 1 Access Road Revised Grading Detail, revised 6/17/05
108. Email from Kathy White to Bill Poss, dated 6/30/05
109. Email from Kathy White to Bill Poss, with attached Wetlands Mitigation Proposal Addendum, dated 6/30/05 (portion of exhibit # 105)
110. Email from Kathy White to Bill Poss, with accompanying figures for the previously sent Wetlands Mitigation Proposal Addendum, dated 6/30/05 (portion of exhibit # 105)
111. Email from Kathy White to Bill Poss, dated 6/30/05
112. Letter from Kathy White, Kathy White Construction Services, to Bill Poss, dated 7/1/05
113. Memorandum from Bill Poss, to Justin Craven, dated 7/6/05
114. Letters to POR from Bill Poss, dated 7/6/05
115. Affidavit of Posting the Public Notice Sign, dated 7/9/05
116. Letter from Kathy Lester to Justin Craven, dated 7/12/05
117. Republication letter from Cindy White, Island County P&CD to Kathy White, dated 7/13/05
118. Letter from Bill Poss, to Kathy White, dated 7/14/05 with copy of letter from Justin Craven to Bill Poss, dated 7/13/05
119. Letter from Kathy White to Bill Poss, dated 7/18/05 with attached exhibit # 120
120. Letter from Earthworks Environmental Inc. to Justin Craven, dated 7/18/05
121. CRSTOL ACRES Mitigation Site Plan Map, dated 7/18/05
122. Memorandum from Bill Poss, to Justin Craven, dated 7/20/05
123. Letters to POR from Bill Poss, dated 7/20/05
124. Email from Kathy White to Justin Craven, dated 7/21/05
125. Email from Greg Stone to Bill Poss #, dated 7/30/05
126. Memorandum from Justin Craven, to Bill Poss, dated 8/4/05
127. Email from Jody Hill to Bill Poss, dated 8/8/05
128. Email from Nancy Waddell to Bill Poss, dated 8/8/05
129. Letter from Michael Ankeny to Bill Poss, dated 8/8/05
130. Email from Lew Barmon to Bill Poss, dated 8/9/05
131. Email from Matthew Kukuk to Bill Poss, dated 8/9/05
132. Email from Matthew Kukuk, Code Enforcement to Diane & Greg Stone, dated 8/11/05
133. Email from Robert Kenny to Justin Craven, Bill Poss, BOICC, Jeff Tate, Phil Bakke & Matt Kukuk, dated 8/11/05
134. Email from Stephanie Ryan to Bill Poss, dated 8/12/05
135. Email from Laurie Keith to Bill Poss, dated 8/12/05
136. Email from Sally Goodwin to Bill Poss, dated 8/12/05
137. Email from Drew Kampion to Jeff Tate, Phil Bakke, BOICC & Bill Poss, dated 8/12/05
138. Letter from Ruth Carlin to Bill Poss, dated 8/12/05
139. Email from Karyn Lazarus to Bill Poss, dated 8/15/05
140. Email from Jonathan Eveleigh to Bill Poss, dated 8/15/05
141. Letter from John Hastings & Scott Pascoe, Maxwellton Salmon Adventure to Bill Poss, rcv’d 8/16/05
142. Letter from Peter Eglieck, EKW Law to Phil Bakke, Jeff Tate, Bill Poss, dated 2/17/06
143. Wetland Mitigation Proposal, Earthworks Environmental Inc., dated 9/19/06
144. Email from Kathy White to Justin Craven, dated 9/28/07 with attached exhibits #’s 145 and # 146
145. Letter to Kathy White from Susan Powell, Department of the Army Seattle District, Corp of Engineers, rcv’d 9/28/07
146. Wetland Mitigation Proposal, Earthworks Environmental Inc., Revised 4/27/07, rcv’d 9/28/07
147. Agent Authorization for CRSTOL Whidbey Corp., dated 10/12/07
148. Letter from Rebekah Padgett, DOE to CRSTOL Whidbey Corp., dated 10/12/07
149. Email from Jeff Tate, to Bill Poss, Justin Craven, Bill Oakes & Phil Bakke, dated 10/16/07
150. Annual Restoration Monitoring Report from Earthworks Environmental Inc. to Justin Craven, Island County P&CD Critical Areas Planner, dated 10/18/07
151. Letter from Kathy White to Bill Poss with attached letter from Susan Powell, Department of the Army Seattle District, Corp of Engineers, same as exhibit # 145, but with attached Site / Vicinity Plan, Plan View & Mitigation Plan, rcv’d 10/22/07
153. Email response from Bill Poss, to Nancy Waddell, Justin Craven Matt Kukuk, cc: POR, dated 10/25/07
154. Letter from Greg Stone to Susan Powell, DOE, dated 11/15/07
155. Email from Julie Charette Nunn to Bill Poss, dated 11/15/07
156. Email from Taddeusz Charette Nunn to Bill Poss, dated 11/15/07
157. Email from Steve Erickson /WEAN to Bill Poss, dated 11/16/07
158. Email from Nancy Waddell to Bill Poss, dated 11/17/07
159. Email from Susan Prescott to Bill Poss, dated 11/17/07
160. Email from Judith Gorman to Bill Poss, dated 11/17/07
161. Email from Anza Muenchow to Bill Poss, dated 11/17/07
162. Email from Shirley Owen to Bill Poss, dated 11/17/07
163. Email from Pam & Gary Ingram to Bill Poss, dated 11/17/07
164. Email from Marc Wilson to Bill Poss, dated 11/18/07
165. Email from Marianne Edain /WEAN to Bill Poss, dated 11/18/07
166. Email from Diane Stone to Bill Poss, dated 11/18/07
167. Email from Mark Wahl to Bill Poss, dated 11/18/07
168. Email from Julie Charette Nunn to Bill Poss, dated 11/20/07
169. Alternatives Analysis prepared by Kathy White, dated 11/07, rcv’d 12/04/07
170. Letter from Bill Poss, to Kathy White, with attached FINAL SEPA THRESHOLD DETERMINATION OF NON-SIGNIFICANCE and ADMINISTRATIVE APPROVAL WITH CONDITIONS FOREST PRACTICES CLEARING PERMIT, CLEARING AND GRADING PERMIT and CRITICAL AREAS PERMITTED USE PERMIT, dated 12/10/07
171. Email notifications from Bill Poss, to POR of approved permit & SEPA determination
172. Notice of Appeal, dated 12/21/07
173. Acknowledgement letter from the Office of the Hearing Examiner to Marianne Edain /WEAN, dated 12/24/07
174. Applicant Acknowledgement, dated 12/17/07, rcv’d 1/2/08
175. Email from Paula Bradshaw, Office of the Island County Hearing Examiner to Marianne Edain /WEAN, dated 1/4/08
176. Letter from William Oakes, Director to Greg Stone, dated 1/16/08
177. Comprehensive Statement of Appeal, dated 1/17/08
178. Notice of Hearing date from Paula Bradshaw, to Marianne Edain /WEAN, dated 1/18/07
179. Letter from Paula Bradshaw to Kathy White, dated 1/25/08
180. Memorandum from Paula Bradshaw to Parties of Record, dated 2/4/08
181. Affidavit of Mailing notice of hearing to appellant, dated 2/4/08
182. Affidavit of Mailing notice of hearing to Parties of Record, dated 2/4/008
183. Unidentified Photos from CGP file 231/04 CRSTOL
184. Letter from Paula Bradshaw to Marianne Edain, dated 2/25/08
185. Affidavit of Mailing, dated 2/25/08
186. WEAN’s Hearing Brief, dated 2/23/08, rcv’d 2/26/08

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187.1) Letter. Kwarsick to Barrea, request for alternate access. 12-15-02 part of # 49
188.2) Access denial, Slattum. 2-26/7-02 part of # 49
189.3) Is Co road access permit. 6-13-03 # 5
190.4) Pre-application conference form. 10-9-03 # 2, 36, 15
191.5) Letter. Anathalie Dawkins (ICHD) to Kathy White. comments. 11-14-03 # 22
192.6) Letter. Bill Poss to Justin Erickson. Pre-app comments. 12-11-03 # 24
193.7) Letter. Matt Kukuk to CRSTOL re: COV. 437/03, 12-12-03
194.8) Memo. Justin Craven to Justin Erickson. comments. 2-11-04; letter. Justin Erickson to Kathy White. pre-application review. 2-12-04 # 35, 37
195.9) Letter. Vin Sherman (ICHD) to CRSTOL approving well site, with attachments 4-26-04 # 38
196.10) Email. Davido to Poss re: temporary road standards. 5-5-04 # 39
197.11) Davido Consultants. Drainage Report. 6-3-04 # 52
198.12) SEPA checklist. 6-14-04 # 50
199.13) CGP application. 6-21-04 # 40
200.14) SEPA public notice, original & corrected, & affidavits of posting. 7-17-04 # 63, 64
201.15) WEAN’s SEPA comments. 7-29-04 # 65
202.16) Letter. Greg & Diane Stone to Poss, & Poss’ response. 7-30-04 # 66, 74
203.17) Maxwellton Salmon Adventure SEPA comments. 8-2-04 # 69
204.18) Comment letter, including long bird list 7-30-04 # 68
205.19) Letter. Nancy Waddell. 7-30-04 # 67
206.20) Letter. Bill Poss to Kathy White. notice of complete application. 8-6-04 # 71
207.21) Memo Justin Craven to Bill Poss re: COV restoration not working # 72
208.22) Comment letter. 8-14-04 # 77
209.23) Letter. Earthworks to Justin Craven re: exotics control, monitoring # 75
210.24) Email. Diane & Greg Stone to Bakke re piecemealing. 9-22-04
211.25) Email. Nancy Waddell re: alternate access. 10-6-04 # 78
212.26) Comment letter. 10-13-04 # 79
213.27) Letter. Kathy White to Justin Craven, with map & affidavits denying access. 4-22-05 # 81
214.28) Letter. Bill Poss to Kathy White. review comments. 5-6-05 # 84
215.29) Earthworks. Wetland Mitigation Proposal. 5-25-05 # 86
216.30) Letter. Kathy White to Bill Poss re: alternate access. 5-26-05 # 88
217.31) Letter. Bill Poss to Kathy White. staff review comments. 6-6-05 # 93
218.32) WEAN comment letter & others. 6-17-05 # 101, 100, 98, 97, 96, 95, 99
219.33) Wetland Mitigation Proposal addendum. 6-29-05 # 105
220.34) Letter. Kathy White to Bill Poss re: road specs. 7-1-05 # 112
221.35) Memo. Justin Craven to Bill Poss. comments on application. 7-13-07 # 118
222.36) Letter. Bill Poss from Kathy White, dated 7/18/05 # 119
223.37) Earthworks Environmental response to staff review. 7-20-05 Excerpt from Earthworks Environmental report. undated # 120
224.38) Memo. Justin Craven to Bill Poss re: findings of fact and conclusions. 8-4-05 # 126
225.39) 5 comment letters. 8-8-05 # 128, 130, 127, 129, 125
226.40) Maxwellton Salmon Adventure letter, revised. 8-13-05. 7 pps. # 141
227.41) 8 comment letters. 8-12-05. 18 pps. # 138, 140, 135, 137, 136, 139, 133, 134
228.42) SEPA checklist with handwritten reviewer’s comments. 6-21-04 # 50 minus pg. 1
229.43) Letter. USACE to CRSTOL re: wetlands, access, etc. 9-6-05
230.44) Letter. Eglick to Is Co threatening appeal. 2-17-06 # 142
231.45) Letter. USACE to CRSTOL, including new sub-delineation. 3-2-06
232.46) Wetland Mitigation Proposal for CRSTOL Acres. 9-19-06, revised 4-27-07 # 146
233.47) Letter from Army Corps to Kathy White re: wetland mitigation. 6-19-07 # 47
234.48) Letter from WDOE “to whom it may concern.” 10-12-07 # 147
235.49) Memo. Jeff Tate to Bill Poss re: meeting follow-up. Permit will issue asap. 10-16-07 # 149
236.50) Earthworks to Justin Craven. annual COV restoration monitoring report. 10-18-07 # 150
237.51) JARPA comments. 10-25-07 # 153, 157
238.52) JARPA notice. 11-17-07 # 152
239.53) WEAN comments re: CGP 23 1/04, with emphasis on mitigation. 11-12-07

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HEARING TESTIMONY

Greg Stone
6452 Longwood Lane
Clinton, WA 98236

Ben Thomas
3495 Daisy Lane
Clinton, WA 98236

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II.

CRSTOL Whidbey Corporation is the owner of eight contiguous ten-acre parcels located in Feeks First Plat of Island Farm north of Ewing Road on south Whidbey Island, Island County, Washington. CRSTOL sought administrative approval for a Forest Practice Clearing and Grading Permit and a Critical Areas Permitted Use Permit for the proposed construction of an access road along the western boundary of four of the eight parcels.
owned by CRSTOL. The purpose of road construction is to access upland portions of the parcel north of a thirty-five acre wetland which bisects the entire parcel. The access road is proposed for the western boundary of the southern four ten-acre parcels and through an easement created when the parcels were platted. The proposed road would cross eight hundred seventy-five feet of wetland and approximately two hundred and twenty feet of buffer and would be twenty feet wide. The application was initially accepted as complete for review on June 21, 2004. A final SEPA Threshold Determination of Non-Significance and approval for the requested permits was granted by Island County Public Works and Island County Planning & Community Development in a determination and decision issued December 10, 2007. WEAN filed this appeal on December 24, 2007. WEAN submitted a timely Comprehensive of Appeal on January 17, 2008. This appeal is properly before the Island County Hearing Examiner. Only the SEPA Determination of Non-Significance was appealed.

III.

The eighty acres owned by CRSTOL have legal access to a public road only at the southwest corner of the properties. Any other potential public road access to the upland (non-wetland) areas of the parcels would require an access easement through private property. There appear to be upland areas along the eastern boundary of the four southern parcels as well as a larger upland area encompassing roughly seventy-five percent of the northern four parcels. The proposed access road would only access the upland areas on the northern four parcels. Conditions attached to approval, including a condition proposed by WEAN and agreed to by Island County and the applicant, will foreclose any additional access roads within the eighty acres thus requiring all residential development to occur on the upland portions of the northern forty acres.

The applicant has indicated an intention to seek a Planned Residential Development on the northern upland areas. The amount of residential development which will be ultimately proposed has not yet been determined but the applicant has indicated numerous times that they would be intending to seek approval for a twenty-eight lot clustered housing development on the northern part of the parcel. Approval of this permit would foreclose access roads to reach the upland portions of the lower four ten-acre parcels. To access the upland portions of the southern parcels would require an additional access road through the wetlands across most of the southern boundary of the properties requiring additional wetland alterations.

IV.

The property is bisected by a thirty-five acre wetland. The wetland extends a short distance beyond the western boundary of the parcel. The road will divide a small area of the wetland adjacent to the eastern side of the applicants’ property from the main wetland area which crosses the property from the southwest to the northeast.
V.

The road as originally proposed would require removal of wetland materials (excavation) in the road corridor and the addition of fill. During review, at the suggestion of agencies with jurisdiction over the wetlands, the road proposal was changed to incorporate a “floating road”. The record establishes that a floating road would have significantly less impact on the wetland. It would not reduce the storage capacity of the wetland. It would allow continued wetland hydrology connections under the road through the maintenance of the wetland materials currently in place. In addition the applicant has proposed a drainage plan which has been approved by Island County Public Works which would require connecting culverts under the road to maintain the current hydrological connectivity of the wetland areas on both sides of the road.

VI.

The applicant has submitted a wetland mitigation proposal. The proposal has undergone modifications during the approximately three year period during which this matter was being reviewed by agencies with jurisdiction. The wetland plan approved by Island County underwent a final revision on April 27, 2007. This wetland plan has also been approved by the United States Army Corps of Engineers (hereinafter referred to as Corps). Numerous revisions to the original wetland delineation and mitigation plan were undertaken at the request of the Corps. In addition to approval by Island County and by the Corp the applicant is also required to obtain water quality impact approval from the Washington State Department of Ecology.

The mitigation plan proposes enhancement of six acres of the wetland area. The proposed road will disturb one half acre of wetland and buffer. The enhancement plan and the conditions of approval imposed by Island County require a twelve to one ratio between the area disturb and the area enhanced. The enhancement plan proposed includes the planting of twelve islands of varied wetland vegetation, the removal of invasive species and noxious weeds, and the filling or partial filling of a drainage ditch through the wetland. The fill of the drainage ditch would increase the storage capacity of the wetland.

The wetland itself was actively farmed until 1992. The value of the wetland in its current form is limited because it is a monoculture wetland consisting primarily of a single native wetland species commonly known as hardtack. The mitigation plan will increase plant diversity in the wetland and increase the diversity of wildlife habitat available.

The mitigation proposed includes planted biofilters along both sides of the proposed road to mitigate for water quality impacts from road runoff. Until the vegetation in the biofilters is well established the conditions of approval require maintenance of erosion control measures.

The decision to forego a road along the southern boundary of the parcels in order to reach the developable upland areas on the southern four parcels will eliminate the need to
disturb an additional one thousand to twelve hundred feet of wetland and wetland buffer area.

VII.

The appellant raised the issue of the adequacy of the attempt by the property owners to obtain an alternate access to the property which would not require disturbing wetlands or buffer areas, or significantly reduce the amount of wetland and buffer area disturbed. The record establishes that the applicant made significant and good faith efforts to acquire another access point. The appellant did submit one affidavit which indicated that a property owner to the west might now be willing to grant an easement for compensation. However this property owner did not appear at the hearing, did not testify under oath subject to cross examination, and did identify what compensation might be adequate. The appellant has failed to establish a viable access alternative which would further mitigate wetland impacts. It should be noted that it would have been of great benefit to the applicant to find an alternative access which would not have required the cost of building a floating road across the wetland and the cost of all the mitigation associated with the wetland disturbance.

VIII.

The SEPA Responsible Official for Island County, the Planning Director, after reviewing the applications decided to do a phased review, separating review of the proposed access road from review of any future proposed residential development. Much of the concern raised by citizens in the area, and there was significant concern, related to the potential for a twenty-eight lot clustered PRD on the property. The based density for this site is one unit per five acres. The current property could probably be sub-divided into sixteen five-acre parcels. Each of the existing ten-acre parcels could have been separately developed with a single home along with any necessary wetland alterations required to allow reasonable access and residential use. A scattered development of this property utilizing the current eight parcels or a sub-division into sixteen five-acre parcels would ultimately result in significantly more incursion into wetland areas.

The Island County Code allows a density bonus for Planned Residential Developments of up to one hundred twenty-five percent of the base density, which in this case would allow a maximum of thirty-six units on the eighty acres. Density bonuses are granted based on the clustering of individual home sites and the retention of open space. If the property proves to be adequate to handle the requirements for septic systems, drainage, wetland buffers, and other limitations on residential development to support twenty-eight home sites, seventy-five percent of the property would be left in open space.

There are suggestions in the record that this proposed road construction could damage Maxwelton Creek. However a careful review of the record leads the Hearing Examiner to conclude that the proposal should have no negative impacts on Maxwelton Creek. Concerns were also raised about bird nesting areas located to the south of this property.
but no concrete evidence was produced to show that the proposed roadway could negatively impacts these nesting areas. There was no credible evidence in the file that the proposed wetland alteration, subject to the conditions of approval requested by regulatory agencies would have negative impacts on wildlife habitat. In fact the mitigation proposed should improve wildlife habitat in the area.

IX.

This application has been reviewed extensively over a three year period by the United States Army Corps of Engineers, the Washington State Department of Ecology, Island County Planning & Community Development, and Island County Public Works. Each of these regulatory agencies has expertise in the issues presented by this proposed road development within the wetland. All have concluded that subject to conditions and subject to compliance with the approved mitigation report, this proposal will have little if any negative overall impact.

X.

The Hearing Examiner finds that all reasonable steps have been taken to mitigate the impacts of construction of the proposed road, and that subject to the conditions of approval placed on the permits by Island County and compliance with the mitigation plan, the proposed mitigation will eliminate the probability of significant adverse environmental impacts associated with the wetland alteration.

XI.

The appellant has suggested that the monitoring plan is inadequate. However they have produced no credible evidence showing that this is the case. The monitoring required will last for ten years and the adequacy of the monitoring will be reviewed regularly.

XII.

Any Conclusion of Law which is deemed a Finding of Fact is hereby adopted as such. Based on the foregoing Findings of Fact, now are entered the following:

CONCLUSIONS OF LAW

I.

The appellant argues that the Threshold Determination of Non-Significance was in error and that an Environmental Impact Statement should be required. The appellant suggests that there will be significant adverse impacts to the environment not properly mitigated, resulting from adverse hydrological impacts on the wetland including water quality impacts, impacts to Maxwelton Creek, impacts caused by inadequate monitoring, and
cumulative impacts not properly addressed by the conditions of approval and the mitigation plan. Stating that there will be impacts is not enough. The appellant has failed to provide credible expert testimony or other evidence which would provide clear, cogent, and convincing evidence that there are likely and significant unmitigated impacts resulting from this project. All agencies with expertise have agreed that the project can go forward and that it minimizes impacts to a degree where significant impacts are not probable. In addition the applicant has been required to hire a qualified wetland specialist and engineers to develop a plan which will effectively mitigate the potential significant adverse impacts from the project. The appellant has failed to provide evidence or expert testimony as to what significant impacts will remain after implementation of the mitigation plan and execution of the proposal subject to the conditions of approval imposed by Island County, The Washington State Department of Ecology, and the Army Corps of Engineers.

The SEPA threshold determination of the Responsible Official is entitled to significant weight. The appellant in this case is required to provide clear, cogent, and convincing evidence that there will be significant adverse environmental impacts which will not be adequately mitigated by existing regulatory decisions. The appellant has completely failed to produce the kind of convincing evidence which would allow identification of specific significant impacts not adequately mitigated by the conditions of approval required by regulatory agencies and/or by implementation of the mitigation plan submitted by Earthworks.

What the appellant has shown is that there may be minor or moderate environmental impacts from the road construction. However a significant impact is defined as one that has more than a moderate impact on the environmental quality. They have not established significant impacts. Nor have they established any likely impacts not appropriately mitigated.

Since the appellant is required to produce clear, cogent, and convincing evidence that there are unmitigated significant impacts which are likely, the appellants’ appeal should be denied and the SEPA Threshold Determination should be upheld.

II.

Like SEPA the Growth Management Act is Environmental Legislation. The Island County Critical Areas Ordinance was adopted pursuant to the Growth Management Act. The requirement for local governments to adopt critical areas ordinances is Environmental Legislation aimed at protecting critical areas. The adoption of Island County’s Critical Areas Ordinance included a SEPA review of the adequacy of the ordinance. In general it is presumed that when the Critical Areas Ordinance, adopted under the Growth Management Act, is applied to specific land use applications it will effectively eliminate significant cumulative impacts to wetlands in the county. To a large degree the environmental impacts of specific land use projects have been adequately
addressed by the SEPA review of ordinances approved pursuant to the Growth Management Act.

III.

The appellant suggests that the SEPA Responsible Official improperly segregated the road construction from potential future residential development. Generally the only procedural determination made by the Responsible Official that can be appealed to the Hearing Examiner is the threshold determination or the adequacy of an Environmental Impact Statement. The Washington Administrative Code does not provide for appeals of other procedural determinations made by the Responsible Official. These determinations, from which there is no appeal at the local level, include inappropriate phasing, withdrawal of a threshold determination, the need for further review after changes are made in a proposal, and other such procedural matters covered by the Washington Administrative Code. Even if there were error in the procedural decisions that the Responsible Official has made on this proposal they are not subject to appeal to the Hearing Examiner. Only the appropriateness of the threshold determination can be appealed at the local level.

In this case the Hearing Examiner concludes that he does not have jurisdiction to overturn a threshold determination based on the decision regarding phasing and segmentation reached by the SEPA Responsible Official.

However the Hearing Examiner does conclude that the Responsible Official made the appropriate procedural determinations including the determination to separate the review of the access road from future land development proposals.

The Hearing Examiner has carefully reviewed all of the materials. Specifically the Hearing Examiner takes note of the response to the appeal set forth by the Planning Director in a memo dated June 13, 2008, Exhibit No. 265 in the Hearing Examiner file. In this memo the Planning Director carefully lays out the reasons for the Planning Director’s determination and the reason the Director believes his determination to use “phased SEPA review” was appropriate and the Hearing Examiner hereby adopts the factual findings and legal conclusions reached by the Planning Director in Exhibit No. 265. These findings and conclusions are hereby adopted as findings of fact and conclusions of law and incorporated herein by this reference.

IV.

The appellant has failed to show that there are probable significant adverse environmental impacts from this development proposal which will not be adequately mitigated by the conditions attached to the permits required by local, state, and federal agencies. Subject to these conditions there are no probable significant adverse impacts which have not been adequately mitigated. At most this proposal will have moderate adverse environmental
impacts. In fact the proposal may result in doing more environmental good than harm when the entire mitigation plan is implemented.

V.

The appellant has suggested, the Planning Director has agreed, and the applicants have also agreed that it would be appropriate to add a condition to the permit that would require the road approved by this permit be the only road in wetland areas and their buffers allowed on the entire eighty acre parcel.

Any Finding of Fact deemed to be a Conclusion of Law is hereby adopted as such. Based on the foregoing Findings of Fact and Conclusions of Law, now is entered the following:

DECISION

The appeal of WEAN of the Responsible Official’s threshold determination is denied. The determination of non-significance is upheld subject to a mitigating condition requiring that the road approved through this wetland area be the only road allowed in the wetland or its’ buffer on the entire eighty acres owned by the applicant.

Entered this 3rd day of July, 2008, pursuant to authority granted under the laws of the State of Washington and Island County.

_____________________________
MICHAEL BOBBINK
Island County Hearing Examiner

APPEAL PROCESS:

APP (SEPA)
Appeal Process For SEPA Related Appeal Issues:
This decision of the Hearing Examiner is a final decision at the County level. Any further appeals must be taken in conformity with RCW 43.21C.075 and WAC 197-11-680.
-Memorandum-

TO: Island County Hearing Examiner

FROM: ________________________
       Jeff Tate, Director

DATE: June 13, 2008

RE: Response to Appeal 502/07 – an appeal of SEPA associated with CGP 231/04

Attached please find the response statement to Appeal 502/07 submitted by Whidbey Environmental Action Network. WEAN’s comprehensive statement of appeal includes a number of broad and unsubstantiated claims. WEAN indicates that they will provide support for these claims at the hearing. Planning and Community Development requests that the Hearing Examiner provide additional time for staff to respond to allegations made at the hearing since we are unable to consider their claims in advance of the hearing.
Response to APPEAL (APP) 502/07
Appeal of the SEPA threshold determination associated with CGP 231/04

I. General Information

Summary: A SEPA threshold determination of non-significance was issued in conjunction with Clearing and Grading Permit (CGP) #231/04. The Whidbey Environmental Action Network (WEAN) has appealed the SEPA threshold determination. The rationale for WEAN's appeal is described in their comprehensive statement of appeal. This staff report describes the basis for the threshold determination and the response to the statements of appeal.

Applicant: CRSTOL Whidbey Corporation

Parcel Information: Parcels S6625-00-00009-0, S6625-00-00010-0, S6625-00-00011-0, S6625-00-00012-0 (Lots 9-12 of Feeks First Plat of Island Farm)

Site Location: North of Ewing Road, located in the Southwest ¼ of Section 21, Township 29 North, Range 3 East on Whidbey Island, Island County, Washington.

Hearing date: June 19, 2008, Board of Commissioner’s Hearing Room, 1 6th and Main, Coupeville, WA 98239

Report Prepared by: Jeff Tate, Assistant Director
II. Relevant Background Information

1. Clearing and Grading Permit (CGP) application #231/04 was accepted as a complete application on June 21, 2004. A notice that a SEPA threshold determination of non-significance would likely be issued on the proposal (DNS Likely) was properly noticed on July 7, 2004. Due to an error in the notice published in the newspaper, the application and DNS Likely were republished on July 17, 2004. The comment period ended on August 2, 2004. Numerous public comments were received.

2. The subject properties are all zoned Rural and allow a density of 1 dwelling unit per 5 acres. While CGP 231/04 only applies to lots 9-12 of Feeks Farm the applicant actually owns lots 5-12. Each of these 8 lots are approximately 10 acres in size.

3. CGP 231/04 took approximately two and half years to review. The project that has been approved is different than the project that was submitted. These changes were a result of public comments, staff review, state agency review and federal review. The SEPA Responsible Official tracked these changes and determined that the scope of the project stayed the same (application was for a road and the approval is for a road). The changes in the project mitigate the impacts that will occur as a result of the road and reduce the impact of the access as compared to the original design as submitted with the clearing and grading permit. The Responsible Official issued a final threshold determination of non-significance in conjunction with the issuance of CGP 231/04. CGP 231/04 contains two separate decisions – a Type I Clearing and Grading Permit and a Type II SEPA threshold determination. It is the Type II SEPA threshold determination that has been appealed to the Hearing Examiner.

4. Planning and Community Development conferred with the applicant prior to submittal of CGP 231/04. At that time, the applicant disclosed that they had an interest in pursuing a Planned Residential Development. The applicant disclosed that the PRD would be located on the north side of the properties that they own (lots 5, 6, 7 and 8 of Feeks Farm). These four lots total approximately 40 acres in size. The subject wetland complex is located on the southeastern side of those lots. The PRD would be located on the approximately 32 acres of upland property that lies north of the wetland complex. There is ample upland area to site a residential development in this location and meet the wetland setback requirements.

5. The applicant disclosed that they needed a road to serve future residential development on lots 5-8. Whether it is a PRD or a more traditional form of development it is a fact that lots 5-8 will require access. Staff explained that the applicant would have to demonstrate that there is no feasible alternative to serving those lots prior to the County issuing any permits to construct a road through the wetland.

6. During this conversation, staff noted that it was fortunate that a single entity owned all 8 of the 10 acre parcels. If the 10 acre parcels were in separate ownerships we would be faced with the possibility of having to consider eight separate roads – one to serve each lot. Staff noted that it would be extremely difficult to avoid a situation where there would be multiple roads through the wetland because of the fact that it would require so many individual property owners to grant permission to cross other properties in order to access each lot. For example, in order to access Lot 8 from the north via Coles Road it would require consent from 8 separate property owners (Lot 7, Lot 6, Lot 5, Lot 4-2, Lot 4-1, Lot 3-1, and the two 10 acre lots between Coles Road and Lot 5. Lots 4-2, 4-1 and 3-1 would need to consent because they hold the easement rights to the existing easement located on the two 10 acre lots between Coles Road and Lot 5). The likelihood of 8 separate lot owners granting permission to cross their property or use their easement presents significant challenges.

7. This challenge becomes exponentially more difficult if the 10 acre lots are short platted into 5 acre lots – something that the Rural zoning clearly would allow. Not only would this scenario increase
the number of lots that need to be crossed in order to access all of the potential parcels it obviously also increases the number of people that would have to grant permission.

8. Staff encouraged the applicant to pursue the consolidated access irrespective of whether the ultimate form of development was a PRD or a more traditional form of residential development. The SEPA Responsible Official determined that a consolidated access point was the least environmentally damaging practical alternative. This conclusion does not require significant analysis. It is based on the very realistic and logical evaluation of the existing lot configuration with respect to the wetland boundary. Staff regularly looks for opportunities to avoid negative outcomes that are very realistic and highly likely to occur. This is not a situation where an alternative has been chosen simply because there is a remote possibility that something worse could happen.

9. The SEPA Responsible Official also determined that this consolidated access point was the least damaging practical alternative because of its location relative to the wetland boundary. The access is located on the very western edge of the wetland boundary as opposed to a road that bisects the middle of a wetland complex.

10. The SEPA Responsible Official based the final threshold determination on the biological evaluation that was prepared by the applicant and reviewed by biologists from Island County, the State Department of Ecology and the Army Corps of Engineers. CGP 231/04 contains the studies, findings and outcome of that review. The reality of the current lot configuration and the location of the access relative to the wetland boundary were very real and practical factors that were considered in this decision.

11. When the applicant first approached the County they were unsure of the viability of development on the other side of the wetland. At that time they were unable to temporarily access the area to be developed in order to conduct soil analysis to test for percability. Planning and Community Development felt that it was prudent to consider a very narrow roadway that would allow access for heavy equipment to conduct site investigation and that could then serve as a permanent driveway to serve Lots 5-8 in the event that a PRD was not viable in the even that the soils would not support such a development. The downside to this approach was that if a PRD could be permitted, the applicant would have to expand the size of the access to support the increased number of lots which would result in impacts to the wetlands on two separate occasions.

12. As a result of ongoing discussions with the applicant, DOE and the Army Corps all parties agreed that it would be better to consider the project impacts and allow construction within the wetland one time. It was this dialogue that resulted in the agencies encouraging the applicant to construct a permanent access that could serve the maximum buildout.

13. ICC 11.01.060.D.1.b requires that access road serving 9 or more lots be 22 feet in width. The Public Works Director has allowed that this standard be reduced down to 20 feet in order to reduce the overall footprint and impact to the wetland.

14. The applicant disclosed their intent to pursue a 28 lot PRD in the future. CGP 231/04 proposes to construct an access that is partially located within a wetland and buffer which would serve that development – if it is ever to be applied for and approved. If a PRD application is ever submitted it will be evaluated on its own merits. Any approval that is issued for a PRD will have to adhere to wetland setbacks, address storm water and traffic impacts, meet density and open space standards, and satisfy all other requirements outlined in the Comprehensive Plan and development regulations. Provided that a PRD meets the requirements for wetland setbacks, septic standards, storm water requirements, and all other applicable standards, there is no relationship between the PRD and the wetland because it is assumed that the standards set forth in the ordinances were considered under SEPA and are presumed to adequately mitigate development impacts unless it is determined otherwise.

15. CGP 231/04 consists of an environmental review of the impacts that a proposed access will have on a wetland. Those impacts have been evaluated by local, state and federal authorities. While the scope of the project has remained the same, the design has been altered dramatically in order to
adequately address potential impacts. The modified design has been determined to satisfactorily address the environmental impacts through a range of conditions that address the design of the access (a floating road), the method of installation, the types of temporary and permanent practices that must be employed, a mitigation plan, and a monitoring plan.

III. MDNS – Discussion and Analysis. This is the issue and decision that is the subject of this appeal.

As is customary for WEAN, they do not provide any specificity regarding their claims. They are general statements in which they indicate they will establish facts in support of the errors in pleading and at hearing (see Section III of their appeal). This typical tactic obviously impairs staff’s ability to provide any specific response. For this reason, Planning and Community Development would like the Hearing Examiner to seriously consider staff’s likely request for time to respond to the details of their claims prior to rendering a decision.

Chapter 43.21C RCW is the state environmental policy act. RCW 43.21C.090 states that "[i]n any action involving an attack on a determination by a governmental agency relative to the requirement or the absence of the requirement, or the adequacy of a ‘detailed statement’, the decision of the governmental agency shall be accorded substantial weight.”

Chapter 197-11 WAC is the administrative code that implements Chapter 43.21C RCW. WAC 197-11-680(3)(a)(viii) reaffirms RCW 43.21C.090 by stating that "[a]gencies shall provide that procedural determinations made by the Responsible Official shall be entitled to substantial weight.”

Prior to considering any of WEAN’s claims it is important to consider this statutory requirement which places a heavy burden on WEAN to prove their claims that errors were made in the procedural and/or substantive elements of environmental review.

There are really four questions that have been raised in WEAN’s appeal:

1. **Should the County have considered a Planned Residential Development in its SEPA review?**

2. **Is the County’s use of “phased SEPA review” appropriate?**

3. **Did the applicant provide sufficient evidence that alternate means of access are not possible?**

4. **Are the impacts to the wetland probable and significant? And is the County’s mitigation adequate to address the potential impacts?**

Planning and Community Development offers the following response to these questions:

1. **Should the County have considered a Planned Residential Development in its SEPA review?**

   The applicant indicated in the SEPA environmental checklist that they may pursue the PRD form of development on the northern half of Lots 5-8. Planning and Community Development has encouraged the applicant to pursue this form of development for a variety of reasons. First, according to the Comprehensive Plan, PRD’s are the preferred form of development. Second, a clustered development served by one road will ensure that no development occurs on the east side of Lots 9-12 (and therefore eliminate the need to construct an east/west road across the wetland). Third, there is adequate upland area on the north side of Lots 5-8 to place a clustered development and still meet the critical area standards, septic standards, storm water standards, and other land use regulations without adversely affecting environmental resources. Fourth, placing a consolidated north/south access road on these properties is best situated on the western boundary of the wetland because it only affects the edge of the wetland instead of being placed in a location that bisects the wetland. Fifth, a consolidated access road eliminates the very real potential to have multiple driveways bisecting the wetland to serve each of the individual lots in the event that they are sold to separate parties.

   While the SEPA Responsible Official considered all of these factors during conversations with the applicant and during the application review process, a determination was made that it was premature to evaluate any residential developments that may eventually be connected to the
consolidated access road. The primary reason for making this determination was due to the fact that there was no assurance as to what type of residential development would be proposed and/or allowed. The applicant still needed to conduct a substantial amount of investigation in order to determine the type, scale and intensity of residential development that would be appropriate on these lots. While the County’s preference is to see a clustered residential development with dwelling units located on the north side of Lots 5-8, there continues to be no assurances that this is possible at this location. Investigation that still needs to occur includes soil testing for septic purposes; engineering analysis to determine suitable solutions for storm water collection, treatment and distribution; availability of potable water; etc.

At some point in the future it is likely that this road will serve some form of residential use. The road may serve a single home on 40 acres; it may serve four homes on Lots 5-8; it may serve eight homes in the event Lots 5-8 are each subdivided into five acre parcels; it may serve sixteen homes in the event Lots 5-12 are subdivided into five acre parcels and all of the units are clustered on the north side of the site; or it may serve up to 36 units in a PRD (80 acres / 5 acres = 16 * 125% = 36). The SEPA evaluation that was conducted did not address the number of units that may be served by the road rather it simply assumed that a residential use would eventually be served by the road. The residential use will have to adhere to the density and land use standards that are allowed within the underlying zoning designation. The number of units that are served by the road will not materially change the mitigation standards or analysis of impacts related to the road’s impact on the wetlands.

It should be noted that the SEPA Responsible Official has not lost the ability to address cumulative impacts. The question that needs to be answered when considering the appropriateness of conducting SEPA review on the road portion of the project now and a residential development later is this: Are there potential environmental impacts that will be overlooked as a result if a residential development is proposed at a later date and not considered at this time? The SEPA Responsible Official considered this question and determined that, in addition to being appropriately considered as a phased SEPA review, there were no potential environmental impacts that will be overlooked. The current evaluation considers the impacts of placing a road within a wetland. A future SEPA review may consider the impacts of a residential development proposal. The future SEPA review will still have to consider the impacts of the development on ground water resources, surface water quality and quantity, and traffic. Review and mitigation for those impacts will not be materially different if that review occurs now or in the future. Evaluation of environmental impacts has not been compromised, nor will it be compromised.

2. Is the County’s use of “phased SEPA review” appropriate?

WAC 197-11-060(5) provides guidance for when phased review is appropriate and when it is not appropriate. Subsection (b) states "[e]nvironmental review may be phased. If used, phased review assists agencies and the public to focus on issues that are ready for decision and exclude from consideration issues already decided or not yet ready." Phased review is appropriate for this project because the future residential development is not fully known. While the applicant has disclosed that the PRD form of development is a goal, there is not adequate information about the site to show whether it can support this form of development. The PRD is not ready and it won’t be ready until additional investigation on this portion of the property has been completed. The applicant has indicated that the road is needed in order to complete this investigation because they need the road to get heavy equipment to this portion of the property.

WAC 197-11-060(5)(c) states that "[p]hased review is appropriate when: (ii) The sequence is from an environmental document on a specific proposal at an early stage (such as need and site selection) to a subsequent environmental document at a later stage (such as sensitive design impacts)." It is important to note that subsection (i) identifies another example of when it is appropriate to use phased review but that section concludes with the word "or" which allows the SEPA Responsible Official to determine if (i) or (ii) apply - the WAC does not require that both (i) and (ii) apply. Subsection (ii) applies in this situation. The actions related to the long term development of these parcels will occur sequentially. CGP 231/04 relies upon environmental
documents on a specific proposal that is at an early stage. Approval of the access is a preliminary step in determining whether a PRD or other residential development is feasible. In fact, a PRD, subdivision or building permit requires that access be secured before those applications can even be accepted for review. This concept is consistent with SEPA provided that it does not break projects into components that allow each component to be classified as an exempt activity.

WAC 197-11-060(5)(d) describes when phased review is not appropriate. Three sections are provided.

Subsection (i) states that phased review is not appropriate when "[t]he sequence is from a narrow project document to a broad policy document." This example does not apply in this situation - there are no policy documents involved.

Subsection (ii) states that phased review is not appropriate when "[i]t would merely divide a larger system into exempted fragments or avoid discussion of cumulative impacts." This example does not apply in this situation - both the clearing and grading permit and the PRD will require SEPA therefore none of the phases would allow for the portions of the project to be classified as exempt or avoid discussion of cumulative impacts. Cumulative impacts of the access are addressed in this permit. Cumulative impacts of a PRD will be addressed if that application is submitted. The sequencing of this project does not avoid addressing the cumulative impacts.

Subsection (iii) states that phased review is not appropriate when "[i]t would segment and avoid present consideration of proposals and their impacts that are required to be evaluated in a single environmental document under WAC 197-11-060(3)(b) or 197-11-305(1); however, the level of detail and type of environmental review may vary with the nature and timing of proposals and their component parts." This example does not apply in this situation. There is no avoiding consideration of the impacts of the access or a PRD - they both necessitate SEPA review. WAC 197-11-060(3)(b) states that projects are required to be reviewed in a single environmental document when it "[c]annot or will not proceed unless the other proposals (or parts of proposals) are implemented simultaneously with them" or when they "[a]re interdependent parts of a larger proposal and depend on the larger proposal as their justification or for their implementation."

Neither of these apply. The first requirement does not apply because the project does not need to proceed simultaneously. The access could be approved without any further action. The second requirement does not apply because they are not interdependent parts that rely on the larger proposal as their justification. Interdependent means that they are mutually dependent. The access and the PRD are not mutually dependent nor does the road rely on the larger proposal (assuming that the larger proposal is a PRD). Access is necessary for lots 5-8 irrespective if a PRD application is ever submitted. **While a PRD may necessitate access it must be recognized that any form of residential development requires access - including development of the existing 10 acre tracts.**

WAC 197-11-680(3)(a)(viii) states that "[a]gencies shall provide that procedural determinations made by the Responsible Official shall be entitled to substantial weight." As such, WEAN carries a significant burden in proving that the procedural determination to use phased review is in error. It is not a matter of simply claiming that it is a procedural error, rather it requires unequivocal proof that an error was made.

In terms of WEAN’s claims that the SEPA Responsible Official failed to address impacts related to a PRD development, the County Engineer, who is the authority in addressing safety considerations for roads, has reviewed the proposal. WEAN representatives have failed to provide engineering information that supports this statement. Since WEAN representatives are not engineers, or individuals with expertise in traffic issues, this argument should be dismissed.

3. **Did the applicant provide sufficient evidence that alternate means of access are not possible?**

The applicant provided demonstration that they sought access from other property owners. An analysis was provided to Planning and Community Development on December 4, 2007 (Exhibit...
(243) which details the applicant’s efforts to obtain access. An evaluation of a parcel and road map shows that there are several logical locations where access to Lots 5-12.

**Lots 5-8**

Lots 5-8 could be served from the north off of Coles Road. This option would require permission from the owner of two 10 acre parcels (R32921-371-2410 and R32921-299-2350) and the owner of Lots 3-1, 4-1 and 4-2. Permission would be required from the owner of the two 10 acre parcels because that is where Coles Road ends and a private easement, which is located on the two 10 acre parcels, begins. Permission would be required from the owners of Lots 3-1, 4-1 and 4-2 because the easement located on the two 10 acre parcels is dedicated to these lots. Use of this easement would require approval from those lot owners.

Lots 5-8 could be served from the west off of Kirkhill Road which is a private road that runs north south and that is located about 660 feet to the west of Lot 8. This option would require approval from property owners who have rights to Kirkhill Road and from the owner of one of the 10 acre parcels located east of Kirkhill Road and west of Lot 8.

Lots 5-8 could be served from the south off of Ewing Road which is a public road that is connected to Lot 12 (owned by the applicant) via a 60’ x 120’ easement. This option does not require permission from any other lot owners. This option necessitates filling of approximately .40 acres of wetland.

**Lots 9-12**

In their current configuration, Lots 9-12 are most practically accessed from Ewing Road. They can be accessed via Ewing through the 60’ x 120’ easement held by the applicant. This would then require crossing the wetland to access the eastern portions of Lots 9-12 in order to utilize the portions of those lots where there is no wetland.

Alternatively, Lots 9-12 can be accessed further east on Ewing Road so that the access does not cross the wetland. Under this alternative, permission would need to be granted by the owners of two parcels located north of Ewing Road but south of Lot 12.

In order to avoid the wetland the applicant must seek permission to cross property from other landowners. The applicant has provided an alternative analysis that describes their efforts to seek permission from other landowners.

4. Are the impacts to the wetland probable and significant? And is the County’s mitigation adequate to address the potential impacts?

WAC 197-11-330(1)(b) requires that the Lead Agency "[d]etermine if the proposal is likely to have a probable significant adverse environmental impact, based on the proposed action, the information in the checklist (WAC 197-11-960), and any additional information furnished under WAC 197-11-335 and 197-11-350”.

RCW 43.21C.090 is titled "[d]ecision of governmental agency to be accorded substantial weight." This section of statute states "[i]n any action involving an attack on a determination by a governmental agency relative to the requirement or the absence of the requirement, or the adequacy of a "detailed statement", the decision of the governmental agency shall be accorded substantial weight."

The statute places a heavy burden on WEAN to demonstrate that there is a probable significant impact. They have failed to address how the impacts are both "probable" and "significant." These terms are defined Chapter 197-11 WAC.

WAC 197-11-782 provides the following definition for Probable

"Probable" means likely or reasonably likely to occur, as in "a reasonable probability of more than a moderate effect on the quality of the environment" (see WAC 197-11-794). Probable is used to distinguish likely impacts from those that merely have a possibility of
occurring, but are remote or speculative. This is not meant as a strict statistical probability test.

WAC 197-11-794 provides the following definition for Significant

(1) “Significant” as used in SEPA means a reasonable likelihood of more than a moderate adverse impact on environmental quality.

(2) Significance involves context and intensity (WAC 197-11-330) and does not lend itself to a formula or quantifiable test. The context may vary with the physical setting. Intensity depends on the magnitude and duration of an impact. The severity of an impact should be weighed along with the likelihood of its occurrence. An impact may be significant if its chance of occurrence is not great, but the resulting environmental impact would be severe if it occurred.

(3) WAC 197-11-330 specifies a process, including criteria and procedures, for determining whether a proposal is likely to have a significant adverse environmental impact.

WEAN has simply made claims. They have not provided definitive evidence of the probable significant impacts. They have not provided definitive evidence of how the County standards or the mitigation measures fail to address likely impacts. Claims must be substantiated and must be specific to the proposal. Given the burden placed on WEAN to overcome the substantial weight that the statute affords to the Lead Agency unfounded claims that are neither specific to the proposal nor to the wetland should be dismissed.

Furthermore, RCW 43.21C.240(1) and (2) describe the importance of considering GMA adopted plans and ordinances in making a threshold determination as well as the significance of other applicable state and federal rules. Not only does the County have GMA adopted plans and ordinances, the State Department of Ecology and the Army Corps of Engineers also have rules and permit requirements that govern this proposal. RCW 43.21C.240(1) and (2) read as follows:

(1) If the requirements of subsection (2) of this section are satisfied, a county, city, or town reviewing a project action shall determine that the requirements for environmental analysis, protection, and mitigation measures in the county, city, or town's development regulations and comprehensive plans adopted under chapter 36.70A RCW, and in other applicable local, state, or federal laws and rules provide adequate analysis of and mitigation for the specific adverse environmental impacts of the project action to which the requirements apply. Rules adopted by the department according to RCW 43.21C.110 regarding project specific impacts that may not have been adequately addressed apply to any determination made under this section. In these situations, in which all adverse environmental impacts will be mitigated below the level of significance as a result of mitigation measures included by changing, clarifying, or conditioning of the proposed action and/or regulatory requirements of development regulations adopted under chapter 36.70A RCW or other local, state, or federal laws, a determination of nonsignificance or a mitigated determination of nonsignificance is the proper threshold determination.

(2) A county, city, or town shall make the determination provided for in subsection (1) of this section if:

(a) In the course of project review, including any required environmental analysis, the local government considers the specific probable adverse environmental impacts of the proposed action and determines that these specific impacts are adequately addressed by the development regulations or other applicable requirements of the comprehensive plan, subarea plan element of the comprehensive plan, or other local, state, or federal rules or laws; and

(b) The local government bases or conditions its approval on compliance with these requirements or mitigation measures.
WAC 197-11-660(1)(e) states that "[b]efore requiring mitigation measures, agencies shall consider whether local, state, or federal requirements and enforcement would mitigate an identified significant impact." Prior to issuing a final threshold determination and determining appropriate mitigation measures, Island County consulted Washington State Department of Ecology and the Army Corps of Engineers.

Furthermore, RCW 43.21C.240(5) directs County's that when "deciding whether a specific adverse environmental impact has been addressed by an existing rule or law of another agency with jurisdiction with environmental expertise with regard to a specific environmental impact, the county, city, or town shall consult orally or in writing with that agency and may expressly defer to that agency. In making this deferral, the county, city, or town shall base or condition its project approval on compliance with these other existing rules or laws."

The County's GMA policies and regulations were consulted. So too where state and federal agencies that have jurisdiction. The County, State and Federal government have all reviewed and approved the proposal and mitigation plans. These facts, which include the environmental documents contained in CGP 231/04, clearly support the conclusion that "all adverse environmental impacts will be mitigated below the level of significance as a result of mitigation measures..." and therefore "a determination of nonsignificance or a mitigated determination of nonsignificance is the proper threshold determination."

The County's review of the proposal, the environmental documents prepared by the applicant, public comments, and the development regulations, combined with the consultation with state and federal agencies caused the project to change from its original submittal. The changes did not intensify the project and the scope of the project stayed the same. The changes were made at the request of the County, State and Federal agencies. When these changes were made it also necessitated additional or modified environmental documents to address those changes. It would be a ridiculous and never-ending cycle to require renotification of a proposal each time the agency asks for modifications and additional information that supports the modification. Renotification is regularly triggered when the applicant changes their project and/or the scope of the project is amended. Neither happened in this scenario.

RCW 43.21C.240(3) goes on to state that "[i]f a county, city, or town's comprehensive plans, subarea plans, and development regulations adequately address a project's probable specific adverse environmental impacts, as determined under subsections (1) and (2) of this section, the county, city, or town shall not impose additional mitigation under this chapter during project review. Project review shall be integrated with environmental analysis under this chapter."

WEAN has failed to show how this review failed, how the resultant decision is inadequate and has failed to demonstrate that there is a reasonable likelihood of more than a moderate adverse impact on environmental quality. WEAN has therefore failed to show that there are probable significant adverse impacts that are (1) not properly mitigated, (2) not adequately addressed through existing GMA policies and regulations, and (3) not properly addressed through other state and federal requirements.

IV. Recommendation

Island County Planning and Community Development recommends that the Hearing Examiner deny the appeal submitted by Whidbey Environmental Action Network and to deny the remedies sought by WEAN with the exception of item #5 below. WEAN’s requested remedies include:

1. Withdrawal of the threshold determination;

WEAN has failed to provide any detailed information that supports this extreme request nor have they provided any information that substantiate the claims that they make in support of this request. Withdrawal of the threshold determination has the obvious impact of causing the applicant and the agencies to redo the significant amount of work that has already been performed. The significant financial burden and delay created by this request requires substantial and unequivocal proof that supports their claims.
2. **Require that the proposal be properly defined:**

   The proposal has been properly defined. There is full disclosure for the type of development that may be served in the future. At this time the proposal is for a residential access. The applicant should not be penalized for disclosing the types of development that the road could serve in the future.

3. **Require environmental review for the entire proposal:**

   Environmental review has been conducted for the entire proposal. The Department of Ecology has been heavily involved in the review and understands what the residential access may serve in the future.

4. **Require that an independent review of the applicant’s alternative access analysis:**

   The applicant has provided significant evidence of the attempts that they made to gain alternative access. WEAN’s claims on this matter are entirely inconsistent with their other arguments. On the one hand, WEAN wants the project to be properly defined as a 28 lot PRD. However, when it comes to the issue of gaining alternative access they are critical that the applicant approached landowners with a request for access to serve a 28 lot PRD.

5. **Require that any road allowed through the wetland serve all of the applicant’s property:**

   This is an appropriate requirement. The SEPA Responsible Official suggests that the Hearing Examiner incorporate this requirement in his final decision.